



Event Transcript

Twenty Million Angry Men: A Conversation about the Importance of Including People with Felony Convictions in Our Jury System

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Description

In the United States, 8 percent of the adult population—and 33 percent of the Black adult male population—has a felony conviction. Even after people have served time in prison, they are systematically excluded from civic participation, including serving on juries. Offered in collaboration with the Institute to End Mass Incarceration at Harvard Law School, this program will explore questions of jury service, civic participation in the criminal legal system, and the importance of such participation by people with prior convictions.

SPEAKERS:

James M. Binnall, associate professor of law, criminology, and criminal justice and executive director of Project Rebound, California State University, Long Beach; author, *Twenty Million Angry Men: The Case for Including Convicted Felons in Our Jury System* (University of California Press, 2021)

Brendon D. Woods, chief public defender, Alameda County (California)

MODERATOR:

Premal Dharia, executive director, Institute to End Mass Incarceration, Harvard Law School

Transcript

TOMIKO BROWN-NAGIN:

- Good afternoon, everyone. I'm Tomiko Brown-Nagin, Dean of the Harvard Radcliffe Institute, and I'm happy to welcome you to this afternoon's program, "20 Million Angry Men, A Conversation about the Importance of Including People with Felony Convictions in Our Jury System."

Our discussion today is presented as a part of the Institute's law education and justice focus area. And it's a collaboration with Harvard Law School's Institute to End Mass Incarceration. I'm particularly pleased to partner with the Institute to End Mass Incarceration in presenting this program, which focuses our attention on a topic that's both fundamental to our legal system and yet one that receives comparatively little attention in conversations about reform.

As many in the audience know, more than two million people are incarcerated in the United States. This historically high rate of incarceration constitutes a national crisis and its impact is broad and deep, including profound civic, family, social, and educational effects. Yet, the consequences are not borne equally. Low-income communities and communities of color, particularly African American and Latinx communities, are disproportionately impacted.

In 2019, black adults were imprisoned at more than five times the rate of white adults. Hispanic adults were imprisoned at nearly three times the rate of white adults according to Department of Justice data. These disparities are the result of multiple overlapping systemic challenges. Today, we focus on one in particular, namely, the fundamental right to a trial by jury of one's peers and one way our legal system may still fall short of upholding that right.

The Sixth Amendment to the US Constitution establishes the right of defendants in criminal prosecutions and it specifically includes the right to an impartial jury. The question of what constitutes an impartial jury of one's peers has long been debated. But more than a century's worth of case law has established the cross section doctrine, which holds that a jury must be assembled from a pool that is broadly representative of a community.

The importance of jury diversity is clear. To quote Justice Thurgood Marshall, "When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience." Yet, as we'll hear today, people with felony convictions are still subject to restrictions on jury service in every state except Maine. And anyone with a felony conviction is permanently barred from jury service in 26 states and in federal courts.

Advocates have sought to overturn these exclusion on the grounds that they either violate the cross section doctrine, the Constitution's Equal Protection Clause, or both. But these legal challenges have so far been unsuccessful. In the context of the ongoing mass incarceration crisis and dramatically disproportionate rates of legal system involvement among specific communities, we must consider anew whether excluding those with felony convictions can be consistent with the right to trial by a jury of peers.

Our distinguished speakers this afternoon bring extensive knowledge and experience to bear on this important question and it's my pleasure to introduce them. James Binnall is a practicing attorney, the Executive Director of Project Rebound, and an Associate Professor of Law, Criminology, and Criminal Justice at California State University, Long Beach. He's the author of *Twenty Million Angry Men*, *The Case for Including Convicted Felons in Our Jury Process*.

Brendon Woods is the Chief Public Defender in Alameda County, California, and a powerful advocate for jury reform. And Premal Dharia, who will moderate today's discussion, is Executive Director of the Institute to End Mass Incarceration, as well as the founder of the Defender Impact

Initiative, which has worked to engage public defenders in advocacy for systemic change. Thank you, Jamie, Brendon, and Premal for joining us today.

Now some logistics. Following our speakers discussion, we'll turn to audience questions. You can use the Q&A feature on Zoom to submit your questions at any point during the program. We only ask that you keep your questions brief, so we can address as many of them as possible. With that, let's begin. Jamie, the floor is yours.

JAMES M. BINNALL:

- Thank you, Dean. Good afternoon. Before I start, I just want to say thank you to everyone that made this event possible today. Premal Dharia from the Institute to End Mass Incarceration at Harvard Law School, and Becky Wasserman, [? Maura ?] [? Madden, ?] Jessica [? Wickland ?] from the Radcliffe Harvard Institute. I appreciate all of your work hosting and publicizing this event. So thank you all for the opportunity to take part in what I think is a very important panel. I'm also grateful to be discussing this topic with a good friend and colleague, Alameda County Public Defender Brendon Woods. So this is, I think, going to be a great event.

As you heard, I'm currently an Associate Professor of Law, Criminology and Criminal Justice at Cal State University, Long Beach. I'm also a formerly incarcerated person. In 1999, I caused a DUI wreck that claimed the life of my passenger who was a college wrestling teammate of mine and my best friend. For that terrible decision, I subsequently spent four years, one month and six days in two maximum security prisons in southern Pennsylvania.

While I was in prison, I took my LSATs in the hope of possibly one day studying law. Six months after my release from prison, I began my first year of law school. In 2008, after I completed my juris doctorate and an LLM, I was admitted to the state bar of California and began my legal career doing criminal defense work, all the while pursuing a PhD.

A year later, in 2009, I was summoned to jury duty for the first time as a California resident. When I arrived at the courthouse on my day of service—and I talk a little bit about this at the beginning of 20 Million Angry Men—I passed through security using the entrance designated attorneys only. And I felt this very strange sense of pride and privilege. Soon thereafter, courthouse personnel instructed me to complete a juror qualification questionnaire. And on that questionnaire was an inquiry regarding criminal convictions. In particular, whether I had been convicted of a felony or a malfeasance in office. I answered yes, of course.

Moments after turning in this questionnaire, I was called to the front of the jury lounge where I was informed by the jury commissioner, jury clerk, that I was permanently ineligible for jury service because of my prior felony conviction. I was also told I would never be summoned again. I protested mildly explaining that I was an attorney. I had used the special attorney's entrance. Showed them my bar card. But I was still told that if I had a problem with California's juror eligibility criteria that I should write my congressperson. Instead of writing my congressperson, I wrote an article comparing jurisdictional juror exclusion policies and bar admission procedures for those with felony criminal convictions. And what I found was that I wasn't alone. In 25 states and the federal system, a person with a felony

conviction can be admitted to the bar and the practice of law, but is forever barred from serving as a juror in either a criminal or civil matter.

I offer this story by way of explanation—well, by way of introduction, but also by way of explanation about why I've spent the better part of the past decade studying a topic that has received, really, up to this point, very little scholarly attention. I also offer this story as the first of several examples of the contradictions and inconsistencies inherent in the practice of excluding those with felony convictions from law—from jury service, excuse me.

When we think about the civic marginalization of folks with prior felony convictions, we typically think first about voter disenfranchisement. Most overlook or simply fail to consider record-based exclusions from jury service. Still, of the collateral consequences that impact the citizens' ability to take part in democratic processes, exclusion from the jury is by far the most pervasive.

49 states, the District of Columbia and the federal system categorically restrict the opportunity to serve as a juror for those who have a prior felony criminal history. Of those jurisdictions, 26 states and the federal system bar those with felony convictions from the jury process permanently. As the Dean mentioned, today, Maine is the only US jurisdiction that places no record-based restriction on juror eligibility.

Now, in justifying these statutes, courts and lawmakers allege that those with a felony conviction would jeopardize the jury process because they purportedly lack the requisite character to serve and/or harbor an inherent bias, making each adversarial to the state but also unduly sympathetic to criminal defendants. In *20 Million Angry Men*, I set out preliminarily to test these justifications for exclusion, before then exploring the possible ramifications of this practice for juries, for the excluded, and for the communities that enforce these types of statutes.

As to the justifications for exclusion, I examined each independently in the book and then simultaneously using a mock jury experiment methodology. What I found was that these justifications which are purportedly intended to protect the jury from corrupting influence are really not supported by evidence. Rather, evidence suggests that both the inherent bias rationale and the character justification fail when you press them empirically.

Again, while several of the studies that comprise the book undermine these justifications, the most damning evidence against exclusion I feel arose in the context of the mock jury experiment that really is the central focus of the book. In that study, I found that jurors with felony convictions approach service—even fake service, as it were in a mock jury experiment—they approach service conscientiously, thoughtfully, and impartially. These jurors brought value to the process.

So to be clear, jurors with a felony criminal history didn't undermine deliberations as the justifications assert. Rather, they added to those deliberations by, in particular, recalling more novel case facts and speaking for a larger proportion of their juries deliberation duration than did their non-felon counterparts. This suggests that contrary to the stated reasons for exclusion, jurors with a felony conviction do not undermine the process but rather enhance it. So jurisdictions that bar those with convictions from jury service, I argue in the book, may unnecessarily be discarding a valuable viewpoint.

What the sum of my research on these purposes for exclusion demonstrates is that there is really a lack of threat that those with a felony conviction pose to the jury. Those with convictions, myself included, are not homogeneous in terms of our pre-trial biases and attitudes, and in the mock jury experiment, did not prove to be liabilities during deliberations. Instead, my participants, my study subjects demonstrated a typical normal distribution of pre-trial biases and took part in deliberations in a thoughtful, considerate way. This research seems to suggest, in turn, that record-based juror exclusion statutes are both over and under-inclusive, undoubtedly capturing and expelling those who would make appropriate, even exemplary, jurors, while at the same time overlooking groups of potential jurors that may jeopardize the impartiality of the jury.

In *20 Million Angry Men*, I also look at how juror eligibility criteria impact communities and those with felony criminal histories. In a field study in Maine—again, the only jurisdiction that places no restriction on the ability to serve for those with records—I conducted qualitative research—a field study, really—with court personnel responsible for screening jurors and then with prospective jurors who have a felony conviction. The studies that I conducted in Maine suggest that Maine's policy of inclusion places a premium on individualized assessments of prospective jurors, as participants in the study generally conceived of those with convictions on a case by case basis, suggesting that those who had finished their commitment to the state deserved an individualized evaluation of their fitness for service.

My fieldwork in Maine also revealed how inclusion in the jury process validated efforts to change for those with a felony criminal history. Participants—again, all with felony criminal convictions—spoke of their inclusion in jury selection as corroboration of their reformation. Subjects boasted about their value as potential jurors and used inclusion as an apt example of how removing barriers to reentry helps one to build a personal narrative that acknowledges a criminal past while also allowing for a law-abiding presence. As many scholars have noted, this process of reconciling past events with present and future aspirations is a key component to criminal desistance.

In sum, my research on record-based exclusion, born out of that embarrassing public event, really demonstrates themes common, I think, to collateral consequences and discretionary disqualifications. Namely, that we, my population, are not all alike. And not all of us categorically threaten democratic institutions and processes. These categorical collateral consequences and discretionary disqualifications are rife with presumptions and stereotypes and really almost always lack a mechanism for individualized evaluation.

Guess what, in the case of juror exclusion, we go so far as to jettison an existing process designed to take the time to consider citizens at a personal individualized level. Jury service, right? Jury selection. As a result, we may damage our jury system. I argue in the book, by barring citizens who can make valuable contributions to a jury's efforts, we sell ourselves short.

Moreover, for those with convictions, exclusion makes reintegration more difficult. By designing and then imposing categorical lifetime obstacles, like juror exclusion statutes, being perpetually reminded of a criminal past damages one's view of one's self to the point that one with a conviction may find it difficult, if not impossible, to let go of the criminal old and embrace a new law-abiding present and future.

To close, look, certainly including those with a felony conviction in the jury process will not fix many of the issues that plague our jury system, our criminal justice system. And it will not assure successful reentry of those who have been part of—that were once part of our criminal justice system. Still, inclusion will very likely aid broader efforts to make juries more representative and to remove obstacles to reentry that tend to dehumanize, categorize those with convictions. And they tend to undermine what it means to be a citizen, especially in this case, and what it means to participate meaningfully in our democracy.

Again, thank you for having me. I am open to any questions you may have about the book or any of the other research I've done. For now, I'd like to turn it over to my colleague and friend, Brendon Woods, the Alameda County Public Defender. Brendon?

BRENDON D. WOODS:

- Great. Thank you. Thank you, Jamie, for that introduction. And thank you for having me and having me be part of this panel. So my name is Brendon Woods, and I'm the Public Defender of Alameda County. I've been with the Alameda County Public Defender's Office since 1996. I actually went to law school specifically to become a public defender.

I wanted to take action and do something about the way I witnessed this criminal legal system exacting harm and violence on my community. I witnessed abusive police practices through over-policing, the way the police targeted communities of color, through unjust and outrageous punitive sentencing—the three strikes laws, the war on drugs, mass incarceration. I wanted to make sure that I did something to fight against a system that was allegedly set up to offer protection, but was, in fact, creating more harm.

So I started out as a public defender in our office and I did every assignment. And I handled misdemeanor cases, misdemeanor trials, felony trials. I moved up and handled death penalty cases. I've been assigned to our Law and Motion Research Unit. I've been in charge of our felony trial staff and recruitment. I've supervised lawyers. And I've done almost everything in this office.

And so in 2012, I was fortunate enough to be appointed by our board of supervisors as the Public Defender of Alameda County. So when they made that decision in 2012, I became the first black Chief Public Defender of Alameda County. And when you think of Alameda County that includes Oakland and Berkeley, that says a lot that it wasn't until 2012 that a black person held this position.

And now for the last several years, I am—I have been and I am currently the only black Chief Public Defender in the entire state of California—the entire state. So I say all that to provide you with some context as to why I became a public defender, why I do this work, and why I am completely honored to be on this panel today. And also, to pull back and tell you racism and race is a big motivating factor regards to why I do this job.

Our criminal legal system, along with so many other systems in this country, whether it be child welfare system, or health care system, or immigration system, is steeped—and I mean steeped—in systemic racism. And we have to recognize and understand the role of racism, the role of

white supremacy and how they have played a major impact in this nation's history. And that these systems are built and designed to uphold a certain order.

And I think it's most visibly apparent in the criminal legal system in which we, in this system, we are taking predominantly black and brown people and placing them in cages in the name of public safety. If there is one thing—I mean one thing if we figured out how to do really well in this country, it's how to incarcerate people. As you heard earlier, we in this country incarcerate more people than any other country in the world.

Our rate of incarceration is more than five times higher than most of the countries in the world. We incarcerate about 2.3 million—2.3 million people annually. And then incarceration extends to systems of control. This carceral state, this correctional state, where there are nearly 7 million people under some form of correctional control right now in the US. And 2.4 million of them are black.

So people want to debate and they want to argue about whether this country is racist, and I don't understand the underpinnings of that argument—I don't. You cannot look—pull back and look at what happens in our criminal courts and see the results it produces and come to any sort of rational conclusion that this country is not racist. So think about it. People of color make up about 30% of the US population and they account for only 60%—I'm sorry, and they account for 60% of those that are in prison.

One out of five black men are in custody right now as opposed to one out of every 106 white men. Black men convicted of crimes receive, on average, a sentence 20% longer than similarly situated white men. There are more black men in prison and jail or on probation or parole right now than there were slaves before the start of the Civil War. And it's not even close. It's not even close. Those racist results, racist outcomes come from a racist nation. And there really isn't any other argument.

With that incarceration of predominantly black and brown people comes the inevitable stripping of certain rights that a normal system would have. So I'm going to back up a little bit and go back to when I first started being a Public Defender. And I remember walking into what we called North County jail. It's in Oakland. And it's a big jail.

And I remember going into the holding tank. And the holding tank was the size of a large living room. And immediately being hit with this visual of 20 to 30 black faces and thinking, oh my god. You hear about how bad the system is and then when you see it up close and personal like that, it is overwhelming. So in that moment, I was depressed, overwhelmed, but also extremely fired up to go out and fight for my clients, to go out start trying cases and to begin liberating my people—really.

And then you go to trial, and you set cases for trial, and you're in the courtroom, and you're seeing all those black faces in jail. And then you're seeing these jury come in and there are no black faces in the jury. You're in Oakland and you're walking around town and seeing there are black people. And there are no black people on the juries.

To highlight this point, there's an African American woman in my office who has tried over 20 cases. More than 50% of her clients have been black. And she can count the number of black

jurors on one hand. We've had cases where out of 57 potential jurors, there have been two black jurors. We had another case where out of 92 potential jurors, there were three black jurors. And I said Alameda County, it includes Oakland, Berkeley. It is a diverse city. We think of Oakland as a predominantly black city. But when you are trying cases here, there is no black representation on juries.

During COVID, over the last year, we did a lot less trials. And we were able to really dive in and collect data with regards to race in our trials. So we did about 33 trials in the last year during COVID and we got good data on 23 of them. 11 out of the 23 trials did not have a single black person on the jury. Of the 276 people who actually served as jurors, who sat in judgment—the 12 in the box—only 16 were black. We had seven black clients go to trial and not have a single black person on their jury.

So I say all that to highlight the fact that black people, people of color, low income people, are over-represented as being prosecuted and charged with crimes and are completely underrepresented as serving as people on our juries. When I was a sophomore in college, my uncle got sent to 27 years in prison and there wasn't a single black person on his jury. So this is why to me being on this panel is important.

Prior to us in California passing a law, SB 310, over 30% of black men—over 30% of black men in California were banned, excluded for life from serving on jury duty because of a felony conviction. The conviction didn't matter how old it was, what you've done with your life since then. It didn't matter. You were banned. And so we have this concept of the jury of your peers. You will be tried by a cross representative section of the community. It doesn't exist. And it doesn't exist as long as the felony exclusion rule is in place.

So all that being said, I'm really happy to be here. I'm happy to be here with Jamie. And I'm now going to turn it over to Premal Dharia, who is the Executive Director of the New Institute to End Mass Incarceration at Harvard Law School. And we're going to start this new virtual conversation here.

PREMAL DHARIA:

- Thank you so much. Thanks to both of you for your opening comments that were so powerful. And thank you all for joining us today and to the Radcliffe Institute for co-hosting with the New Institute to End Mass Incarceration. We're thrilled to be co-hosting this conversation and to bring you these experts to discuss these important issues.

The title of the talk, as you have now discerned certainly, is based on Dr. Binnall's book, 20 Million Angry Men. Which is important in so many ways, but is, of course, especially timely now as we grapple with the crisis of mass incarceration that we've built and how to go about dismantling it. And so without further ado, I want to begin the conversation with our guests. And I'm going to start with Dr. Binnall.

You told us about your own background and what sparked your drive to engage in some of this research and writing. Thank you for sharing that compelling personal story and background. In your book, you essentially seek to answer, as I can tell, two main questions. One, does the

research support the justifications for these exclusions? And two, what are the consequences of these kinds of exclusions?

So with respect to the first question about what the research supports and whether it supports these exclusions, you went into in your research a bunch of different areas of juries and how they operate, attitudes that people bring in, how they engage. Could you tell us a little bit more about those features of the research that you did and what you found?

JAMES M. BINNALL:

- Sure. So the bulk of my work on the justification—so let me back up. The two justifications—really, the character rationale and the inherent bias rationale—one is sort of confused, the other is relatively clear. So the character rationale is sort of confused. Some courts suggest that maybe it is a lack of character that impacts the function of the jury. Won't follow jury instructions, won't comport behavior to what the law requires to be a juror.

The other possibility that folks have floated is that, in fact, character is more about the appearance of impropriety. That if we include these folks on juries, that, in fact, the public, whomever, will look at juries with a skeptical eye, the verdicts may not be seen as entirely legitimate. And I can talk more about that. I'm actually conducting a study right now and preliminary results say the opposite is, in fact, true.

But when we talk about most of the inherent bias rationale, that was more clear. The claim is pretty straightforward. If we were to put someone with a felony conviction on a jury, the tendency would be for them, in a criminal matter, to acquit, simply because they have sympathy for criminal defendants and have this adversarial relationship with the state. Now, because those statutes are categorical, that really does make a few assumptions about those of us with convictions.

One, that we're homogeneous with respect to the direction and strength of our pretrial bias. The fear is pro-defense, anti-prosecution in a pretty big way. The second assumption is that we, as a group, pose really a unique threat to the jury process, more so than any other group that you might suspect has similar or the same biases.

I tested this by looking at group level biases for law students and for law enforcement personnel and comparing those to folks with convictions. And what I found was there was no statistically significant difference between law students and folks with felony convictions with respect to their pre-trial biases on a validated measure of pre-trial biases scale. So what does that mean? Should we exclude all law students from jury duty as well? I mean, that seems to be where this goes, right?

When we looked at law enforcement personnel, we saw the opposite. A pro-prosecution bias that was equally as strong as the pro-defense bias that we found that existed among formerly incarcerated people—or excuse me, folks with convictions and also law students.

All of this is to say that my evidence, my research suggests that we don't pose a unique threat. And this is the under-inclusivity piece of this—the under-inclusive piece of this is that there are

other groups that harbor biases that if you suggest our group level biases would threaten the jury process, theirs would as well. So what do you do with those folks?

And then finally the last assumption that I think these types of categorical restrictions make in terms of bias is that anyone who's been convicted of a felony conviction will necessarily come to this with a pro-defense anti-prosecution bias, that it is a dispositive predictor of that type of bias. We found that the formation of pretrial biases is a holistic thing. That multiple factors, demographic and otherwise, come into play to determine what direction your pretrial bias is in and how strong it is.

So again, all of this is to say the justifications found no support. And the book really does detail how I went about trying to systematically test those justifications to see really if there was anything there and there was not.

PREMAL DHARIA:

- Thank you. I just want to ask one follow-up question about that. You also, in the book, researched and discussed a bit the different approaches to actual engagement in the jury room in deliberations that people might have. Could you talk about that for a minute?

JAMES M. BINNALL:

- Yeah, so what really did surprise me in terms of the mock jury experiment that included folks with felony convictions was that all of our participants with convictions disclosed their status to their fellow jurors almost immediately once deliberations started. My fear, being someone who has a conviction and lives in this world, was that the fear of stigma, the fear of prejudice in the jury room would push folks to keep that quiet, to not disclose their status in the jury. They didn't. And in fact, they drew on that status in analyzing evidence and then, I argue, even-handedly applying the law. They talked about our defendant in the case—just a quick—our defendant in the case was on parole at the time that this alleged offense happened. And talked about having to report to his parole officer, and if he didn't get there on time, there would be ramifications.

Folks without felony convictions in the room who had never been on supervision really didn't understand that exchange. What we had was folks with convictions standing up at a whiteboard talking about this is what it means to report to a parole officer, this is what it means when you abscond, this is what it means—so using experiences that were otherwise negative as really a valuable source of knowledge and helping their fellow jurors sort out the evidence and come to a just conclusion.

PREMAL DHARIA:

- Thank you. I want to turn to Brendon Woods for a moment. Brendon, you shared some of your background about why you became a Public Defender and your career. Thank you. As a former longtime public defender myself, I'm particularly thrilled to hear all of that and to have you here with us today.

I wanted to just ask a practice question—a practical question about juries. Given your experience in the courtroom and experience representing people who are entangled in the criminal legal system, can you tell us where the origins of the right to a jury or the jury trial come from and how that functions in real life?

BRENDON D. WOODS:

- Sure. I think it goes back to our Constitution, and England, and the Magna Carta, and it goes way back. I think how it functioned in real life for me—as a public defender, you get a criminal case and you are assigned to represent your client. And one of the—for me, sometimes even more important than the facts of the case itself is the jury, the people who are going to be sitting in judgment, the people who are going to be deciding your client's fate.

And the jury is composed of alleged cross section of the community. People are called in to serve. There are reasons why people can get out of service. And then you are there with your client and you're going through this whole jury selection process. And you're trying to come up with a jury that is fair and is going to judge the case. And what I think the average citizen doesn't realize is that there are so many barriers in place that exist before you even get to that jury selection process that exclude people.

One thing is what we're talking about here is a felony exclusion. And because of that, you are stripping away a certain segment of potential jurors that really have a valuable voice, a valuable perspective and a valuable contribution to make to any sort of criminal case or civil case. And we don't realize that there are certain experiences that are just being wiped away and not being heard in criminal trials. One thing I really like the best about a criminal trial is sitting down and going through jury selection, and learning about people and figuring out who is going to be the best people to serve on the jury.

PREMAL DHARIA:

- Thank you. Going back to Dr. Binnall for a moment, I want to zoom out for a minute. And I think that the most well-known form of exclusion is one that you touched upon in your earlier comments around voting. Exclusion from civic participation that most people are familiar with is around voting. And I would guess that most people in the audience here today are familiar with that generally. And so I wanted to ask you if you could talk a little bit more, expanding on your earlier comments, about the similarities and differences between—and the rationales and justifications for these exclusions, and how we can think about the framework that the voting exclusion work and advocacy has provided as we think about juror exclusion.

JAMES M. BINNALL:

- Sure. So I mean, from the outset, the contexts are very much similar, but also there are some fundamental differences. I mean, first there's a fundamental right of voting versus not a fundamental right to serve as a juror. And then obviously placement in the Constitution, lots of differences. But you're right to point out that really the rationales for disenfranchisement on the voting side and disenfranchisement on the jury side really are of the same flavor. The idea is that we are trying to protect these institutions from the bad people with the felony convictions who

will infiltrate these systems and will somehow corrupt those systems in a way that benefits their population, however defined.

And so I think the fear on the voting side is ballot manipulation, possibly electing someone who is, quote unquote, "soft on crime." Maybe there's some voter fraud. On the jury side, the character rationale speaks to much the same sorts of concerns. That someone will get into the jury room and engage in nullification, will disregard jury instructions, will otherwise flout the law in the face of what they're told to do.

Also, on the bias side, we're talking the same thing, about the function of the jury, that this really all is about corrupting a process. Just like on the voting side, there is no evidence that I found that supports that there is this threat, that this threat exists in any way. And I will say as we zoom out, this is I think part and parcel for how we treat folks with convictions. We love to talk about the deficits that people with convictions have. They're missing this. They're not good at this. Whatever it might be.

And we talk very little, I think, more so these days about the strengths and attributes of people who have been inside and people who have felony convictions. We are a resilient bunch and we bring I think—at least the book demonstrates—value to these processes and really the threat is minimal to nil.

PREMAL DHARIA:

- Thank you. I want to go back to Brendon for a minute and to follow up on that. I think what Professor Binnall was describing, this issue of character—or of corruption is the word I think that you used, Dr. Binnall—of something equating having a prior felony conviction with anything to do with character or how one might behave, or act, or anything like that.

That framework, I wanted to ask you if it appears anywhere else. Does it appear anywhere else in the law, in the criminal law, as you see in your day-to-day work standing beside people who are charged in the criminal system and seeing the daily impact on people's lives. Brendon, do you see that issue of character coming up in other ways? Is it consistent or inconsistent with how we've been talking about it here and the concerns that Dr. Binnall has raised?

BRENDON D. WOODS:

- I think it's completely consistent. And you probably noticed one thing I do is I focus on race a lot and the way my black clients are treated as compared to the way my white clients are treated, to the way my—the way affluent people who come through the system are treated as compared to those who don't have any resources. And there is definite disparities in how they're treated, disparities in how they're charged, disparities with regards to who ends up with a felony conviction and who doesn't. They all exist.

And then it comes down to once that conviction is then on your record, how you are treated after that. And these exclusions are one way we see. There's so many barriers that are put in place for people who once they have these felony convictions, it's very hard to overcome. And one thing I really appreciate about in Jamie—sorry, Dr. Binnall's book—[LAUGHS] is that he talks about how the civic engagement is really a major step towards rehabilitation.

And one thing I want to go back to, if I can, Premal, with regards to the question around maybe voting and jury service, and how they're different, but how they're also interlinked. I do want people to understand and consider and think about this. I don't think there is a more important civic duty or civil responsibility than jury duty. If we think about voting, you are not summoned to vote. Voting is voluntary.

You are summoned to come serve as a juror. You have to—the government essentially has the power to subpoena you to come participate. And I do give jury service more weight, because not like voting where you're voting on someone and it will have some [INAUDIBLE] impact later on, you are now voting real time in the moment. And you're going to have a significant immediate impact on someone's life right then and there.

And so I [INAUDIBLE] see anything more important as far as a civic duty than serving on juries. And if we extrapolate a little bit more when we compare voting and jury service, we see how the system cannibalizes itself. And we set up these rules which prevent you from voting. And then people who vote set up these policies that are more draconian and they end up punishing black and brown people. And then black and brown people go to criminal trials and there's no one who is going to be sitting in judgment on them, because they're prevented from serving as jurors.

PREMAL DHARIA:

- That's a perfect segue to my next—to question for Dr. Binnall. We've talked a bunch about the justifications and how your research demonstrates that they don't really add up. They don't make sense when you actually look at the evidence and move away from the emotion, and fear, and assumptions, and stereotypes that people might have. I want to talk for a minute about consequences.

And one of the things you wrote about in your book is how Alexis de Tocqueville described jury service as a school for civic engagement. And I found that really compelling. And I was wondering if you could talk a little bit about how jury participation can actually lead to increased engagement in communities and political activity by people who have been able to serve.

JAMES M. BINNALL:

- Yeah, so some political scientists have done some great work on what it—after we engage in jury service, does this prompt additional interest participation in civic processes? And what they found was actually anywhere from a 4% to 6% increase in voting rates for folks who had previously served as jurors, have been empanelled jurors.

For members of our population—population with felony convictions—I think that statistics bear out that many folks in that population have been detached from these civic processes. Maybe they haven't engaged the way you would expect or the way you would hope. And that this impact of a taste of civic engagement through jury service and what that can mean in the future really is most impactful for people who maybe were a little bit disassociated with these civic processes prior to. So I think it can have a tremendous effect.

One thing I will mention, though—I mean, like in California, we passed SB 310. Rights are now restored. One of the things that if we are talking about possibly lifting this legislation or altering it, such that folks with convictions can serve, I think it's very important how we make that change. And I know we're probably going to talk about it in a little bit. But the idea that we need to notify the folks who are now eligible in appropriate ways and we need to notify courthouses in appropriate ways, so that everyone is on the same page.

Some folks on the voting side have written about de facto disenfranchisement where people just don't have any idea that they're still allowed to vote, so they assume they can't and they don't go vote. Even election officials—and [INAUDIBLE] up in Vermont wrote about some folks in New York who really—even the election officials didn't know the rules. We see if the notification isn't appropriate or correct, this sort of de facto jurymaning or this de facto I'm not going to show up, because I simply—if I'm a person who hasn't been notified, simply believe I don't—I can't serve. Isn't that the policy? So I know this is sort of a roundabout way to answer your question. I apologize. But yeah, so that's what I think about notification and about serving.

PREMAL DHARIA:

- Thank you. So I think it's time to move into some of these questions. We've got a lot of really great questions from our audience here. A few different people have inquired about states other than Maine. What makes Maine an outlier? How can other states learn from their policy? And what are the experiences of other states along these lines, if any? Could you speak to that?

JAMES M. BINNALL:

- Yeah, so I thought a lot—I grew up in Boston. And I spent a lot of time in Maine. And I thought a lot about what made Maine different, right? Without offending any Mainers, I mean, they have a way that they do things up there that is very straightforward. And so when I—it didn't surprise me that Maine was the only jurisdiction.

I will say—and I want to offer a caveat to Maine being the only jurisdiction—in Colorado, folks with convictions are—felony convictions—are allowed to serve on petit juries, but they are restricted from ever serving as grand jurors. So Maine is really the only pure state that has—it doesn't even have a statute speaking to folks with convictions serving.

What can we—do why do I think Maine is that way? I mean, when they broke off from Massachusetts, they were still a permanent exclusion state. It wasn't until I believe—I'd have to look—I apologize I don't know this off the top of my head, but it was in I believe the early '70s when the restriction was really lifted and there has not been one since.

In terms of how Maine functions, I mean, really this isn't an issue for them. When I spoke to judges and attorneys about jury selection in Maine, they really thought of folks with convictions really as anyone else. And it wasn't a topic they had ever considered. They knew on the federal side in Maine folks with convictions were excluded permanently. And the courthouses are right across the street from one another in Portland. But they also knew that Maine had never done this, so it really wasn't an issue for them.

PREMAL DHARIA:

- Thanks.

- Brendon—oh, yeah—

BRENDON D. WOODS:

- Can I add to that a little bit? I'm such a cynic. And I love Maine and Vermont. They always come out doing great stuff around us.

- [INAUDIBLE]

- But—

JAMES M. BINNALL:

- I'm 90% white, right, Brendon?

BRENDON D. WOODS:

- 90—yes. [LAUGHS] Yes.

JAMES M. BINNALL:

- Fair enough. Yes.

BRENDON D. WOODS:

- Maine, I think is like 1.2% black. So I do believe there is a reason and purpose with regards to why these exclusions exist. And it goes back to history. It goes back to slavery. It goes back to when juries were comprised of all white men in order to convict black men. That's how that came about. And if you have a city or state where it's just 1% black, you're not concerned about it. You're just not. So I do fall back and I know—yeah, so I do fall back on that and that's why. I appreciate what they do. It needs to be done in more places.

PREMAL DHARIA:

- Yep. Thank you for—thank you for making sure to include that important point. I appreciate that. I want to ask you a question that—there's a few different people who have gotten at this question, so I'm going to merge them into one question. But it's basically about what the differences are between excluding people with felony convictions versus the possibility that they get excluded through peremptory challenges. And what do you do with the fact that there's another way to exclude people and what are the differences in those processes? If you've seen it all from your experience in California with SB 310 or have thoughts about that more broadly.

BRENDON D. WOODS:

- Sure. So I think for me, as you can tell, the big issue that we're trying to do—for me, why this was a huge issue was just making sure that people with felony convictions—black people—had the ability to serve as jurors. Yes, prosecutors are going to remove people of color. They're going to try it through multiple ways. They think it's better for their case. And if there is a pattern of them doing it for x reason, we can object and make our record.

We've had some really great changes in the law in California with SB 310 to felony exclusion and also a new law that goes into effect next year around limiting—a little bit off topic—the Batson-Wheeler process with regards to other reasons why prosecutors might exclude black people from jurors whether it be based on their neighborhood or some other perceived bias like not—or believing police officers engage in discriminatory conduct or racial profiling. Those reasons can no longer be used.

I think you can make a similar type argument or objections around excluding people based on felony convictions. We haven't quite gotten there yet. I think, unfortunately, when SB 310 got passed, we moved right into pandemic world. And so trials just came to a grinding halt. And now we're starting to get back up on that.

One thing Jamie mentioned earlier and he—sorry, Professor Binnall mentioned earlier [LAUGHS] was the outreach and making sure people are aware of this. I went back and dug up old emails that I had. We were in the process of trying to make a outreach video about the people with felony convictions now have the right to serve as jurors. And then it all came to a grinding halt in March where just everything stopped. So now I'm like, hey, we've got to get back on that.

PREMAL DHARIA:

- Right. Did you want to add something?

JAMES M. BINNALL:

- I've called my agent for that video. So we're [INAUDIBLE].
[LAUGHTER]

PREMAL DHARIA:

- There are some questions, Dr. Binnall, about the findings that you described about the impact of jury exclusion for successful building up of life after coming home, successful reentry. Can you talk a little bit more about what the research has shown about that?

JAMES M. BINNALL:

- Sure. Yeah. And I make a point here that has been made on the voting side as well. Chris Uggen, Jeff Manza make this argument in Locked Out and I believe later articles. The idea that when we vote, when we serve as a juror, that's a role—the ideal voter, the ideal juror. And when we attempt to—when we take on that role and we attempt to live up to it, there are certain strictures of that role that suggest that we have—things that we have to do and certain things that we can't do if we're going to live up to this ideal version of this role.

And eventually, we start to take on this identity and we start to see ourselves as more productive and less antisocial—all of it. The self-concept change is really what I'm getting at and what I think the folks on the voting side got to. And the idea was that really, yes, allowing folks to serve on a jury that have a felony conviction is not going to alter their self-concept in significant ways having served on a jury once.

But being excluded from jury service is really part of this tapestry of exclusions. And when we look at them together, what it really says is we have a lot of flaws—our population—and that we shouldn't be involved in a lot of this stuff for fear that we may somehow corrupt all of it. And with those rules, those exclusions, those can impact how we feel about ourselves and how we adjust our self-concept to view ourselves not as criminal but as now pro-social, contributing members of society.

When you're reminded of this in a almost permanent way with these collateral consequences that are categorical and trigger as a result of a conviction, it can be really hard to start seeing yourself as pro-social and to make the changes necessary to successfully re-enter. And that's really what I was getting at. And there's evidence of that in other—when we look at other collateral consequences—most relevant I think on the voting side there's evidence of that as well.

PREMAL DHARIA:

- Thanks. Tapestry is such a powerful visual word. I really appreciate your use of that. There's a question that's fairly practical, but I think will be of interest to lots of people who have asked questions about the parallels between voting and jury duty. Where do states draw their jury rolls from? Are they related to the voting rolls? How are people getting identified as potential jurors or potential voters?

JAMES M. BINNALL:

- Brendon or me?

BRENDON D. WOODS:

- I'll start. That's a great question and every state is different. Like, for example, in California, we do it based on DMV California ID. We've now added tax filers to that. In the original SB 310 bill that we tried to get passed, we did expand that group. It had people with felony—it got rid of felony exclusions and it also was supposed to add tax filers and people who pay utility rate payers. We wanted to really expand the roll.

Each state is different. Each state needs to expand more, I believe, if you want to really create a true diverse jury pool. So we need to be doing more outreach and expanding more. But historically, it usually comes down to voter registration, DMV, and license.

JAMES M. BINNALL:

- And uniquely, in Maine, you can volunteer for jury service. And about half of the folks that I interviewed with convictions had affirmatively volunteered to be put back on the rolls or to be

included, to ensure they were never taken off by mistake and they were never supposed to be. So yes, you can volunteer.

PREMAL DHARIA:

- Thank you. It sounds like our audience was also moved by your use of tapestry. There are some questions about the tapestry of exclusions and if you could expand a little bit on some of the examples that might fall into that tapestry.

JAMES M. BINNALL:

- Sure. Yeah, absolutely. And I think, again, [INAUDIBLE] has done some great work on this and a number of folks—Michael [? Pinard. ?] So there's a whole bunch of record-based restrictions that are triggered as a result of you having a felony conviction. Yes, checking the box for employment applications. Checking the box for higher education applications. Although that is slowly being removed in about five or six jurisdictions, I think, to date. Any apartment applications for housing, any public assistance, any public housing.

The record—I mean, it isn't a categorical denial in all those instances, but it does impact your opportunity to access those services or to access those opportunities. Others—obviously voting, which is, again, slowly disintegrating, going away. Less and less states are restricting voting. Jury service is the most pervasive. The ability to run for office exists in a few jurisdictions.

And then, of course, all kinds of occupational licensing barriers beyond just checking the box to get your job. Jobs are great. Careers are better. What happens when we want to move into a career for folks with convictions, oftentimes that's when the gates come down for the professional licensing. And then there's issues there.

So again, I could talk about collateral consequences till tomorrow. There are so many. There's a whole lot. And they trigger differently depending on the type of conviction and a number of different things. All serve to make it a little bit more difficult in the long run to start viewing yourself as a regular old citizen rather than someone who's committed a criminal offense.

PREMAL DHARIA:

- Thank you. I think that I'm getting a prompt to move on from these questions. There are a tremendous number of really great questions from a very engaged audience. I think we do have time for one more. Oh, great question for this Institute to End Mass Incarceration and Radcliffe Institute program. Is this research and are these findings making their way into law schools and into universities? Are people who are up and coming practitioners and experts in this field—are they learning about these things so that we can move forward with making change?

JAMES M. BINNALL:

- I hope so. I've done my part, I think, to try to take advantage of this virtual platform during the pandemic and get to as many schools as I possibly can over the last six or seven months since the book has come out or even since before the book came out. So I'm giving it a shot. I think the book does have a place in criminal procedure classes, in trial practice classes, any class that

really speaks to how we select our juries and what juries are supposed to look like. So yeah, I hope so.

PREMAL DHARIA:

- And Brendon, related to that, you do so much community activism and community engaged work as a public defender. Do you have any parting words of wisdom or encouragement for people who want to take action in this area, who are motivated and inspired by what you've both shared today. There are a lot of questions about what can we do—what can we do on this issue? It's very compelling.

BRENDON D. WOODS:

- Yeah, so I think thinking about last year and there was this real national racial awakening around racial justice, on what to do. I think extending that to juries and the power of jury service. And how if you want to have an impact, don't try to get out of jury service. Come, show up. I mean, do your part. I've been tweeting a lot Black Lives Matter on juries. Yes, Black Lives Matter on juries. If you care about ending mass incarceration, show up for jury service. If you care about some sort of racial justice or racial equity in the courts, show up for jury service. People who are like-minded and care about these issues shouldn't be avoiding doing that basic work that needs to be done.

And with that, I got to go back to Jamie—Professor Binnall. I've been a fan of his forever. He's written prolifically about this subject. I thought it would take 10 years to get something like SB 310 passed, but his work made it a lot faster. And so the research is out there. If you care about those issues, start researching, do it. And there's community that will be behind you to support it. There's so many ways in which we can make our juries more diverse and more representative. This is just one of them.

PREMAL DHARIA:

- Thank you so much. Thank you both so much for joining us today and for sharing all of your expertise, and insights and reflections. This has just been a fantastic conversation. I think the audience members agree given the comments and questions that I've seen. So thank you both very much.

This concludes our program today. I want to thank our panelists for their presentations and perspectives, and also thank our audience for terrific engaged questions. In Dr. Binnall's book, he describes the role of emotion in some of the decision-making around these issues. And I just encourage everyone to think about the role that emotional appeals and reactions can play and how important it is to disrupt those narratives of fear and emotion, particularly as our country grapples with undoing the decades of harm caused by our criminal legal system. I think both of our distinguished guests today have done a great job of encouraging all of us to think more critically about what the evidence demonstrates as opposed to what narratives of fear might demonstrate.

Today's program has been recorded and it will be posted on the Radcliffe website in about a week. Thank you again for joining us and please take care.