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# Jury diversity in the age of mass incarceration: an exploratory mock jury experiment examining felon-jurors' potential impacts on deliberations

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## ABSTRACT

Today, nineteen million American citizens bear the mark of a felony conviction, far more than in any prior era. With that mark comes a host of record-based restrictions that curtail access to various political, social, and civic institutions. One such restriction impacts convicted felons' eligibility for jury service. Forty-nine states, the federal government, and the District of Columbia statutorily limit convicted felons' opportunities to serve as jurors. Justifying these restrictions, lawmakers and courts suggest that convicted felons, if allowed to serve, would diminish the quality of the deliberation process. This exploratory mock jury experiment is the first to assess jury deliberations that include felon-jurors, comparing (1) homogenous juries comprised entirely of non-felon-jurors to diverse juries comprised of both non-felon and felon-jurors and (2) non-felon-jurors to felon-jurors. Results suggest that on theoretically derived measures of deliberation structure, deliberation content, and juror perceptions, diverse juries performed as well as homogenous juries. Data also tend to demonstrate few statistically significant differences between felon-jurors and non-felon-jurors. Notably, on measures of novel case facts covered and time spoken as a proportion of deliberation duration, felon-jurors outperformed their non-felon counterparts, perhaps calling into question the necessity of blanket felon-juror exclusion policies.

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## 1. Introduction

The United States incarcerates more of its citizens than any other country in the world (Wagner & Walsh, 2016). Today, over 2.3 million Americans are behind bars (Wagner & Rabuy, 2017; Guerino et al., 2012). Research estimates that 3 percent of adults have been to prison, and 8 percent of adults, 19 million American citizens, have been convicted of a felony (Shannon et al., 2017). Such statistics suggest the disturbing normalization of a felony criminal record.

For those millions who live as convicted felons, punishment does not end when the prison doors open. A vast network of collateral consequences and discretionary disabilities restrict their freedoms and opportunities post-release (Owens & Smith, 2012; Mele & Miller,

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2005; Pager, 2003). One such restriction curtails convicted felons' eligibility for jury service (Kalt 2003; Binnall 2009; 2010). Forty-nine states, the federal government, and the District of Columbia statutorily limit convicted felons' opportunities to serve as jurors (Kalt, 2003; Binnall, 2014). Presuming that convicted felons lack the requisite character to serve as jurors and harbor an inherent bias prompting sympathy for criminal defendants and antipathy toward the prosecution, felon-juror exclusion statutes are premised on the notion that convicted felons, if allowed to serve, would corrupt the adjudicative process (Kalt, 2003; Binnall, 2014). No research supports this proposition (Binnall, 2014; 2017 findings contradict the professed rationales for felon-juror exclusion).

Instead, prior studies of diverse juries and deliberation quality suggest that felon-jurors likely pose little threat to the jury (Cowan, Ellsworth & Thompson, 1984; Marder, 2002; Sommers, 2006; Sommers, 2008). In studies comparing diverse and homogenous juries focusing on participating jurors' race (Sommers, 2006), gender (Marder, 2002), and views of the death penalty (Cowan, Thompson, and Ellsworth, 1984), results suggest that diversity has a positive impact on the deliberative process. Still, the exact mechanisms through which diversity operates to improve deliberation quality are unclear. Psychological research tends to show that diversity can both improve and hinder group decision-making processes (Millikan & Martins, 1996; Webber & Donahue 2001). Though diversity increases overall cognitive resources (Phillip et al., 2004; Antonio et al., 2004), it can also prompt stress and conflict which can result in cognitive depletion and, in turn, less effective group performance (Tajfel & Turner, 1979; De Dreu & Weingart, 2003).

The Supreme Court's treatment of non-felon-juror eligibility stands in stark contrast to the law's approach to prospective felon-jurors. For non-felons, the Court has long favored an inclusive jury system (Peters v. Kiff, 1972). In an effort to ensure jury diversity, the Court has held that juries must represent a fair cross section of the community (Taylor v. Louisiana, 1975; Duren v. Missouri, 1979) and that gender and race based eligibility exclusions are unconstitutional (United States v. Ballard, 1946; Smith v. Texas, 1940). Conversely, the Court has implicitly authorized the exclusion of convicted felons from jury service (Carter v. Jury Comms's of Greene County, 1970) and lower courts have rejected all challenges to felon-juror exclusion statutes (Binnall, 2014; see also State v. Compton, 2002 [reviewing case law on cross-section claims]; United States v. Conant, 2000 [reviewing case law on equal protection claims]).

This exploratory study is the first to examine diverse juries that include convicted felons. Using an experimental, mock-jury design comprised of 101 participants that divide into 19 juries, this study explores how felon-jurors may influence deliberation structure, deliberation content, and juror perceptions. To do so, I first detail the practice of statutorily excluding convicted felons from jury service. Next, I review prior research on jury diversity, noting relevant mechanisms underlying diverse group decision-making processes. I then detail the methods of the present study and present my findings, which include jury level and juror level comparisons on theoretically derived measures of deliberation structure, deliberation content, and juror perceptions. To make these comparisons, this study employs both parametric and non-parametric tests (at the jury level) and multi-level models (at the juror level). Finally, I situate my findings in a broader discussion of jury diversity, the deliberation process, and the alleged threat convicted felons pose to the jury.

### 1.1. Felon-Juror exclusion in the United States

All but one U.S. jurisdiction (Maine) statutorily restricts a convicted felon's eligibility for jury service (Kalt, 2003; Binnall, 2014). Those restrictions take several forms. In twenty-eight jurisdictions, they are permanent, banning convicted felons from jury service for life (Binnall, 2014). Twelve states bar convicted felons from jury service until the full completion of their sentence, notably disqualifying individuals serving felony-parole and felony-probation. Seven states enforce hybrid regulations that may incorporate penal status, charge category, type of jury proceeding, and/or a term of years. For example, the District of Columbia and Colorado adhere to differing hybrid models; the former excludes convicted felons from jury service during any period of supervision and for ten years following the termination of supervision, while the latter excludes convicted felons solely from grand jury proceedings. And finally, two states recognize lifetime for cause challenges, permitting a trial judge to dismiss a prospective juror from the venire on the basis of a felony conviction. Moreover, in all but four jurisdictions, felon-juror exclusion statutes are categorical, barring *all* convicted felons from serving as jurors in *all* types of litigation (Binnall, 2017).

Lawmakers and courts cite two justifications for the exclusion of convicted felons from jury service. The first is the probity rationale (Kalt, 2003). In his seminal article on felon-juror exclusion, Kalt explains that the meaning of probity 'is fairly clear: moral excellence, integrity, rectitude, uprightness, conscientiousness, honesty, sincerity' (2003 p. 74). Though, as Kalt notes, courts and lawmakers have been less clear about the exact mechanisms through which character defects make convicted felons unfit for jury service (Kalt, 2003). Still, courts seem to presume that convicted felons will mar deliberations and denigrate the jury process. As one New York appellate court held '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' (*People ex rel. Hannon v. Ryan*, 1970 p. 712).

The second proffered justification for felon-juror exclusion is the inherent bias rationale (Kalt 2003; Binnall 2014). The inherent bias rationale alleges that, as a result of their experiences with the criminal justice system, convicted felons harbor an inherent bias that makes each sympathetic to criminal defendants and antithetical toward the prosecution. As one court succinctly explains,

'a person who has suffered the most severe form of condemnation that can be inflicted by the state ... might well harbor a continuing resentment against "the system" that punished him and equally unthinking bias in favor of the defendant on trial'. (*Rubio v. Superior Court of San Joaquin County*, 1979 p. 101)

The proffered justifications for felon-juror exclusion assume that citizens with a felonious criminal history pose a significant threat to the jury process. Still, no evidence supports this assumption. Instead, several lines of research tend to contradict these justifications for excluding millions of convicted felons from the jury process.

### 1.2. Felon-Juror exclusion, diverse juries, and deliberating groups: prior research

Despite the pervasiveness and severity of felon-juror exclusion, it has been the subject of little empirical research. In those few empirical studies focused on felon-juror exclusion, research suggests that the practice may racially homogenize juries (Wheelock, 2012) and likely makes inaccurate presumptions about the pre-trial biases of convicted felons

(Binnall, 2014). The only other empirical study of felon-juror exclusion is also the most relevant to the current research. In a qualitative field study of former and prospective felon-jurors in Maine, Binnall found that convicted felons viewed jury service as a welcomed experience (2017). Data also reveal that prospective felon-jurors strive to fulfill what they perceive to be the ideal juror role, considering evidence carefully and adjudicating a case impartially. For convicted felons who had previously served, they expressed a positive view of their experience and reported serving conscientiously (Binnall, 2017). These limited findings call into question the rationales for felon-juror exclusion.

Unlike felon-juror exclusion, the jury process has been the topic of a wealth of research. Such research divides roughly into two categories: juror research and jury research (Davis, Bray, & Holt, 1977; Pennington & Hastie, 1990). While *juror* research explores how an individual juror arrives at a verdict preference, *jury* research focuses on group-level decision-making processes (Mazella & Feingold, 1994). Approximately five to ten percent of jury research centers on the dynamics of the deliberation process (Devine, 2012), yet of those studies, few systematically evaluate deliberations (Devine et al., 2007), and even fewer explore how diverse juries compare to homogenous juries (Cowan, Thompson, & Ellsworth, 1984; Marder, 2002; Sommers, 2006).

In an early study of diverse juries, Cowan et al. conducted a mock jury experiment that examined how death qualified jurors compared to excludable jurors (Witherspoon excludables) based on their views of the death penalty (1984). Cowan et al. compared homogenous juries comprised entirely of death qualified jurors to those comprised of both death qualified and excludable jurors using post-deliberation questionnaires. At the jury level, Cowan et al. found that diverse juries (those that included excludable jurors) were more critical of prosecution witnesses, rated the deliberation experience as less satisfying, and, on average, recalled more case facts than did homogenous juries (Cowan, Thompson, & Ellsworth, 1984). At the juror level, findings revealed that death qualified jurors tended to rate prosecution witnesses more favorably than excludable jurors and that excludable jurors (in the minority) were less satisfied with deliberations.

In a later study of diverse juries, Marder used post-deliberation questionnaires to examine the effects of age, race, and gender on deliberations. Focusing on actual jurors who had previously taken part in jury service, Marder found that gender diverse juries reported a higher level of satisfaction with deliberations and also felt as though deliberations were more thorough (2002). In the most recent study of diverse juries, Sommers compared homogenous jurors comprised of all white jurors to racially diverse juries that included both white and African-American jurors (2006). Sommers found that racially diverse juries deliberated longer and covered more case facts than did homogenous juries.

Notably, Sommers' research revealed that differences in deliberation durations and coverage of case facts between diverse and homogenous juries were not solely the product of African-American jurors 'adding unique perspectives to the discussion' (2006 p. 606). Instead, Sommers found that White jurors on diverse juries raised more case facts and contributed to longer deliberation durations than White jurors on homogenous juries. Sommers hypothesized that the improved performance of White jurors on mixed juries may be attributable to a 'watchdog effect' whereby White jurors took note of diverse participants and anticipated that group discussions would involve questions centered on race (Sommers, 2006 p. 606). In turn, White jurors took steps to insulate group discussions from

instances of bias or prejudice against a defendant who was also part of the minority group (Sommers, 2006).

Though the sum of these findings tends to demonstrate that diversity likely bolsters deliberations, psychological research outside of the jury context suggests that the benefits of diversity are unclear (Kochan et al., 2003; Webber and Donahue, 2001), leading some scholars argue that diversity is a 'double edged sword' (Millikan & Martins, 1996 p. 403). While diversity can enhance the cognitive resources of the group (McLeod et al., 1996; Watson et al., 1996; Valls et al., 2016), such enhancements may be negligible when diversity gives rise to conflict and a lack of group cohesion (Behfar et al., 2008; Greer & Jehn, 2007; Greer et al., 2008). In such instances, minority group members may expend precious cognitive energy coping with stressors, reducing group problem-solving capabilities (Trawalter et al., 2009; Richeson & Shelton, 2003). Unstructured group settings, like jury deliberations, may exacerbate this negative impact of diversity (Avery et al., 2009).

The type of diversity at issue may also influence group performance (Pelled, 1996). Diversity that gives rise to polarizing attitudes is more likely to cause dissention and conflict (Sunstein, 2002). While Binnall (2017) found that former felon-jurors reported actively participating in jury deliberations, prior research suggests that many citizens harbor strong negative feelings toward those with a felony criminal history (Braithwaite, 1989; LeBel, 2012; Moore et al., 2016) and that many former offenders cope with stigmatization through social isolation and withdrawal (Haney, 2003). Combined, these findings make convicted felons' potential contributions to deliberations uncertain.

In sum, the rationales for excluding convicted felons from jury service coupled with prior research on felon-juror exclusion, diverse juries, and deliberating groups paints an unclear picture of how convicted felons will impact deliberation structure, deliberation content, and juror perceptions. Exploratory in nature, the design of the present mock jury experiment accommodates this uncertainty.

## 2. The mock jury experiment

The present study is a mock-jury experiment conducted in a large county in Southern California over the course of six months in 2015–2016. The design of this study draws from prior mock-jury experimental research focused on diverse juries (Cowan, Ellsworth, & Thompson, 1984; Sommers, 2006).

### 2.1. Method

#### 2.2.1. Participants

This study includes 101 participants that divide into two groups: otherwise eligible jurors with a felony criminal record (felon-jurors) and eligible jurors without a felony criminal record (non-felon-jurors). In an effort to preserve the ecological validity of this study and because this study took place in California, I used California's juror eligibility guidelines as exclusionary criteria and prescreened all prospective participants (Cal. Civ. Proc. Code § 203(a), 2010).

To obtain an adequate number of juror-eligible participants, I used a multi-pronged recruitment effort. I recruited felon-jurors using in-person solicitation at Parole and Community Team (PACT) meetings in the host county. The California Department of

Corrections and Rehabilitation (CDCR) requires all newly released prisoners to attend a PACT meeting within thirty days of their release from prison. Over the course of the study (6 months), I attended weekly PACT meetings in the host county, recruiting participants at a total of 25 meetings at which attendance ranged from ten to fifty convicted felons. All felon-jurors were active state parolees.<sup>1</sup> In-person recruitment of prospective participants included a brief description of the study, available study sessions, and a promise to compensate participants \$50.00 for 3–4 hours of their time. Interested participants were provided a local telephone number and email address (both dedicated only to participant recruitment) and instructed to call or email to schedule their mock-jury session.

To recruit non-felon-jurors, I relied on written advertisements at all courthouses (9) in the host county. At each location, an advertisement was posted in the central lobby and when permission was granted (5 courthouses) in the jury lounge. Advertisements gave a brief description of the mock-jury study, listed the available times and dates, and promised participants \$50.00 compensation for 3–4 hours of their time. The advertisements also listed the study telephone number and email address. Interested participants were instructed to call or email the study organizers. Advertisements were maintained for the duration of the study.

Participants who called or emailed in response to in-person and written solicitations were pre-screened by research assistants to ensure that they met California's juror eligibility criteria.<sup>2</sup> For felon-jurors, pre-screening did not include California's juror eligibility criterion excluding convicted felons from jury service (Cal. Civ. Proc. Code § 203(a)(5), 2010). I also took additional steps to ensure the ecological validity of the present study. Because California's juror rolls are derived from voter registration lists and driver's license records, participants were also excluded (1) if they were not a registered voter in the State of California or (2) if they did not possess a valid California's driver's license.

Using these recruitment methods, I was able to compile a demographically diverse participant pool. Of the 101 participants, 65 are men (64.36 percent), 35 are women (34.65 percent), and 1 is transgender (.99 percent). Participant ages range from 19 to 80, with a mean age of 39.4 ( $SD = 8.88$ ). The participants were also diverse in racial and ethnic identity. Approximately 52 percent of participants identify as white, 21 percent identify as African-American, 18 percent identify as Latino/a, and 9 percent indicated they are some other ethnicity.<sup>3</sup>

The felon-juror population differed somewhat from the non-felon-juror population.<sup>4</sup> Of the 21 felon-jurors in the study, 16 are men (76.19 percent) and 5 are women (23.81 percent). Non-felon-jurors consisted of 49 men (61.25 percent), 30 women (37.5 percent), and 1 transgendered person (1.25 percent). The age of the participant groups also differed. Felon-jurors' average age is 41, while the average age of non-felon-jurors is 30. Additionally, there are some differences with respect to ethnicity. Approximately, 38 percent of the felon-jurors identified as white, 33 percent identified as African-American, 24 percent identified as Latino/a, and 5 percent indicated they were some other ethnicity. In contrast, 45 percent of the non-felon-jurors identified as white, 14 percent as African-American, 13 percent as Latino/a, and 8 percent as some other ethnicity.

### 2.2.2. Procedures

The 101 participants who took part in the present study comprised 19 mock juries. I attempted to schedule 7 participants for each mock jury. For a number of sessions,



fewer than 7 participants were available or actually appeared for the session. In these instances, in line with prior research, a session was cancelled if fewer than 4 participants attended (Lynch & Haney, 2009).

I constructed juries of three types: juries comprised exclusively of non-felons ( $N = 5$ ), juries including a single felon-juror ( $N = 8$ ), and juries including multiple felon-jurors ( $N = 6$ ). Though minorities of 1 do create unique deliberation dynamics (Sommers, 2006), I chose to include diverse juries of single felon-jurors to preserve ecological validity. Prior research in jurisdictions that include convicted felons in the jury process reveals that the number of convicted felons likely present in any jury pool coupled with the for-cause challenges and peremptory strikes make it is unlikely that any single jury will include more than 1 or 2 convicted felons (Binnall 2017). To approximate this reality, I constructed juries of similar character.

Once I assembled a viable (4+ persons) mock jury, I brought participants into the study site and seated them at the large conference table. I then placed a placard with an identification number in front of each participant, positioned such that the numbers were visible for video recording. After arranging a mock jury, I read participants a study information sheet and asked each to provide written consent to be filmed.

Participants then watched a video reenactment of an actual criminal trial. Since the goal of this study was to analyze deliberations of diverse juries comprised of felon-jurors and non-felon-jurors, I sought to reenact a criminal case that did not give rise to a clear verdict (See Kalven & Zeisel, 1968 discussing the 'liberation hypothesis'). To find a case that met this criterion, I pretested five criminal trial transcripts involving defendants with prior felony convictions. To do so, I used focus groups of attorneys and eligible jurors in the host county. The chosen transcript was decidedly the most neutral.

The reenactment that served as the experimental stimulus involved the robbery of bank (18 U.S.C. § 2113) by a defendant who was on parole at the time of the alleged crime. I created the reenactment using lawyers, law students, and professional actors. The edited reenactment was 94 minutes in length. The reenactment included opening statements, the testimony of two prosecution and two defense witnesses, and highlights from closing arguments.

After participants had finished viewing the experimental stimulus, they were read the Ninth Circuit model federal jury instructions for bank robbery (Jury Instructions Committee – Ninth Circuit, 2010). The instructions contained a description of the legal elements of bank robbery (18 U.S.C. § 2113), a legal definition of reasonable doubt, and general guidelines for deliberations. As part of jury instructions, participants were instructed to select a foreperson, but were not given any further details about how to conduct that process. Jurors were compensated \$50.00 for their participation and asked not to discuss the experiment with others in the community.

### 2.2.3. Measures

There are generally two approaches to the study of deliberations (Cowan, Thompson, & Ellsworth, 1984). The first approach involves content analyses of deliberations in a mock jury setting (Ellsworth, 1989; Sommers, 2006). To determine what aspects of jury deliberations may serve as measures of deliberation quality, researchers look primarily to jury instructions (Pennington & Hastie, 1990; Cowan, Thompson, & Ellsworth, 1984; Ellsworth, 1989; Devine et al., 2007). They suggest that common elements of jury instructions



reveal several 'process-oriented criteria' helpful in the operationalization of deliberation quality (Devine et al., 2007).

A second approach to the study of deliberations uses post-deliberation questionnaires that poll participants about their impressions of the deliberation experience in either a mock jury setting or in as a follow up to actual deliberations (Cowan, Thompson, & Ellsworth, 1984; Devine et al., 2007). In such studies, jurors are often asked to rate their satisfaction with the jury service experience, their perceptions of witnesses, and their evaluations of attorneys.

Drawing on prior research of diverse juries, this study utilizes theoretically derived measures from both approaches to the study of deliberations. The first set of measures pertains to deliberation structure: foreperson selection (Diamond & Casper, 1992; Devine et al., 2001), and deliberation style (Ellsworth, 1989). The second set of measures relates to deliberation content: deliberation duration (Sommers, 2006), juror time spoken (Sommers, 2006), coverage of facts and law (Cowan, Thompson, & Ellsworth, 1984; Sommers, 2006), and accuracy of facts and law covered (Sommers, 2006). The final set of measures assesses jurors' perceptions of: deliberation experience (Marder, 2002), witness credibility, and attorney credibility/likability (Cowan, Thompson, & Ellsworth, 1984).

#### *2.2.4. Analytic strategy and study limitations*

For measures of deliberation structure and content, I used a concept-driven, deductive strategy to build a coding frame (Schreier 2012; Esterberg 2002). The present study's coding frame is theoretically derived, as it draws from prior research on diverse juries (Schreier 2012).

To code the data, I employed three coders who, at the same time, coded six deliberation transcripts. Those transcripts were then compared to assess the reliability of each coder. I then randomly reassigned each coder a second set of 6 jury deliberations (because my sample involved 19 juries, one research assistant coded an extra transcript). Like prior studies of diverse juries (Sommers, 2006), I then conducted a comparison of pairwise kappas for each of the following variables: novel facts raised, novel law raised, and accuracy of facts and law. As did Sommers (2006), I compared each coder on individual level juror coding. Values of the pairwise kappas ranged from .72 to .83 (higher than the generally accepted .70 level of reliability) (Stangor, 1998).<sup>5</sup>

I also utilized a post-deliberation questionnaire focused on deliberation satisfaction, attorney assessments, and witness credibility. The post-deliberation questionnaire contained a 9-question scale assessing a juror's satisfaction with the deliberation process and a 6-question scale focused on the performance/likability of counsel and the credibility of witnesses in the case. Each scale was scored on a 7-point Likert scale. Respectively, higher scores suggested greater satisfaction with the deliberation process and a more favorable opinion of counsel/witnesses.

Given the relatively small size of the study, statistical analyses are limited and any findings derived from such analyses are suggestive only. At the jury level, because of the small sample size ( $N = 19$ ), I made comparisons between diverse juries and homogenous juries using both parametric and non-parametric tests. At the juror-level, the data are hierarchically organized with jurors nested within juries. Given this hierarchical data structure, and in line with prior mock jury studies of the same design (Lynch &

Haney 2009), random intercept models were estimated in Stata (Rabe-Hesketh & Skrondal 2008; Raudenbush & Bryk 2002).

### 3. Results

#### 3.1. Deliberation structure

Preliminarily, this study explores how the presence of felon-jurors may influence the structure of deliberations by examining foreperson selection (Diamond & Casper, 1992; Devine et al., 2004) and deliberation style (Ellsworth 1989). At the start of each deliberation, juries selected a foreperson. Most juries (16) relied on a volunteer foreperson. The remaining 3 juries voted to elect a foreperson. In all homogenous juries, forepersons volunteered. Of the 3 juries that voted to elect a foreperson, 2 included a single felon-juror and 1 included multiple felon-jurors. Notably, in roughly 20 percent of juries (4), a felon-juror served as the foreperson. In all of those instances, felon-jurors volunteered to serve as the foreperson.

Deliberation styles varied across jury types. Nine juries took an initial vote prior to discussing the trial stimulus (verdict driven). The remaining 10 juries engaged in a discussion about the case at hand before polling jurors (evidence driven). Homogenous juries tended to favor an evidence-driven deliberation style (4/5) while the majority of diverse juries tended to employ a verdict-driven deliberation style (7/13). Single felon juries were evenly split with respect to deliberation style (4/4) and multiple felon juries slightly favored a verdict driven deliberation style (4/6).

#### 3.2. Deliberation content

In a second set of analyses, this study compares homogenous juries to diverse juries and felon-jurors to non-felon-jurors on several theoretically derived measures of deliberation content. Those measures include: deliberation duration (Sommers, 2006), time spoken (Sommers, 2006), novel case facts and novel legal concepts covered (Cowan, Thompson, & Ellsworth, 1984; Sommers, 2006).

Overall, deliberation durations range from 10.3 to 37.4 minutes with an average deliberation time of 24.62 minutes ( $SD = 8.17$ ). The average length of diverse juries' deliberations ( $M = 24.9$  minutes,  $SD = 7.9$ ) exceeded the average length of homogenous juries' deliberations ( $M = 23.8$  minutes,  $SD = 9.7$ ), but this difference was not statistically significant (Table 1). Moreover, a test of intergroup mean deliberation durations across juries also yielded no statistically significant differences (Table 2). These findings suggest that the presence of felon-jurors did little to change the overall length of deliberations.

**Table 1.** Jury Level Comparisons of Deliberation Content (Homogenous Juries/Single Felon Juries/Multiple Felon Juries).

	Non-Parametric (Kruskal–Wallis)		Parametric (One-way ANOVA)	
	$\chi^2$	$p$	$F$	$p$
Deliberation Duration	3.25	(0.18)	2.37	(0.13)
Novel Case Facts Raised	1.44	(0.49)	0.81	(0.46)
Novel Legal Concepts Raised	4.28	(0.12)	2.50	(0.11)

\*\* $p < .01$ .

**Table 2.** Jury Level Comparisons of Deliberation Content (Homogenous Juries/Diverse Juries).

	Non-Parametric (Mann–Whitney)		Parametric (t-test)	
	<i>z</i>	<i>p</i>	<i>SD</i>	<i>p</i>
Deliberation Duration	−0.46	(0.64)	8.17	(0.81)
Novel Case Facts Raised	0.58	(0.57)	1.07	(0.59)
Novel Legal Concepts Raised	−0.38	(0.70)	1.31	(0.89)

\*\* $p < .01$ .

Along with measures of duration, this study also analyzes individual level juror participation: time spoken as a proportion of deliberation duration. Overall, felon-jurors spoke for longer than their non-felon-juror counterparts. Felon-jurors spoke for an average of 5.4 minutes each ( $SD = 3.27$ ) while non-felon-jurors spoke for an average of 4.20 minutes each ( $SD = 2.97$ ). Moreover, as a proportion of total duration time, felon-jurors again spoke for longer than non-felon-jurors. Felon-jurors spoke for an average of 24 percent ( $SD = 12$  percent) of their jury's total deliberation time, while non-felons spoke for an average of 17 percent ( $SD = 10$  percent) of their individual jury's deliberations. This difference in proportion of time spoken, as it relates to each juror's individual deliberations, is statistically significant ( $p = .007$ ) (Table 3), suggesting that felon-jurors contributed more to their jury's deliberations than did non-felon-jurors.

This study also explores the number of novel case facts and novel legal concepts covered by each jury. Across juries, the number of novel case facts covered ranged from 7 to 10 ( $M = 8.37$ ,  $SD = 1.07$ ). Homogenous juries ( $N = 5$ ) covered an average of 8.6 case facts ( $SD = 1.14$ ), while diverse juries ( $N = 14$ ) covered an average of 8.29 case facts ( $SD = 1.07$ ). Among diverse juries, multiple felon juries raised the most case facts covering an average of 8.67 case facts ( $SD = 1.21$ ), while single felon juries covered an average of 8.00 ( $SD = 0.93$ ). Yet, both parametric and non-parametric jury level analyses reveal no statistically significant differences between juries of any type (Tables 1 and 2). These findings suggest that the juries in the present study recalled and discussed most relevant case facts and that convicted felons did not detract from that process.

In an analysis of case facts covered at the individual or juror level, felon-jurors raised an average of 3.43 novel case facts ( $SD = 1.91$ ), while non-felon-jurors raised an average of 1.09 novel case facts ( $SD = 1.19$ ). A nested comparison revealed a statistically significant difference between number of novel case facts raised by felon-jurors and non-felon-jurors ( $p = .00$ ) (Table 3). This result tends to suggest that felon-jurors may enhance a jury's ability to thoroughly review evidence.

Next, this study explores novel legal concepts covered. Of the 8 legal concepts/definitions contained in the experiment stimulus, juries raised an average of only 2.5 ( $SD = 1.30$ ). Among all juries, the number of legal concepts raised ranged from 0 to

**Table 3.** Juror Level Comparisons of Deliberation Content (HLMS).

	<i>B</i>	<i>SE</i>
Proportional Time	0.07**	(0.03)
Novel Case Facts Covered	2.34**	(0.33)
Novel Legal Concepts Covered	0.30	(0.19)

\*\* $p < .01$ .

5. diverse juries ( $M = 2.5$ ,  $SD = 1.22$ ) and homogenous juries ( $M = 2.4$ ,  $SD = 1.67$ ) raised roughly the same average number of novel legal concepts. Of diverse juries, those including only a single felon ( $M = 3.12$ ,  $SD = 1.07$ ) outperformed those including multiple felons ( $M = 1.67$ ,  $SD = 1.21$ ). Still, a comparison of means across groups showed no statistically significant difference among juries (Tables 1 and 2). These results tend to show that, unlike juries' coverage of case facts, juries performed poorly with respect to their tendency to raise legal concepts during deliberations. Yet, like juries' tendency to cover case facts, juries' tendency to cover legal concepts is seemingly unhindered by the inclusion of felon-jurors. A juror level analysis of novel legal concepts showed that felon-jurors raised an average of .71 novel legal concepts ( $SD = .96$ ), while non-felon-jurors raised an average of .41 novel legal concepts ( $SD = .71$ ), this difference was not statistically significant (Table 3).

Virtually all jurors who raised novel case facts and legal concepts did so accurately. Only 2 jurors (both non-felon-jurors) inaccurately cited a case fact and only 4 jurors (2 felon-jurors and 2 non-felon-jurors) raised an inaccurate legal concept (1 felon-juror incorrectly stated 2 legal concepts). These results are likely the product of the relative simplicity of the trial stimulus. The trial stimulus involved a limited number of facts offered into evidence through only four witnesses: two for the defense and two for the prosecution. The applicable law included only four elements and four legal principles/definitions. Still, these results offer some insights into participants' comparative ability to recall points of fact and law.

### 3.3. Juror perceptions

This study also explores jurors' perceptions of deliberations. Like prior mock jury studies, this study relies on post-deliberation questionnaires examining: deliberation satisfaction, attorney competence, attorney likability, and witness credibility (Cowan, Thompson, & Ellsworth, 1984; Marder 2002).

On a measure of deliberation satisfaction – higher scores indicating greater satisfaction with deliberations – homogenous juries' mean score ( $M = 48.08$ ,  $SD = 3.39$ ) was virtually identical to the mean scores of single felon juries ( $M = 48.48$ ,  $SD = 2.46$ ) and multiple felon juries ( $M = 47.30$ ,  $SD = 2.93$ ). Comparisons confirmed no statistically significant differences across juries (Tables 4 and 5). Similarly, at the juror level, deliberation satisfaction was not impacted by a felony criminal history. Felon-jurors' average score on a measure of deliberation satisfaction ( $M = 49.86$ ,  $SD = 7.36$ ) was slightly higher than that of non-felon-jurors ( $M = 46.91$ ,  $SD = 6.59$ ), but that difference was not statistically significant (Table 6).

Perceptions of attorney performance, attorney likability, and witness credibility were likewise not impacted by jury or juror type (Tables 4–6). A closer look at opinions of attorneys and witnesses, separated into defense and prosecution orientations, again demonstrated no statistically significant differences at the jury or juror level (Tables 4–6). As part of this analysis of witness credibility, participants also rated the importance of the defendant's prior criminal history when deciding guilt or innocence and when assessing credibility. On both measures, jury type and juror criminal history status yielded no statistically significant differences (Tables 4–6).

In sum, these results suggest that jurors' perceptions of deliberations, attorneys, and witnesses were not impacted by the composition of their respective juries or their criminal

**Table 4.** Jury Level Comparisons Juror Perceptions (Homogenous Juries/Single Felon Juries/Multiple Felon Juries).

	Non-Parametric (Kruskal–Wallis)		Parametric (One-way ANOVA)	
	$\chi^2$	$p$	$F$	$p$
Deliberation Satisfaction	0.56	(0.76)	0.47	(0.64)
Attorney Performance	0.29	(0.86)	0.06	(0.94)
Attorney Likability	0.45	(0.80)	0.08	(0.92)
Defense Attorney Performance	0.80	(0.67)	0.86	(0.44)
Defense Attorney Likability	0.31	(0.86)	0.65	(0.54)
Prosecuting Attorney Performance	1.05	(0.59)	1.18	(0.33)
Prosecuting Attorney Likability	1.37	(0.50)	1.00	(0.39)
Witness Credibility	0.29	(0.87)	0.23	(0.80)
Defense Witness Credibility	0.39	(0.82)	0.21	(0.82)
Prosecution Witness Credibility	0.14	(0.93)	0.01	(0.99)
Defendant Criminal History Guilt/Innocence	1.53	(0.46)	0.53	(0.60)
Defendant Criminal History Credibility	0.48	(0.79)	0.26	(0.77)

\*\* $p < .01$ .

**Table 5.** Jury Level Comparisons of Juror Perceptions (Homogenous Juries v. Diverse Juries).

	Non-Parametric (Mann– Whitney)		Parametric ( $t$ -test)	
	$z$	$p$	$SD$	$p$
Deliberation Satisfaction	−0.46	(0.64)	2.78	(0.56)
Attorney Performance	0.32	(0.75)	0.85	(0.94)
Attorney Likability	0.37	(0.71)	0.91	(0.92)
Defense Attorney Performance	0.83	(0.40)	0.73	(0.22)
Defense Attorney Likability	0.56	(0.57)	0.73	(0.26)
Prosecuting Attorney Performance	−1.02	(0.31)	0.64	(0.13)
Prosecuting Attorney Likability	−1.16	(0.25)	0.72	(0.20)
Witness Credibility	−0.42	(0.68)	1.02	(0.72)
Defense Witness Credibility	0.37	(0.71)	1.32	(0.75)
Prosecution Witness Credibility	−0.32	(0.75)	1.34	(0.97)
Defendant Criminal History Guilt/Innocence	0.65	(0.52)	0.89	(0.41)
Defendant Criminal History Credibility	0.05	(0.96)	0.75	(0.94)

\*\* $p < .01$ .

**Table 6.** Juror Level Comparisons of Juror Perceptions (HLMS).

	$B$	$SE$
Novel Case Facts Raised	2.34**	(0.33)
Novel Legal Concepts Raised	0.30	(0.19)
Proportional Time	0.07**	(0.03)
Deliberation Satisfaction	2.94	(1.64)
Attorney Credibility/Likability	−0.90	(0.93)
Defense Attorney Credibility/Likability	−0.28	(0.65)
Prosecuting Attorney Credibility/Likability	−0.68	(0.60)
Witness Credibility	0.90	(0.79)
Defense Witness Credibility	0.14	(0.60)
Prosecution Witness Credibility	0.79	(0.65)

\*\* $p < .01$ .

histories. Moreover, views of the defendant – a former offender – did not result in statistical differences at the jury or juror levels, contrary to the proffered justifications for felon-juror exclusion statutes.

## 4. Discussion

Few prior studies have explored how the jury diversity may influence the quality of deliberations (Cowan, Thompson, & Ellsworth, 1984; Marder, 2002; Sommers, 2006). Instead, most scholars and courts simply assume that an array of opinions, experiences, and perspectives will necessarily yield richer, more robust deliberations (see e.g. *Peters v. Kiff*, 1972). Yet, some scholars (Travis, 2002) and most courts (see e.g. *People v. Miller*, 2008; *Rubio v. The Superior Court of San Joaquin County*, 1979) also assume that a juror with a felony criminal record lacks character, harbors biases, and will, in turn, somehow taint the deliberation process. Findings from the present study tend to demonstrate that diversity, in the form of a felony criminal history, does little to diminish, and may enhance, deliberation quality. Accordingly, findings also indirectly suggest that the rationales for felon-juror exclusion may lack empirical support.

In the present study, the structure of deliberations is consistent with prior research. Previous studies reveal that a foreperson is selected early in the deliberation process (Diamond & Casper, 1992) and is usually selected via vote, nomination, or volunteer (Devine et al., 2007; Bridgeman & Marlow, 1979; Ellsworth, 1989). For all juries in the present study, foreperson selection took place early in the deliberation process, and in all instances it was the first task the jury undertook. Notably, in 4 of the 14 diverse mock juries, a felon-juror served as the foreperson and for all juries, felon-juror forepersons volunteered for the position. This seems to cut against the categorical presumption that those with a felony criminal history are less likely to approach service thoughtfully. Instead, while suggestive only, this result tends to show that convicted felons serve actively and conscientiously.

The deliberation style of the mock juries in the present study also fell in line with prior research (Hastie, Penrod, & Pennington, 1983). Though studies of deliberation style are far from consistent, most suggest an even split between evidence-driven and verdict-driven approach to deliberations (Ellsworth, 1989; Devine et al., 2007; Sandys & Dillehay, 1995). Overall, roughly half of the juries in the present study engaged in each deliberation style (9 verdict driven and 10 evidence driven), and of the 14 diverse juries in the present study, 6 took an evidence-driven approach to deliberations, while 8 took a verdict-driven approach. Given prior research that suggests that the evidence-driven deliberation style yields higher quality deliberations (Hastie, Penrod, & Pennington, 1983), this result, again while suggestive only, tends to show that felon-jurors did not negatively impact how a jury deliberated.

Unlike deliberation structure, deliberation content was somewhat influenced by the presence of felon-jurors. While novel legal concepts raised and accuracy of novel facts and legal concepts raised did not differ by jury or juror type, in line with Sommers' research (2006), time spoken as a percentage of total deliberation time was higher for felon-jurors, as were novel case facts raised. Again, these results suggest that felon-jurors do little to diminish deliberation quality and may enhance the process.

As to the duration of deliberations, while felon-jurors did not add to the overall duration time of their respective juries, they were responsible for a greater percentage of their juries total deliberation time than were their non-felon counterparts. In all, felon-jurors were responsible for 24 percent of their juries' deliberation time, while non-felon-jurors only accounted for 17 percent of total deliberation time – a statistically significant result ( $p = .007$ ). This result seems to suggest that felon-jurors engaged the deliberation

process to a greater extent than non-felon-jurors. These contributions, while they have the potential to override non-felon contributions and detract from the deliberation process, appear to have been positive, as felon-jurors were also responsible for raising more novel case facts than jurors without a felony criminal history. At the jury level, diverse juries and homogenous juries did not differ significantly with respect to novel case facts raised. Yet, at the juror level, felon-jurors raised an average of 3.43 novel case facts, while non-felon-jurors raised an average of 1.09 novel case facts. This difference is statistically significant ( $p = <.00$ ).

Taken together, these results suggest that convicted felons took an active, productive role in deliberations. While the rationales for the categorical exclusion of convicted felons from jury service assumes that convicted felons are unfit to productively engage in deliberations or, in the alternative, will actively sabotage deliberations, the present study does not support those presumptions. Additionally, data derived from the present study does not support research suggesting that increased diversity may lead to less group cohesion and more conflict, sapping the cognitive resources of individual group members and, in turn, diminishing group performance (Greer et al., 2008; Trawalter et al., 2009; Richeson & Shelton, 2003).

Instead, in line with research by Cowan, Thompson, and Ellsworth (1984) and Sommers (2006), this study supports the proposition that felon-jurors can add value to the jury process, by engaging in deliberations in a meaningful way. These results also align with psychological research suggesting that diversity improves group decision-making capabilities by increasing the cognitive resources of the collective (McLeod et al., 1996; Watson et al., 1996; Valls et al., 2016). Notably, the positive impacts of diversity in the present study – novel case facts covered – seem to be associated with increased performance by felon-jurors, the minority group members. This result offers some evidence, albeit suggestive, that diversity can enhance deliberations by improving the performance of both majority members of the group (Sommers, 2006), and by improving the performance of minority group members.

Finally, in the present study, impressions of jury service, counsel, and witnesses were not impacted by the presence of felon-jurors. Though rationales for felon-juror exclusion seemingly assume that the inclusion of felon-jurors will reduce non-felon-jurors' overall satisfaction with jury service and that felon-jurors will disproportionately favor defense counsel and defendants, again, the present study does not support those presumptions. Rather, no difference in measures of deliberation satisfaction, counsel evaluation, or witness believability presented. Felon-jurors and non-felon-jurors expressed similar levels of satisfaction with deliberations and rated attorneys and witnesses similarly, cutting against the presumptions implicit in the justifications for felon-juror exclusion that convicted felons would favor the defense as a result of their negative experiences with the criminal justice system (Kalt, 2003; Binnall, 2014).

In sum, the results of the present study seem to show that felon-jurors may not pose as much of a threat to the jury process as the law presumes. Instead, this study suggests that felon-jurors may add to the deliberation process by increasing the cognitive resources of the group, specifically in the area of evidence coverage. Of note, this study tends to show that diversity can increase cognitive resources without diminishing group cohesion or producing conflict. Moreover, this study suggests that minority group members, like majority group members, may also benefit from group diversity.



## 5. Conclusion

Since 1980, the number of Americans who bear the felon label has grown exponentially (Shannon et al., 2017). A direct result of the United States' experiment with mass incarceration (Pager, 2007; Alexander, 2012), the proliferation of felony criminal records means that convicted felons are now part of the political, social, and civic fabric of our nation, often occupying positions of influence (Binnall, 2010). To those positions, convicted felons bring a unique life experience that has the potential to enrich a dialogue on criminal justice policy. Still, a vast network of categorical, record-based restrictions ensures that the 'convicted perspective' is officially discounted. Felon-juror exclusion extends this phenomenon.

As was the case when African-Americans and women were excluded from jury service, the exclusion of convicted felons from the jury process constrains deliberations. Apart from removing a unique perspective from the deliberation room, felon-juror exclusion statutes seemingly curtail the potential of the collaborative deliberative process. The open exchange of ideas and the careful adherence to the law are the cornerstones of effective deliberations. This study suggests that felon-jurors perform adequately, if not admirably, in both areas. To banish a population from the jury process based only on speculation and conjecture denigrates the law's professed conceptualization of the jury as a representative, inclusive arbiter of facts. Moreover, to do so denies the reality that we have incarcerated millions of our citizens and are unwilling, or at least woefully unprepared, to accommodate a perspective that we as a nation have cultivated. Though limited and suggestive only, the present study marks a starting point for potential future projects that perhaps explore, at a more granular, contextualized level, convicted felons' contributions to the deliberation process and to other fundamental political, social, and civic institutions.

## Notes

1. I chose to recruit active parolees rather than former offenders who had completed their term of supervision. I hypothesized that character defects and biases threatening to the jury process, if they exist, would likely present most regularly and strongly in convicted felons who had recently completed a term of incarceration.
2. The criteria requires that a prospective juror (1) must be a citizen of the United States, (2) must be 18 years of age, (3) must be domiciliaries of the State of California, (4) must be residents of the jurisdiction they are summoned to serve, (5) must not have been convicted of malfeasance in office or a felony, (6) must possess sufficient knowledge of the English language (sufficient to understand court proceedings), (7) must not be already serving as grand or trial jurors in any court in the State, and (8) must not be the subject of a conservatorship (Cal. Civ. Proc. Code § 203(a)(1)-(8) 2010).
3. For 2010, the United States Census reported that the host county was approximately 49.8 percent female and 50.2 percent male. Roughly 48.5 percent of the residents in the host county are White, 4.7 percent are African-American, 32 percent are Latino/a, and 14.8 percent are of some other ethnicity. Thus, in the present study and as compared to the host county, men and African-Americans are overrepresented, while Latino/a's are underrepresented (United States Census Bureau, 2010).
4. As of December 31, 2011, California's parolee population consisted of 10 percent females and 90 percent males. In the present study, 24 percent of felon-jurors are women and 76 percent are men. Thus, women are overrepresented as compared to California's parolee population

(Parole Census Data as of December 11, 2012). The racial composition of convicted felons in this study also differs slightly from California's parolee population. Of parolees in California, 29.9 percent are White, 27.9 percent are Black, 36.7 percent are Latino/a, and 5.5 percent are some other race. In the present study, 38 percent of convicted felons are White, 33 percent are African-American, 24 percent are Latino/a, and 5 percent are some other race. Thus, as compared to California's parolee population, white felon-jurors are overrepresented in the present study, while Latino/a felon-jurors are underrepresented (Parole Census Data as of December 11, 2012).

5. See Carletta, 2008, p. 4: "The kappa coefficient (K) measures pairwise agreement among a set of coders making category judgments, correcting for expected chance agreement.  $K = \frac{P(A) - P(E)}{1 - P(E)}$ , where  $P(A)$  is the number of times the coders agree and  $P(E)$  is the number of times we would expect them to agree by chance ... When there is no agreement other than that which would be expected by chance K is zero. When there is total agreement, K is one. When it is useful to do so, it is possible to test whether or not K is significantly different from chance, but more importantly, interpretation of the scale of agreement is possible."

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