

JURY OF OUR PEERS

Why New Jersey Must Allow People with
Criminal Convictions to Serve on Juries

INTRODUCTION

The right to a jury of one's peers is foundational to American democracy.¹

So foundational that the United States Supreme Court declared that in order for juries to be “instruments of public justice” they must be “a body truly representative of the community.”²

And yet, New Jersey prohibits approximately 219,000 to 269,000 of its Black population from jury service because of a criminal conviction³ – a staggering 23-29%.⁴

New Jersey leads the nation in having the highest racial inequality in Black/white incarceration rates for both adults and youth.⁵ A Black adult is over 12 times more likely to be incarcerated than a white adult,⁶ and a Black young person is 18 times more likely to be incarcerated than a white peer⁷ even though Black and white youth commit most offenses at similar rates.⁸

By connecting jury service to criminal convictions, New Jersey imports racism into the jury service process – whitewashing our juries and impeding the right to a jury of one's peers, while also disproportionately precluding Black community members from serving on juries.

This policy brief will outline why New Jersey must act urgently to end this racialized practice by expanding jury service to people with criminal (indictable) convictions.

The brief contains quotes from formerly incarcerated people sharing their perspective on this issue.

NEW JERSEY'S BLACK DEFENDANTS ARE NOT JUDGED BY A JURY OF THEIR PEERS

New Jersey bars people with indictable offenses from serving on juries for life.⁹

This barrier prevents an estimated 438,000 to 533,000 of the overall population of the state from serving on juries,¹⁰ about 7-8% of the overall population of the state.¹¹ As New Jersey has the worst Black to white racial disparity in incarceration in the country, this bar disproportionately affects Black people.¹² An estimated 219,000 to 269,000 of the Black population in New Jersey is impacted by this bar¹³ – a staggering 23-29%.¹⁴ Barring people with criminal convictions from serving on juries perpetuates and exacerbates the racial disparities in the criminal justice system and in civic participation in Black communities.¹⁵

Black people, and people of color more broadly, accused of crimes in New Jersey cannot receive a jury of their peers if a quarter of the state's Black population¹⁶ is barred from serving on a jury and juries in the state are whiter than its racially diverse population.¹⁷

This is particularly important because racially diverse juries are more thoughtful and effective at delivering justice and, as one study found, "deliberated longer and considered a wider range of information than did homogeneous groups."¹⁸ Another study of Harris County, Texas estimates that racially diverse juries would reduce the median sentence length of people convicted of crimes by 50% and the probability of receiving a life sentence by 67%.¹⁹

"I don't feel most juries represent the makeup of our societies, we don't see like a lot of minorities on juries, most of them are white men and it makes it unfair because, I don't know, people from different cultures come in with their different views and different perspectives and they're not able to look at the person as a peer, or as a person from their community."

Nicole Guyette, formerly incarcerated

NEW JERSEY'S JURIES ARE NOT A CROSS-SECTION OF THE COMMUNITY

Federal law mandates that juries must be composed of a "fair cross-section,"²⁰ and the Supreme Court declared that a fair cross-section is required under the Sixth Amendment of the Constitution.²¹

The Supreme Court in *Taylor v. Louisiana* stated that there are many reasons for this requirement: 1) to be "prophylactic" in ensuring that the common-sense judgment of the community is represented as a check against prosecutorial overreach; 2) to recognize that public participation in the criminal justice system is crucial in democracy; and 3) to ensure community participation, which is important for public confidence in the system.²²

To be sure, none of these purposes are accomplished by categorically excluding people with criminal convictions from serving on juries, particularly because they often live, work, pay taxes and now vote in their communities.²³

They must be included to have a true "cross-section." This legal requirement can only faithfully be fulfilled by removing the lifetime ban on people with criminal convictions from serving on juries.

HOW OTHER STATES TREAT PEOPLE WITH CRIMINAL CONVICTIONS

Every state has some form of jury participation exclusion based on criminal convictions.²⁴ However, more and more states are restoring the right to serve on juries to people with criminal convictions, including California, Louisiana, Connecticut and Washington.²⁵

50 STATES: WHAT TRIGGERS EXCLUSION FROM SERVING ON A JURY?			
Current incarceration	Current incarceration & some past felony convictions	Current incarceration & all past felony convictions	Current incarceration, all past felony convictions, & some past misdemeanor convictions
<p><i>No legal exclusion, but incarcerated jurors excused</i> Maine</p> <p><i>No exclusion after incarceration ends</i> Indiana North Dakota Washington</p> <p><i>No exclusion after incarceration ends (although attorneys may request dismissal by the court)</i> Colorado Illinois Iowa</p>	<p><i>Forever</i> Alabama</p>	<p><i>Forever</i> Arizona Arkansas Delaware Georgia Hawaii Kentucky Michigan Mississippi Missouri Nebraska New Hampshire New York Oklahoma Tennessee Utah Vermont Virginia West Virginia Wyoming</p> <p><i>For a fixed period of time</i> Connecticut District of Columbia Kansas Louisiana Massachusetts Nevada</p>	<p><i>Forever</i> Maryland New Jersey Pennsylvania South Carolina Texas</p> <p><i>For a fixed period of time</i> Oregon</p>
		<p><i>Until sentence completed (including parole and probation)</i> Alaska California (certain offenses lead to permanent exclusion) Florida (certain offenses lead to permanent exclusion) Idaho Minnesota Montana New Mexico North Carolina Ohio Rhode Island South Dakota Wisconsin</p>	
<p><i>Pending criminal charges also result in exclusion</i> Connecticut, Kentucky, Louisiana and Massachusetts also exclude anyone currently facing felony charges. Florida, Maryland, Texas and D.C. also exclude anyone currently facing felony charges or facing (some or all) misdemeanor charges.</p>			

Source: Prison Policy Initiative, with updates from NJISJ

THE STATED REASONS TO EXCLUDE PEOPLE WITH CRIMINAL CONVICTIONS ARE PROVEN FALSE

Though there is no evidence to support the position, proponents of the ban argue people with criminal convictions will be biased.²⁶ However, the existing voir dire process, which was recently strengthened through the work and recommendations of the Judicial Conference on Jury Selection,²⁷ is equipped to address any possible bias that any potential juror may have.²⁸ This would also mean that judges and prosecutors will hear from people with actual experience with the criminal justice system.²⁹

There is also an erroneous belief that other jurors would be uncomfortable serving on juries with people who have been convicted of crimes.³⁰ However, there is no empirical evidence to support this proposition. On the contrary, a recent study from California found that “the public does not harbor an overwhelming sense of fear about including those with a felony conviction in the jury process.”³¹

In the end, there is no good reason to categorically exclude people with criminal convictions from serving on a jury.

“I think that ... jury selection should be amended to include people who have ... indictable offenses and there may be pushback because they think that ‘oh since I’ve been locked up, I’m just gonna free everybody and I’m gonna be on the side of the defense, or whatever the case may be.’ That’s not the case – 2015, May 2, my brother was murdered and if his murderer was ever brought to justice and the evidence was there, yes, I would vote for finding of guilt ... I think that people that have been impacted by system or who have had an indictable offense should be able to serve on juries because we have that additional insight.”

Al-Tariq Witcher, formerly incarcerated

JURY OF OUR PEERS: IT’S TIME FOR PEOPLE WITH CONVICTIONS TO SERVE ON JURIES

It has not always been this way in New Jersey. Nor does it need to continue to be.

In 1995, New Jersey passed a law allowing people convicted of an indictable offense to serve on juries after the completion of their sentence.³² But in 1996, the Legislature reinstated the lifetime ban based on an unfounded belief that the “very real bias by convicted criminals against law enforcement officers and the criminal justice system dictates that these individuals should be barred from jury service.”³³

Fortunately, New Jersey has made substantial strides in building an inclusive democracy. In 2019, the Legislature passed and the Governor signed a historic law restoring the right to vote to 83,000 people on parole and probation.³⁴ New Jersey recognized that removing a right of citizenship from people does not serve anyone. Rather, the state's democracy is stronger when people have the right to vote.

New Jersey must now expand jury service. In fact, the two are related. Research has shown that people who serve on juries are more likely to vote in subsequent elections.³⁵ One study also found that serving on a jury led to an increase in voting by 4-7% for infrequent voters.³⁶

Recently, the New Jersey Judicial Conference on Jury Selection examined the lifetime ban and recommended extending jury service to people who have completed their sentence.³⁷ For its part, New Jersey should go further and join Maine, Washington, Indiana and North Dakota in removing the bar on all formerly incarcerated people serving on juries – including those on probation and parole.

New Jersey must allow people with criminal convictions to serve on juries. A pending bill in the Assembly, A977,³⁸ will accomplish just that. A Senate counterpart will be introduced shortly. This legislation, which should be passed quickly, is an important step toward a stronger democracy and will make our criminal justice system – and our democracy – more just.

“I do believe that you should have the right to serve on a jury with an indictable offense mainly because you’ve served your time, that means you’ve paid your debt to society. What you’re telling me, when you don’t give it back to me, is that I’m not a citizen ... [A]t least in New Jersey, after you are on parole and you are on probation, now, we have gotten that change so even if you are on parole or on probation, you can still vote. If you can vote, then that means you should have the right to be on the jury ... [T]he most important reason is, if you only have people on trial, or on the jury, that have never been convicted of a crime, an indictable offense, you can’t truly balance the scale.”

Dameon Stackhouse, formerly incarcerated

“Absolutely, definitely would. I mean, that’s part of our democracy and I want to make sure that someone in my position has the opportunity to receive a fair trial not one truncated and decided by the state but truly have a fair opportunity to have all the evidence considered before a decision is made.”

Edwin Ortiz, formerly incarcerated, on whether he would serve if called for jury service

ENDNOTES

¹ See U.S. CONST. art. III, § 2, cl. 3 (“The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed . . .”); U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.” (emphasis added)); *Strauder v. State of W. Virginia*, 100 U.S. 303, 308 (1879), *abrogated by Taylor v. Louisiana*, 419 U.S. 522 (1975) (“The very idea of a jury is a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds.”).

² *Smith v. State of Texas*, 311 U.S. 128, 130 (1940).

³ ASHLEY NELLIS, THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS, THE SENT’G PROJECT (Oct. 13, 2021) <https://www.sentencing-project.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/>.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ JOSHUA ROVNER, BLACK DISPARITIES IN YOUTH INCARCERATION, THE SENT’G PROJECT (Jul. 15, 2021), <https://www.sentencingproject.org/publications/black-disparities-youth-incarceration/>.

⁸ *Id.*

⁹ N.J. Stat. Ann. § 2B:20-1(e) (West 2022).

¹⁰ These statistics were obtained from an online resource of supplementary data for a study published by Sarah K.S. Shannon et al., *The Growth, Scope, and Spatial Distributions of People with Felony Records in the United States, 1948-2010*, 54 *Demography* 1795, 1803 (2017).

¹¹ *Id.*

¹² See NELLIS, *supra* note 3.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Anna Roberts, *Casual Ostracism: Jury Exclusion on the Basis of Criminal Convictions*, 98 *Minn. L. Rev.* 592, 602 (2013).

¹⁶ See NELLIS, *supra* note 3.

¹⁷ New Jersey is over 48% people of color. Bureau of the Census, U.S. Dep’t of Commerce, Decennial Census of Population and Housing (2020), <https://www.census.gov/programs-surveys/decennial-census/decade/2020/2020-census-results.html>. As New Jersey also bans non-citizens from serving on juries, the two prohibitions together leave many of the state’s people of color out of jury pools.

¹⁸ GINGER JACKSON-GLEITCH, RIGGING THE JURY: HOW EACH STATE REDUCES JURY DIVERSITY BY EXCLUDING PEOPLE WITH CRIMINAL CONVICTIONS, PRISON POLICY INITIATIVE (Feb. 18, 2021), <https://www.prisonpolicy.org/reports/juryexclusion.html> (citing Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 *J. OF PERSONALITY & SOC. PSYCHOL.* 597, 606 (2006)).

¹⁹ Shamina Anwar et al., *Unequal Jury Representation and Its Consequences*, NAT’L BUREAU OF ECON. RES. (Aug. 2021), https://www.nber.org/system/files/working_papers/w28572/w28572.pdf.

²⁰ Brian C. Kalt, *The Exclusion of Felons from Jury Service*, 53 *Am. U. L. Rev.* 65, 78 (2003).

²¹ *Taylor v. Louisiana*, 419 U.S. 522, 528 (1975).

²² Kalt, *supra* note 20.

²³ Jessica Corbett, *New Jersey restores voting rights of people on parole and probation*, SALON (Dec. 20, 2019, 7:30 AM), <https://www.salon.com/2019/12/20/new-jersey-restores-voting-rights-of-people-on-parole-and-probation/>.

²⁴ JACKSON-GLEITCH, *supra* note 18.

²⁵ *Id.*; WASH. REV. CODE ANN. § 29A.08.520 (West 2022).

²⁶ See James M. Binnall, *Convicts in Court: Felonious Lawyers Make a Case for Including Convicted Felons in the Jury Pool*, 73 *Alb. L. Rev.* 1379, 1386 (2010).

²⁷ *Notice to the Bar & Public – Jury Reform – Recommendations of the Committee of the Judicial Conference on Jury Selection*, N.J. SUP. CT. COMM. OF THE JUD. CONF. ON JURY SELECTION (2022), <https://www.njcourts.gov/notices/2022/n220428a.pdf>.

²⁸ See Roberts, *supra* note 15, at 634.

²⁹ *Id.* at 645-46.

³⁰ James M. Binnall & Nick Peterson, *No Fear Here: How the Public Views Anticipated Interactions with Jurors Convicted of a Felony*, 25 *Berkeley J. Crim. L.* 61 (2020).

³¹ *Id.*

³² Administration of Civil Justice—Court Organization—Juries, 1995 N.J. Sess. Law Serv. Ch. 44 (Assembl. 531) (West) (“Every person summoned as a juror: shall not be serving a sentence of imprisonment, or be on probation or parole, as a result of a conviction of any indictable offense under the laws of this State, another state, or the United States.”).

³³ Juries—Qualifications—Conviction of Indictable Offense, 1997 N.J. Sess. Law Serv. Ch. 127 (S. 264), <https://repo.njstatelib.org/bitstream/handle/10929.1/8353/L1997c127.pdf?sequence=4&isAllowed=y>.

³⁴ Corbett, *supra* note 23.

³⁵ James M. Binnall, *Cops and Convicts: An Exploratory Field Study on Jurymandering*, 166 *Ohio St. J. Crim. L.* 221, 226 (2018) (citing John Gastil et al., *Civic Awakening in the Jury Room: A Test of the Connection between Jury Deliberation and Political Participation*, 64 *J. of Pol.* 585, 592 (2002); John Gastil & Phillip J. Weiser, *Jury Service as an Invitation to Citizenship: Assessing the Civic Value of Institutionalized Deliberation*, 34 *Pol’y Stud. J.* 605, 615 (2006); John Gastil et al., *The Jury and Democracy: How Jury Deliberation Promotes Civic Engagement and Political Participation* (2010)).

³⁶ *Id.* (citing John Gastil et al., *Jury Service and Electoral Participation: A Test of the Participation Hypothesis*, 70 *J. of Pol.* 351, 359 (2008)).

³⁷ *Notice to the Bar & Public – Jury Reform – Recommendations of the Committee of the Judicial Conference on Jury Selection*, *supra* note 27.

³⁸ Assemb. Bill A977, 220th Leg., 2022-2023 Sess. (N.J. 2022), https://www.njleg.state.nj.us/bill-search/2022/A977/bill-text?f=A1000&n=977_I1.



NJISJ

do social justice.

NEW JERSEY INSTITUTE FOR SOCIAL JUSTICE

The Institute gratefully acknowledges the generous support of the Ford Foundation, Vital Projects Fund, the Prudential Foundation and our Board of Trustees.

AUGUST 2022