

“Social justice should be the underlying goal of all humanity.”

-Alan V. Lowenstein, Institute Founder



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do social justice.

New Jersey State Advisory Committee to the U.S. Commission on Civil Rights

Statement of Scott Novakowski, New Jersey Institute for Social Justice

June 29, 2018

My name is Scott Novakowski and I am Associate Counsel at the New Jersey Institute for Social Justice (“Institute”). I want to start by thanking the New Jersey State Advisory Committee for providing me the opportunity to testify before you today on one of the most important racial and social justice issues of our time: denying the fundamental right to vote to people with a felony conviction.

The Institute is a legal advocacy organization that seeks to ensure that urban residents can live in a society that respects their humanity, provides equality of economic opportunity, empowers them to use their voice in the political process, and protects equal justice. As Associate Counsel, I help to lead the Institute’s civic engagement work.

I. Introduction

Laws that deny people the right to vote based on a criminal conviction have their origin in the ancient Greek concept of “civil death,” under which a person with a criminal conviction lost all political, civil, and legal rights.¹ While many aspects of civil death have appropriately been abandoned over the years, felony disfranchisement—the practice of denying the right to vote to people with criminal convictions—remains.

New Jersey’s law disqualifies people from voting when they are in prison, and when they are on parole or probation for a felony.²

¹ Alec C. Ewald, *“Civil Death”: The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 WIS. L. REV. 1045, 1049 n.13 (2002).

² Specifically, New Jersey law states, “[n]o person shall have the right of suffrage . . . [w]ho is serving a sentence or is on parole or probation as a result of a conviction of any indictable offense under the laws of this or another state or of the United States.” N.J. STAT. ANN. § 19:4-1(8) (West 2017). An “indictable offense” is defined as a crime of the first through the fourth degree, roughly what other states consider a felony. See N.J. STAT. ANN. §§ 2C:1-4; 2C:43-1 (West 2017). New Jersey’s Elections Code allows a court to impose disfranchisement as an additional punishment on anyone convicted of an elections offense. N.J. STAT. ANN. § 19:34-46 (West 2017). Whether to

By linking the right to vote with a criminal justice system that is infected with racial discrimination, New Jersey's felony disfranchisement law imports inequality into the political process in a manner that disproportionately reduces Black political power, all while failing to achieve any legitimate public safety purpose.

The Institute urges the New Jersey State Advisory Committee to address felony disfranchisement as one of its priority issues, and to urge New Jersey's elected officials to restore the fundamental right to vote to more than 94,000 people in prison, on parole, and on probation.

II. New Jersey's Historical Foundation of Democratic Exclusion

The impact of New Jersey's current law, particularly on people of color, must be understood within the context of the racist history from which it grew.

New Jersey has a shameful history when it comes to the civil and political rights of its Black residents. It was the *first* Northern state to restrict the vote to white men,³ and it was the *last* Northern state to abolish slavery.⁴ New Jersey opposed the Emancipation Proclamation.⁵ It opposed ratification of the Thirteenth Amendment, which outlawed slavery.⁶ The state did initially ratify the Fourteenth Amendment, which guarantees due process and equal protection of the laws, in 1866 only to rescind that ratification shortly thereafter.⁷ It was not until 2003 that the New Jersey legislature finally approved the amendment.⁸ Finally, New Jersey also rejected the Fifteenth Amendment, which prohibits racial discrimination in voting.⁹

It was in this atmosphere of exclusion that New Jersey first broadly denied the right to vote based on a criminal conviction when it ratified a new state constitution in 1844,¹⁰ the same year it constitutionalized its restriction of the franchise to white men.¹¹ Today, while legal slavery is abolished and explicit racial discrimination prohibited, nearly 175 years later New Jersey continues to deny voting rights to people with convictions. And the decision to maintain this practice is now

impose disfranchisement and for how long are in the complete discretion of the court. *Id.* This statute appears to be seldom, if ever, used and of questionable constitutionality. *See In re Evans*, 227 N.J. Super. 339, 349-50 (1988).

³ ALEXANDER KEYSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 320 (Table A5) (rev. ed. 2009).

⁴ JAMES J. GIGANTINO II, *THE RAGGED ROAD TO ABOLITION: SLAVERY AND FREEDOM IN NEW JERSEY, 1775-1865* 235 (2014).

⁵ GILES R. WRIGHT, *AFRO-AMERICANS IN NEW JERSEY: A SHORT HISTORY* 29 (1989).

⁶ *Id.* at 28-29.

⁷ *Id.* at 29.

⁸ *See* S.J. Res. 16, 110th Leg. (N.J. 2003), <https://www.nj.gov/state/archives/pdf/amendment14withdrawwthdrawn.pdf>.

⁹ WRIGHT, *supra* note 9, at 29.

¹⁰ KEYSAR, *supra* note 3, at 360 (Table A15).

¹¹ *Id.* at 320 (Table A5).

accomplishing the same racial exclusion that was common in 1844. In 2016, New Jersey denied the right to vote to over 94,300 people because of a conviction¹²—more people than reside in New Jersey’s capital city of Trenton.¹³ Although Black people comprise just 15 percent of New Jersey’s overall population,¹⁴ they represent, incredibly, about half of those who have lost their voting rights as a result of a criminal conviction.¹⁵

Overall, more than 5 percent of the state’s Black voting age population was denied the right to vote in the 2016 presidential election because of a conviction.¹⁶ The percentage of the Black voting age population prohibited from voting in New Jersey is more than twice that of both New York and Pennsylvania.¹⁷ And, the total number of Black people disenfranchised in New Jersey is higher than the number in New York, despite the fact that New York’s Black voting age population dwarfs that of New Jersey: 899,227 compared to over 2.2 million.¹⁸

III. Leading in Racial Inequality: Importing Racism into the Electorate

The disparate impact on Black political power is a direct and foreseeable result of maintaining a link between the fundamental right to vote and a criminal justice system infected with pervasive racial disparities—a problem that is itself traceable in part to New Jersey’s history of institutionalized racism.¹⁹

New Jersey has the shameful distinction of having the largest racial disparities in incarceration rates in the nation for both adults and youth. A Black adult in New Jersey is 12 times more likely to be incarcerated than a white adult,²⁰ and a Black youth is 30 times more likely to be detained

¹² CHRISTOPHER UGGEN, RYAN LARSON, & SARAH SHANNON, THE SENTENCING PROJECT, 6 MILLION LOST VOTERS: STATE-LEVEL ESTIMATES OF FELONY DISENFRANCHISEMENT 15 (Table 3) (2016), <http://www.sentencingproject.org/wp-content/uploads/2016/10/6-Million-Lost-Voters.pdf>.

¹³ See TOGETHER WE TEACH, POPULATIONS OF NEW JERSEY CITIES, <http://www.togetherweteach.com/TWTIC/uscityinfo/30nj/njpopr/30njpr.htm> (citing 2010 data from the U.S. Census Bureau) (last visited Oct. 16, 2017).

¹⁴ U.S. CENSUS BUREAU, QUICKFACTS: NEW JERSEY, <https://www.census.gov/quickfacts/fact/table/NJ/RHI725216> (last visited Aug. 11, 2017).

¹⁵ UGGEN ET AL., *supra* note 12, at 15-16 (Tables 3-4), analysis by Novakowski.

¹⁶ *Id.* at 16 (Table 4).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ See *generally*, MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (rev. ed. 2012).

²⁰ ASHLEY NELLIS, THE SENTENCING PROJECT, THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISON 17 (Table D) (2016), <http://www.sentencingproject.org/wp-content/uploads/2016/06/The-Color-of-Justice-Racial-and-Ethnic-Disparity-in-State-Prisons.pdf>.

or committed than their white counterparts.²¹ Importantly, a significant portion of these disparities cannot be explained by differing rates of offending,²² and for youth, the disparities persist even though Black and white youth commit most offenses at about the same rate.²³

Black people in New Jersey, once incarcerated, are also more likely to be imprisoned for longer periods of time than white people. For example, while making up about 60 percent of New Jersey's prison population,²⁴ almost 70 percent of people serving sentences of life without parole are Black.²⁵

However, incarceration is only the final stage. New Jersey's stark racial disparities begin at first contact with the criminal justice system. Black people in New Jersey are more likely to be stopped, ticketed, and subjected to other interactions with law enforcement than white people. For example, a 2014 investigation by the U.S. Department of Justice found that almost 81 percent of the Newark Police Division's ("NPD") stops and almost 80 percent of its arrests were of Black residents, even though Newark's population is only about 54 percent Black.²⁶ The investigation also found that Black people were 85 percent of those stopped because an NPD officer subjectively determined them to be a "suspicious person," a conclusory phrase that requires no further justification for the stop.²⁷

²¹ THE SENTENCING PROJECT, BLACK DISPARITIES IN YOUTH INCARCERATION 1 (2017), <http://www.sentencingproject.org/wp-content/uploads/2017/09/Black-Disparities-in-Youth-Incarceration.pdf>.

²² NELLIS, *supra* note 20, at 9.

²³ JOSHUA ROVNER, THE SENTENCING PROJECT, RACIAL DISPARITIES IN YOUTH COMMITMENTS AND ARRESTS 6 (2016), <http://www.sentencingproject.org/wp-content/uploads/2016/04/Racial-Disparities-in-Youth-Commitments-and-Arrests.pdf>.

²⁴ NELLIS, *supra* note 20, at 16 (Table A).

²⁵ ASHLEY NELLIS & RYAN S. KING, THE SENTENCING PROJECT, NO EXIT: THE EXPANDING USE OF LIFE SENTENCES IN AMERICA 15 (2009), <https://www.sentencingproject.org/wp-content/uploads/2016/01/No-Exit-The-Expanding-Use-of-Life-Sentences-in-America.pdf>.

²⁶ CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE & U.S. ATTORNEY'S OFFICE DIST. OF N.J., INVESTIGATION OF NEWARK POLICE DEPARTMENT 16, 20-21 (2014), https://www.justice.gov/sites/default/files/crt/legacy/2014/07/22/newark_findings_7-22-14.pdf. The DOJ report further noted that these racial disparities persisted both in areas of the city with high and low concentrations of Black residential populations. *Id.* at 16. In all, Black people in Newark were 2.7 times more likely to be subject to a search by NPD, 3.1 times more likely to be frisked, and 2.6 times more likely to be arrested by NPD than white people in Newark. *Id.* at 20-21.

²⁷ *Id.* at 19.

Similar disparities in rates of arrests for low-level offenses have been found in cities and towns across the state.²⁸ And Black New Jerseyans were three times as likely as their white peers to be arrested for marijuana possession in 2013, even though rates of marijuana use are the same for white and Black people.²⁹

The U.S. Supreme Court famously characterized the right to vote as fundamental because it is preservative of all other rights.³⁰ Indeed, civil rights activists gave their lives to win the right to vote because they recognized its power and promise to eradicate systemic racism. New Jersey's law flips that promise on its head: by importing the racial disparities of the criminal justice system into the political process, it is sowing racial inequality even deeper into the fabric of our civic life.

IV. New Jersey's Felony Disfranchisement Law Serves No Legitimate Public Safety Purpose

Felony disfranchisement laws serve no legitimate public safety or rehabilitative purpose.

Denying a person the right to vote—stigmatizing them and excluding them from their communities—does not rehabilitate a person. Being actively engaged in one's community and establishing an identity as a law-abiding citizen is central to successful rehabilitation.³¹ In fact, a growing body of research indicates that disfranchisement likely hinders rehabilitation and increases the likelihood of recidivism.³²

²⁸ See, e.g., Jay Scott Smith, *Do Cops Target Blacks? FBI Stats Show Arrest Disparity*, ASBURY PARK PRESS (Nov. 18, 2014), <https://www.app.com/story/news/investigations/2014/11/18/racial-arrest-disparity-nj/19247461/> (finding that while Black residents make up less than 15% of shore communities in Monmouth and Ocean Counties, they account for 44% of arrests in those towns); ACLU-NJ, SELECTIVE POLICING: RACIALLY DISPARATE ENFORCEMENT OF LOW-LEVEL OFFENSES IN NEW JERSEY 20 (2015), https://www.aclu-nj.org/files/7214/5070/6701/2015_12_21_aclunj_select_enf.pdf (finding dramatic racial disparities in arrests for low-level offenses such as marijuana possession, disorderly conduct, defiant trespass, and loitering, in the cities of Elizabeth, Jersey City, Millville, and New Brunswick).

²⁹ ACLU-NJ, UNEQUAL AND UNFAIR: NEW JERSEY'S WAR ON MARIJUANA USERS 6, 9 (2017), https://www.aclu-nj.org/files/6614/9744/1887/2017_06_14_mj_rpt.pdf.

³⁰ *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

³¹ Christopher Uggen, Jeff Manza & Angela Behrens, *"Less than the average citizen": Stigma, Role Transition and the Civic Reintegration of Convicted Felons: Pathways to Offender Reintegration, in After Crime and Punishment*, in AFTER CRIME AND PUNISHMENT: PATHWAYS TO OFFENDER REINTEGRATION 258, 287 (Shad Maruna & Russ Immarigeon eds., 2004).

³² See, e.g., Guy Padraic Hamilton-Smith & Matt Vogel, *The Violence of Voicelessness: The Impact of Felony Disenfranchisement on Recidivism*, 22 BERKLEY LA RAZA L. J. 407 (2015), <http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1252&context=blrlj>; Christopher Uggen & Jeff Manza, *Voting and Subsequent Crime and Arrest: Evidence From a Community Sample*, 36 COLUM. HUM. RTS. L. REV. 193 (Fall 2004); FLORIDA PAROLE COMMISSION, STATUS UPDATE: RESTORATION OF CIVIL RIGHTS' (RCR) CASES GRANTED, 2009 AND 2010 (2011),

Voting is a fundamental right, a principle that has been repeatedly affirmed by the U.S. Supreme Court,³³ and we as a society should not deny a person their fundamental rights as a way of punishing them. We do not, for example, prohibit a person from practicing their religion³⁴ or getting married³⁵ because of a criminal conviction. While rights can be restricted based on public safety concerns or the specific needs of administering a prison,³⁶ it is not credible to claim that the right to vote, the foundation of our democracy, is a threat to public safety or prison administration.

A variation on this argument is that the sanctity of the ballot must be protected from people with convictions because they cannot be trusted to vote responsibly or will use their vote to achieve immoral ends.³⁷ Not only is this claim empirically false—research indicates people with convictions largely have the same political and ideological beliefs as those without³⁸—it also strikes at the core of American democratic values. It is deeply problematic, not to mention constitutionally impermissible, to deny a person the right to vote based on how they will exercise it.³⁹

V. Ending Felony Disfranchisement in New Jersey: We Are 1844 No More

This year the Institute launched 1844 No More, a campaign to restore the right to vote to people in prison, on parole, and on probation in New Jersey.

To achieve this goal, we are building a robust coalition that includes impacted voices and system-involved people, community leaders, policy makers and elected officials, faith leaders, coalition

http://thecrimereport.s3.amazonaws.com/2/4a/4/1150/blog_mansfield_florida_parole_commission_report.pdf.

³³ See, e.g., *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 670 (1966); *Reynolds v. Sims*, 377 U.S. 533, 562 (1964); *Yick Wo*, 118 U.S. at 370.

³⁴ See, e.g., *Holt v. Hobbs*, 135 S. Ct. 853 (2015).

³⁵ *Turner v. Safley*, 482 U.S. 78, 96 (1987)

³⁶ See *id.* at 89-91.

³⁷ An example of such an argument was recently made by a New Jersey lawmaker who justified denying the vote to people because “[t]hey have proven that they have pretty bad judgment and that they don’t respect the law.” See Nicholas Pugliese, *Voting rights could be restored to NJ prisoners and people on parole, probation*, NORTHJERSEY.COM, Feb. 26, 2018, <https://www.northjersey.com/story/news/new-jersey/2018/02/26/inmates-voting-nj-could-restore-voting-rights-prisoners-people-parole-probation/372788002/> (quoting Sen. Gerry Cardinale). Notably, inability to vote responsibly is the same rationale that has been used throughout history to deny the vote to people of color, women, and low-income Americans. Note, 102 HARV. L. REV. 1300, 1308 (1989).

³⁸ See, e.g., JEFF MANZA & CHRISTOPHER UGGEN, LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY 144-59 (2006).

³⁹ See *Carrington v. Rash*, 380 U.S. 89, 95 (1965); see also *Romer v. Evans*, 517 U.S. 620, 634 (1996) (stating that voting rights cannot be denied to “persons advocating a certain practice,” even if that practice is illegal); *Cipriano v. City of Houma*, 395 U.S. 701, 706 (1969) (stating that differing opinions cannot be a basis for disfranchisement).

partners, and more. So far close to 100 organizations, as well as the mayors of major cities including Newark, Jersey City, and Hoboken, have joined the call to restore voting rights to people in prison, on parole, and on probation in New Jersey.⁴⁰ The editorial boards of the Newark Star-Ledger⁴¹ and the Times of Trenton,⁴² two of the largest media outlets in the state, have also written in support of the campaign.

Earlier this year, the Institute was joined by legislators, community leaders, people currently denied the right to vote, and faith leaders to announce the introduction of historic legislation (S-2100/A-3456) that would restore voting rights to people in prison, on parole, and on probation in New Jersey. The legislation, sponsored by leaders of New Jersey's Legislative Black Caucus, is currently pending in committee.

Our collective task in the twenty-first century is to reduce barriers to voting and to encourage more people to participate in the political process.⁴³ New Jersey can no longer condition the most fundamental democratic right on involvement in the criminal justice system, an institution infected with racism. We are confident that New Jersey's elected leaders will end up on the right side of history, and that we will proclaim once and for all that "We Are 1844 No More."

VI. Recommendations to the New Jersey State Advisory Committee

The Institute respectfully recommends that the New Jersey State Advisory Committee:

- Issue a finding that New Jersey's law denying voting rights to people in prison, on parole, and on probation disproportionately reduces the political power of the state's Black residents, a result of linking the fundamental right to vote to a criminal justice system infected throughout by racial disparities.
- Issue a finding that the only effective remedy is a complete separation of the right to vote from involvement in the criminal justice system.

⁴⁰ See *Sign-On To Restore Voting Rights To People With Convictions*, N.J. INST. FOR SOC. JUSTICE, http://www.njisj.org/sign_on_to_restore_voting_rights_to_people_with_convictions (last visited June 12, 2018).

⁴¹ Editorial, *New Jersey's 94,000 missing voters*, STAR-LEDGER (Mar. 26, 2018), http://www.nj.com/opinion/index.ssf/2018/03/time_to_restore_voting_rights_for_felons_editorial.html.

⁴² Editorial, *1 ancient law is stopping thousands of people from voting*, TIMES OF TRENTON (Mar. 5, 2018), http://www.nj.com/opinion/index.ssf/2018/03/1_ancient_law_is_stopping_thousands_of_people_from_voting.html.

⁴³ See Ryan P. Haygood, *The Past as Prologue: Defending Democracy Against Voter Suppression Tactics on the Eve of the 2012 Elections*, 64 RUTGERS L. REV. 1019 (2012).

- Call on the legislature and Governor of New Jersey to take action, including enactment of S-2100/A-3456, to restore voting rights for people in prison, on parole, and on probation and to end felony disfranchisement in New Jersey.
- Issue a recommendation that other states repeal their own felony disfranchisement laws.

VII. Best Practices: Maine and Vermont

In both Maine and Vermont, the right to vote is never denied as the result of a criminal conviction.⁴⁴ Both states can serve as a model for New Jersey, particularly in their procedures for voting by incarcerated people. In both Maine and Vermont, people in prison vote in their home districts by using a mail-in absentee ballot.⁴⁵ Moreover, both states require that incarcerated people be counted as residents of their home districts rather than at the prison for the purposes of drawing district lines,⁴⁶ a common sense reform that we also urge New Jersey to adopt.⁴⁷

⁴⁴ See ME. CONST. art. II, § 1 (“Every citizen of the United States of the age of 18 years and upwards, excepting persons under guardianship for reasons of mental illness, having his or her residence established in this State, shall be an elector for Governor, Senators and Representatives, in the city, town or plantation where his or her residence has been established, if he or she continues to reside in this State”); ME. REV. STAT. ANN. tit. 21-A, § 111 (listing statutory qualifications to vote); 29-250-505 ME. CODE R. § 2 (“Maine law does not allow for the removal of a registrant’s name from the voter list because of a criminal conviction in any court.”); VT. STAT. ANN. tit. 17, § 2121 (West 2018) (listing the statutory qualifications to vote).

⁴⁵ ME. REV. STAT. ANN. tit. 21-A, § 112 (2017) (“A person incarcerated in a correctional facility may apply to register to vote in any municipality where that person has previously established a fixed and principal home to which the person intends to return.”); VT. STAT. ANN. tit. 17, § 2122(a) (West 2018); VT. STAT. ANN. tit. 17, § 2531 (West 2018).

⁴⁶ See ME. REV. STAT. ANN. tit. 21-A, § 112 (2017); Vt. Stat. Ann. tit. 17, § 2122(a) (West 2018).

⁴⁷ Legislation to end prison-based gerrymandering passed both houses of the legislature last year, only to be vetoed by former Governor Chris Christie. That bill has been introduced this year as S-758/A-1987.

Appendix A: Experts

The Institute recommends the following as additional experts on the topic of felony disfranchisement:

1. Marc Mauer, Executive Director, The Sentencing Project
2. Vanita Gupta, President & CEO, The Leadership Conference on Civil and Human Rights
3. Leah Aden, Senior Counsel, NAACP Legal Defense and Educational Fund, Inc.
4. Amol Sinha, Executive Director, ACLU of New Jersey
5. Jesse Burns, Executive Director, League of Women Voters of New Jersey
6. Richard Smith, President, NAACP New Jersey State Conference
7. Ronald Pierce, Advocate, currently denied the right to vote
8. William Senning, Director of Elections and Campaign Finance, Office of the Secretary of the State of Vermont
9. Julie Flynn, Director of Elections, Office of the Secretary of State of Maine
10. Senator Ronald Rice, Primary Sponsor of S-2100
11. Senator Sandra Cunningham, Primary Sponsor of S-2100
12. Assemblywoman Shavonda Sumter, Primary Sponsor of A-3456

Appendix B: Documents

In addition to the sources cited in this testimony, the Institute recommends the State Advisory Committee review the following documents:

N.J. INST. FOR SOC. JUSTICE, *WE ARE 1844 NO MORE: LET US VOTE* (2017), <http://www.njisj.org/1844nomorereport2017>

PORTIA ALLEN-KYLE, ACLU OF N.J., *MISSING: 39,527 NEW JERSEY VOTERS* (2017), <https://www.aclu-nj.org/news/2017/06/06/missing-39527-new-jersey-voters>

Hearing on A-2937/S587 Before the Assemb. Judiciary Comm. 2016-2017 Leg., (N.J. 2017) (statement of Aleks Kajstura, Legal Dir., Prison Policy Initiative), <https://www.prisonersofthecensus.org/testimony/NJ-A2937-PPI-Testimony-2017.pdf>

Janai S. Nelson, *The First Amendment, Equal Protection, and Felon Disenfranchisement: A New Viewpoint*, 65 FLA. L. REV. 111 (Jan. 2013)