

1844 No More

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Introduction

THE STORY IS OFTEN TOLD of how racist Southern legislatures built democracies that excluded Black people and other people of color and women.^[i] What is less well known is that this history of exclusion also took root in the North,^[ii] including very deeply in New Jersey. Indeed, New Jersey was the *first* Northern state to restrict the vote to white men.^[iii] It opposed the Emancipation Proclamation^[iv] and was the *last* Northern state to abolish slavery.^[v] And following the Civil War, New Jersey refused to ratify the Reconstruction Amendments.^[vi]

It was against this historical backdrop that New Jersey further restricted access to the ballot box by denying the vote to people with criminal convictions. New Jersey first prohibited people with criminal convictions from voting when it ratified a new state Constitution in 1844,^[vii] the same year it constitutionalized its restriction of the right to vote to white men.^[viii]

Today, nearly 175 years later, though legal slavery has been abolished and New Jersey no longer explicitly prohibits Black people from voting, New Jersey continues to deny voting rights to people with criminal convictions.

New Jersey's law disqualifies people from voting when they are in prison, and when they are on parole or probation for a felony.^[ix] Under the law, over 94,300 people^[x] are denied access to the fundamental right that is the cornerstone of our democracy and "preservative of all rights."^[xi]

New Jersey denies the right to vote to more people than the total population of New Jersey's capital city, Trenton. It denies the right to vote to more people than live in Camden, Hoboken, Montclair, and more than 150 other municipalities in New Jersey.^[xii]

Over three-quarters -- almost 73,000 -- of those denied the right to vote are living in the community on parole or probation.^[xiii] No other state in the Northeast denies voting rights to as many people living in the community as does New Jersey.^[xiv]

Today, consistent with the racist era in which it was conceived, New Jersey's law has a devastating impact on Black political power.

Although Black people comprise just 15 percent of New Jersey's overall population,^[xv] they represent, incredibly, about half of those who have lost their voting rights as a result of a criminal conviction.^[xvi]

Overall, 5.28 percent of New Jersey's Black voting age population is without a voice in the political process.^[xvii] And the rate for Black men is considerably higher. ^[xviii]

The percentage of the Black voting age population prohibited from voting in New Jersey is more than twice that of both New York, Pennsylvania, Rhode Island, and Massachusetts.^[xix] And the total number of Black people disfranchised 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: over 2.2 million compared to 899,227.^[xx]

Indeed, owing to population increases, more Black people in New Jersey are disqualified from voting today than were prohibited from voting prior to the passage of the Fifteenth Amendment in 1870.^[xxi]

Because the New Jersey criminal justice system is infected with pervasive racial discrimination, the state's law imports that inequality into the political process, accomplishing what now-prohibited poll taxes, grandfather clauses, and literacy tests explicitly sought to do -- exclude Black people from voting.^[xxii]

Importing Racism into the Electorate

The Fifteenth Amendment to the United States Constitution prohibits the denial of the right to vote "on account of race, color, or previous condition of servitude." But New Jersey's law that denies the right to vote to people with criminal convictions undermines the Fifteenth Amendment's prohibition on explicit racial discrimination by linking the right to vote to a racially discriminatory criminal justice system.

New Jersey leads the nation in having the highest racial disparities in having the highest Black/white incarceration rates for both adults and youth, making the laws racially discriminatory impact particularly acute.^[xxiii]

With respect to adults, New Jersey has a Black/white incarceration ratio of 12:1.^[xxiv] In other words, a Black adult is 12 times more likely than a white adult to be incarcerated in New Jersey. This is more than double the national ratio of 5:1.^[xxv] A significant proportion of these disparities cannot be explained by differing rates of offending.^[xxvi]

New Jersey also leads the nation in racial disparities in youth incarceration, where the gap is even more staggering: a Black youth is 30 times more likely to be detained or committed to a youth facility than their white counterpart.^[xxvii] These disparities persist even though Black and white youth commit most offenses at about the same rate.^[xxviii]

These disparities are in significant part a reflection of racially discriminatory policy decisions at every stage of the criminal justice system.^[xxix]

As one federal appeals court declared:

"Before one who commits a criminal act becomes a felon...numerous other decisions must be made by State actors. Police departments decide where to spend resources, officers decide which individuals to search and arrest, prosecutors decide which individuals to charge (including whether to charge a felony or a misdemeanor), detain, and prosecute. If those decision points are infected with racial bias, resulting in some people becoming felons not just because they have committed a crime, but because of their race, then that felon status cannot...disqualify felons from voting."^[xxx]

The exclusion of a sizeable portion of the Black population from New Jersey's electorate is a direct result of its decision to link voting rights with the criminal justice system.^[xxxi]

Impact on New Jersey Communities

The impact of New Jersey's law that denies voting rights based on a criminal conviction is felt most directly by the very communities of color in New Jersey that need greater—not less—access to the ballot box.

Essex and Camden Counties bear a disproportionate and substantial share of lost votes,^[xxxii] together accounting for almost a quarter of those removed from the rolls because of a criminal conviction despite being home to less than 15 percent of the state's total population.^[xxxiii]

In fact, just five counties—Essex, Camden, Hudson, Monmouth, and Ocean—are home to almost half of those removed from the rolls.^[xxxiv] Those same five counties are home to 46 percent of the state's Black population.^[xxxv]

New Jersey's law disproportionately harms these communities by silencing valuable voices from the political process and by reducing the voting strength of the community as a whole.

New Jersey's Foundation of Democratic Exclusion

The impact of New Jersey's current law, particularly on people of color, cannot be properly understood outside of the racist history from which it grew.

By the 1830s, New Jersey was home to more enslaved Africans than all of New England combined.^[xxxvi] Though it formally banned the importation of enslaved Africans in 1786, the state maintained slavery in some form until at least March 27, 1865, two weeks before the Confederacy surrendered.^[xxxvii]

While slavery was common, free Black people in New Jersey were initially permitted to vote. Under the state's first written Constitution of 1776, all "inhabitants...of full age" could vote as long as they met the property and residency qualifications.^[xxxviii]

That changed in 1807 when the state passed a law limiting the franchise to white male citizens over 21 years of age.^[xxxix] New Jersey was the first state in the Northeast to limit the franchise to white residents. At the time, only seven other states explicitly prohibited Black people from voting: Virginia, Georgia, South Carolina, Delaware, Kentucky, Maryland, and Ohio.^[xl]

With little debate,^[xli] New Jersey wrote its restrictions on Black suffrage into its 1844 Constitution, crystalizing racial exclusion in its foundational governing document. New Jersey did not ultimately extend the right to vote to Black people until the Fifteenth Amendment was enacted in 1870. Even then, the state legislature refused to ratify the amendment.^[xlii] Ironically, and despite New Jersey's reticence, the first Black person to vote after the Fifteenth Amendment became the law of the land was Thomas Mundy Peterson in Perth Amboy, New Jersey.^[xliii]

Jim Crow By Another Name: Denying the Vote to People with a Criminal Conviction and the Rise of Mass Incarceration

Laws that disfranchise people because of a criminal conviction have historically been used to prevent newly-freed Black people from voting.^[xliv] Following the Civil War, many states specifically crafted their disfranchisement laws to strip away voting rights for offenses they believed were disproportionately committed by Black people.^[xlv] For instance, in Mississippi, a person would lose their voting rights for committing theft, but not for murder. Under this rationale, a person would lose the right to vote for stealing a chicken, but not for killing the chicken's owner.^[xlvi]

New Jersey enacted its first broad ban on voting by people with criminal convictions as part of its 1844 Constitution,^[xlvii] at a time when slavery was still legal in the state and free Black people had been denied the right to vote by statute for almost 40 years. The 1844 Constitution banned anyone from voting who had been convicted of a crime that would disqualify them from serving as a witness in court.^[xlviii] Its purpose was to "maintain the purity" of the state's elections.^[xlix]

Under the 1844 law, any person convicted of "blasphemy, treason, murder, piracy, arson, rape, sodomy, or the infamous crime against nature, committed with mankind or with beasts, polygamy, robbery, conspiracy, forgery, or larceny above the value of six dollars" would be denied the right to vote.^[l] The loss of voting rights in New Jersey was tied to this list of crimes until 1970 when a federal court ruled that the list was "totally irrational."^[li]

New Jersey responded to the court's ruling in 1971 by *broadening* its disfranchisement statute so that it applied to *anyone* serving a sentence for *any* indictable crime, just as the country began to embrace a devastating practice of mass incarceration in the era of the War on Drugs.^[lii]

Incarceration in New Jersey skyrocketed: between 1950 and 1986, the number of people admitted to state and federal prisons in New Jersey each year increased over three-and-a-half fold.^[liii] Between 1980 and its peak in 1999, New Jersey's prison population increased over 460 percent.^[liiii]

The rise of mass incarceration did not impact Black and white people equally. New Jersey's Black population had grown dramatically throughout the twentieth century^[lv] and was becoming increasingly concentrated in urban areas.^[lvii] Beginning in the 1960s, as urban rebellions erupted in cities across the country, law enforcement agencies intentionally focused their efforts in these urban, predominantly Black areas.^[lvii] And the War on Drugs, which was launched in the 1970s and gathered steam in the 1980s, introduced mandatory minimum sentences that required much more severe sentences for possession of crack cocaine, more common in low-income urban areas, than powder cocaine.^[lviii]

These racially discriminatory policy decisions ensured that Black communities would be disproportionately targeted by the new mass incarceration regime. In New Jersey, the number of Black people entering prisons each year increased over 420 percent between 1950 and 1986, compared to an increase of 127 percent in the number of white people.^[lix]

New Jersey's decision to maintain its disfranchisement law in the face of decades of racially discriminatory criminal justice policies has led to a dramatic increase in the number of Black people who have lost their voting rights and a corresponding reduction in the political power of Black communities.^[lx]

Realizing the Promise of the Fifteenth Amendment

Dr. Martin Luther King, Jr. famously remarked that "voting is the foundation stone for political action."^[li] Our votes not only affirm the legitimacy of our democracy, but are also the source of the power by which elected officials are held accountable.^[lii] 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.

Rather than strengthen our democracy, however, New Jersey's decision to deny the right to vote to people with criminal convictions deprives its most vulnerable communities of valuable voices needed to affect systemic change. Decisions are routinely made on important local issues such as school policy, taxes, employment, housing, healthcare, and policing by elected officials who are unaccountable to a wide swath of those living in their districts on parole or probation or who are incarcerated.

New Jersey can no longer condition the most fundamental democratic right on involvement in the criminal justice system, an institution infected with racism.^[liii] The realization of the Fifteenth Amendment, and the integrity and legitimacy of our democracy, demand that New Jersey end its practice of denying the right to vote to people with criminal convictions.

To create a fair, open, inclusive, and true democracy, the Institute recommends the following:

1. Restore Voting Rights to People with Criminal Convictions

New Jersey must put an end to the practice of denying voting rights to people with criminal convictions. The legislature should pass, and the governor should sign, legislation to restore voting rights to the almost 100,000 people currently in prison, on parole, or on probation in New Jersey. And disfranchisement must be eliminated altogether as a consequence of a criminal conviction moving forward, as is the practice in Maine, Vermont, and most European democracies.^[liv]

2. Designate state corrections agencies as voter registration agencies

In addition to restoring voting rights to people with criminal convictions, all efforts must be made to ensure that this right is not illusory.

New Jersey should designate agencies such as the Department of Corrections, State Parole Board, and state probation offices as voter registration agencies under state or federal law. As voter registration agencies, they would be required to notify each person of their right to vote, provide the person with a voter registration application, and provide assistance in completing the form and transmitting it to election officials.

3. Ensure that people in prison have meaningful access to the ballot

To ensure that all people are able to cast a ballot, New Jersey should enact policies to facilitate access to mail-in ballots for people in prison or other residential facilities.

4. Launch a public awareness campaign on voting rights for people with criminal convictions

The New Jersey Division of Elections should launch a broad public awareness campaign to educate New Jersey residents about the voting rights of people with criminal convictions. There is widespread confusion and misinformation, particularly among communities of color, about when a person with a conviction can register and vote. Using traditional and social media, state and local election officials should seek to inform impacted communities of their rights and proactively offer voter registration opportunities.

5. End Prison-Based Gerrymandering

Under New Jersey's practice of "prison-based gerrymandering," incarcerated people are counted as residents of the prison for the purposes of drawing legislative districts, rather than their home addresses.^[lv] The communities surrounding the prison receive disproportionate legislative representation because their districts are padded by "phantom constituents"—incarcerated people who cannot vote in the district.^[lvii] cannot access community resources, and to whom elected officials are not accountable.^[lviii] Political power, in the form of representation, is therefore transferred away from the communities from which incarcerated people come and will most likely return, and transferred to the communities that host prisons.^[lviii]

Endnotes

[li] See, e.g., Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in the United States* 83-93 (rev. ed. 2009); Jeff Manza & Christopher Uggen, *Locked Out: Felon Disenfranchisement and American Democracy* 41-68 (2006).

[lii] See, e.g., Erika Wood, Liz Budnitz & Garima Malhotra, Brennan Center for Justice, *Jim Crow in New York* (2009), <https://www.brennancenter.org/publication/jim-crow-new-york>.

[liii] Keyssar, *supra* note 1, at 320 (Table A5).

[liv] Giles R. Wright, *Afro-Americans in New Jersey: A Short History* 28 (1989) (hereafter "G. Wright").

[lv] James J. Gigantino II, *The Ragged Road to Abolition: Slavery and Freedom in New Jersey, 1775-1865* (2015).

[lvii] G. Wright, *supra* note 4, at 28-29. The Reconstruction Amendments—the Thirteenth, Fourteenth, and Fifteenth Amendments to the U.S. Constitution—were enacted following the Civil War to protect the rights of Black residents, including the right to be free from slavery, to equal protection of the law, and the right to vote.

[viii] Keyssar, *supra* note 1, at 360 (Table A15).

[viii] *Id.* at 320 (Table A5). As discussed below, New Jersey first limited the franchise to white males by statute in 1807. That restriction was written into the state's Constitution in 1844.

[ix] 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 the 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). In addition to people disfranchised because of being convicted of an indictable offense, 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 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).

[x] Christopher Uggen, Ryan Larson, & Sarah Shannon, The Sentencing Project, 6 Million Lost Voters: State-level Estimates of Felony Disenfranchisement, 2016 15 (Table 3), <http://www.sentencingproject.org/wp-content/uploads/2016/10/6-Million-Lost-Voters.pdf> (hereafter "Sentencing Project, 2016").

[xi] *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)

[xii] 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).

[xiii] Sentencing Project, 2016, *supra* note 10, at 15 (Table 3).

[xiv] See *id.* New Jersey is the only state in the Northeast that denies voting rights to people on both parole and probation. Connecticut and New York both disfranchise only people in prison and on parole. Massachusetts, Rhode Island, New Hampshire, and Pennsylvania restore voting rights once a person is released from prison. And, in Vermont and Maine, people with a felony conviction never lose the right to vote. *Id.* at 4.

[xv] U.S. Census Bureau, QuickFacts: New Jersey, <https://www.census.gov/quickfacts/fact/table/NJ/RHI725216> (last visited Aug. 11, 2017).

[xvi] Sentencing Project, 2016, *supra* note 10, at 15-16 (Tables 3-4), (analysis by Novakowski).

[xvii] *Id.*

[xviii] Jamie Fellner & Marc Mauer, The Sentencing Project & Human Rights Watch, Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States 9 (Table 2) (1998), <https://www.hrw.org/legacy/reports98/vote/usvot98o-01.htm>. More recent data specifically on Black men is not currently available.

[xix] Sentencing Project, 2016, *supra* note 10, at 16 (Table 4).

[xx] *Id.*

[xxi] In 2016, 47,470 Black New Jerseyans were disfranchised because of a criminal conviction. *Id.* There were 25,336 Black people in New Jersey in 1860 and 30,568 in 1870, all of whom were barred from voting prior to enactment of the Fifteenth Amendment. G. Wright, *supra* note 4, at 80 (Appendix 2).

[xxii] Data on the number of Latino people in New Jersey denied the right to vote because of a criminal conviction is not available. We do know, however, that Latino adults and juveniles are more likely to be incarcerated in New Jersey than their white peers. In 2016, New Jersey had a Latino/white incarceration disparity of over 2 to 1, the 10th highest in the nation. Ashley Nellis, The Sentencing Project, The Color of Justice: Racial and Ethnic Disparity in State Prisons 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>. Similarly, Latino youth in New Jersey are five times more likely to be incarcerated than white youth. The Sentencing Project, Latino Disparities in Youth Incarceration (2017), <http://www.sentencingproject.org/wp-content/uploads/2017/10/Latino-Disparities-in-Youth-Incarceration.pdf>. Under New Jersey's law, these disparities are reproduced in our electorate.

[xxiii] Nellis, *supra* note 22, at 17 (Table C). To its credit, New Jersey is also a national leader in having reduced its prison population by 35 percent since 1999. The Sentencing Project, U.S. Prison Population Trends 1999-2015, <http://www.sentencingproject.org/wp-content/uploads/2016/02/US-Prison-Population-Trends-1999-2015.pdf>, with the greatest reductions being of people of color, Nellis, *supra* note 22, at 12 (Table 4). Despite this progress, the disparities described herein nonetheless remain.

[xxiv] Nellis, *supra* note 22, at 17 (Table C).

[xxv] *Id.*

[xxvi] *Id.* at 9.

[xxvii] The Sentencing Project, Black Disparities in Youth Incarceration (2017), <http://www.sentencingproject.org/wp-content/uploads/2017/09/Black-Disparities-in-Youth-Incarceration.pdf>.

[xxviii] See Andrea McChristian, New Jersey Institute for Social Justice, Bring Our Children Home: Ain't I A Child? 2 (2016), https://d3n8a8pr07vhmx.cloudfront.net/njsj/pages/465/attachments/original/1482183464/Ain't_I_A_Child_Final_.pdf?1482183464.

[xxix] See Andrea McChristian, *How discrimination is sending more black kids to prison*, Star-Ledger (Oct. 3, 2017), http://www.nj.com/opinion/index.ssf/2017/10/how_discrimination_is_sending_more_black_youths_to.html.

[xxx] *Farrakhan v. Gregoire*, 590 F.3d 989, 1014 (9th Cir. 2010).

[xxxi] See Ryan Haygood, *Disregarding the Results: Examining the Ninth Circuit's Heightened Section 2 "Intentional Discrimination" Standard in Farrakhan v. Gregoire*, 111 Colum. L. Rev. 51 (2011).

[xxxii] Portia Allen-Kyle, ACLU of New Jersey, Missing: 39,527 New Jersey Voters, (June 6, 2017), <https://www.aclu-nj.org/news/2017/06/06/missing-39527-new-jersey-voters>. The number of voters removed from the rolls does not factor in the extent of disfranchisement among those who were not previously registered. Nevertheless, alternative measures of disfranchisement mirror the same disproportionate impact. For example, over a quarter of people currently in New Jersey prisons come from Essex County and Camden County and those same two counties lead the state in the size of their probation caseloads. See N.J. Dep't Corr., Offenders in New Jersey Correctional Institutions on January 3, 2017, by County of Commitment, http://www.state.nj.us/corrections/pdf/offender_statistics/2017/By%20County%20of%20Commitment%202017.pdf; N.J. Admin. Office of the Courts, Court Management Statistics, June 2017, <https://www.judiciary.state.nj.us/public/assets/stats/cman1706.pdf>. According to a response by the State Parole Board to an Open Public Records Act Request, data on parole by county is not collected and not available.

[xxxiii] U.S. Census Bureau, Quick Facts: New Jersey, Essex County, and Camden County, Population estimates for July 1, 2016, <https://www.census.gov/quickfacts/fact/table/camdencountynewjersey,essexcountynewjersey,NJ/RHI725216> (last viewed Aug. 8, 2017) (analysis by Novakowski).

[xxxiv] Allen-Kyle, *supra* note 32 (analysis by Novakowski).

[xxxv] U.S. Census Bureau, Quick Facts: New Jersey, Essex County, Camden County, Hudson County, Monmouth County, Ocean County, Population estimates for July

1. 2016.
<https://www.census.gov/quickfacts/fact/table/oceancountynewjersey,monmouthcountynewjersey,HUDSONCOUNTYNEWJERSEY,CAMDENCOUNTYNEWJERSEY,ESSEXCOUNTYN>
 (analysis by Novakowski).
- [xxvii] Gigantino, *supra* note 5, at 2. There were, of course, pockets of New Jersey residents who opposed slavery and worked toward abolition, including by hosting stops along the Underground Railroad. *See id.* at 216.
- [xxviii] *Id.* at 235.
- [xxviiii] Richard P. McCormick, *The History of Voting in New Jersey 69-70* (1953).
- [xxix] The statute specifically limited the franchise to free, white male citizens, 21 years of age or older and "worth fifty pounds proclamation money, clear estate, and have resided in the county where he claims a vote for at least twelve months immediately preceding the election." J.R. Pole, *The Suffrage in New Jersey, 1790-1807*, 71 *Proceedings of the N.J. Historical Soc'y* 39, 58 (1953) (citing *Laws*, 32 sess., 1 sit., pp. 14-15); *see also* Marion Thompson Wright, *Negro Suffrage in New Jersey 175* (1948) (hereafter "M. Wright"); McCormick, *supra* note 38, at 99-100. Notably, the law was passed several years after enactment of the Act for the Gradual Abolition of Slavery of 1804, which would greatly expand the number of free Black people as children born to enslaved Africans reached adulthood, and thus increase Black political power. *See* Gigantino, *supra* note 5, at 95-98.
- [xli] Keyssar, *supra* note 1, at 320 (Table A5).
- [xlii] *See* McCormick, *supra* note 38, at 144; *Proceedings of the 1844 Constitutional Convention*, May 30, p. 163, <http://babel.hathitrust.org/cgi/pt?id=uc1.b4506453;view=1up;seq=7> ("Mr. Stokes presented a petition from certain colored citizens of the State praying that they may not be excluded by the Constitution, from exercising the right of suffrage -- . . . [w]hich was read, and, on motion of Mr. J.R. Thomson, was ordered to lie on the table."); *see also* Gigantino, *supra* note 5, at 230.
- [xliii] G. Wright, *supra* note 4, at 29.
- [xliv] Gigantino, *supra* note 5, at 207-08. Peterson's name often takes the form of several variations. Gigantino refers to him as "Thomas Peterson-Mundy." *Id.* Though the three names were never actually used together contemporaneously, he is now most commonly known as "Thomas Mundy Peterson." *See* Gordon Bond, *Guest Post: Thomas Mundy Peterson and the Fifteenth Amendment*, *The Junto* (July 11, 2013), <https://earlyamericanists.com/2013/07/11/thomas-mundy-peterson-and-the-fifteenth-amendment/> (last visited Dec. 12, 2017).
- [xlv] *See, e.g.*, Keyssar, *supra* note 1, at 83-93; Manza & Uggen, *supra* note 1, at 41-68.
- [xlvi] *See id.* at 55-58.
- [xlvii] NAACP Legal Defense and Educational Fund & The Sentencing Project, *Free the Vote: Unlocking Democracy in the Cells and on the Streets 2* (Updated 2016), http://www.naacpldf.org/files/about-us/Free%20the%20Vote%202016_o.pdf
- [xlviii] The constitutional provision adopted in 1844 was the first time New Jersey codified the denial of voting rights based on conviction of a broad range of crimes. *See* Keyssar, *supra* note 1, at 325 (Table A.7); McCormick, *supra* note 38, at 132. New Jersey had briefly denied voting rights to people convicted of treason during the Revolutionary Era. *See* McCormick, *supra* note 38, at 74-76. Those laws were narrowly tailored and short-lived, having been repealed by 1788. *Id.*
- [xlviii] *Application of Marino*, 42 A.2d 469, 471 (N.J. 1945).
- [xlix] *Id.* at 470.
- [l] *See* *Proceedings of the 1844 Constitutional Convention*, May 25, p. 97, <https://babel.hathitrust.org/cgi/pt?id=uc1.b4506453;view=1up;seq=7>; *Proceedings of 1947 Constitutional Convention*, Vol. 2, at 1367, http://www.njstatelib.org/research_library/new_jersey_resources/highlights/constitutional_convention/.
- [li] *Stephens v. Yeomans*, 327 F. Supp. 1182, 1188 (D. N.J. 1970). In 1947, New Jersey adopted the Constitution that remains in place today which empowers the legislature to "pass laws to deprive persons of the right of suffrage who shall be convicted of such crimes as it may designate." N.J. Const. art. II, § 1(7). Following the adoption of the new Constitution, the legislature prescribed disfranchisement for the same list of crimes that prevented a person from serving as a witness at the time the 1844 Constitution was adopted. *See Stephens*, 327 F. Supp. at 1188.
- [lii] Compare N.J. STAT. ANN. § 19:4-1 ("No person shall have the right of suffrage... [w]ho is serving a sentence or is on parole or probation as the result of a conviction of any indictable offense under the laws of this or another state or of the United States.") (emphasis added) with *Stephens*, 327 F. Supp. At 1183-84 (quoting 1948 version of the statute). For a general discussion on the explosion in mass incarceration beginning around this time, *see, generally*, MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (rev. ed. 2010).
- [liii] Patrick A. Langan, U.S. Bureau of Justice Statistics, *Race of Prisoners Admitted to State and Federal Institutions, 1926-86* (Table 7) (May 1991), <https://www.ncjrs.gov/pdffiles1/nij/125618.pdf>. There are significant gaps in the data available for New Jersey in the BJS report. In 1950, 1,367 people entered New Jersey prisons. Data for New Jersey is not reported again until 1977, at which point the number had almost doubled to 2,474. By 1986, the last year covered by the BJS report, 4,905 people entered state and federal prisons in New Jersey.
- [liv] The Sentencing Project, *Criminal Justice Facts – State-by-State Data: New Jersey*, <http://www.sentencingproject.org/the-facts/#detail?state1Option=New%20Jersey&state2Option=0>. (last visited Aug. 11, 2017)
- [lv] Between 1870 and 1910, New Jersey's Black population almost tripled. G. Wright, *supra* note 4, at 45. In all, the state's Black population increased almost 3,000 percent between 1870 and 1980. *Id.* at 79 (analysis by Novakowski).
- [lvii] By 1980, over 95 percent of New Jersey's Black population resided in urban areas. *Id.* at 70-72.
- [lviii] *See* Elizabeth Hinton, *From the War on Crime to the War on Poverty: The Making of Mass Incarceration in America* 12-25 (2016).
- [lviii] *Id.* at 317.
- [lix] Langan, *supra* note 53.
- [lx] *See* Ryan P. Haygood, *Juneteenth: Free at Last?*, *The Black Commentator*, June 19, 2008, http://www.blackcommentator.com/282/282_juneteenth_haygood_printer_friendly.pdf.
- [lxii] Martin Luther King, Jr., *Civil Right No. 1*, *N.Y. Times Mag.*, Mar. 14, 1965, at 27.
- [lxii] 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).
- [lxiii] *See* Haygood, *supra* note 31.
- [lxiv] Most European countries allow people to vote while incarcerated and some facilitate voting by setting up polling places in the prison and helping to secure absentee ballots. Jean Chung, *The Sentencing Project, Felony Disenfranchisement: A Primer* (2016), <http://www.sentencingproject.org/publications/felony-disenfranchisement-a-primer/>. Furthermore, if disenfranchising people in prison makes the U.S. an outlier among Western democracies, its practice of disenfranchising

people who have completed their prison sentences makes it a truly global outlier: no other nation in the world disfranchises more people who have been released from prison than the U.S. Alexander, *supra* note 52, at 158.

[lxv] See Prison Policy Initiative, Prison Gerrymandering Project: The Problem, <https://www.prisonersofthecensus.org/impact.html> (last visited Sept. 5, 2017).

[lxvii] People who are in jail but maintain their right to vote do not vote for candidates of the district in which the prison is located. Rather, they maintain their domicile and vote by absentee ballot in their home districts.

[lxviii] See Prison Policy Initiative, *supra* note 65; see also Prison Policy Initiative, Fixing prison-based gerrymandering after the 2010 Census: New Jersey, <https://www.prisonersofthecensus.org/50states/NJ.html> (last visited Sept. 5, 2017). For a more academic perspective on prison-based gerrymandering and the role of the Census Bureau, see Nathaniel Persily, *The Law of the Census: How to Count, What to Count, Whom to Count, and Where to Count Them*, 32 *Cardozo L. Rev.* 755 (2011).

[lxviii] See *Hearing on A2937/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>. Ending prison-based gerrymandering is especially important if people in prison are prohibited from voting as their presence pads the district of the prison and they are completely without a vote. If the franchise is extended to people in prison, maintaining a policy of prison-based gerrymandering creates the illogical situation in which they are counted as residents of the prison district but vote in their home district.



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