



Legislative Affairs
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2023-2024 Legislative Memorandum

Subject: Jury of Our Peers Act - A.1432-A (Aubry) / S.206-A (Cleare)

Position: SUPPORT

Jury service is a cornerstone of our system self-government and, with voting, represents Americans’ “most significant opportunity to participate in the democratic process.”¹ However, in New York, Judiciary Law § 510(3) permanently disqualifies people with a past felony conviction from serving on a jury, no matter the offense nor how distant the conviction in time or place.

Judiciary Law § 510(3) not only permanently strips individuals with a felony conviction of a basic right of citizenship—denying them the opportunity to engage in a core part of our system of self-government—but, because of the history of discriminatory policing and prosecution, it has the very real effect of reducing jury diversity. Simply put, the law prevents the promise of a “jury of one’s peers” from being realized.

The New York Civil Liberties Union (NYCLU) strongly supports the Jury of Our Peers Act, which will strengthen our democracy and public confidence in our legal system by restoring the right to serve on a jury upon release from incarceration.

The ability to serve on a jury is a core right of citizenship and provides an opportunity to participate in our system of self-government.

Our nation has long recognized that jury service is a core element of our government structure. For the Framers, the jury was “fundamentally, a political institution embodying popular sovereignty and republican self-government.”² The Federal Farmer—one of the antifederalists whose advocacy in support of juries led to the adoption of the Fifth, Sixth, and Seventh Amendments—equated the role of jurors to the role of voters: “It is essential in every free country, that common people should have a part and share of influence, in the judicial as well as in the legislative department.”³

¹ *Powers v. Ohio*, 499 U.S. 400, 407 (1991).

² *Anderson v. Miller*, 346 F.3d 315, 325 (2d Cir. 2003) (quoting Akhil Reed Amar, *The Constitution and Criminal Procedure*, 121-22 (1997)).

³ Letters from the Federal Farmer (IV), reprinted in 2 *The Complete Anti-Federalist* 245 (Herbert Storing ed., 1981).

This principle has been reiterated by the U.S. Supreme Court, which recognized: “Just as suffrage ensures the people’s ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary.”⁴

In New York, the importance of the jury system as an institution of democratic control of the administration of justice pre-dates both the federal and state constitutions. In the celebrated 1735 case of John Peter Zenger, a New York jury thwarted the attempt of the colonial government to prosecute a publisher for seditious libel for printing articles critical of the governor. Gouverneur Morris, a New Yorker who was the “Scrivener of the Constitution,” described Zenger’s case as “the germ of American freedom, the morning star of that liberty which subsequently revolutionized America.”⁵ Prior to the adoption of the United States Constitution, New York’s 1787 Bill of Rights protected the right to trial by a jury of one’s peers.

The right to serve on a jury—like the right to vote—should be automatically restored upon release from incarceration.

In 2021, New York passed legislation to restore the right to vote to people with felony convictions automatically upon release from prison. The State Legislature recognized that “facilitating reentrance in the voting process should be an essential component of rehabilitation and reintegration” and contributes to the goal of “prevent[ing] individuals from straying from the confines of our laws and society’s norms.”⁶ The same is true of jury service.

For many people convicted of felonies, civic engagement—including through political participation such as voting and jury service—is a critical means to facilitate sustainable reintegration back into society. The restoration of civil rights also enhances public safety and community stability, as research shows that people whose civil rights have been restored are substantially less likely to reoffend.⁷

However, in New York, the only way for people with past felony convictions to apply for restoration of their jury eligibility is through a process that is intrusive, burdensome, and subject to the standardless discretion of sentencing judges or corrections officials. Most people seeking relief have little, if any, access to counsel or other assistance with their applications. Few New Yorkers with felony convictions ever see their jury service rights restored, meaning that Judiciary Law § 510(3) essentially operates as a blanket ban on jury participation.

This bar on jury participation simply serves no legitimate purpose. As a class, people with felony convictions are as capable of serving as jurors as any other group of citizens. The categorical bar on their jury service is rooted in unsupported stereotypes about their moral character and fitness. Moreover, under current law, offenses and conduct

⁴ *Blakely v. Washington*, 542 U.S. 296, 306 (2004) (collecting founding era sources).

⁵ Edgar J. McManus. “Hamilton, Andrew.” 9 *American National Biography* 913-915 (1999).

⁶ Sponsor Memo, N.Y. Senate Bill S.830B, <https://www.nysenate.gov/legislation/bills/2021/S830>.

⁷ Hanna Hoover, *Civil Rights Restoration and Recidivism* (January 26, 2021), available at SSRN: <https://ssrn.com/abstract=3773572> or <http://dx.doi.org/10.2139/ssrn.3773572>.

that more directly implicate an individual's fitness for jury service are not uniformly classed as felonies and therefore not categorically banned. For example, a person can still serve on a jury after being convicted for tampering with a juror in the first degree, a misdemeanor conviction that includes a finding of "communicat[ing] with a juror" with "intent to influence the outcome of an action or proceeding."⁸ Other examples abound: Lawyers suspended from the bar for making "demonstrably false and misleading statements,"⁹ police officers who are not disciplined (let alone criminally charged) for dishonesty,¹⁰ politicians who abuse their offices,¹¹ and those with enough money¹² or political clout to avoid criminal sanction for their wrongdoing are among those who are not categorically barred from jury service, but instead receive individualized consideration for jury service through *voir dire*. Indeed, citizens who show callous disregard for the right and obligation of jury duty, including by ignoring five jury summonses over the course of a decade and incurring a fine, do not lose their eligibility for jury service.¹³ Instead, they maintain their eligibility for jury service and receive individual screening through *voir dire*.

New York law already provides for individualized screening of prospective jurors in civil trials, criminal trials, and on grand juries.¹⁴ The Jury of Our Peers Act would simply replace the blanket disqualification of people with felony convictions from jury service and instead apply the same individualized screening that all other prospective jurors

⁸ N.Y. Penal Law § 215.25.

⁹ See, e.g., Nicole Hong, William K. Rashbaum, and Ben Protess, *Court Suspends Giuliani's Law License, Citing Trump Election Lies*, N.Y. Times (June 24, 2021), <https://www.nytimes.com/2021/06/24/nyregion/giuliani-law-license-suspended-trump.html>.

¹⁰ See, e.g., Jeff Coltin, *NYPD officers are supposed to be fired for lying. They aren't.*, City & State (Apr. 11, 2022), <https://www.cityandstateny.com/policy/2022/04/nypd-officers-are-supposed-be-fired-lying-they-arent/365517/> ("[T]he city's police watchdog agency found that 181 NYPD officers had lied to the board in the past decade, and not a single one was fired for it. And just five cops were sanctioned at all for the downgraded charge of 'misleading.'").

¹¹ See, e.g., Gwynne Hogan and Brigid Bergin, *State Assembly Report Finds Cuomo Used State Resources to Enrich Himself*, Gothamist (Nov. 22, 2021), <https://gothamist.com/news/state-assemblys-report-cuomo-confirms-sexual-harassment-misuse-state-resources-lack-transparency-about-nursing-home-death-toll> ("A long awaited report from the New York State Assembly finds former governor Andrew Cuomo sexually harassed multiple women, used state resources for his own personal benefit while drafting his memoir in violation of state ethics laws, and withheld information from the public regarding the deaths of nursing home residents from COVID.").

¹² See, e.g., Karen Matthews, *Manhattan DA Returns Artifacts Worth \$20 Million to Greece*, Associated Press (Feb 23, 2022) (reporting that a hedge fund manager would not face criminal charges despite stealing \$70 million worth of artifacts").

¹³ See, e.g., Jonathan Chew, *Donald Trump Reports for Jury Duty Today*, Fortune (Aug. 17, 2015), <https://fortune.com/2015/08/17/donald-trump-jury-duty/> ("After some discussion with Trump's lawyers, Manhattan County Clerk Milton Tingling agreed to let Trump report for duty today after his lawyers assured him that this would be a convenient time. . . . A Manhattan judge earlier this year fined the Republican presidential frontrunner \$250 for ignoring five jury summons since 2006.").

¹⁴ See, e.g., N.Y. Civ. Prac. L. R. § 4109 (McKinney); N.Y. Crim. Proc. L. § 270.20 (McKinney), N.Y. Crim. Proc. L. § 190.209(2) (McKinney); N.Y. State Unified Court System, *Grand Juror's Handbook* 3-4 (Feb. 2017), https://www.nyjuror.gov/pdfs/hb_Grand.pdf.

receive through *voir dire*. Prospective jurors with felony convictions whom *voir dire* reveals to be unfit to serve on a particular jury can be removed for cause like any other similarly unfit prospective juror.

The majority of U.S. states have less restrictive jury disqualification rules than New York, and twenty-two states—including Indiana, North Dakota as well as Maine—and the District of Columbia either never exclude people with felony convictions from jury service or provide for automatic restoration of eligibility after a set time.¹⁵ In 2021, even Florida and Louisiana ended their lifetime bans on jury service and instead provided for restoration upon completion of certain conditions.¹⁶

New York’s disqualification of people with felony convictions reduces racial diversity on juries, denies people the right to a jury of their peers.

The impropriety of jury disenfranchisement is compounded by the history of racialized policing and prosecution. Because the Judiciary Law bans a person with a felony conviction from serving on a jury permanently, that law perpetuates the effects of decades of racially discriminatory law enforcement. For example, data from the New York State Division of Criminal Justice Services indicates that from 2002 through 2019, Black people in Manhattan were arrested for a felony at a rate 16.6 times greater than white people and convicted of felonies at a rate 21.3 times greater than white people.¹⁷ In Manhattan and many other counties, New Yorkers of color are significantly overrepresented among the population with felony convictions and underrepresented in jury pools.

The reduction in jury diversity compromises the quality of deliberations and erodes public confidence in the fairness of the jury system.¹⁸ As studies have found, racially

¹⁵ See Alaska Stat. § 09.20.020; Conn. Gen. Stat. § 51-217; Idaho Code §§ 18-310, 19-2018; Ind. Code Ann. §§ 33-28-5-18; 3-7-13-4; Iowa R. Civ. P. 1.915, 2.18; Kan. Stat. §§ 43-158, 21-6613; La. Code Crim. Proc. art. 401(A)(5); Mass. Gen. Laws ch. 234A, § 4; Me. Rev. Stat. tit. 14, § 1211; Minn. Stat. § 609.165; Mont. Code § 46-18-801; Nev. Rev. Stat. §§ 176A.850, 213.155; N.M. Stat. § 38-5-1; N.C. Gen. Stat. §§ 9-3, 13-1; N.D. Cent. Code §§ 12.1-33-01, 12.1-33-03, 27-09.1-08; Ohio Rev. Code § 2967.16; Or. Rev. Stat. §§ 137.281, 10.030; R.I. Gen. Laws § 9-9-1.1; S.D. Codified Laws §§ 16-13-10, 23A-27-35; Wash. Rev. Code §§ 2.36.070, 9.94A.637; Wis. Stat. §§ 756.02, 304.078; D.C. Code § 11-1906(B); Jury Plan for the Superior Court of the District of Columbia, § 6 (2019); Illinois effectuates this via common law for cause challenges, see *People v. Gil*, 240 Ill. App. 3d 151, 162 (1992) (“A venireperson may be excused for cause where he or she has been previously charged with various crimes.”).

¹⁶ Ginger Jackson-Gleich, *Rigging the jury: How each state reduces jury diversity by excluding people with criminal records*, Prison Policy Initiative (Feb. 18, 2021), <https://www.prisonpolicy.org/reports/juryexclusion.html>.

¹⁷ Complaint, *Justin v. Tingling*, No. 1:22-cv-10370, ¶ 40 (SDNY filed Dec. 8, 2022); see also, e.g., New York State Division of Criminal Justice Services, *NYS Adult Arrests and Prison Sentences by Race/Ethnicity in 2019* (Aug. 31, 2020), <https://www.criminaljustice.ny.gov/crimnet/ojsa/comparison-population-arrests-prison-demographics/2019%20Population%20Arrests%20Prison%20by%20Race.pdf> (2019 New York County arrest data).

¹⁸ Judge Milton A. Tingling, *Jury Duty Is a Right and a Privilege*, N.Y. Amsterdam News (Oct. 1, 2020), <https://amsterdamnews.com/news/2020/10/01/jury-duty-right-and-privilege/>.

diverse juries tend to deliberate longer, consider a broader range of information, and examine their racial prejudices and stereotypes.¹⁹

Thus, current New York law creates a vicious cycle: the underrepresentation of people of color on juries contributes to the overrepresentation of people of color among the population with felony convictions, which in turn drives their underrepresentation in the jury pool, and so on. This reality was reflected in a report issued by the New York State Judicial Commission on Minorities—today, the Franklin H. Williams Judicial Commission—over 30 years ago. That report found people of color were underrepresented in New York State juries and noted that there “is reason to believe that minority underrepresentation affects jury outcomes in ways that disadvantage minority litigants.”²⁰ New York is long overdue to end this vicious cycle by ending jury disenfranchisement.

Ensuring a more diverse and equitable jury pool in New York State is an imperative for strengthening our democracy, increasing confidence in our legal system, addressing racial disparities in the criminal legal system, and building stronger, safer, and more prosperous communities. The NYCLU strongly supports passage of S.206-A/A.1432-A and urges the legislature to pass the Jury of Our Peers Act immediately.

¹⁹ Jackson-Gleich, *supra* note 16.

²⁰ *Report of the New York State Judicial Commission on Minorities*, 19 Fordham Urb. L.J. 181, 242 (1991).