

Unshackling Democracy:

Why New York Should Allow Everyone to Vote – Including Prisoners

Tristan Burchett

January 5, 2024

Unshackling Democracy: Why New York Should Allow Everyone to Vote – Including Prisoners

Voting is a fundamental human right and democratic obligation. Yet New York state continues to disenfranchise imprisoned people¹ and count their bodies in distant prison districts for federal elections,^{2,3} perpetuating a racist history that extends back to the original mass carceral institution, slavery. We must confront this injustice by allowing imprisoned people to be counted in their home communities and, even more fundamentally, to vote.

With entrenched racist roots, disenfranchisement of imprisoned people should be abolished in New York because it originated historically as a substitute for Black disenfranchisement and continues to exert discriminatory effects even today. In the early 1800s, New York's free Black population grew dramatically in part due to abolition legislation.⁴ In the mid-1820s, the 1799 Gradual Abolition act was set to begin freeing young people^{5,6} and a 1817 law scheduled universal emancipation for 1827.^{7,8,9} With this on the horizon, New York's Democratic-Republican party expressed fear of losing power to the Black vote.¹⁰ The 1821 New York Constitutional Convention teemed with racist rhetoric about Black criminality to justify Black disenfranchisement.^{11,12} Narrowly failing to disenfranchise Black people outright,¹³ the

¹ N.Y. Const., art. II, § 3, <https://www.nysenate.gov/new-york-state-constitution>.

² Legislative task force on demographic research and reapportionment, N.Y. Legis. Law, § 83-m(13) (2023), <https://www.nysenate.gov/legislation/laws/LEG/83-M>.

³ Marissa Zanfardino, "Prison Populations, The Census, and Prison Gerrymandering," *New York Law School City Land*, February 16, 2022, <http://www.citylandnyc.org/prison-populations-the-census-and-prison-gerrymandering/>.

⁴ David N. Gellman and David Quigley, eds., *Jim Crow New York: A Documentary History of Race and Citizenship, 1777-1877* (New York: New York University Press, 2003), 56.

⁵ New York State Legislature, 22nd session, "An Act for the gradual abolition of slavery," March 29, 1799, in Enrolled acts of the State Legislature, Series 13036-78, Laws of 1799, Chapter 62, New York State Archives, <https://digitalcollections.archives.nysed.gov/index.php/Detail/objects/10815>.

⁶ The Gradual Abolition act technically emancipated all enslaved people born after 1799. But it required them to "be a servant" of their enslaver until age 25 for women and 28 for men, only truly freeing them in the mid-1820s and beyond. It is clear the act intends enslavers to get economic benefit from the "freed" people by indenturing them during prime working years, especially men whose labor was considered more economically valuable.

⁷ New York State Legislature, 40th session, "An Act relative to slaves and servants," March 31, 1817, in Enrolled acts of the State Legislature, Series 13036-78, Laws of 1817, Chapter 137, Section 4, <https://digitalcollections.archives.nysed.gov/index.php/Detail/objects/10817>.

⁸ Gellman and Quigley, *Jim Crow New York*, 67-72.

⁹ The 1817 "An Act relative to slaves and servants" emancipated all enslaved people in 1827. However, it forced people born from 1799-1817 to continue to "serve" their mother's enslaver until age 25 or 28 and those born from 1817-1827 until age 21.

¹⁰ Ted O'Reilly, "'Reputed and considered to be free': Obstructing the Black vote in Early Republic New York," *From the Stacks*, New-York Historical Society, October 28, 2020, <https://www.nyhistory.org/blogs/reputed-and-considered-to-be-free-obstructing-the-black-vote-in-early-republic-new-york>.

¹¹ L. H. Clarke, *A Report of the Debates and Proceedings of the Convention of the State of New York* (New York: J. Seymour, 1821), 91-181, <https://nysl.ptfs.com/aw-server/rest/product/purl/NYSL/f/8e83dd68-d920-4f7b-add7-6527ee53ee90>.

¹² Erika Wood and Liz Budnitz, "Jim Crow in New York," Brennan Center for Justice, February 10, 2010, 6-8, <https://www.brennancenter.org/media/297/download>.

¹³ New York State Constitutional Convention (1821), *Journal of the Convention of the State of New York, 1821* (Albany: Cantine & Leake, 1821), 201-202, <https://nysl.ptfs.com/aw-server/rest/product/purl/NYSL/i/c9031777-e8b0-4d4a-b160-05212e33c3fc>.

convention then amended the state constitution to allow prisoner disenfranchisement¹⁴ and doubled the property requirements for Black voters while eliminating them for whites.¹⁵ Echoing the racist justifications of many delegates, Delegate Samuel Young said, “Look to your jails and penitentiaries. By whom are they filled? By the very race whom it is now proposed to clothe with the power of deciding upon your political rights.”¹⁶ Prisoner disenfranchisement was now cemented as an instrument of racist voter suppression. In 1846, another New York Constitutional Convention attempted to disenfranchise all Black people citing “a criminal disposition in the race”.^{17,18} Failing narrowly, it instead vastly expanded allowable criminal disenfranchisement by adding minor offenses.^{19,20} A pattern of substituting prisoner disenfranchisement for racist Black disenfranchisement emerged in the very history of New York’s constitution.

After the Civil War, New York continued to intertwine racist voter suppression with prisoner disenfranchisement. In 1870, New York ratified and then pointedly rescinded its ratification of the Fifteenth Amendment barring disenfranchisement on the basis of race.^{21,22} After four years, New York finally removed its unconstitutional property requirement for Black voting but simultaneously amended the Constitution to *require* prisoner disenfranchisement, rather than allowing counties to implement it.²³ New York’s practice of substituting escalating prisoner disenfranchisement for thwarted Black disenfranchisement now merged with the national wave of prisoner disenfranchisement used to circumvent Black suffrage mandated by the Reconstruction Amendments.

Despite securing universal Black male suffrage on paper, systematic criminalization and eventual mass incarceration inexorably increased racist disenfranchisement through imprisonment. From the mid-1800s, New York police forces increasingly targeted Black and other marginalized people,²⁴ reinforcing the Black criminality narrative that justified replacing the first carceral system, slavery, with the one still with us today.²⁵ This association was forged

¹⁴ N.Y. Const., art. II, § 2 (1821), https://history.nycourts.gov/wp-content/uploads/2018/11/Publications_1821-NY-Constitution.pdf.

¹⁵ N.Y. Const., art. II, § 1 (1821).

¹⁶ Clarke, *A Report of the Debates and Proceedings of the Convention of the State of New York*, 102.

¹⁷ New York State Constitutional Convention (1846), *Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of New York. 1846 - 1846*, eds. William G. Bishop and William H. Attree (Albany: Evening atlas, 1846), 1014-1020, <https://nysl.ptfs.com/aw-server/rest/product/purl/NYSL/i/ed33cf55-63ac-437c-a53a-80984324f9ed>.

¹⁸ New York State Constitutional Convention (1846), *Report of the Debates and Proceedings*, 1029-30.

¹⁹ N.Y. Const., art. II, § 2 (1846), https://history.nycourts.gov/wp-content/uploads/2019/01/Publications_1846-NY-Constitution-compressed.pdf.

²⁰ Wood and Budnitz, “Jim Crow in New York,” 10.

²¹ U.S. Const., amend. XV (1870).

²² “The Ratification of the Fifteenth Amendment Rescinded,” *New York Times*, January 6, 1870, <https://www.nytimes.com/1870/01/06/archives/albany-the-first-act-of-the-democratic-legislature-the.html>.

²³ New York State Constitutional Commission (1872-1873), *Journal of the Constitutional Commission of the State of New York* (Albany: Weed, Parsons and Company 1873), 97, 170, <https://babel.hathitrust.org/cgi/pt?id=mdp.35112203890126&seq=9>.

²⁴ Elizabeth Hinton and DeAnza Cook, “The Mass Criminalization of Black Americans: A Historical Overview,” *Annual Review of Criminology* 4, no. 1 (2021): 269, <https://doi.org/10.1146/annurev-criminol-060520-033306>.

²⁵ Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (London: Penguin Books, 2019), 42, 237-8.

further as police fenced illegal activities into vice districts within Black and working class neighborhoods from the late 1800s onward.²⁶ Finally, when the Civil Rights movement increased the visibility of racist disenfranchisement, New York instituted the harshest sentences in the country for drug offenses, the 1973 Rockefeller Laws, which included up to life for minor marijuana possession.²⁷ These laws were consistently supported by state lawmakers from rural, white prison districts²⁸ that benefited from counting disenfranchised prisoners for legislative representation, a terrible echo of counting enslaved people for congressional representation.

With clearly discriminatory origins, New York's prisoner disenfranchisement must be abolished unless we have proof that it lacks ongoing discriminatory impacts – proof that is lacking. New York City continues to feed prisoner disenfranchisement through racially biased policing overrepresented in communities of color.²⁹ In 2022, 90% of police stops targeted Native, Black, or Latinx people, who constitute only 50% of the population.³⁰ Statewide in 2021, Black people were 50% more likely than whites to be convicted when arrested.³¹ Native people were 11 times more likely to be imprisoned or jailed than whites, Black people 8 times, and Hispanic people 3 times.³² These are the people New York silences en masse through disproportionate disenfranchisement.

Further, New York persists in counting these disenfranchised people in predominantly rural prison districts away from their home communities for federal elections.³³ This distorts democracy itself, transferring democratic power from communities of color to largely white prison districts. In anti-democratic fashion, it incentivizes legislators from prison districts to continue denying imprisoned people suffrage.

Despite its bleak discriminatory effects that continue its original purpose, arguments persist for disenfranchisement of imprisoned people. Prevailing rationales are that silencing their vote aligns with imprisonment's purpose, be it punishment, protection of society, or rehabilitation. Yet prisoner punishment through the denial of fundamental rights has been increasingly disavowed by courts. Further, the United Nations declares "universal and equal

²⁶ Hinton and Cook, "The Mass Criminalization of Black Americans," 269.

²⁷ James M. Markham, "Toughest in the Nation," *New York Times*, May 13, 1973, <https://www.proquest.com/historical-newspapers/toughest-nation/docview/119912507/se-2>.

²⁸ Editorial Board, "You've Heard About Gerrymandering. What Happens When It Involves Prisons?," *New York Times*, April 11, 2021, <https://www.nytimes.com/2021/04/11/opinion/prison-gerrymandering-census.html>.

²⁹ "A Closer Look at Stop-and-frisk in NYC," New York Civil Liberties Union, accessed December 20, 2023, <https://www.nyclu.org/en/closer-look-stop-and-frisk-nyc>.

³⁰ "Stop-and-frisk data," New York Civil Liberties Union, accessed December 20, 2023, <https://www.nyclu.org/en/stop-and-frisk-data>.

³¹ New York State, Division of Criminal Justice Services, "NYS Adult Arrests and Prison Sentences by Race/Ethnicity in 2021," August 24, 2023, <https://www.criminaljustice.ny.gov/crimnet/ojsa/comparison-population-arrests-prison-demographics/2021%20Population%20Arrests%20Prison%20by%20Race.pdf>.

³² "Prison and jail populations by state, sex, youth status (under 18), and race and ethnicity, with comparative total state population data and incarceration rate per 100,000 people," Prison Policy Institute, September 2023, https://prisonpolicy.org/data/race_bystate_2021.xlsx.

³³ N.Y. Legis. Law, § 83-m(13) (2023).

suffrage” is a human right in the 1948 *Universal Declaration of Human Rights*³⁴ and “all prisoners retain the human rights and fundamental freedoms” therein.³⁵ Some justify prisoner disenfranchisement through the historical concept of “civil death” for criminals, yet this is contradicted by the Supreme Court decision that imprisoned people cannot be stripped of civil citizenship³⁶ and New York’s practice of counting them for congressional representation.

Another common refrain emphasizes protection: imprisoned people should not influence the laws they have broken, perhaps due to lack of judgment or morals. However, imprisoned people are unlikely to change criminal laws without joining community efforts with broader support, and judgment and morals have never been a requirement of suffrage. Moreover, if we feel some people are not deserving enough to vote, is New York’s racially biased criminal justice system a fair mechanism for this?

Last, if the purpose of imprisonment lies in rehabilitation as the UN requires³⁷, we should not strip away the obligation to participate in the bedrock of responsible society, voting. Research has found that prisoner re-enfranchisement is linked to greater civic engagement³⁸ and lower recidivism.³⁹ Voting while imprisoned would help our marginalized citizens be a positive part of civil society, starting a powerful cycle of democratic contribution.

New York should confront the troubling historical origins and ongoing discriminatory impact of prisoner disenfranchisement by granting suffrage to all citizens. History shows that voting rights are “not immutably frozen like insects trapped in Devonian amber,” as the Ninth District Court held regarding prisoner disenfranchisement.^{40,41} Despite the terrible racist justifications that marred the 1821 New York Constitutional Convention, let us draw inspiration from Delegate Robert Clark, who asked, “[I]s it consistent with sound policy [...] to alienate one portion of the community [...] from their own political institutions?”⁴² History beckons us to forge stronger voting rights for all New Yorkers regardless of incarceration status, fortifying the bedrock of an equitable democratic society.

³⁴ United Nations General Assembly, *Universal Declaration of Human Rights*, art. 21, December, 10, 1948, <http://www.un.org/en/universal-declaration-human-rights/>.

³⁵ United Nations General Assembly, *Basic Principles for the Treatment of Prisoners*, art. 5, Dec 14, 1990, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/BasicPrinciplesTreatmentOfPrisoners.aspx>.

³⁶ *Trop v. Dulles*, 356 U.S. 86 (1958), <https://supreme.justia.com/cases/federal/us/356/86/>.

³⁷ United Nations General Assembly, *International Covenant on Civil and Political Rights*, art. 10 § 3, December 16, 1966, www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights.

³⁸ Christopher Uggen, Jeff Manza, and Angela Behrens, “‘Less than the average citizen’: Stigma, role transition and the civic reintegration of convicted felons,” in *After Crime and Punishment*, eds. Shadd Maruna and Russ Immarigeon (London: Willan, 2004), 276, <https://doi.org/10.4324/9781843924203>.

³⁹ Guy P. Hamilton-Smith and Matt Vogel, “The violence of voicelessness: The impact of felony disenfranchisement on recidivism,” *Berkeley La Raza Law Journal* 22, no. 2 (2012): 407- 432, <https://doi.org/10.15779/Z38Z66F>.

⁴⁰ *Dillenburg v. Kramer*, 469 F.2d 1222, 1226 (9th Cir. 1972), <https://law.justia.com/cases/federal/appellate-courts/F2/469/1222/79768/>.

⁴¹ Interestingly, this *Dillenburg v. Kramer* case also held that “courts have been hard pressed to define state interest served by laws disenfranchising persons convicted of crimes.”

⁴² Nathaniel H. Carter and William L. Stone, *Reports of the Proceedings and Debates of the Convention of 1821* (Albany: E. and E. Hosford, 1821), 188, <https://nysl.ptfs.com/aw-server/rest/product/purl/NYSL/i/9bde6b27-3bdf-4e74-9885-e68d65fd1087>.

In Convention.
November 10th 1821.
To the people of the State of New-York:
The delegates of the people, in convention having this day terminated their deliberations, present to you the constitution of the state, in an amended form, as the result of the arduous and responsible duties which your confidence has imposed upon them. They have adopted this course from a sense

Article II.
Section 1. Every male citizen of the age of twenty one years, who shall have been an inhabitant of this state one year preceding any election, and for the last six months a resident of the town or county where he may offer his vote, and shall have within the year next preceding the election paid a tax to the state or county, assessed upon his real or personal property, or shall by law be exempted from taxation; or being armed and equipped according to law, shall have performed within that year military duty in the militia of this state, or who shall be exempted from performing militia duty, in consequence of being a fireman in any city, town, or village, in this state; and also every male citizen of the age of twenty one years, who shall have been for three years next preceding such election, an inhabitant of this state, and for the last year a resident in the town or county where he may offer his vote, and shall have been within the last year assayed to labor upon the public highways, and shall have performed the labor, or paid an equivalent therefor, according to law, shall be entitled to vote in the town or ward where he actually resides, and not elsewhere, for all officers that now are, or hereafter may be, elective by the people; but no man of colour, unless he shall have been for three years a citizen of this state, and for one year next preceding any election, shall be seized and possessed of a freehold estate, of the value of two hundred and fifty dollars, over and above all debts and incumbrances charged thereon, and shall have been actually rated and paid a tax thereon, shall be entitled to vote at any such election. And no person of colour shall be subject to direct taxation, unless he shall be seized and possessed of such real estate as aforesaid.
Section 2. Laws may be passed, excluding from the right of suffrage persons who have been, or may be, convicted of infamous crimes.
Section 3. Laws shall be made for ascertaining by proper proofs, the citizens who shall be entitled to the right of suffrage, hereby established.

The New York State Constitution of 1821. Images from the preamble (top) and Article II regulating suffrage (bottom). Source: New York State Archives.
<https://digitalcollections.archives.nysed.gov/index.php/Detail/objects/72609>.

Bibliography

Primary Sources

- Carter, Nathaniel H., and William L. Stone. *Reports of the Proceedings and Debates of the Convention of 1821*. Albany: E. and E. Hosford, 1821. <https://nysl.ptfs.com/aw-server/rest/product/purl/NYSL/i/9bde6b27-3bdf-4e74-9885-e68d65fd1087>.
- Clarke, L. H. *A Report of the Debates and Proceedings of the Convention of the State of New York*. New York: J. Seymour, 1821. <https://nysl.ptfs.com/aw-server/rest/product/purl/NYSL/f/8e83dd68-d920-4f7b-add7-6527ee53ee90>.
- New York State Constitutional Commission (1872-1873). *Journal of the Constitutional Commission of the State of New York*. Albany: Weed, Parsons and Company, 1873. <https://babel.hathitrust.org/cgi/pt?id=mdp.35112203890126&seq=9>.
- New York State Constitutional Convention (1821). *Journal of the Convention of the State of New York, 1821*. Albany: Cantine & Leake, 1821. <https://nysl.ptfs.com/aw-server/rest/product/purl/NYSL/i/c9031777-e8b0-4d4a-b160-05212e33c3fc>.
- New York State Constitutional Convention (1846). *Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of New York. 1846 - 1846*. Eds. William G. Bishop and William H. Attree. Albany: Evening Atlas, 1846. <https://nysl.ptfs.com/aw-server/rest/product/purl/NYSL/i/ed33cf55-63ac-437c-a53a-80984324f9ed>.
- New York State, Division of Criminal Justice Services. "NYS Adult Arrests and Prison Sentences by Race/Ethnicity in 2021." August 24, 2023. <https://www.criminaljustice.ny.gov/crimnet/ojsa/comparison-population-arrests-prison-demographics/2021%20Population%20Arrests%20Prison%20by%20Race.pdf>.
- New York State Legislature, 22nd session. "An Act for the gradual abolition of slavery." March 29, 1799. In *Enrolled acts of the State Legislature, Series 13036-78, Laws of 1799, Chapter 62*. <https://digitalcollections.archives.nysed.gov/index.php/Detail/objects/10815>.
- New York State Legislature, 40th session. "An Act relative to slaves and servants." March 31, 1817. In *Enrolled acts of the State Legislature, Series 13036-78, Laws of 1817, Chapter 137, Section 4*. <https://digitalcollections.archives.nysed.gov/index.php/Detail/objects/10817>.
- United Nations General Assembly. *Basic Principles for the Treatment of Prisoners*. Dec 14, 1990. <http://www.ohchr.org/EN/ProfessionalInterest/Pages/BasicPrinciplesTreatmentOfPrisoners.aspx>.
- United Nations General Assembly. *International Covenant on Civil and Political Rights*. December 16, 1966. <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights>.
- United Nations General Assembly. *Universal Declaration of Human Rights*. December, 10, 1948. <http://www.un.org/en/universal-declaration-human-rights/>.

Secondary Sources

- Alexander, Michelle. *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*. London: Penguin Books, 2019.
- Gellman, David N., and David Quigley, eds. *Jim Crow New York: A Documentary History of Race and Citizenship, 1777-1877*. New York: New York University Press, 2003.
- Hamilton-Smith, Guy P., and Matt Vogel. "The violence of voicelessness: The impact of felony disenfranchisement on recidivism." *Berkeley La Raza Law Journal* 22, no. 2 (2012): 407- 432. <https://doi.org/10.15779/Z38Z66F>.
- Hinton, Elizabeth and DeAnza Cook. "The Mass Criminalization of Black Americans: A Historical Overview." *Annual Review of Criminology* 4, no.1 (2021): 261-286. <https://doi.org/10.1146/annurev-criminol-060520-033306>.
- Markham, James M. "Toughest in the Nation." *New York Times*. May 13, 1973. <https://www.proquest.com/historical-newspapers/toughest-nation/docview/119912507/se-2>.
- New York Civil Liberties Union. "A Closer Look at Stop-and-frisk in NYC." Accessed December 20, 2023. <https://www.nyclu.org/en/closer-look-stop-and-frisk-nyc>.
- New York Civil Liberties Union. "Stop-and-frisk data." Accessed December 20, 2023. <https://www.nyclu.org/en/stop-and-frisk-data>.
- New York Times Editorial Board. "You've Heard About Gerrymandering. What Happens When It Involves Prisons?" *New York Times*. April 11, 2021. <https://www.nytimes.com/2021/04/11/opinion/prison-gerrymandering-census.html>.
- New York Times*. "The Ratification of the Fifteenth Amendment Rescinded." January 6, 1870. <https://www.nytimes.com/1870/01/06/archives/albany-the-first-act-of-the-democratic-legislature-the.html>.
- O'Reilly, Ted. "‘Reputed and considered to be free’: Obstructing the Black vote in Early Republic New York." *From the Stacks*. New-York Historical Society. October 28, 2020. <https://www.nyhistory.org/blogs/reputed-and-considered-to-be-free-obstructing-the-black-vote-in-early-republic-new-york>.
- "Prison and jail populations by state, sex, youth status (under 18), and race and ethnicity, with comparative total state population data and incarceration rate per 100,000 people." Prison Policy Institute. September 2023. https://prisonpolicy.org/data/race_bystate_2021.xlsx.
- Uggen, Christopher, Jeff Manza, and Angela Behrens. "‘Less than the average citizen’: Stigma, role transition and the civic reintegration of convicted felons." In *After Crime and Punishment*, edited by Shadd Maruna and Russ Immarigeon, 258-287. London: Willan, 2004. <https://doi.org/10.4324/9781843924203>.
- Wood, Erika, and Liz Budnitz. "Jim Crow in New York." Brennan Center for Justice. February 10, 2010. <https://www.brennancenter.org/media/297/download>.
- Zanfardino, Marissa. "Prison Populations, The Census, and Prison Gerrymandering." *New York Law School City Land*, February 16, 2022. <https://www.citylandnyc.org/prison-populations-the-census-and-prison-gerrymandering/>.