

May 31, 2024

I. Introduction

For over 50 years in Nebraska, the ACLU has worked statewide in courts, legislatures, and communities to protect the constitutional and individual rights of all people. With a nationwide network of offices and millions of members and supporters, including an ever-growing presence in Nebraska, we take up the toughest civil liberties fights. Beyond one person, one party, or one side — we the people dare to create a more perfect union.



AMERICAN CIVIL LIBERTIES UNION
FOUNDATION

Nebraska

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The ACLU recognizes that race intersects with every critical social justice and civil rights issue of our time. More than mere recognition though, the ACLU fights to eradicate racial injustice in the U.S. and works to foster a society in which people of color and communities of color have full access to the rights and benefits of American society. Working with affected communities, the ACLU litigates, advocates, and educates to address the roots of racial injustice. As part of this racial justice work, the ACLU has long been an advocate for robust and diverse jury pools including challenging discriminatory law preventing women from serving as jury members and submitting briefs in death penalty cases where juries are rigged to be more conviction-prone, friendlier to the prosecution, and to exclude Black community members. Juries are central to the American judicial system, and a representative jury is necessary for a robust democracy and to ensure all have access to a fair trial. Racial disparities in jury pools exacerbate longstanding racial disparities in our criminal legal system.

The proposed Amendments to Neb. Ct. R. §§ 6-1002 and 6-1003 must go further to ensure Nebraska juries are representative of our communities. We applaud the Nebraska Access to Justice Commission and the Committee on Equity and Fairness's intent to standardize and modernize the Nebraska Jury Qualification Form and respectfully urge the court to consider additional improvements outlined below as well as those outlined in the comment submitted by the NAACP.

II. Why Representative Juries are Necessary

When a layperson thinks of the criminal justice system, their first thought is likely of lawyers and judges and not how non-attorneys also play a significant role in the system. Discussions of a biased and racist criminal justice system have become a hot topic in national discourse, especially after the murders of George Floyd, Breonna Taylor, and Ahmaud Arbery in 2020. Some of those conversations were focused on



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the lack of diversity within the legal profession, a fair point as there is a clear racial disparity among prosecutors and judges. 95 percent of elected prosecutors are white, with 73 percent of elected prosecutors being white men.¹ Along with a majority of white elected prosecutors, the majority of judges in the country are white. In more than 20 states, there are no judges of color, including in more than 10 states where people of color make up at least 20 percent of the population.² Likewise, many police departments are not representative of the communities they are created to serve.³ This disproportionate representation can mean a BIPOC (Black, Indigenous, or Person of Color) could be arrested, charged, and have criminal proceedings against them without seeing someone who looks like them at any stage of the process. Therefore, in a criminal case, having a representative jury is often the only opportunity for a defendant to have members of their community be seen and heard as their case moves through the legal system.

Historically, Black people and people of color have been mistreated and have suffered greatly at the hands of the United States criminal legal system. Conversations regarding implicit and explicit bias, particularly in the legal system, have been occurring with greater frequency at all levels. Research consistently shows that implicit bias does in fact appear in the legal system and can impact everything from policing to charging decisions.⁴ A study of mock jurors in California found that white jurors were more likely to view Black criminal defendants as remorseless, cold-hearted, and dangerous.⁵ These views can result in harsher sentences for Black defendants than white defendants. Associating criminality and Blackness, whether the association is unconscious or not, undoubtedly increases the risk of a wrongful conviction or unfair sentence.

The mere presence of racial minorities in the jury room does not mean that long-held biases will be magically erased, but racially representative juries can shed light on aspects of a case that might otherwise go unnoticed and help enrich the deliberation process.⁶ Representative juries are the cornerstone of the judicial system and

¹ Reflective Democracy Campaign, *Tipping the Scales: Challengers Take On the Old Boys' Club of Elected Prosecutors*, Oct. 2019.

² Janna Adelstein and Alicia Bannon, *State Supreme Court Diversity — April 2021 Update*, Brennan Center for Justice April 2021.

³ Shelley S. Hyland and Elizabeth Davis, *Local Police Departments, 2016: Personnel*, Bureau of Justice Statistics Oct. 2019.

⁴ Jennifer L. Eberhart, *Biased: Uncovering the Hidden Prejudice that Shapes What We See, Think, and Do*, Equal Justice Initiative, Presumption of Guilt, New York: Viking 2019.

⁵ Mona Lynch and Craig Haney, *Mapping the Racial Bias of the White Male Capital Juror: Jury Composition and the 'Empathic Divide'*, *Law & Society Review* 45, no. 1 (2011): 91-92.

⁶ Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, *Duke Law Journal* 57, no. 345 (2007): 414-15.



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allow people to have faith in the judicial system. From the founding days of the United States, the right to a representative jury has been held in the highest regard.⁷ The denial of trial by jury was listed in the Declaration of Independence as one of the abuses prompting independence from the Crown.⁸ By including this right to trial by jury as part of the Bill of Rights, the Founding Fathers made clear just how important this right truly is. In fact, the right to trial by jury is so important that it is referred to in three different amendments in the Bill of Rights.⁹ When members of BIPOC communities see people like themselves serving on juries, they are more likely to trust the outcomes. A diverse jury sends a powerful message that the legal system values inclusivity and respects the voices of all community members. This, in turn, fosters public confidence in the fairness and integrity of the judicial process.

Nebraska-specific demographic data from 2010 to 2018, reveals an increasingly diverse Nebraska with a more than 25 percent increase in the ethnic minority population.¹⁰ Even taking into account this increased diversity within Nebraska, people of color remain vastly overrepresented in Nebraska jails and prisons. According to the Prison Policy Initiative, in 2021 Black Nebraskans accounted for 5 percent of the resident population and 28 percent of the prison population.¹¹ Hispanic Nebraskans were similarly overrepresented, accounting for 12 percent of the resident population and 15 percent of the prison population. In comparison, white Nebraskans accounted for 78 percent of the resident population and 51 percent of the prison population.¹² One of the first lines of defense against miscarriages of justice is a diverse, representative jury which is much more capable of fairly weighing evidence, holding the government to its high burden, and protecting the rights of those accused of crimes than an all-white jury. In *Smith v. Texas*, a case considering whether Black Americans had been intentionally excluded from grand juries, the Court upheld the challenge and explained that only when juries represent the entire community can juries function as true “instruments of public justice.”¹³ The Court further added that “the exclusion from jury service of otherwise qualified groups not only violates our Constitution

⁷ See Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. Chi. L. Rev. 867, 875 (1994).

⁸ *Id.*

⁹ See U.S. Const. Amends. V (right to be indicted by a grand jury in felony cases), VI (right to an impartial jury in criminal cases), VII (right to a jury in civil matters).

¹⁰ Department of Health and Human Services, Office of Health Disparities & Health Equity, *Nebraska Minority Report Card*, 2020.

<https://dhhs.ne.gov/Reports/Minority%20Population%20Report%20Card.pdf>

¹¹ Prison Policy Initiative, Nebraska Profile, <https://www.prisonpolicy.org/profiles/NE.html>. (last visited May 31, 2024).

¹² *Id.*

¹³ *Smith v. Texas*, 311 U.S. 128 (1940).



[. . .] but is at war with our basic concepts of a democratic society and a representative government.”¹⁴

Juries are an integral part of our justice system. Their goal is to determine the truth based on the facts presented and apply the law fairly and equitably. Other than voting, serving on a jury is the most substantial opportunity that most individuals have to participate in the democratic process. The Sixth Amendment of the United States Constitution guarantees all criminal defendants the right to trial by an impartial jury of one’s peers.¹⁵ This guarantee applies to trials held in both state and federal courts. An essential component of the Sixth Amendment’s impartial jury requirement is a jury selected from a pool that represents a fair cross-section of the community.¹⁶

The proposed amendments are a positive first step in updating Juror Qualification Forms for Nebraska, but the improvements cannot stop there. Specifically, by designating the demographic questions as optional, the goal of ensuring that all Nebraska juries are made up of a fair cross-section of the community is undermined. To determine whether a fair cross-section of the population is represented in Nebraska juries, there must be statistically reliable and transparent data available for dissemination and analysis. With the current lack of reliable data available to defendants and scholars alike, it is impossible to know if Nebraska is meeting its constitutional obligation thereby undermining public faith in juries. By requiring a response to the demographic questions, the Court and the public will be able to determine whether convened juries in Nebraska are reflective of the diversity of the state and are pulled from “a fair cross-section of the population of the area served by the court.”¹⁷

III. Future Improvements

The ACLU of Nebraska recommends that the Nebraska Judicial Branch create a website that allows jury forms to be completed online and requires the demographic questions to be answered before submission. To ensure equal treatment under the law, it is important to acquire accurate data about race and ethnicity of jurors in Nebraska courts. Requiring a response to the demographics question will allow for statistically significant, aggregate data to be collected and ensure that juries in Nebraska represent a fair cross-section of the community. We can look to neighboring Iowa as an example. Iowa

¹⁴ *Id.*

¹⁵ U.S. Const. Amend. VI.

¹⁶ See *Taylor v. Louisiana*, 419 U.S. 522, at 530 (Trial by jury presupposes a jury drawn from a pool broadly representative of the community as well as impartial in a specific case.) (quoting *Thiel v. Southern Pacific Co.*, 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting)).

¹⁷ Neb. Rev. Stat. § 25-1645 (1).



currently uses an online jury form website that allows individuals who receive jury summonses to input their information online.¹⁸ Importantly, the demographic questions are required, not optional. On its Juror Questionnaire website, Iowa states that questions regarding race and gender are asked to “ensure our jury panels are representative of the community at large.”¹⁹ Without requiring a response to the demographics question on Nebraska Juror Qualification Forms, it is impossible to glean any statistically reliable data to evaluate whether a fair cross-section of the community is actually represented.

Moreover, the proposed new jury form does not include a separate category for someone who identifies as two or more races. Importantly, the U.S. census includes a category for individuals who identify as two or more races. As the world becomes more diverse and integrated, a growing number of people identify as biracial or multiracial, and it is vital that Nebraska follow the lead of the U.S. Census and collect demographic information in accordance with national best practices.

Finally, the ACLU joins the NAACP in its comment concerning proposed improvements to the form.

IV. Conclusion

The ACLU of Nebraska supports the proposed changes to Neb. Ct. R. §§ 6-1002 and 6-1003 and respectfully requests the court implement the suggested changes above and those offered by the NAACP. These proposals ensure that juries in Nebraska are representative of the diverse communities within our state. A diverse jury is not merely a matter of diversity for diversity’s sake: it is a cornerstone of a fair and impartial criminal legal system. By bringing together individuals from diverse backgrounds, a representative jury can better fulfill its duty to administer justice equitably and uphold the principles of democracy and Nebraska’s motto of “Equality Before The Law.”

Sincerely,

Joy Kathurima
Joy Kathurima
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¹⁸ Iowa Judicial Branch, Juror Questionnaire, <https://www.iowacourts.gov/juror/juror-questionnaire>. (last visited May 31, 2024).

¹⁹ *Id.*