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Across the country, thousands of elected officials wield considerable power over the function and outcomes of the criminal legal system. Each year, in some states and districts, voters elect state attorneys general, district attorneys, sheriffs, state supreme court judges, and trial court judges. These elected officials make choices and take actions that formatively influence the functions of the criminal legal system. For example: district attorneys have considerable discretion when deciding whether to file criminal charges against someone accused of committing a crime, and trial court judges make decisions that significantly impact the outcomes of criminal trials, such as determining what evidence can be shown to a jury. However, millions of Americans who have a vested interest in the fairness of our criminal legal system – those who are detained while awaiting their criminal trial – are denied a meaningful opportunity to vote, despite their right under the law to do so. Most individuals held in city or county jail at any given time have not been convicted of any crime and are awaiting a trial, meaning they retain their legal right to vote, but procedural and logistical barriers make it difficult or impossible for them to do so. Reforms that make it easier to vote from jail, up to and including the establishment of polling locations inside jail facilities, will help eligible incarcerated voters to actualize their right to vote from jail.

You have the right to vote from jail, but it may be very difficult to do so.

Courts have affirmed that eligible voters detained while awaiting a trial or after a misdemeanor conviction have the right to vote – at least in theory. Unfortunately, the courts have failed to affirmatively obligate jails to provide meaningful ballot access to detained voters. This makes it difficult, or impossible, to cast a ballot from jail in many jurisdictions despite the right to do so.

In 1974, the Supreme Court ruled in O’Brien v. Skinner that eligible incarcerated voters cannot be denied their constitutional right to vote due to their detainment. In that case, the Court found that pretrial detainees were unconstitutionally denied access to the ballot when they were not allowed to cast absentee ballots and the state failed to provide them with any other means of casting their vote. In fact, the state had “rejected out of hand” any alternative that would permit the detained individuals to vote without absentee ballots. As a result of O’Brien v. Skinner, individuals can’t be denied the right to vote based solely on their detainment.

But having the right to vote is different from having the ability to vote, and the Court has obscured that difference by interpreting very narrowly what constitutes being denied the right to vote as a detained American. In McDonald v. Board of Election Commissioners of Chicago (1969), individuals who were detained in Chicago’s Cook County Jail while awaiting trial claimed that Illinois’ practice of barring detained individuals from using absentee ballots violated the equal protection clause of the 14th Amendment. In McDonald, unlike in O’Brien, the Court found that the failure to provide absentee ballots did not violate the Constitution. Also unlike O’Brien, the Court based its decision on the fact that these plaintiffs weren’t prohibited from every possible mechanism of voting, just from using absentee ballots despite there being no other realistic method of participation at that time. The majority raised that it is within the state’s power to establish a special polling booth in the jail or consider other options to enable detained individuals to vote on Election Day, which would allow the plaintiffs
to vote without using absentee ballots. But few states or jurisdictions have adopted these alternative pathways to enable detained citizens to vote.

In the more than 50 years since these cases were decided, only a small handful of carceral facilities that house eligible incarcerated voters have established jail-based polling sites or any broad mechanism for allowing detained individuals to access the ballot besides voting by mail – and detained individuals who are eligible to cast an absentee ballot from jail often face prohibitively burdensome barriers to doing so.

These circumstances have had the predictable effect of leaving many detained Americans with a slim chance of successfully voting – and no recourse when they are disenfranchised, because the state has not expressly prohibited them from voting by any means.

The Court ignoring what the “right to vote” can really mean with no avenue to cast a ballot reflects a major tension over jail-based voting: States, localities and jail administrators can maintain that they are not actively denying detained individuals the right to vote while offering no practical avenue to do so. This has led to a crisis wherein hundreds of thousands of Americans may not be able to cast a ballot for their candidates and policies of choice, despite being legally eligible to vote, because they are detained.

De facto disenfranchisement and the legacy of Jim Crow

The denial of voting rights to legally eligible individuals who are detained in American carceral institutions is a form of de facto disenfranchisement, by which legally eligible voters are nevertheless denied an opportunity to vote. In jails, de facto disenfranchisement has a profound numeric impact on voter turnout – and Black and economically marginalized Americans make up a disproportionate share of those disenfranchised while in jail. As of 2017, pretrial detainees comprised nearly two-thirds of the 745,000 people incarcerated in American jails, a near-quadrupling since 1980s. A majority of the other 263,000, who were serving a sentence for a criminal conviction, were incarcerated for a misdemeanor offense.

The racially disparate impact of de facto disenfranchisement aligns with the longstanding historical pattern: Criminal disenfranchisement, the revocation of the right to vote based on a criminal conviction, has long been used as a tool to suppress Black political power. Although de facto disenfranchisement of people in jails is procedurally distinct from criminal disenfranchisement for a felony conviction, taken together, these two interrelated forms of voter suppression are emblematic of a fundamental historical truth: Since Reconstruction, the burden of disenfranchisement based on contact with the criminal legal system has been borne disproportionately by Black Americans.

American states — particularly Southern states — strategically adapted crime-based restrictions on voting after the Civil War. At that time, criminal disenfranchisement’s reach was extended to a broad swath of crimes not previously included among disqualifying common-law felonies. The expansions were designed to cover crimes thought to be particularly common among Black residents. In South Carolina, legislators extended criminal disenfranchisement against adultery, arson, wife-beating and other crimes that were identified with Black people, but not for murder or fighting, with which whites were charged at rates similar to Black residents. In 1896, the Mississippi Supreme Court heard a challenge to its constitution’s disenfranchisement of
(mostly Black) persons convicted of minor crimes, not but major crimes committed largely by whites (such as murder and rape). The Court recognized that Mississippi, like other Southern states at the time, had manipulated criminal disenfranchisement as part of a campaign to disenfranchise as many Black people as possible without triggering the federal constitutional protections in the 14th and 15th Amendments. Because these criminal disenfranchisement provisions didn’t explicitly mention race, the Court found that Mississippi had not violated the 14th and 15th Amendments, which prohibited explicit racial discrimination in voting and promised Black Americans the equal protection of the law.\textsuperscript{16}

Criminal disenfranchisement was one part of broader efforts to prevent Black Americans from voting. Some voter suppression tactics, like poll taxes and literacy tests, were struck down as unconstitutional – while others persisted.\textsuperscript{17} It was not until the passage of the Voting Rights Act of 1965 (VRA) that America made good on the promises of the 14th and 15th Amendments – although it allowed criminal disenfranchisement to persist.\textsuperscript{18}

The VRA enshrined new voter protections and crucially required jurisdictions with a history of voter discrimination to gain federal approval before making changes to their voting laws.\textsuperscript{19} The passage of the VRA was a response to the chasm between Black Americans’ equal right to vote on paper and their lack of access to the ballot box in reality. What good is the “right” to vote when you will face violence for attempting to cast a ballot? Or when your state forces you to jump through arbitrary and exclusionary hoops, such as providing a printed photocopy of a qualifying ID, in order to vote? Recognizing the meaninglessness of the legal right to vote when it is not enforced or actualized, the VRA ushered in a new era in voting rights, marked by a new and expansive conception of what it means to be meaningfully enfranchised.\textsuperscript{20}

The contradiction that inspired the VRA – \textit{What good is your right to vote if you are Black when logistical and procedural barriers make it virtually impossible for you to cast a ballot?} – is unfortunately still felt by hundreds of thousands of American citizens who have the legal right to vote but who are disenfranchised by logistical and procedural barriers when they are detained.

Given the persistently racially disparate impact of disenfranchisement practices, it is unsurprising that Black Americans’ ballot access is particularly compromised by \textit{de facto} disenfranchisement. The racial and economic disparities for pretrial detention and incarceration for misdemeanor offenses are predictably egregious. Black Americans comprise nearly half of the country’s pretrial population despite being only 13\% of the U.S. population.\textsuperscript{21} This is a direct result of the money bail system, which “creates a two-tiered justice system: those with money can buy their way to freedom, while those without money are made to languish in jail.”\textsuperscript{22} The but-for cause of detention for a large and disproportionately non-white swath of the pretrial population is the ability to pay bail: The median money bail amount for a felony charge is $10,000, and the average yearly income of a person who cannot afford bail is $16,000 for men and $11,000 for women.\textsuperscript{23} Race and class disparities are also apparent among individuals detained for probation and parole violations. Black Americans account for 40\% of people detained for probation or parole violations, despite making up only 13\% of the U.S. population.\textsuperscript{24} In some cases, individuals are returned to custody for infractions as minor as being late to a meeting with a parole officer or failing to make payments on a fine.\textsuperscript{25} The overrepresentation of Black Americans and low-income Americans in pretrial detention reflects the racial disparities that exist at every level of the criminal legal system, from arrest to conviction.\textsuperscript{26}
Logistical barriers to voting while detained

There are manifold barriers to casting a ballot from jail, ranging from a lack of information about voter eligibility and how to vote from inside to impediments to voter registration and casting a ballot. Our conversations with voting rights advocates and jail-based voting organizers, as well as the observations of LDF’s Prepared to Vote/Voting Rights Defender teams, have substantiated the significant burden involved in voting from jail.

**Informational barriers.** Some of the most formidable barriers to voting in jail are informational. Details about voter eligibility and how to vote are often sparse, or entirely lacking. Where information is available to incarcerated voters, circulated information about eligible detained voters’ right to vote is often outdated or wholly inaccurate. Jail administrators, who are the point of contact for detained individuals, are often not sufficiently informed of the right to vote pretrial and are confused about eligibility and what they can do to facilitate voting from jail. Sometimes voter registration forms contain incorrect, confusing, or incomplete information about criminal disenfranchisement laws, compounding the problem.

Due to a lack of centralized investment in voter education and information in jails, addressing informational and other barriers sometimes falls to voter outreach teams – nonpartisan organizations or individuals who assist detained voters with ballot access. These grassroots jail outreach teams provide support and access to individuals who are detained around election periods, helping them to cast a ballot. They also pass along important information about the elections themselves, filling a crucial gap: Detained individuals are sometimes isolated from civic education and cannot independently access the information they need to understand whether they are eligible to vote, when elections are being held, and what will be on the ballot. Nonpartisan voter education efforts like LDF’s Prepared to Vote (“PTV”) initiative fill an informational gap for eligible jailed voters. Over the past two years, the PTV team has been working with organizers like Pure Justice and Houston Justice to disseminate accurate and accessible voter education materials to pre-trial detainees at the Harris County Jail in Texas.

**Registration barriers.** While these voter education efforts are crucial, LDF’s PTV staff has seen first-hand that even when voters know they are eligible to vote, numerous obstacles stand in the way of doing so, beginning with the myriad obstacles to registering to vote from jail. In 30 states, people wanting to vote must register days or weeks in advance of Election Day. People detained through the registration period who cannot register from jail may end up excluded from voting. Even those who can meet the deadline to register are likely to face problems doing so. Some states have strict voter ID laws requiring limited forms of identification to register to vote. People in jail are less likely to have the types of identification required to vote, and their personal effects (including IDs) are typically confiscated upon entering the jail. In addition, government-issued prison or jail ID cards frequently do not qualify as acceptable forms of identification. A would-be voter who lacks acceptable identification, either because they never had it or because it was confiscated upon intake, may not be able to register to vote. Even those who manage to keep or regain access to their state-issued identification in jail may not be able to participate in the modernized online voter registration due to a lack of internet access. Without regular and reliable internet access, it can be difficult to check on voter registration status, after submitting a paper or online registration form, to see if the registration was successful.
**Absentee ballot barriers.** Voters who are detained on Election Day are almost always prevented from voting in person. Absentee ballots are the common workaround, but absentee balloting itself presents many additional barriers to voting from jail. A lack of internet access can prevent registered voters from applying to vote by mail, which usually involves submitting a form or request. Even in cases where correctional officers hand out vote-by-mail applications, access is not guaranteed – someone who happens to be in the shower or elsewhere when officers circulated the forms might miss their only chance to obtain one.\(^{33}\)

If a jailed voter manages to overcome registration and absentee ballot request hurdles, the costs of stamps may impede or prevent casting a ballot. Only 19 states and Washington D.C. require local election officials to provide return postage for mailed ballots.\(^{34}\) Voters who live in the remaining 31 states and can’t find or afford postage to mail their ballot back to their elections office may be disenfranchised.

**Voter outreach: An imperfect solution.** The burden of navigating these barriers to registering to vote and voting by mail from jail falls on nonpartisan voter outreach teams, volunteers, and detained voters themselves. Voter outreach teams help detained individuals secure proper identification and navigate other hoops to jump through in order to register to vote or request a mail-in ballot. They have successfully advocated for ballot carve-outs in facilities that digitize mail and procedures to afford detained voters temporary access to their facility-controlled identification. They also educate facility staff about the ballot components that must be delivered for voters to cast their ballot, as well as changes to election procedures and deadlines. Jail-based voter registration and outreach programs are crucial to mitigating voter access issues in jails, but they are not sufficient to resolve the crisis of barriers to voting while detained. Outreach groups rely on people power and resources that are not available everywhere, so many voters are left behind when these groups take on redressing the wide-ranging shortfalls in voting access in jails. And, like detained voters, outreach groups are limited by access and logistical barriers. Jail outreach teams cannot operate in the same way as traditional get-out-the-vote drives, where volunteers can go door-to-door or connect with potential voters at a student union or farmer’s market. They require not only the initiative of non-profit organizations like Pure Justice or other groups but also the cooperation of jail administrators, who have discretion over visitors and outreach within the jail.

Roshawn Evans is the Organizing Director of Pure Justice, a local advocacy group comprised of system-impacted individuals who help to facilitate voter registration drives and advocacy around the jail-based polling place in the Harris County Jail. He told us that many jail administrators block these groups from access to eligible incarcerated voters by denying requests to deliver voter programs. Oftentimes, voter outreach groups are at the mercy of a friendly pro-voter jail administrator or else faced with additional hurdles to jump through.

Outreach groups also rely in some ways on local and state governments, which can limit their efficacy. For example, a paper shortage in Texas during the 2022 election led the Secretary of State’s office to hand out fewer voter registration forms to groups that help register voters.\(^{35}\) This substantially constrained the work of jail-based outreach teams who rely on paper ballots to register detained voters without internet access.\(^{36}\) While these dedicated volunteers and organizations work hard to offer much-needed support, their work should not be the sole source of voter education and engagement, and it will never be a sufficient solution to all of the challenges that detained voters face throughout the country.
Relying on mail-in ballots and voter outreach teams to address a state’s failure to provide robust voter access in jails is a step in the right direction but is far too limited to address the fundamental access problems faced by thousands of eligible incarcerated voters who are *de facto* disenfranchised. The resources of outreach teams are too limited, their presence across geographic regions too uneven, and jail administrators’ discretionary powers too great for this to be a sufficient solution. A more centralized response, which expands opportunities to access the franchise for all detained voters, is possible. Local jails can and should provide voter education, reliable mail-in voting options that are not hindered by inadequately trained mail room personnel or mail digitization policies, and a place for detained individuals to vote, in person, during early voting period and on Election Day.

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### A Tale of Two Jails: The impact of jail-based poll sites

Barriers to voting vary from locality to locality and from jail to jail. Read on to learn about the state of jail-based voting at two counties – and the varying levels of political participation that result.

**Travis County, TX**

LDF and partners are active in Texas’ Travis County, where they have encountered obstacles to voting from jail that reflect some of the complications seen across the country.

Travis County does not have a polling location on-site, so detained individuals must attempt to vote by mail. In Texas, applications to vote by mail must be received by the County Clerk’s Office at least 11 days before an election. As a result, people who enter jail after this deadline must vote in person; otherwise, they will be completely disenfranchised.
Even for people who are incarcerated earlier, submitting a vote-by-mail application and subsequent ballot is often difficult and unreliable to accomplish in a jail setting. Misinformation about eligibility, combined with lack of access to the internet, phones, pens, stamps, and identification cards, means that eligible incarcerated voters must overcome countless hurdles in order to cast their ballot.

Only four people successfully voted by mail from the Travis County Jail in the November 2022 election.

**Cook County, IL**

Beginning in 2020, Illinois law required Cook County to set up voting machines within its jail – Cook County Jail, the nation’s second largest. The jail constructed more than half a dozen temporary poll sites supervised by the Cook County Clerk’s Office and the Chicago Board of Elections.

Jail-based voters, many of whom were able to register and vote on the same day, took advantage of the ability to vote in-person from jail. More than 2,000 of the 5,400 people in Cook County Jail voted in the 2020 general election.

In the 2018 primary, before the establishment of the jail-based poll site, less than 7% of detained individuals voted at the Cook County Jail. In the 2022 primary, after the Cook County Jail enacted jail-based in-person voting, 25% of the individuals detained there voted.

**A better way: Jail-based poll sites**

Eligible voters who are detained during election season do not lose the right to vote simply by virtue of their confinement, but the barriers to voting from jail can be prohibitive, in which case the right to vote from jails is essentially meaningless. The best way to actualize the right to vote from jail – that is, to ensure that all eligible incarcerated voters have the information and access they need to cast a ballot – is to leverage jail infrastructure to provide registration and voting access to jailed voters on site.

Jail-based polling sites, where detained voters can cast their ballots in person, realize the promise of the right to vote while detained. They address some of the most burdensome challenges to voting from jail under traditional circumstances, such as information deficits, registration barriers and absentee ballot complications.

**Addressing informational barriers.** Direct contact with voters is the number one factor impacting voter turnout in jails. Nonetheless advocates report that most jails do not actively provide the information necessary to register and vote. A survey of 68 Wisconsin county jails by the ACLU and All Voting is Local found that only one county provided detailed information on registration and voting and the rest had vague or no voter education or registration procedures. Without information about voter eligibility and procedures, detained individuals are very unlikely to vote successfully. Supporting a jail-based polling site provides...
jails with the opportunity to strengthen their voter education and outreach — and relieves the burden on volunteer organizations and individuals who may assist with outreach and education.

Jail-based polling sites are administered by the same people who already have access to the facility, such as jail administrators and representatives from the sheriff’s office. The entities or individuals who already provide detained individuals with announcements and information about other logistical matters are in a better position than outreach volunteers to communicate announcements and information regarding the polling site at the jail.

Another informational benefit of jail-based polling sites is that voting in person from jail is more straightforward procedurally, so it requires less information and navigation than registering and voting by mail. In other words, voters need less information to be able to vote in person in jail than they would need in order to vote by mail from the jail. This lowers the informational burden of voting from jail.

Many jailed voters do not have access to materials about particular candidates or policies that are on the ballot due to a lack of Internet access in jails.\(^{46}\) Jail-based outreach volunteers have expressed hesitation about bringing voter education materials about particular candidates or policies into jails, and about talking to detained individuals about the candidates in an upcoming election, out of concern over being misperceived as trying to influence voters. A jail-based polling site could provide voter education materials produced by each campaign and nonpartisan sources to inform voters about particular candidates and policies, allowing detained individuals to make informed voting decisions without accessing the Internet or depending on voter outreach teams to provide this crucial information.

**Solving registration barriers.** Allowing individuals in jail to register to vote in person, before or during the voting period and/or on Election Day, minimizes the burden of voter registration under traditional circumstances. In addition to hosting jail-based polling sites, states can and should designate jails as formal voter registration agencies, as Rhode Island has done with its Department of Corrections and Washington, D.C. has done with its jails.\(^{47}\)

Offering on-site voter registration mitigates the Internet, phone, and printer access challenges that make registering to vote from jail so difficult. A jail-based registration apparatus would include the materials needed to register to vote, whether paper registration forms and/or access to an online portal where individuals can register or be registered by an administrator.

In states with same-day voter registration, jail-based polling sites allow detained individuals to register and vote at the same time rather than having to register, apply for a mail-in ballot, and submit a ballot by mail in multiple time-separated steps.

**Solving mail-in ballot barriers.** Jail-based polling sites obviate the need for absentee ballots for most individuals detained during the election period. Mail-in ballots present a host of challenges for detained voters which jail-based polling sites can mitigate. Jail mail delays can jeopardize voters’ timely receipt of a mail-in ballot, and mail digitization policies and inadequately trained mail room personnel may prevent jail voters from receiving a usable ballot.\(^{48}\) Jail polling places eliminate all of these concerns by removing facility mail policies and procedures from the voting process.\(^{49}\) Early deadlines to request a mail-in ballot can disenfranchise individuals who are not detained until after the deadline has passed, whereas anyone who is detained and eligible can vote in person at a jail-based polling site. Some detained individuals fear compromised ballot secrecy since many jails reserve the right for staff to read outgoing mail, whereas ballot secrecy is assured at a jail-based polling site.\(^{50}\) Voter outreach
volunteers who assume the burden of couriering registration forms and ballots back and forth between the jail and the elections office can be criminalized for doing so under “ballot harvesting” laws in some states – at a jail-based polling site, the administrators of the site and elections officials coordinate on ballot return, so volunteers do not run the risk of violating the law.51

**Early success in jail-based voting.** As of 2022, at least eight jails provide in-person voting. Data from these sites suggest that when people in jail know they can vote where they are detained, they do.52 For example, at the Cook County Jail, less than 7% of people detained in the jail voted in the 2018 primary election. After the jail established an on-site polling location in 2020, about 37% of the jail’s population voted in the 2020 General Election.53 That represents an increase of more than 1,500 voters making their voices heard. In the June 2022 Primary Election, people detained in the Cook County jail voted at a higher rate than registered voters in Chicago at large, making the jail “Chicago’s most active voting precinct.”54

Replicating this success in jails across the nation will require buy-in from jail administrators, local officials, individuals in jails and their communities, and community partners. Our upcoming action toolkits will help voters, voting advocates and organizers, and election officials forge these partnerships and take action to establish polling locations and enshrine the ability to vote in or around detention centers.
REFERENCES


6 McDonald, 394 U.S. at 806.

7 Id. at 809–11.


11 Porter, supra note 10.


13 Id. at 55.

14 Id.


20 Id.


22 Id.


36 See id.


38 Profile: Travis County, TX (Pre-COVID: March 2020 to Present), Jail Data Initiative, https://jaildatainitiative.org/profile?fips=48453&state=TX&jail=Travis_County&roster=&date=Precovid (Choose “Pre-COVID: March 2020 to Present” as Date; Choose “Texas” as State; Choose “Travis County” as County; Zoom in on chart data where x-axis reads “Nov 2022”; hover over line graph data to view jail population for each date in the range.) (last visited May 5, 2023).


40 Id.

42 Id.


45 Id.


47 Press Release, supra note 30.

48 Id.

49 See id.

50 Id.


52 Awan, supra note 41.

53 Id.

54 Id.; Jake Sheridan, Chicago Tribune, Chicago’s most active voting precinct is supported by inmates, Corrections1 (Apr. 4, 2023), https://www.corrections1.com/voting-rights/articles/chicagos-most-active-voting-precinct-is-supported-by-inmates-7H243rI67Tc5RhNs/.