

CHALLENGING JAIL-BASED DISENFRANCHISEMENT: A RESOURCE GUIDE FOR ADVOCATES

Just because someone is in jail does not mean that they have lost their right to vote. In fact, most of the 750,000 people who are incarcerated in jails each day in the United States are detained pretrial, which has no impact on voter eligibility. In most states, people who are serving time for misdemeanor convictions also retain their right to vote.

While many jailed voters retain their constitutional right to vote, few actually cast ballots. This is not because they lack an interest in voting, it is because they often can't; it is because of jail-based disenfranchisement.

Jail-based disenfranchisement is not the result of one bad law; instead, it is caused by a complicated, convoluted net of practical barriers that deprive eligible, incarcerated voters of their constitutional right to vote. Although the Supreme Court has affirmed that eligible voters cannot be disenfranchised simply because they are incarcerated, barriers to ballot access from jail remain prolific.

This problem is particularly insidious because of who jailed voters are: a microcosm of historically marginalized voters. Jailed voters are disproportionately people of color, low-income voters, homeless voters, and voters with disabilities.

The good news is that people are increasingly finding new ways of taking action to challenge jail-based disenfranchisement. This resource guide hopes to push that movement forward. Whether you have been doing this work for years or are interested in launching a new effort, we hope this resource guide provides you with actionable information and tools to help you put more ballots into the hands of eligible, incarcerated voters.

The guide proceeds in three parts. It begins by laying out what causes jail-based disenfranchisement, because we must understand this problem before we can go about fixing it. Then, it focuses on advocacy and considers three main approaches to addressing jail-based disenfranchisement, highlighting specific places where this work is occurring and outlining things advocates may want to consider as they take this work on in their own communities. The final section considers how the law can advance advocacy goals and provides an overview of the relevant law to arm advocates with the information they need to assert the rights of jailed voters.

UNDERSTANDING JAIL-BASED DISENFRANCHISEMENT: Why is Voting from Jail So Hard?

As a first order matter, election infrastructure was not built to serve jailed voters. Take for example, absentee voting. Jailed voters often must rely on absentee voting because they cannot show up in person to a polling place to cast their ballots. In states with restrictive absentee ballot laws, though, jailed voters may not be eligible vote absentee or be unable to, for example, comply with a requirement that voters request absentee ballots in person, notarize their absentee ballot requests, or other similar restrictions. Relatedly, voters who are arrested close to Election Day may miss the absentee voting window, which often means they cannot vote at all. Some states do provide emergency voting for voters who become incapacitated unexpectedly close to an election, but these processes often either explicitly exclude jailed voters or impose onerous procedural requirements that make it impossible for jailed voters to participate.

Even if jailed voters can theoretically take advantage of an absentee ballot process or other emergency ballot process, voting from jail is enormously difficult. People in jails are isolated from the outside world. They usually do not have access to the internet or libraries to tell them when elections are, if they are eligible to vote, how to register or cast a ballot, and what is going to be on that ballot. Even if a voter has this information, they may have no support to guide them in filling out the correct paperwork, leading them to provide the wrong mailing address or reason for their absence. Jails are also steeped in bureaucracy, so voting forms and ballots can get caught up in slow jail mail systems and seeking support from third parties outside of jail can be difficult.

The barriers to participation for jailed voters are not only grounded in law and policy, they are also social and political in nature. People in jails disproportionately come from communities that are and long have been over policed, underinvested in, and targeted by disenfranchisement. The system has never worked for them, so why should they trust it? Unsurprisingly, studies have shown that people—and Black men in particular—who spend even short amounts of time in jails become less likely to remain civically engaged upon their release. Often these voters have experienced first-hand institutionalized racism and oppression, which has been disempowering, affirming time and again that their voices do not matter. In some cases, the sheriffs and prosecutors—many of whom are elected officials themselves and who made the decisions that disenfranchised these voters—openly express that they do not believe justice-involved voters should be able to cast ballots.

Part of this work, then, is about combatting this history and context; it is about creating a system that is not only accessible to all voters, but one that encourages participation; it is about finding new ways to empower and elevate voices that are and have long been marginalized in our democracy.

ADVOCACY APPROACHES:

How to Think Strategically about Enfranchising Voters in Jails

I: Create or advocate for voter education and outreach programs in jails.

The number one factor that impacts voter turnout is voter contact. Outreach and support is particularly crucial in jails, where voters have little to no access to outside resources to help them determine if they are eligible to vote and how to cast a ballot. Any program to enfranchise jailed voters should ensure not only that information on eligibility and voting is available, but also that there are robust systems in place for outreach and voter assistance.

Advocates who seek to do this work can engage in a number of ways. They can conduct direct outreach themselves, by volunteering with civic engagement groups who already do this work¹ or, if one doesn't already exist in their area, creating their own. Advocates may also push local and state officials to undertake the work or lobby for rules requiring they do so. Such policies might require jails to provide voter guides, registration, and absentee ballot forms to eligible voters at intake or before elections. Advocates may also lobby to designate jails as Voter Registration Agencies under the National Voter Registration Act, which means they are required to provide registration assistance to voters in jails².

Voices of the Experienced, a grassroots organization formed and run by formerly incarcerated people, has been leading this movement in Louisiana, creating voter education guides that speak directly to incarcerated and formerly incarcerated people³ and working with the Department of Corrections and in jails directly to assist incarcerated voters with absentee voting. Another leader in this space is Washington D.C., which has not only designated jails as Voter Registration Agencies⁴, but also created a voter guide specifically for incarcerated voters⁵ and passed a law requiring officials to identify and reach out to all eligible, incarcerated voters to inform them of their rights⁶.

Advocates doing this work should consider:

- What kinds of materials are needed and who is developing them?
 - Are there voter guides that sufficiently explain the process to voters in jails or do new materials need to be developed? How is information about what is on the ballot being communicated?

¹ Houston Justice Project, *Project Orange*, available at <https://www.houstonjustice.org/inmatejustice>.

² United States Department of Justice, *National Voter Registration Act Questions and Answers*, available at <https://www.justice.gov/crt/national-voter-registration-act-1993-nvra>.

³ Voice of the Experienced, *How Every Seat Up for Election Can Either Harm or Heal Our Futures*, Vote Blog, available at <https://www.vote-nola.org/blog/september-24th-2019>.

⁴ *Voter Registration, Frequently Asked Questions*, District of Columbia Board of Elections, available at <https://www.dcboe.org/FAQS/Voter-Registration>.

⁵ *Voting Guide for Incarcerated and Returning Citizens*, District of Columbia Board of Elections, available at https://www.dcboe.org/dcboe/media/PDFFiles/ReturningCitizens_4-30-18.pdf.

⁶ B22-0312 - D.C. Voting Rights Notification Act of 2017, <http://lms.dccouncil.us/Legislation/B22-0312>.

- When and how should outreach occur?
 - Are there existing systems that advocates plug into, for instance by asking jails to include voter guides in intake materials? Can those who are providing voters with assistance get increased access around election time?
- Who is the best position to carry out this work?
 - This means interest; who wants to do it? Also, resources; who has the capacity and knowledge? Finally, context matters; who can build a trusting relationship with incarcerated voters? Incarcerated and formerly incarcerated people and people from impacted communities should shape and lead any reform efforts.

2: Advocacy focused on election officials and sheriffs; requirements to create and publish jail ballot access plans.

Election law is complicated, particularly as it relates to justice-involved voters. The complexity of this law not only impacts voters who may be confused about whether and when they lose their rights to vote, it also breeds confusion amongst the officials responsible for facilitating jail voting⁷. Educating these officials is itself a worthwhile project, and some advocates engage in this kind of direct outreach and education, doing training and outreach to sheriffs and election officials about their responsibility to provide ballot access to incarcerated voters.

Other advocates, though, have gone a step further and asked sheriffs and election officials to create jail voting plans. This strategy works on two levels, ensuring both that local officials are made aware of their obligation to provide ballot access to jailed voters and pushing them to build infrastructure to do so. The Secretaries of State in Colorado and Arizona have both adopted rules that require local elections officials create plans to provide jailed voters with ballot access⁸. While Arizona's rule is pending approval from the state's Governor and Attorney General, Colorado's was first implemented last year. Colorado's rule also imposes an additional requirement that those plans be published, which improves accountability and creates space for continued advocacy. Reforms like these could also be undertaken locally to require similar action from sheriffs and clerks.

Advocates doing this work should consider:

- Who should you be targeting?
 - If a local clerk is not open to creating a plan, maybe the sheriff is. Also, your Secretary of State may only have the power to require this of election officials, is there a similar authority for jails? Consider all avenues for who can take action.

⁷ Erica Wood and Rachel Bloom, *De Facto Disenfranchisement*, American Civil Liberties Union and Brennan Center for Justice at New York University School of Law (2008) available at <https://www.brennancenter.org/sites/default/files/legacy/publications/09.08.DeFacto.Disenfranchisement.pdf>.

⁸ Julia Rentsch, *Advocates Push to Enfranchise Jailed Colorado Voters*, Reporter Herald, (August 25, 2018) available at <https://www.reporterherald.com/2018/08/25/advocates-push-to-enfranchise-jailed-colorado-voters/>.

- What are you asking them to do?
 - The more specific a jail voting plan is, the better. As advocates ask state and local officials what they are going to do about this issue, they should seek specific deliverables and should consider accountability measures. This could mean designating a particular staffer a point person responsible for coordinating jail voting programming, setting deadlines for plan publication, and asking officials to discuss specific criteria in their plan, for example how they will coordinate with the sheriff's office or how often they will conduct outreach.

3: Push for policies that create election infrastructure that makes voting accessible to all eligible jailed voters.

Often, jailed voters must rely on the absentee ballot system to cast their ballots. However, in some states, absentee voting may be difficult for incarcerated voters. Advocates can push for reforms to change that. In one recent example, Georgia amended its laws to allow absentee ballots to be sent directly to jails. Previously, jailed voters had to mail them to a third party and have that person deliver it to the jail, causing complications for people who lack social support and imposing unnecessary delay.

Voting from jail can also be difficult or impossible for voters incarcerated close to Election Day, after absentee ballot deadlines have passed. Some jurisdictions have solved this problem by providing emergency absentee ballot access to jailed voters who were incarcerated after the deadline⁹, while others have tried to find ways to bring mobile voting locations to jailed voters. Illinois, for example, recently enacted a law placing a permanent polling location inside Cook County Jail in Chicago¹⁰.

Advocates doing this work should consider:

- What are the requirements for voting and can jailed voters meet those requirements?
 - At a basic level, advocates must consider whether the law provides some path for incarcerated voters to cast ballots. For example, in states that require excuses for absentee voting, does state law view incarceration as a valid excuse? Is that still true if they are incarcerated and thus will be present in the jurisdiction where they reside? Do voters ever need to appear in person to apply for absentee voting?
 - The same questions should be asked about late-jailed voters who are incarcerated close to Election Day. Is there a way for them to cast a ballot?
 - Finally, when someone is jailed, their possessions are confiscated. So, if there are ID requirements, will a jail ID or signed affidavit be sufficient?

⁹ *Tommy Ray Mays II et al v. Ohio Secretary of State Frank LaRose Case Action Page*, Campaign Legal Center, available at <https://campaignlegal.org/cases-actions/tommy-ray-mays-ii-et-al-v-ohio-secretary-state-frank-larose>

¹⁰ A.D. Quig, *Chicago's Newest Polling Location? The Cook County Jail*, Crain's Chicago Business, (August 22 2019) available at <https://www.chicagobusiness.com/government/chicagos-newest-polling-location-cook-county-jail>

- Are there existing mechanisms that could be built out to enfranchise jailed voters?
 - If, for example, state law provides for emergency voting or mobile election boards in cases where voters are hospitalized close to Election Day, consider if that infrastructure could be expanded to serve jailed voters. Similarly, could jails alter the IDs they issue such that they could serve as a voter ID?

LEGAL ARGUMENTS: Leveraging the Law to Fight Jail-Based Disenfranchisement

In the fight against jail-based disenfranchisement, advocates do have one powerful advantage: the law is on their side. This section provides an overview of the relevant federal law to ensure advocates can use it to push state and local officials to take action on jail voting reform. If you go to our website, you can find letters that CLC has written to support state and local advocates in advancing their reform goals that will provide you with some concrete examples of how the law can be invoked and leveraged to push forward reform efforts in different contexts. While these letters adopt a stern tone, others might be encouraging—reminding officials of the importance of this right and applauding their efforts in this space. Once you have a sense of what the law is and how might apply in different settings, we hope that you will be able to use it to address the specific needs of your own community.

The Basic Right to Vote from Jail:

In 1974, the Supreme Court ruled in *O'Brien v. Skinner* that jailed, eligible voters cannot be denied their constitutional right to vote.¹¹ In that case, the Court found that pretrial detainees were unconstitutionally denied access to the ballot because were not allowed to cast absentee ballots and the state failed to provide them with any other means of casting their vote. While states are still in control of determining the process by which jailed voters are able to vote, the state has a clear constitutional obligation to provide some process by which all eligible voters can cast their ballot.

While the state has an obligation to facilitate free and unimpaired access to the franchise for any voter,¹² that responsibility is even greater with regard to the voters it incarcerates.¹³ Because the state has undertaken the “affirmative act of restraining the individual’s freedom to act on his own behalf—through incarceration, institutionalization, or other similar restraint of personal liberty”—the protections of the Due Process Clause are triggered.¹⁴ With these constitutional concerns in mind, there is a responsibility for states to have processes in place to ensure the eligible voters it incarcerates have access to the ballot from the moment they are arraigned through Election Day.

¹¹ See *O'Brien v. Skinner*, 414 U.S. 524, 534 (1974).

¹² *Reynolds v. Sims*, 377 U.S. 533, 562 (1964) (“[T]he right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.”).

¹³ See *Youngberg v. Romeo*, 457 U.S. 307, 317 (1982) (“[W]hen a person is institutionalized—and wholly dependent on the State—. . . a duty to provide certain services and care does exist . . .”).

¹⁴ *DeShaney v. Winnebago Cty. Dep’t of Soc. Servs.*, 489 U.S. 189, 199–200 (1989).

The Voting Rights Act:

Failing to provide ballot access to eligible, jailed voters can give rise to liability under the Voting Rights Act.¹⁵ Because we live in a world where people of color—specifically Black people, Native Americans, and Latinos—are more likely to be jailed than their white counterparts, they’re more likely to experience jail-based disenfranchisement. In many places, defendants of color are not only less likely to be released without bail, they are also less likely to be offered pretrial diversion, and more likely to have higher bails imposed. Whenever a law or practice disproportionately deprives voters of color of access to the ballot, there may be a violation of section 2 of the Voting Rights Act.

Jail-Based Disenfranchisement as a Poll Tax:

Low-income voters also suffer disproportionately without robust processes in place to facilitate jail voting. Many pretrial detainees are incarcerated solely because they cannot afford to pay bail. In such instances, bail operates as a function poll tax; it is the only thing preventing low-income voters from leaving the jailhouse and entering the polling place. As the Supreme Court clearly stated in *Harper v. Virginia State Bd. Of Elections*, “a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard.”¹⁶ A person’s ability to pay, thus, cannot stand as a barrier to the ballot box. Just as it is unconstitutional to bar low-income people from voting with the imposition of a poll tax,¹⁷ the imposition of bail cannot function to deny anyone of their right to vote.

Requirements for Uniformity and Procedural Due Process:

The state also has a responsibility to put processes in place to ensure jailed voters are not erroneously deprived of their right to vote, i.e. that they will not be disenfranchised by mistake.¹⁸ The obligation to provide procedural safeguards is particularly strong where the threatened harm is a deprivation of the right to vote, because of a deprivation of the right to vote is permanent.¹⁹ Once someone is denied an opportunity to participate in an election, the election is over and the state cannot remedy the harm after the fact. The risk of erroneous deprivation in this context is also high. Because the system of criminal disenfranchisement in this county is so complex, officials and voters alike are often confused about when someone is eligible to vote and how they can cast ballots.²⁰ Justice-involved voters may also have particularly complicated voting issues arise, for example dealing with past convictions or difficulties accessing proof of residency from jail. Procedural due process, then, demands that states and localities have support and infrastructure in place—perhaps trainings, published policies on jail voting, and educational materials—to ensure eligible voters who want to access the ballot reliably can.

¹⁵ See 52 U.S.C. § 10301.

¹⁶ *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 666 (1966).

¹⁷ See U.S. Const. amend. XXIV.

¹⁸ See, e.g., *Goldberg v. Kelly*, 397 U.S. 254, 262–63 (1970).

¹⁹ *Mathews v. Eldridge*, 424 U.S. 319, 342 (1976).

²⁰ See Erika Wood & Rachel Bloom, *De Facto Disenfranchisement*, Am. Civil Liberties Union And Brennan Center For Justice, 2–5 (2008); see also Asma Khalid, *Election Laws May Discourage Some From Voting, Even If They Are Allowed*, NPR (Oct. 13, 2019), <https://www.npr.org/2018/09/13/646314446/election-laws-may-discourage-some-from-voting-even-if-they-are-allowed>; Colorado Criminal Justice Reform Coalition, *Press Release: Colorado Survey Finds Significant Public Confusion Surrounding Voting Rights of People with Criminal Records; Many Eligible Voters are Widely Believed to Be Ineligible*, According to New Report (Oct. 12, 2018).

Similarly, the Equal Protection Clause imposes what known as a uniformity requirement.²¹ Uniformity requires that eligible voters across jurisdictions be able to be able to go into the voting booth (or seek an absentee ballot) with similar degrees of confidence that they will be able to cast their ballot and have it counted. Uniformity issues arise when problems in election administration go beyond “garden variety election irregularity” and produce a system infected by fundamental unfairness.²² When jurisdictions lack uniform policies and procedures such that a voter in one jurisdiction is far more likely to have his ballot thrown out than someone in a neighboring jurisdiction, there may be uniformity problems sufficient to give rise to liability under the Equal Protection Clause. These arguments might be particularly useful in the jail voting context, where bail practices, rates of pretrial incarceration, and jail voting infrastructure vary greatly from jurisdiction to jurisdiction.

²¹ See *Bush v. Gore*, 531 U.S. 98 (2000); see also *Hunter v. Hamilton Cty. Bd. of Elections*, 635 F.3d 219, 236 (6th Cir. 2011).

²² See Edmund S. Sauer, Note: “Arbitrary and Disparate” Obstacles to Democracy: The Equal Protection Implications of *Bush v. Gore* on Election Administration, 19 J. L. & POL. 299, 321 (2003); see also Jay M. Mitzer, Annotation, Application of Equal Protection Principle Recognized in *Bush v. Gore*, 531 U.S. 98, 121 S. Ct. 525, 148 L. Ed. 2d 388 (2000), to Elections Cases, 104 A.L.R.6th 547 (2015).