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Casting a Ballot for Change: How to Overcome Jail Policy Deficiencies and the O'Brien Precedent to Expand Voting Rights for Jailed Individuals

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COMMENTS

CASTING A BALLOT FOR CHANGE: HOW TO OVERCOME JAIL POLICY DEFICIENCIES AND THE *O'BRIEN* PRECEDENT TO EXPAND VOTING RIGHTS FOR JAILED INDIVIDUALS

Lorelee Kampschnieder*

*Prior to the 2020 election, lawmakers in several states sought to expand voting rights for individuals with felony convictions, and while this work is important, a large swath of voters who legally never lost the right to vote are still unable to do so because they are detained in jail. These individuals, often detained prior to trial, have the right to vote pursuant to a 1974 Supreme Court ruling in *O'Brien v. Skinner*. However, despite the clear legal precedent protecting voting rights for those in jail, the right remains unrealized for most incarcerated individuals due to numerous barriers. Some localities, such as the Cook County jail, have taken steps to provide access to voting to those in jail. However, a multi-faceted approach using policy and legal solutions is necessary to address disenfranchisement in jail. This Comment first examines the extent of disenfranchisement in jail by showing that disenfranchisement specifically targets indigent individuals and minorities. It also reveals the specific barriers incarcerated individuals face when trying to vote from jail. Next, this Comment reviews and critiques the existing legal landscape of voting rights for those in jail stemming from the *O'Brien* case. Finally, this Comment offers potential legal and policy solutions that can redress the rights violations faced by those in jail who are unable to vote.*

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INTRODUCTION

Several states made headlines surrounding the 2020 election for expanding voting rights to people with felonies and those previously incarcerated on felony convictions.¹ In Florida, organizers and formerly incarcerated individuals celebrated the passage of Amendment 4, which restored the right to vote to people with prior felony convictions.² In D.C. and Maryland, lawmakers passed bills to allow people convicted of felonies

¹ Matt Vasilogambros, *More States Expand the Ballot to Previously Incarcerated*, PEW CHARITABLE TR. (June 1, 2021), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2021/06/01/more-states-expand-the-ballot-to-previously-incarcerated> [https://perma.cc/Z7VY-UW95].

² Alex Pena, *Former Felons in Florida Cast Their First Ballots in Early Voting*, CBS NEWS (Oct. 26, 2020, 6:04 PM), <https://www.cbsnews.com/news/florida-former-felons-vote-2020-election/> [https://perma.cc/U5U3-VZTE].

to vote while in prison.³ As public opinion continues to shift toward re-enfranchisement, most voting rights legislation dealing with incarcerated individuals mirrors these headlines; they deal with felony disenfranchisement policy reforms.⁴ However, this type of policy reform specifically overlooks the more than 658,000 people being held in jail that remain disenfranchised, even though the majority have not been convicted of crimes and remain eligible to vote.⁵

While some jails, like the Cook County jail in Chicago, have taken steps to allow those incarcerated to register and vote,⁶ the majority have not, so voting rights for those in jails remain dependent on the person's location.⁷ For example, while 40% of eligible people in the Cook County jail voted in the 2020 general election,⁸ in Arizona, fewer than one out of every twenty eligible voters in jail voted.⁹ In Pennsylvania, only fifty-two out of 25,000 people in jails across the state were sent a ballot for the 2020 election.¹⁰ Like

³ Julie Zauzmer Weil & Ovetta Wiggins, *D.C. and Maryland Have New Policies Allowing Prisoners to Vote. Making It Happen Is Hard*, WASH. POST (Sept. 28, 2020, 7:00 AM), <https://www.washingtonpost.com/dc-md-va/2020/09/28/dc-maryland-prisoners-voting/> [<https://perma.cc/BJ5Q-G6KR>].

⁴ See MORGAN MCLEOD, SENT'G PROJECT, EXPANDING THE VOTE: TWO DECADES OF FELONY DISENFRANCHISEMENT REFORM 3–4 (2018), <https://www.sentencingproject.org/publications/expanding-vote-two-decades-felony-disenfranchisement-reforms> [<https://perma.cc/6TNV-853M>].

⁵ Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2022*, PRISON POL'Y INITIATIVE (Mar. 14, 2022), <https://www.prisonpolicy.org/reports/pie2022.html> [<https://perma.cc/9ASL-KZPU>].

⁶ Madeline Carlisle & Lissandra Villa, *Most of the 750,000 People in Jail Are Eligible to Vote. These Advocates Are Fighting to Get Them Registered.*, TIME (Sept. 11, 2020, 2:25 PM), <https://time.com/5887658/voting-in-jail-2020-election> [<https://perma.cc/C8KW-96B4>] (reporting efforts by Spread the Vote, All Voting is Local, and Chicago Votes to make ballots more accessible in jails, featuring Chicago Votes and Cook County Jail as an example).

⁷ Madeline Carlisle & Lissandra Villa, *Whether or Not You're Able to Vote in Jail May Come Down to Where You're Incarcerated*, TIME (Oct. 1, 2020, 8:19 PM), <https://time.com/5895219/voting-jail-2020-election> [<https://perma.cc/7X3G-ZXS5>].

⁸ Amanda Vinicky, *Voting at Cook County Jail Sees 40% Turnout for General Election*, WTTW NEWS (Oct. 28, 2020, 9:25 PM), <https://news.wttw.com/2020/10/28/voting-cook-county-jail-sees-40-turnout-general-election> [<https://perma.cc/H2XZ-LSNP>].

⁹ ARIZ. COAL. TO END JAIL-BASED DISENFRANCHISEMENT, UNLOCK THE VOTE ARIZONA, PART 3: JAIL-BASED VOTING IN ARIZONA'S NOVEMBER 2020 GENERAL ELECTION 5, <https://www.votefromjail.org/wp-content/uploads/2021/05/General-Election-JBV-Report-1.pdf> [<https://perma.cc/5NT2-T2TY>] [hereinafter UNLOCK THE VOTE ARIZONA] (collecting data on the number of ballots requested by individuals in jail, the number of those ballots that were returned, and estimates of the number of individuals eligible to vote from county jails).

¹⁰ ALL VOTING IS LOC., BALLOTS FOR ALL: HOLDING PENNSYLVANIA COUNTY JAILS ACCOUNTABLE FOR PROVIDING BALLOT ACCESS 3 (Sept. 7, 2021), <https://allvotingislocal.org/media/ballots-for-all-holding-pennsylvania-county-jails-accountable-for-providing-ballot-access> [<https://perma.cc/GXT8-EPVE>].

Chicago, several other cities—Denver, Los Angeles, New York, and Washington D.C.—have also recently worked toward enfranchising voters in jail; however, the norm across the U.S. is that individuals in jail that are eligible to vote legally have meager voting turnout rates.¹¹

The low percentage of voters is not due to lack of interest;¹² rather, would-be voters often face numerous barriers to voting, including lack of access, and, in some cases, resistance from jail staff.¹³ Most of the barriers to voting faced by those in jail are not legal ones, as the Supreme Court affirmed that many in jail have the constitutional right to vote in 1974.¹⁴ However, despite having the right to vote, little has been done to ensure that those who want to vote while in jail are able to do so. Improving access to voting for those in jail represents a unique problem because incarcerated individuals rely on jail staff, outside voting organizations, family members, or friends to help them register to vote, receive their ballot, and cast their vote.¹⁵ Those exercising power over protocols for jails, such as sheriffs or county officials, typically have not developed administrative rules or oversight regarding voting. These officials also do not have a specific program for voting in prison, and there is no state law expressly establishing standards for access to voting in jails.¹⁶

Not only has the issue gone unaddressed by lawmakers and those in charge of jails, but legal scholarship and case law addressing these voting rights also remain undeveloped.¹⁷ Additionally, it is difficult to track the

¹¹ See Danielle Root & Lee Doyle, *Protecting the Voting Rights of Americans Detained While Awaiting Trial*, CTR. FOR AM. PROGRESS (Aug. 23, 2018, 9:00 AM), <https://www.americanprogress.org/issues/democracy/reports/2018/08/23/455011/protecting-voting-rights-americans-detained-awaiting-trial> [<https://perma.cc/6EVS-825R>]; see also Naila Awan, *Jail-Based Polling Locations: A Way to Fight Voter Disenfranchisement*, PRISON POL'Y INITIATIVE (Oct. 25, 2022), https://www.prisonpolicy.org/blog/2022/10/25/jail_voting [<https://perma.cc/8AWW-DTE8>].

¹² See Awan, *supra* note 11 (finding, in general, that in jails where people could register or vote, people chose to do so, and that people in jail in Cook County voted at a higher rate than registered voters in the city of Chicago).

¹³ Ginger Jackson-Gleich & S. Todd Yeary, *Eligible, But Excluded: A Guide to Removing the Barriers to Jail Voting*, PRISON POL'Y INITIATIVE, https://www.prisonpolicy.org/reports/jail_voting.html [<https://perma.cc/YR3D-7LKS>]; see also UNLOCK THE VOTE ARIZONA, *supra* note 9, at 2 (“We have heard countless stories of applications [to vote] being ignored, deadlines being purposely and arbitrarily changed, no explanations given for why a person cannot receive a ballot, and even increased scrutiny by jail staff towards those who refused to relinquish their right to vote.”).

¹⁴ See *O'Brien v. Skinner*, 414 U.S. 524, 531 (1974).

¹⁵ See Jackson-Gleich & Yeary, *supra* note 13.

¹⁶ See Dana Paikowsky, *Jails as Polling Places: Living Up to the Obligation to Enfranchise the Voters We Jail*, 54 HARV. C.R.-C.L.L. REV. 830, 837–42 (2019).

¹⁷ *Id.* at 832.

progress of voting in jails because even in jails with established voting programs, data remains difficult to find, and jails without established polling locations continue to be unforthcoming about their processes.¹⁸

As legal scholarship is lacking in this area, this Comment seeks to explore further the problem of disenfranchisement of those in jail and what legal and policy solutions are available. The Comment first explores the expansive impact of disenfranchisement of those in jail, explicitly highlighting the groups of people most impacted. Part I seeks to describe the barriers that exist to voting in jail specifically. Part II reviews the legal landscape surrounding voting rights for those in jail while also emphasizing the shortcomings of the existing doctrine. Drawing on this context, Part III explores potential legal solutions using constitutional claims, including violations of the Twenty-fourth Amendment, vote denial claims under the Voting Rights Act, procedural justice claims, and claims enforced by the Department of Justice. Finally, Part IV explores policy alternatives that also can provide for enfranchisement, especially in situations where the legal hurdles are too significant to overcome for those in jail.

I. THE IMPACT OF DISENFRANCHISEMENT ON JAILED INDIVIDUALS

A. THE DIFFERENCE BETWEEN PRISON AND JAIL

Before the problem of disenfranchisement in jails can be fully understood, it is necessary to understand what a jail is and who is in it. Jails serve a different function than prisons. Over 80% of the people in jails are accused of crimes and have been arrested but not yet convicted, so they remain in custody,¹⁹ often because they cannot pay bail.²⁰ Even though these individuals are not convicted, they can still be detained for significant periods while awaiting trial, especially if it is a trial for a felony charge, which averages between 50 to 200 days of pretrial detention.²¹ About 16% of those

¹⁸ Awan, *supra* note 11.

¹⁹ Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2023*, PRISON POLICY INITIATIVE (Mar. 14, 2023), <https://www.prisonpolicy.org/reports/pie2023.html> (finding that out of the average daily local jail population of 514,000 individuals, only 88,000, approximately 17%, had been convicted of a crime).

²⁰ U.S. COMM'N ON CIV. RTS., THE CIV. RTS. IMPLICATIONS OF CASH BAIL, ii, 5 (Jan. 20, 2022) <https://www.usccr.gov/files/2022-01/USCCR-Bail-Reform-Report-01-20-22.pdf> [<https://perma.cc/96MY-34CW>] (finding that more than 60% of arrested and accused individuals are detained prior to trial because they cannot post bail, and 30% of those individuals remain in jail until trial because of their inability to pay bail).

²¹ PATRICK LIU, RYAN NUNN & JAY SHAMBAUGH, HAMILTON PROJECT, THE ECONOMICS OF BAIL AND PRETRIAL DETENTION 5 (2018), https://www.hamiltonproject.org/assets/files/BailFineReform_EA_121818_6PM.pdf [<https://perma.cc/2KP5-B6DC>].

in jail have been convicted and are serving short sentences for misdemeanor convictions, typically lasting less than one year.²² While much less prevalent, there are some incarcerated individuals in jail serving felony sentences.²³ On the other hand, prisons typically house people convicted of felony sentences that carry longer sentences.

Another stark difference between prison and jail is the population at any given time. There are 2.3 million incarcerated people in the U.S. There are 3,134 local jails in the United States.²⁴ On any given day, the average jail population is around 740,000, roughly one-third of the total incarcerated population.²⁵ By contrast, there are 1,833 state and 110 federal prisons in the United States, housing roughly 1.5 million people.²⁶ Each year, 600,000 people are sent to prison as opposed to the five to nine million unique individuals that spend time in jail each year, in addition to the millions of individuals cycling through jail more than once within a single year.²⁷ These numbers demonstrate just how important it is to enfranchise those in jail because daily statistics of the jailed population do not fully illustrate the enormous amount of people that spend time in jail at any point in a given year, which far surpasses that of the prison population.

B. UNDERSTANDING WHO IS DISENFRANCHISED IN JAIL

It is difficult to determine the number of eligible voters in jail, given the high turnover rate of incarcerated individuals and the variance of voter eligibility in each state. Each state has laws governing who is eligible to vote based on current or previous conviction status, with the majority of state laws restricting voting around felony convictions, which can last throughout incarceration and even beyond.²⁸ Looking at the total jail population, 35%

²² See Sawyer & Wagner, *supra* note 19 (“Only a small number (about 87,500 on any given day) have been convicted, and are generally serving misdemeanors sentences under a year.”).

²³ See JOHN M. DAWSON, BUREAU OF JUST. STAT., FELONY SENTENCING AND JAIL CHARACTERISTICS 3 (1993).

²⁴ See Sawyer & Wagner, *supra* note 5.

²⁵ *Id.* It is important to note that this number represents the consistent average population prior to the Covid-19 pandemic when courts began releasing inmates instead of incarcerating them due to the safety concerns from the pandemic. See also JACOB KANG-BROWN, CHASE MONTAGNET & JASMINE HEISS, VERA INST. OF JUST., PEOPLE IN JAIL AND PRISON IN SPRING 2021 (2021).

²⁶ Sawyer & Wagner, *supra* note 5.

²⁷ *Id.*

²⁸ See Jackson-Gleich & Yeary, *supra* note 13 (reporting that all but three states have barriers that keep a person serving a felony sentence from voting, and some states impose barriers for prior felony convictions).

are serving a sentence in jail or are in jail after conviction but awaiting sentencing.²⁹ Of this 35%, only a minority are legally barred from voting due to a felony conviction or, in some states, a misdemeanor conviction, which depends on the state laws dealing with voting, the type of conviction, and current incarceration. However, the majority of people in jail (65%) have not been convicted of a crime, meaning that although they are in jail, they are not legally prohibited from voting.³⁰ It is crucial to ensure that people detained pretrial can access their right to vote as the number of pretrial detainees has rapidly grown since the 1970s due to the increased use of monetary bail.³¹ Additionally, the length of time people stay in jail has increased exponentially, increasing 22% between 2010 to 2017.³² This means that the likelihood of someone spending time in jail during an election has dramatically increased.

More importantly, disenfranchisement of those in jail disproportionately impacts the most disadvantaged populations of people in our country, including racial minorities, those with disabilities and mental illnesses, and homeless and indigent people. First, Black, Latinx, and Indigenous people make up over half of the incarcerated population in jail,³³ despite accounting for roughly one-third of the population in the United States.³⁴ Black men are more likely than their counterparts to be detained before trial.³⁵

Additionally, for years jails have served as “de facto mental health hospitals” because more than 63% of people in jail experience mental health problems.³⁶ The prevalence of severe mental illness occurs at rates of four to

²⁹ ZHEN ZENG & TODD D. MINTON, U.S. DEP’T OF JUST., BUREAU OF JUST. STAT., JAIL INMATES IN 2019 1 (2021).

³⁰ Sawyer & Wagner, *supra* note 5.

³¹ LÉON DIGARD & ELIZABETH SWAVOLA, VERA INST. OF JUST., JUSTICE DENIED: THE HARMFUL AND LASTING EFFECTS OF PRETRIAL DETENTION 1 (2019) (showing that the population of pretrial detainees in jail has increased 433% from 1970 to 2015).

³² Jake Horowitz & Tracy Velázquez, *Why Hasn’t the Number of People in U.S. Jails Dropped?*, PEW CHARITABLE TR. (Mar. 27, 2020), <https://www.pewtrusts.org/en/research-and-analysis/articles/2020/03/27/why-hasn-t-the-number-of-people-in-us-jails-dropped> [<https://perma.cc/9VFH-W8FP>] (analyzing Bureau of Justice Statistics data over and finding that length of jail stays has increased but not determining the cause of this increase).

³³ See ZENG & MINTON, *supra* note 29, at 5.

³⁴ *Quick Facts: United States*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/US/PST045219> [<https://perma.cc/Q7PZ-TA8N>] (July 15, 2021).

³⁵ See RAM SUBRAMANIAN, RUTH DELANEY, STEPHEN ROBERTS, NANCY FISHMAN & PEGGY MCGARRY, VERA INST. OF JUST., INCARCERATION’S FRONT DOOR: THE MISUSE OF JAILS IN AMERICA 15 (2015).

³⁶ DORIS J. JAMES & LAUREN E. GLAZE, U.S. DEP’T OF JUST., BUREAU OF JUST. STAT., MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES 1 (2006).

six times higher in jail than in the general public.³⁷ This is because people with severe mental illness are often experiencing other issues such as homelessness, poverty, and substance abuse disorders when their underlying mental health disorders are left untreated, which increases the likelihood that they will be arrested and jailed for minor offenses.³⁸ Even worse, “[w]hile most people with serious mental illness in jails . . . enter jail charged with minor, nonviolent crimes, they end up staying in jail for longer periods of time,” in some cases, twice as long as the general population.³⁹ In addition to those who are mentally ill, jails also disproportionately imprison people with disabilities, with approximately 40% of the jail population reporting having at least one disability.⁴⁰ Unlike some of the other vulnerable groups in jail, disabled individuals are afforded additional protections when it comes to voting.⁴¹

Disenfranchisement in jail also unfairly punishes those living in poverty because of the prevalence of monetary bail and the cycle of criminal legal debt. Many people spending time in jail are already experiencing financial hardship, with 26% of people in jail experiencing homelessness prior to incarceration.⁴² To add to the problem, most states require arrested individuals to pay cash bail to be released while waiting for their case to come to court.⁴³ To put the cost of bail into perspective, for felonies, the median bond is around \$10,000.⁴⁴ This amount is approximately eight months’ income for the average detained person, representing a substantial financial

³⁷ SUBRAMANIAN ET AL., *supra* note 35, at 12.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ JENNIFER BRONSON, LAURA M. MARUSCHAK & MARCUS BERZOFKY, U.S. DEP’T OF JUST., BUREAU OF JUST. STAT., *DISABILITIES AMONG PRISON AND JAIL INMATES, 2011–12* 4 (2015).

⁴¹ See generally *The Americans with Disabilities Act and Other Federal Laws Protecting the Rights of Voters with Disabilities*, U.S. DEP’T OF JUST. (Oct. 10, 2014), https://archive.ada.gov/ada_voting/ada_voting_ta.htm [<https://perma.cc/SS25-42GW>] (reporting the federal government’s comprehensive protection of voting rights of people with disabilities).

⁴² *More on Legal Perils of Homelessness*, HUM. TOLL OF JAIL & VERA INST. OF JUST. (2016), <http://humantollofjail.vera.org/legal-perils-of-homelessness> [<https://perma.cc/AF3D-DSA5>].

⁴³ See *Bail Reform*, ACLU, <https://www.aclu.org/issues/smart-justice/bail-reform> [<https://perma.cc/H6MC-AYVR>].

⁴⁴ BERNADETTE RABUY & DANIEL KOPF, PRISON POL’Y INITIATIVE, *DETAINING THE POOR: HOW MONEY BAIL PERPETUATES AN ENDLESS CYCLE OF POVERTY AND JAIL TIME* 1 n.9 (2016) (finding that the only nationally calculated median of felony bail was from the Bureau of Justice Statistics which calculated median felony bail as \$10,000 in 2009 and not finding a median estimate of misdemeanor bail).

burden.⁴⁵ Bail is often unaffordable, even when set at a lower amount.⁴⁶ For example, in New York City, more than 50% of people in jail who were pretrial detainees face misdemeanor charges and cannot pay a bail set at \$2,500 or less.⁴⁷ Bail consistently and unfairly punishes poor people by subjecting them to incarceration solely based on their financial liquidity.⁴⁸ Pretrial incarceration is not just for short amounts of time; in some cases, individuals spend months in jail for low-dollar bail.⁴⁹ For instance, Randall McCray, a mentally ill man who was arrested for disorderly conduct, spent more than two and a half months in jail in Atlanta until an anonymous donor paid his bail.⁵⁰

Even those that leave jail may end up returning because of the accumulation of debt due to criminal legal system involvement. Many people incarcerated in jail are there because they cannot afford to pay bail, and they risk losing their jobs due to incarceration.⁵¹ Additionally, while in jail, inmates are charged fees for numerous services, including laundry, medical care, and telephone services, which add up.⁵² Some jailed individuals also face thousands of dollars of debt due to the combination of expenses that continue to accrue as they remain incarcerated, including child support, credit card debt, and rent.⁵³ All these costs add up and can create economic instability, which increases the likelihood that an individual will be incarcerated solely based on vulnerability due to financial hardship.⁵⁴ People can also be incarcerated for failing to pay their bills, such as child support. In fourteen states, people can be incarcerated for failing to pay child support (which continues to accrue while they are incarcerated); they may be released

⁴⁵ Sawyer & Wagner, *supra* note 5.

⁴⁶ See SUBRAMANIAN ET AL., *supra* note 35, at 32.

⁴⁷ N.Y.C.L.U., PRESUMED INNOCENT FOR A PRICE: THE IMPACT OF CASH BAIL ACROSS EIGHT NEW YORK COUNTIES 7 (2018), https://www.nyclu.org/sites/default/files/field_documents/bailreport_20180313_final.pdf [<https://perma.cc/PS82-GJJ4>].

⁴⁸ RABUY & KOPF, *supra* note 44, at 3.

⁴⁹ Steven D. Schwinn, *The Bail Bond System and Rule of Law*, AM. BAR ASS'N (Jan. 27, 2022), https://www.americanbar.org/groups/public_education/publications/insights-on-law-and-society/volume-21/issue-3/the-bail-bond-system-and-rule-of-law [<https://perma.cc/X36K-CJQG>].

⁵⁰ Richard Fausset, *Bail Was \$500, Money He Didn't Have. Atlanta Faces Calls for Change.*, N.Y. TIMES (Jan. 11, 2018), <https://www.nytimes.com/2018/01/11/us/atlanta-bail-courts-reform.html> [<https://perma.cc/J45C-RQW2>].

⁵¹ SUBRAMANIAN ET AL., *supra* note 35, at 16.

⁵² *Id.* at 15.

⁵³ *See id.*

⁵⁴ *See id.*

and given time for repayment, only to end up back in jail because they were still unable to pay.⁵⁵

These vulnerable populations must be able to exercise their right to vote, even when in jail. First, studies have shown that enfranchisement increases pro-social attitudes, which decreases recidivism.⁵⁶ The power to vote provides vulnerable populations with the power and agency to change the discriminatory practices and lack of access to affordable housing and healthcare that often lead to these populations' disproportionately higher incarceration rates. This type of agency is critical on the local level, where election outcomes can be closer, and people in jail can have a bigger impact in swaying election outcomes. It is also crucial that people in jails weigh in on the outcome of local elections for stakeholders that directly impact incarcerated people, such as sheriffs and judges.⁵⁷ Most importantly, ensuring that those incarcerated have the right to vote is a step toward restoring the political power that has been systemically stripped from communities of color through mass incarceration.⁵⁸

C. CURRENT BARRIERS TO VOTING FACING THOSE IN JAIL

Before being able to determine what legal and policy solutions can fix access to voting in jail, it is necessary to understand the numerous existing barriers. There are four main areas where improvement is warranted to correct the following problems: lack of information, policy, registration, and absentee voting regulations.

⁵⁵ See Tara O'Neill Hayes & Margaret Barnhorst, *Incarceration and Poverty in the United States*, AM. ACTION F. (June 30, 2020), <https://www.americanactionforum.org/research/incarceration-and-poverty-in-the-united-states> [<https://perma.cc/9CS5-JUJE>].

⁵⁶ See e.g., Victoria Shineman, *Restoring Rights, Restoring Trust: Evidence that Reversing Felon Disenfranchisement Penalties Increases Both Trust and Cooperation with Government* (Working Paper, Oct. 25, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3272694 [<https://perma.cc/U5RU-JKNF>] (reviewing studies surveying individuals who had been disenfranchised due to a felony conviction that find that when those individuals received information about policies that would restore voting rights, individuals show “stronger trust in government and the criminal justice system, perceive government as being more fair and representative, and report an increased willingness to cooperate with law enforcement” and providing evidence to suggest that based on the results of these surveys “restoring voting rights to disenfranchised citizens helps those citizens develop the types of pro-democratic attitudes commonly associated with successful post-prison re-entry, reduced tendencies to commit crime, and lower rates of recidivism”).

⁵⁷ See Carlisle & Villa, *supra* note 7.

⁵⁸ See Paikowsky, *supra* note 16, at 846–47.

I. Lack of Information

One of the most considerable barriers to accessing the right to vote for those in jail is a lack of information about voting. Without the aid of outside civic rights organizations that explain voting rights to those in jail, many are unaware that they even have the right to vote while incarcerated.⁵⁹ Not only do some fear that being in jail means they have lost their right to vote, but the lack of information disseminated by jail officials to detainees about their rights also contributes to the confusion about eligibility.⁶⁰ Unlike prisons, where most people are incarcerated on felony charges, and thus are consistently disenfranchised, confusion can arise in jails where some people may be barred from voting due to prior convictions, but others can vote as they are simply awaiting trial.⁶¹

Indeed, the confusion about general eligibility can also be complicated by information provided by states on registration forms.⁶² Voter registration forms often use complex statutory language that may be inaccessible or use vague terms, confusing those detained in jail about their eligibility, regardless of their criminal history.⁶³ For example, Louisiana's voter registration affirmation asks a registrant to swear that they are not currently "under an order of imprisonment for conviction of a felony."⁶⁴ This means that the inability to vote is not limited to when a person is imprisoned for a felony, but also includes "parole, probation, and suspended sentences," which is not explicit in the language.⁶⁵ The voter registration also does not explain that those with felony convictions must submit proof that they are no longer "under an order of imprisonment" to successfully register to vote.⁶⁶ Another example of inaccessible phrasing can be found in Arkansas' registration, which asks if the registrant has ever pleaded "nolo contende," without explaining what the legal phrase means.⁶⁷

⁵⁹ See Margaret Barthel, *Getting Out the Vote from the County Jail*, ATL. (Nov. 4, 2018), <https://www.theatlantic.com/politics/archive/2018/11/organizers-fight-turn-out-vote-county-jails/574783> [<https://perma.cc/EW3S-47YP>]; see also Hannah Critchfield, *Helping People in Jail Exercise Their Right to Vote in North Carolina*, PBS (Oct. 1, 2020), <https://www.pbs.org/wgbh/americanexperience/features/vote-help-people-jail-right-vote-north-carolina> [<https://perma.cc/2QTM-LLX9>].

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² See ACLU, VOTING WITH A CRIMINAL RECORD: HOW REGISTRATION FORMS FRUSTRATE DEMOCRACY 6 (2008).

⁶³ See *id.* at 7–11.

⁶⁴ *Id.* at 8.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 9.

The remedy is not always as simple as asking someone for help. Election officials who could answer eligibility questions are often difficult or impossible to reach via phone,⁶⁸ and jail officials may give out incorrect information.⁶⁹ Additionally, in some states, election officials were also confused or were incorrect in their understanding of who was eligible to vote.⁷⁰ In some cases, jail staff can actively bar voting by refusing to answer questions or provide registration information, retaliate against those who want to vote, or prevent voter rights organizations from sharing information within the jail about voter eligibility.⁷¹ These problems are all compounded by the fact that asking outsiders for help is severely limited due to restrictions on phone calls, emails, visitors, and internet access. When the information in jails is unreliable, those inside are forced to call on friends and family, who may not have the answers, for help or rely on independent civic organizations that are not necessarily accessible depending on where someone is jailed.⁷²

Additionally, even where those in jail understand their right to vote and how to exercise it, there is still the issue of being informed about the election itself. Those who have expressed their desire to vote feel that the right is hollow without access to information about the candidates.⁷³ As one incarcerated individual expressed: “If we are going to be allowed to vote, we need more information on who’s running. I need to know how can I benefit from voting for a particular candidate.”⁷⁴ While some localities offer full-fledged civic participation classes and information about candidates, most do not offer the distribution of published voter guides in jail.⁷⁵ Even where outside organizations take the time to pay for and print voting guides, there is no guarantee this information makes its way to incarcerated people due to misunderstandings by jail staff about mail restrictions and what information

⁶⁸ ERIKA WOOD & RACHEL BLOOM, ACLU & BRENNAN CTR. FOR JUST., *DE FACTO DISENFRANCHISEMENT* 2, 7–8 (2008).

⁶⁹ Jackson-Gleich & Yeary, *supra* note 13.

⁷⁰ WOOD & BLOOM, *supra* note 68, at 2.

⁷¹ See Carlisle & Villa, *supra* note 7.

⁷² *Id.*

⁷³ See e.g., La Risa Lynch, *Illinois Advocates Work to Ensure Ballot Access for Jail Voters During Pandemic*, GROUNDTRUTH PROJECT (Oct. 13, 2020), <https://thegroundtruthproject.org/illinois-advocates-work-to-ensure-ballot-access-for-jail-voters-during-pandemic-chicago/> [<https://perma.cc/33KT-79MH>].

⁷⁴ *Id.*

⁷⁵ See Kelli Smith, *Cook County Jail Set for In-Person Voting Despite COVID-19 Setbacks: ‘It’s Also About Social Justice, It’s About Fairness, It’s About Hope’*, CHI. TRIB. (Sept. 21, 2020, 5:00 PM), <https://www.chicagotribune.com/news/breaking/ct-cook-county-jail-inmate-election-vote-20200921-mh3yo3z6bnfq5fgdqhxco6weve-story.html> [<https://perma.cc/7MFC-28EY>]; Jackson-Gleich & Yeary, *supra* note 13.

could be disseminated.⁷⁶ To make matters worse, even when the government approves third-party election material, sheriffs, who are often running for office themselves, can still bar the information from being shared.⁷⁷ Without this information, it is difficult for those in jail to cast their ballot in a way that is actually meaningful.

2. *Lack of Policy*

Another common problem is that even where the law itself does not create voting barriers, the lack of established policies in jails to enable voting does. Prior to 2021, there was no momentum at the federal level for jails to enforce policies to ensure that people in jail could vote. On March 7, 2021, President Biden passed Executive Order 14019, requiring the United States Marshals Service to include language in jail contracts that would “require the jails to provide educational materials related to voter registration and voting, and to facilitate voting by mail, to the extent practicable and appropriate.”⁷⁸ While this is a step in the right direction, there is no guarantee that the executive order is enough to push jails in the right direction.

First, the Executive Order only directs the Attorney General to design procedures to ensure that language about voting is included in jail contracts with the United States Marshals Service.⁷⁹ Not all jails have contracts with the Marshals Service, which are known as intergovernmental agreements that allow the Marshals Service to house federal detainees at certain state and local facilities.⁸⁰ Therefore, this Executive Order would only be enforceable against jails that do contract with the Marshals Service. Additionally, the Attorney General has yet to design these procedures, so it is unclear if there will be any enforcement mechanism against jails that include the language in their contracts but do not follow through with actually providing voting information and policies.⁸¹ Most concerning, there is no clear timeline for

⁷⁶ See e.g., Carlos Ballesteros & Emily Hoerner, *Injustice Watch Mailed Its Judicial Election Guide to 1,000 Detainees at Cook County Jail. They Never Received Them*, INJUSTICE WATCH (Oct. 26, 2020), <https://www.injusticewatch.org/news/2020/cook-county-jail-rejects-1000-judicial-election-guides-mailed-to-detainees> [<https://perma.cc/8HGZ-HAMN>].

⁷⁷ See Letter from Ariz. Coal. to End Jail-Based Disenfranchisement et al., to Joseph Dedman, Sheriff, Apache Cnty. & Michael Cirivello, Commander, Apache Cnty. Jail at 1, 2 (Sept. 25, 2020), https://campaignlegal.org/sites/default/files/2020-10/FINAL_Apache%20County%20Jail%20Voting%20Letter.pdf [<https://perma.cc/S9MS-USG5>].

⁷⁸ Exec. Order No. 14019, 86 Fed. Reg. 13623, 13626 (Mar. 7, 2021).

⁷⁹ *Id.*

⁸⁰ See U.S. DEP’T OF JUST. OFF. OF THE INSPECTOR GEN., OVERSIGHT OF INTERGOVERNMENTAL AGREEMENTS BY THE UNITED STATES MARSHALS SERVICE AND THE OFFICE OF THE FEDERAL DETENTION TRUSTEE ii (2007).

⁸¹ See Exec. Order No. 14019, *supra* note 78.

when these procedures will be established, nor is it clear that the Attorney General's office will take steps to ensure these policies are actually in place and functioning properly.⁸² Thus, despite the existence of the executive order requiring jails to facilitate voting, barriers remain.

Since the Executive Order, states have failed to create meaningful voting policies within jails. For example, in Pennsylvania, twenty-six out of sixty-one county jails definitively have no established policies for voting in jail, and another fifteen did not respond when asked about their policies.⁸³ Of the twenty county jails with established policies, thirteen only provided vague language within their policy that did not offer useful guidance about key dates, documents required, or what steps jailed individuals need to complete to register and vote by mail.⁸⁴ Without established policies, jails often do not take affirmative actions to facilitate voting, leaving the responsibility on the jailed individual who may be confused about their eligibility or not understand the voting process.

3. Registration

In situations where jailed voters actually understand the voting process and know how to register, there are still barriers inherent within the registration process. First is the issue of access to the registration forms themselves. For those not incarcerated, registering to vote usually involves filling out an online or physical form.⁸⁵ This alone poses a challenge for incarcerated individuals who typically cannot access the internet and may face difficulties obtaining registration forms at the jail.⁸⁶ This can be further complicated by registration deadlines, which vary from state to state. While some states allow voters to register on the same day they vote, the majority require registration in advance of the election, meaning if someone is unable to register while incarcerated, they will be unable to vote.⁸⁷ Voting identification requirements compound problems because some states require voters to provide certain forms of IDs, such as a driver's license or social security number, to register to vote. This may be difficult for jailed individuals to meet because they typically do not have access to personal

⁸² *See id.*

⁸³ ALL VOTING IS LOC., *supra* note 10.

⁸⁴ *Id.*

⁸⁵ *How to Register to Vote*, USA.GOV, <https://www.usa.gov/register-to-vote> [<https://perma.cc/WJ7D-J39V>].

⁸⁶ Jackson-Gleich & Yeary, *supra* note 13.

⁸⁷ *Voter Registration Deadlines*, NAT'L CONF. OF STATE LEGISLATURES (Feb. 10, 2023), <https://www.ncsl.org/elections-and-campaigns/voter-registration-deadlines> [<https://perma.cc/58NB-XA5Q>].

effects while incarcerated, including their government-issued identification.⁸⁸ Without policies in place for the jail to provide jailed persons access to their IDs, they may not be able to register or cast their ballots.⁸⁹

4. *Absentee Voting*

Similar to registration, absentee voting policies also pose barriers to registration. If someone is already registered to vote, there is no guarantee that they will be able to access an absentee ballot to vote in the election. In sixteen states, to vote absentee, a voter must qualify based on a few available justifications, which often do not include being in jail.⁹⁰ It is not clear that jails in these states have established alternative methods of providing ballots or ways for jailed individuals to vote when they are not allowed to access an absentee ballot. Additionally, since the 2020 election and widespread false claims of election fraud, some states have sought to restrict voting by mail, making it more difficult to obtain a ballot in person, reducing the timeline to vote by mail, and increasing ID requirements.⁹¹

II. EXISTING LEGAL LANDSCAPE

A. SUPREME COURT PRECEDENT

The existing case law upholding the right to vote from jail is sparse at best. The right to vote while detained pretrial in jail was established and further solidified in three Supreme Court cases in the 1970s,⁹² but despite more recent claims of disenfranchisement from jail adjudicated in lower

⁸⁸ See Letter from Danielle M. Lang, Campaign Legal Ctr., to Judge Hidalgo 5 (Sept. 23, 2019), <https://campaignlegal.org/sites/default/files/2019-09/Letter%20Re%20Harris%20County%20Jail%20Voting%20Initiative-merged.pdf#page=5> [<https://perma.cc/J4MG-XU64>].

⁸⁹ *Id.*

⁹⁰ See Table 2: *Excuses to Vote Absentee*, NAT'L CONF. OF STATE LEGISLATURES (Apr. 20, 2020), <https://www.ncsl.org/research/elections-and-campaigns/vopp-table-2-excuses-to-vote-absentee.aspx> [<https://perma.cc/6CFF-H6EG>].

⁹¹ See *Voting Laws Roundup: July 2021*, BRENNAN CTR. FOR JUST. (July 22, 2021), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-july-2021> [<https://perma.cc/P7AF-7RAN>]; see also Elise Viebeck, *Here's Where GOP Lawmakers Have Passed New Voting Restrictions Around the Country*, WASH. POST (July 14, 2021, 6:21 PM), <https://www.washingtonpost.com/politics/2021/06/02/state-voting-restrictions> [<https://perma.cc/U6XS-MHKJ>].

⁹² See *McDonald v. Bd. of Election Comm'rs of Chicago*, 394 U.S. 802 (1969); *Goosby v. Osser*, 409 U.S. 512 (1973); *O'Brien v. Skinner*, 414 U.S. 524 (1974).

courts,⁹³ the Supreme Court has not addressed the issue further, in part due to doctrinal murkiness created by these early cases.⁹⁴

The first case addressed by the Supreme Court was *McDonald v. Board of Election Commissioners of Chicago*, where two people detained during pretrial in the Cook County jail brought an equal protection challenge because they were denied absentee ballots while in jail.⁹⁵ The challenge was to an Illinois state law that prohibited registered and present individuals in a specific county on election day from voting with an absentee ballot unless they had a categorically approved exception, such as being physically unable to go to the polls for medical reasons.⁹⁶ Under the law, being in jail in the same county an individual was registered in did not fall into any of the allowable exceptions under the law.⁹⁷

The Court did legal gymnastics, finding that, despite not being able to obtain an absentee ballot and not being able to go to a physical polling location, the state of Illinois had not deprived the jailed individuals of the right to vote within their absentee ballot law.⁹⁸ The Court came to this conclusion because no Illinois law specifically disenfranchised those in jail, and reasoned that they could not conclude based on the record that “the State might not, for instance, possibly furnish the jails with special polling booths or facilities on election day, or provide guarded transportation to the polls

⁹³ See e.g., *Mays v. LaRose*, 951 F.3d 775 (6th Cir. 2020); see also *Barnhart v. Gladieux*, No. 1:17-CV-124-TLS, 2019 WL 1470200 (N.D. Ind. Apr. 3, 2019); *Buroff v. Gladieux*, No. 1:17-CV-124-TLS, 2018 WL 2277093 (N.D. Ind. May 17, 2018).

⁹⁴ Paikowsky, *supra* note 16, at 853–55 (arguing that despite the right to vote from jail being upheld by the Supreme Court, a variety of barriers to bringing successful challenges exist based on the doctrinal landscape created by these Supreme Court cases. These barriers include litigants knowing the specific steps they would need to take in jail to try and vote, such as requesting an absentee ballot and transport to the polls and being denied at each step, to meet the high burden of proving an “absolute deprivation” of the right to vote, in addition to litigants having to overcome the issue that it is unclear “what kinds of specific state action give rise to the constitutional harm.” Paikowsky argues that these barriers have led to especially limited successful claims of relief, citing only *Murphree v. Winter*, 589 F. Supp. 374 (S.D. Miss. 1984) and *Dawson v. Kendrick*, 527 F. Supp. 1252 (S.D. W. Va. 1981). What Paikowsky does not say explicitly, but can be inferred from her analysis, is that many cases face insurmountable barriers for relief such that these claims are rarely pursued as to be heard by circuit courts of appeal, let alone the Supreme Court. In fact, Paikowsky’s entire review of jail voting cases relies on only two circuit court cases, *Swann v. Sec’y of State of Ga.*, 668 F.3d 1285 (11th Cir. 2012) and *Fair Elections Ohio v. Husted*, 770 F.3d 456 (6th Cir. 2014), both of which were district court cases that were vacated and remanded, and petitions for certiorari were never filed in either case.).

⁹⁵ *McDonald*, 394 U.S. at 803–04.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* at 807.

themselves for certain inmates, or entertain motions for temporary reductions in bail to allow some inmates to get to the polls on their own.”⁹⁹ The Court applied a rational basis standard of review because it found that Illinois was not restricting voting rights based on wealth or race through its law.¹⁰⁰ The Court also concluded that the right to vote was not actually at stake here but rather the right to vote with an absentee ballot.¹⁰¹ In the first loss for jailed individuals, this case set the initial foundation for establishing that there is no constitutional right to an absentee ballot.¹⁰²

The next case where the Supreme Court addressed voting rights for jailed individuals was *Goosby v. Osser*.¹⁰³ This case was brought by a class of people detained in Philadelphia’s jails, with the majority being non-white pretrial detainees who could not afford bail because they were indigent.¹⁰⁴ The class alleged that, unlike *McDonald*, Pennsylvania’s laws absolutely denied jailed individuals the right to vote both facially and as applied to them, violating both the Equal Protection Clause and Due Process Clause of the Fourteenth Amendment.¹⁰⁵ The Court agreed with the petitioners, finding that they were “absolutely prohibited” from voting because state law specifically denied a person “confined in [a] penal institution” the ability to vote using an absentee ballot.¹⁰⁶ After all, the petitioner’s requests to register and to vote in person, by proxy, had been denied, and polling locations and registration facilities were not set up at the prison.¹⁰⁷ The Court, however, did not decide the case on the merits, but instead remanded it, finding that the petitioners raised a claim that the lower courts could consider.¹⁰⁸

Finally, in *O’Brien v. Skinner*, the Court decided the constitutionality of a claim brought by people denied the right to vote while in jail.¹⁰⁹ In this case, a group of people in jail that were otherwise able to vote were barred by New York law from requesting an absentee ballot while in jail because they were confined in the same county in which they resided.¹¹⁰ Unlike *McDonald*, the record reflected that the appellants tried to establish a procedure to be

⁹⁹ *Id.* at 809 n.6.

¹⁰⁰ *Id.* at 807.

¹⁰¹ *Id.*

¹⁰² *Id.* at 806–07.

¹⁰³ 409 U.S. 512 (1973).

¹⁰⁴ Brief for Petitioners at 3–4, *Goosby v. Osser*, 409 U.S. 512 (1973) (No. 71-6316), 1972 WL 135834, at *3–*4.

¹⁰⁵ *Goosby*, 409 U.S. at 513–14.

¹⁰⁶ *Id.* at 521–22.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 522.

¹⁰⁹ *O’Brien v. Skinner*, 414 U.S. 524, 531 (1974).

¹¹⁰ *Id.* at 528–29.

registered while in jail or transported to voting locations but were denied, leading the Court to find that the burden on the right to vote was severe.¹¹¹ The Court noted that because voters jailed in their county of registration could not vote using an absentee ballot, but voters jailed outside of their county of registration could, the state statute granted the right to vote to some while disenfranchising others. Because of this, Justice Marshall's concurrence argued that the law should be reviewed using a heightened level of scrutiny to determine whether the exclusion is necessary to promote a compelling state interest.¹¹² The Court held that the state statute arbitrarily discriminated between categories of qualified voters and that the restriction constituted an unconstitutional burden.¹¹³

B. CONSTITUTIONAL DISENFRANCHISEMENT CHALLENGES
BROUGHT BY JAILED INDIVIDUALS SINCE *O'BRIEN*

O'Brien leaves a sparse, but existent, framework to find constitutional injury when jailed voters are disenfranchised, specifically if a state makes it necessarily impossible for jailed persons to vote due to the statutes or policies.¹¹⁴ However, in practice, courts have rarely upheld challenges brought by jailed persons based on the framework established in *O'Brien*.

In 1980, a Tennessee district court ordered a permanent injunction that the jail had to provide otherwise eligible but detained voters with absentee ballots.¹¹⁵ The court justified its finding using the framework from *O'Brien*, as the Tennessee law prohibited anyone held in a penal institution from obtaining a ballot.¹¹⁶ The law made it necessarily impossible for the jailed individuals to vote because the state officials refused to allow any alternative means of voting, such as temporarily releasing inmates so they could vote, transporting inmates to polling places, or establishing polling places inside of the jail.¹¹⁷ In 1981, a district court in West Virginia found that the jail "must take steps to facilitate the right to vote as otherwise established by West Virginia Law."¹¹⁸ However, the court's remedy was for the jail to simply submit a plan to facilitate voting.¹¹⁹

¹¹¹ *Id.* at 525–27.

¹¹² *See id.* at 533 (Marshall, J. concurring).

¹¹³ *Id.* at 530.

¹¹⁴ *Id.*

¹¹⁵ *Tate v. Collins*, 496 F. Supp. 205, 211 (W.D. Tenn. 1980).

¹¹⁶ *Id.* at 209.

¹¹⁷ *Id.* at 208.

¹¹⁸ *Dawson v. Kendrick*, 527 F. Supp. 1252, 1316 (S.D. W.Va. 1981).

¹¹⁹ *Id.* at 1316.

In 1984, a district court in Mississippi granted a preliminary injunction for a class of jailed people to prohibit the jail from denying their right to vote.¹²⁰ In that case, the jail officials told incarcerated people that they would not be able to vote, and when their families inquired with the city, they were told that the people would not be able to vote using an absentee ballot, but rather, a deputy would have to take the incarcerated individuals to the polls, which they refused to do.¹²¹ In this case, the court concluded that the statute allowing absentee ballots for people who are sick or physically unable to vote would literally encompass those in jail because they cannot physically leave to vote.¹²² More importantly, the court ruled that if the statute was read as not encompassing jailed individuals, then it would effectively disenfranchise them, which would render the statute unconstitutional.¹²³

While the courts in these cases required the jails to facilitate voting for jailed people, they were not lenient about administrative errors contributing to disenfranchisement in jail. For example, in *Swann v. Handel*, jail officials gave the plaintiff an application for an absentee ballot, but state law required that ballots only be sent to the voter's home address or an address outside of the county in which they were registered.¹²⁴ Mr. Swann only put his home address on the ballot, but was not told about the drop box in the jail lobby, so he expected the ballot to come to the jail, instead of having a family member drop off the ballot in the box.¹²⁵ As a result, Mr. Swann was not able to vote in the election, as he never received his ballot, and he sued the jail arguing that the law as applied violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment.¹²⁶

The court first dismissed Mr. Swann's equal protection claim. Mr. Swann was not treated differently from other similarly situated inmates because he failed to request that the ballot be mailed to the jail, even though the ballot would not have been sent there under the state's law.¹²⁷ The court then dismissed his procedural due process claim because he had not been denied the right to vote, as his application for an absentee ballot was approved even if he was not told where it would be delivered.¹²⁸ The court

¹²⁰ *Murphree v. Winter*, 589 F. Supp. 374, 374 (S.D. Miss. 1984).

¹²¹ *Id.* at 376.

¹²² *Id.* at 381.

¹²³ *Id.*

¹²⁴ *Swann v. Handel*, No. 1:09-CV-2674-TWT, 2010 WL 4117448, at *1 (N.D. Ga. Oct. 18, 2010), *vacated and remanded by Swann v. Sec'y of Ga.*, 668 F.3d 1285 (2012).

¹²⁵ *Id.*

¹²⁶ *Id.* at *1-2.

¹²⁷ *Id.* at *3.

¹²⁸ *Id.* at *4.

also refused to determine whether the ballot drop box was constitutionally sufficient because the ballot box at the jail was provided to resolve the issue if inmates registered under their home address, but put the jail as their mailing address, which Mr. Swann did not do.¹²⁹

Courts have also granted deference to jail staff who do not assist incarcerated people in obtaining the necessary voting forms. For instance, the plaintiff in *Montgomery v. Whidbee* asked the jail staff for assistance in getting forms to vote in the upcoming election, but the jail staff did not assist him.¹³⁰ The court did not find this to be a constitutional violation because “‘even though the right to vote is well-established’ and cannot be entirely removed from an otherwise eligible detainee, the Court is not aware of any authority imposing a constitutional obligation on county jail officials to provide forms ‘which the detainee may acquire for himself.’”¹³¹

C. CRITIQUING THE *O’BIEN* FRAMEWORK AS DEVELOPED BY LOWER COURTS

Despite the Supreme Court’s ruling in *O’Brien*, as discussed above, many people in jail still do not have the right to vote. This is partly due to the legal hurdles the *O’Brien* framework presents. First, *O’Brien* never clearly defined what made a statutory scheme and policies “unconstitutionally onerous” for jailed voters.¹³² However, in practice, as seen in the cases above, it appears that a constitutional violation usually requires a combination of lack of access to voting registration or ballots, when requested correctly by individuals, and refusal by jail officials to provide alternatives. This means that in certain cases it is difficult to establish that the bad practices, which ultimately led to disenfranchisement, rise to the level of being “unconstitutionally onerous.” For example, as seen in *Swann*, a jail may provide a way for jailed people to vote absentee without explaining voting protocols, which effectively leaves jail voters uninformed and disenfranchised, but does not rise to the level of being “unconstitutionally onerous” because voting was still technically possible.¹³³ This means that the problem of inmates not knowing about their right to vote is not something for which the court is willing to hold the jail accountable. This is problematic

¹²⁹ *Id.*

¹³⁰ *Montgomery v. Whidbee*, 446 F. Supp. 3d 306, 313 (M.D. Tenn. 2020).

¹³¹ *Id.* (quoting *Long v. Pierce*, No. 2:14-CV-00244-LJM-MJD, 2016 WL 912685, at *5 (S.D. Ind. Mar. 10, 2016)).

¹³² *O’Brien v. Skinner*, 414 U.S. 524, 530 (1974) (quoting *Rosario v. Rockefeller*, 410 U.S. 752, 760 (1973)).

¹³³ *See Swann*, 2010 WL 4117448, at *4.

given the realities of incarceration, where those in jail do not readily have the ability to research their eligibility to vote and request the proper forms.

Additionally, the *O'Brien* framework does not care if the right to vote itself is hollow, so long as it technically exists. Democracy works best when the electorate is adequately informed about the choices they are making.¹³⁴ However, people in jail often cannot research the ballot they are voting on while incarcerated, nor do they have access to the internet and media the same way the general public does.¹³⁵ They also do not have a right to receive information about the election, but are beholden to whether the jail permits the distribution of voter guides by outside sources.¹³⁶ For instance, in 2020, the Arizona Coalition to End Jail Based Disenfranchisement provided politically neutral voting guides to the Apache County jail, but jail staff never distributed the guides, leaving those incarcerated feeling uninformed due to their lack of access to information.¹³⁷ Effectively, under *O'Brien*, as long as people in jail retain the right to vote, jail staff will likely be held not liable for withholding information despite the consequences for the ability of jailed individuals to exert their right to vote to the fullest extent.

Administrative policies that effectively lead to disenfranchisement are not always found to be “unconstitutionally onerous” despite making voting practically impossible. For example, Yonas Kahsai, unlike many of his jailed colleagues, knew that he had the right to vote while jailed despite being told otherwise by jail staff.¹³⁸ Despite correctly requesting an absentee ballot to be sent to the jail, Kahsai never received one because the ballot arrived in an envelope that was too large, violating the mail restriction rules in the jail.¹³⁹ Even though Kahsai was unable to vote due to no fault of his own, under the existing *O'Brien* framework as it has played out in lower courts, it is unclear whether or not Kahsai would have a justiciable claim because he would need to prove that he had no other alternatives to vote. Even then, jail officials are

¹³⁴ Rebecca Weisberg, *Voting 101: The Ethics of Being Informed*, UNIV. N.C. CHAPEL HILL: OFF. ETHICS & POL'Y BLOG (Oct. 29, 2020), <https://ethicspolicy.unc.edu/news/2020/10/29/voting-101-the-ethics-of-being-informed> [<https://perma.cc/EB5T-94RC>].

¹³⁵ Letter from Ariz. Coal. to End Jail-Based Disenfranchisement et al. to Joseph Dedman, Sheriff, Apache Cnty. & Michael Cirivello, Commander, Apache Cnty. Jail, *supra* note 77, at 2.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ Hannah Critchfield, *Only Eight People Voted from Arizona's Jails in 2018. Will This Election Be Different?*, INTERCEPT (Mar. 16, 2020, 11:20 AM), <https://theintercept.com/2020/03/16/voting-rights-arizona-jails>. [<https://perma.cc/9TK3-QKZU>].

¹³⁹ *Id.*

afforded a wide berth of protection from claims of unconstitutionality under the qualified immunity doctrine.¹⁴⁰

Ultimately, *O'Brien* created a heavily fact-specific analysis that varies from case to case, requiring a jailed individual to show that the right to vote is prohibited. Unfortunately, this framework fails to acknowledge when given realities make voting nearly impossible. For example, it appears as though neither the jail staff nor the state is likely to be held liable under *O'Brien* for failing to provide information about “voting, voter eligibility, or voter registration” and “access to the ballot for persons eligible to register and/or vote.”¹⁴¹ Having access to this information is crucial for most people in jail to exercise their right to vote, but because lack of clarity about these procedures does not make voting impossible through a state statute, jailed individuals are afforded no affirmative right to receive such information under *O'Brien*. Similarly, lower courts have also found the lack of state “strategy governing inmate voter registration and voting” and lack of state plans to “distribute ballots, absentee or otherwise, to pretrial detainees or convicted misdemeanants who are registered voters wanting to exercise their right to vote” acceptable under the *O'Brien* framework because, while these issues may lead to disenfranchisement, they are not specific provisions of the law that burden or prohibit the jailed person’s right to vote.¹⁴²

Not only does the *O'Brien* framework allow for disenfranchisement to continue due to the aforementioned reasons, but it is especially arduous for litigants to prove they were disenfranchised under the framework. For example, since the *O'Brien* framework is a fact-specific analysis that requires an ample record of specific jail policies or practices that prohibit voting leading to a constitutional violation, plaintiffs have to maintain a detailed record of facts regarding what is happening within the jails, which often relies on accessing nonpublic information controlled by the jails.¹⁴³ This not only poses problems for individual litigants that are directly impacted, but also limits the ability of interest groups to challenge jail practices that are disenfranchising. These groups often do not have the ability to enter jails, request relevant records, and interview detained individuals.¹⁴⁴

¹⁴⁰ See *Swann v. Handle*, No. 09-CV-2674-TWT, 2010 WL 4117448, at *4 (N.D. Ga. Oct. 18, 2010).

¹⁴¹ *Johnson v. Prince George’s Cnty. Bd. of Elections*, No. CV DKC 17-2867, 2018 WL 1069434, at *1 (D. Md. Feb. 27, 2018).

¹⁴² *Id.*

¹⁴³ See Sarah Geraghty & Melanie Velez, *Bringing Transparency and Accountability to Criminal Justice Institutions in the South*, 22 STAN. L. & POL’Y REV. 455, 458 (2011).

¹⁴⁴ *See id.*

Additionally, while many claims by practiced lawyers failed to meet the pleading standard,¹⁴⁵ it is exponentially more difficult for jailed pro se litigants to sufficiently plead their case as they often lack the resources and specific legal knowledge to successfully argue the nuances of these cases.¹⁴⁶ As discussed above, a majority of jail inmates cannot afford bail, let alone the legal fees that come with hiring a lawyer to represent them in the case or even in filing a claim. For instance, in one jail voting case, the plaintiff was pro se and in forma pauperis, but the court still denied the plaintiff's request for council and required a filing fee of 20% of "the average monthly balance in the prisoner's trust account for the six-month period immediately preceding the filing of the complaint."¹⁴⁷

In addition to filing fees, the court often decides these types of cases based on standing,¹⁴⁸ which makes it difficult for pro se claims to succeed due to the complexities of the facts that need to be alleged. There is also the issue of "doctrinal muddiness" that makes it difficult to plead a claim due to the issue of inconsistent findings by the court.¹⁴⁹ For example, courts have been inconsistent in stating what constitutes a sufficient claim, with some finding a verbal request for a ballot as sufficient, but others requiring more.¹⁵⁰ It is also unclear whether jails are required to take affirmative steps to facilitate voting or if deliberate intent to impede the right to vote is required for relief.¹⁵¹ All of these factors mean that jailed individuals who do not have a right to counsel in civil matters, combined with filing fees and doctrinal complexities, face a steep uphill battle in filing their own claims to challenge jail voting policies.

¹⁴⁵ See, e.g., *Johnson*, 2018 WL 1069434, at *3–5 (dismissing the § 1983 claim for lack of standing, for failure to state a claim, and for failing to establish an actual controversy for declaratory judgment).

¹⁴⁶ Paikowsky, *supra* note 16, at 853–54.

¹⁴⁷ See *Garnett v. Milwaukee Cnty. Jail*, No. 06-C-1257, 2007 WL 1121338, at *1 (E.D. Wis. Apr. 16, 2007) (dismissing Garnett's pro se case, even though he successfully pled that his constitutional right to vote was violated, because Garnett sued the jail, which does not meet the definition of a person "for purposes of federal civil rights statutes").

¹⁴⁸ See *Swann v. Sec'y of State of Ga.*, 668 F.3d 1285, 1288 (11th Cir. 2012); see also *Fair Elections Ohio v. Husted*, 770 F.3d 456, 459 (6th Cir. 2014); *Garnett v. Criss*, No. 06-C-1257, 2008 WL 11170297, at *6 (E.D. Wis. July 29, 2008).

¹⁴⁹ Paikowsky, *supra* note 16, at 854.

¹⁵⁰ *Compare Post v. Du Page Cnty.*, No. 91 C 447, 1993 WL 101823, at *8 (N.D. Ill. Apr. 1, 1993) with *Long v. Pierce*, No. 2:14-cv-00244-LJM-MJD, 2016 WL 912685, at *5 (S.D. Ind. Mar. 10, 2016).

¹⁵¹ See *Dawson v. Kendrick*, 527 F. Supp. 1252, 1280 (S.D. W.Va. 1981); see also *Criss*, 2008 WL 11170297, at *6.

III. POSSIBLE LEGAL SOLUTIONS

Given the challenges posed by the *O'Brien* framework, the question remains as to what the best way is to ensure voting rights for jailed individuals through the courts. Though the law remains underdeveloped in this area, there are several potential approaches that would provide alternative avenues to remedy jail-based disenfranchisement, including framing jail disenfranchisement as a poll-tax issue, trying a new application of the Voting Rights Act, arguing that this type of disenfranchisement is a procedural due process issue, or involving the Department of Justice.

A. FRAMING JAIL DISENFRANCHISEMENT AS A POLL-TAX ISSUE

First, to skirt the problems faced by individual litigants and the arduous fact-specific record requirements of *O'Brien*, litigants could frame the inability to access the polls as a poll-tax issue. Under both the Twenty-Fourth Amendment and the precedent established in *Harper v. Virginia State Board of Elections*, poll taxes are unconstitutional.¹⁵² Litigants that are jailed pretrial based on their inability to pay bail, and then subsequently unable to exercise their right to vote because they are unable to vote while in jail, could argue that bail is effectively functioning as a poll tax under the Twenty-Fourth Amendment. In *Harper*, the Court found that a poll tax was unconstitutional under the Equal Protection Clause of the Fourteenth Amendment because there was no justification for tying voter qualification to wealth, so requiring the payment of a fee amounted to “invidious discrimination.”¹⁵³ Similarly, litigants could compare bail to a poll tax, arguing that they are unable to vote due to their inability to pay bail, while their counterparts who could pay bail were released and thus able to vote. In this case, litigants could argue that this amounts to discrimination based on wealth because pretrial detainees have not yet been convicted of a crime, so there is no other classification impacting their ability to vote other than their ability to pay bail.

This is an important distinction when compared to *Jones v. Governor of Florida*.¹⁵⁴ In *Jones*, the Eleventh Circuit upheld a Florida law requiring previously disenfranchised people convicted of felonies to pay all fines and fees before their right to vote is restored.¹⁵⁵ While the court ultimately upheld this regulation, it did so based on the finding that because Florida has an interest in rehabilitating people convicted of felonies and payment of fees is

¹⁵² U.S. CONST. amend. XXIV, § 1; *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 686 (1966).

¹⁵³ *Id.* at 667–68.

¹⁵⁴ 975 F.3d 1016 (11th Cir. 2020).

¹⁵⁵ *Id.* at 1027.

part of the conviction, rehabilitation is not complete until every part of the conviction, including payment of fines, is complete.¹⁵⁶ The court also applied rational basis review, instead of a higher level of scrutiny, because people with felonies do not have a fundamental right to vote.¹⁵⁷

However, unlike the *Jones* case, jailed individuals detained prior to trial have not been convicted of a crime, and they are presumed innocent until convicted. Unlike people convicted of felonies, the right to vote remains a fundamental right for individuals detained pretrial.¹⁵⁸ In this case, pretrial detention in jail is not serving the purpose of punishment or rehabilitation, as is the case with prison sentences, but rather ensures that the individual appears for their court date. Moreover, the government's interest in collecting fines and fees also does not apply, because bail is returned once the person attends all of their required court appearances. Additionally, the government is not "safeguarding the ballot box from a singularly unqualified group of potential voters" because those that can pay bail are still able to easily access their right to vote.¹⁵⁹ Though this argument has potentially given the difference between bail for pretrial detainees and fines resulting from felony conviction, it is crucial that if a plaintiff brings this claim, they should do so in a court that will likely find in the plaintiff's favor, given the ideological composition of the Court.

B. USING A NEW APPLICATION OF THE VOTING RIGHTS ACT

While the law is typically not applied in this way, another potential avenue is to bring a claim under the Voting Rights Act of 1965 (VRA). Section 2 prohibits voting practices that discriminate on the basis of race.¹⁶⁰ Recently, vote denial claims have been brought under Section 2 to challenge laws or practices that limit minority participation in elections, focusing on issues such as ID requirements, registration hurdles, and limits on absentee voting.¹⁶¹ While vote denial claims under Section 2 are still developing in the courts, the basic test has become "that an election measure violates [S]ection 2 if it (1) causes a disparate impact on minority voters (2) through the law's interaction with conditions of social or historical race discrimination."¹⁶² This test is based on the notion that Congress has discretion "to outlaw all voting

¹⁵⁶ *Id.* at 1034.

¹⁵⁷ *Id.* at 1029.

¹⁵⁸ *See, e.g., Reynolds v. Sims*, 377 U.S. 533, 561–62 (1964).

¹⁵⁹ *Jones v. Governor of Fla.*, 950 F. 3d 795, 812 (11th Cir. 2020).

¹⁶⁰ 52 U.S.C. § 10301.

¹⁶¹ Hayden Johnson, Note, *Vote Denial and Defense: A Strategic Enforcement Proposal for Section 2 of the Voting Rights Act*, 108 GEO. L. J. 449, 465 (2019).

¹⁶² *Id.* at 458.

arrangements that result in denial or abridgement of the right to vote even though not all such arrangements are unconstitutional, because this is a means of preventing their use as engines of purposive and therefore unconstitutional racial discrimination.”¹⁶³

Litigants, deprived of their right to vote because they were in jail, may be able to bring a successful claim under the VRA because both factors of the test weigh in favor of those denied the right to vote. Under the first factor, litigants can show that disenfranchisement of those in jail disparately impacts minority individuals, since, as discussed above, the population of people in jail is disproportionately minorities. In the context of felony disenfranchisement, courts have already acknowledged that the criminal legal system has a disparate impact on minorities.¹⁶⁴ While the cases brought dealing with felony disenfranchisement under Section 2 of the VRA have not been successful, this is because courts have held that felony disenfranchisement is permitted under the Fourteenth Amendment.¹⁶⁵

In this case, the findings that courts have already made about disparate racial impact in the criminal legal system can be applied to those in jail, without the court disregarding their claims. There is also sufficient data discussing how criminalization and mass incarceration have disproportionately impacted minorities from the colonial era to present.¹⁶⁶ For instance, “jails and prisons in the southern United States emerged as critical mechanisms to reinforce the institution of slavery.”¹⁶⁷ Moving to the era of Jim Crow segregation, jails were a “means to control ‘undesirable’ groups and, in the process, maintain public order as increasing numbers of [B]lack Americans migrated from the rural South.”¹⁶⁸ And of course, once mass incarceration began to explode in the 1970s, the “disproportionate rates of incarceration c[ould] be partly attributed to the socioeconomic conditions [B]lack people confronted as the fight against crime intensified.”¹⁶⁹ Due to the strength of support meeting both prongs of the Section 2 vote denial test, there remains potential to bring claims using this method because, unlike felony disenfranchisement laws, they cannot be dismissed because the majority of jailed individuals are pretrial detainees.

¹⁶³ *Id.* at 458 n.34.

¹⁶⁴ *See, e.g.*, *Farrakhan v. Gregoire*, 623 F.3d 990, 995–96 (9th Cir. 2010); *see also* *Hayden v. Pataki*, 449 F.3d 305, 333 (2d Cir. 2006).

¹⁶⁵ *See* *Farrakhan v. Gregoire*, 623 F.3d 990, 993 (9th Cir. 2010).

¹⁶⁶ *See, e.g.*, Elizabeth Hinton & DeAnza Cook, *The Mass Criminalization of Black Americans: A Historical Overview*, 4 ANN. REV. CRIMINOLOGY 261, 262–65 (2021).

¹⁶⁷ *Id.* at 265.

¹⁶⁸ *Id.* at 269.

¹⁶⁹ *Id.* at 273.

C. PROCEDURAL DUE PROCESS CLAIMS

Another potential avenue is procedural due process. In this context, a procedural due process claim would argue that, because it is unconstitutional to deprive these individuals of the right to vote, “whatever process exists should be aimed at guaranteeing eligible voters’ access to the ballot rather than determining when a deprivation is permissible.”¹⁷⁰ This type of claim is possible “where broad-gauged unfairness permeates an election, even if derived from apparently neutral action.”¹⁷¹ In theory, this means that a jailed voter could potentially claim a violation of procedural due process if they “can demonstrate that the combination of a state’s lack of established procedures to enfranchise jailed voters and its overreliance on the discretion of individual officials creates a system where jailed voters are regularly at risk of being erroneously denied ballot access.”¹⁷² A claim of this nature would be evaluated by examining and subsequently weighing “[f]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards;” and third, “the Government’s interest, including the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.”¹⁷³

The analysis of these factors under current precedent suggests that there is a likelihood for this type of claim to be successful. Looking at the first prong: the weight of the right that is impacted and the degree of harm caused by that deprivation.¹⁷⁴ The Court has continued to reiterate that the right to vote is a “fundamental political right.”¹⁷⁵ Additionally, the Court has also found that if “the election process itself reaches the point of patent and fundamental unfairness, a violation of the due process clause may be indicated and relief under § 1983 therefore in order.”¹⁷⁶ This would suggest that the Court believes that harm from disenfranchisement is significant,¹⁷⁷ especially in light of the fact that once someone has been denied the right to

¹⁷⁰ Paikowsky, *supra* note 16, at 859.

¹⁷¹ Griffin v. Burns, 570 F.2d 1065, 1077 (1st Cir. 1978).

¹⁷² Paikowsky, *supra* note 16, at 859.

¹⁷³ Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

¹⁷⁴ *Id.*

¹⁷⁵ Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886).

¹⁷⁶ Roe v. Alabama, 43 F.3d 574, 580 (11th Cir. 1995) (quoting Duncan v. Poythress, 657 F.2d 691, 703 (5th Cir. 1981)).

¹⁷⁷ See e.g., Wesberry v. Sanders, 376 U.S. 1, 17 (1964) (“Other rights, even the most basic, are illusory if the right to vote is undermined.”).

vote in a particular election, they are not able to get that right back after the fact, stripping them of the ability to participate in the political process.

Next, looking at the second prong, there are several options for claims of erroneous deprivation. As discussed above, elected officials are often unaware or misinformed about the eligibility of jailed individuals to vote, and this type of error naturally leads to deprivation when officials improperly deny jailed individuals that are eligible to vote the right to do so based on their mistaken belief. Additionally, it may also be possible to plead erroneous deprivation in situations where legally jailed individuals have the right to vote, but the lack of established state policies to register and receive ballots results in disenfranchisement.

Lastly, looking at the third prong, courts have consistently found that administrative ease does not supersede an individual's interest in voting.¹⁷⁸ While some jails have pushed back claiming they do not have the resources to provide a polling place within the jail,¹⁷⁹ there are financially feasible means to ensure the right to vote, such as providing incarcerated individuals with instructions on how to register and vote by absentee ballot.

D. LEVERAGING THE DEPARTMENT OF JUSTICE

Finally, to avoid individual court claims, an alternative solution is for the Department of Justice (DOJ) to address the problem of disenfranchisement in jail. The Biden administration could be amenable to this course of action based on its goal to incentivize states to automatically reinstate the voting rights of people convicted of felonies after they are released from prison.¹⁸⁰ However, it is important to note that given administrative goals and public perception of helping jailed individuals, the success of this course of action will vary depending on the administration in charge.

However, if willing, the DOJ can protect the rights of incarcerated individuals from patterns of abuse and remedy these problems under the Civil Rights of Institutionalized Persons Act (CRIPA).¹⁸¹ CRIPA specifically provides the U.S. Attorney General with the ability to initiate legal action to ensure that jailed and pretrial detainees are "afforded the full measure of protections guaranteed them by the Constitution of the United States."¹⁸²

¹⁷⁸ See *League of Women Voters v. North Carolina*, 769 F.3d 224, 244 (4th Cir. 2014).

¹⁷⁹ See *Tate v. Collins*, 496 F. Supp. 205, 207 (W.D. Tenn. 1980).

¹⁸⁰ See *The Biden Plan for Strengthening America's Commitment to Justice*, BIDEN HARRIS DEMOCRATS (Dec. 13, 2022), <https://joebiden.com/justice> [<https://perma.cc/G3TG-XTR4>].

¹⁸¹ 42 U.S.C. § 1997.

¹⁸² S. REP. NO. 96-416, at 3 (1979).

Under CRIPA, the DOJ has the power to investigate “egregious or flagrant conditions which deprive [institutionalized] persons of any rights . . . secured or protected by the Constitution.”¹⁸³ This would allow the DOJ to investigate practices in jails where jail staff does not provide adequate information and access to voting and voting registration. If the DOJ’s investigation determines that there is a “pattern or practice” of disenfranchisement at the specific jail, the DOJ can tell the facility what needs to be changed in order to ensure protection of the right to vote of the jailed individuals, and if the facility fails to correct the conditions, then the DOJ can file suit against them.¹⁸⁴

IV. POLICY SOLUTIONS

With the current ideological makeup of the Supreme Court and certain states passing legislation to restrict voting rights,¹⁸⁵ federal or state legal challenges may not be the best avenue for change at the moment. Instead, until a favorable outcome in the judicial system is more likely, it makes sense to look at policy solutions to create a multifaceted approach to solving jailed voter disenfranchisement.

On the federal level, the Biden administration has already shown its support of requiring voting procedures in jail.¹⁸⁶ With a narrow Democratic majority in the Senate, there is the potential to push through federal legislation that would encourage enfranchisement in jails. While the federal government often leverages federal funding to compel states to comply with federal standards, in this case, state and local jails are not reliant on federal funding, so the funding would have to be tied to something else. There is also an option to include reforms that would benefit jail enfranchisement in general voting legislation. For example, in the new voting legislation introduced by Senate Democrats, there are provisions that would help to enfranchise voters in jail, such as automatic voter registration.¹⁸⁷ This provision would take away the existing barriers to registration because incarcerated individuals would be registered automatically instead of having

¹⁸³ 42 U.S.C. § 1997(a).

¹⁸⁴ See U.S. DEP’T OF JUST., JUST. MANUAL § 8-2.261 (2018); see also Darrell L. Ross, *Correctional Law Commentary: Assessing the Trends in the Application of the Civil Rights of Institutionalized Persons Act (CRIPA) in Prisons and Jails: 2000–2014*, 52 CRIM. L. BULL. 1720 (2016).

¹⁸⁵ See Viebeck, *supra* note 91.

¹⁸⁶ Exec. Order No. 14019, 86 C.F.R. 13623 (Mar. 7, 2021).

¹⁸⁷ Carl Hulse, *Democrats Propose a Compromise Bill on Voting Rights*, N.Y. TIMES (Sept. 14, 2021), <https://www.nytimes.com/2021/09/14/us/politics/voting-rights-bill-democrats.html> [<https://perma.cc/D9UZ-7MW7>].

to deal with the ordeal of registering and providing appropriate forms of ID while in jail.¹⁸⁸ Additionally, the proposed legislation would allow all voters to vote by mail, which would also help address some of the concerns of voters in states that do not allow for absentee ballots to be requested by people in jail.¹⁸⁹ While this type of legislation would not remove all of the barriers to voting, it would establish voting processes that would make voting easier for people in jail.

Instead of federal legislation, states have and can continue to pass laws that improve access to voting in jail. While this process is constrained by the political support each state could garner for this type of reform, some states have already found success in passing this type of legislation.¹⁹⁰ For example, Colorado allows pretrial detainees and those serving misdemeanor sentences in jail to vote.¹⁹¹ While the state law ensures that those in jail can vote, additional reforms to the Colorado election rules established that county clerks must work with sheriffs to develop plans for how to coordinate voting from jail, including mail-in ballot and drop box procedures.¹⁹² However, state law does not include information about registration, so non-profit groups, such as the Colorado Criminal Justice Reform Coalition, have worked with the sheriffs to register eligible individuals in jail.¹⁹³ While this type of state law does not fix all of the problems with jail voting and relies on help from outside organizations, it is still a large step in the right direction for improving voting access by requiring jails and county clerks to coordinate and develop specific voting plans.

Similar to Colorado, Illinois expanded the right for those in jail to vote through state legislation.¹⁹⁴ The Illinois law is similar to Colorado's law as it requires counties with less than three million people to have the jail and election officials coordinate to devise a voting plan.¹⁹⁵ County jails are also required to provide eligible voters with information about voting rights in the jail¹⁹⁶ and a voter registration application upon their release from jail.¹⁹⁷ However, for Cook County jail, which is in a county with more than three

¹⁸⁸ Freedom to Vote Act, S. 2747, 117th Cong. §§ 1001–1007 (2021).

¹⁸⁹ *Id.*

¹⁹⁰ See Nicole D. Porter, *Voting in Jails*, SENT'G PROJECT (May 7, 2020), <https://www.sentencingproject.org/publications/voting-in-jails> [https://perma.cc/3PFP-S3DV].

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ 10 ILL. COMP. STAT. 5/19-2.3 (2020).

¹⁹⁶ 10 ILL. COMP. STAT. § 3-15003.4 (2020).

¹⁹⁷ 55 ILL. COMP. STAT. 5/3-15003.3 (2020).

million people, the law is far more specific. For example, it allows same day voter registration and requires the primary county jail to offer in-person voting so the jail serves as a polling location.¹⁹⁸ Unlike the Colorado law, the Illinois model serves as a more comprehensive plan for enfranchising those in jail by providing for coordination between jails and elected officials, distribution of voting rights materials, and even creation of a polling location in the Cook County jail. Indeed, the Cook County model has proven to be the most successful out of the jails that provide in-person voting, seeing almost 40% of the jail population vote during the 2020 general election and 25% of the jail population vote in the June 2022 primary, which was higher than the 20% primary voting rate across the city of Chicago.¹⁹⁹

Other localities do not have state laws authorizing enfranchisement plans for jails but have created hybrid models that rely on a combination of volunteers, jail staff, and election commissions. For example, in California, the state law authorizes those in jail to vote, but the Los Angeles County jail relies on organizers and nonprofits, in conjunction with the county board and sheriffs, to raise awareness about the right to vote and monitor the implementation of voting processes.²⁰⁰ The jail coordinates voting, and individuals can submit ballot request forms and receive a ballot in jail.²⁰¹ Similarly, the jails in Philadelphia facilitate voting by having jail staff assist incarcerated people with voter registration and disseminate voter education information.²⁰² In Washington, D.C., the jail staff, in collaboration with the D.C. Board of Elections, distribute voter information and registration forms to incarcerated people, and jail staff can provide voter education as well as request forms for absentee ballots.²⁰³ In these locations, the development of jail processes was a result of organizers coordinating with elected officials and working with the jails to establish procedures and provide voter registration. Lastly, some locations rely primarily on volunteers to coordinate voting in jail. One example is the Harris County jail in Texas where nonprofit groups use volunteers to facilitate registration, voter education, and advocacy.²⁰⁴

Overall, there are numerous policy options to develop laws and procedures to facilitate voting in jails. These policies can help to fill in the gaps left by the existing legal landscape where concrete jail voting plans and

¹⁹⁸ 10 ILL. COMP. STAT. 5/19A-20 (2021).

¹⁹⁹ Awan, *supra* note 11.

²⁰⁰ Porter, *supra* note 190.

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.*

absentee ballots are not required. Whether it is through more ambitious federal or state law or jail-specific coordination with election boards and volunteers, there are numerous ways to develop systems to enfranchise voters, and it makes sense to look to the programs that are already in place that have shown an increase in access so far.

CONCLUSION

There is no one right way to expand voting rights for those in jail. Rather, it starts with increasing awareness about how significant and substantial the group of voters disenfranchised in jail is. For too long both impoverished and minority individuals have been unfairly punished by losing their right to vote as pretrial detainees solely because of their inability to pay bail, rather than because they are guilty of a crime. Even those that have been convicted of misdemeanors in some cases still retain the right to vote, but misinformation and a lack of jail policies have prohibited this group of individuals from voting. While *O'Brien* confirmed that those in jail have the right to vote, the fact-specific analysis created by the Court is often confusing and leads to inconsistent outcomes. Therefore, it is necessary to continue to explore alternative avenues to ensure that those in jail can vote and are not losing that right based on the difficulty of proving their claim in court. Litigation to expand past the *O'Brien* standards by relying on constitutional claims under theories such as equal protection claims, procedural due process, and the Voting Rights Act; federal regulation through the Department of Justice; policy reform on the federal, state, or local level; or some combination of these options can be used to address the critical need to improve voting rights.