
ILLINOIS PUBLIC ACT 101-0442: UNLOCKING EDUCATION,
REGISTRATION, AND PARTICIPATION OF VOTERS IN PRETRIAL
DETENTION

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There is a myriad of scholarship, debate, and policy surrounding convicted felon disenfranchisement. This attention is immensely important. But what about individuals in jail who are awaiting trial, not convicted of any crime, and eligible to vote? This tragically overlooked population is often “de facto disenfranchised,” barred from voting not by legal prohibition but by barriers of information and access to voting materials. Recently, activists, legislatures, and courts have begun to work toward solving this problem, but without uniform strategy, progress is only piecemeal. Illinois is at the forefront of positive change with its recently enacted Public Act 101-0442 (“the Act”). The Act amended the Illinois Election Code to require that counties with populations over 3 million provide temporary polling places and smaller county jails facilitate opportunities for voting by mail for those eligible while incarcerated. This Note explores the Act’s many triumphs and offers remedies for its pitfalls, ultimately recommending it as a model for voting districts nationwide.

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I. INTRODUCTION

The 2016 United States presidential election was effectively decided by 107,000 people, or 0.09% of all votes cast.¹ John F. Kennedy won the White House in 1960 thanks to less than a 120,000-vote difference from then-presidential candidate Richard Nixon.² The State of Florida decided the 2000 presidential election between George W. Bush and Al Gore—more specifically, 537 out of 6 million voters decided.³ These presidential races demonstrate a fundamental but frequently disregarded truth: every vote counts.

The county and city jail population in the United States hovers around 745,000 people, with 482,000 being held pretrial in large part because they cannot post bail after being charged with a crime.⁴ In Illinois, state and county jails hold 64,000 people,⁵ with 20,000 detained pretrial.⁶ Cook County, encompassing Chicago and much of the metro area, is home to Illinois's largest

1. Tim Meko, Denise Lu & Lazaro Gamio, *How Trump Won the Presidency with Razor-Thin Margins in Swing States*, WASH. POST (Nov. 11, 2016), <https://www.washingtonpost.com/graphics/politics/2016-election/swing-state-margins/> [https://perma.cc/6VLA-QVDE].

2. Don Vaughan, *5 Remarkably Close U.S. Presidential Elections*, BRITANNICA, <https://www.britannica.com/list/5-remarkably-close-us-presidential-elections> (last visited June 5, 2022) [https://perma.cc/8XV9-X2SE].

3. Ron Elving, *The Florida Recount of 2000: A Nightmare that Goes on Haunting*, NAT'L PUB. RADIO (Nov. 12, 2018, 5:00 AM), <https://www.npr.org/2018/11/12/666812854/the-florida-recount-of-2000-a-nightmare-that-goes-on-haunting> [https://perma.cc/YCM4-HPY8].

4. Nicole D. Porter, *Voting in Jails*, SENT'G PROJECT 5 (May 7, 2020), <https://www.sentencingproject.org/publications/voting-in-jails/> [https://perma.cc/VEB2-XVYK].

5. *Illinois Profile*, PRISON POL'Y INITIATIVE, [hereinafter *Illinois Profile*] <https://www.prisonpolicy.org/profiles/IL.html#:~:text=Illinois%20has%20an%20incarceration%22rate,than%20many%20wealthy%20democracies%20do> (last visited June 5, 2022) [https://perma.cc/QMT2-DA45].

6. *Measuring Success*, CHICAGO VOTES, <https://chicagovotes.com/accomplishments/> (last visited June 5, 2022) [https://perma.cc/JBR6-LHPM].

jail by population.⁷ An estimated 94% of the 6,000 people detained in Cook County Jail are eligible to vote.⁸ By the numbers, people detained in Cook County Jail alone could have decided the 2000 Presidential election ten times over.⁹ Unfortunately, the vast majority of eligible voters in jail cannot cast their ballots.¹⁰

There is a myriad of scholarship, debate, and policy surrounding convicted felon disenfranchisement.¹¹ This attention is immensely important. But what about individuals in jail who are awaiting trial, not convicted of any crime, and eligible to vote? This tragically overlooked population is often “de facto disenfranchised,” barred from voting not by legal prohibition but by barriers of information and access to voting materials.¹² Recently, activists, legislatures, and courts have begun to work toward solving this problem, but without uniform strategy, progress is only piecemeal.¹³ Illinois is at the forefront with its recently enacted Public Act 101-0442 (“the Act”). The Act amended the Illinois Election Code to require that counties with populations over 3 million provide temporary polling places¹⁴ and smaller county jails facilitate opportunities for voting by mail for those eligible while incarcerated.¹⁵

This Note surveys the democratic crisis of the de facto disenfranchisement of eligible voters in pretrial detention and analyzes Illinois’s path forward toward engaging that population.¹⁶ Part II reviews the background and scope of disenfranchisement of eligible voters in jails and the barriers to enfranchisement. Part III analyzes the urgency of the problem unsolved, efforts made to remedy this problem across the nation, and dives deep into Illinois’s Public Act 101-

7. *Illinois Counties by Population*, CUBIT, https://www.illinois-demographics.com/counties_by_population (last visited June 5, 2022) [https://perma.cc/8H2V-ZY83].

8. Matt Masterson, *Voting in Jail? New Bill Seeks to Expand Ballot Access for Detainees*, WTTW (Feb. 7, 2018, 3:14 PM), <https://news.wttw.com/2018/02/07/voting-jail-new-bill-seeks-expand-ballot-access-detainees> [https://perma.cc/BR9Z-4X22].

9. See Elving, *supra* note 3.

10. Danielle Root & Lee Doyle, *Protecting the Voting Rights of Americans Detained While Awaiting Trial*, CTR. 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/WFA3-M48S] (describing barriers of “information and access”).

11. See Christina Rivers, *A Brief History of Felon Disenfranchisement and Prison Gerrymanders*, AM. HISTORIAN, <https://www.oah.org/tah/issues/2017/november/a-brief-history-of-felon-disenfranchisement-and-prison-gerrymanders/> (last visited June 5, 2022) [https://perma.cc/TC3Z-GK6G].

12. See, e.g., Root & Doyle, *supra* note 10 (describing barriers of “information and access”); Ginger Jackson-Gleich & Rev. Dr. S. Todd Yeary, *Eligible, but Excluded: A Guide to Removing the Barriers to Jail Voting*, PRISON POL’Y INITIATIVE (Oct. 2, 2020), https://www.prisonpolicy.org/reports/jail_voting.html [https://perma.

cc/2CXQ-G6BU]; Naila Awan & Shruti Banerjee, *How to End De Facto Disenfranchisement in the Criminal Justice System*, DEMOS (May 20, 2020), <https://www.demos.org/policy-briefs/how-end-de-facto-disenfranchisement-criminal-justice-system> [https://perma.cc/62P7-2BEV]; ERIKA WOOD & RACHEL BLOOM, AM. CIV. LIBERTIES UNION & BRENNAN CTR. JUSTICE, DE FACTO DISENFRANCHISEMENT I (2008).

13. Jackson-Gleich & Yeary, *supra* note 12.

14. 10 ILL. COMP. STAT. 5/19A-20(e) (2021).

15. 10 ILL. COMP. STAT. 5/19-2.3 (2021).

16. Voting rights of convicted felons, misdemeanor detainees, and persons on parole are beyond the scope of this Note.

0442. Part IV recommends scaling Illinois's model and adopting the use of in-person polling in jails across the nation.

II. BACKGROUND

A. *Backdrop to De Facto Disenfranchisement: Mass Incarceration*

As of early 2020, 2.3 million people or about 0.7% of the entire American population were incarcerated.¹⁷ The U.S. incarceration rate far outpaces that of the rest of the world:¹⁸ while America is home to just 5% of the world's general population, it represents about 20% of the world's incarcerated population.¹⁹

"Incarceration" can relate to a variety of institutions,²⁰ and it merits mention that prisons and jails are different entities. "Jails [are] under the jurisdiction of a local government for the confinement of people awaiting trial or those convicted of minor crimes, usually serving sentences of one year or less. A prison [is a] federal or state institution[] housing primarily convicted felons, serving sentences of more than one year."²¹ State and federal prison systems are also distinct; they house individuals charged with and convicted of respective state and federal laws.²² The primary focus of this Note is state and local jails.

Not everyone in jail has been convicted of a crime. In fact, the majority have not—about 64%²³ of the American jail population are "pretrial detainees," meaning "defendant[s] . . . held prior to their trial on criminal charges because no bail is posted or are denied a pre-trial release."²⁴ Most of the people detained pretrial are eligible to vote because they are not serving a sentence nor have been convicted of a felony.²⁵ People in jail awaiting trial or serving time for misdemeanors would only be ineligible to vote if (1) they have a prior felony conviction unrelated to their current detention and are in a state that permanently disenfranchises people convicted of felonies; or (2) they are on probation or parole for a felony conviction in a state that does not reinstate the right to vote until probation and parole are completed.²⁶

17. Peter Wagner & Wand Bertram, 'What Percent of the U.S. is Incarcerated?' (*And Other Ways to Measure Mass Incarceration*), PRISON POL'Y INITIATIVE (Jan. 16, 2020), <https://www.prisonpolicy.org/blog/2020/01/16/percent-incarcerated/> [<https://perma.cc/WM99-BCEM>].

18. *Id.*

19. *Id.*

20. LALEH ISPAHAN & TRICIA FORBES, VOTING WHILE INCARCERATED iii (2005), https://www.aclu.org/sites/default/files/pdfs/votingrights/votingwhileincarc_20051123.pdf [<https://perma.cc/2EXA-W5TC>].

21. *Id.*

22. *10 Differences Between Federal Prison and State Prison*, VIVA DIFFERENCES, <https://vivadifferences.com/federal-prison-vs-state-prison/> (last visited June 5, 2020) [<https://perma.cc/RZ8k-3ZGG>].

23. Porter, *supra* note 4.

24. *Pretrial detainee*, BLACK'S LAW DICTIONARY (2d ed. 1910).

25. Porter, *supra* note 4.

26. ISPAHANI & FORBES, *supra* note 20.

The majority of the 482,000 people detained pretrial in the United States could legally cast ballots.²⁷ In Illinois, 20,000²⁸ of the 76,000 total incarcerated individuals²⁹ are being held pretrial and are mostly eligible voters.³⁰ The pretrial population has outpaced the already astronomical growth of the general prison population, representing 470% and 370% increases in pretrial jail and prison populations, respectively, over the last forty years.³¹

Prison and jail populations did not reach these startling numbers overnight. Since 1970, the American incarcerated population has ballooned by 700%, creating a societal ailment known as mass incarceration.³² Among many factors contributing to this phenomenon³³ is a cash bail system that keeps people behind bars³⁴ despite a constitutionally protected presumption of innocence.³⁵ Originally intended to serve as an incentive to return to court when a person is arrested, the cash bail system has effectively become a sorting device for those charged with crimes who have money and those who do not.³⁶ Those who cannot afford bail may wait months and even years before trial.³⁷ That time spent behind bars can overlap with elections and censuses, causing a subsequently massive group of eligible voters to be separated from the polls.³⁸

27. Porter, *supra* note 4 (total incarceration population of 745,000) (statistics as of 2017).

28. *Measuring Success*, *supra* note 6 (statistics as of 2019).

29. *Illinois Profile*, *supra* note 5 (statistics as of 2018) (referring to state, local, federal, youth, and involuntary incarceration).

30. See ISPAHANI & FORBES, *supra* note 20, and accompanying text.

31. Jacob Kang-Brown & Ram Subramanian, *Out of Sight: The Growth of Jails in Rural America*, VERA INST. JUST. 9–11 (June 2017), <https://www.vera.org/downloads/publications/out-of-sight-growth-of-jails-rural-america.pdf> [<https://perma.cc/UFU5-LA3A>].

32. *Mass Incarceration*, AM. CIV. LIBERTIES UNION, <https://www.aclu.org/issues/smart-justice/mass-incarceration> (last visited June 5, 2022) [<https://perma.cc/6GU8-N5J6>].

33. Notably, higher crime rates are not among these factors. Michael Mitchell, *The Causes and Costs of High Incarceration Rates*, CTR. ON BUDGET POL'Y PRIORITIES (Oct. 29, 2014, 1:12 PM), <https://www.cbpp.org/blog/the-causes-and-costs-of-high-incarceration-rates#:~:text=Incarceration%20rates%20have%20risen%20mainly,to%20target%20these%20two%20areas> [<https://perma.cc/A6QM-XDUN>] (listing factors contributing to increased incarceration rates including increased likelihood of convicted individuals going to prison—including a 350% increase in likelihood of prison time for drug-related offenses—between 1980 and 2010, and an increase in average time served by 25% for property crimes and 37% for violent and drug crimes between 1990 and 2009).

34. New Jersey's bail reform efforts in 2017 demonstrate a strong link between money bond and mass incarceration. See Udi Ofer, *We Can't End Mass Incarceration Without Ending Money Bail*, AM. CIV. LIBERTIES UNION (Dec. 11, 2017, 4:30 PM), <https://www.aclu.org/blog/smart-justice/we-cant-end-mass-incarceration-without-ending-money-bail> [<https://perma.cc/N93G-V9UN>]. Between January 1, 2017 and December of the same year, New Jersey saw a 17.2% drop in daily prison population. *Id.*

35. *After Cash Bail: A Framework for Reimagining Pretrial Justice*, BAIL PROJECT, <https://bailproject.org/after-cash-bail/> (last visited June 5, 2022) [<https://perma.cc/39S2-39KP>].

36. Ofer, *supra* note 34.

37. Ofer, *supra* note 34. As of February 2021, Illinois became the first state to pass legislation eliminating cash bail completely. 730 ILL. COMP. STAT. 5/3-14-1 (2021) (Illinois House Bill 3653). The Illinois Pre-Trial Fairness Act—within Illinois House Bill 3653—is one of many criminal justice reform measures in the sweeping legislation. *Id.*; see Cheryl Corley, *Illinois Becomes 1st State to Eliminate Cash Bail*, NAT'L PUB. RADIO (Feb. 22, 2021, 9:35 PM), <https://www.npr.org/2021/02/22/970378490/illinois-becomes-first-state-to-eliminate-cash-bail> [<https://perma.cc/L9NM-BHLV>]. Comparatively, New Jersey and Washington, D.C. have nearly eliminated cash bail, while New York, Alaska, and California have introduced measures to eliminate cash bail that have not materialized. *Id.*

38. Porter, *supra* note 4.

B. *The People Directly Impacted by De Facto Disenfranchisement*

This system of mass incarceration creates an ancillary but profound impact on the United States voter population because people behind bars often have the right to vote but cannot exercise it.³⁹ Incarceration, and in effect de facto voter disenfranchisement, does not impact all populations equally.⁴⁰ Indeed, one in three Black men go to jail in their lifetimes, compared to one in six Latino men and one in seventeen white men.⁴¹ Nearly one in six transgender Americans have been to jail.⁴² This number is even higher for Black transgender Americans: *half* of that demographic has been incarcerated at some point in their lives.⁴³ The disproportionate jailing and de facto disenfranchisement of marginalized populations mirrors discrimination in the American electoral system at large.⁴⁴ Indeed, the United States has a troubled and prolific history of deliberately excluding people of color from the electoral enterprise.⁴⁵

Geography also plays a role in how voting while in pretrial detention—and in fact simply existing in pretrial detention—disproportionately impacts minority communities.⁴⁶ Incarcerated individuals' census data reflects where they are in jail, not their home communities or legal residence, regardless of whether they are held pretrial or have been convicted.⁴⁷ This practice has been in place since the very first United States census in 1790.⁴⁸ This method of data collection leads to a practice called “prison gerrymandering,”⁴⁹ where states can utilize the

39. *Id.*

40. *Id.*

41. *Mass Incarceration*, *supra* note 32. These statistics underestimate the impact and racial disparities of mass incarceration on communities and families. A Cornell University Study reports 63% of Black and Native American adults have had a family member in jail or prison for at least one night, compared to 48% of Latinx adults, and 42% of white adults. Rachel Weiner, *Almost Half of U.S. Adults Have Seen a Family Member Jailed, Study Shows*, WASH. POST (Dec. 6, 2018, 7:10 AM), <https://www.washingtonpost.com/crime-law/2018/12/06/almost-half-us-adults-have-seen-family-member-jailed-study-shows/> [https://perma.cc/SHVP-2EQA].

42. *Transgender Incarcerated People in Crisis*, LAMDA LEGAL, <https://www.lambdalegal.org/know-your-rights/article/trans-incarcerated-people> [https://perma.cc/ZW6Y-HBT3] (last visited June 5, 2022) (“‘Over-policing and profiling of low-income people and of trans and gender-nonconforming people intersect,’ as the Sylvia Rivera Law Project (SRLP) describes it, ‘producing a far higher risk than average of imprisonment, police harassment and violence for low-income trans people.’”).

43. *Id.*

44. ISPAHANI & FORBES, *supra* note 20, at 1.

45. *Id.*

46. Brett Blank & Peter Wagner, *Importing Constituents: Prisoners and Political Clout in Illinois*, PRISON POL’Y INITIATIVE (Feb. 1, 2010), <https://www.prisonersofthecensus.org/illinois/importing.html> [https://perma.cc/CP89-M4YZ].

47. *Id.*

48. Hansi Lo Wang & Kumari Devarajan, *‘Your Body Being Used’: Where Prisoners Who Can’t Vote Fill Voting Districts*, NAT’L PUB. RADIO: CODE SWITCH (Dec. 31, 2019, 5:00 AM), <https://www.npr.org/sections/codeswitch/2019/12/31/761932806/your-body-being-used-where-prisoners-who-can-t-vote-fill-voting-districts> [https://perma.cc/7B9K-D9JJ].

49. Blank & Wagner, *supra* note 46. Illinois recently passed a law outlawing prison gerrymandering, but it will not take effect until 2030. Aleks Kajstura, *Illinois Legislature Passes Bill Ending Prison Gerrymandering*, PRISON POL’Y INITIATIVE (Jan. 13, 2021), <https://www.prisonersofthecensus.org/news/2021/01/13/illinois-hb3653/> [https://perma.cc/5QAU-KL72]; Statewide Use of Force Standardization Act, Pub. Act 101-0652, 2921 Ill. Laws 3653.

population bump of predominantly Black and Latinx incarcerated people to centralize voting and census-derived power and services in predominantly rural, white towns.⁵⁰ Thus, not only are potential voters being de facto disenfranchised due to their incarceration, but that same incarceration actually further strengthens other already powerful voting populations.

A growing number of states and municipalities, including only recently Illinois, have passed legislation banning prison gerrymandering.⁵¹ The Census Bureau still collected data in accordance with aforementioned methods during the 2020 census, but changed its reporting practices to include prison population counts in recording states' redistricting data.⁵²

C. *Barriers to Voting Behind Bars*

Certain universal challenges underlie the national democratic crisis of de facto disenfranchisement of eligible voters in jail. There are multitudes of barriers to enfranchisement behind bars, but most relate to either information or infrastructure.⁵³ Scholars from the Center for American Progress describe, “[t]o be able to participate in elections, one must know when an election is happening; deadlines for voter registration and submitting absentee ballots; and information about voter eligibility. In addition, eligible voters must have access to voter registration forms, applications for mail-in ballots, and/or access to polling places.”⁵⁴ The local nature of elections complicates the national problem of de facto disenfranchisement in jails, hindering national efforts⁵⁵ to involve people in pretrial detention in the election process and making the barriers of information and infrastructure even more halting in certain states depending on local laws.⁵⁶

1. *Barriers of Information*

Eligible voters detained in pretrial face hurdles of information that leave them not just uncertain, but often fearful of prosecution in the event of mistake.⁵⁷ As a result, confusion stops the suffrage process before it can even start.⁵⁸ People

50. Wang & Devarajan, *supra* note 48.

51. Aleks Kajstura, *Building Momentum Against Prison Gerrymandering*, PRISON POL’Y INITIATIVE (Dec. 18, 2020), <https://www.prisonersofthecensus.org/news/2020/12/18/building-momentum/> [<https://perma.cc/HUL3-265Y>].

52. *Id.*

53. Root & Doyle, *supra* note 10 (describing barriers of “information and access”).

54. *Id.*

55. Margaret Barthel, *Getting Out the Vote from the County Jail*, ATLANTIC (Nov. 4, 2018) (quoting Nicole Porter, The Sentencing Project) <https://www.theatlantic.com/politics/archive/2018/11/organizers-fight-turn-out-vote-county-jails/574783/> [<https://perma.cc/R4PC-SH4T>] (“There is no national organization that is the anchoring institution to ensure that residents that happen to be in jail on Election Day never lose their voting rights”).

56. Jackson-Gleich & Yeary, *supra* note 12 (describing registration-related barriers varying across states).

57. Barthel, *supra* note 55.

58. See Root & Doyle, *supra* note 10 (describing barriers to voting by pretrial detainees).

detained pretrial are often understandably confused about their voter eligibility.⁵⁹ Some enter the jail system without knowledge of voting on the outside: “[B]ecause the jail population skews younger, many detainees have never cast a ballot before and are unfamiliar with the regular voting system, much less what’s available to them inside.”⁶⁰ Remediating this confusion independently is difficult considering people in detention go without access to computers, the news, or other experienced voters to learn about voting.⁶¹

The perceptions (and misperceptions) of felon disenfranchisement laws are often the source of confusion, despite not directly applying to people in pretrial detention.⁶² The subsequent confusion is two-fold. First, the complexity of felon disenfranchise laws creates unclear bounds of when someone becomes disenfranchised, directly bearing on incarcerated people who may incorrectly believe being in jail triggers a voting rights punishment.⁶³ Second, due to the extreme variation in felon disenfranchisement laws and piecemeal media coverage, “voters might simply expect the worst given the scraps of information they receive about voting laws across the country.”⁶⁴ Part of the obscurity of eligibility derives from the sheer vastness of voting regimes not just “from state to state, from county to county, [but] from institution to institution.”⁶⁵

Clearer than the laws themselves, perhaps, is the consequence of violation. High-profile and severe prosecutions deter any attempt at untangling the laws for risk of error: “The risk that even unintentional illegal voting could lead to criminal conviction is no mere abstraction. Prosecutors have exercised their discretion to pursue individuals who illegally voted, when the facts clearly indicated that those individuals did so without any intent to commit a crime.”⁶⁶

Multiple bureaucratic layers suffer from the impediment of confusion: “It’s not just detainees who don’t realize they’re eligible to vote; corrections departments, courts, correctional officials, and even voting authorities can also be confused.”⁶⁷ When election officials are unaware of voting rights themselves, that misinformation spreads.⁶⁸ The Prison Policy Initiative and the Rainbow PUSH Coalition report, “[o]ne of the biggest barriers to voting in jail is the fact that the local election officials often don’t know that most people in jail can vote, and it’s not unusual for such officials to provide incorrect information in response to questions about the issue.”⁶⁹ That misinformation lasts far beyond

59. *See id.* (describing allegations of failure by jail administrators to provide detainees with information regarding voting eligibility).

60. Barthel, *supra* note 55.

61. *Id.*

62. *See id.* Some pretrial detainees may not be eligible to vote for reasons unrelated to their current detention; this variable is not explored in this Note.

63. Emily Rong Zhang, *New Tricks for an Old Dog: Deterring the Vote Through Confusion in Felon Disenfranchisement*, 84 MO. L. REV. 1037, 1038 (2019).

64. *Id.* at 1043.

65. Barthel, *supra* note 55.

66. Zhang, *supra* note 63, at 1048.

67. Barthel, *supra* note 55.

68. *See id.*

69. Jackson-Gleich & Yeary, *supra* note 12.

the initial exchange and could lead to the permanent de facto disenfranchisement of a would-be voter.⁷⁰ “Once a single local election official misinforms a citizen that he is not eligible to vote . . . it is unlikely that citizen will ever follow up or make a second inquiry.”⁷¹ Unfortunately, confusion among election officials about individuals interacting with the criminal justice system is common.⁷² In Kentucky, for example, 53% of county clerks responded incorrectly about whether individuals with misdemeanor convictions are eligible to vote.⁷³ This type of misunderstanding directly bears on the jail population, as individuals charged with misdemeanors often reside in jail.⁷⁴

Dependence on jail administrators for access to anything outside the jail facility often creates a subsequent reliance on those administrators for voting information, representing another opaque layer between voters behind bars and the ballot box.⁷⁵ Scholars from the Center for American Progress explain, “given the complexity of state disenfranchisement laws, administrators may not know about detained people’s eligibility and thus may not seek out the relevant materials or provide them upon request.”⁷⁶ Dependence on jail administrators for information represents a larger theme of third parties gatekeeping information—either actively or accidentally—due to confusion around voter eligibility.⁷⁷

2. *Barriers of Infrastructure*

Even if eligible voters have complete information required to understand eligibility and the voting process, the physical act of casting a ballot can be near impossible.⁷⁸ Indeed, it is not just bars that separate people in detention from elections outside. Internet connectivity issues, mail delays, access to required forms, the revolving door of incarceration, and more prevents people from casting ballots while in jail.⁷⁹

Many would-be voters rely on the internet to acquire voter registration forms or absentee ballots, but that process is made challenging or impossible “when someone cannot use the internet or easily contact the Board of Elections in their community.”⁸⁰ Even if there are volunteers or election workers facilitating the voting process, internet issues can still prove fatal to enfranchisement efforts. In Texas’s Harris County Jail, activists attempted to expand voter access to incarcerated residents but could not implement their in-

70. WOOD & BLOOM, *supra* note 12, at 1.

71. *Id.*

72. *Id.*

73. *Id.* at 2.

74. ISPAHANI & FORBES, *supra* note 20, at iii.

75. Root & Doyle, *supra* note 10, at 2.

76. *Id.*

77. See Dana Paikowsky, Note, *Jails as Polling Places: Living Up to the Obligation to Enfranchise the Voters We Jail*, 54 HARV. C.R.-CIV. LIBERTIES L. REV., 829, 838 (2019) (“Jailed voters, then, must rely on third parties—jail officials most directly, but also election administrators, non-profit groups, or even family and friends—to give them the information and resources they need to cast their ballots.”).

78. Porter, *supra* note 4.

79. *Id.*

80. *Id.*

person polling initiative due to objections by the County Clerk, who emphasized “the county’s jail’s lack of internet access which would complicate the duties of election workers.”⁸¹

Lack of internet access in jail is a common hurdle to voting regimes. The majority of individuals in detention still rely on paper forms for information and communication, as jails restrict the use of internet almost universally.⁸² Already paltry access—whether for security reasons, financials, or otherwise—is further limited to certain people and for certain purposes, like job-searching.⁸³ People in detention are subsequently severed from modern society and vital information. “[M]illions of people in jails and prisons with no Internet access still rely on librarians for answers that could be found in seconds online.”⁸⁴ This problem will only worsen as the rest of the world transitions to digital registration: “as new generations become more accustomed to using web-based services, reliance on online voter registration may increase in the future.”⁸⁵

The alternative to the internet—paper mail—is also plagued with issues. The United States Postal Service (“USPS”) has long faced financial, political, and infrastructural challenges, recently exacerbated by the COVID-19 pandemic.⁸⁶ When it comes to elections, these problems can have detrimental consequences. In the 2020 presidential election, delays in receiving absentee ballots and issues tracking those ballots created pain points.⁸⁷ While the obstacles posed by an overburdened and underfunded USPS impact everyone using the postal service, voters in jails face even greater hurdles.⁸⁸ Jail mail delays can make timely registration or voting burdensome to impossible.⁸⁹ Considering the

81. *Id.*

82. Ben Branstetter, *The Case for Internet Access in Prisons*, WASH. POST: DAILY DOT (Feb. 9, 2015, 9:40 AM), <https://www.washingtonpost.com/news/the-intersect/wp/2015/02/09/the-case-for-internet-access-in-prisons/> [https://perma.cc/AA7B-978D]; see, e.g., Department of Corrections, OR. SEC’Y OF STATE, <https://secure.sos.state.or.us/oard/displayDivisionRules.action?selectedDivision=937> (last visited June 5, 2022) [https://perma.cc/P58D-WK5R].

83. *Id.*

84. Max Kutner, *With No Google, the Incarcerated Wait for the Mail*, NEWSWEEK (Jan. 25, 2015, 2:12 PM), <https://www.newsweek.com/people-behind-bars-google-answers-arrive-mail-301836> [https://perma.cc/FDL5-XLEQ].

85. Danielle Root & Liz Kennedy, *Increasing Voter Participation in American*, CTR. AM. PROGRESS (July 11, 2018, 12:01 AM), <https://www.americanprogress.org/article/increasing-voter-participation-america/> [https://perma.cc/E5LN-4JKY].

86. Oliver Effron, *Why the US Postal Service is in Deep Financial Trouble*, CNN (Oct. 6, 2020, 10:02 AM), <https://www.cnn.com/2020/10/06/business/congress-usps-funding-problems/index.html> [https://perma.cc/4HTA-GXQF]; Tony Romm, Jacob Bogage & Lena H. Sun, *Newly Revealed USPS Documents Show an Agency Struggling to Manage Trump, Amazon and the Pandemic*, WASH. POST (Sept. 18, 2020, 2:09 PM), <https://www.washingtonpost.com/us-policy/2020/09/17/usps-trump-coronavirus-amazon-foia/> [https://perma.cc/QN2R-TTZ3].

87. *The Voting Experience in 2020*, PEW RSCH. CTR. (Nov. 20, 2020), <https://www.pewresearch.org/politics/2020/11/20/the-voting-experience-in-2020/> [https://perma.cc/6F2J-9GNP].

88. Jackson-Gleich & Yearly, *supra* note 12.

89. *Id.*

average jail stay averages three to four weeks, many people cannot afford delay.⁹⁰

Having the supplies to mail materials creates its own set of challenges: “Even getting paper, pens and stamps can be problematic behind bars, where there are often delays and bans on inmates sending or receiving mail, activists say.”⁹¹ In sum, hurdles for people confined on election day range from the granular task of acquiring pens to the grand obstacle of a stressed postal system.

Limited internet and delayed mail systems are compounded, again, by the crucial issue of reliance on third parties. Regardless of whether resources are digital or tangible, “[j]ail officials act as a sort of gateway through which all information and materials from the outside world must pass. They tightly control every aspect of incarcerated people’s lives, from the way their mail is processed to how often they can access their phone or computer.”⁹² Thus, even if incarcerated individuals have the resources they need to vote, concerns of ballot secrecy can deter voting entirely. All non-privileged outgoing mail can be read by custody staff.⁹³ Considering that staff members may be on the ballot itself,⁹⁴ “issues of ballot secrecy may also generate concerns about retaliation or ballot tampering that dampen turnout in jails.”⁹⁵ The infrastructural challenges ultimately isolate incarcerated voters not just from the outside world, but from electoral participation.

3. *Complicating Local Laws*

Voting laws in some municipalities create higher infrastructural barriers to incarcerated voters than others. For example, thirty-six states employ identification requirements to vote.⁹⁶ This creates an insurmountable issue to many incarcerated voters, as when people are arrested, “their personal effects—including IDs—are typically confiscated.”⁹⁷ Dashing hopes of a possible workaround, “government-issued prison or jail ID cards do not typically qualify as accepted forms of identification.”⁹⁸ Further, sixteen states require “for-cause” absentee voting only, requiring voters to provide an excuse as to why they cannot vote in-person on election day.⁹⁹ In most of these states, being in jail is not an

90. *Id.* (describing the phenomenon known as “jail churn”).

91. Jack Karp, *From Behind Bars, Pretrial Detainees Fight to Vote*, LAW360 (Oct. 25, 2020, 8:02 PM), <https://www.law360.com/access-to-justice/articles/1322319/from-behind-bars-pretrial-detainees-fight-to-vote> [<https://perma.cc/PHN5-5RYJ>].

92. Paikowski, *supra* note 77, at 838.

93. Jackson-Gleich & Yeary, *supra* note 12.

94. See discussion *infra* Subsection III.B.3 (discussing elected sheriffs).

95. Jackson-Gleich & Yeary, *supra* note 12.

96. *Voter Identification Requirements: Voter ID Laws*, NAT’L CONF. STATE LEGISLATURES (Aug. 25, 2020), <https://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx> [<https://perma.cc/C7FL-G6T3>].

97. Jackson-Gleich & Yeary, *supra* note 12.

98. *Id.*

99. *VOPP: Table 1: States with No-Excuse Absentee Voting*, NAT’L CONF. STATE LEGISLATURES (May 1, 2020), <https://www.ncsl.org/research/elections-and-campaigns/vopp-table-1-states-with-no-excuse-absentee-voting.aspx> [<https://perma.cc/V2P7-99HN>].

accepted excuse.¹⁰⁰ In sum, barriers to enfranchisement are many, varied, and in their current state, often insurmountable.

III. ANALYSIS

A. *The Urgency of Enfranchisement*

Information gaps and the nature of jails' infrastructure create obstacles to voting as strong as metal bars themselves. Perhaps this is a sign of a failing system, or perhaps a system operating tragically as intended—advancing the policies of a society that routinely marginalizes individuals either for indiscretions or simply identity, regardless of guilt or innocence.¹⁰¹ Despite systematic and systemic setbacks, democracy can and should exist for eligible voters in jails. The right to vote is fundamental.¹⁰²

The Supreme Court has made clear that infringement on the right to vote should be fiercely protected against, stating in *Reynolds v. Sims* that “[u]ndoubtedly, the right of suffrage is a fundamental matter in a free and democratic society . . . the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights.”¹⁰³ Unfortunately, this shining standard of democracy has been repeatedly tarnished by voter suppression tactics such as Jim Crow laws, gerrymandering, and felon disenfranchisement laws.¹⁰⁴

The Voting Rights Act of 1965 attempted to right some of these wrongs and protect the right to vote for all.¹⁰⁵ It codified:

No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color. . . .¹⁰⁶

At its signing, President Johnson explained the importance of suffrage in America and the need for such an act: “[F]reedom and justice and the dignity of man are not just words to us. . . . [A]s long as some among us are oppressed—

100. Jackson-Gleich & Yeary, *supra* note 12. West Virginia, South Carolina, New York, and Texas accept being in jail as an excuse. *Absentee Voting Rules*, VOTE.ORG, <https://www.vote.org/absentee-voting-rules/> (last visited June 5, 2022) [https://perma.cc/4VVQ-W6JH].

101. For commentary on systemic racism in the electoral system, see Danyelle Soloman, Connor Maxwell, & Abigail Castro, *Systemic Inequality and American Democracy*, CTR. AM. PROGRESS (Aug. 7, 2019, 7:00 AM), <https://www.americanprogress.org/issues/race/reports/2019/08/07/473003/systematic-inequality-american-democracy/> [https://perma.cc/W7VU-57VF].

102. U.S. CONST. art. I, § 2; U.S. CONST. amend. XIV, § 2; *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (referring to the political franchise of voting as a fundamental political right).

103. *Reynolds v. Sims*, 377 U.S. 533, 561–62 (1964).

104. Terrance Smith, *Timeline: Voter Suppression in the US from the Civil War to Today*, ABC NEWS (Aug. 20, 2020, 5:03 AM), <https://abcnews.go.com/Politics/timeline-voter-suppression-us-civil-war-today/story?id=72248473> [https://perma.cc/ZD38-MAYL].

105. Voting Right Act of 1965, Pub. L. No. 89-110, 79 Stat. 437.

106. 52 U.S.C. § 10301 (2014).

and we are part of that oppression—it must blunt our faith and sap the strength of our high purpose.”¹⁰⁷

It is not just the functioning of a democratic system at large that necessitates an unhindered right to vote, but individual dignity and freedom. As explained to *The Atlantic* by Michelle Mbekaeani-Wiley, a former staff attorney at the Sargent Shriver National Center on Poverty Law and involved in the voting efforts at Cook County Jail, voting in jail can be “a glimmer of home in a very trauma-filled environment: You get to demonstrate that you participated in the political process, and you’ve exercised power despite being in such a powerless place.”¹⁰⁸

B. *Elected Officials and the Criminal Justice System*

To understand how interwoven electoral politics are in the criminal justice system, it helps to think of the arch of criminal prosecution. In that arch, defendants invariably interact with four key groups of actors embedded into both the electoral and criminal justice systems: (1) legislators; (2) prosecutors; (3) sheriffs; and (4) judges.¹⁰⁹ Each group is addressed in turn.

1. *Legislators*

State and federal jails are products of state and federal criminal justice systems, which are products of state and federal laws.¹¹⁰ State and federal legislators create the laws that are eventually allegedly broken or that can set someone free.¹¹¹ Legislators are directly elected officials.¹¹² Voting for federal legislative representation in Congress is not simply a vote for an individual but also for party control of the Senate and House of Representatives; the same goes for respective offices at the state level.¹¹³ The legislature can be the gatekeeper for the passage or denial of criminal justice legislation.¹¹⁴ Individuals interacting with the criminal justice system have a vested interest in voting for representatives who advocate for voter-friendly legislation.¹¹⁵

107. Lyndon B. Johnson, President of the United States, Voting Rights Act Signing Remarks (Aug. 6, 1965), <https://millercenter.org/the-presidency/presidential-speeches/august-6-1965-remarks-signing-voting-rights-act> [<https://perma.cc/ZQ4X-K8XP>].

108. See generally Barthel, *supra* note 55 (internal quotations omitted).

109. *Id.* (“[P]arts of the ballot . . . have direct effects on the criminal-justice system, such as races for district attorney, sheriff, and judicial positions.”).

110. See, e.g., *Correctional Facilities*, NAT’L INST. OF JUST., <https://nij.ojp.gov/topics/corrections/correctional-facilities> (last visited June 5, 2022) [<https://perma.cc/H5FK-5LPD>].

111. *How Laws are Made and How to Research Them*, USA.GOV (Sept. 17, 2020), <https://www.usa.gov/how-laws-are-made> [<https://perma.cc/BE3G-AXYA>].

112. *Congressional Elections and Midterm Elections*, USA.GOV, <https://www.usa.gov/midterm-state-and-local-elections> (last visited June 5, 2022) [<https://perma.cc/8DZD-DMQQ>].

113. *Id.*

114. *How Laws are Made and How to Research Them*, *supra* note 111.

115. See Barthel, *supra* note 55.

2. Prosecutors

Prosecutors hold an arguably unapparelled amount of power in the criminal justice system, and many are elected.¹¹⁶ As of 2015, all but four states elected at least some of their prosecutors.¹¹⁷ States began electing prosecutors as early as 1832 in an attempt to quell political influence in the criminal justice system and instead incentivize accountability to the voting public.¹¹⁸ In reality, voters do not have much choice in who they elect: 85% of incumbent prosecutors run unopposed for reelection.¹¹⁹

Prosecutors, elected or otherwise appointed, possess a tremendous amount of power to decide who to charge with what crimes.¹²⁰ Their influence shapes defendants' interactions with the criminal justice system from beginning to end: "[Prosecutors] decide, virtually unilaterally, whether an individual is diverted from the criminal system. . . . [t]hey resolve 94 percent of criminal convictions through a plea bargain where they primarily decide how the charges are settled. . . . [and] make influential recommendations regarding bail and sentences."¹²¹

Notably, prosecutors do not reflect the populations they serve by metrics of race and gender. A study conducted in 2014 sampling 2,400 elected prosecutors reported that 95% of the country's elected prosecutors are white and 83% are men, and only 1% are women of color.¹²² Some scholars, including activist Choresi Carter of the Reflective Democracy Campaign as interviewed on *National Public Radio*, say that this lack of diverse life experiences leads to less empathetic prosecution: "Having women and people of color represented more fully in these positions is no guarantee of equality in the criminal justice system, but I do feel very confident that we're not going to get equality with these numbers."¹²³

116. Juleyka Lantigua-Williams, *Are Prosecutors the Key to Justice Reform?*, ATL (May 18, 2016), <https://www.theatlantic.com/politics/archive/2016/05/are-prosecutors-the-key-to-justice-reform/483252/> [<https://perma.cc/A4Q6-B7JC>] ("[T]he American prison population has ballooned, a phenomenon that until recently was blamed on socioeconomic factors, harsh federal and state guidelines, or other macro-level explanations. . . the real explanation for a growing prison population is much simpler: growing prosecutorial power.").

117. Amita Kelly, *Does it Matter that 95 Percent of Elected Prosecutors are White?*, NPR (July 8, 2015, 4:59 PM), <https://www.npr.org/sections/itsallpolitics/2015/07/08/420913118/does-it-matter-that-95-of-elected-prosecutors-are-white> [<https://perma.cc/V24E-9TZK>].

118. *Id.*

119. *Id.*

120. Nicole Zayas Fortier, *Voters Can't Elect the Right Prosecutors if These Elected Officials' Records Aren't Made Public*, AM. CIV. LIBERTIES UNION (Feb. 13, 2019, 9:00AM), <https://www.aclu.org/blog/smart-justice/prosecutorial-reform/voters-cant-elect-right-prosecutors-if-these-elected> [<https://perma.cc/4RYP-4MEK>].

121. *Id.*

122. Kelly, *supra* note 117.

123. *Id.*

3. *Sheriffs*

Once someone is charged and awaiting trial, the defendant may be required to pay money bail or provide collateral to be released from custody.¹²⁴ Days, weeks, months, or even years may pass before trial and those who cannot pay stay.¹²⁵ Most people in detention will have countless interactions with sheriffs while in that custody as sheriffs operate over 85% of jails in the United States.¹²⁶ Sheriffs are not discussed as often as police in discourse on criminal justice reform but are immensely powerful figures.¹²⁷ Forty-six states elect their sheriffs, and they “enjoy unparalleled autonomy and really a remarkable lack of accountability. . . . [S]heriffs for the most part really answer to no one except the voters.”¹²⁸

Considering sheriffs control the operation of the institutions where people in detention live, and “a local sheriff’s support could make or break a voter-registration drive or ballot request program,”¹²⁹ people in detention have a vested interest in voting for the most qualified and fair candidate.

4. *Judges*

There are two primary court systems in our country: state and federal.¹³⁰ These feed into respective state and federal prison systems.¹³¹ Most criminal cases are adjudicated by judges in the state court system,¹³² who are sometimes appointed but more often elected.¹³³ Issues of habeas corpus, the constitutional¹³⁴ protection against unlawful and indefinite imprisonment¹³⁵ and thus extremely pertinent to the detained population, fall under the purview of

124. *How Courts Work: Steps in a Trial: Bail*, AM. BAR ASS’N (Sept. 9, 2019), https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/bail/ [https://perma.cc/RBB4-E76Z].

125. Ofer, *supra* note 34.

126. *Jail Operations*, NAT’L SHERIFFS’ ASS’N, <https://www.sheriffs.org/gcps/jail-ops> (last visited June 5, 2022) [https://perma.cc/D9LY-RE2N].

127. Michel Martin, *Do Elected Sheriffs Have Outsized Power in the U.S.?*, NAT’L PUB. RADIO (July 25, 2020, 5:16 PM), <https://www.npr.org/2020/07/25/895423249/do-elected-sheriffs-have-outsized-power-in-the-u-s> [https://perma.cc/7N7S-HLFG]. Like with prosecutors, the aforementioned racial and gender disparities in jails are inversely reflected in sheriffs, as about 90% are white men.

128. *Id.*

129. Barthel, *supra* note 55.

130. *Comparing Federal & State Courts*, U.S. DIST. COURTS, <https://www.uscourts.gov/about-federal-courts/court-role-and-structure/comparing-federal-state-courts> (last visited June 5, 2022) [https://perma.cc/JZH6-SV4X].

131. Lauren-Brooke Eisen, *Criminal Justice Reform at the State Level*, BRENNAN CTR. JUST. (Jan. 2, 2020), <https://www.brennancenter.org/our-work/research-reports/criminal-justice-reform-state-level> [https://perma.cc/GU7V-ARAJ].

132. See *Comparing Federal & State Courts*, *supra* note 130.

133. *Id.*

134. U.S. CONST. art. 1, § 9.

135. *Background on Habeas Corpus*, AM. C.L. UNION, <https://www.aclu.org/other/background-habeas-corporus> (last visited June 5, 2022) [https://perma.cc/J6PY-2XDC].

federal judges.¹³⁶ Federal judges, or Article III judges,¹³⁷ are appointed by the President and confirmed by members of the Senate—¹³⁸ both elected offices. Regardless of how or where someone is charged with a crime, judges oversee pretrial hearings, settlement hearings, and trials.¹³⁹ If someone is convicted by settlement or trial verdict, they will be sentenced.¹⁴⁰ In both state and federal courts, the judge decides the sentence based on a set of sentencing guidelines;¹⁴¹ following these guidelines, however, is not mandatory.¹⁴²

In sum, every judge in our nation has earned his or her position in part due to the confidence of electors.¹⁴³ Those who appear before the judges thus have an undeniable interest in voting. Either directly or through representative democracy, voters influence who decides defendants' freedom or incarceration.

C. National Legal Landscape of Enfranchisement

Voting rights are granted or denied through a variety of means and institutions.¹⁴⁴ Advocates for preserving the electoral franchise for individuals detained pretrial have utilized the judiciary, the legislature, and grassroots efforts with varying success.¹⁴⁵ This Section provides non-exhaustive surveys of how respective sectors are changing the landscape of pretrial voter de facto enfranchisement in state and local jails.

1. The Judiciary: Notable Caselaw

Courts have been inconsistent agents of change but remain a potential avenue for progress for pretrial voters. The landmark 1969 case of *McDonald v. Board of Election Commissioners of Chicago* was the first instance of such advocacy.¹⁴⁶ In *McDonald*, two men detained in pretrial at Cook County Jail brought suit under the Fourteenth Amendment arguing that distinctions in absentee ballot access violated equal protection.¹⁴⁷ The plaintiffs argued, “the distinction between those medically incapacitated and those ‘judicially’

136. See *Comparing Federal & State Courts*, *supra* note 130.

137. See *id.*

138. *Id.*

139. *How Courts Work: Steps in a Trial: Pre-trial Court Appearances in a Criminal Case*, AM. BAR ASS'N (Sept. 9, 2019), https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/pretrial_appearances/ [https://perma.cc/EMD9-PYPJ].

140. See *How Courts Work: Steps in a Trial: Sentencing*, AM. BAR ASS'N (Sept. 9, 2019), https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/sentencing/#:~:text=In%20most%20states%20and%20in,death%20penalty%20is%20a%20possibility [https://perma.cc/Y9T7-ESAX].

141. *Id.*

142. *United States v. Booker*, 543 U.S. 220, 258 (2005).

143. See discussion *supra* Subsection III.B.4 (discussing judges roles in the criminal justice system).

144. See *The Fight for the Right to Vote*, WASH. COLL. L. PENCE L. LIB., <https://wcl.american.libguides.com/voting/history/timeline> (last visited June 5, 2022) [https://perma.cc/9S4P-MT49].

145. See discussion *infra* Subsection III.C.

146. See *McDonald v. Bd. of Election Comm'rs of Chi.*, 394 U.S. 802 (1969).

147. *Id.* at 806.

incapacitated bears no reasonable relationship to any legitimate state objective, the classifications are arbitrary and therefore in violation of equal protection.”¹⁴⁸ Citing that some counties allow for voting absentee for any reason while others prevent voting absentee from jail, the plaintiffs also argued, “it is clearly arbitrary to deny the absentee ballot to other unsentenced inmates simply because they happen to be incarcerated within their own resident counties.”¹⁴⁹

The Supreme Court held that denying plaintiffs access to absentee ballots was constitutional as nothing on the record showed they were “absolutely prohibited from exercising the franchise” because “it is not the right to vote that is at stake here but a claimed right to receive absentee ballots.”¹⁵⁰

While the pretrial detainee plaintiffs were unsuccessful in securing absentee ballots,¹⁵¹ *McDonald* set the stage for future Supreme Court litigation on the topic of voting from jail.¹⁵² Four years after *McDonald* came *Goosby v. Osser*, brought by a class of 2,000 pretrial detainees in Pennsylvania alleging absolute disenfranchisement under state election laws both facially and as applied, in violation of the Fourteenth Amendment.¹⁵³ The class alleged “a specific provision [of Pennsylvania election law] affirmatively excludes persons confined in a penal institution from voting by absentee ballot,” because efforts to “register to vote either by absentee ballot, or by personal or proxy appearance” at polling places and registration facilities outside and within the prison had been denied.¹⁵⁴ The case was remanded without evaluating the merits, holding that the petitioners had raised judiciable questions and were not precluded for seeking relief under *McDonald*.¹⁵⁵

Later, the Supreme Court issued a win for the pretrial detainee population when it held in favor of a class of detained plaintiffs who challenged a New York statute in *O’Brien v. Skinner*.¹⁵⁶ Citing a path paved by *McDonald* and *Goosby*, the Court held that “New York’s election statutes, as construed by [the New York Supreme Court], discriminate between categories of qualified voters in a way that, as applied to pretrial detainees and misdemeanants, is wholly arbitrary.”¹⁵⁷ The Court held that the New York statute denied the class equal protection of the law under the Fourteenth Amendment.¹⁵⁸

People in pretrial detention continue to seek relief through courts, though not necessarily successfully.¹⁵⁹ For example, a petition to extend registration deadlines for detained voters in Ohio left those voters without relief in the 2020

148. *Id.*

149. *Id.*

150. *Id.* at 807–09.

151. *Id.*

152. Paikowski, *supra* note 77, at 848.

153. *Goosby v. Osser*, 409 U.S. 512, 513–14 (1973).

154. *Id.* at 521–22.

155. *Id.* at 522.

156. *O’Brien v. Skinner*, 414 U.S. 524, 530 (1974).

157. *Id.* at 530–31.

158. *Id.*

159. *See Mays v. LaRose*, 951 F.3d 775, 791 (6th Cir. 2020).

case *Mays v. LaRose*.¹⁶⁰ By reiterating that there is no constitutional right to an absentee ballot, the Sixth Circuit denied the right for extending registration deadlines for individuals in detention, weighing a “minimal burden” on hopeful absentee voters in jail against state interests.¹⁶¹

2. *The Legislature: State and Local Initiatives*

The legislature provides an additional potential avenue for progress in welcoming pretrial detainees into the electoral fold. Indeed, the American Bar Association explains: “[P]rotection of the right to vote has mostly come through the political process, not from courts. . . . While the Supreme Court declared the right to vote fundamental, it was political actors who actually made that right a reality.”¹⁶² While no state legislature imposes formal barriers to voter eligibility for individuals detained pretrial,¹⁶³ municipalities vary widely in their efforts and opportunities for incarcerated voters to cast their ballots.¹⁶⁴ In 2019 alone, lawmakers in Connecticut, Hawaii, Nebraska, New Jersey, New Mexico, New York, Virginia, and Washington, D.C. introduced legislation to expand voting rights to individuals in prison.¹⁶⁵ Expanding voting opportunities in jail, distinguishingly, remains largely unlegislated.¹⁶⁶ With this said, some states and municipalities have historically used the legislature as a tool for enfranchisement for people in pretrial detention.¹⁶⁷

Rhode Island and Washington, D.C. have designated jails as formal voter registration agencies under Section 7 of the National Voter Registration Act.¹⁶⁸ “Section 7 of the Act requires states to offer voter registration opportunities at all offices that provide public assistance and all offices that provide state-funded programs primarily engaged in providing services to persons with disabilities.”¹⁶⁹ Those who request services are provided with voter registration forms, assistance completing the form, and assistance sending the completed application to the appropriate election officials.¹⁷⁰ This designation mostly assists individuals already discharged from incarceration, but can serve as a guide for the period of incarceration itself: having the Department of Corrections be involved in the voting process can allay the information barriers among jail

160. *Id.*

161. *Id.* (“Ohio’s generally applicable deadline for requesting absentee ballots is constitutional because it imposes only a minimal burden on Plaintiffs’ right to vote and the same state interests from Plaintiffs’ Equal Protection claim justify that burden.”).

162. Daniel P. Tokaji, *The Right to Vote in an Age of Discontent*, AM. BAR ASS’N (Jan. 7, 2019), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/we-the-people/right-to-vote-in-age-of-discontent/ [<https://perma.cc/JV3Y-GZAJ>].

163. See Jackson-Gleich & Yeary, *supra* note 12.

164. *Id.*

165. Porter, *supra* note 4, at 12 n.36.

166. See ISPAHANI & FORBES, *supra* note 20 and accompanying text (distinguishing jail and prison).

167. See discussion *infra* notes 168–201 and accompanying text.

168. 52 U.S.C. § 20506 (2018).

169. *About the National Voter Registration Act*, U.S. DEP’T JUST. (May 21, 2019), https://www.justice.gov/crt/about-national-voter-registration-act#nvra_faq [<https://perma.cc/R9ZP-UQE2>].

170. *Id.*

staff that prevents many people in pretrial detention from realizing they are eligible.¹⁷¹

Massachusetts, in contrast, has deemed incarcerated but otherwise eligible voters as “specially qualified” absentee voters.¹⁷² “As a result of that classification, they do not have to register in advance of completing an absentee vote.”¹⁷³ This classification comes with a high burden of proof—incarcerated voters must submit a timely written request identifying themselves to election officials in the municipality they previously lived, sign the letter, and note the prison’s address.¹⁷⁴ Incarcerated people who work in state-owned businesses earn between \$0.33 and \$1.41 per hour and those working regular prison jobs earn half that.¹⁷⁵ In Massachusetts, specifically, half that money is deducted into a savings account to pay for expenses after release.¹⁷⁶ The price of simply buying a stamp could thus stop any registration effort in its tracks.

Florida, despite its troubling felon disenfranchisement laws,¹⁷⁷ protects the rights of voters detained in jail pretrial to cast absentee ballots.¹⁷⁸ Interpreting a combination of constitutional provisions, the Florida State Attorney General issued guidance following *O’Brien*,¹⁷⁹ stating, “[a] pretrial detainee or convicted misdemeanor incarcerated in the county jail who is not in any way disabled from voting or registering as an elector under the Florida Constitution should not be denied the right to register and vote.”¹⁸⁰

Colorado election law also explicitly accounts for jailed voters, albeit briefly: “[b]efore each election, the county clerk must make efforts to coordinate with the sheriff or his or her designee at each county jail or detention center in the county to provide confined eligible individuals an opportunity to register to vote.”¹⁸¹ Denver’s Confined Voter Program, expanding on the state law, is a thoughtful and thorough initiative seeking to remove barriers between eligible,

171. See LALEH ISPAHANI, RACHEL BLOOM, & NICOLE KIEF, *BREAKING BARRIERS TO THE BALLOT BOX: FELON ENFRANCHISEMENT TOOLKIT*, AM. CIV. LIBERTIES UNION 13, https://www.aclu.org/sites/default/files/pdfs/votingrights/righttovote_20080125.pdf#page=20 [<https://perma.cc/77ZN-LZGK>].

172. Sarah Betancourt, *Getting Out the Prisoner Vote*, COMMONWEALTH (Oct. 22, 2020), <https://commonwealthmagazine.org/politics/getting-out-the-prisoner-vote/> [<https://perma.cc/SB4N-LBD9>].

173. *Id.*

174. *Id.*

175. Wendy Sawyer, *How Much do Incarcerated People Earn in Each State?*, PRISON POL’Y INITIATIVE (Apr. 10, 2017), <https://www.prisonpolicy.org/blog/2017/04/10/wages/> [<https://perma.cc/F22L-Y55A>]. A deeper discussion of prison labor and compensation are outside the scope of this note. For a brief introduction, see Charles Decker, *Time to Reckon with Prison Labor*, YALE INST. SOCIAL & POL’Y STUD., <https://isps.yale.edu/news/blog/2013/10/time-to-reckon-with-prison-labor-0> (last visited June 5, 2022) [<https://perma.cc/C3NT-SJVG>].

176. See Sawyer, *supra* note 175.

177. *Voting Rights Restoration Efforts in Florida*, BRENNAN CTR. JUST. (Sept. 11, 2020), <https://www.brennancenter.org/our-work/research-reports/voting-rights-restoration-efforts-florida> [<https://perma.cc/V3AA-GC75>].

178. Fla. Att’y Gen. Op. No. 75-187 (Jul. 3, 1975), <http://www.myfloridalegal.com/ago.nsf/Opinions/92EA-F47D7EE772A3852566B700616352> [<https://perma.cc/JT4L-8E4K>].

179. See *O’Brien v. Skinner*, 414 U.S. 524, 529 (1974).

180. Fla. Att’y Gen., *supra* note 178.

181. 8 Colo. Code Regs. § 1505-1:2.19.1 (2019).

jailed voters and their full exercise of the franchise.¹⁸² The Confined Voter Program was born from the Denver Elections Division investigating, identifying, and addressing the substantial barriers to voting behind bars.¹⁸³ It addresses issues of reliance on third parties and secrecy concerns: “Ballot box security logs can track every movement of a ballot. Defined voting areas ensure a voter can privately mark their ballot and have assistance provided.”¹⁸⁴ The program also provides bilingual voter assistance and a tablet option, with information provided directly to voters about eligibility and registration—remediating multiple barriers of information.¹⁸⁵ This program is extremely admirable, and while it is based in state law, it is limited to one county.¹⁸⁶

Like Denver in Colorado, Los Angeles in California is a pioneering county when it comes to voting from jail. As of February 2020, otherwise voter eligible women of the Century Regional Detention Facility (CRDF) can vote in-person from jail through a “We All Count” pilot initiative.¹⁸⁷ Previously, incarcerated would-be voters “used the vote-by-mail process, either through their facility voting coordinator or their own designee.”¹⁸⁸ But, on designated days in February 2020, “as part of the Los Angeles County Registrar-Recorder/County Clerk’s voting campaign, they made ballot marking devices available to the eligible women inside the jail facility.”¹⁸⁹

The We All Count campaign not only increased in-person voting, but also civic education, registration, and direct assistance throughout those processes.¹⁹⁰ “Once eligibility was confirmed, the inmates attended a non-partisan civics course to gain a basic understanding of civic life, politics, government, and a brief history of how our nation and government were developed.”¹⁹¹ If the women in detention are not registered, assistance is provided through population management Bureau personnel and Education Based Incarceration staff.¹⁹² Uniquely, the mobile polling station at the jail was also made available as a voting location for the general public.¹⁹³ This initiative is commendable for bringing the polls to voters who cannot go to the polls themselves, but as it is a jail-specific initiative rather than a law, there is no enforcement power to

182. AMBER F. MCREYNOLDS, DENVER ELECTIONS DIVISION, *CONFINED VOTER PROGRAM 2* (2016).

183. *Id.*

184. *Id.*; see Paikowsky *supra* note 77 and accompanying text (discussing the burden of reliance on third parties in voting from jail).

185. MCREYNOLDS, *supra* note 182, at 2; see discussion *supra* Subsection II.C.1 (discussing barriers of information).

186. See MCREYNOLDS, *supra* note 182.

187. *Eligible Inmates in LA County Jails to be Able to Vote Under New Program*, CITY NEWS SERV. (Feb. 23, 2020, 4:13 PM), <https://www.nbclosangeles.com/news/local/eligible-inmates-in-la-county-jails-to-be-able-to-vote-under-new-program/2314523/> [<https://perma.cc/LKX6-35DH>].

188. *Sheriff Villanueva Announces “We All Count” Campaign for Voting in Women’s Jail*, L.A. COUNTY SHERIFF’S DEP’T, <https://lasd.org/we-all-count-campaign/> (last visited June 5, 2022) [<https://perma.cc/8JFN-UKK3>].

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

encourage other jails to follow suit nor accountability mechanisms ensuring future sheriffs at the CRDF continue the program.¹⁹⁴

Maine and Vermont have the most comprehensive voting rights for incarcerated people: “[i]n addition to pretrial inmates, Maine and Vermont allow all prisoners to vote, and some states only disenfranchise those convicted of certain crimes.”¹⁹⁵ Given the troubled history and present racial landscape of incarceration,¹⁹⁶ it is devastatingly unsurprising that these outlier states share a key similarity. “[U]nlike many states, the majority of prisoners in Maine and Vermont are white, which defuses the racial dimensions of felony disenfranchisement laws.”¹⁹⁷ While this cannot necessarily be deemed causal, the outlier status of these states and their unique prison population is notable and alarming.

Maine and Vermont’s uniform voting rights inherently lead to less ambiguity for pretrial voters, because there is no question of their eligibility as related to their interaction with the criminal justice system.¹⁹⁸ Maintenance of rights, of course, does not necessarily translate to exercise of those rights. Maine and Vermont may only boast the infrastructure for absentee voting, and it is unclear how many utilize the opportunity in these states.¹⁹⁹ While the voting rights schemes are stirring, their efforts to involve pretrial voters through the absentee ballot system alone have not been sufficient to involve more people in the franchise.²⁰⁰ Whether this lack of uptake is specific to Maine and Vermont or whether it is universal to other programs and only reported in Maine and Vermont is not clear.

3. *Grassroots and Non-Profit Efforts*

Grassroots organizers are a driving force behind de facto enfranchisement of pretrial voters.²⁰¹ These organizers are often currently or formerly incarcerated individuals themselves,²⁰² and more generally are community members best suited to understand community problems.²⁰³ The empathy and understanding of grassroots and altruism of non-profits can have sustained arduous efforts across the nation.

194. *See id.*

195. Karp, *supra* note 91.

196. *See supra* Section II.B.

197. Nicole Lewis, *In Just Two States, All Prisoners Can Vote. Here’s Why Few Do*, MARSHALL PROJECT (June 11, 2019, 6:00 AM), <https://www.themarshallproject.org/2019/06/11/in-just-two-states-all-prisoners-can-vote-here-s-why-few-do> [<https://perma.cc/X2F5-RYUS>].

198. *See id.*

199. *Id.*

200. *Id.*

201. Clint Smith, *Let the Incarcerated Vote*, ATL. (Oct. 31, 2020), <https://www.theatlantic.com/ideas/archive/2020/10/let-incarcerated-vote/616951/> [<https://perma.cc/JSB2-GCHU>].

202. *Id.*

203. Alexandra Bettencourt, *Grassroots Organizations are Just as Important as Seed Money for Innovation*, U.N.H.C.R., <https://www.unhcr.org/innovation/grassroots-organizations-are-just-as-important-as-seed-money-for-innovation/> (last visited June 5, 2022) [<https://perma.cc/K7XC-SWUR>].

Very often, these organizers work in tandem with government officials.²⁰⁴ For example, “[t]he Colorado Criminal Justice Reform Coalition (“CCJRC”)[] started partnering in 2016 with the Denver Elections Division and the Sheriff’s Department to register eligible voters detained in the jails,” ultimately contributing to the advances made in Denver County.²⁰⁵ The We All Count campaign in Los Angeles’s CRDF also operates in tandem with independent organizers, including a partnership with the ACLU of Southern California’s Jail Project.²⁰⁶ National prison reform organization Citizens United for Rehabilitation of Errants (“CURE”), among other local groups, has spent two decades registering people in Washington, D.C. jails and facilitating relationships between local election officials and jail staff.²⁰⁷

Not all organizations work closely with government actors.²⁰⁸ For example, Houston Justice and the Texas Organizing Project have spent years registering incarcerated residents without a formal government partnership.²⁰⁹ In sum, whether in formal partnerships or as independent bridge builders, non-profits and grassroots advocates play integral roles in the enfranchisement scene.

D. *Illinois’s Solution: Public Act 101-0442*

When evaluating the national landscape of pretrial detainee voter enfranchisement, Illinois stands out. In a feat of grassroots advocacy and legislative progress, Illinois passed landmark legislation in 2019 that overhauled the state’s voting opportunities for people in pretrial detention.²¹⁰ Illinois Lieutenant Governor Juliana Stratton described to local news reporters how Illinois and Cook County, specifically, are changing the landscape for voters behind bars: “[w]e are providing access[] where there was suppression and providing clarity where there was confusion. This polling place at the Cook County Jail gives equal access to the ballot box.”²¹¹ These virtues are championed by Public Act 101-0042 (“the Act”).²¹² Illinois is first of its kind in providing in-person voting in jails through legislation,²¹³ and joins other states

204. Corey Vaughn, *Grassroots Advocacy 101: A Guide for Those New to Political Advocacy*, MUSTER (June 7, 2016), <https://www.muster.com/blog/grassroots-advocacy> [<https://perma.cc/44P2-B8GQ>].

205. Porter, *supra* note 4, at 8; see MCREYNOLDS, *supra* note 182.

206. Sheriff Villanueva Announces “We All Count” Campaign for Voting in Women’s Jail, *supra* note 188; Porter, *supra* note 4, at 9.

207. Porter, *supra* note 4, at 10.

208. See, e.g., Ginger Jackson-Gleich & Rev. Dr. 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 (last visited June 5, 2022) [<https://perma.cc/X36D-WZV5>] (noting lack of cooperation between prison actors can make voting impossible for jailed persons).

209. See Porter, *supra* note 4, at 8.

210. Vote by mail; jails, Pub. Act 101-0442, 2019 Ill. Laws 2090.

211. Jesse Kirsch, *Chicago Board of Elections Surpasses 500K Vote by Mail Ballot Applications, Quadrupling the City’s All-Time Record*, ABC 7 CHI. NEWS (Oct. 17, 2020), <https://abc7chicago.com/chicago-early-voting-cook-county-jail-2020-election-sheriff-tom-dart/7103902/> [<https://perma.cc/HN8V-86JY>].

212. Vote by mail; jails, Pub. Act 101-0442.

213. Nicole Lewis & Aviva Shen, *Unlocking the Vote in Jails*, MARSHALL PROJECT (Oct. 26, 2020, 5:45 AM), <https://www.themarshallproject.org/2020/10/26/unlocking-the-vote-in-jails> [<https://perma.cc/Q9BQ-MSXP>].

in providing voter education, registration, and vote by mail initiatives.²¹⁴ The Act amends the Illinois Election Code and contains three primary features relevant to people in pretrial detention: (1) access to education and registration materials;²¹⁵ (2) absentee ballot access²¹⁶; and (3) in-person polling in jails.²¹⁷

Regarding voter education, the Act reads: “[t]he Department [of Corrections] shall make available to a person in its custody current resource materials, maintained by the Illinois State Board of Elections, containing detailed information regarding the voting rights of a person with a criminal conviction”²¹⁸ Voter registration under the Act is facilitated both by the Department of Corrections and local election authorities.²¹⁹ The Act requires officials to provide access to materials and to facilitate the registration of eligible voters who are confined or detained in a county facility.²²⁰

County jails in counties with populations under 3 million also collaborate with election authorities to “facilitate an opportunity for voting by mail” for registered incarcerated voters.²²¹ In county jails in counties with populations over 3 million, by contrast, “the election authority in the county shall establish a temporary branch polling place under this Section in the county jail.”²²² In-person polling in jail under the Act resembles voting in the outside through utilizing voting booths or screens “to the maximum extent feasible,” providing flexibility to ensure certain logistical challenges do not preclude voting altogether.²²³

The Act was passed with bipartisan support twice, first vetoed by then-Governor Bruce Rauner in 2018, then signed by Governor J.B. Pritzker in 2019.²²⁴ Before the Act, only eight of 102 counties including Cook County provided voter information or registration materials to pretrial detainees.²²⁵ The Act took effect for the first time during the March 2020 primary elections, enabling many incarcerated Illinoisans to cast their ballots who otherwise would not have.²²⁶

In all, the Act remedies almost all of the major issues that currently prevent eligible would-be voters held in pretrial detention from casting their ballots. First,

214. See Vote by mail; jails, Pub. Act 101-0442; *supra* Section II.C.

215. 55 ILL. COMP. STAT. 5/3-15003.3–.4 (2020).

216. 10 ILL. COMP. STAT. 5/19-2.3 (2020).

217. 10 ILL. COMP. STAT. 5/19A-20. (2021).

218. 730 ILL. COMP. STAT. 5/3-2-2.3 (2021).

219. 55 ILL. COMP. STAT. 5/3-15003.3.

220. *Id.*

221. 10 ILL. COMP. STAT. 5/19-2.3.

222. 10 ILL. COMP. STAT. 5/19A-20(e).

223. *Id.*

224. Marin Scott, *Pretrial Detainees to Vote at First Polling Place in Cook County Jail*, CHI. SUN TIMES (Feb. 20, 2020, 4:32 PM), <https://chicago.suntimes.com/2020/2/20/21141112/pretrial-detainees-to-vote-at-first-polling-place-in-cook-county-jail> [<https://perma.cc/S5DW-P3X4>]; Shawn Mulcahy, *Voting Behind Bars: Cook County's Huge Jail Becomes a First-Time Polling Precinct*, WASH. POST. (Mar. 6, 2020, 6:00 AM), https://www.washingtonpost.com/politics/voting-behind-bars-cook-countys-huge-jail-becomes-a-first-time-polling-precinct/2020/03/05/5bf10fc0-581c-11ea-9000-f3cffee23036_story.html [<https://perma.cc/AG4Z-ECDK>].

225. Scott, *supra* note 224.

226. *Id.*

the Act addresses and fills in gaps in understanding and information.²²⁷ It addresses confusion at the official level and the individual voter level through its mandated voter education program.²²⁸ The Act reads: “The Department shall make available to a person in its custody current resource materials, maintained by the Illinois State Board of Elections, containing detailed information regarding the voting rights of a person with a criminal conviction”²²⁹ These educational materials are provided to “a person in its custody,” meaning there is not discretion or vetting as to which individuals receive these materials.²³⁰ Thus, confusion at the officer level becomes less consequential at this stage; they do not gatekeep. As an additional benefit, the physical act of providing these materials “in print[,] . . . on the Department’s website[,] and . . . in a visible location on the premises . . . where notices are customarily posted” likely educates not just the recipient, but also whoever is providing the materials.²³¹ This means less confusion among pretrial voters and among jail staff.²³²

Second, the Act addresses and breaks down infrastructural hurdles that typically prevent eligible voters from accessing voting materials.²³³ It solves this dilemma both for in-person and by-mail voting at every step from registration to casting a ballot. The Act requires election authorities to collaborate with county jails within their jurisdiction to “facilitate voter registration for voters eligible to vote in that county who are confined or detained in the county jail.”²³⁴ Jails must provide voting applications to anyone who requests one and is voting eligible.²³⁵ Illinois allows for same-day registration generally, which applies in jails and under the Act.²³⁶ This overcomes the challenges of “jail churn”—the cycle of people moving in and out of jail with an average incarceration of only three to four weeks.²³⁷ Absent same-day registration, jail churn makes the lengthy process of registration by mail essentially impossible if someone has the misfortune of being incarcerated near an election.

Third, the goals and execution of the Act are scalable to function in other jails, as evidenced by similar efforts and successes across the nation.²³⁸ The

227. 730 ILL. COMP. STAT. 5/3-2-2.3(a)(2021).

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.*

232. See *supra* Subsection II.C.1 (describing the scope and impact of confusion among jail staff about the voting rights of incarcerated people).

233. Scott, *supra* note 224 (“With same-day registration and access to polling machines, those in the Cook County Jail who want to vote can do so without complications.”).

234. 55 ILL. COMP. STAT. 5/3-15003.3 (2020).

235. *Id.*

236. See *Same Day Registration*, NAT’L CONF. STATE LEGS. (Sept. 20, 2021), <https://www.ncsl.org/research/elections-and-campaigns/same-day-registration.aspx> [<https://perma.cc/M9E5-K85Z>]; Scott, *supra* note 224.

237. See Jackson-Gleich & Yeary, *supra* note 12.

238. *Unlock Civics*, Chicago Votes, <https://chicagovotes.com/cook-county-jail-votes/> (last visited June 5, 2022) [<https://perma.cc/X2CP-67JH>] (“Our work in the Cook County Jail has inspired organizations and jails across the country to adopt our framework.”); Mulcahy, *supra* note 224 (“Illinois may become a model—or inspiration—with its new law.”).

physical spaces used for polling in Cook County are not unique and could likely be replicated in most jails.²³⁹ Other jails have already attempted²⁴⁰ or successfully facilitated in-person polling places²⁴¹ and vote-by-mail initiatives²⁴² similar to the Illinois law.

For example, Los Angeles County Jail, the largest jail in the nation by population,²⁴³ allows incarcerated people to vote by mail²⁴⁴ and could potentially go a step further by offering in-person polling. As evidenced by the infrastructure of an absentee voting program at the nation's largest jail by population, it is possible to overcome the major hurdles of coordinating with county officials and galvanizing volunteers even on massive scales.²⁴⁵ Further, per previous discussion, the women's facility in Los Angeles, CRDF, already has an in-person voting program.²⁴⁶ Though enacted through the sheriff rather than legislative mandate in the case of CRDF, the in-person efforts at even one jail in California provide proof that in-person voting through legislation could be possible.²⁴⁷

Finally, even with the gargantuan hurdle of the COVID-19 pandemic in jails, the empirical data from the 2020 election cycle confirms the efficacy of the Act.²⁴⁸ Compared to 1,200 ballots cast from the Cook County Jail for the 2016 election, 2020 drew 2,000 voters—a 40% increase before and after the Act's passage.²⁴⁹ Those 2,000 ballots constitute 40% voter turnout of the eligible voting population in the jail for during the pandemic, and that was early voting alone.²⁵⁰ In-person polling in Cook County jail has thus proved overwhelmingly successful. Admittedly, the 2020 election in general proved historic in voter turnout and engagement and it is possible this trend held steady for eligible voters at the Cook County Jail as well, making it difficult to distinguish causation and

239. Mulcahy, *supra* note 224 (“Voting will take place in the jail’s gym’s chapels, law library and other special spaces . . .”).

240. *Id.* (describing a Harris County, Texas facility that attempted to designate the jail as a polling place but faced security, Internet, and other logistical concerns).

241. Porter, *supra* note 4, at 9–10 (describing in-person voting in Los Angeles County Jail and Washington, D.C. Department of Corrections).

242. Mulcahy, *supra* note 224 (describing vote-by-mail campaign in jails in Massachusetts and pending bill to codify the practice similar to Illinois’s).

243. John Misachi, *The Largest Jails in the United States*, WORLDATLAS (Sept. 28, 2017), <https://www.worldatlas.com/articles/the-largest-jails-in-the-united-states.html> [<https://perma.cc/K2UF-UACM>].

244. Porter, *supra* note 4, at 9.

245. *Id.* (describing Los Angeles county officials support for “We All Count” initiative and community organizations catalyzing voter registration).

246. *See supra* Subsection III.C.2.

247. *Id.*

248. *See COVID-19 Cases at CCDOC*, COOK CNTY. SHERIFF, <https://www.cookcountysheriff.org/covid-19-cases-at-ccdoc/#:~:text=29%20detainees%20in%20custody%20at,currently%20positive%20for%20COVID%20D19.&text=11%2C097%20detainees%20have%20tested%20negative,receiving%20treatment%20at%20local%20hospitals> (last visited June 5, 2022) [<https://perma.cc/WAS8-PYYZ>].

249. *See* Barthel, *supra* note 55; *see also* 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/A84J-7R8J>].

250. Vinicky, *supra* note 249.

correlation between the Act's passage and the increased turnout.²⁵¹ Either way, the fact that people in pretrial detention could vote—and did—is evidence that the Act is at the very least facilitating de facto enfranchisement.

IV. RECOMMENDATION

A. *The Case for Public Act 101-0442*

Illinois Public Act 101-0442 (“the Act”) offers the most substantive, effective, and scalable solution to the barriers of information and infrastructure that de facto disenfranchise thousands of eligible voters in pretrial detention.²⁵² It remedies barriers of information and infrastructure, it is scalable, and it has proven effective.²⁵³ The Act should be adopted as a model across states nationwide, expanded to provide in-person polling in jails of all sizes, and be amended to create stricter standards of adherence.

Using one system—Illinois's—for voting in jails would serve the constitutional function of uniformity.²⁵⁴ In a compelling piece exploring the current state of pretrial detainee voting rights and options for expansion in the future, scholar Dana Paikowsky explains how the currently fractured and inconsistent mechanisms for enfranchising pretrial voters might be remedied through uniformity:

The constitutional demand for some degree of jurisdictional uniformity, however, could prove very useful to jailed eligible voters. As a first order matter, pretrial detention practices are not standardized statewide. Some localities have abolished money bail, while neighboring jurisdictions continue to heavily rely on it; some jurisdictions use algorithms to assess dangerousness of defendants before imposing pretrial detention, whereas others leave it solely to the discretion of local judges; whatever the reason, it is clear that rates of pretrial detention can vary widely across jurisdictions in a single state. *As a result, whether an arrested indigent voter can vote may largely depend on where she is arrested.* Similarly, some jurisdictions make affirmative efforts to provide ballot access to eligible voters in jails, while others have no processes in place.²⁵⁵

As Paikowsky points out, calls for uniformity in election processes have been cited by the Supreme Court with increasing regularity since *Bush v. Gore*.²⁵⁶ The

251. Kevin Schaul, Kate Rabinowitz & Ted Mellnik, *2020 Turnout is the Highest in Over a Century*, WASH. POST (Dec. 28, 2020, 4:29 PM), <https://www.washingtonpost.com/graphics/2020/elections/voter-turnout/> [<https://perma.cc/SAW4-7HMQ>].

252. Vote by mail; jails, Pub. Act 101-0442, 2019 Ill. Laws 2090.

253. See *supra* Section III.D.

254. This recommendation—that all states individually adopt legislation like Illinois's—is distinct from nationalizing voting and enacting such a system federally. Such an approach would require constitutional amendment. U.S. CONST. art. I, § 4, cl. 1 (Elections Clause). For commentary proposing nationalizing elections, see Ed Kilgore, *Let's Nationalize the Way We Run Elections*, N.Y. MAG. (May 31, 2020), <https://nymag.com/intelligencer/2020/05/lets-nationalize-the-way-we-run-elections.html> [<https://perma.cc/89AP-UYCY>].

255. Paikowsky, *supra* note 77, at 863 (emphasis added).

256. *Bush v. Gore*, 531 U.S. 98, 109 (2000).

Bush Court stated, “[w]hen a court orders a statewide remedy, there must be at least some assurance that the rudimentary requirements of equal treatment and fundamental fairness are satisfied.”²⁵⁷ The benefits and protections of uniformity can be expanded further and put in the national context. While elections are within the purview of the states, pretrial detainees’ right to vote does not vary across state lines.²⁵⁸ A uniform system to match that uniform right would take guess work out of the equation for jails without current protections and initiatives, eliminate confusion among voters and officials caused by conflicting messaging across state lines, and serve a compelling constitutional function.²⁵⁹

Utilizing a uniform system at the state level would also be consistent with the approach utilized on the national level.²⁶⁰ Indeed, President Biden signed an Executive Order calling for uniformity in voting protections in federal custody.²⁶¹ The Order reads: “The Attorney General shall establish procedures, consistent with applicable law, to provide educational materials related to voter registration and voting and, to the extent practicable, to facilitate voter registration, for all eligible voters in the custody of the Federal Bureau of Prisons.”²⁶² This includes people detained pretrial in federal facilities.²⁶³

Legislation, as compared to other means, is the best-suited tool to tackle the problem of people in detention being de facto disenfranchised. First, state-wide legislation allows for greater intrastate uniformity, ensuring that the location of someone’s arrest does not impact his or her voting rights.²⁶⁴ Los Angeles and Denver demonstrate how individual sheriffs can make a material positive impact,²⁶⁵ and in doing so show the extent of discretion sheriffs enjoy that could just as easily be used to backtrack or halt enfranchisement programs in their counties.²⁶⁶ Statewide legislation would standardize these practices, and can do so for the better. Second, legislation provides a means of enforcing the goals of enfranchisement efforts. The Act provides, specifically: “A county that establishes a temporary branch polling place inside a county jail in accordance with this subsection (e) shall adhere to all requirements of this subsection (e).”²⁶⁷ The Illinois Election Code describes consequences for not adhering to the Act and other sections: “[A]ny person who knowingly (a) does any act prohibited by or declared unlawful by, or (b) fails to do any act required by, this Code, shall, unless a different punishment is prescribed by this Code, be guilty of a Class A misdemeanor.”²⁶⁸ Unfortunately, change will not occur through altruism—

257. *Id.*

258. Root & Doyle, *supra* note 10.

259. *See supra* Subsection II.C.3.

260. *See* Exec. Order No. 14,019, 3 C.F.R. 13,623 (2021), <https://www.govinfo.gov/content/pkg/FR-2021-03-10/pdf/2021-05087.pdf> [<https://perma.cc/824Q-P8L3>].

261. *Id.*

262. *Id.*

263. *Id.*

264. Paikowsky, *supra* note 77, at 863.

265. *See supra* Subsection III.C.2.

266. *See supra* Subsection III.B.3 (discussing sheriffs).

267. 10 ILL. COMP. STAT. 5/19A-20(e) (2021).

268. 10 ILL. COMP. STAT. 5/29-12 (2011) This passage does not apply to Article 9 of the Code.

enfranchisement schemes must be enforceable through consequence for violations. Third, legislation avoids the funding concerns in money and human capital associated with grassroots organizing.²⁶⁹ Lastly, statewide legislation takes the onus off incarcerated individuals from bringing time and money expensive lawsuits on their own behalf and instead puts the burden on representatives to act.²⁷⁰

As such, that Illinois's path forward toward availing voters in pretrial detention to the electoral franchise is through legislation, rather than judicial or grassroots advocacy, can and should be emulated. Of course, legislation is not just the product of legislators—to say that the Act is purely a result of state actors would ignore the fervent advocacy of organizers and people currently or formerly involved in the criminal justice system, themselves, who raised their voices and ultimately helped ensure its passage.²⁷¹

B. Further Strengthening the Act

While Public Act 101-0442 symbolizes and executes tremendous change, Illinois can go even further to aid eligible incarcerated people in exercising their right to vote. First, the Act should be amended to expand in-person polling requirements to jails with populations smaller than 3 million, the current standard.²⁷² In-person polling eliminates bureaucratic and logistical boundaries that prevent so many incarcerated, eligible voters from casting ballots and should be facilitated for all interested detained voters.²⁷³ Smaller jails have successfully created in-person polling in jails, showing logistical challenges can be overcome even with smaller sized jails and budgets.²⁷⁴ Additionally, providing the same opportunities to vote in-person jail to jail serves the aforementioned goal of a more just, uniform system.²⁷⁵

Further, the Act should codify that all educational and registration material be available in the eligible person's language. Currently, registration materials provided to eligible voters still inside the jail are not available in many languages.²⁷⁶ Illinois has language protections elsewhere in its statutory scheme, like in 730 ILC 5/3-14-1(a-3), which requires that the Department of Corrections provide eligible people released on parole, mandatory release, final discharge, or pardon with voter registration applications “in the languages provided by the

269. Cf. Bettencourt, *supra* note 203.

270. See generally Subsection III.C.1 (describing cases in which petitioners are almost all incarcerated would-be voters, themselves).

271. Porter, *supra* note 4, at 7 (“Groups like the Chicago Lawyers’ Committee for Civil Rights, Chicago Votes, League of Women Voters, and Rainbow PUSH Coalition have anchored efforts at the jail in support of voter registration and participation.”).

272. See 10 ILL. COMP. STAT. 5/19A-20(e) (2021).

273. See *supra* Section IV.A.

274. Porter, *supra* note 4, at 10 (describing the Washington D.C. Department of Correction as a polling location for incarcerated voters, with a daily population of around 2,059).

275. See Paikowsky, *supra* note 77.

276. 55 ILL. COMP. STAT. 5/3-15003.3 (2020).

Illinois State Board of Elections.”²⁷⁷ There is no such protection in the Act. Under the Voting Rights Act,²⁷⁸ which the Board of Elections is beholden to but can expand upon, the availability of bilingual ballots and information based on census data, not a voter’s preference.²⁷⁹ Nationally, only 3.3% of counties and towns are required by the Voting Rights Act to offer language assistance.²⁸⁰ As explained previously,²⁸¹ the counties surrounding jails often do not match the demographics in jail.²⁸² This means under the current law, jails could be in full compliance with the Act and federal law, but not all eligible voters would be able to participate due to a language barrier. By codifying language assistance, fully possible as demonstrated elsewhere in the Illinois Election Code, the Act would protect the suffrage of eligible voters facing language barriers.²⁸³ Notably, Denver’s Confined Voter Program explicitly accounts for bi-lingual staff assistance, which could act as a model supplementary or interim solution as Illinois breaks down its own language barriers.²⁸⁴

C. *Pitfalls and Counterarguments*

While the Act makes tremendous progress in Illinois and has the potential to inspire similarly impactful legislation across the nation, it is not without flaws. First, the Act might be considered a “bandage on a bullet wound”—it does not account for the systemic issues that underlie its necessity like mass incarceration and voter disenfranchisement. For example, one might argue the Act simply makes mass incarceration more palatable rather than fighting it.²⁸⁵ This would be misguided. The eligible voters currently in jail deserve voting rights now, even as justice elsewhere lags. This “bandage” is not mutually exclusive with full healing of greater societal injuries.

Others might argue that there is not enough information or empirical data to justify scaling the Act. These are legitimate concerns especially considering COVID-19 protocols preventing any sort of estimate of the success of the Act in normal circumstances. Even with the pandemic, Cook County Jail boasted a 40% voter turnout of those eligible in the 2020 general election.²⁸⁶ Further, while the Act itself is relatively new, much of the substantive advocacy advanced by it is not; those other successes are notable.²⁸⁷ Indeed, there have been voter registration and mail-in-voting initiatives in jails for decades.²⁸⁸ Cook County

277. 730 ILL. COMP. STAT. 5/3-14-1(a-3) (2022).

278. Voting Rights Act of 1965, Pub. L. 89-110, 79 Stat. 437.

279. D’Vera Cohn, *More Voters Will Have Access to Non-English Ballots in the Next Election Cycle*, PEW RSCH. CTR. FACTTANK (Dec. 16, 2016), <https://www.pewresearch.org/fact-tank/2016/12/16/more-voters-will-have-access-to-non-english-ballots-in-the-next-election-cycle/> [<https://perma.cc/WK6Q-5P4Z>].

280. *Id.*

281. *See supra* Section II.B.

282. Wang & Devarajan, *supra* note 48.

283. *See* 730 ILL. COMP. STAT. 5/3-14-1(a-3) (2022).

284. *See* MCREYNOLDS, *supra* note 182.

285. *See After Cash Bail*, *supra* note 35 (discussing mass incarceration).

286. Vinicky, *supra* note 249.

287. Porter, *supra* note 4, at 9–10.

288. *Id.*

itself ran a mail-in voting program since the 1970s.²⁸⁹ Regarding in-person polling, Cook County and Illinois are indeed pioneers and therefore long-term empiric data on the costs and benefits are unavailable.

Illiteracy in the jail voting population creates barriers to participation no matter what form enfranchisement efforts take.²⁹⁰ It is important to note that “illiteracy” is not a monolith—it is a spectrum and can be broken into categories such as prose literacy, document literacy, and quantitative literacy.²⁹¹ One study revealed that 60% of people in prison are illiterate to some degree, with some research even citing numbers as high as 75%.²⁹² Illiteracy has direct impact on the exercise of voting.²⁹³ Intimidation, confusion, and subsequent avoidance of the polls due to struggles with reading and writing decreases voter turnout generally.²⁹⁴ Confusing language and instructions create particularly high barriers for those who struggle to read or write.²⁹⁵ Indeed, “[t]he ballot stumbling blocks range from poor design to arcane and ambiguous language.”²⁹⁶ Congress attempted to protect individuals who are illiterate through a 1982 federal law, stating: “[a]ny voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by a person of the voter’s choice, other than the voter’s employer or agent of that employer or officer or agent of the voter’s union.”²⁹⁷ Unfortunately, even with these federal protections, many people face an invisible obstacle: shame.²⁹⁸ “Although these plans are implemented to help those who struggle reading the ballot, many low-literate adults find shame in asking for help.”²⁹⁹ Thus, de facto enfranchisement in jails must be coupled with education programs to combat literacy challenges.³⁰⁰

Additionally, in-person polling and even voter registration and absentee voting requires a tremendous lift by volunteers.³⁰¹ This issue is not unique to

289. Scott, *supra* note 224.

290. Corey Michon, *Uncovering Mass Incarceration’s Literacy Disparity*, PRISON POL’Y INITIATIVE (Apr. 1, 2016), <https://www.prisonpolicy.org/blog/2016/04/01/literacy/> [https://perma.cc/JH8N-62AC].

291. *Id.*

292. Michael Sainato, *US Prison System Plagued by High Illiteracy Rates*, OBSERVER (July 18, 2017, 6:00 AM), <https://observer.com/2017/07/prison-illiteracy-criminal-justice-reform/> [https://perma.cc/VEU2-5QRW] Please be aware that this article includes an anecdote of physical abuse.

293. Jessica Gilmour, *Does the Literacy Level of an Adult Affect their Ability to Vote?*, PROLITERACY: BLOG (Nov. 11, 2019), <https://www.proliteracy.org/Blogs/Article/474/Does-the-Literacy-Level-of-an-Adult-Affect-Their-Ability-to-Vote> [https://perma.cc/P9F5-TSGY].

294. *Id.*

295. See Lewis, *supra* note 197.

296. Jeff Kunerth, *Ballots Still Present Literacy Test for Some Voters*, CHI. TRIB. (Jan. 29, 2001, 2:00 AM), <https://www.chicagotribune.com/news/sns-ballots-literacy-os-story.html> [https://perma.cc/2Q8F-RV9Z].

297. 52 U.S.C. § 10508 (2018).

298. Gilmour, *supra* note 293.

299. *Id.*

300. See Jessica Gilmour, *5 Ways Prison Education Programs Can Benefit Inmates*, PROLITERACY: BLOG (Sept. 22, 2020), <https://www.proliteracy.org/Blogs/Article/598/5-Ways-Prison-Education-Programs-Can-Benefit-Inmates> [https://perma.cc/3JRG-95ZZ] (describing how prison education programs are effective tools to increasing literacy in program participants).

301. Lewis & Shen, *supra* note 213 (describing volunteers and community organizers across the country working around the clock to ensure eligible voters in jail can vote).

polling places in jails—it is a universal truth and challenge in our democracy—and thus should not serve as justification for not creating in-person polling in jails.³⁰² Indeed, “[a]lmost every election in the United States is run with the assistance of non-professional volunteers that staff polling places. They number in the hundreds of thousands and are recruited and prepared for their jobs in various ways by local election administrators.”³⁰³ While there are certain challenges unique to volunteering in jails,³⁰⁴ grassroots organizations have so far been successful in their efforts to staff polling places in that environment.³⁰⁵

Moreover, even where the opportunity to vote exists and the proper tools to do so are within reach, many people still do not vote. In Maine and Vermont, where the right to vote from jail is long-established,³⁰⁶ volunteers have reported some individuals in detention, “were more cynical, and expressed a general distrust of anyone seeking public office. A handful felt as if there was no point.”³⁰⁷ The isolation from the political process and inability to access information about issues and candidates is also demotivating.³⁰⁸

Empirics match these anecdotal accounts; in a recent survey by *Slate* and *The Marshall Project* of 8,000 incarcerated people, over 80% of respondents stated they do not believe politicians are acting in their interest.³⁰⁹ Voter disillusionment is a problem that plagues the nation at large, but to a lesser extent than in jails and prisons. *FiveThirtyEight* recently conducted a survey of the general population in which 31% of voters abstained from voting because they did not like the candidates.³¹⁰ Regardless of the reason for abstaining, voter disengagement in the general population is still striking; over 34% of eligible voters did not casting ballots in the 2020 election, and this sad number represents

302. See, e.g., *EAVS Deep Dive: Poll Workers and Polling Places*, U.S. ELECTION ASSISTANCE COMM’N (Nov. 15, 2017), <https://www.eac.gov/documents/2017/11/15/eavs-deep-dive-poll-workers-and-polling-places> [<https://perma.cc/BL5C-2ESB>].

303. Bonnie E. Glaser, Karin Mac Donald, Iris Hui, & Bruce E. Cain, *The Front Lines of Democracy: Who Staffs Polling Places and Does it Matter?* (Election Admin. Rsch. Ctr. Working Paper No. 0704, 2007), https://web.mit.edu/supportthevoter/www/files/2013/08/Front-Lines-of-Democracy-Who-Staffs-Polling-Places-and-Does-it-Matter-Glaser_Mac-Donald-2007.pdf [<https://perma.cc/UX49-ZZZF>].

304. See, e.g., Chris Ruys, *Chicago League Volunteers Step up to Help Register County Jail Detainees*, LEAGUE OF WOMEN VOTERS OF CHI., <https://my.lwv.org/illinois/chicago/article/chicago-league-volunteers-step-help-register-county-jail-detainees> (last visited on June 5, 2022) [<https://perma.cc/3C9G-C7KQ>] (interviewing a volunteer who encountered “the complexity and logistics of an effort where thousands of inmates are spread out in multiple buildings in high-and low-security areas”).

305. *Id.*

306. Lewis, *supra* note 197.

307. *Id.*

308. *Id.*

309. Nicole Lewis, Aviva Shen, & Anna Flagg, *What 8,000 Prisoners Think About American Politics*, SLATE, (Mar. 11, 2020, 5:45 AM), <https://slate.com/news-and-politics/2020/03/prisoner-survey-politics-2020.html> [<https://perma.cc/M7BK-NJLG>].

310. Amelia Thomson-DeVeaux, Jasmine Mithani, & Laura Bronner, *Why Many Americans Don’t Vote*, FIVETHIRTYEIGHT (Oct. 26, 2020, 6:00 AM), <https://projects.fivethirtyeight.com/non-voters-poll-2020-election/> [<https://perma.cc/U83D-WCXH>] (providing survey results broken down into a variety of categories ranging from structural barriers to more granular breakdowns of why voters distrust the system).

the *best* turnout in 120 years.³¹¹ The universality of voter disengagement beyond jail and prison walls informs the opinion that voter disengagement should not discourage voter enfranchisement—this is not an issue with the detained individuals but with the system at large. Further, not voting by choice and not voting by marginalization are materially different omissions.

Additionally, critics may argue that a topic as important and unique as voting from jail should not be addressed by legislators far removed from the carceral experience and ignorant to its realities. Grassroots organizing might be better suited in this way, as the swell of support from community members necessarily reflects the wants and needs of those communities.³¹² Legislation, in comparison, is top-down.³¹³ Legislators with good intentions but little understanding of delicate social problems can often do more harm than good due to that naiveté.³¹⁴ Community organizers played an active role in the Act’s passage and laying its foundation,³¹⁵ at least lessening the valid concern of disconnectedness. “Groups like the Chicago Lawyers’ Committee for Civil Rights, Chicago Votes, League of Women Voters, and Rainbow PUSH Coalition have anchored efforts at the [Cook County] jail in support of voter registration and participation.”³¹⁶ Nonprofit advocates like the ACLU have also voiced their approval for the Act. Khandine Bennett, Advocacy and Intergovernmental Affairs Director of the ACLU of Illinois, publicly applauded the legislation: “Thank you to House sponsor Representative Welch for his commitment to this issue and leadership in getting this legislation through.”³¹⁷

This support from groups intimately familiar with the issues of voting from jail due to on-the-ground volunteering or judicial advocacy allays some concerns that the Illinois legislators were too far disconnected to enact sound policy that actually serves the needs of detained people. Thus, other states can turn to Illinois both as a model in its legislative process and its product, the Act.

Finally, the logistical concerns that prevented in-person polling and voting of any kind for so long remain sizable barriers. For example, the county commissioner of Texas’s Harris County Jail proposed establishing the facility as a polling place, but the plan stalled due to “security, Internet connectivity and

311. Kevin Schaul, Kate Rabinowitz, & Ted Mellnik, *2020 Turnout is the Highest in over a Century*, WASH. POST (Dec. 28, 2020, 4:29 PM), <https://www.washingtonpost.com/graphics/2020/elections/voter-turnout/> [<https://perma.cc/SAW4-7HMQ>].

312. Bettencourt, *supra* note 203.

313. *Id.*

314. To illustrate this point, consider how some likely well-intentioned nuisance ordinances aimed at deterring crime have the unintended consequence of harming domestic violence victims by interfering with their housing and ability to report crimes without repercussions. That legislators did not consider the delicacy of domestic violence in their enactment demonstrates of the limitations of top-down advocacy. *I am not a Nuisance: Local Ordinances Punishing Victims of Crime*, AM. C. L. UNION, <https://www.aclu.org/other/i-am-not-a-nuisance-local-ordinances-punish-victims-crime> (last visited June 5, 2022) [<https://perma.cc/7A9E-SRXX>].

315. Porter, *supra* note 4, at 7.

316. *Id.*

317. *ACLU Applauds Passage of Senate Bill 2090—Expanding Voting in Jails—in Illinois House*, AM. C. L. UNION (May 28, 2019), <https://www.aclu-il.org/en/press-releases/aclu-applauds-passage-senate-bill-2090-expanding-voting-jails-illinois-house> [<https://perma.cc/655M-K25T>].

other logistical concerns.”³¹⁸ These are not insurmountable, however, as evidenced by one of the largest jails in the nation³¹⁹ complying with the Act. The sheriff who oversees Cook County Jail, Tom Dart, doubts the actual strength of many of these hurdles, explaining in an interview with *The Marshall Project*, “I cannot conceive of one legitimate reason why you can’t do this” then continuing, “[t]he vast majority of the people in my custody are charged with horribly violent offenses. So when people say, ‘Security this, security that,’ I say, ‘You walk me through one of the challenges you have that I don’t have.’”³²⁰

Even if claims of logistical challenges are sound and substantial, they should not usurp the exercise of the fundamental right to vote.³²¹ Advocates have explained, there is “no sound policy reason for excluding people in the criminal justice system from our voting and election systems.”³²² The late great Congressman John Lewis said it best: “The vote is precious. It’s almost sacred. It is the most powerful nonviolent instrument or tool that we have in a democratic society, and we must use it.”³²³ We must protect it.

V. CONCLUSION

Illinois has blazed a trail toward a more just electoral system and a more robust, engaged, and representative electorate through its enactment of Public Act 101-0442. Illinois can and should serve as a model for jails across the nation for how to facilitate voter education initiatives, registration, mail-in voting, and in-person-voting.

318. Mulcahy, *supra* note 224.

319. Misachi, *supra* note 243.

320. Lewis & Shen, *supra* note 213.

321. See Porter, *supra* note 4; Kramer v. Union Free Sch. Dist., 399 U.S. 621, 627 (1969) (holding restrictions on voting must satisfy strict scrutiny).

322. Mulcahy, *supra* note 224 (commentary from Ami Gandhi, senior counsel for the Lawyers’ Committee for Civil Rights) (internal quotation omitted).

323. John Lewis, United States Congressman, Commencement Speech at Washington University in St. Louis (May 20, 2020) in Valerie Strauss, *The Prescient Commencement Speech Rep. John Lewis Gave in 2016*, WASH. POST (Jan 16, 2017, 11:18 AM), <https://www.washingtonpost.com/news/answer-sheet/wp/2017/01/16/the-prescient-commencement-speech-rep-john-lewis-gave-in-2016/> [https://perma.cc/GR3K-V9NE].

