Jails as Polling Places: Living Up to the Obligation to Enfranchise the Voters We Jail

*By Dana Paikowsky**

In 1974, the Supreme Court affirmed that eligible voters in jails cannot be denied their right to vote simply because they are incarcerated. Despite this ruling, little has been done over the last 45 years to make this right real, and many eligible, jailed voters continue to suffer jail-based disenfranchisement today. The impact of jail-based disenfranchisement is significant. Jails incarcerate nearly 750,000 people each day, including half a million pretrial detainees who have not been convicted of any crime, many of whom are held simply because they cannot afford to pay bail. Poverty, though, should never deprive anyone of their right to vote. The jailed population is not only disproportionately indigent, it is a microcosm of historically marginalized voters. As compared to both the general and incarcerated populations, people in jails are disproportionately Black, Native American, and Latino; low-income; homeless; and disabled. The time has come to address jail-based disenfranchisement and ensure these eligible voters can exercise their constitutional right to vote.

This Note seeks to understand the role of the law in combating jail-based disenfranchisement, and it proceeds in three parts. First, it describes the problem. It explains how jail-based disenfranchisement occurs, considers who it most affects, and articulates rationales for reform. Next, this Note situates the normative problem of jail-based disenfranchisement in the law, considering the doctrinal origins of the right to vote from jail and the limitations of the existing legal framework. Finally, this Note looks to the future to consider new avenues that litigants today might use to better secure the right to vote for jailed, eligible voters.

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Introduction

La Plata County, Colorado has about 51,000 residents[1] and a propensity for close elections.[2] In 2012, just .3% of the vote decided a race for County Commissioner;[3] in 2014, just 168 voters settled a race for the Colorado House of Representatives;[4] and in 2016, only 51 voters determined the outcome of a primary race for the Colorado State Board of Education.[5]

In each of these elections, one constituency never had their voices heard: jailed voters.[6] The simple fact that someone is incarcerated does not render them ineligible to cast a ballot. While a *conviction* precipitating an incarceration can impact voter eligibility, the jailed population is largely comprised of pretrial detainees—defendants awaiting trial—who retain their eligibility despite their incarceration.[7] The number of eligible voters in jail is higher than one might assume. After the 2016 primary election in La Plata, a survey of the La Plata County Jail showed that only two of the 144 people

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[1] *See* 2010 Census, Population Survey, La Plata County, Colorado, https://factfinder.census.gov/faces/nav/jsf/pages/community_facts.xhtml, *archived at* https://perma.cc/A4E5-G9TF.

[2] *See* Shane Benjamin, *Most Jail Inmates Have the Right to Vote, but Few Do*, The Durango Herald News (Aug. 31, 2016), https://durangoherald.com/articles/108912, *archived at* https://perma.cc/Z474-LU5N.

[3] *See id.*

[4] *See id.*

[5] *See La Plata County Election Results*, GoVoteColorado.com, https://www.sos.state.co.us/pubs/elections/Results/Abstract/2016/primary/republican/education.html (last visited Mar. 9, 2019), *archived at* https://perma.cc/LX9S-U3NW.

[6] The incarcerated population in the United States is split between two kinds of facilities: prisons and jails. According to the Bureau of Justice Statistics, a prison is defined as "a long-term confinement facility run by a state or the federal government, which typically holds felons and offenders with sentences of more than one year . . . ." Danielle Kaeble & Mary Cowhig, Dept. of Justice, Bureau of Justice Statistics, Correctional Populations in The United States, 2016 5 (2018). Jails, on the other hand, are "confinement facilities operated under the authority of a sheriff, police chief, or city or county administrator. . . . Facilities include jails, detention centers, city or county correctional centers, special jail facilities (such as medical or treatment centers and pre-release centers) and temporary holding or lockup facilities that are part of the jail's combined function. Inmates sentenced to jail facilities usually have a sentence of one year or less." *Id.*

[7] *See* O'Brien v. Skinner, 414 U.S. 524, 525 (1974) ("This is an appeal from . . . 72 persons who were at the time of the trial of the original action, [jailed]. Some are simply detained awaiting trial, others are confined pursuant to misdemeanor convictions; none is subject to any voting disability under the laws of New York.").

incarcerated there were ineligible to vote because of previous felony convictions.[8] In a place like La Plata, 142 voters could be a powerful voting bloc, especially in local elections. Local elected officials like district attorneys, judges, and county sheriffs make decisions every day that directly impact jailed voters in La Plata. Participating in local elections would be a powerful way for these voters to hold those officials accountable for how they use or abuse their offices. Despite this population's eligibility, only one vote has been cast from the La Plata County Jail in the last 20 years.[9]

This lack of participation, though, cannot fairly be attributed to a lack of interest in voting. When jailed voters have access to voting information and materials, they vote.[10] One need only look just across the state, from La Plata to Denver, for proof. In 2016, the Denver Elections Department, the Denver County Sheriff's Department, and a local non-profit group ran a pilot program that simply informed jailed voters of their eligibility and provided them with the materials they needed to vote.[11] Before the pilot program, one Denver jail employee estimated about 10 people had registered to vote from the jail.[12] After the program, more than 300 jailed voters had registered to vote and about a hundred cast ballots from jail.[13] In 2018, the now permanent program registered more than 760 people to vote from jail.[14]

Unfortunately, however, most jailed voters find themselves in jurisdictions that look more like La Plata than Denver—jurisdictions where otherwise eligible voters do not or cannot cast ballots simply because they are jailed.[15] In this Note, I adopt the term jail-based disenfranchisement to describe this phenomenon. Using this outcome-focused framework allows us to consider the varied reasons why jailed voters may be unable to access the franchise. For example, some jailed voters may not know (and lack the resources to learn) they are eligible to vote, and others may ask for voter registration or absentee ballot request forms, only to be refused by local sheriffs or county clerks. Voters might be disenfranchised if they are arrested after their state's absentee ballot request deadline has passed and their jails have

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[8] *See* Benjamin, *supra* note 2.

[9] *See id.*

[10] *See* Amanda Pampuro, *Colorado Inmates Get Help Exercising Their Right to Vote*, Courthouse News Service (Oct. 8, 2018), https://www.courthousenews.com/colorado-inmates-get-help-exercising-their-right-to-vote/, *archived at* https://perma.cc/3QPW-T4D4; *see also* Danielle Root & Lee Doyle, Center for American Progress, Protecting the Voting Rights of Americans Detained While Awaiting Trial (2018).

[11] *See* Noelle Phillips, *Got a Criminal Record? Serving Time in the County Jail? You Can Still Vote in Colorado*, The Denver Post (Oct. 1, 2018), https://www.denverpost.com/2018/10/01/criminal-record-felons-voting-colorado-election/, *archived at* https://perma.cc/Z3SD-WL4F.

[12] *See* Pampuro, *supra* note 10.

[13] *See* Phillips, *supra* note 11.

[14] *See* Ryan Haarer, *Colorado Nonprofit Registers 762 Inmates to Vote in Election*, KUSA News (Oct. 12, 2018), https://www.9news.com/article/news/local/local-politics/colorado-nonprofit-registers-762-inmates-to-vote-in-election/73-603987477, *archived at* https://perma.cc/GK48-ZPXY.

[15] Root & Doyle, *supra* note 10.

no alternative means of providing ballot access. The list goes on. Before we can solve this problem, we must understand it.

The heart of the issue, however, is this: because jailed voters are incarcerated, they must rely on others to provide them with the information and materials they need to exercise their right to vote. However, these third parties—sheriffs, county clerks, and other local officials—operate largely without rules or oversight with respect to jail voting.[16]

Jail-based disenfranchisement has been largely overlooked and unaddressed.[17] Although the Supreme Court ruled in 1974 affirming jailed voters have a constitutional right not to be disenfranchised by their incarcerations,[18] little has been done since to ensure these voters have meaningful access to the ballot.[19] Recent efforts to fight felon disenfranchisement have captured national headlines, but jail-based disenfranchisement remains notably absent from the conversation.[20] And although a handful of localities—Denver,[21] Los Angeles,[22] Chicago,[23] New York,[24] and Washington DC[25]—have taken affirmative steps to enfranchise jailed voters, these jurisdictions are the exception, not the rule.[26] The legal community has not done much better. This Note represents the first attempt to meaningfully address the right to vote from jail in legal scholarship.[27] Even practitioners seem to have overlooked

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[16] *See id.*; *see also* David C. Fathi, *The Challenge of Prison Oversight*, 47 Am. Crim. L. Rev. 1453, 1461 (2010).

[17] *See* Root & Doyle, *supra* note 10.

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

[19] *See* Root & Doyle, *supra* note 10.

[20] *See, e.g.*, Miles Rapoport, *Movement in the Fight for Voting Rights Restoration*, The American Prospect (Feb. 5, 2018), https://prospect.org/article/movement-fight-voting-rights-restoration, *archived at* https://perma.cc/L4RB-YC7P.

[21] *See* Pampuro, *supra* note 10.

[22] Caleigh Wells, *Did You Know You Can Vote From Jail? County Inmates Didn't*, LAist (Sept. 25, 2018), https://laist.com/2018/09/25/did_you_know_you_can_vote_from_jail_county_inmates_didnt.php, *archived at* https://perma.cc/RBH2-9BMG.

[23] *See* Erin Rubin, *A New Illinois Law Allows Inmates to Vote In Person in Jail Polling Sites*, Nonprofit Quarterly (July 12, 2017), https://nonprofitquarterly.org/2017/07/12/new-illinois-law-allows-inmates-vote-person-jail-polling-sites/, *archived at* https://perma.cc/9NCC-LJUR.

[24] *See* Ray Downs, *NYC Begins Effort to Register Jail Inmates to Vote*, UPI (Aug. 7, 2018), https://www.upi.com/NYC-begins-effort-to-register-jail-inmates-to-vote/1101533692793/, *archived at* https://perma.cc/6ATH-DRWU.

[25] *See* Mark Segraves, *Non-Felon Prisoners Vote at DC Jail*, First Read-DMV (Nov. 2, 2016), https://www.nbcwashington.com/blogs/first-read-dmv/Non-Felon-Prisoners-Vote-at-DC-Jail-399681871.html, *archived at* https://perma.cc/YRX3-ZNBS.

[26] *See* Root & Doyle, *supra* note 10.

[27] Only two pieces of legal scholarship mention jail-based disenfranchisement. One argues for the need to end felony disenfranchisement completely by allowing voting from prisons and mentions jailed voting in passing. Marc Mauer, *Voting Behind Bars: An Argument for Voting by Prisoners*, 54 How. L. J. 549, 560 (2011). The second uses *Fair Elections Ohio v. Husted*, 770 F.3d 456 (6th Cir. 2014), a case brought by jailed voters in Ohio, as a case study to understand how "current standing criteria stifles efforts to attack discriminatory voting laws." Alex Beck, *"Do Not Pass Go, Do Not Collect $200, Do Not Submit Your Absentee Ballot, Go Directly to Jail, and Lose Your Right to Vote": Why Traditional Standing Tests Insulate Voting-Rights Claims*, 85 U. Cin. L. Rev. 529, 531 (2017).

jail-based disenfranchisement, and it has largely fallen to *pro se* defendants rather than trained lawyers to raise this issue in court.[28] Also, as a first order matter, jails are largely run behind closed doors, so little is known about their day-to-day operations.[29] Unsurprisingly, there is much we do not know about the realities of ballot access and voting from jail. Though a patchwork of legal cases and local reporting has drawn attention to access problems in a few localities like La Plata, these small windows into jail voting have primarily highlighted the need for more comprehensive research, oversight, and accountability in this space.

This Note seeks to address these gaps, proceeding in three parts. First, this Note works to understand jail-based disenfranchisement as a normative problem. This is a descriptive project, striving to articulate how jail-based disenfranchisement occurs, who is most affected, and why this problem must be addressed. Next, this Note will discuss how and when courts have understood jail-based disenfranchisement to give rise to a constitutional injury. This section will consider not only the doctrinal origins of the right to vote from jail, but also the barriers within that doctrinal framework that currently impede jailed voters' ability to vindicate their rights. Finally, the Note will consider new legal pathways to push jail-voting doctrine further to ensure jailed voters have meaningful access to the ballot and make the right to vote real for the hundreds of thousands of voters incarcerated in the United States every Election Day.

1. Understanding Jail-Based Disenfranchisement

The Scope of Jail-Based Disenfranchisement: Who is Affected?

The United States incarcerates more people than any other country in the world[30] in what has come to be recognized as a crisis of mass incarceration.[31] While prison populations have decreased over the last ten years, jails continue to play an often-overlooked role in perpetuating modern mass incarceration.[32] Of the 2.16 million people incarcerated in the United States

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[28] *See infra* note 172.

[29] *See* Fathi, *supra* note 16, at 1461.

[30] *See Highest to Lowest - Prison Population Total*, World Prison Brief, http://www.prisonstudies.org/highest-to-lowest/prison-population-total, *archived at* https://perma.cc/FJL7-MAWG.

[31] *See generally* Michelle Alexander, The New Jim Crow (2010) (describing the rise of mass incarceration in the United States).

[32] Over the last decade, both the federal and state prison populations have decreased, but the jailed population has remained relatively stable. *See* Kaeble & Cowhig, *supra* note 6, at 1. One particularly egregious example of how jails and prisons work together to perpetuate mass incarceration comes from Indiana, where a prison reform bill decreased the state's "prison" population by simply moving its prisoners to local jails. *See* Oliver Hinds & Jack Norton, *Crisis at the Crossroads of America*, Vera Institute of Justice (Nov. 5, 2018), https://www.vera.org/in-our-backyards-stories/crisis-at-the-crossroads-of-america, *archived at* https://perma.cc/DY2U-ECMP.

each day, one third are held in county jails.[33] That is a daily population of nearly 750,000 people.[34]

Jail-based disenfranchisement, however, does not impact all those who are jailed. Jail-based disenfranchisement occurs only when *eligible* voters are not able to cast their ballots because of their incarceration. Determining exactly who is a part of this eligible jailed population is not a simple matter. Because the Constitution grants states broad authority to set voter qualifications,[35] it creates what one observer has called 51 small republics with 51 different requirements for political citizenship.[36] To see how this system plays out in reality, one can simply look at the variable patchwork of state rules governing whether people with previous convictions can vote. Each state can decide for itself which convictions lead to disenfranchisement (i.e., misdemeanors, felonies, or some other list of covered crimes), which sentences lead to disenfranchisement (i.e., only for incarceration or for probation and parole), and how long the disenfranchisement lasts (i.e., only during incarceration or beyond). As a result, a man convicted of felony robbery in Maine will be able to vote from prison, but a similarly situated person in Kentucky will find himself disenfranchised for the rest of his life.[37] Criminal convictions aside, jailed people may also be ineligible to cast ballots because they are too young, are not citizens, or have some other issue impairing their eligibility.[38] This variability makes it very difficult to know the precise number of eligible voters in jail on any given day.

The population of eligible voters in jail is likely higher than one might assume. Only about 35% of the jailed population is incarcerated because of a conviction.[39] This population is often in jail either because they are awaiting sentencing or serving a sentence for a low-level misdemeanor or, occasionally, felony.[40] As discussed above, only some portion of this convicted

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[33] *See* Kaeble & Cowhig, *supra* note 6, at 2.

[34] *See id.*

[35] This system was created as a compromise, a middle ground to bridge the division between the drafters of the Constitution who believed in voting as a fundamental right and those who believed in a "stakeholder democracy," where taxation begets representation and property interests give rise to political citizenship. *See* Jeff Manza & Christopher Uggen, Locked Out: Felon Disenfranchisement and American Democracy 20–21 (2008).

[36] *See id.* at 21 (discussing the work of political theorist Katherine Pettus).

[37] *See Criminal Disenfranchisement Laws Across the United States*, Brennan Center for Justice (last updated Dec. 7, 2018), https://www.brennancenter.org/criminal-disenfranchisement-laws-across-united-states, *archived at* https://perma.cc/HM3F-QKFW.

[38] *See, e.g.*, *Voter Eligibility*, Washington Office of the Secretary of State, https://wei.sos.wa.gov/agency/osos/en/voters/Pages/voter_eligibility.aspx, *archived at* https://perma.cc/67GQ-989M (explaining the various qualifications—and disqualifications—for voting in Washington state).

[39] *See* Zhen Zeng, Dept. of Justice, Bureau of Justice Statistics, Jail Inmates in 2016 4 (Feb. 2018), https://www.bjs.gov/content/pub/pdf/ji16.pdf, *archived at* https://perma.cc/SX2M-MUSG.

[40] *See id.*; *see also* Ram Subramanian et al., Vera Institute of Justice, Incarceration's Front Door: The Misuse of Jails in America 5 (2017) ("[N]early 75 percent of the population of both sentenced offenders and pretrial detainees are in jail for nonviolent traffic, property, drug, or public order offenses.").

population will be formally disenfranchised by their incarcerations, depending on the relevant state law. On the other hand, 65% of the jailed population—around half a million people—are incarcerated while awaiting trial;[41] because they are not incarcerated as a result of a conviction, the fact of this group's incarceration cannot impede their eligibility to vote.[42]

The risk that someone will find herself disenfranchised by pre-trial detention has grown significantly over the last few decades. Since the Court affirmed the right to vote from jail in the early 1970s, the number of people held in pretrial detention has grown more than five-fold and the national rate of pretrial detention has more than tripled.[43] County jails now make nearly 11 million admissions per year, an admissions rate 19 times that of federal and state prisons combined.[44] Arrest today also results in incarceration much more than it did thirty years ago. In 1982, the rate of post-arrest jailing was 51 admissions for every 100 arrests.[45] By 2012, that number was a staggering 95 admissions for every 100 arrests.[46] People who are arrested today are not only more likely to face jail after an arrest, but also more likely to spend significant time there.[47] The average length of a jail stay grew from 14 days in 1983 to 23 days in 2013[48] to 25 days in 2016—an 8% growth rate over just three years.[49] The longer someone spends in jail, the more likely it is that their incarceration will coincide with an election.

The affected population is a microcosm of historically marginalized voters. Jailed voters are disproportionately low-income, Black, Latino, Native American, homeless, and disabled. Though Black and Latino individuals make up 30% of the general population, together they account for 51% of the jailed population;[50] additionally, Black individuals are jailed at a rate 3.5 times that of non-Hispanic whites.[51] Native Americans have the second highest jail-incarceration rate at 1.6 times that of non-Hispanic whites.[52] People experiencing homelessness are also disproportionately incarcerated in jails. One study in Los Angeles found that one of every six people the city arrested was homeless at the time of their arrest,[53] and people with a long

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[41] *See* Zeng, *supra* note 39, at 4.

[42] *See, e.g.*, Lewis v. San Mateo County, No. C 96–4168 FMS, 1996 WL 708594, at *1 (N.D. Cal. Dec. 5, 1996) ("A state may disenfranchise those convicted of a crime, including those who have completed their sentences and paroles. Pretrial detainees stand on a different footing than those convicted of a crime, however.") (internal citation omitted).

[43] Jacob Kang-Brown & Ram Subramanian, Vera Institute of Justice, Out of Sight: The Growth of Jails in Rural America 9 (June 2017).

[44] *See* Subramanian et al., *supra* note 40, at 4.

[45] *See id.* at 22.

[46] *See id.*

[47] *See id.* at 10.

[48] *See id.*

[49] *See* Zeng, *supra* note 39, at 1.

[50] *See* Subramanian et al., *supra* note 40, at 15.

[51] *See* Zeng, *supra* note 39, at 1.

[52] *Id.* at 3.

[53] *Id.*

history of cycling through jail are twice as likely to be homeless.[54] According to the Bureau of Justice Statistics, people in jails are also almost twice as likely to show signs of "serious psychological distress" as people in prisons and five times as likely as the general population.[55] Studies have found individuals with severe mental health issues are also more likely to spend longer periods of time incarcerated, making them more likely to be disenfranchised as a result.[56] In addition to mental health problems, incarcerated people are more likely to be confronting chronic health conditions and lack access to care.[57] Incarcerated individuals who do not speak English also have a much more difficult time accessing health services,[58] which raises concerns that jailed non-English speaking voters may also lack access to ballots and voting information that they can understand.[59]

People in jail are also more likely to be living in poverty than both the imprisoned and general population, which should come as no surprise given our country's continued use of money bail.[60] In money bail systems, access to wealth is a powerful determinant as to whether someone will be subjected to pretrial detention. In one particularly salient example, only 15% of the defendants in New York City who were assigned bails of $500 or less could afford their bails.[61] Imposition of money bail is particularly burdensome for women and people of color who already confront systemic barriers to wealth, which has made pretrial detention a more likely consequence of arrest for those groups.[62] The median income of a woman who is unable to post bail is $11,071—below the Census Bureau poverty threshold—but, for men, that number is $15,598.[63] Black and Latino women are even more likely to have a pre-incarceration income below the poverty threshold than

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[54] Tanvi Misra, *The Homelessness Problem We Don't Talk About*, CityLab (Aug. 16, 2018), https://www.citylab.com/equity/2018/08/the-homelessness-problem-we-dont-talk-about/567481/, *archived at* https://perma.cc/2U3M-VDDX.

[55] Jennifer Bronson & Marcus Berzofsky, Dept. of Justice, Bureau of Justice Statistics, Indicators of Mental Health Problems Reported by Prisoners and Jail Inmates, 2011–12 (2017).

[56] *See* Subramanian et al., *supra* note 40, at 15 ("In Los Angeles, . . . Vera found that users of the Department of Mental Health's services on average spent more than twice as much time in custody than did the general custodial population—43 days and 18 days respectively.").

[57] Laura M. Maruschak & Marcus Berzofsky, Dept. of Justice, Bureau of Justice Statistics, Medical Problems of State and Federal Prisoners and Jail Inmates, 2011–12 (2016).

[58] *Id.* at 13.

[59] *See, e.g.*, Jocelyn Friedrichs Benson, *Su Voto Es Su Voz! Incorporating Voters of Limited English Proficiency into American Democracy*, 48 B.C. L. Rev. 251, 263 (2007) (discussing barriers to the ballot box for the 8 million citizens over the age of eighteen who are considered to have limited English proficiency).

[60] *See generally* Bernadette Rabuy & Daniel Kopf, Prison Policy Initiative, Detaining the Poor: How Money Bail Perpetuates an Endless Cycle of Poverty and Jail Time (2016).

[61] *See* Subramanian et al., *supra* note 40, at 32.

[62] Elizabeth Swavola et al., Vera Institute of Justice, Overlooked: Women and Jails in an Era of Reform 29 (2016).

[63] *See* Rabuy & Kopf, *supra* note 60.

their white counterparts.[64] Similarly, the median pre-incarceration income for Black men who are unable to post bail is $11,275, far below the median pre-incarceration income of Latino men and white men, which is $17,449 and $18,283 respectively.[65] In America today, the only thing most people in jail are guilty of is being in poverty. These indigent individuals have already lost their liberty because of an inability to pay. They should not lose their right to vote as well.

The Mechanics of Jail-Based Disenfranchisement: How Does it Occur?

Before we can address the problem of jail-based disenfranchisement, it is important we understand how it occurs. To begin, consider the story of Hassan Swann, an eligible voter in DeKalb County, Georgia who was not able to cast his ballot from jail during the 2008 presidential election.[66] The Sheriff in DeKalb held a voting drive in his jail to help jailed voters cast their ballots, so at the outset Mr. Swann was in a better position to cast his ballot than many other jailed voters.[67] Mr. Swann wanted to vote, so he took advantage of the program and filled out a ballot request form. The form asked for two addresses—an "Address as Registered" and an "Address (Ballot to be Mailed)."[68] Some voters in the jail put the jail's address on the "to be Mailed" line.[69] Mr. Swann left that line blank because he did not know the address of the jail.[70] He assumed, however, that his ballot would be sent to the jail regardless because the jail had facilitated the program.

Unfortunately, no ballots would be sent to DeKalb County Jail that year. Five days before Election Day, the Director of Elections for the county told the Chief Deputy Sheriff in DeKalb she could not send any absentee ballots to the jail.[71] According to her, the state election code only allowed registered voters who would be present in the county on Election Day to request absentee ballots if they were prevented from voting by a medical disability.[72] Mr. Swann and the other jailed voters did not qualify because they were incarcerated in their home county and were not prevented from voting by a medical incapacity. To get around this problem, the Sheriff and Director of Elections created their own solution; the absentee ballot clerk would mail the requested ballots to jailed voters' home addresses, and the Sheriff would place a box in front of the jail where friends and family could deposit the ballots after they arrived.[73] No one informed Mr. Swann of any

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[64] *Id.*
[65] *Id.*
[66] *See* Swann v. Sec'y of State of Ga., 668 F.3d 1285, 1286 (11th Cir. 2012).
[67] *See id.* at 1287.
[68] *See id.*
[69] *See id.*
[70] *See id.*
[71] *See id.*
[72] *See id.*
[73] *See id.*

issues with his absentee ballot, and he was never told about the drop-box in front of the jail.[74] Election Day came and went, and Mr. Swann was disenfranchised.[75]

When considering what jail-based disenfranchisement looks like, one might jump to a more clear and direct kind of disenfranchisement than what happened to Mr. Swann, one where a bad-acting sheriff disenfranchises an eligible voter who asks him for a ballot. Though this kind of direct disenfranchisement certainly occurs, jail-based disenfranchisement is often more complicated than that, borne of many smaller system-failures.

Mr. Swann's story, though not necessarily emblematic, still speaks to the core problem of jail-based disenfranchisement: because jailed voters are incarcerated, they cannot access the franchise on their own. Jail 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 peoples' lives, from the way their mail is processed and how often they can access the phone or computer to what plays on their television screen.[76] 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. Even when people in jail are lucky enough to have third parties make some attempt to facilitate their voting, as the DeKalb Sheriff did, the jail bureaucracy and its restrictions on information and access can still disenfranchise voters like Mr. Swann.

Mr. Swann was lucky, in a sense, because he knew he had a right to vote. That is not always the case. One jailed voter in Denver actually jumped out of his seat with surprise when a jail official offered him a voter registration form.[77] He and others in his position have good reason to be confused about their eligibility. Contact with the criminal justice system can and often does impact voter eligibility. Forty-eight states—all except Maine and Vermont—disenfranchise some group of people who have been convicted of a crime.[78] However, the rules that dictate whether one is in that class of disen-

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[74] *See id.*

[75] *See id.* Mr. Swann brought suit in this case. Although the County Clerk claimed she sent a ballot to Mr. Swann's home, he claimed his wife never received it. The court also found that Mr. Swann was not harmed when the jail neglected to inform him that the ballots were being sent to people's homes or about the drop box in front of the jail because he had not filled in the jail's address and was therefore not in the class of voters who could reasonably have expected to receive a ballot at the jail or needed to know about the new accommodations. The court finally concluded that Mr. Swann's inability to vote was not fairly attributable to any actions by state officials and rejected his claim on standing grounds. *Id.*

[76] *See* Margaret Barthel, *Getting Out the Vote from the County Jail*, The Atlantic (Nov. 4, 2018), https://www.theatlantic.com/politics/archive/2018/11/organizers-fight-turn-out-vote-county-jails/574783/, *archived at* https://perma.cc/WF8A-TNKE.

[77] *See* Phillips, *supra* note 11.

[78] *See Felon Voting Rights*, National Conference of State Legislatures (Dec. 21, 2018), http://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx, *archived at* https://perma.cc/6F5U-NDA9.

franchised voters are complicated and confusing.[79] In a particularly egregious example, until 2017, Alabama law said people convicted of "crimes of moral turpitude" could not vote.[80] However, Alabama did not specify what those "crimes of moral turpitude" were, instead giving local election officials wide discretion to enforce the law however they saw fit.[81] Surveys regularly find that people misunderstand how and when contact with the criminal justice system impacts voter eligibility.[82] One recent survey in Colorado found that just over 40% of those surveyed mistakenly believed that people on probation, in pretrial detention, or serving sentences for misdemeanor convictions are not eligible to vote.[83] Voters who have already had contact with the criminal justice system may be particularly unwilling to try to vote if they are unsure of their eligibility, especially after recent, highly publicized criminal enforcement against ineligible previously incarcerated individuals who mistakenly cast ballots.[84] Ultimately, however, one cannot exercise a right she does not know she has.

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[79] *See* Asma Khalid, *Election Laws May Discourage Some From Voting, Even If They Are Allowed*, NPR (Oct. 13, 2019), https://www.npr.org/2018/09/13/646314446/election-laws-may-discourage-some-from-voting-even-if-they-are-allowed, *archived at* https://perma.cc/QLR4-867E; *see also* Jacey Fortan, *Can Felons Vote? It Depends on the State*, N.Y. TIMES (Apr. 21, 2018), https://www.nytimes.com/2018/04/21/us/felony-voting-rights-law.html, *archived at* https://perma.cc/AVZ2-3QEM.

[80] *See* Sam Levine, *Alabama Tweaks White Supremacist Law To Potentially Restore Voting Rights To Thousands*, HUFFINGTON POST (May 26, 2017), https://www.huffingtonpost.com/entry/alabama-felon-voting-right-restoration_us_59286e72e4b0df57cbfb840e, *archived at* https://perma.cc/ED2F-VFK8.

[81] *See id.*

[82] *See, e.g.*, ROBERT P. JONES ET AL., PUBLIC RELIGION RESEARCH INSTITUTE, AMERICAN DEMOCRACY IN CRISIS: THE CHALLENGES OF VOTER KNOWLEDGE, PARTICIPATION, AND POLARIZATION (2018).

[83] *See* Press Release, Colorado Criminal Justice Reform Coalition, Colorado Survey Finds Significant Public Confusion Surrounding Voting Rights of People with Criminal Records; Many Eligible Voters are Widely Believed to Be Ineligible, According to New Report (Oct. 12, 2018), https://www.ccjrc.org/wp-content/uploads/2018/10/20181002-vwc-report-press-release.pdf, *archived at* https://perma.cc/D69A-6CTE.

[84] In the last few years there have been several high-profile criminal prosecutions of individuals who mistakenly cast ballots but were not eligible—particularly people on probation, with previous felony convictions, and non-citizens. One case that has gotten significant attention is that of Crystal Mason, a 43-year-old mother of three, who voted while on probation. She was convicted of felonious voter impersonation and sentenced to five years in prison, a term of imprisonment that would double the time she had already spent incarcerated. These prosecutions have been justified as a push for "election integrity" by the Attorneys General who bring the lawsuits, while many critics believe they are efforts to intimidate and suppress the votes of people of color. *See* Jack Healy, *Arrested, Jailed and Charged With a Felony. For Voting.*, N.Y. TIMES (Sept. 2, 2018), https://www.nytimes.com/2018/08/02/us/arrested-voting-north-carolina.html, *archived at* https://perma.cc/XHH8-HCCM; *see also* Sam Levine, *Here's Why One Wrong Voting Move Can Be Catastrophic For Former Felons*, HUFFINGTON POST (Oct. 2, 2018), https://www.huffingtonpost.com/entry/felon-disenfranchisement-voting-rights_us_5bb3cd60e4b028e1fe38a253, *archived at* https://perma.cc/S2QG-7RTZ; Ed Pilkington, *US Voter Suppression: Why this Texas Woman Is Facing Five Years' Prison*, THE GUARDIAN (Aug. 28, 2018), https://www.theguardian.com/us-news/2018/aug/27/crime-of-voting-texas-woman-crystal-mason-five-years-prison, *archived at* https://perma.cc/J9U8-TDMQ.

This confusion about voter eligibility is not limited to jailed voters; perhaps more troublingly, the officials tasked with providing ballot access to jailed voters often have similar misconceptions. One report found many election officials misunderstand how and when contact with the criminal justice system affects eligibility.[85] In Kentucky, for example, 53% of county clerks surveyed did not know that misdemeanants are eligible voters in their state.[86] In Tennessee, 90% of local election officials surveyed misunderstood the eligibility rules for people with out-of-state felony convictions.[87] Sheriffs and jail officials too may not know the law. One jail official who became involved in a jail-enfranchisement effort told interviewers, "[q]uite honestly, even with us being a law-enforcement agency, we were not aware that you could vote if you had a certain classification or certain record, so not only are the inmates being educated on this whole process."[88] Even if a voter requests a ballot, the sheriff at the jail or county clerk may mistakenly believe they are not eligible and thus decline to provide them with the requisite voting materials.

Even if a jail or election official understands that they have some obligation to provide jailed voters with ballot access, they may misunderstand the nature of that obligation and fail to meet it. Though the legal standard will be discussed in more depth below, the Constitution requires that jails provide "some other alternative means of voting" to voters who cannot access absentee ballots from jail; this would include, for example, voters like Mr. Swann who are statutorily barred or voters who are incarcerated after an absentee ballot request deadline has passed.[89] It is unclear whether local officials are aware of this obligation. A warden of a jail in Suffolk County told the author that she could not provide ballots to people arrested after the absentee ballot request deadline passed because she "could not break the law."

Even if jail staff does want to approve a jailed voter's request for alternative means of voting, they may be unable to do so if accommodations cannot be made in time. Many jurisdictions do not have formal policies or plans to provide alternative means of ballot access to voters in jail, which makes the task of granting requests ever more difficult as Election Day approaches and late-jailed voters increasingly require last minute accommodations.[90]

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[85] Erika Wood & Rachel Bloom, Am. Civil Liberties Union and Brennan Ctr. for Justice, De Facto Disenfranchisement 2–5 (2008).

[86] *Id.* at 2

[87] *Id.* at 6.

[88] *See* Pampuro, *supra* note 10.

[89] *See* O'Brien v. Skinner, 414 U.S. 524, 529 (1974).

[90] *See, e.g.*, Julia Rentsch, *Advocates Push to Enfranchise Jailed Colorado Voters*, Reporter-Herald (Aug. 25, 2018), http://www.reporterherald.com/news/election/ci_32095057/advocates-push-enfranchise-jailed-colorado-voters, *archived at* https://perma.cc/MU9T-7FVM ("Beginning in January, . . . [the Colorado Secretary of State's Office] began work on a rulemaking process to mandate county clerks and jails across the state to work together on

Jailed voters also must navigate not only electoral bureaucracy, but also jail bureaucracy. Jailed voters in New York City, for example, could not rely on the jail to promptly deliver their mail and were being disenfranchised by jail mail systems that delayed ballot request forms and ballots themselves.[91] Even if jails have systems in place to circumvent these issues and facilitate voting, jailed voters must know they exist to take advantage of them. Take for example Mr. Swann, who may have been able to exercise his right to vote if he had known whom in the jail he could turn to for assistance and what to ask. Even if Mr. Swann was concerned that he had not received his ballot in the jail mail system, he may have been reluctant to follow up with jail officials. Mr. Swann, like many people in jail, had social and institutional reasons to avoid this follow up, fearing he might irritate the guards, be seen as someone causing problems, and risk incurring backlash. By the time he realized he truly would not be getting his ballot, it was likely too late for him to do anything about it.

State officials can also directly deprive voters of ballot access. In 1996, Timothy Lewis was jailed in San Mateo County, California. He requested a voter registration form four days before the deadline, but the jail officials failed to provide one to him until the deadline had already passed.[92] He could not register to vote that year.[93] What happened to Mr. Lewis may have been caused by incompetence, or it may not have been so innocent. Some officials do not believe voters entangled in the criminal justice system *should* vote. In one report, election officials in Tennessee expressed a belief that people with felony convictions "shouldn't be able to vote," despite the fact that state law allows such voters to restore their rights and, subsequently, to vote.[94] Sheriffs' associations also have a record of opposing bills that liberalize access to the ballot in local jails.[95] Given how much jailed voters must rely on these

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getting voter registration and ballots to and from the inmates. . . . Larimer County Clerk Angela Myers said Larimer did not previously have a plan . . . .").

[91] *See* Downs, *supra* note 24.

[92] *See* Lewis v. San Mateo County, No. C 96-4168 FMS, 1996 WL 708594, at *1 (N.D. Cal. Dec. 5, 1996).

[93] *See id.*

[94] *See* Wood & Bloom, *supra* note 85, at 7.

[95] *See* La Risa Lynch, *Voting Could Soon Be Easier at All Illinois Jails*, The Chicago Reporter (Apr. 9, 2018), https://www.chicagoreporter.com/voting-could-soon-be-easier-at-all-illinois-jails/, *archived at* https://perma.cc/H3X6-F9C8 ("Stratton worked with local advocates to introduce a bill in February to expand voter access and education among Illinois' jail population, which is about 20,000 people. But the bill has received opposition from a statewide sheriffs' association."); *see also* Patrick McGreevy, *Should Felons be Allowed to Vote from Behind Jail Bars?*, L.A. Times (Jul. 14, 2016), https://www.latimes.com/politics/la-pol-sac-california-felons-voting-rights-20160714-snap-story.html, *archived at* https://perma.cc/Z8BS-KNF8 ("[P]olice chiefs and sheriffs throughout California say the proposal . . . undermines a longstanding social compact: those who commit a serious crime lose not only their freedom to live in society for a time but also their right to participate in democracy. 'We believe that there have to be consequences to your action . . . ,' said Kern County Sheriff Donny Youngblood, president of the California State Sheriffs' Assn."); Patrick McGreevy, *Felons in County Jails to Be Allowed to Vote in California Elections*, L.A. Times (Sep. 28, 2016), https://www.latimes.com/politics/essential/la-pol-sac-essential-politics-updates-felons-

actors to cast their ballots, sheriffs' and election officials' negative opinions on these matters raise serious cause for concern.

While much of this section's discussion has focused on individual actors—either voters or state officials—state law can also play a pivotal role in providing or restricting ballot access to jailed voters. Many states require voters to request absentee ballots as many as 10 or 11 days (or 21 days in Rhode Island) before an election.[96] These early deadlines make voting especially difficult for eligible jailed voters who are arrested after their state's deadline has passed. Also, as was the case in Georgia, many states have "for cause" absentee voting, which restricts access to absentee ballots and only allows some voters to vote by mail.[97] There is also little affirmatively good law providing ballot access for jailed voters. While legislative effort to enfranchise pretrial detainees was approved by the Illinois state legislature, it died after being vetoed by the governor.[98] However, there are a few bright spots. California recently passed a law expanding the pool of eligible jailed voters to include not only voters convicted of misdemeanors but also voters convicted of felonies who are serving their sentences in jails;[99] additionally, Colorado's Secretary of State enacted a rule directing sheriffs and county clerks to create processes for providing ballot access to jailed voters.[100] The majority of states, though, impose no obligations on sheriffs and county clerks to facilitate voting from jail (or not), giving them the discretion to set up the system however they see fit without mandating any formalized plan.[101]

For all of these reasons, casting a ballot can be difficult or impossible for would-be voters in jails. To truly address the problem of jail-based disenfranchisement, advocates must think comprehensively—imaginatively—about what would actually make voting from jail possible. That means perhaps starting with repealing restrictions on absentee ballot access and fighting against bad-acting officials, but then moving forward pushing for a system that provides affirmative access, one that is concerned with making

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in-jails-to-be-allowed-to-vote-1475094969-htmlstory.html, *archived at* https://perma.cc/7NNH-UG8U ("Despite widespread opposition from law enforcement, Gov. Jerry Brown on Wednesday signed a bill that will allow thousands of felons in county jails to vote in California elections as part of an effort to speed their transition back into society.").

[96] *See Absentee Ballot Deadlines*, Vote.org (last updated Oct. 8, 2018), https://www.vote.org/absentee-ballot-deadlines/, *archived at* https://perma.cc/WN25-XGSN.

[97] *See Absentee and Early Voting*, Nat'l Conference of State Legislatures (last updated Apr. 3, 2019), http://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx, *archived at* https://perma.cc/8DK5-EQBQ (providing a map of early and absentee voting across the fifty states).

[98] *See HB 4469: Expand Voting in Jails*, Am. Civil Liberties Union of Ill. (Aug. 17, 2018), https://www.aclu-il.org/en/legislation/hb-4469-expand-voting-jails, *archived at* https://perma.cc/VUA5-T8Q5.

[99] *See* McGreevy, *supra* note 95.

[100] *See* Rentsch, *supra* note 90.

[101] *See* Root & Doyle, *supra* note 10.

voting not just possible but easy, one that is built to meet the deeper needs of the citizens we jail.

Significance of Jail-Based Disenfranchisement: Why We Need a Solution

Jail-based disenfranchisement is a matter of democratic, social, and moral concern. First, the fact that coercive contact with the government—contact with the criminal justice system—leads to disenfranchisement is a democratic problem.[102] Elected officials make decisions every day that powerfully and often most directly impact jailed voters: legislators make the laws that jailed voters are charged with breaking, district attorneys prosecute their cases, state judges adjudicate their cases, and sheriffs police them on the streets and run the jails in which they are currently incarcerated. Jailed voters' exposure to the criminal justice system makes them uniquely qualified to evaluate these officials; their participation is crucial if the ballot box is truly to be a site of democratic accountability.

Jail-based disenfranchisement also raises election integrity concerns. Unlike voters in society, jailed voters cannot show up at a polling place to cast a provisional ballot or take steps independently to ensure they will be able to cast a ballot on Election Day; they must rely solely on a select few *elected officials*—county clerks and sheriffs—to facilitate their participation in the democratic process. This system creates opportunities for those elected officials to interfere with what the Supreme Court has called, "'the core principle of republican government,' namely, 'that the voters should choose their representatives, not the other way around.'"[103] Although opponents of enfranchising incarcerated voters voice concerns that jail officials may inappropriately influence *how* incarcerated voters vote[104]—something that has not borne itself out in states where incarcerated voting is allowed[105]—perhaps we should be more concerned about a system that effectively grants law enforcement and election officials power to decide *if* voters can vote.

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[102] *See* Dorothy E. Roberts, *Constructing a Criminal Justice System Free of Racial Bias: An Abolitionist Framework*, 39 Colum. Hum. Rts. L. Rev. 261, 279 (2007) ("The United States is exceptional not only because of the astronomical rate of incarceration within its borders, but also because of the antidemocratic impact of incarceration.").

[103] Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2652, 2677 (2015).

[104] *See* Sam Levine and Igor Bobic, *2020 Candidates Are Very Hesitant About Letting Prisoners Vote*, Huffington Post (Apr. 10, 2019), https://www.huffpost.com/entry/2020-democrats-felon-disenfranchisement_n_5cae58dde4b09a1eabf75616, *archived at* https://perma.cc/8U6D-EH8G (reporting that a presidential candidate believed "felons should not be able to vote while under the control of law enforcement—including if they're on parole—because their votes could be 'unduly influenced by those authorities.'").

[105] *See* Daniel Nichanian, *"A Sliver of Light:" Maine's Top Election Official on Voting From Prison*, The Appeal (May 2, 2019), https://www.appealpolitics.org/2019/matthew-dunlap-on-voting-in-maine-interview/ *archived at* https://perma.cc/JB2A-CC3W (discussing the process for voting from prison in Maine and how the system ensures voter independence).

Sheriffs not only control what kind of election information jailed voters can access, they also have significant discretion to decide who is arrested and jailed to begin with. In a system like ours—where arrest very often results in long-term incarceration and ballot access largely depends on the discretion of local law enforcement—the power of arrest becomes the power to disenfranchise.[106] This is a power we should not grant so easily. Courts have long acknowledged the history of police interference in the democratic process—from Machine-era police acting as violent enforcement arms for their political bosses in the late 19th and early 20th centuries[107] to Civil Rights-era police working to keep Black voters from the polls through mass arrests in the 1960s.[108] This pattern, however, is not merely historical. In 2004, one sheriff in Alamance County, North Carolina "took a list of registered voters in his county that had Spanish surnames, and said publicly that he would send deputies to the homes of each of those voters to verify that they were citizens."[109] Around the same time, "there were reports of police being stationed outside polling sites in an 'overwhelmingly Latino' area of Texas—a more subtle, yet 'familiar form of voter intimidation.'"[110] In 2018, a Black man who drove more than 400 people to the polls in his limousine in Georgia was pulled over by six police cars for "illegal parking."[111] Around the same time, an activist in Texas was arrested in a county clerk's office after a police officer asked his party affiliation.[112] The activist

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[106] *See supra* notes 43–47 and accompanying discussion (considering the rise of post-arrest jailing in the United States).

[107] *See, e.g.*, Lodge No. 5 of Fraternal Order of Police *ex rel.* McNesby v. City of Philadelphia, 763 F.3d 358, 363 (3d Cir. 2014) ("In the late 19th and early 20th centuries, the police engaged in aggressive get-out-the-vote efforts, voter fraud, and voter intimidation, often resorting to brute force. For example, police officers turned a blind eye when "professional repeaters" cast fraudulent votes, and in some instances, beat those who protested these practices . . . . The nefarious relationship between Philadelphia's Republican machine and its police force culminated in September 1917 with the scandal of the "Bloody Fifth" Ward, where officers beat an opposition candidate, terrorized his supporters, and killed a detective who attempted to intervene.").

[108] *See, e.g.*, United States v. McLeod, 385 F.2d 734, 742 (5th Cir. 1967) (internal citations omitted) ("'[T]he [sheriffs] took advantage of every opportunity, serious or trivial,' to arrest prominent Negro voting registration workers. The arrests . . . fall into three groups: the arrests of adults for disturbing the peace, inciting to riot, and like offenses; the arrests of numerous juveniles for truancy; and the arrests of persons leaving a mass meeting on the charge of improper license-plate lighting. All were mass arrests. All were directed against a group of persons engaging at the time in voter activity.").

[109] Shelby County, Alabama v. Holder, 811 F. Supp. 2d 424, 486–87 (D.D.C. 2011), *aff'd*, 679 F.3d 848 (D.C. Cir. 2012), *rev'd on other grounds*, 570 U.S. 529 (2013); *vacated and remanded*, 541 F. App'x 1 (D.C. Cir. 2013), *and vacated sub nom.*, Shelby County v. Holder, No. CV 10-0651 (JDB), 2013 WL 10509740 (D.D.C. Oct. 11, 2013).

[110] *Id.*

[111] *See* Charles Bethea, *Are Police Targeting Get-Out-the-Vote Efforts in Georgia?*, The New Yorker (Nov. 1, 2018), https://www.newyorker.com/news/dispatch/are-police-targeting-get-out-the-vote-efforts-in-georgia, *archived at* https://perma.cc/4YV7-AHU6.

[112] *See* Andrew Eversden & Emma Platoff, *Campaign for Congressional Candidate Mike Siegel Disputes Account of Worker's Arrest*, Texas Tribune (Oct. 11, 2018), https://www.texastribune.org/2018/10/11/campaign-congressional-candidate-mike-siegel-disputes-account-workers-/, *archived at* https://perma.cc/AGG4-M6JH; Johnathan Silver, *Arrest of Campaign Official*

had been trying to ensure that students at a nearby historically Black university had ballot access after it seemed their registrations were being rejected.[113] Turning jails into sites of democratic participation would curtail this power to interfere with democracy under the guise of promoting "law and order."

Providing ballot access to jailed voters is not only a democratic imperative; it could also be helpful in assisting with re-entry. People who are jailed but never convicted often are subject to the same collateral consequences of incarceration as their convicted counterparts.[114] Their incarcerations put at risk their income, jobs, custody of children, housing, public benefits, and mental and physical health—all factors that also make rearrests more likely.[115] For people who have served time in prison for felony convictions, re-enfranchisement and political participation positively correlate with a reduction in recidivism.[116] There is no reason to believe this would not translate to jailed pre-trial detainees and misdemeanants.

Perhaps the most important justifications for this reform, however, are resistance and empowerment. In a very foundational sense, jails and prisons were designed to deprive those they incarcerate—primarily low-income, Black, and Latino people—of their personal agency and power.[117] They take control: from what prisoners eat and wear, to when they are able to communicate with their families, go outdoors, take showers, read books, or even see other people. Incarceration renders prisoners vulnerable to sexual and physical assault by guards and other prisoners.[118] Again, incarceration puts at risk the jobs, homes, health, and families of the people they incarcerate.[119] Pre-trial incarceration also has consequences for defendants' criminal cases, in-

Highlights Confusion over Student Voting, STATESMAN (Oct. 12, 2018), https://www.statesman.com/news/20181012/arrest-of-campaign-official-highlights-confusion-over-student-voting, *archived at* https://perma.cc/6S3Y-8Y33.

[113] *See* Eversden & Platoff, *supra* note 112; Silver, *supra* note 112.

[114] *See* Nick Pinto, *The Bail Trap*, N.Y. TIMES MAGAZINE (Aug. 13, 2015), https://www.nytimes.com/2015/08/16/magazine/the-bail-trap.html, *archived at* https://perma.cc/JR7L-YAR2.

[115] *See id.*

[116] *See* Guy Padraic Hamilton-Smith & Matt Vogel, *The Violence of Voicelessness: The Impact of Felony Disenfranchisement on Recidivism*, 22 LA RAZA L.J. 407, 414 (2015) ("The empirical research . . . supports the argument that democratic participation is positively associated with a reduction in recidivism."); *see also* Nancy Leong, *Allowing Felons to Vote Could Prevent Crime*, TAKE CARE (July 27, 2017) https://takecareblog.com/blog/allowing-felons-to-vote-could-prevent-crime, *archived at* https://perma.cc/V63F-3WB9; *see also* McGreevy, *supra* note 95 (discussing "a bill that will allow thousands of felons in county jails to vote in California elections as part of an effort to speed their transition back into society").

[117] *See generally* MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON (1975); Dorothy E. Roberts, *Democratizing Criminal Law As an Abolitionist Project*, 111 NW. U. L. REV. 1597, 1599 (2017) (arguing "the law enforcement bureaucracy is designed to operate in an anti-democratic manner.").

[118] *See* ALLEN J. BECK ET AL., DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SEXUAL VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES, 2011–12 UPDATE (2014).

[119] *See* Pinto, *supra* note 114.

creasing the likelihood they will waive their rights and plead guilty[120] and be subject to longer, harsher sentences after they plea.[121] All of these collateral consequences of incarceration not only harm incarcerated people themselves, but also their loved ones and communities.[122] Through jail-based disenfranchisement, felony disenfranchisement laws, prison gerrymandering, and the propagation of myths of criminality, mass incarceration has worked to systematically strip Black and brown voters and their communities of their political power.[123] Research has shown that spending even short periods of time in jail can negatively impact marginalized voters' future political participation, an effect that is particularly pronounced for Black voters.[124] The system is designed to disempower.

At its best, the project of turning jails into sites of civic engagement can be understood as a mechanism for resisting mass incarceration and building power within this system that has largely existed to take power away from marginalized communities. In a direct way, providing jailed voters with the materials they need to cast a ballot could help preserve some of their senses of power, agency, and community connection.[125] This reform agenda may

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[120] *See* Will Dobbie et al., *The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108 Am. Econ. Rev. 201, 201 (2017) ("[P]retrial detention significantly increases the probability of conviction, primarily through an increase in guilty pleas.").

[121] *See* Christopher T. Lowenkamp et al., Laura and John Arnold Found., Investigating the Impact of Pretrial Detention on Sentencing Outcomes 4 (2013) ("Low-risk defendants who are detained for the entire pretrial period are 5.41 times more likely to be sentenced to jail and 3.76 times more likely to be sentenced to prison when compared to low-risk defendants who are released . . . before trial . . . .").

[122] *See generally* Marc Mauer & Meda Chesney-Lind, Invisible Punishment: The Collateral Consequences of Mass Imprisonment (2003).

[123] The criminal justice system's racial bias functions to deny blacks' citizenship rights in two principal ways. First, criminal justice supervision of a large proportion of black people interferes with their participation in democracy by isolating them in prisons, denying them the right to vote, and damaging broader social and political relationships necessary for collective action. Second, the system reinforces the myth of blacks' propensity for criminality, which has been invoked throughout U.S. history as "evidence that blacks were unworthy of assuming the full rights and duties of citizenship."

Roberts, *supra* note 102, at 266; *see also* Bailey Figler, *A Vote for Democracy: Confronting the Racial Aspects of Felon Disenfranchisement*, 61 N.Y.U. Ann. Surv. Am. L. 723, 729 (2006); Dale E. Ho, *Captive Constituents: Prison-Based Gerrymandering and the Current Redistricting Cycle*, 22 Stan. L. & Pol'y Rev. 355, 362 (2011) (discussing prison-based gerrymandering and its "unquestionable effect of transferring political power from communities of color to predominantly white communities.").

[124] *See* Ariel White, *Misdemeanor Disenfranchisement? The Demobilizing Effects of Brief Jail Spells on Potential Voters*, 113 Am. Pol. Sci. Rev. (forthcoming 2019) (manuscript at 21), https://www.cambridge.org/core/journals/american-political-science-review/article/misdemeanor-disenfranchisement-the-demobilizing-effects-of-brief-jail-spells-on-potential-voters/2FEDEE197EA55768312586DA2FEFB8F9, *archived at* https://perma.cc/XP3P-EKAU (showing Black men who spent even short periods of time in jail were 13% less likely to cast ballots in upcoming elections, despite there being no change to their eligibility).

[125] In Maine—a state that allows all incarcerated citizens to cast ballots—the Secretary of State discussed how their voting program worked to mitigate some of the psychological effects of long-term incarceration on voters, voters who felt separated from the world, even forgetting

also be impactful for more than just individual voters. While incarcerated people have a long history of engaging in political organizing and resistance, historically they have had to fight tooth and nail to have that space.[126] Reforms to strengthen the right to vote from jail would not only ensure jails cannot block political participation, but could also carve out affirmative space for political conversation, learning, and engagement. It is true that voting is just one way someone can participate in politics or harness their political power, but it is not a bad place for the conversation to begin.

This resistance/empowerment framework also has implications for our larger democracy. Democratic participation is not an innate skill. No one is born knowing how to vote, and in our complicated system it takes time, money, and education to learn how—and that is to say nothing of casting an actual ballot.[127] Our system over-relies on privately funded campaigns and partisan volunteers—people with time and money to spare—to come to our door or call us on the phone to tell us when, where, and how we should vote. Unsurprisingly, voters tend to be people with the time and resources to turn out. But democracy should not just be a hobby of the rich and elite.[128] At every opportunity, we must find new ways to put the tools of democracy and political power into the hands of those who need it most—those who are and too long have been marginalized. Putting ballots in the hands of jailed voters is one way we can begin to do that work.

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their last phone numbers or addresses. But, he said the effect of their program could be profound:

> When I talked with one of the social workers at the prison about [assistance to get] the driver's license, they said that it's like that sliver of light that comes in through the ceiling. For some of them, it's their last connection to the outside world, having a driver's license. There's a little bit of humanity involved here as well. . . . [Y]ou cannot deny that you are still working with human beings, people who have a psychological structure that is greatly impacted by their incarceration. . . . [T]hey're still people, they're still human beings, [T]hey're still American citizens, and I think this is a process that should belong to every American citizen. And in no small way it helps keep them connected to the real world.

Nichanian, *supra* note 105.

[126] *See* Jocelyn Simonson, *Democratizing Criminal Justice through Contestation and Resistance*, 111 Nw. U. L. Rev. 1609, 1620 (2017); *see also* Avi Brisman, *Fair Fare?: Food As Contested Terrain in U.S. Prisons and Jails*, 15 Geo. J. on Poverty L. & Pol'y 49, 70–89 (2008).

[127] *See* Asma Khalid et al., *On the Sidelines of Democracy: Exploring Why So Many Americans Don't Vote*, NPR (Sept. 10, 2018), https://www.npr.org/2018/09/10/645223716/on-the-sidelines-of-democracy-exploring-why-so-many-americans-dont-vote, *archived at* https://perma.cc/6UT3-WEAL.

[128] *See id.* ("The wealthy tend to vote more frequently. Nonvoters are more likely to be poor, young, Hispanic or Asian-American.").

2. The Right to Vote from Jail: Origins of the Right and Challenges to Enforcement

Origins of the Right

Three Supreme Court cases established the doctrinal framework to assess the right to vote from jail: *McDonald v. Board of Election Commissioners of Chicago*,[129] *Goosby v. Osser*,[130] and *O'Brien v. Skinner*.[131] These cases—the only ones ever considered by the Court on the subject of the right to vote from jail—were all handed down in one five-year span, from 1969 to 1974. While *McDonald* and its progeny notably affirm that jailed eligible voters have a constitutionally protected right to vote while incarcerated, they also create a framework for vindicating that right that has been an impediment to litigation for more than 40 years.

The first and most famous of these cases, *McDonald v. Board of Election Commissioners of Chicago*, is well-known for establishing "that that there is no federal constitutional right to vote by absentee ballot."[132] In *McDonald*, two pretrial detainees in Cook County Jail—Samuel McDonald and Andrew Byrd—brought an Equal Protection challenge to an Illinois law that denied absentee ballots to jailed voters because they were going to be present in the county where they were registered to vote on Election Day.[133] While the absentee statute did make exceptions for some categories of voters who would be in their home counties on Election Day—people who were medically incapacitated, for example—jailed voters did not qualify for any of the exceptions.[134] The Court rejected their claim, holding that the state's denial of absentee ballots to jailed voters incarcerated in their home counties did not deprive them of their right to vote.[135]

Though the Court did not dispute that Mr. McDonald and Mr. Byrd would be incarcerated on Election Day and would be unable to request absentee ballots, it argued that it "cannot lightly assume, with nothing in the record to support such an assumption, that Illinois has *in fact* precluded appellants from voting."[136] The Court noted the absence of any Illinois statute that specifically and wholly disenfranchised pretrial detainees,[137] then continued, "the record is barren of any indication that the State might not, for

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[129] McDonald v. Bd. of Election Comm'rs of Chi., 394 U.S. 802 (1969).

[130] Goosby v. Osser, 409 U.S. 512 (1973).

[131] O'Brien v. Skinner, 414 U.S. 524 (1974).

[132] *See, e.g.*, Martin v. Kemp, 341 F. Supp. 3d 1326, 1338 (N.D. Ga. 2018) (citing *McDonald*, 394 U.S. at 806–07), *appeal dismissed sub nom.* Martin v. Sec'y of State of Ga., No. 18-14503-GG, 2018 WL 7139247 (11th Cir. Dec. 11, 2018).

[133] *See McDonald*, 394 U.S. at 803–04.

[134] *See id.*

[135] *See id.* at 807.

[136] *Id.* at 808.

[137] *See id.* ("[T]he State's statutes specifically disenfranchise only those who have been convicted and sentenced, and not those similarly situated to appellants.").

instance, possibly furnish the jails with special polling booths or facilities on election day, or provide guarded transportation to the polls themselves for certain inmates, or entertain motions for temporary reductions in bail to allow some inmates to get to the polls on their own."[138]

Because the Court found that Mr. McDonald and Mr. Byrd had not adequately demonstrated they had been disenfranchised by the state, it declined to consider two of their arguments: first, that the state was imposing a wealth-based qualification by denying indigent voters who could not afford to pay bail access to the ballot; and, second, that the state had a constitutional obligation to provide jailed voters with absentee ballots to avoid disenfranchisement, an impermissible consequence of pretrial detention.[139]

The Court did, however, consider their two remaining Equal Protection arguments, which claimed that Illinois' absentee law arbitrarily and impermissibly distinguished between two classes of voters: (1) medically incapacitated and judicially incapacitated voters on the one hand, and (2) voters jailed outside of their county of residence and voters jailed within the county of their residence on the other.[140] Because the Court found the Illinois absentee ballot statutes did not actually infringe on Mr. McDonald and Mr. Byrd's right to vote and were not drawn on the basis of race or wealth, it adopted an extremely deferential rational basis standard of review. The Court asserted that the "challenged statute must bear some rational relationship to a legitimate state end and will be set aside . . . only if based on reasons totally unrelated to the pursuit of that goal."[141] If no grounds for the classifications can be discerned, the Court continued, "their statutory classifications will be set aside only if no grounds can be conceived to justify them."[142]

The Court, predictably, upheld the classifications on three grounds. First, the Court argued that legislatures must be "allowed to take reform one step at a time" and "need not run the risk of losing an entire remedial scheme simply because it failed, through inadvertence or otherwise, to cover every evil that might conceivably have been attacked."[143] The Court also found the legislature was reasonable "to treat differently the physically handicapped, who must, after all, present affidavits from their physicians attesting to an absolute inability to appear personally at the polls in order to qualify for an absentee ballot" and pretrial detainees, "[s]ince there is nothing to show that a judicially incapacitated, pretrial detainee is absolutely prohibited from exercising the franchise."[144] This was a particularly puzzling conclusion given that, along with their ballot request forms, Mr. McDonald and Mr. Byrd submitted an affidavit from the jail's warden verifying their

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[138] *Id.* at 809 n.6.
[139] *Id.* at 808 n.7.
[140] *Id.*
[141] *Id.* at 809.
[142] *Id.*
[143] *Id.*
[144] *Id.* at 809.

incarcerations and attesting to their physical inability to reach the polls.[145] Lastly, the Court found a reasonable basis for distinguishing between in-county and out-of-county detainees, arguing that "local officials might be too tempted to try to influence the local vote of in-county inmates."[146] According to the Court, "[s]uch a temptation with its attendant risks to prison discipline would, of course, be much less urgent with prisoners incarcerated out of state or outside their resident counties."[147] It again seems strange, however, that a Court worried that local officials might be tempted to influence elections would nevertheless force jailed voters to rely on these same local officials to—on their own initiative—furnish special voting booths, escort voters to polling locations under guard, or lower their bails for Election Day rather than providing voters with independent access to absentee ballots.

McDonald presented two central questions central to jail-voting cases. First, it began to consider what constitutes a legally cognizable injury in claims alleging a deprivation of the right to vote from jail; and, second, it considered when and how the law can treat jailed voters differently from other classes of voters. The Court continued to refine these doctrinal frameworks in its two subsequent jail-voting cases: *Goosby v. Osser* and *O'Brien v. Skinner*.

In *Goosby*, a class of 2,000 pretrial detainees—mostly indigent, 90% non-white, and all eligible voters[148]—alleged Pennsylvania's election laws absolutely denied jailed voters of their right to vote both facially and as applied and therefore violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment.[149] The lower court dismissed their claim, arguing that *McDonald* foreclosed consideration of these kinds of claims and "rendered petitioners' constitutional claims wholly insubstantial."[150]

On appeal, the Supreme Court disagreed. Far from being foreclosed by *McDonald*, the Court found that "petitioners' complaint alleges a situation that *McDonald* itself suggested might make a different case."[151] The Court contrasted the two cases, noting:

> [T]he Pennsylvania statutory scheme absolutely prohibits them from voting, both because a specific provision affirmatively excludes 'persons confined in a penal institution' from voting by absentee ballot, and because requests by members of petitioners' class to register and to vote either by absentee ballot, or by personal or proxy appearance at polling places outside the prison, or

[145] *See id.*
[146] *Id.* at 810.
[147] *Id.*
[148] Brief of Appellants at 3–4, Goosby v. Osser, 409 U.S. 512 (1973) (No. 71-6316), 1972 WL 135834, *3–*4.
[149] *Goosby*, 409 U.S. at 513–14.
[150] *Id.* at 518.
[151] *Id.* at 522.

> at polling booths and registration facilities set up at the prisons, or generally by any means satisfactory to the election officials, had been denied.[152]

Although the Court did not reach the merits of the case, it held that the petitioners raised justiciable questions and remanded the case for reconsideration.[153]

In its last jail-voting case, *O'Brien v. Skinner*, the Court went a step further, reaching the merits to hold that New York's statutory scheme actually unconstitutionally deprived jailed voters of their right to vote.[154] Like in *McDonald* and *Goosby*, the plaintiffs in *O'Brien* were 72 otherwise eligible voters who were statutorily barred from requesting absentee ballots.[155] Beyond requesting absentee ballots, these voters made extraordinary efforts to access the franchise. They applied to the "authorities of Monroe County, including the Board of Elections, to establish a mobile voters registration unit in the county jail in compliance with a mobile registration procedure which had been employed in some county jails in New York State" and requested alternative accommodations to be "transported to polling places under appropriate restrictions."[156] Their requests were all denied.[157] Given these circumstances, the Court found that the appellants in *O'Brien*, "like the petitioners in *Goosby*, bring themselves within the precise fact structure that the *McDonald* holding foreshadowed" and sufficiently demonstrated a deprivation of the right to vote.[158]

After finding the statutory scheme constituted a severe burden on the right to vote, the Court then revisited the question whether states can deny absentee ballots to jailed voters within the jurisdiction where they are registered to vote and yet provide absentee ballots to those jailed outside of their home counties. Applying a heightened level of scrutiny, the Court held that "New York's election statutes . . . discriminate between categories of qualified voters in a way that, as applied to pretrial detainees and misdemeanants, is wholly arbitrary" and "operate as a restriction which is 'so severe as itself to constitute an unconstitutionally onerous burden on the . . . exercise of the franchise.'"[159] After *O'Brien*, then, it would seem that states cannot provide ballot access only to voters jailed outside of the jurisdictions where they are registered to vote if voters jailed within their home jurisdictions can demon-

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[152] *Id.* at 521–22 (citations omitted).

[153] *See id.* at 522. The author was unable to find records from after *Goosby* was remanded, so it is unclear how the case was finally resolved.

[154] *See* O'Brien v. Skinner, 414 U.S. 524, 530 (1974).

[155] Brief of Appellants at 4–5, O'Brien v. Skinner, 414 U.S. 524 (1974) (No. 72-1058), 1973 WL 172633 at *4–*5.

[156] *O'Brien*, 414 U.S. at 525.

[157] *See id.*

[158] *Id.* at 530.

[159] *Id.* (citation omitted).

strate the classification severely burdens their ability to exercise their right to vote.

Challenges to Enforcement

As a preliminary matter, jailed plaintiffs face significant obstacles to judicial relief. Because they are disproportionately indigent, jailed voters often must represent themselves. Without the assistance of counsel, jailed voters may have difficulty submitting timely filings, pleading their cases, documenting relevant actions by officials, and doing the multitude of other things necessary to bring successful civil rights claims.[160] Jailed voters also may be subject to all of the restrictions of the Prison Litigation Reform Act that has so severely impeded access to justice for incarcerated people.[161] Indigent jailed voters may also find the cost of litigating too high, even when proceeding *in forma pauperis*. In at least one jail voting case where the voter was *pro se* and *in forma pauperis*, the court not only twice denied a jailed voter's request for appointed counsel, it also assessed a court-mandated "partial" filing fee on the plaintiff that amounted to "20% of . . . the average monthly balance in the prisoner's trust account for the six-month period immediately preceding the filing of the complaint," or $18.57 for this particular indigent jailed voter.[162] These challenges are further exacerbated by the fact that this group of plaintiffs are disproportionately transient, homeless, and suffering from mental illness and addiction, which can further impede their ability to access justice in a courtroom.[163]

Similarly, by their very nature, jail-voting cases are difficult. To avoid mootness issues, plaintiffs who are seeking injunctive relief—as most would be—have to litigate their claims between the moment they are deprived of the right to vote and Election Day, a matter of weeks at most.[164] Standing requirements also can be a significant problem for those who may want to bring a jail-voting claim. Think, for example, of Mr. Swann, who lost standing because he did not know the address of the jail and had trouble filling

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[160] *See* Dawson v. Kendrick, 527 F. Supp. 1252, 1316 (S.D. W. Va. 1981).

[161] *See* Tasha Hill, *Inmates' Need for Federally Funded Lawyers: How the Prison Litigation Reform Act,* Casey*, and* Iqbal *Combine with Implicit Bias to Eviscerate Inmate Civil Rights*, 62 UCLA L. Rev. 176, 208 (2015).

[162] *See* Garnett v. Milwaukee Cty. Jail, No. 06-C-1257, 2007 WL 1121338, at *1 (E.D. Wis. Apr. 16, 2007) (assessing a $350 filing fee and denying plaintiffs second request for assigned counsel).

[163] *See* discussion of impacted voters *supra* Part 1.

[164] *See* U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 396 (1980) (explaining "mootness has two aspects: 'when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome.'"). *But see* Roe v. Wade, 410 U.S. 113, 125 (1973) (creating an exception for the mootness requirement to allow for adjudication of claims over things like pregnancy that are "capable of repetition, yet evading review").

out his ballot request form.[165] Courts have shown themselves to be reluctant to reach the merits of these claims and often dismiss on standing grounds.[166]

The *McDonald-O'Brien* framework exacerbates these more foundational problems by articulating a rights framework under which only a small handful of voters have been able to successfully win judicial relief in the last 40 years.[167]

Under a strict reading of *McDonald-O'Brien*, the task of demonstrating a "severe burden" or an in-fact *absolute* deprivation is enormously difficult for a jailed voter. Consider what it takes for a jailed voter to bring a meritorious claim under this framework. First, the voter must be jailed in a jurisdiction that bars her from receiving an absentee ballot in jail. Then, knowing she will be rejected, she must nevertheless know to submit her absentee ballot request form (properly filled out and timely submitted, often with no third-party assistance). Next, although she is likely not a lawyer and lacks independent access to the Internet, she must know to take the additional steps of requesting transport to the polls under guard and establishment of a mobile polling location in her jail, seeking a reduction in bail, or asking for some other set of accommodations from local officials. And she must do all of this in between the date of her arrest and Election Day.

Given these challenges, it is unlikely that jailed voters will ever be able to bring a *McDonald-O'Brien*-style claim without third-party assistance. But, as necessary as such assistance is, it is unfortunately scarce. Because jailed voters are disproportionately low-income, they are unlikely to be able to shoulder the burden of basic legal assistance let alone the large-scale costs of civil rights litigation.[168] Jail-voting cases typically do not produce monetary damages, so jailed voters are unlikely to find alternative representation from the private plaintiffs' bar.[169] Non-profits have only brought a handful of cases since *O'Brien*, and, even in these few cases, trained voting rights lawyers have still struggled to establish standing for their clients.[170] Establishing standing in these cases seems to require careful planning and forethought, a kind of offensive representation. It is not surprising that the jailed voters who succeeded in establishing standing in *O'Brien* had been working with civil rights non-profits long before their cases were ever filed.[171] Since then,

[165] *See* Swann v. Sec'y of State of Ga., 668 F.3d 1285, 1288 (11th Cir. 2012).

[166] *See id.*; *see also* Fair Elections Ohio v. Husted, 770 F.3d 456, 459 (6th Cir. 2014).

[167] *See* Dawson, 527 F. Supp. at 1280; *see also* Murphree v. Winter, 589 F. Supp. 374, 379 (S.D. Miss. 1984).

[168] *See supra* notes 60–65 and accompanying text.

[169] *Goosby*, 409 U.S. at 522.

[170] *See Swann*, 668 F.3d at 1288; *see also* Fair Elections Ohio, 770 F.3d at 459; Beck, *supra* note 27, at 531 ("This article addresses current flaws in standing jurisprudence that prevent nonprofit organizations from fighting discriminatory voting laws in federal court. It utilizes *Fair Elections Ohio v. Husted*, a case out of the Sixth Circuit Court of Appeals, as a case study for demonstrating how current standing criteria stifles efforts to attack discriminatory voting laws." (citation omitted)).

[171] *See* Brief of Appellants at 5, O'Brien v. Skinner, 414 U.S. 524 (1974) WL 172633 *5 (noting plaintiffs worked with the League of Women Voters and were represented by the New

however, most jail-based disenfranchisement claims have largely been brought *pro se* and have almost always been dismissed for lack of standing.[172]

Another difficulty comes from the doctrine's failure to clearly articulate what kinds of specific state action give rise to the constitutional harm. While these cases affirm that the "precise fact structure" from *McDonald* presents an unconstitutional burden on jailed voters' right to vote—i.e., where there is a statutory deprivation of an absentee ballot and a refusal by officials to provide alternative ballot access, there is a denial of the right—without further guidance, lower courts have significant discretion to adopt very strict lines for when jail-based disenfranchisement crosses the threshold into an unconstitutional deprivation. For example, one court in Illinois found that a lack of responsiveness to a jailed voter's verbal requests for ballot materials was sufficient to state a claim,[173] but a court in Indiana dismissed a similar claim against a jail official who told an incarcerated voter he would get him the materials necessary to vote but never did.[174] Another district court in West Virginia held that the jail was constitutionally required to "take steps to facilitate the prisoners' right to vote" after finding that there was "no provision made at the jail for allowing any inmates to be taken to the polls on election day for voting or to provide absentee ballots";[175] in a stark contrast, another court in Wisconsin declined to order relief unless there was an "indication of any *deliberate intent or conduct* to impede the plaintiff's right to vote."[176]

This doctrinal muddiness may not only cause confusion with respect to establishing the merits of a claim, but also from a remedies perspective. As noted above, typically a jailed voter would not (or could not) seek damages, because, as general matter, civil rights plaintiffs cannot seek damages for "abstract" rather than actual—i.e., physical or monetary—harms.[177] Jail-voting cases, however, may be proving themselves a narrow exception to this rule.[178] No doubt this development is promising; it could help plaintiffs avoid

York American Civil Liberties Union); *see also* Owens-El v. Robinson, 442 F. Supp. 1368, 1372 (W.D. Pa. 1978) (noting plaintiffs were represented by Neighborhood Legal Services).

[172] *See* Long v. Pierce, No. 214CV00244LJMMJD, 2016 WL 912685, at *5 (S.D. Ind. Mar. 10, 2016); *see also* Garnett v. Criss, No. 06-C-1257, 2008 WL 11170297, at *6 (E.D. Wis. July 29, 2008).

[173] *See* Post v. Du Page County, Illinois, No. 91 C 447, 1993 WL 101823, at *8 (N.D. Ill. Apr. 1, 1993).

[174] *See Long*, 2016 WL 912685, at *5.

[175] Dawson v. Kendrick, 527 F. Supp. 1252, 1280 (S.D. W. Va. 1981).

[176] *Garnett*, 2008 WL 11170297, at *6 (emphasis added).

[177] *See generally* Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 308 (1986) (holding "the abstract value of a constitutional right may not form the basis for § 1983 damages").

[178] Though no suits have yet successfully won damages, several cases have been allowed to proceed where plaintiffs are seeking monetary relief. *See* Garnett v. Milwaukee Cty. Jail, No. 06-C-1257, 2007 WL 1121338, at *2 (E.D. Wis. Apr. 16, 2007); *see also* Buroff v. Gladieux, No. 1:17-CV-124-TLS, 2018 WL 2277093, at *1 (N.D. Ind. May 17, 2018); Swann v. Handel, No. 1:09-CV-2674-TWT, 2010 WL 4117448, at *4 (N.D. Ga. Oct. 18, 2010), *vacated and remanded sub nom.* Swann v. Sec'y of State of Ga., 668 F.3d 1285 (11th Cir. 2012).

mootness problems and attract the legal assistance from the private bar. Unfortunately, however, once plaintiffs overcome the presumption against damages, they will likely encounter a second problem: qualified immunity. Under qualified immunity doctrine, state actors can only be liable for violating "clearly established rights."[179] Because the constitutional right to vote from jail is only "clearly established" within the narrow fact structure of *McDonald*, a state official who deprives a jailed voter of ballot access under a different set of circumstances could claim that she should be found immune from liability. This has borne out in real cases. For example, in the case of the sheriff who told a jailed voter he would help him vote but never did, the court found he was protected by qualified immunity and therefore dismissed the claim.[180]

This framework has not worked for jailed voters for more than 40 years. If we want the right to vote from jail to be a real, meaningful guarantee, we must revisit the framework laid out by *McDonald* and *O'Brien* and break down the barriers we have erected to judicial oversight and relief.

3. Expanding the Right to Vote From Jail

The *McDonald* framework does not adequately protect jailed voters or combat the varied causes of jail-based disenfranchisement that continue to deprive hundreds of thousands of eligible voters of their right to vote each Election Day. Not only does *McDonald* impose a heavy burden on jailed voters to demonstrate an extreme deprivation of their right to vote, it also adopts a rights structure that articulates a negative right—the right not to be deprived of the franchise—rather than a positive, affirmative right of ballot access for eligible jailed voters. The *McDonald* framework also only narrowly speaks to the rights of a specific class of jailed voters who are being disenfranchised in a very specific way. It does not consider the availability of voter registration and educational materials, the nature of states' obligations to provide alternative means of voting when absentee ballots are not available to jailed voters, and the rights frameworks that might apply to specific classes of jailed voters, specifically voters of color, indigent voters, and incarcerated voters. The time has come to revisit the paradigm.

This task will be challenging. As a general matter, the Court and Congress seem to disfavor incarcerated plaintiffs and have increasingly limited their ability to bring civil rights claims.[181] Courts today are also typically less

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[179] *See* Pearson v. Callahan, 555 U.S. 223, 231 (2009) ("The doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" (citation omitted)).

[180] *See* Long v. Pierce, No. 214CV00244LJMMJD, 2016 WL 912685, at *5 (S.D. Ind. Mar. 10, 2016).

[181] Over the last 30 years, the law has progressively made it more difficult for incarcerated plaintiffs to seek judicial remedy for violations of their civil rights. *See* Hill *supra* note 161.

friendly towards voting rights claims than they were forty years ago.[182] In light of these challenges, plaintiffs should consider the value of a comprehensive approach to litigation. For example, because plaintiffs can anticipate courts will be reluctant to find standing, they should seek to establish as many grounds for standing as they can.[183] Similarly, plaintiffs might consider using multiple claims to illustrate their injury and establish liability. Bringing new kinds of claims to vindicate jailed voters' right to vote will have the additional advantage of providing new opportunities to expand the scope of the right and the protections granted to eligible voters in jails. The contours of these claims change depending on the nature of the harm and the plaintiffs bringing suit. The following section will discuss six avenues for challenging jail-based disenfranchisement: equal protection, procedural due process, uniformity, the Voting Rights Act, wealth-based claims, and substantive due process claims.

Anderson-Burdick: Pushing the Equal Protection Envelope

The framework for evaluating voting rights claims announced by the Court in *Anderson v. Celebrezze*[184] and *Burdick v. Takushi*[185] has become the bread and butter of modern voting rights claims. Under *Anderson-Burdick*:

> A court considering a challenge to a state election law must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights."[186]

This hybrid test applies a more flexible standard than the all-or-nothing approach that the Court used in *McDonald* and *O'Brien.*[187] With this new, more flexible standard, jailed voters may be able to challenge an election

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[182] *See* Beck, *supra* note 27, at 531.
[183] *See id.*
[184] 460 U.S. 780, 789 (1983).
[185] 504 U.S. 428, 433–34 (1992).
[186] *Id.* at 434 (citations omitted).
[187] If a plaintiff alleges only that a state treated him or her differently than similarly situated voters, without a corresponding burden on the fundamental right to vote, a straightforward rational basis standard of review should be used . . . . On the other extreme, when a state's classification "severely" burdens the fundamental right to vote, as with poll taxes, strict scrutiny is the appropriate standard . . . . Most cases fall in between these two extremes. When a plaintiff alleges that a state has burdened voting rights through the disparate treatment of voters, we review the claim using the "flexible standard" outlined in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992).

Obama for Am. v. Husted, 697 F.3d 423, 429 (6th Cir. 2012) (some citations omitted).

procedure under some heightened level of review without having to show that the procedure in question completely deprives them of their rights.

A court recently applied this test to a jailed-voting claim in *Fair Elections Ohio v. Husted*[188] in 2012. In *Fair Elections*, a group of organizations that conducted voter outreach in jails brought an *Anderson-Burdick* challenge to an Ohio absentee ballot provision. This provision provided "emergency ballots" to voters who had medical emergencies after the absentee ballot request deadline had passed but not to similarly situated jailed voters.[189] The plaintiffs here were able to sufficiently show that the burden of Ohio's statutory scheme on late-jailed voters—voters who were jailed after the absentee request deadline passed—was so severe as to constitute a complete deprivation of the right to vote, meeting even the higher *McDonald* standard as well.[190]

These voters, however, had an unusually strong case to show an absolute deprivation. Ohio had created a process that provided jailed voters with access to the ballot through "a Confined Voter procedure," a sort of vote-by-mail system designed for Ohio jails.[191] However, the process explicitly barred access to the Confined Voter procedure after the absentee ballot request deadline passed.[192] After the court found that this explicit bar severely burdened jailed voters' right to vote, it considered the state's interests justifying the burden and whether the burden was necessary to achieve that interest.[193]

The state advanced an argument that its statutory scheme furthered the state's interest in efficiently and securely administering elections.[194] It also argued that the administrative burden on the jail and election officials was too onerous to justify accommodating the small number of impacted jailed voters.[195] The court did not agree.[196] It found that "late-jailed electors are similarly-situated to late-hospitalized electors whom the boards of election already accommodate. The boards of election teams should have no trouble locating late-jailed electors, as they literally have a captive audience."[197] It dismissed the "Defendants' concerns regarding security" as "overblown," and asserted that "jail staff are competent to assist in the efficient voting of those within their custody."[198]

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[188] 770 F.3d 456, 459 (6th Cir. 2014).

[189] *See id.*

[190] *See* Fair Elections Ohio v. Husted, 47 F. Supp. 3d 607, 614 (S.D. Ohio 2014), *vacated and remanded*, 770 F.3d 456 (6th Cir. 2014) ("Here there is no dispute that late-jailed voters are completely deprived of the right to vote.").

[191] *See id.* at 610.

[192] *See id.*

[193] *See id.* at 614–15.

[194] *See id.* at 615–16.

[195] *See id.* at 616

[196] *See id.*

[197] *Id.* at 615.

[198] *Id.*

This decision was, unfortunately, reversed on appeal for lack of standing.[199] Fortunately, however, a new group of plaintiffs have renewed this challenge.[200] That case is ongoing.

While *Fair Elections* is not good law, it does illustrate some of the advantages of *Anderson-Burdick*. It adopts what the Ninth Circuit has described as a "means-end fit framework . . . [using] a sliding scale test, where the more severe the burden, the more compelling the state's interest must be."[201] This framework allows plaintiffs to engage in a kind of cost-benefit analysis with the Court about the project of enfranchising jailed voters. As was the case in *Fair Elections*, the state's interest in not providing registration materials or absentee ballots to jails is likely connected to some kind of state interest in administrative efficiency. Courts generally have not found that a state's generalized interest in efficiently conducting elections is compelling when weighed against a personal interest in exercising one's right to vote.[202] Attendant to this line of analysis, the balancing test in *Anderson-Burdick* also allows plaintiffs to highlight for the Court how enfranchising jailed voters requires minimal effort by the state—often only asking them to minimally expand existing election infrastructure. This line of inquiry is useful even for jailed voters when they cannot demonstrate that a practice completely deprives them of access to the ballot. If plaintiffs can demonstrate how easy it is for states to provide minimal protections to enfranchise jailed voters, it will become harder for those states to argue they have compelling reasons to decline to provide those protections.[203]

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[199] *See* Fair Elections Ohio v. Husted, 770 F.3d 456, 461 (6th Cir. 2014); *see also* Beck, *supra* note 27, at 531 (discussing the standing issues in *Fair Elections* and how courts use standing to stifle voting rights claims).

[200] *See* Complaint at 2–3, Mays v. Husted, No. 2:18-cv-1376 (S.D. Ohio Nov. 6, 2018), 2018 WL 5801377.

[201] Arizona Green Party v. Reagan, 838 F.3d 983, 988 (9th Cir. 2016) (internal citations excluded).

[202] *See* Obama for Am. v. Husted, 697 F.3d 423, 434 (6th Cir. 2012) (rejecting the state's "vague interest in the smooth functioning of local boards of elections."); Democratic Exec. Comm. of Fla. v. Detzner, 347 F. Supp. 3d 1017, 1031–32 (N.D. Fla. 2018) ("The Defendants argue that requiring additional procedures . . . will unduly burden the election. . . . [A]ny potential hardship imposed . . . is out-weighed by the risk of unconstitutionally depriving eligible voters of their right to vote and have that vote counted.").

[203] In one recent opinion, a district court found that an opinion issued by the Florida Secretary of State's Office affirmatively banning polling locations on college campuses was an impermissible burden on students' right to vote after focusing on the state's "specious" asserted interests. Although the state had no affirmative obligation to allow polling locations on campuses, its refusal to do so as a matter of policy became particularly problematic for the court when it became clear there was no reasonable rationale for this policy. *See* League of Women Voters of Fla., Inc., v. Detzner, 314 F. Supp. 3d 1205, 1221 (N.D. Fla. 2018) ("Defendant's lack of precise interests is all the more glaring when weighted against Plaintiffs' significant burdens.").

Procedural Due Process

Procedural due process is an underexplored avenue for challenging the lack of policies that affirmatively provide ballot access to eligible jailed voters. Jailed voters' procedural due process claims are not like traditional due process claims where the central question is how much process is due before a deprivation can occur.[204] Because it is unconstitutional to deprive eligible jailed voters of their right to vote,[205] whatever process exists should be aimed at guaranteeing eligible voters' access to the ballot rather than determining when a deprivation is permissible. In other words, these claims are concerned with erroneous deprivation. Although due process is not offended every time a voter is deprived of their right to vote by "garden variety election irregularities"[206] or the limited misconduct of an official,[207] a jailed voter can bring a procedural due process claim "where broad-gauged unfairness permeates an election, even if derived from apparently neutral action."[208] For a jailed voter, this claim might arise if she can demonstrate that the combination of a state's lack of established procedures to enfranchise jailed voters and its overreliance on the discretion of individual officials creates a system where jailed voters are regularly at risk of being erroneously denied ballot access.

Procedural due process claims of this kind have recently found success in challenges to signature match laws that similarly vest untrained officials with the power to disenfranchise voters with few structures for oversight or accountability.[209] Signature match laws generally require voters to sign both their registration forms and their ballots; if poll workers or county clerks believe the two signatures do not match, the mismatched ballots are invalidated and never counted.[210] Courts in these cases have found that insufficient

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

[205] *See* O'Brien v. Skinner, 414 U.S. 524, 529 (1974).

[206] *See* Griffin v. Burns, 570 F.2d 1065, 1076 (1st Cir. 1978) ("Circuit courts have uniformly declined to endorse action under § 1983 with respect to garden variety election irregularities.").

[207] *See id.* at 1077 ("[L]ocal election irregularities, including even claims of official misconduct, do not usually rise to the level of constitutional violations where adequate state corrective procedures exist . . . .").

[208] *See id.*

[209] *See* Saucedo v. Gardner, 335 F. Supp. 3d 202, 222 (D.N.H. 2018) ("The infirmity with the statute begins with vesting moderators with sole, unreviewable discretion to reject ballots due to a signature mismatch."); *see also* Martin v. Kemp, 341 F. Supp. 3d 1326, 1340 (N.D. Ga. 2018), *appeal dismissed sub nom.* Martin v. Sec'y of State of Georgia, No. 18-14503-GG, 2018 WL 7139247 (11th Cir. Dec. 11, 2018) (enjoining implementation of a signature match after finding substantial likelihood plaintiffs would prevail on their procedural due process claim); La Follette v Padilla, No. CPF-17-515931, 2018 WL 3953766, at *3 (Cal. Super. Mar. 05, 2018); Zessar v. Helander, No. 05 C 1917, 2006 WL 642646, at *7 (N.D. Ill. Mar. 13, 2006) ("This Court finds that under the current statutory system, the election judges' rejection-erroneous or not-wholly deprives an absentee voter of the right to vote. There is no recourse for the voter and no way to remedy the loss of that vote in that election."); Raetzel v. Parks/Bellemont Absentee Election Bd., 762 F. Supp. 1354, 1358 (D. Ariz. 1990).

[210] *See, e.g.*, *Saucedo*, 335 F. Supp. at 206.

training, guidance, and review in the signature match process can together constitute a violation of procedural due process that deprives the eligible voters whose ballots are rejected of their right to vote.[211] In the jail-voting context, similar claims could be made against Secretaries of State who have not promulgated rules affirming that jailed voters are eligible to cast ballots, directing clerks and sheriffs to provide jailed voters with ballot access, or setting up infrastructure to ensure that jailed voters who lack access to absentee ballots will have some other means of exercising their right to vote.

If a jailed voter brings this kind of claim, the court will evaluate it using the three-factored *Mathews*[212] test, weighing: "[f]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including . . . the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."[213]

The private interest prong of *Mathews* is concerned with the nature of the right at stake and the degree of harm caused by a potential deprivation of that right.[214] The Court has routinely found that the right to vote should receive the highest level of constitutional protection, because "no right is more precious in a free country . . . . Other rights, even the most basic, are illusory if the right to vote is undermined."[215] The degree of harm if the right to vote is denied is extreme. Unlike deprivations of property rights, the right to cast a ballot in a particular election can never be remedied once it is lost.[216] Also, as discussed above, jailed voters are a constituency that is among the most directly impacted by the decisions of elected officials. They have a particularly strong interest in holding those officials accountable at the ballot box. It would not be difficult for jailed voters to demonstrate a strong private interest in the first prong of the test.

The second prong—likelihood of erroneous deprivation—also weighs strongly in favor of providing pre-deprivation process to jailed eligible vot-

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[211] In recent elections, however, the signature-match requirement has disenfranchised hundreds of absentee voters. . . . [It] is fundamentally flawed. . . . [M]oderators receive no training in handwriting analysis or signature comparison; no statute, regulation, or guidance from the State provides functional standards to distinguish the natural variations of one writer from other variations that suggest two different writers; and the moderator's assessment is final, without any review or appeal.

Id.

[212] Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

[213] *Id.*

[214] *Id.*

[215] Wesberry v. Sanders, 376 U.S. 1, 17 (1964); *see also* Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886) (asserting that the right to vote "is regarded as a fundamental political right, . . . preservative of all rights."); Evans v. Cornman, 398 U.S. 419, 422 (1970) (noting that any restrictions on access to the franchise "must meet close constitutional scrutiny.").

[216] *See Mathews*, 424 U.S. at 342 (discussing the hardship imposed by the deprivation and whether it can be remedied post-deprivation).

ers. In the signature match context, plaintiffs presented evidence that showed how many valid ballots were erroneously invalidated for signature issues and the wide range of criteria poll workers used to evaluate voter signatures.[217] In the jail voting context, voters could present evidence showing there is confusion among officials about the nature of their obligations to provide ballot access and that the lack of procedures in place to provide ballot access result in the disenfranchisement of a number of eligible voters in different localities across the state. Because they are incarcerated, jailed voters also have a diminished capacity to take affirmative steps to prevent or remedy erroneous deprivations. While these showings would require some investigation, the probability of erroneous deprivation would be high given this area is almost completely devoid of governing rules and oversight.

The final prong—the government interest—similarly weighs in favor of instituting pre-deprivation proceedings for jailed voters. Courts have found that states' interest in administrative convenience cannot outweigh the individual interest in casting a ballot.[218] While every locality may not have the resources to put a fully staffed polling place in each jail, it is not hard to imagine equally effective remedies that are less resource intensive. In the signature match context, courts have been particularly amenable to remedial relief that builds on existing state infrastructure.[219] In the jail voting context, that might mean some states can simply expand existing absentee ballot procedures to allow voters in jails to access ballots up until Election Day, while other states might need to train sheriffs' deputies and local election officials to provide in person ballot access or other accommodations. States *know* they will incarcerate eligible voters though Election Day; they cannot shirk the burden of providing this literally captive population of eligible voters with access to the ballot.

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[217] *See, e.g.*, Amended Complaint at 11–14, Saucedo et al. v. Gardner, No. 1:17-cv-183 (D.N.H. Oct. 12, 2017), 2017 WL 7035810.

[218] *See* League of Women Voters of N.C. v. North Carolina, 769 F.3d 224, 244 (4th Cir. 2014) (discussing "the problem of sacrificing voter enfranchisement at the altar of bureaucratic (in)efficiency and (under-)resourcing."); *see also* Fla. Democratic Party v. Detzner, No. 4:16CV607-MW/CAS, 2016 WL 6090943, at *7 (N.D. Fla. Oct. 16, 2016) ("[E]ven assuming that [additional procedures to verify ballots before invalidating them] would be an administrative inconvenience . . . that interest cannot justify stripping Florida voters of their fundamental right to vote and to have their votes counted.").

[219] *See* Saucedo v. Gardner, 335 F. Supp. 3d 202, 221 (D.N.H. 2018) ("[T]his is a case not of foisting wholly novel procedures on state election officials, but of simply refining an existing one to allow voters to participate and to ensure that the process operates with basic fairness."); *see also Detzner*, 2016 WL 6090943, at *8 ("[T]he Florida Legislature made it so that no-signature ballots could be cured in a simple and effective manner. There is no reason that same procedure cannot be implemented . . . for mismatched-signature ballots.").

Uniformity

Since *Bush v. Gore*,[220] courts have increasingly become open to what are called "uniformity arguments."[221] Uniformity arguments assert that the differences in the way a state runs its elections across jurisdictions can create such fundamental unfairness in a system that it gives rise to a violation of equal protection.[222] At their core, uniformity arguments embrace the basic idea that eligible voters across jurisdictions should be able to go to the ballot box with approximately equal confidence that they will be able to cast their ballot and have it counted.[223] The prototypical example comes from election administration. Take, for example, a state that has certified three different kinds of electronic voting machines. Two types have error rates of less than 1%, while the third has an error rate of 20%. A voter in the jurisdiction that uses the third type of machine could bring suit, arguing that the state has set up a system in which her vote is far less likely to be counted than someone in a neighboring jurisdiction.[224] To succeed in a uniformity argument, voters must show the challenged system creates more than a "garden variety election irregularity"—which is, as discussed earlier, constitutionally permissible.[225] Rather, the irregularity must infect the system with so much unfairness as to deprive voters of their fundamental right to vote.[226] Uniformity arguments are relatively new and rarely litigated, so the line between a garden-variety irregularity and systemic unfairness remains less than clear.[227]

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[220] 531 U.S. 98 (2000).

[221] The Court in *Bush v. Gore* held that the recount procedures Florida used to reexamine ballots cast in the 2000 presidential election violated Equal Protection because they lacked safeguards to ensure ballots were all evaluated under uniform standards, affecting a system of "arbitrary and disparate treatment" and "valu[ing] one person's vote over that of another." *Bush*, 531 U.S. at 104–05. Although the holding in *Bush v. Gore* was supposed to be "limited to the present circumstances," *id.* at 109, courts have continued to cite this decision in support of the proposition that the Constitution demands that states treat voters within its borders with some degree of uniformity, see, e.g., Hunter v. Hamilton Cty. Bd. of Elections, 635 F.3d 219, 236 (6th Cir. 2011).

[222] *See id.* at 234.

[223] *See, e.g.*, Stewart v. Blackwell, 444 F.3d 843, 859–60 (6th Cir. 2006), *vacated* (July 21, 2006), *superseded*, 473 F.3d 692 (6th Cir. 2007).

[224] *C.f.* Wexler v. Anderson, 452 F.3d 1226, 1231 (11th Cir. 2006).

[225] *See supra* notes 204–216 and accompanying text; *see also, e.g.*, Griffin v. Burns, 570 F.2d 1065, 1076 (1st Cir. 1978) ("Circuit courts have uniformly declined to endorse action under § 1983 with respect to garden variety election irregularities.").

[226] *See id.*

[227] *See* Edmund S. Sauer, *Note: "Arbitrary and Disparate" Obstacles to Democracy: The Equal Protection Implications of* Bush v. Gore *on Election Administration*, 19 J. L. & Pol. 299, 321 (2003) ("[C]ourts thus far have struggled to interpret and apply *Bush v. Gore* consistently . . . ."); *see also* Jay M. Mitzer, Annotation, *Application of Equal Protection Principle Recognized in* Bush v. Gore*, 531 U.S. 98, 121 S. Ct. 525, 148 L. Ed. 2d 388 (2000), to Elections Cases*, 104 A.L.R.6th 547 (2015) ("While the Court specifically limited the precedential value of its holding, . . . nevertheless, other courts have attempted to apply the Bush v. Gore Equal Protection standard to election controversies. . . . Other case law has reached varying conclusions in applying the Bush v. Gore Equal Protection standard. . . .").

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.[228] 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.[229] This means a voter is much more likely to be able to exercise her right to vote in some jails but not others—a compelling case for a lack of uniformity.

The Voting Rights Act

Section 2 of the Voting Rights Act (VRA) gives voters a right to challenge systems under which voters of color "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."[230] Because we live in a world where people of color—specifically Black people, Native Americans, and Latinos—are more likely to be jailed, they are also more likely to experience jail-based disenfranchisement.[231] Section 2 is designed to challenge that disappointing reality, requiring courts to undertake highly contextual inquiries concerned with the real-world impacts of election policy on voters of color.[232] The Court has explained: "The essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives."[233]

Section 2 creates two distinct claims: vote dilution and vote denial. Historically, most litigation under section 2 has involved claims of vote dilution—claims challenging districting maps or election systems that drown

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[228] *See, e.g.*, Dorothy Weldon, *More Appealing: Reforming Bail Review in State Courts*, 118 Colum. L. Rev. 2401, 2406–07 (2018).

[229] *See* Root & Doyle, *supra* note 11.

[230] 52 U.S.C. § 10301 (2018).

[231] *See infra* notes 50–52 and accompanying discussion.

[232] *See* Thornburg v. Gingles, 478 U.S. 30, 35 (1986) ("Congress substantially revised § 2 to make clear that a violation could be proved by showing discriminatory effect alone and to establish as the relevant legal standard the 'results test' . . . ."); *but see* Farrakhan v. Gregoire, 623 F.3d 990, 993 (9th Cir. 2010) (finding that plaintiffs who seek to challenge felon disenfranchisement laws must show that intentional discrimination has "infected" the criminal justice system or that the law was enacted with a discriminatory purpose, but noting this "ruling is limited to this narrow issue").

[233] *Thornburg*, 478 U.S. at 47.

out, or dilute, the strength of minority votes.[234] Jailed voters of color, however, would likely want to bring the second kind of claim—vote denial—alleging that a state, locality, or jail's practices "result in the denial of equal access to . . . the electoral process for minority group members."[235]

To determine whether there has been a violation of section 2, courts use a "totality of the circumstances" test.[236] Because the primary avenue for litigating section 2 has historically been through vote dilution claims, courts are just beginning to build out the doctrine in the context of denial.[237] While there is still significant disagreement among the circuits as to how these claims should be adjudicated, as a general matter, courts seem to consider denial claims in two phases: "first, [with] an analysis of whether the challenged voting practice has a disparate impact on racial minorities; next, [with] an examination of whether, under the totality of circumstances, the challenged practice interacts with social and historical conditions to diminish minorities' opportunities to participate in the political process."[238] Given the makeup of the jailed population, jailed voters should be able to make the required showing that jail-based disenfranchisement disparately impacts voters of color. The second half of the inquiry is also beneficial for jailed voters because it creates space to bring the court's attention to the racialized history of mass incarceration, policing, and disenfranchisement.

Section 2 vote denial claims have been brought in one adjacent area: challenging felony disenfranchisement laws. Although these challenges have been denied in all six of the circuit courts that have heard such claims,[239] there is reason to believe that jailed voters could take advantage of the court's reasoning in these cases to bolster their own claims. As an initial matter, many of the courts that considered the challenges to felony disenfranchisement laws acknowledged the disparate impact that the criminal justice system has on has on people of color, which could be useful for jailed voters who will have to make a similar baseline showing.[240]

More importantly, however, the courts in these cases concretely discussed the usually amorphous "historical, social and political factors" im-

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[234] *See id.*

[235] *See* Daniel P. Tokaji, *Applying Section 2 to the New Vote Denial*, 50 Harv. C.R.-C.L. L. Rev. 439, 445 (2015) (quoting S. REP. NO. 97-417 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177 and discussing the origins of vote denial claims).

[236] *See Thornburg*, 478 U.S. at 43.

[237] *See* Tokaji, *supra* note 235, at 445.

[238] *See id.*

[239] *See id.* at 450 ("Six federal appellate courts have now considered claims that disqualifying voters due to past convictions violates § 2, and all courts have rejected these claims."); *see also* Farrakhan v. Gregoire, 623 F.3d 990, 993 (9th Cir. 2010); Simmons v. Galvin, 575 F.3d 24, 41 (1st Cir. 2009); Hayden v. Pataki, 449 F.3d 305, 323 (2d Cir. 2006); Johnson v. Governor of State of Fla., 405 F.3d 1214, 1234 (11th Cir. 2005); Wesley v. Collins, 791 F.2d 1255, 1261 (6th Cir. 1986); Howard v. Gilmore, No. 99-2285, 2000 WL 203984, at *1 (4th Cir. Feb. 23, 2000).

[240] *See Hayden*, 449 F.3d at 333 (noting that "although the VRA reaches much state action that has discriminatory effects on minority voting, it does not encompass" felony disenfranchisement); *see also Farrakhan*, 623 F.3d at 996.

portant for the "totality of the circumstances" evaluation of a challenged procedure.[241] In concluding the VRA was never intended to reach felony disenfranchisement laws,[242] the reviewing courts placed significant weight on the language in the Fourteenth Amendment explicitly allowing for criminal disenfranchisement,[243] the fact that felony disenfranchisement laws predate Black enfranchisement and Jim Crow,[244] the fact that the enacting Congress knew about these laws and declined to include them in the scope of the VRA,[245] and that felony disenfranchisement is a quintessential exercise of the power the Constitution grants states to determine voter *qualifications*.[246] In stark contrast, the Constitution prohibits rather than permits the disenfranchisement of jailed voters.[247] Jail-based disenfranchisement similarly does not raise questions implicating states' power to set voter qualifications. Also, jail-based disenfranchisement does not have "ancient origins" like felony disenfranchisement, which was a common Greek, Medieval European, and early-colonial practice.[248] We cannot similarly assume that legislators in 1965 were aware of and unconcerned about jail-based disenfranchisement.

At the time the VRA was enacted, far fewer people were jailed than are today. The first national survey of jails, conducted in 1970, counted about 160,000 people jailed nationwide, about 80,000 of whom were in pretrial detention.[249] Recall, the daily jail population hovers around 750,000 today, with about 500,000 pretrial detainees.[250] Pretrial detention—the reason most jailed voters are at risk of jail-based disenfranchisement—is a decidedly

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[241] *See* Wesley v. Collins, 791 F.2d 1255, 1261 (6th Cir. 1986) (citations omitted).

[242] *See, e.g.*, *Hayden*, 449 F.3d at 322 (holding that "[section 2 of the VRA] . . . was not contemplated or meant to include longstanding state felon disenfranchisement statutes, the existence and general validity of which were recognized both by the Fourteenth Amendment and in the legislative history of another section of the Voting Rights Act itself.").

[243] *See Farrakhan*, 623 F.3d at 993 (noting "felon disenfranchisement has an affirmative sanction in the Fourteenth Amendment"); *see also Simmons*, 575 F.3d at 32.

[244] *See Farrakhan*, 623 F.3d at 993; *see also Johnson*, 405 F.3d at 1218 (noting that at the time the state's felon disenfranchisement law was enacted "the right to vote was not extended to African–Americans, and, therefore, they could not have been the targets of any disenfranchisement law").

[245] *See Farrakhan*, 623 F.3d at 993 ("Congress was no doubt aware of these laws when it enacted the VRA in 1965 and amended it in 1982, yet gave no indication that felon disenfranchisement was in any way suspect.").

[246] *See* Simmons v. Galvin, 575 F.3d 24, 34 (1st Cir. 2009) ("Felon disenfranchisement statutes are not like all other voting qualifications. Congress has treated such laws differently. They are deeply rooted in our history, in our laws, and in our Constitution.").

[247] *See* O'Brien v. Skinner, 414 U.S. 524, 529 (1974).

[248] *See* Hayden v. Pataki, 449 F.3d 305, 316 (2d Cir. 2006).

[249] *See* Margaret Werner Cahalan, Dept. of Justice, Bureau of Justice Statistics Historical Corrections Statistics in the United States, 1850-1984 (1986).

[250] *See* Kaeble & Cowhig, *supra* note 6.

modern phenomenon,[251] with a history that is inexorably entwined with the racialized "War on Drugs" and the rise of the New Jim Crow.[252]

From its English and colonial roots, "the sole purpose of bail was to permit the defendant to be free from incarceration while reasonably assuring his or her appearance at trial and judgment."[253] Federal law largely embraced this theory of bail from the passage of the Judiciary Act of 1789, which allowed for pretrial detention only in capital cases, until the Bail Reform Act of 1984.[254] The BRA was among the most controversial provisions of the Comprehensive Crime Control Act, the centerpiece of President Ronald Reagan's "War on Drugs"[255]—a criminal justice reform effort built on racial fearmongering and disproportionate criminalization of the Black community.[256] The BRA specifically sought to address the "the alarming problem of crimes committed by persons on release."[257] Not only did the bill expand the presumption of pretrial detention to crimes other than capital offenses—most notably to federal drug crimes[258]—it also refocused bail inquiries from being concerned with whether a defendant will appear for judicial proceedings to whether a court believes he is "dangerous."[259] Just three years later, the Court affirmed the constitutionality of such preventative pretrial detention in *United States v. Salerno*.[260]

Dangerousness, however, is not and has never been a neutral criterion. According to one observer,

> [t]hroughout most of the twentieth century, race was used explicitly and directly as a predictor of dangerousness. From their inception in the 1920s to at least the 1970s, many of the prediction tools

[251] *See* Laura I. Appleman, *Justice in the Shadowlands: Pretrial Detention, Punishment, & the Sixth Amendment*, 69 Wash. & Lee L. Rev. 1297, 1304 (2012) ("Pretrial detention in the twenty-first century has evolved from a brief containment for a few accused deemed exceptionally dangerous to punishment for large numbers of accused awaiting trial.").

[252] *See* Alexander, *supra* note 31, at 58 (describing the rise of mass incarceration in America as a targeted, racist reinstitution of Jim Crow-era policies); *see also* Candace McCoy, *Caleb Was Right: Pretrial Decisions Determine Mostly Everything*, 12 Berkeley J. Crim. L. 135, 141 (2007) ("The main point is that since the 1970s, the rate of ROR release from felony defendants has fallen nationwide from about seventy percent in the 1970s, to sixty-three percent in the 1990s, to twenty-three percent in 2002.").

[253] Ann M. Overbeck, *Detention for the Dangerous: The Bail Reform Act of 1984*, 55 U. Cin. L. Rev. 153, 158–59 (1986); *see also* Appleman, *supra* note 251, at 1324 ("The system of bail developed to free untried prisoners.").

[254] *See* Overbeck, *supra* note 253, at 158–59.

[255] *See* Thomas E. Scott, *Pretrial Detention Under the Bail Reform Act of 1984: An Empirical Analysis*, 27 Am. Crim. L. Rev. 1, 6 (1989).

[256] *See* Alexander, *supra* note 31, at 58.

[257] Louis M. Natali, Jr., *Redrafting the Due Process Model: The Preventive Detention Blueprint*, 62 Temp. L. Rev. 1225, 1230 (1989).

[258] *See* Overbeck, *supra* note 253, at 164.

[259] *See generally* Shima Baradaran, *Restoring the Presumption of Innocence*, 72 Ohio St. L.J. 723, 748 (2011).

[260] 481 U.S. 739, 741 (1987).

expressly used the nationality and race of the parents of the inmate as one of the central factors to predict future dangerousness.[261]

The BRA itself prescribes a multifactor approach to dangerousness assessment, which allows the court to undertake a highly subjective inquiry into the personal qualities of defendants.[262] In this regime, implicit bias can and does infect the discretionary judgments of courts.[263] Even when courts use algorithms and other tools to limit the impact of their own personal biases, the assessment tools that courts use to make dangerousness determinations are not and never have been race neutral.[264] Predictably, since the 1980s the number of pretrial detainees in America has ballooned, a disproportionate number of whom are non-white.[265]

In 1965, the framers of the VRA would not have been able to imagine a system where pretrial detention is the norm rather than the exception, a tool wielded at the discretion of courts, and one that is disproportionately wielded against people of color accused of non-capital crimes. Given these differences in social and historical context, jailed voters can ask courts to consider how, in this new context, the disparate impacts of mass incarceration on voters of color could give rise to a violation of the VRA.

Pre-Trial Detainees and Wealth-Based Claims

If the reason a jailed voter cannot reach the polls is because he cannot afford to pay bail, that bail not only impermissibly burdens the right to vote for indigent voters but also functionally becomes a poll tax—something that is unconstitutional under the Twenty-Fourth Amendment and *Harper v. Virginia State Board of Elections*.[266] The Court has not yet confronted a jail-voting claim brought by a class of plaintiffs detained because they cannot afford bail. As the bail reform movement has taken hold in the United States,

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[261] Bernard E. Harcourt, *Risk as a Proxy for Race: The Dangers of Risk Assessment*, 27 FED. SENT'G REP. 237, 238 (2015).

[262] *See* Cassia Spohn, *Race, Sex, and Pretrial Detention in Federal Court: Indirect Effects and Cumulative Disadvantage*, 57 U. KAN. L. REV. 879, 882 (2009).

[263] *See id.* at 888 ("[W]ith only one exception (use of a weapon during the offense), there are significant differences between black offenders and white offenders on all of the variables relevant to pretrial detention decisions."); *cf.* Marcia Johnson & Luckett Anthony Johnson, *Bail: Reforming Policies to Address Overcrowded Jails, the Impact of Race on Detention, and Community Revival in Harris County, Texas*, 7 NW. J. L. & SOC. POL'Y 42, 68 (2012) ("A 2011 study similarly concluded that courts consider race in setting bail and suggests that 'judges set bail as if they value blacks' lost freedom as thousands of dollars less valuable than whites' freedom.' ").

[264] *Cf.* Ellora Thadaney Israni, *When an Algorithm Helps Send You to Prison*, N.Y. TIMES (Oct. 26, 2017), https://www.nytimes.com/2017/10/26/opinion/algorithm-compas-sentencing-bias.html, *archived at* https://perma.cc/66UW-BGRH ("[S]hifting the sentencing responsibility to a computer does not necessarily eliminate bias; it delegates and often compounds it.").

[265] *See* Harcourt, *supra* note 261, at 241 ("[T]he bottom line is essentially the same: increased admissions, as well as length of stay, account for sharp increases in imprisonment. All of these factors disparately affect people of color.").

[266] *See* Harper v. Va. State Bd. of Elections, 383 U.S. 663, 668 (1966).

stories of the injustices of money bail have proliferated—a man accused of stealing $7 and a bottle of cologne from a peer in his senior living facility assessed $350,000 bail,[267] a sixteen year old boy accused of stealing a backpack spending three years on Riker's Island and eventually taking his own life because of a $3,000 bail,[268] or the 24 year old homeless woman who lost custody of her child and her housing after being held on $1,500 bail on a case that was eventually dismissed. Bail need not be exorbitant to lead to incarceration. The median income of a pretrial detainee unable to meet bail is $15,598 for men and $11,071 for women.[269] Thirty-six percent of the women incarcerated in a pretrial unit in Massachusetts could not afford bails of $500 or less; across three women's facilities in Massachusetts, between 77% and 88% of pretrial detainees were held because of an inability to pay bail under $2,000.[270]

Jailed voters who cannot afford to pay bail could make both a Twenty-Fourth Amendment argument that assessment of bail in this circumstance functions as a poll tax and an Equal Protection argument that the state is unconstitutionally burdening the right to vote for indigent jailed voters. Although these claims would largely be novel (and potentially risky, given the current composition of the Court), the district court in *Fair Elections* actually found in favor of jailed plaintiffs who made an argument in this vein.[271] After *Harper v. Virginia State Board of Elections*[272] and the passage of the Twenty-Fourth Amendment,[273] that no one should be kept from the ballot box because of his or her inability to pay is constitutionally settled ground. Though bail assessments vary widely state to state, they are typically much higher than the $1.50 demanded in *Harper*.[274]

While the previous claims largely articulate what states cannot do, indigent voters in jails could also bring a claim as a suspect class to establish what states *must* do.[275] In the *Douglas-Moffit* line of cases, the Court found indigent defendants have rights to free court transcripts and free counsel on

[267] Thea L. Sebastian & Alec Karakatsanis, *Challenging Money Bail in the Courts*, 57 JUDGES' J. 23, at 23, 25.

[268] Jennifer Gonnerman, *Before the Law*, THE NEW YORKER (Oct. 6, 2014), https://www.newyorker.com/magazine/2014/10/06/before-the-law, *archived at* https://perma.cc/PFB8-823B.

[269] This lack of access to resources is more acute for non-white pretrial detainees. While the median incomes from Black and Latino pretrial detainees is lower than that of white pretrial detainees, the median incomes for Black men and women and Latino women fall below the federal poverty line. *See* RABUY & KOPF, *supra* note 60.

[270] See SWAVOLA ET AL., *supra* note 62, at 30.

[271] *See* Fair Elections Ohio v. Husted, 47 F. Supp. 3d 607, 614 (S.D. Ohio 2014), *vacated and remanded*, 770 F.3d 456 (6th Cir. 2014) ("Here there is no dispute that late-jailed voters are completely deprived of the right to vote.").

[272] *See* Harper v. Va. State Bd. of Elections, 383 U.S. 663, 668 (1966).

[273] U.S. CONST. amend. XXIV.

[274] *See Harper*, 383 U.S. at 668.

[275] *See* Sundeep Kothari, *And Justice for All: The Role Equal Protection and Due Process Principles Have Played in Providing Indigents with Meaningful Access to the Courts*, 72 TUL. L. REV. 2159, 2180 (1998).

direct appeal, using a kind of hybrid equal-protection-due-process analysis to ensure indigent individuals accused of crimes can vindicate their constructional rights regardless of their poverty.[276] Though this kind of analysis has fallen out of favor with the courts, it has not completely disappeared.[277] The Court has found indigent defendants have rights to psychiatric expert witnesses for competency evaluations,[278] waiver of some court fees,[279] appellate counsel,[280] and more.[281] These cases impose obligations on states to engage in a particularized assessment of what process is due to each individual—particularly indigent defendants—to ensure that they can vindicate their fundamental rights.[282] While this line of cases has traditionally been applied in the context of the right to a fair trial, an expansion to the right to vote feels apt; the right to vote is no less foundational to our constitutional system, and indigent defendants should not be deprived of any of their essential rights because of their poverty. Just as indigent defendants have affirmative rights to the resources they need to vindicate the rights to trial, they should also have access to the information, materials, and assistance they need to vote.

Confined Voters, Affirmative Obligations, and Substantive Due Process

As a general matter, the Court has found that due process "is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security," and "[c]onsistent with these principles, our cases have recognized that the Due Process Clauses generally confer no affirmative right to governmental aid . . . ."[283] However, "in certain limited

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[276] *See id.*

[277] Although the Court made later attempts to limit the *Griffin-Douglas* line of cases to a due process rationale, equal protection remained a critical element of its related holdings. As recently as 2005, the Court reaffirmed that this line of cases "reflect[s] 'both equal protection and due process concerns'" but acknowledged also that most of its decisions in this area rely on equal protection principles. Even when the verbalized basis for an opinion has been something other than equal protection—most often due process—there is a clear narrative throughout the access to courts' line of cases that contemplates the notion of equality and its centrality to fair treatment within the criminal justice system.

Lauren Sudeall Lucas, *Reclaiming Equality to Reframe Indigent Defense Reform*, 97 MINN. L. REV. 1197, 1224 (2013).

[278] *See* Ake v. Oklahoma, 470 U.S. 68, 74 (1985).

[279] *See* Boddie v. Connecticut, 401 U.S. 371, 374 (1971).

[280] *See* Burns v. State of Ohio, 360 U.S. 252, 258 (1959).

[281] *See* Little v. Streater, 452 U.S. 1, 17 (1981).

[282] Just as a generally valid notice procedure may fail to satisfy due process because of the circumstances of the defendant, so too a cost requirement, valid on its face, may offend due process because it operates to foreclose a particular party's opportunity to be heard. The State's obligations under the Fourteenth Amendment are not simply generalized ones; rather, the State owes to each individual that process which, in light of the values of a free society, can be characterized as due.

Boddie, 401 U.S. at 380.

[283] *See* DeShaney v. Winnebago Cty. Dep't of Soc. Servs., 489 U.S. 189, 195–96 (1989).

circumstances the Constitution imposes upon the State affirmative duties of care and protection with respect to particular individuals."[284] For example, as discussed above, the Court has found states have an obligation to provide indigent defendants with certain kinds of assistance to ensure they can vindicate their rights to a fair trial under a version of substantive due process.[285] The Constitution similarly mandates states and localities provide people with disabilities with accommodations to ensure they have access to courtrooms and polling places to exercise their fundamental rights.[286]

In a series of lesser-known cases, the Court has found an affirmative substantive due process right extends to another important group of people: the people it confines.[287] Though this has not proven to be the most robust rights framework, a due process right of this kind has been applied to a wide range of plaintiffs, from people incarcerated in prisons and jails to people subjected to involuntary civil commitment to children in foster care.[288] The logic of this affirmative right is simple; "because the prisoner is unable 'by reason of the deprivation of his liberty [to] care for himself,' it is only 'just' that the State be required to care for him."[289] In modern terms, the state's decision to confine someone gives rise to a "special relationship" which creates additional obligations on the state to provide for that person's well-being.[290]

Though the majority of these cases are concerned with guaranteeing the basic needs—food, medical care, bodily safety—of people who are involuntarily committed,[291] this doctrine has also been read more expansively to impose a duty on the state to take steps to ensure it is not subjecting "an involuntarily confined individual to deprivations of liberty which are not among those generally authorized by his confinement."[292]

Applied to the jail-voting context, if the state makes the constitutionally permissible decision to confine an eligible voter, than it should have some

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[284] *See id* at 198.

[285] *See generally* Kothari, *supra* note 275, at 2180.

[286] *See* Tennessee v. Lane, 541 U.S. 509, 532–33 (2004); *see also* People of New York ex rel. Spitzer v. County of Delaware, 82 F. Supp. 2d 12, 16 (N.D.N.Y. 2000); Key v. Grayson, 179 F.3d 996, 999 (6th Cir. 1999); Michael E. Waterstone, Lane, *Fundamental Rights, and Voting*, 56 Ala. L. Rev. 793, 809 (2005).

[287] *See DeShaney*, 489 U.S. at 199–200 ("[I]t is the State's affirmative act of restraining the individual's freedom to act on his own behalf—through incarceration, institutionalization, or other similar restraint of personal liberty—which is the 'deprivation of liberty' triggering the protections of the Due Process Clause."); *see also* Youngberg v. Romeo, 457 U.S. 307, 317 (1982) ("[W]hen a person is institutionalized—and wholly dependent on the State—. . . a duty to provide certain services and care does exist . . . .").

[288] *See id.*; *see also* Joshua E. Weishart, *Reconstituting the Right to Education*, 67 Ala. L. Rev. 915, 970 (2016) (theorizing the rights framework should also cover children in public schools).

[289] *DeShaney*, 489 U.S. at 198–99; *see also* Spicer v. Williamson, 191 N.C. 487 (1926).

[290] *See* Laura Oren, Deshaney *and "State-Created Danger": Does the Exception Make the "No-Duty" Rule?*, 35 Admin. & Reg. L. News 3–4 (2010).

[291] *See Youngberg*, 457 U.S. at 314; *see also DeShaney*, 489 U.S. at 199.

[292] *Id.* at 200.

new affirmative duty to ensure that voter does not suffer a secondary impermissible constitutional deprivation—in this case, a deprivation of her right to vote—as a result of her incarceration. The Court's inquiry in these kinds of cases has focused on the accessibility of rights, asking what is necessary for confined people to vindicate their fundamental rights during their confinement. In cases where educational materials, trainings, and resources enable people confined by the state to access their rights, the Court has found states are under some obligation to provide them.[293] For example, in *Youngberg v. Romeo*[294] the Court found that the state was required to provide some "habilitation" training to an involuntarily confined, developmentally disabled person, because the training could have enabled him to be free from restraints during his confinement.[295] Similarly, in *Bounds v. Smith*[296] the Court found that "the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law."[297] At a minimum, this theory could mandate that states and localities inform jailed voters that they retain their eligibility after their confinement, supply voters with ballot request forms, and instruct them on how to properly submit them. Thinking more imaginatively, the right to vote is more than just the right to check a box on a ballot. It is the right to participate in democracy, to speak and be heard, to be an educated dissenter or supporter. This kind of meaningful participation requires access to media, voter educational materials, and even social discourse that would not be secured by a framework that is only concerned with wholesale deprivation of access to the ballot but may be protected under a positive rights framework.[298]

Storytelling and Civil Rights Litigation

Americans are increasingly rejecting the idea that contact with the criminal justice system should strip people—primarily low-income people of color—of their right to vote. While efforts to combat felony disenfranchisement have historically met with significant resistance in courts,[299]

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[293] *Youngberg*, 457 U.S. at 317 ("When a person is institutionalized—and wholly dependent on the State—it is conceded by petitioners that a duty to provide certain services and care does exist, although even then a State necessarily has considerable discretion in determining the nature and scope of its responsibilities.").

[294] 457 U.S. 307 (1982).

[295] *See id.* at 319 ("[W]e agree with his view and conclude that respondent's liberty interests require the State to provide minimally adequate or reasonable training to ensure safety and freedom from undue restraint.").

[296] 430 U.S. 817 (1977).

[297] *Id.* at 828.

[298] *C.f.* Max Stul Oppenheimer, *Return of the Poll Tax: Does Technological Progress Threaten 200 Years of Advances Toward Electoral Equality?*, 58 CATH. U. L. REV. 1027, 1033 (2009).

[299] *See, e.g.*, Simmons v. Galvin, 575 F.3d 24, 34 (1st Cir. 2009).

formerly incarcerated voters have been re-enfranchised in unprecedented numbers through policy change backed by a groundswell of popular support.[300] Advocates have and should continue to turn to the political process to ensure these voters have access to the ballot. If the political moment seems ripe for policy change, though, why should incarcerated voters seek a forum in a courtroom as well?

If we believe that the Court is not a countermajoritarian force in government—i.e., that it is sensitive and responsive to public opinion—perhaps there has been no better time to tell the story of jailed voters in court.[301] Jail-based disenfranchisement claims are not only valuable because they potentially offer new ways to resolve entrenched doctrinal difficulties and expand a constitutional rights framework, but also because they provide potential litigants with a forum by which they can shape both their own and the national narrative. Litigation—particularly during trial—provides an opportunity for plaintiffs to establish a factual record, to tell their story and the story of their constitutional harm. The courtroom, then, turns into a kind of ballot box proxy, a space where jailed voters can voice dissent and work to hold their government accountable for how it treats them.[302]

From a more functionalist perspective, building a robust factual record can be instrumental to the success of civil rights claims.[303] Stories matter. Admittedly, courts are much more likely to adopt an identity neutral voting rights framework like *Anderson-Burdick* or procedural due process lens to adjudicate jail-based disenfranchisement cases. But that does not mean the other claims are not useful. While litigants who seek to bring identity-based

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[300] *See* Sasha Ambramsky, *Florida Just Won a Historic Voting-Rights Victory,* THE NATION (Sept. 18, 2018), https://www.thenation.com/article/florida-is-on-the-verge-of-a-historic-voting-rights-victory/, *archived at* https://perma.cc/GQY9-FP7J; *see also* Jon Schuppe, *Voters Kill Remnants of Jim Crow in Florida and Louisiana*, NBC NEWS (Nov. 7, 2018, 3:37 PM), https://www.nbcnews.com/news/us-news/voters-kill-remnants-jim-crow-florida-louisiana-n933441, *archived at* https://perma.cc/FMC5-YH3L.

[301] *See, e.g.*, Mary L. Dudziak, *The Court and Social Context in Civil Rights History*, 72 U. CHI. L. REV. 429, 432 (2005) ("The Court does not shape American society. Instead, the Court follows the flow of cultural mores, reflecting changes that have their source elsewhere."); *see generally* MICHAEL J. KLARMAN, JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004).

[302] *See* Robert L. Tsai, *Conceptualizing Constitutional Litigation as Anti-Government Expression: A Speech-Centered Theory of Court Access*, 51 AM. U. L. REV. 835, 838 (2002) ("Constitutional litigation constitutes 'anti-government' expression in the broadest sense: the speaker questions the legitimacy of a governmental action."); *see also* Alexandra D. Lahav, *The Roles of Litigation in American Democracy*, 65 EMORY L.J. 1657, 1659 (2016) ("The process of litigation promotes democracy by permitting participants to perform acts that are expressions of self-government. An obvious example . . . is civil rights litigation, which allows individuals who are otherwise shut out of the democratic process to access a governmental official (the judge) who must listen to their claim.").

[303] *See* Allison Orr Larsen, *Constitutional Law in an Age of Alternative Facts*, 93 N.Y.U. L. REV. 175, 202 (2018) ("[T]he second generation of social movement lawyers are quite advanced at growing the factual dimensions of their cases in a way that sets them up for successful constitutional arguments."); *see also* KENJI YOSHINO, SPEAK NOW: MARRIAGE EQUALITY ON TRIAL: THE STORY OF HOLLINGSWORTH V. PERRY (2015) (discussing the importance of factual development at trial in the successful litigation for gay marriage).

claims using the VRA or substantive due process should be extremely wary of creating bad precedent or eroding the existing rights protecting people of color, low-income people, and people in state custody, litigants who responsibly bring such claims can force courts to confront the real-world impacts of jail-based disenfranchisement. Plaintiffs can also draw the court's attention to the history of the law here, how the law has recognized these identity groups as politically unpopular, historically disempowered, "discrete and insular minorities" entitled to heightened constitutional protection.[304]

Making these kinds of arguments could help situate courts in a fundamental rights framework, even if the claims themselves are not independently successful. Because the identity neutral voting frameworks are all balancing tests—opportunities for courts to weigh damage of the harm against the needs of the state; to consider when deference or intervention is appropriate; to ask cost-benefit questions that have far reaching implications for our democratic system—telling the stories of those harmed by jail-based disenfranchisement, situated in as many historical and legal contexts as possible, could help tip the balance in jailed voters' favor.

4. Conclusion

Despite the fact that the Supreme Court affirmed the right to vote from jail more than 40 years ago, most eligible jailed voters will be deprived of their fundamental rights because the system is not set up to protect their political voices. The impact of this system failure is great. Every Election Day, hundreds of thousands of eligible voters—primarily those who have been historically marginalized—are deprived of their right to hold accountable the people who made the decisions that led to their incarcerations, to participate in their own political community, and to exercise their fundamental rights. Though litigating these claims requires some front-end investment—first, to understand the barriers to access that jailed voters actually confront and, second, to work with jailed voters to ensure they take the necessary steps to ensure they can seek a remedy in court—the law here is clear: Jailed voters have a constitutional right to a ballot. That right should not be just an empty promise in an old Supreme Court opinion; it should be a meaningful guarantee, protecting the political voices of the hundreds of thousands of voters jailed each Election Day in the United States. Now is the time to make this right real for jailed voters everywhere.

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[304] *See* Lewis F. Powell, Jr., Carolene Products *Revisited*, 82 COLUM. L. REV. 1087, 1089–91 (1982) (explaining political process theory and the genesis of heightened scrutiny review).