

How to End *De Facto* Disenfranchisement in the Criminal Justice System

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More than 2 million people are incarcerated in prisons or jails each year.¹ This population, which is often ignored and *de facto* disenfranchised, is disproportionately Black and brown. Black, Indigenous, and Hispanic Americans are 3.5 times, 2.1 times, and 1.08 times, respectively, more likely to be incarcerated in jail than someone who is white.² These disparities exist in the prison population as well, with Black and Hispanic Americans being 5.72 times and 3.05 times, respectively, more likely to be incarcerated than someone who is white.³ The majority of people held in jails, as well as some of those who are held in prisons, remain eligible to vote.

COVID-19 has exposed the cracks in our current democratic system, and advocacy groups have provided recommendations for voting during the pandemic. What groups have largely failed to do, however, is address how we best protect the right to vote for eligible voters being held in prisons and jails. We must not let a pandemic exacerbate the *de facto* disenfranchisement these individuals face and further restrict the ability of eligible, incarcerated voters to have a say in who and what laws govern them.

The very fact that our country incarcerates so many people, and in such racially disproportionate numbers, underscores why the ability to exercise one's fundamental right to vote is vital: individuals who are incarcerated are often unable to advocate for policy changes that could save their lives, because they are unable to access the ballot. Incarcerated people have relied on litigation to set basic standards for health care in prisons and jails,⁴ and, although prisoners' right to health care is

protected by the 8th Amendment’s prohibition of “cruel and unusual” punishment, reports have found that prisoners’ access to health care and the quality of that care are often inadequate.⁵ Additionally, when incarcerated individuals have tried to advocate for better policies that would reduce incarceration rates and lessen the racial disparities in our criminal legal system, they have been met with harsh resistance. For example, in 1997, when individuals incarcerated in Massachusetts organized to advocate for prison and sentencing reforms, the acting governor moved to halt these efforts, strip people in prison of their right to vote, and prevent them from sharing information on the voting history of candidates or otherwise advocating for change.⁶ Policy reforms that improve access to health care and decrease overcrowding in jails and prisons could have curbed the spread of COVID-19, but these measures have failed, in part because most of the impacted population is denied voting power.

As the COVID-19 crisis has unfolded, some states have made underwhelming efforts to release people from jails and prisons to curb the spread of the virus. They have also, in some cases, adjusted their voting procedures and practices to expand access to the ballot for the un-incarcerated population. The recommendations set forth below are designed to ensure that people who come into contact with the criminal legal system are fully able to exercise their right to vote during the current pandemic and moving forward. These recommendations examine how to increase access to the ballot for people who are released from incarceration, and for eligible voters who are currently incarcerated.

A. Protecting the Right to Vote for People Being Released from Incarceration

The United States holds the dishonor of having the highest incarceration rate in the world.⁷ The U.S. Bureau of Justice Statistics reports that in 2016 (the last year for which they published data), more than 2.16 million people were incarcerated in prisons or jails⁸—representing a 500 percent increase in the number of people incarcerated over a 40-year period.⁹ And, of those in jail, 65 percent had not been convicted of any crime but “were awaiting court action.”¹⁰

Tapping into racial resentment and anxiety, and using racist dog-whistles that called for “tough-on-crime policies,” policymakers in jurisdictions across the U.S. aggressively expanded the criminal justice system in the 1980s, escalating the War on Drugs. The jump in incarceration rates can be explained not as the result of an increase in actual crime rates, but as a consequence of policymakers’ decisions to

raise penalties, create mandatory minimum sentences, and establish truth-in-sentencing and three-strike laws.¹¹

Currently, the criminal justice system touches 1 in 40 U.S. residents¹² and incarcerates traditionally marginalized populations at disproportionately high rates. Because of the over-policing, incarceration, and conviction they experience, people of color have been severely impacted by policy changes that have increased the penalties for crimes. Currently, there is a 1 in 3 chance that a Black man will be imprisoned, compared to a 1 in 6 chance for Latino men and a 1 in 17 chance for white men.¹³ Similar disparities exist for Black, Latina, and white women.¹⁴

As the Prison Policy Initiative aptly states: “Prisons and jails are amplifiers of infectious diseases such as the coronavirus, because social distancing is impossible inside and movement in and out of facilities is common.”¹⁵ This statement has been borne out with COVID-19 outbreaks in prisons and jails across the county,¹⁶ and tragic and avoidable deaths.¹⁷

Decarceration efforts led by grassroots groups have resulted in prisons and jails releasing a small number of incarcerated individuals to respond to the public health crisis posed by COVID-19¹⁸—showing that there are steps that can be taken immediately to reduce the numbers of people behind bars.

As individuals are released from incarceration, some are becoming eligible to vote. States across our nation have a patchwork of laws specifying when people become eligible to vote after being convicted of a felony and released from incarceration;¹⁹ however, many formerly incarcerated people are unaware of the laws of their state and assume that they remain ineligible to vote.²⁰ It is, therefore, critical that individuals (1) be informed if—or when—they become eligible to vote and (2) be registered to vote if they are eligible to vote when they are released from incarceration.

Recommendations:

- **Voter Education**

- » Provide each person released from incarceration information on their voting rights. This information should include, but not be limited to, when they become eligible to vote, and what procedures, if any, they need to follow to have their voting rights restored.

- **Voter Registration**

- » Provide individuals who become eligible upon release from incarceration with the opportunity to register at the time of their release. Departments of Correction and other facilities should automatically submit registration information for eligible voters to the appropriate election officials, providing formerly incarcerated people the opportunity to opt out.
- » If a state does not automatically register individuals upon release from incarceration, it should designate the agency where a person has their last point of contact before becoming eligible to vote—e.g., departments of corrections, probation, parole, or community supervision—as a voter registration agency. These agencies should be required to provide people who were formerly incarcerated with voter registration forms, assistance in completing those forms, and no-fee submission of registration forms if an individual wants the agency to transmit their voter registration form to the appropriate election authority.

B. Protecting the Right to Vote for People who are Incarcerated

It is estimated that the daily jail population in the United States is 631,000,²¹ of which approximately 34 percent are Black.²² The majority of these individuals—as well as some individuals who are incarcerated in prison on a felony conviction—remain eligible to vote.²³ However, many qualified, incarcerated voters are unaware that they can register and exercise their right to vote while incarcerated.²⁴ Grassroots and state-based organizations often lead efforts to ensure people who are incarcerated can access to the ballot.²⁵

Protecting the right to vote for people who are incarcerated during the COVID-19 pandemic requires that states and local election officials undertake immediate efforts to provide access to registration, ballots, and information on how individuals who are incarcerated can exercise their right to vote.

1. Voter Registration

Local organizations often lead the efforts to register eligible voters who are incarcerated in jails and prisons.²⁶ However, in response to

the COVID-19 outbreak and the ease with which the disease is able to spread among incarcerated people, many jails and prisons suspended visitation.²⁷ This means that many eligible voters who are incarcerated are not receiving the opportunity to register to vote.

Recommendations:

- **Facilitate voter registration for eligible voters who are experiencing a period of incarceration. To effectively provide people who are incarcerated with voter registration opportunities, states must:**
 - » Integrate voter registration into the intake process.
 - » Maintain copies of voter registration forms at all places of incarceration where eligible voters are being held. In state facilities, these applications should be provided by the Secretary of State or local election officials. Federal facilities should be required to have copies of the National Mail Voter Registration Form.²⁸
 - » Provide registration forms to all eligible voters who are incarcerated in jails and in prisons.
 - » In states with same-day registration,²⁹ allow qualified voters who are incarcerated to participate in an election if they submit a voter registration form and absentee ballot application through the day of an election or the end of the same-day voter registration period.³⁰
 - » Timely transmit voter registration forms to the appropriate election officials, without cost to the person who is incarcerated.³¹

2. Access to the Ballot

As previously noted, many individuals believe they cannot vote while incarcerated, or do not know how to access a ballot. With grassroots organizations having visitations suspended, one way of communicating that information is lost.

Furthermore, as some states look to expand access to voting absentee by mail, it is clear that these efforts are ignoring incarcerated, eligible voters. For example, the state of Georgia mailed absentee ballot request forms for the primary election to registered voters.³² Similarly, in Ohio, the state mailed postcards to registered voters informing them of when the state's rescheduled primary was being held and how they could request an absentee ballot.³³ These applications and postcards

were directed to a person's voter registration address, but there was no indication that the states did anything to provide these materials to voters incarcerated in jail. Georgia and Ohio are not alone in failing to extend access to the ballot to incarcerated residents.

The imposition of voter identification requirements may also act to prevent eligible, incarcerated voters from being able to cast a ballot.³⁴

Recommendations:

- **Absentee Ballot Applications**

- » Maintain copies of absentee ballot applications in all state facilities where eligible voters are incarcerated. These applications should be provided by the Secretary of State or local election officials.³⁵
- » Offer an absentee ballot application to all eligible, incarcerated voters.
- » Timely transmit absentee ballot applications to the appropriate election officials without cost to the person who is incarcerated.³⁶

- **Casting Ballots**

- » Require that physical ballots be provided to eligible voters who are incarcerated.
- » Absentee ballots provided to incarcerated voters should have return postage pre-paid.
- » Timely transmit absentee ballots to the appropriate elections office either through the mail, through personal delivery and return by board of elections officials, personal return by a member of the department of corrections, or other means.
- » Establish polling locations in jails or prisons where possible.
- » Ensure incarcerated voters can cast a secret ballot.

- **Identification Requirements**

- » Require that places of incarceration copy and make available any identification documents a voter may need to provide in order to cast an absentee ballot.
- » Declare an attestation or printed document from a jail or prison qualifies as a form of identification for voting purposes.

3. Access to Information

Many individuals who are eligible to vote experience *de facto* disenfranchisement because they are unaware that they can register and vote while incarcerated. For this reason, it is essential that eligible, incarcerated voters be made aware of these rights and, to the extent that new voting procedures are adopted, what those procedures are.

Recommendations:

- **Educational Materials**

- » Provide know-your-rights documents to all people who are currently incarcerated, and integrate these documents into materials people are provided during their intake process.
- » Disseminate information telling people how they can register and vote while incarcerated: via signage, on closed circuit televisions, radio, and other means.
- » Establish a toll-free number in each state that voters who are incarcerated can call with any questions they have about voting, or report any problems registering, obtaining, or casting a ballot.

Conclusion

A public health crisis should not turn into a crisis for our democracy. At this moment, more than ever, we must ensure that eligible, incarcerated voters—who are too often marginalized and have their voices silenced in the political process—are provided access to the ballot. States, election officials, and advocates must not overlook these voters when advancing policies to extend voting opportunities. Reforms, like those presented here, must be adopted to ensure that the hundreds of thousands of eligible voters who are incarcerated can exercise their fundamental right to vote.

Endnotes

- 1 U.S. Bureau of Justice Statistics, press release, “U.S. Correctional Population Declined for the Ninth Consecutive Year,” Apr. 26, 2018, <https://www.bjs.gov/content/pub/press/cpus16pr.pdf>; see also Danielle Kaeble and Mary Cowhig, *Correctional Populations in the United States*, 2016, U.S. Bureau of Justice Statistics, Apr. 2018, <https://www.bjs.gov/content/pub/pdf/cpus16.pdf>. Of the 2.16 million people incarcerated in 2016, approximately 2 million were held in state and local prisons and jails—not federal prisons. Drew Kann, *5 Facts Behind America’s High Incarceration Rate*, CNN.com, Apr. 21, 2019, <https://www.cnn.com/2018/06/28/us/mass-incarceration-five-key-facts/index.html>.
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- 4 *Estelle v. Gamble*, 429 U.S. 97 (1976).
- 5 Andrew P. Wilper, et al., “The health and health care of US prisoners: results of a nationwide survey,” *American Journal of Public Health* vol. 99,4 (2009): 666-72. doi:10.2105/AJPH.2008.144279 (<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2661478/>).
- 6 Emancipation Initiative, “Timeline of Massachusetts Incarcerated Voting Rights,” <https://emancipationinitiative.org/ballots-over-bars/returning-the-right-to-vote/>; see also Edgar Herwick III, “How Massachusetts Prisoners (Recently) Lost the Right to Vote,” WGBH News, May 29, 2019, <https://www.wgbh.org/news/local-news/2019/05/29/how-massachusetts-prisoners-lost-the-right-to-vote>.
- 7 Kann, *supra* note 1.
- 8 U.S. Bureau of Justice Statistics, *supra* note 1.
- 9 The Sentencing Project, “Criminal Justice Facts,” <https://www.sentencingproject.org/criminal-justice-facts/>.
- 10 U.S. Bureau of Justice Statistics, “Jail Inmates in 2016,” Feb. 2018, https://www.bjs.gov/content/pub/pdf/ji16_sum.pdf. According to Prison Policy Initiative, more than 550,000 people who are currently incarcerated have not been sentenced or convicted; 470,000 of these individuals are held in local jails, comprising more than 74% of the local jail population. Wendy Sawyer and Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, Prison Policy Initiative, Mar. 24, 2020, <https://www.prisonpolicy.org/reports/pie2020.html>.
- 11 The Sentencing Project, *supra* note 9.
- 12 Communities United, et al., *The \$3.4 Trillion Mistake: The Cost of Mass Incarceration, and How Justice Reinvestment Can Build a Better Future for All*, 2016, 3, https://maketheroadny.org/pix_reports/Justice%20Reinvestment%20Final%20Report.pdf.
- 13 The Sentencing Project, *supra* note 9.

- 14 *Id.*
- 15 Prison Policy Initiative, “Responses to the COVID-19 Pandemic,” May 4, 2020, <https://www.prisonpolicy.org/virus/virusresponse.html>; *see also* Elie Honig, “Releasing Prisoners During COVID-19 Crisis Makes Good Sense,” CNN.com, Apr. 20, 2020, <https://www.cnn.com/2020/04/20/opinions/covid-19-prosecutors-prison-release-honig/index.html> (Career prosecutor stating: “I’ve spent plenty of time working inside prisons, and it is difficult to imagine just how cramped and overcrowded so many of them are unless you’ve actually been in the buildings. Prisons also often offer subpar health services. . . . Unsurprisingly, the virus has ripped through prison populations around the country.”).
- 16 *See, e.g.*, “Prison COVID Outbreak Aided by Crowding,” *The Columbus Dispatch*, May 3, 2020, <https://www.dispatch.com/opinion/20200503/editorial-prison-covid-outbreak-aided-by-crowding> (noting that 80 percent of people held at the Marion Correctional Institution in Ohio had tested positive for COVID-19); Bill Hutchinson, “COVID-19 Outbreak Infecting Over 500 Prisoners May Have Come From Staff: Medical Director,” ABC News, Apr. 28, 2020, <https://abcnews.go.com/US/covid-19-outbreak-infecting-500-prisoners-staff-medical/story?id=70382322> (noting that 583 people held at a Tennessee prison had tested positive for COVID-19); Cheryl Corley, “The COVID-19 Struggle in Chicago’s Cook County Jail,” NPR, April 13, 2020, <https://www.npr.org/2020/04/13/833440047/the-covid-19-struggle-in-chicagos-cook-county-jail> (noting that more than 500 people held in Cook County Jail had tested positive for COVID-19); Kelan Lyons, “Shifting Plans and A COVID-19 Outbreak at a Connecticut Prison,” *The CT Mirror*, Apr. 17, 2020, <https://ctmirror.org/2020/04/17/shifting-plans-and-a-covid-19-outbreak-at-a-connecticut-prison/> (“COVID-19 has spread quickly throughout Connecticut’s prisons and jails.”); Max Marin, “Over 75% of People Tested in Philly Jails Are Positive for COVID-19,” *BillyPenn*, Mar. 4, 2020, <https://billypenn.com/2020/05/04/over-75-of-people-tested-in-philly-jails-are-positive-for-covid-19/>; Miranda Bryant, “Coronavirus Spread at Rikers is a ‘Public Health Disaster,’ Says Jail’s Top Doctor,” *The Guardian*, Apr. 1, 2020, <https://www.theguardian.com/us-news/2020/apr/01/rikers-island-jail-coronavirus-public-health-disaster> (noting that, “[i]n just 12 days, . . . confirmed cases at Rikers had soared from one to nearly 200”).
- 17 *See, e.g.*, Kaley Johnson, “Whistleblower Warned of Conditions at Fort Worth Prison Before Woman Died of Coronavirus,” *Fort Worth Star-Telegram*, May 1, 2020, <https://www.star-telegram.com/news/local/crime/article242405771.html> (noting that Andrea Circle Bear, a 30-year-old woman, was incarcerated for 26 months, contracted COVID-19 while pregnant, gave birth while on a ventilator, and later passed away); Federal Bureau of Prisons, “Inmate Death at FMC Carswell,” Apr. 28, 2020, https://www.bop.gov/resources/news/pdfs/20200428_press_release_crw.pdf; Angie Jackson, “Michigan Juvenile Lifer Who Died of Coronavirus in Prison Was Weeks Away from Parole,” *Detroit Free Press*, Apr. 18, 2020, <https://www.freep.com/story/news/local/michigan/2020/04/18/michigan-prisons-coronavirus-infections-deaths-william-garrison/5156073002/>; Victoria Law, “Louisiana Prisoners Held in Notorious Isolation Unit Are Facing a ‘Slow-Moving Disaster,’” *The Appeal*, Apr. 17, 2020, <https://theappeal.org/louisiana-prisoners-held-in-notorious-isolation-unit-are-facing-a-slow-moving-disaster/>.

- 18 Prison Policy Initiative, *supra* note 15 (describing prison and jail releases). These efforts are widely supported by the public. See ACLU, press release, “ACLU Poll Shows Wide-Ranging Support for Releasing Vulnerable People from Jails and Prisons,” Mar. 20, 2020, <https://www.aclu.org/press-releases/aclu-poll-shows-wide-ranging-support-releasing-vulnerable-people-jails-and-prisons> (noting “63 percent of registered voters support releasing people from jails and prisons to stop the spread of COVID-19” and “72 percent of voters support clemency for elderly incarcerated people in the midst of this pandemic”).
- 19 Restoration of Rights Project, <http://restoration.ccresourcecenter.org/>.
- 20 Ernest Drucker and Ricardo Barreras, *Studies of Voting Behavior and Felony Disenfranchisement Among Individuals in the Criminal Justice System in New York, Connecticut, and Ohio*, The Sentencing Project, Sept. 2005, https://www.prisonpolicy.org/scans/sp/fd_studiesvotingbehavior.pdf.
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- 22 Zhen Zeng, *Jail Inmates in 2017*, U.S. Bureau of Justice Statistics, Apr. 2019, <https://www.bjs.gov/content/pub/pdf/ji17.pdf>.
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- 24 *Id.*
- 25 *See, e.g., id.*
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- 27 Jason Hanna, “Federal and Most State Prisons are Banning Visits to Protect Inmates from Coronavirus,” CNN.com, Mar. 14, 2020, <https://www.cnn.com/2020/03/14/health/prisons-coronavirus-visitations-banned/index.html> (discussing also the restrictions in place in some jails); Molly Minta, “With Prison Visitation Suspended Due to COVID-19, Families of Incarcerated People Say Phone Calls Should Be Free,” *The Appeal*, Apr. 2, 2020, <https://theappeal.org/prison-calls-covid-19/> (same); Bernadette Rabuy and Wanda Bertram, “Jails and Prisons are Suspending Visits to Slow COVID-19. Here’s What Advocates Can Do To Help People Inside,” Prison Policy Initiative, Mar. 17, 2020, <https://www.prisonpolicy.org/blog/2020/03/17/covid19-visits/>.
- 28 *See* Election Assistance Commission, National Mail Voter Registration Form, <https://www.eac.gov/voters/national-mail-voter-registration-form>.
- 29 Same-day voter registration “allows any qualified resident of the state to go to register to vote and cast a ballot all in that day.” National Conference of State Legislatures, “Same Day Voter Registration,” June 28, 2019, <https://www.ncsl.org/research/elections-and-campaigns/same-day-registration.aspx> (noting that as of June 2019, 21 states and the District of Columbia had “enacted same day registration”).

- 30 In some states, a voter registration deadline still exists for voters who submit applications by mail. The ability to make use of same-day registration only applies, in these instances, to people who can go to their polling location or the same-day registration site. This means that the ability to register after the general registration deadline is limited to people who are able to physically travel to a designated site. Thus, while states with same-day registration have the technology and ability to process registration forms received after the general deadline, voters in jail are required to meet the general deadline requirement while other members of the population can register after the deadline has passed.
- 31 States should examine ways to allow for voter registration applications and other voting materials to be transmitted most effectively—e.g., by allowing transmission through scan, fax, mail, and personal delivery. In addition, because access to commissary may be limited in places of incarceration and people who are incarcerated may lack funds for stamps, envelopes, or other necessary materials, voting materials should be able to be returned at no cost to any voter who is incarcerated.
- 32 Mark Niese, “Georgia to Mail Absentee Ballot Request Forms to All Active Voters,” *Atlanta Journal-Constitution*, Apr. 20, 2020, <https://www.ajc.com/news/state--regional-govt--politics/georgia-mail-absentee-ballot-request-forms-all-active-voters/s1ZcJ57g8qqIwyG6LNWfIM/>.
- 33 Ohio Secretary of State, press release, “LaRose Shares Design of the Vote-by-Mail Postcard Which Will Soon Arrive in Mailboxes,” Apr. 2, 2020, <https://www.ohiosos.gov/media-center/press-releases/2020/2020-04-02/>.
- 34 As noted by the Alliance for a Just Society: “Incarcerated eligible voters must vote using absentee ballots; however, some states require certain forms of ID to be submitted with the absentee voter application . . . that are unavailable to incarcerated people.” Allyson Fredericksen and Linnea Lassiter, *Disenfranchised by Debt: Millions Impoverished by Prison, Blocked from Voting*, Alliance for a Just Society, Mar. 2016, <http://allianceforajustsociety.org/wp-content/uploads/2016/03/Disenfranchised-by-Debt-FINAL-3.8.pdf>.
- 35 Federal facilities should offer eligible voters the opportunity to vote absentee and download, print, and provide these voters with timely access to absentee ballot applications.
- 36 *See supra* note 31.



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