

# Voting in Jail: Illinois, Indiana, and Beyond

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## Introduction

In recent years, Illinois has aggressively pursued and earned a reputation as a leader in bold voter access reforms. The Illinois election system boasts innovations including election day registration, expanded early voting, and automatic voter registration that have the potential to create a more equitable democracy. But even with these changes, there are still persistent conditions that threaten access to voting in Illinois, particularly for communities of color. Beneath the surface of Illinois's reputation of providing diverse communities with access to the ballot, there remain obstacles to voting for communities of color, including people in the criminal legal system. In Illinois as well as neighboring states such as Indiana, there are significant opportunities to strengthen access to voting in this regard.

## Language Matters: Jail Versus Prison

A jail is a facility where most people who are detained are awaiting trial and have not been convicted in connection with those charges. A prison is a facility where people convicted of a crime are held in connection with a sentence for that crime. See *A Guide To Voter Registration In Jails*, Chicago Votes (2021), <https://chicagovotes.com/wp-content/uploads/sites/27/2021/09/A-guide-to-voter-registration-in-jails-3.pdf>. As described further below, people in jail are typically in pretrial detention and legally allowed to vote, though access to voting and the process to exercise the right to vote varies state by state and county by county. While referring to people who are detained in jails and prisons, this article specifically avoids using the terms “detainees” or “inmates,” as those terms dehumanize the people in the facilities by identifying them only as their current carceral status. The carceral system is deeply unfair and racially biased. Highlighting the individual people being harmed is an important and necessary step to understanding and changing the system.

## The Law Provides Access for Voters in Pretrial Detention

### a. Expanded Access Under Illinois Law

In 2019, the Illinois legislature passed a law that enabled election authorities to work with county jails to establish temporary polling places for people who are in jail and are eligible to vote. 10 ILCS 5/19-2.3; 10 ILCS 5/19A-20 (S.B. 2090, 101st Gen. Assemb., Reg. Sess. (Ill. 2019)); Kiran Misra, *How Cook County Jail Became the Country's First Jail-Based Polling Place*, Belt Mag., Oct. 30, 2020, <https://beltmag.com/cook-county-jail-polling-election-2020/>. The law mandated that Cook County Jail establish a polling place starting with the 2020 elections and opened the door for other counties to expand access to voting in jail. 10 ILCS 5/19-2.3; 10 ILCS 5/19A-20. During the June 28, 2022 primary election, Illinois saw its second county (Will) take this important step toward ensuring the protection of the right to vote by setting up an in-person polling place for the people it housed. Voting rights advocates and the legal community more broadly have an opportunity to advocate for this continued vital expansion. They can ensure the right to vote across the state of Illinois and start the work in neighboring states such as Indiana.

The conversation about voting while detained pretrial in jail – and the broader conversation about disenfranchisement for people who are convicted of a crime and serving a sentence in a prison – must be centered on the disproportionate impact that restrictions and barriers to the right to vote have on people of color. The legal community should continue to investigate the policies that most disproportionately harm communities of color, ranging from denying the right to vote in pretrial detention to the harms of prison-based gerrymandering, and consider the impacts on both the people who are incarcerated and the over-policed communities they often come from.

In Illinois, only people who are convicted of a crime and are serving a sentence (usually in prison rather than jail) lose their right to vote. This disenfranchisement comes from the Illinois Constitution, which states that “A person convicted of a felony, or otherwise under sentence in a correctional institution or jail, shall lose the right to vote, which right shall be restored not later than upon completion of his sentence.” Ill. Const. art. III, § 2. Notably, Illinois law currently only restricts the right to

vote when a person is under a “sentence of confinement.” 10 ILCS 5/3-5. Once that sentence of confinement ends, they become eligible to re-register to vote. Additionally, people in Illinois who are on parole or probation are eligible to vote. This is true even if they previously served a sentence under a conviction, as long as they are not currently serving a sentence of confinement.

But even though people in pretrial detention are clearly eligible to vote, there is a large gap in ensuring that this right is protected. This space between the right to vote and the ability to register or cast a ballot creates a significant amount of voter disenfranchisement. These challenges are set against the backdrop of the mass incarceration system, which disproportionately locks up people of color in both pretrial detention and post-conviction sentences.

#### b. Persistent Racial Disparities

Disparities in voter access for people in pretrial detention is an especially pressing issue given that Black people face disproportionate rates of being incarcerated in jails, according to national, state, and local level data. Below is a snapshot of this disturbing inequity:

- In 2020, 48% of people detained at local jails were white, 35% were Black, and 15% were Hispanic. Bureau of Justice Statistics, *Jail Inmates in 2020 – Statistical Tables*, Department of Justice Office of Justice Programs, <https://bis.ojp.gov/library/publications/jail-inmates-2020-statistical-tables>. In contrast, 57.8% of the total United States population is white, 18.7% is Hispanic, and 12.1% is Black. Connie Hanzhang Jin et al., *What the New Census Data Shows About Race Depends on How You Look at It*, National Public Radio, Aug. 13, 2021, <https://www.npr.org/2021/08/13/1014710483/2020-census-data-us-race-ethnicity-diversity> (citing 2020 United States Census).
- In Illinois, 54% of the 2020 prison population was Black, while Black individuals made up 15% of the Illinois population. Illinois Department of Corrections, Prison Population Data Sets, <https://www2.illinois.gov/idoc/reportsandstatistics/Pages/Prison-Population-Data-Sets.aspx> (data from set dated 12-31-20); 2020 United States Census, *QuickFacts Illinois*, United States Census Bureau, <https://www.census.gov/quickfacts/IL>.
- In August of 2022, about 75% of those detained by the Cook County Sheriff’s Office were Black, and 8% were white. *Sheriff’s Daily Report 8/5/2022*, Cook County Sheriff’s Office, <https://www.cookcountysheriff.org/data>. This is a wildly disproportionate number when compared to overall population figures, where only about 24% of Cook County residents are Black and 65% are white. 2021 Population Estimates, *QuickFacts Cook County Illinois*, United States Census Bureau American Community Survey, <https://www.census.gov/quickfacts/fact/table/cookcountvillinois/PST045221>.

In the pretrial detention context, racial disparities are often exacerbated by a misguided approach to addressing pretrial detention through reliance on an outdated bail system. Bail is the system where someone who is held in pretrial detention can post a bond, a dollar amount set by law or the court, to leave detention while they await a trial. This results in a system that disproportionately disrupts the lives of people who are unable to post a bond simply because of their economic status and regardless of any threat that they might pose, contributing to the harmful and disproportionately high detention rates of communities of color and Black people in particular.

In response to these systemic issues with bail, Illinois recently passed the Pretrial Fairness Act as part of the broader set of criminal justice reforms known as the SAFE-T Act. See 725 ILCS 5/110-1.5; 725 5/110-2 (H.B. 3653, 101st Gen. Assemb., Reg. Sess. (Ill. 2019)). The Pretrial Fairness Act shifts the burden and reliance on the use of bail by eliminating the cash bond aspect of bail and only holding people in pretrial detention based on the severity of the crime, any potential physical risk to someone else, or a risk that the person would not show up to their court date (as determined by a judge). See 725 ILCS 5/110-1.5; 725 5/110-2. Even with bail reform, Illinois jails and prisons will still disproportionately house people of color – and barriers to voting in jail will disproportionately harm those same over-policed communities.

This racialized system is the backdrop for the conversation about protecting the right to vote for eligible voters being detained while they await trial. Prior to the Illinois law that created in-person polling places in jails, people who were in pretrial detention were still eligible to vote, but their only access to the ballot was to vote by mail. While this process is

open and accessible for many in the general Illinois population, there are extreme bureaucratic and practical limitations and challenges for people in jail to register, request, and vote by mail. Systems that we use every day on the outside are simply not as available or accessible to people in a controlled environment like a jail.

### c. Illinois Examples of Cook and Will Counties

When Cook County Jail introduced a temporary in-person polling place, voter turnout in the jail voting population increased massively. The 2020 (presidential) primary election was the first election where Cook County Jail established a polling place. Out of a total population of about 5,600, 1,850 voted in that election, according to the non-partisan organization Chicago Votes. In the previous (non-presidential) primary election in 2018, only 394 ballots were cast through the available vote by mail processes. The 2018 election even involved limited in-person assistance by election personnel above and beyond what is normally available for people in pretrial detention.

The program has been so successful that in the most recent primary election in June of 2022, voter turnout was higher in the Cook County Jail than it was for the City of Chicago; 25% of eligible voters in Cook County Jail voted compared to about 20% for the whole City of Chicago. Pascal Sabino, *Cook County Jail Detainees Had a Higher Voter Turnout in The Primary Than the City as a Whole*, Block Club Chicago, Jul. 12, 2022, <https://blockclubchicago.org/2022/07/12/cook-county-jail-voter-turnout/>. This is a testament to the hard work of organizers and supporters of the work, notably the nonprofit organization Chicago Votes. It also demonstrates that the interest in civics and voting for people in jail is not any less enthusiastic than the general population. In fact, studies have shown that acts of civic participation themselves, such as voting, reduce overall recidivism rates. See, e.g., Guy Padraic Hamilton-Smith & Matt Vogel, *The Violence of Voicelessness: The Impact of Felony Disenfranchisement on Recidivism*, 22 Berkeley La Raza L.J. 407 (2012).

Will County Adult Detention Center in Joliet, Illinois utilized the process for the very first time for the 2022 primary. While Cook County was mandated to establish a polling place, other counties may optionally do so. 10 ILCS 5/19A-20(e)(2). Through the effective advocacy of the community organization Speak Up and Vote, Will County became the first Illinois county to voluntarily set up such a polling place.

The Will County Adult Detention Center is significantly smaller than the Cook County Jail (which is one of the largest jails in the country). As with any jail, this election presented an opportunity but highlighted the challenges of working in a controlled environment such as the Detention Center. The biggest challenge was low voter turnout, partly due to voter eligibility and access depending on when people were brought to the facility – particularly given that COVID precautions still require a quarantine period. Issues that remain to be resolved for the upcoming general election include timing, registration requirements imposed by the facility, and access to voting for newly admitted people. We are hopeful that these issues can continue to improve as officials gain experience with how various voting requirements can interact with the facilities' requirements and voters' needs.

There are many additional counties where an in-person jail voting process is necessary to effectively ensure that the constitutionally guaranteed right to vote is protected. It is simply not enough to just make vote-by-mail available to people in jail.

### d. Challenges Under Indiana's Election System

Similar to the law of Illinois, people held in pretrial detention in the neighboring state of Indiana are still eligible to vote. Like Illinois, Indiana has a law that disenfranchises only "a person who is convicted of a crime" and who is "imprisoned following conviction." Ind. Code Ann. § 3-7-13-4. However, Indiana does not have a law providing for in-person voting at pretrial detention facilities. This means that pretrial voters in Indiana must rely upon the state's restrictive absentee ballot system, a process widely inaccessible to those being detained. The current legal landscape presents obstacles for Indiana voters in pretrial detention. As one example, the United States District Court for the Northern District of Indiana denied relief to over 300 eligible voters who were unable to vote in the 2016 election while detained at a jail in Allen County, Indiana. *Barnhart v. Gladieux*, No. 1:17-CV-124-TLS, 2019 U.S. Dist. LEXIS 57205, at \*17 (N.D. Ind. Apr. 3, 2019) (granting summary judgment to county, finding that there was not enough evidence that the voters attempted to exercise their

vote, citing a state law that requires voters to obtain absentee ballots themselves (Ind. Code § 3-11-4-2)). This underscores the opportunity for improvement to strengthen the voting rights of Indiana citizens in pretrial detention.

## Conclusion

Protecting all of the ways that someone may need to vote, such as while they are in pretrial detention, is all the more important in the context of how and when an individual person will have access to the ballot. There is a worrisome trend of “voter blaming” for anyone who finds their access to voting cut off simply because they did not cast their vote while a different avenue was theoretically available to them. For instance, the United States Court of Appeals for the Sixth Circuit approached this issue relating to two people who were arrested in Ohio in the days leading up to an election. They were detained after the cut-off date to request an absentee ballot and were not able to vote in person because they were detained through election day. The plaintiffs challenged the law as denying their right to vote, noting that other exceptions existed for late requests for absentee ballots. The court disagreed with their allegations, using a balancing test to determine that the “moderate” burden placed on the plaintiffs was not greater than the State’s interest in running an efficient election in part because they could have voted earlier. *Mays v. LaRose*, 951 F.3d 775 (6th Cir. 2020).

Unfortunately, there’s also a line of thinking that somehow voting in person on election day is worthy of more protection than any other avenue to voting. The Seventh Circuit has implied that the mere existence of the constitutionally guaranteed possibility to vote in person means that states might be free to impose rules regardless of whether it makes it more difficult to exercise the right to vote in some other manner. *Common Cause Indiana v. Lawson*, 977 F.3d 663, 664 (7th Cir. 2020) (“As long as it is possible to vote in person, the rules for absentee ballots are constitutionally valid if they are supported by a rational basis and do not discriminate based on a forbidden characteristic such as race or sex.”) (citing *Tully v. Okeson*, 977 F.3d 608, 615-16 (7th Cir. 2020)).

These types of court decisions make it even more important to recognize that not everyone will have the same access to the ability to vote, and that every version of voting must be protected. There remain significant challenges for protecting voting rights of people with different barriers to voting on election day – including people who are in pretrial detention. We welcome the legal community in Illinois and Indiana to contact Chicago Lawyers’ Committee for Civil Rights to join us in protecting voting rights in 2022 and beyond.

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