

VOTER FRAUD MISTAKE

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ABSTRACT

False narratives challenging electoral integrity often cite ineligible voting as a prime example of so-called widespread voter fraud. This Article demonstrates that ineligible voting often consists of mistakes that are problematically treated like fraud. Some jurisdictions criminalize ineligible voting on a strict liability basis, imposing punishment even when the ineligible voter is unaware of her ineligibility. When jurisdictions impose this strict criminal liability, mistakes are often misunderstood or misrepresented as fraud. This harsh and confused treatment of voter mistake undermines the criminal justice system by severing criminality from culpability, punishing good faith democratic participation, targeting marginalized populations, and amplifying systemic bias. It also undermines American democracy by chilling eligible voting, needlessly undermining electoral confidence, justifying unnecessary electoral burdens, and allocating the burdens and risks of eligibility determinations away from the election officials best positioned to assume them. Courts should address the strict criminalization of voter mistake by applying the presumption of scienter and recognizing a constitutional mens rea requirement. States should amend their laws to condition criminal liability on knowledge of ineligibility. Congress should similarly amend federal criminal and immigration laws and pre-empt state laws that impose strict criminal liability. The Help America Vote Act should be clarified (through judicial elaboration or legislative amendment) to make a provisional ballot a true safe harbor for people unsure of their eligibility to vote. Prosecutors should refuse to pursue voter mistake cases. And all of us—including media, scholars, advocates, lawyers, judges, and politicians—must replace the current conflation of voter mistake and voter fraud with a more accurate public discourse that carefully distinguishes between fraud and mistake.

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INTRODUCTION

At this moment in American democracy, *voter fraud* is a ubiquitous and politically charged term. False narratives of so-called widespread voter fraud often focus on ineligible voting by noncitizens and persons with felony convictions, like President Trump's infamous claim in 2016 that he "won the popular vote if you

deduct the millions of people who voted illegally.”¹ A robust literature has already demonstrated that such ineligible voting is exceedingly rare.² This Article complements that literature with a distinct claim: in those rare instances when ineligible voting occurs, it is often *mistake* rather than *fraud*. But while the term *voter fraud* is ubiquitous, the counterpart term *voter mistake* is virtually non-existent. This lacuna in our lexicon reflects a more pernicious blind spot in both law and public discourse—a failure to distinguish between mistake and fraud when it comes to ineligible voting. When we punish voter mistake like voter fraud, we pervert the criminal justice system, punishing non-culpable conduct and chilling eligible voting. And when we conflate voter mistake with voter fraud, we undermine the electoral system, fueling false narratives that erode trust and rationalize burdens on the right to vote. This Article documents these problems and proposes reforms to address them.

The difference between fraud and mistake is foundational. As Oliver Wendell Holmes once quipped, “even a dog distinguishes between being stumbled over and being kicked.”³ For an example of fraud, consider the case of Russ Casey, a Justice of the Peace in Tarrant County, Texas. Casey pled guilty to tampering with a government record after he “tried to rig his own election by submitting fake signatures on documents needed to secure a spot on . . . [a] primary ballot.”⁴ This meets the dictionary definition of fraud: “Criminal deception; the using of false representations to obtain an unjust advantage or to injure the rights or interests of another.”⁵

¹ Arnie Seipel, *Trump Makes Unfounded Claim That ‘Millions’ Voted Illegally for Clinton*, NPR (Nov. 27, 2016, 8:18 PM), <https://www.npr.org/2016/11/27/503506026/trump-makes-unfounded-claim-that-millions-voted-illegally-for-clinton> [<https://perma.cc/GKW3-9XCE>].

² See, e.g., Justin Levitt, *The Truth About Voter Fraud*, BRENNAN CTR. JUST. (Nov. 9, 2007), <https://www.brennancenter.org/our-work/research-reports/truth-about-voter-fraud> [<https://perma.cc/P4CW-EA6C>]; LORRAINE C. MINNITE, *THE MYTH OF VOTER FRAUD* (2010); Sharad Goel et al., *One Person, One Vote: Estimating the Prevalence of Double Voting in U.S. Presidential Elections*, 114 AM. POL. SCI. REV. 456, 467–68 (2020); M. V. Hood III & William Gillespie, *They Just Do Not Vote Like They Used To: A Methodology to Empirically Assess Election Fraud*, 93 SOC. SCI. Q. 76, 76, 91–92 (2012); David Cottrell et al., *An Exploration of Donald Trump’s Allegations of Massive Voter Fraud in the 2016 General Election*, 51 ELECTORAL STUD. 123, 125, 138 (2018); Ray Christensen & Thomas J. Schultz, *Identifying Election Fraud Using Orphan and Low Propensity Voters*, 42 AM. POL. RSCH. 311, 312–13, 330–31 (2014). For a helpful collection of sources, see *Resources on Voter Fraud Claims*, BRENNAN CTR. JUST. (June 26, 2017), <https://www.brennancenter.org/our-work/research-reports/resources-voter-fraud-claims> [<https://perma.cc/43FN-Y57L>].

³ O.W. HOLMES, JR., *THE COMMON LAW* 3 (Bos., Little, Brown & Co. 1881).

⁴ Gillian Edevane, *Judge Gets Probation for Voter Fraud in Same County Where Woman Got Five-Year Prison Term for Voting Illegally*, NEWSWEEK (Apr. 24, 2018, 11:45 AM), <https://www.newsweek.com/judge-gets-probation-election-fraud-county-woman-got-five-years-prison-texas-899147> [<https://perma.cc/V4F3-Y8TU>].

⁵ *Fraud*, OXFORD ENGLISH DICTIONARY (Sept. 2024), https://www.oed.com/dictionary/fraud_n?tab=meaning_and_use#3652690 [<https://perma.cc/PFR5-DFCP>]; see also JOHN WILLARD, *A TREATISE ON EQUITY JURISPRUDENCE* 147 (Platt Potter ed., Banks & Brothers

For an example of mistake, consider the case of Crystal Mason, another resident of Tarrant County, Texas.⁶ Mason served time in federal prison for a nonviolent financial crime.⁷ She then returned home to her community under a form of federal supervisory release distinct from probation or parole.⁸ Under the Texas Election Code, voting rights are restored to a person “finally convicted of a felony . . . [when she] has: fully discharged [her] sentence, including any term of incarceration, parole, or supervision, or completed a period of probation ordered by any court.”⁹ Since Mason had completed her term of incarceration and was now on federal supervisory release, not “probation” or “parole,” her eligibility to vote under Texas law turned on whether her federal supervisory release constituted “supervision” under the qualification provision of the state election code.¹⁰ Texas Representative John Turner subsequently observed, “I would not have known whether a person on federal supervised release was eligible to vote, and I’m a lawyer and a member of the legislature.”¹¹ A court later concluded that her federal supervisory release rendered her ineligible to vote under Texas law.¹² But on Election Day, Mason’s mother told her she should perform her civic duty and vote.¹³ Mason listened to her mom, casting a provisional ballot after interacting with a poll worker.¹⁴

Mason has always maintained (including in her sworn trial testimony) that she was unaware of her ineligibility and would never have voted had she known she was

1875) (“Fraud has been defined to be, any *kind of artifice by which another is deceived*. Hence, all surprise, trick, cunning, dissembling, and other unfair way that is used to cheat any one, is to be considered as fraud.”).

⁶ Mason’s conviction for illegal voting was initially upheld by a state intermediate appellate court. *Mason v. State (Mason I)*, 598 S.W.3d 755, 762–63, 789 (Tex. App. 2020). But the Texas Court of Criminal Appeals (the state’s highest court for criminal cases) reversed in part and remanded. *Mason v. State (Mason II)*, 663 S.W.3d 621, 623–24, 635 (Tex. Crim. App. 2022). Upon remand, the appellate court entered a judgment of acquittal. *Mason v. State (Mason III)*, 687 S.W.3d 772, 773–74, 785 (Tex. App. 2024). Recently, the Texas Court of Criminal Appeals granted the state’s petition for discretionary review of that judgment. *Id.* I take the facts of her case from these court opinions.

⁷ *Mason I*, 598 S.W.3d at 763–65.

⁸ *Id.* at 765, 772 n.13.

⁹ TEX. ELEC. CODE ANN. § 11.002(4)(A) (West 2025).

¹⁰ *Id.*

¹¹ H.J. of Tex., 87th Leg., 2d C.S. 317 (Aug. 31, 2021). Republican Representative Dustin Burrows agreed. *Id.* at 321 (“And as you said earlier, I would not have known that being on supervised release would have made you ineligible.”).

¹² *Mason I*, 598 S.W.3d at 772–73 (concluding that “supervision as used in Section 11.002(a)(4)(A) does not mean only . . . community supervision [under Texas law but also] includes post-imprisonment supervised release ordered under [federal law]”).

¹³ *Mason III*, 687 S.W.3d 772, 781 (Tex. App. 2024); Brief of Appellant at 2, *Mason I*, 598 S.W.3d 755 (No. 02-18-00138-CR).

¹⁴ *Mason II*, 663 S.W.3d 621, 625 (Tex. Crim. App. 2022).

ineligible.¹⁵ But she was convicted at a bench trial and sentenced to five years in prison for violating a Texas statute that criminalizes ineligible voting.¹⁶ That statute has an explicit mens rea requirement, applying only to a “person [who] . . . votes or attempts to vote in an election in which *the person knows the person is not eligible to vote*.”¹⁷ The literal language suggests the crime requires actual knowledge of ineligibility. However, a state intermediate appellate court concluded otherwise, declaring:

Texas law has long provided that to prove the commission of this offense, the State need only show . . . that the defendant voted while *knowing of the condition that made the defendant ineligible*; the State does not have to prove that the defendant subjectively knew that voting with that condition made the defendant ineligible to vote¹⁸

The state’s high court ultimately reversed, clarifying that the statute “requires *knowledge* that a defendant herself is ineligible to vote.”¹⁹ On remand, the appellate court acquitted Mason, concluding the state alleged insufficient evidence that Mason knew she was ineligible to vote.²⁰ The prosecution has appealed, and the high court has agreed to review the case once again.²¹ Even if that court affirms and Mason is ultimately vindicated, Texas prosecutors have upended her life for the past seven years.

And Mason was relatively fortunate because she was prosecuted under a statute with robust mens rea protection. Had Texas made ineligible voting a strict liability crime, Mason might be in prison today. Less fortunate was Margarita Del Pilar Fitzpatrick, a Peruvian national and U.S. permanent resident who applied for a driver’s license in 2006.²² When she arrived at the Department of Motor Vehicles

¹⁵ *Mason III*, 687 S.W.3d at 781.

¹⁶ *Mason II*, 663 S.W.3d at 623–25.

¹⁷ TEX. ELEC. CODE ANN. § 64.012(a)(1) (West 2025), *amended by* Acts 2021, 87th Leg., 2d C.S., ch. 1 (S.B. 1), TEX. ELEC. CODE ANN. § 9.03 (effective Dec. 2, 2021), *and* Acts 2023, 88th Leg., ch. 814 (H.B. 1243), TEX. ELEC. CODE ANN. § 1 (effective Sept. 1, 2023) (emphasis added).

¹⁸ *Mason I*, 598 S.W.3d 755, 768 (emphasis added) (footnote omitted).

¹⁹ *Mason II*, 663 S.W.3d at 629.

²⁰ *Mason III*, 687 S.W.3d at 773–74, 785.

²¹ State’s Brief on the Merits at 8, *Mason III*, 687 S.W.3d 772 (No. PD-0300-24), *petition for discretionary rev. filed* (Apr. 25, 2024).

²² Fitzpatrick’s order of removal for illegal noncitizen voting was repeatedly upheld by the Board of Immigration Appeals and the Seventh Circuit. *Matter of Fitzpatrick*, 26 I. & N. Dec. 559, 559 (B.I.A. 2015); *In re Fitzpatrick*, 2016 WL 1722507, at *1 (B.I.A. 2016); *Fitzpatrick v. Sessions*, 847 F.3d 913, 915 (7th Cir. 2017). Margarita petitioned the Supreme Court for cert. *Petition for Writ of Certiorari, Fitzpatrick v. Sessions*, No. 17-76, 2017 WL

(DMV) office in Galesburg, Illinois, she presented her Peruvian passport and U.S. green card.²³ After inspecting these documents, which conclusively established her ineligibility to vote, the DMV official asked her “whether she would like to register to vote.”²⁴

Fitzpatrick was confused. She had come to the United States lawfully four years prior, studied English in college, earned a certificate as a medical interpreter, and trained as a nurse, but she was not yet a U.S. citizen, as the DMV official now surely knew. She “was aware that restrictions applied to non-citizens’ voting eligibility but also believed that the official had noted her identification and was inviting her to register nonetheless. As a new resident of Illinois, [she] thought, perhaps this state allowed her to vote.”²⁵ After all, under the distinctive U.S. system of electoral federalism, voter qualifications for federal elections are set by each state.²⁶ When she asked, “Am I supposed to?” the DMV official responded, “It’s up to you,” compounding Fitzpatrick’s confusion.²⁷ At this point, Fitzpatrick made a mistake that would haunt her for the rest of her life. She completed the voter registration application and, after receiving a voter registration card, voted in two federal elections.²⁸

Given her mistaken belief that the DMV official had confirmed her eligibility to vote, Fitzpatrick did not think she was doing anything wrong. So, when she subsequently applied for U.S. citizenship, she freely disclosed and accurately described her registration and voting history.²⁹ But the U.S. government treated Fitzpatrick’s admitted case of voter mistake more like an egregious case of voter fraud. A provision of immigration law, 8 U.S.C. § 1227(a)(6), makes removable any noncitizen who votes in violation of federal law.³⁰ A federal criminal statute, 18 U.S.C. § 611, generally makes it a crime, punishable by up to one-year imprisonment, “for any alien to vote in any [federal] election.”³¹ The federal courts have uniformly construed § 611 to apply even if the voting noncitizen is unaware of her ineligibility to vote.³² So when Fitzpatrick applied for citizenship and truthfully disclosed her voting history, the Department of Homeland Security (DHS) initiated removal proceedings. An immigration judge and the Board of Immigration Appeals repeatedly ruled “that she must indeed leave the United States, even though she has

3034218 (7th Cir. July 11, 2017) [hereinafter *Petition for Writ Cert.*]. But the Court declined. *Fitzpatrick v. Sessions*, 583 U.S. 870 (2017) (No. 17-76) (mem.). I take the facts of her case from these court opinions and filings.

²³ *Fitzpatrick*, 847 F.3d at 914.

²⁴ *Petition for Writ Cert.*, *supra* note 22, at *4–5.

²⁵ *Id.* at *5.

²⁶ *See infra* Section III.A.1.

²⁷ *Fitzpatrick*, 847 F.3d at 914.

²⁸ *Id.* at 914–15.

²⁹ *Id.* at 914.

³⁰ 8 U.S.C. § 1227(a)(6)(A).

³¹ 18 U.S.C. § 611.

³² *See infra* Part III.

led a productive and otherwise-unblemished life in this country, is married to a U.S. citizen, and has three U.S.-citizen children.”³³ The Seventh Circuit rejected her defense of “official authorization,” holding that the DMV official’s response, “It’s up to you,” was “a refusal to give advice, not an assurance that it was lawful to register.”³⁴ The U.S. Supreme Court denied cert,³⁵ and other courts have cited the Seventh Circuit decision as approvingly denying similar arguments by other noncitizens.³⁶ At oral argument before the Seventh Circuit, judges specifically asked if DHS would exercise prosecutorial discretion so that Fitzpatrick could remain in the United States with her husband and children—but DHS declined the panel’s entreaty.³⁷ According to a news report from 2020, Fitzpatrick was deported in 2017 and had not seen two of her three children in years.³⁸ She was grateful she could spend time with her two-week-old grandchild before she left the United States.³⁹

The cases of Crystal Mason and Margarita Del Pilar Fitzpatrick are not isolated incidents. As this Article will demonstrate, they reflect a structural problem with how some U.S. jurisdictions enforce voter eligibility rules. Every U.S. jurisdiction restricts the franchise and makes it a crime for disenfranchised persons to vote. But some jurisdictions criminalize ineligible voting on a strict liability basis, in the sense that the crime requires no subjective mens rea regarding ineligibility, so a person is subject to punishment even if she was unaware of her ineligibility. This strict criminal liability separates criminality from culpability in a particularly perverse way by excluding a person from democratic life and then punishing them for democratic participation despite their unawareness of the exclusion. It also chills participation by eligible voters because it shifts onto prospective voters the burden of eligibility determination and the risk of mistake, inviting people to vote at their peril in the shadow of criminal punishment. By shifting the burden and risk of eligibility determination away from the state, it also disincentivizes best practices by election officials in the best position to promote accuracy and clarity in these determinations.

³³ *Fitzpatrick*, 847 F.3d at 914.

³⁴ *Id.* at 915.

³⁵ *Fitzpatrick v. Sessions*, 583 U.S. 870 (2017) (No. 17-76) (mem.).

³⁶ *Chernosky v. Sessions*, 897 F.3d 923, 924–25 (8th Cir. 2018); *Olaifa v. Mayorkas*, No. 18 CV 6801, 2021 WL 1057736, at *5 (N.D. Ill. Mar. 18, 2021).

³⁷ *Fitzpatrick*, 847 F.3d at 915 (“The panel inquired at oral argument whether Fitzpatrick is the kind of person the Attorney General and the Department of Homeland Security want removed from the United States. The answer was yes . . .”).

³⁸ Associated Press, *Voter Registration Error Could Mean Deportation for Immigrants in Illinois*, WHAS11 (Feb. 10, 2020, 4:57 PM), <https://www.whas11.com/article/news/nation-world/voter-registration-error-risks-deportation-for-immigrants/417-b4aaec67-87e7-4eb8-9835-ffd1f7542965> [<https://perma.cc/4D3K-CLLZ>].

³⁹ NBC News, *Kansas Grandmother Deported for Voter Fraud Leaves U.S. in Tears*, YOUTUBE (Aug. 6, 2017), <https://www.youtube.com/watch?v=6R-TS-g3lnk> [<https://perma.cc/95B4-XS3T>].

This harsh punishment is then compounded by a related dynamic—the conflation of voter mistake and voter fraud, and the tendency of various institutional actors to misunderstand or misrepresent this criminalized mistake as pernicious fraud. As this Article will explain in greater detail below, the Heritage Foundation, a prominent conservative think-tank, maintains a website it describes as a searchable database of “Election Fraud” cases spanning all fifty states (plus D.C.).⁴⁰ As of this writing, it purports to contain over 1,500 “[p]roven instances of voter fraud” from 1982 to the present.⁴¹ This searchable database assigns each case a “Fraud Category,” but of the eleven categories, one is simply “Ineligible Voting,” defined as “[i]llegal registration and voting by individuals who are not eligible to vote.”⁴² “Ineligible Voting” is the second most prevalent fraud category, accounting for 22%—almost a quarter of the entries—367 of the 1,567 total cases.⁴³ But the database makes little effort to distinguish cases of mistaken ineligible voting from cases of knowing ineligible voting. For example, it provides the following cursory, misleading description of Fitzpatrick’s case.

Margarita Del Pilar Fitzpatrick is a native and citizen of Peru who became a non-citizen permanent resident in 2004. When she applied for a driver’s license, Fitzpatrick also filled out a “Motor Voter” registration form on which she falsely claimed to be a U.S. citizen. She subsequently voted in the 2006 federal election. In 2007, while applying for naturalization, Fitzpatrick acknowledged to immigration officials that she had registered and voted. Fitzpatrick’s application was denied and she was ordered removed from the country because of this violation.⁴⁴

⁴⁰ *Election Fraud Map: A Sampling of Proven Instances of Election Fraud*, HERITAGE FOUND. (Dec. 3, 2024), <https://electionfraud.heritage.org/> [<https://perma.cc/X6AB-ACSM>]. Prior to publication, I reached out to Heritage staff who worked on the database to share a draft of this Article and solicit their feedback. See E-mail from Benjamin Cover, Assoc. Professor of L., Univ. of Idaho Coll. of L., to Hans von Spakovsky, Jessica Reinsch & Zach Smith, Heritage Found. (Feb. 11, 2025, 4:52 PM MST) (on file with author). As of this writing, I have received no response.

⁴¹ *Categories of Election Fraud*, HERITAGE FOUND. (Dec. 3, 2024), <https://electionfraud.heritage.org/categories> [<https://perma.cc/E9G2-K7QG>]; *Election Fraud Map: Explore the Data*, HERITAGE FOUND., <https://electionfraud.heritage.org/search> [<https://perma.cc/5SEX-8KWY>] (last visited Feb. 19, 2025).

⁴² *Categories of Election Fraud*, *supra* note 41.

⁴³ *Id.*; *Election Fraud Map: Interactive Graphics*, HERITAGE FOUND., <https://electionfraud.heritage.org/graphics> [<https://perma.cc/T74D-5BXX>] (last visited Feb. 19, 2025); *Categories of Election Fraud*, *supra* note 41.

⁴⁴ *Margarita Del Pilar Fitzpatrick*, HERITAGE FOUND., <https://electionfraud.heritage.org/case/201110> [<https://perma.cc/VFR8-BEZB>] (last visited Feb. 19, 2025).

This summary omits essential context: that Fitzpatrick went to the DMV to get a driver's license, not a voter registration card; that she presented her Peruvian passport and U.S. green card; that the DMV official asked her if she wanted to register; that she asked if she was supposed to; that the DMV official said it was up to her; that this interaction induced the mistaken belief that she was eligible to register; and that the basis of her removal was simply voting in violation of federal law under 8 U.S.C. § 1227(a)(6), not any false claim of U.S. citizenship. Moreover, the Heritage Foundation makes no distinction between 18 U.S.C. § 611, which punishes noncitizen voting on a strict liability basis and other statutes with mens rea requirements.⁴⁵

No wonder then that media reports citing the Heritage Foundation's so-called "Election Fraud" database fail to distinguish between voter fraud and voter mistake. A representative example is an article from the Prairie State Wire called "*Over 40 cases of Illinois voter fraud documented by Heritage Foundation*."⁴⁶ The article starts: "More than 40 people have been found guilty of election or voter fraud in Illinois since the year 2000, according to a Heritage Foundation database that details such cases nationwide."⁴⁷ The article goes on: "The cases also include Margarita Del Pilar Fitzpatrick, a noncitizen who voted in the 2006 federal election and was subsequently deported to Peru . . ."⁴⁸ The suggestion that Fitzpatrick's removal proceeding represents a case where a person was "found guilty of election or voter fraud" is doubly mistaken.⁴⁹ Fitzpatrick was never charged with any crime. She was subject to civil removal proceedings that lacked the essential procedural safeguards of a criminal trial. And there was no finding that she engaged in any type of fraud. Instead, she was found to have voted in violation of 18 U.S.C. § 611, even though she acted on the mistaken belief that she was eligible to vote.⁵⁰ The article concludes with a table listing the names and last known addresses of the forty individuals.⁵¹ The table is titled, "Proven Instances of Illinois Voter Fraud Since 2000."⁵² In this way, the Heritage database is embedded in a vast information ecosystem churning out narratives on electoral integrity.

This rhetorical conflation between mistaken and fraudulent ineligible voting threatens American democracy. It undermines confidence in electoral institutions by contributing to a false perception of widespread voter fraud. When states then

⁴⁵ See *infra* Section IV.B.2.

⁴⁶ Local Lab News Service, *Over 40 Cases of Illinois Voter Fraud Documented by Heritage Foundation*, PRAIRIE ST. WIRE (Oct. 1, 2019), <https://prairiestatewire.com/stories/514044295-over-40-cases-of-illinois-voter-fraud-documented-by-heritage-foundation> [<https://perma.cc/EM2F-CGY5>].

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Fitzpatrick v. Sessions*, 847 F.3d 913, 914 (7th Cir. 2017).

⁵¹ Local Lab News Service, *supra* note 46.

⁵² *Id.*

enact electoral reforms that burden eligible voters, states cite and judges credit that false perception as a justification for the law's burdens.

This Article proposes various ways to address the problematic criminalization of eligibility mistakes and the associated conflation of mistaken and fraudulent ineligible voting. The first set of proposals relates to prosecutors and lawmakers. State and federal prosecutors should decline to prosecute absent fraudulent intent. State lawmakers should amend statutes to add explicit mens rea requirements or treat ineligible voting as a civil matter rather than a crime. Federal lawmakers should likewise amend federal criminal and immigration law and pre-empt state law that imposes strict criminal liability for ineligible voting. The Help America Vote Act should be clarified (through judicial elaboration or legislative amendment) to make a provisional ballot a true safe harbor for people unsure of their eligibility to vote. The second set of proposals is directed to litigants and jurists. First, I argue that courts should construe these provisions to require a subjective mens rea based on principles of statutory interpretation, including the avoidance canon, the rule of lenity, and the scienter presumption. Second, I argue that the federal Constitution requires a subjective mens rea for ineligible voting, just as the First Amendment requires a subjective mens rea for categories of unprotected speech like defamation, obscenity, incitement, and true threats. Third, I briefly consider a reasonable reliance defense based on due process principles.

The Article proceeds in five Parts. Part I provides the essential background on the crime of ineligible voting, analyzes its elements, and canvasses jurisdictional variation in mens rea approaches. Part II shows how Ohio imposes strict criminal liability for ineligible voting, wrong-place voting, and multiple voting. Part III documents how federal prosecutors and immigration officials wield federal law to impose criminal punishment and harsh immigration consequences on noncitizens who vote based on a mistaken belief in their eligibility. Part IV explains how this criminalization of voter mistake undermines both the criminal justice system and American democracy. Part V considers how prosecutors, legislators, and jurists should address strict criminal liability for ineligible voting. I conclude with an entreaty—our public discourse must carefully distinguish between fraud and mistake, adding the term “voter mistake” to our shared lexicon and reserving the charged term “voter fraud” for those rare cases that truly involve fraudulent intent.

I. THE CRIMINALIZATION OF INELIGIBLE VOTING

This Part presents the unusual crime of ineligible voting, where a person's voter eligibility, as determined by extrinsic laws and facts, transforms the act of voting from a fundamental right to a crime. First, I define the crime of ineligible voting, identify its elements, and highlight its distinctive features. Second, I analyze the mens rea of ineligible voting and survey different jurisdictional approaches.

A. *The Actus Reus of Ineligible Voting*

Election law tells voters *how* to vote and tells officials what to do when voters *vote incorrectly*. When an eligible voter incorrectly marks their ballot, the big question is whether to count the vote.⁵³ These mistakes might distort the vote tally so that it less accurately captures the popular will of those eligible voters who opt to participate. They might even flip a Presidential election. But there is usually no consideration of punishment other than excluding the ballot from the vote tally. Generally, we do not send people to prison for incorrectly marking ballots.

Election law also determines *whether* a person can vote and what happens if an ineligible person *incorrectly votes*. Throughout this Article, I will refer to this situation as ineligible voting. Here, the inquiry is generally flipped. There is no real question about whether to count the ballot because the answer is obviously no. If an election official determines that an ineligible voter has cast an identifiable ballot, that ballot should be excluded from the vote tally. The more interesting question is what consequence, if any, the state should impose on the ineligible person who cast the ballot. The uniform answer seems to be punishment, specifically criminal punishment, and sometimes quite harsh criminal punishment. Every U.S. jurisdiction makes it a crime for any ineligible person to vote. The Federal Noncitizen Voting Ban generally makes it a federal crime for any noncitizen to vote in a federal election.⁵⁴ And federal immigration law makes noncitizen voting a trigger for serious immigration consequences, including non-admissibility and removability.⁵⁵ It is not immediately obvious why we virtually *never* impose *any* punishment for *voting incorrectly* but virtually *always* impose *criminal* punishment for *incorrectly voting*. In this Article, I do not challenge voter eligibility rules like felony disenfranchisement.⁵⁶ Nor do I dispute that election officials should exclude from the vote tally any ballot cast by any person other than a qualified voter. Instead, I consider how U.S. jurisdictions criminalize ineligible voting.

⁵³ See, e.g., *Bush v. Gore*, 531 U.S. 98, 100 (2000).

⁵⁴ 18 U.S.C. § 611(a) (“It shall be unlawful for any alien to vote in any [federal] election . . .”). Throughout this Article, I use the term “noncitizen,” but the statutory text uses the term “alien.” On the significance of this terminology, see D. Carolina Nunez, *War of the Words: Aliens, Immigrants, Citizens, and the Language of Exclusion*, 2013 BYU L. REV. 1517, 1518–19, 1561–62.

⁵⁵ 8 U.S.C. § 1227(a)(6)(A) (rendering removable any noncitizen who votes in violation of federal or state law); *id.* § 1182(a)(10)(D)(i) (rendering inadmissible any noncitizen who votes in violation of federal or state law).

⁵⁶ For recent critiques of felon disenfranchisement, see Neil L. Sobol, *Defeating De Facto Disenfranchisement of Criminal Defendants*, 75 FLA. L. REV. 287, 290 (2023); Carla Laroche, *Black Women and Voter Suppression*, 103 B.U. L. REV. 2431, 2431–32, 2495 (2022); Jaylen Amaker et al., *Mass Incarceration & the Minority Vote: The Case for a Federal Ban on Felon Disenfranchisement*, 36 NOTRE DAME J.L. ETHICS & PUB. POL’Y 731, 731–32, 763 (2022); Erin Kelly, *Do the Crime, Do the Time—And Then Some: Problems with Felon Disenfranchisement and Possible Solutions*, 51 U. TOL. L. REV. 389, 389–91, 420 (2020); Cynthia Alkon, *The Lost Promise of Lambert v. California*, 49 STETSON L. REV. 267, 285–87 (2019).

What exactly is the crime of ineligible voting? I reserve the term “ineligible voting” for the most obvious scenario when a ballot is cast by a person who is categorically ineligible to vote due to age, noncitizen status, or a disqualifying felony conviction. When a person is categorically ineligible to vote, the act of voting is the relevant conduct for the crime I call “ineligible voting.” But an ineligible person might first register to vote, and that registration process might involve attestations regarding citizenship status, criminal convictions, and eligibility more generally. The act of registration might constitute a second crime, which I call “ineligible registration.” Any false statement related to the process of registering or voting might constitute a third crime, which I call “false swearing.” Two other crimes are closely related to the categorical form of ineligible voting. The first, which I call “wrong-place voting,” occurs when a person eligible to vote in one place instead votes in another, i.e., in the wrong jurisdiction, district, or precinct. The second, which I call “multiple voting” or “double voting,” occurs when an eligible voter casts more than one ballot.⁵⁷ A third crime, which I call “voter impersonation,” consists of voting as another person. This offense may also involve mistakes in the context of voter assistance when the defendant means to help another voter or to vote on another’s behalf rather than to vote as another. In this Article, I primarily focus on ineligible voting, wrong-place voting, and multiple voting, but I also briefly consider ineligible registration, false swearing, and voter impersonation.

These are all election crimes committed by voters. In the terminology of Jocelyn Benson, if these crimes involve fraud, it is “voter-initiated” fraud rather than “voter-targeted” fraud.⁵⁸ The Heritage database generally focuses on this type of voter-initiated fraud.⁵⁹ But election laws govern the conduct of people other than voters.

⁵⁷ These cases could be described as an eligible voter voting incorrectly—i.e., in the wrong place or the wrong number of times. Or these cases could be described as an ineligible person incorrectly voting because the person is not eligible to vote in a given place or to cast an additional ballot. It makes sense to consider these cases alongside cases of pure ineligible voting because states criminally punish people for both wrong-place voting and multiple voting. However, these cases are distinct because the person is not a member of a group that is categorically excluded from the franchise. For this reason, the person may enjoy more favorable treatment, as I discuss in Section IV.B.2.

⁵⁸ Jocelyn Friedrichs Benson, *Voter Fraud or Voter Defrauded? Highlighting an Inconsistent Consideration of Election Fraud*, 44 HARV. C.R.-C.L. L. REV. 1, 1 (2009).

⁵⁹ But not exclusively. The database lists two entries for John Burkman and Jacob Wohl, who each pleaded guilty to one count of telecommunications fraud for a robocall scheme that targeted tens of thousands of voters with false claims intended to dissuade them from voting by mail. *John Burkman*, HERITAGE FOUND., <https://electionfraud.heritage.org/case/200892> [<https://perma.cc/G4YF-FBY9>] (last visited Feb. 19, 2025); *Jacob Wohl*, HERITAGE FOUND., <https://electionfraud.heritage.org/case/200783> [<https://perma.cc/3BAF-XZZ5>] (last visited Feb. 19, 2025). The database counts this as two cases of “voter fraud” coded with the fraud category *Illegal “Assistance” at the Polls*. Of course, this is a case of voter-targeted fraud, rather than voter-initiated fraud. Most people would call this voter *suppression* rather than voter *fraud* because the fraud was perpetrated against voters, not by them, and its purpose was to dissuade participation by eligible voters, not to facilitate participation by ineligible

A person involved in voter registration, ballot collection, or gathering signatures for a ballot initiative, may be prosecuted for election crime. Some of those prosecutions may raise concerns similar to those I identify here.⁶⁰ But those cases lie beyond this Article's scope.

An "element analysis" takes the statutory provision defining a criminal offense and disaggregates the crime into those component parts (i.e., elements) the prosecution must prove beyond a reasonable doubt.⁶¹ I use the term "actus reus" to connote a crime's physical elements (i.e., what must occur in the world), and the term "mens rea" to describe a crime's mental elements (i.e., what must occur in the defendant's mind). Under this formulation, the term actus reus includes (1) the proscribed conduct (an act or omission), i.e., the verb the defendant must perform (or fail to perform); but it may also include (2) attendant circumstances, i.e., external facts that are necessary conditions for the crime's existence; and (3) the result caused by the proscribed conduct.⁶²

For ineligible voting and related offenses, an element analysis readily reveals several distinctive features. For ineligible voting, wrong-place voting, and multiple voting, the proscribed conduct is the act of voting. Criminal law generally distinguishes between *malum in se* crimes, where the proscribed conduct is inherently wrongful, and *malum prohibitum* crimes, where the proscribed conduct is only wrongful because the law proscribes it.⁶³ But voting is generally *bonum in se*, i.e., prosocial conduct our society highly values and protects. The Supreme Court has

voters. It is not clear why these cases are included in the database, which generally focuses on voter-initiated fraud rather than voter-targeted. Nor is it clear why Heritage coded these cases with the fraud category *Illegal "Assistance" at the Polls*. The unlawful conduct did not occur at the polls. Nor does it match the database's definition of the term: "Forcing or intimidating voters—particularly the elderly, disabled, illiterate, and those for whom English is a second language—to vote for particular candidates while supposedly providing them with 'assistance.'" *Categories of Election Fraud*, *supra* note 41. The database has no category for voter suppression or voter intimidation.

⁶⁰ See, e.g., Arelis R. Hernández & Molly Hennessy-Fiske, *Paxton's Election Fraud Charges Upend Lives but Result in Few Convictions*, WASH. POST (Sept. 2, 2024, 5:00 AM), <https://www.washingtonpost.com/nation/2024/09/02/paxton-texas-election-fraud-charges/> [<https://perma.cc/A2PY-RBBM>] ("Texas Attorney General Ken Paxton has aggressively filed charges accusing volunteers, candidates and voters of election fraud. But the cases rarely go to trial. . . . The result has been a chilling effect on volunteers and community groups . . .").

⁶¹ See generally Paul H. Robinson & Jane A. Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681 (1983).

⁶² See, e.g., Ian P. Farrell & Justin F. Marceau, *Taking Voluntariness Seriously*, 54 B.C. L. REV. 1545, 1568–69 (2013) ("The ascendant view, and the view that seems sensible to us, is that the physical parts of a crime—the actus reus—can consist of actions or omissions, attendant circumstances, and results caused by actions or omissions."). Some crimes also have non-material elements related to matters like jurisdiction and venue. Compare *id.* § 1.13(9) (defining a material element), with *id.* § 1.13(10) (defining a non-material element).

⁶³ See generally Stuart P. Green, *Legal Moralism, Overinclusive Offenses, and the Problem of Wrongfulness Conflation*, 14 CRIM. L. & PHIL. 417 (2020).

repeatedly recognized voting as a fundamental right.⁶⁴ The American people have repeatedly amended their national charter to further protect voting rights—prohibiting vote denial or abridgment based on race, sex, tax, or age; mandating popular election for senators; and including D.C. in the electoral college.⁶⁵ Congress has further protected voting rights through foundational statutes like the Voting Rights Act.⁶⁶ The Supreme Court now subjects suffrage exclusion to strict scrutiny.⁶⁷ Voting is mandatory in many countries, and some suggest the United States should join them.⁶⁸ Even without a legal mandate, Americans “rock the vote,” don “I voted” stickers, and generally venerate voting as both a civic duty of the highest order and one of the nation’s most precious freedoms.⁶⁹

So voting is a fundamental right—unless it is a crime. For ineligible voting, the attendant circumstance that transforms voting from a fundamental right to a crime is generally the actor’s status under the state’s voter eligibility rules. For wrong-place voting, the attendant circumstance is a place mismatch (in terms of district, jurisdiction, or precinct) between where the voter casts her ballot and where she should cast her ballot. For multiple voting, the attendant circumstance is a prior vote. In all three cases, the actor may be aware of the relevant attendant circumstance. Or the actor

⁶⁴ In the United States, states generally determine voter qualifications for both state and federal elections. *See infra* Section III.A.1. But when a person meets a state’s voter qualifications, she enjoys a right to vote. *See Ex parte Yarbrough*, 110 U.S. 651, 664 (1884). And that right is fundamental. *See Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (“[T]he political franchise of voting . . . [t]hrough not regarded strictly as a natural right, but as a privilege merely conceded by society . . . is regarded as a fundamental political right, because preservative of all rights.”); *Reynolds v. Sims*, 377 U.S. 533, 555 (1964) (“The right to vote freely for the candidate of one’s choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.”).

⁶⁵ U.S. CONST. amends. XV (prohibiting vote denial or abridgment based on race), XIX (sex), XXIV (tax), XXVI (age), XVII (mandating popular election for senators), XXIII (including D.C. in the electoral college).

⁶⁶ Voting Rights Act of 1965, 52 U.S.C. §§ 10301–14, 10501–08, 10701–02.

⁶⁷ *See generally* *Harper v. Va. State Bd. of Elections*, 383 U.S. 663 (1966); *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621 (1969). When a law burdens voting but does not exclude a person from suffrage entirely, the Court applies the Anderson-Burdick balancing framework, a legal test less rigorous than strict scrutiny. *See Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 190 (2008); *Burdick v. Takushi*, 504 U.S. 428, 434 (1992); *Anderson v. Celebrezze*, 460 U.S. 780, 789–98 (1983).

⁶⁸ *See generally* *Compulsory Voting*, INT’L IDEA SUPPORTING DEMOCRACY WORLDWIDE, <https://www.idea.int/data-tools/data/voter-turnout-database/compulsory-voting> [<https://perma.cc/LXG2-QRZE>] (last visited Feb. 19, 2025); Note, *The Case for Compulsory Voting in the United States*, 121 HARV. L. REV. 591 (2007); BROOKINGS INST. & ASH CTR. DEMOCRATIC GOVERNANCE & INNOVATION, HARV. KENNEDY SCH., *LIFT EVERY VOICE: THE URGENCY OF UNIVERSAL CIVIC DUTY VOTING* (2020).

⁶⁹ *See, e.g.*, Brian Pinaire et al., *Barred from the Vote: Public Attitudes Toward the Disenfranchisement of Felons*, 30 FORDHAM URB. L.J. 1519, 1533–34 (2003) (noting that 93.2% of survey respondents believe that the right to vote is either the most important or one of the most important rights in a democracy).

may be mistaken about (or ignorant of) the circumstance due to a mistake (or ignorance) regarding relevant facts, relevant law, or both. Notably, the crime's actus reus contains no result element. It involves no violence. It involves no financial or other harm to any specific individual. It requires no specific electoral result. It is irrelevant whether the ballot flips the result of an election. It may be irrelevant whether the ballot is counted at all.⁷⁰

These three features combined make ineligible voting a most unusual crime. It is a crime with no individualized victim and no result element, only a conduct element and an attendant circumstance. Absent that circumstance, the conduct is *bonum in se*. The attendant circumstance that transforms the conduct from a fundamental right to a crime is the existence of a prior vote, a place mismatch, or a person's legal status under voter eligibility law, all potentially subject to both factual and legal errors. So, what if a person votes based on the mistaken belief that she is eligible to do so? In other words, what is the mens rea of ineligible voting?

B. The Mens Rea of Ineligible Voting

The mens rea analysis is complicated by confusing terminology and misleading maxims. The confusion starts with the very term "mens rea." Literally, this Latin term means "guilty mind." Historically, the term generally connoted a culpable mental state. In more modern usage, it often refers more precisely to the particular mental state required for a specific element of a criminal offense. I refer to the historical concept as "functional" mens rea because it performs the ultimate function of separating wrongful from innocent conduct. I refer to the modern concept as "formalist" mens rea because it relies on a formal definition involving specified elements of a given offense.

Historically, these two mens rea concepts tended to converge because common law crimes were generally *malum in se* (evil in itself): when the actus reus is innately wrongful, one who intends it acts with an evil mind. However, many modern crimes are *malum prohibitum*: proscribed by law, but not inherently evil. A *malum prohibitum* offense can have formalist mens rea without functional mens rea. If a statute prohibits "knowing possession of plastic bags," that statute explicitly includes a mens rea term but proscribes innocent conduct and thereby decouples criminal liability from moral culpability. So, this statute has (formalist) mens rea but lacks (functional) mens rea.

To further complicate matters, multiple terms may refer to the same (or similar) concepts, while the same term may be used in different contexts to describe distinct concepts. For example, "scienter" is Latin for "knowledge," and the Court often uses the term "presumption of scienter" to describe an interpretive principle that construes ambiguous statutory language to preserve functional mens rea.⁷¹ But the term

⁷⁰ See *State v. Jones*, No. CA2019-03-020, 2020 WL 2312539, at *1–2, *5–6 (Ohio Ct. App. May 11, 2020) (holding that a provisional ballot that was never counted qualifies as a vote supporting conviction for illegal voting).

⁷¹ See *infra* Section V.C.1.

“specific intent” is, ironically, not specific enough, because it is used in different ways in different contexts.⁷² Mindful of this minefield, I will endeavor to use terminology clearly and consistently.

The Model Penal Code (MPC) links formalist and functional mens rea by generally predicating criminal liability on a culpable mental state “with respect to each material element of the offense.”⁷³ The MPC uses four culpable mental states: purpose, knowledge, recklessness, or negligence.⁷⁴ Negligence is an objective mental state satisfied when a person “*should be* aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct.”⁷⁵ The other three mental states are subjective. Essentially, they require a person to want something (purpose), know something (knowledge), or consciously disregard a sufficient risk of something (recklessness).⁷⁶ These four mental states stack like Matryoshka dolls: purpose is more culpable than knowledge, which is more culpable than recklessness, which is more culpable than negligence. The MPC uses a default rule: when the law defining the offense fails to specify the requisite mental state for a material element, recklessness suffices, but negligence does not.⁷⁷ This default rule accords with the general principle that negligence is sufficient for civil, but not criminal, liability.⁷⁸

These four mental states are pervasive, but they are not the only mens rea terms used in criminal provisions. Criminal statutes often use the term “intentionally” to connote purpose or knowledge. Other common terms include “fraudulently” and “willfully.” “Fraudulently” usually connotes an “intent to defraud.”⁷⁹ The term “willfully” may be used as a synonym for “purposefully” but often connotes a highly culpable mental state marked by a motivation that is “malicious, evil, or corrupt.”⁸⁰ Even without an explicit mens rea term, the verb used to characterize a crime’s

⁷² WAYNE R. LAFAVE & AUSTIN W. SCOTT, 1 SUBSTANTIVE CRIM. L. § 5.2(e) (3d ed. 2017) (contrasting four distinct formulations of the terms “specific intent” and “general intent”); Eric A. Johnson, *Understanding General and Specific Intent: Eight Things I Know for Sure*, 13 OHIO ST. J. CRIM. L. 521 (2016) (“Judges and scholars alike long have criticized the terminology of ‘general intent’ and ‘specific intent’ as confusing and perhaps incoherent.”); MODEL PENAL CODE § 2.02 cmt. at 231 n.3 (1985) (describing this distinction as “an abiding source of confusion and ambiguity in the penal law”).

⁷³ MODEL PENAL CODE § 2.02(1).

⁷⁴ *Id.* § 2.02(2).

⁷⁵ *Id.* § 2.02(2)(d) (emphasis added).

⁷⁶ *Id.* § 2.02(2)(a)–(c).

⁷⁷ *Id.* § 2.02(3).

⁷⁸ *Elonis v. United States*, 575 U.S. 723, 737–38 (2015) (“[A] ‘reasonable person’ standard is a familiar feature of civil liability in tort law, but is inconsistent with ‘the conventional requirement for criminal conduct—*awareness* of some wrongdoing.’” (quoting *Staples v. United States*, 511 U.S. 600, 606–07 (1994))); *Cochran v. United States*, 157 U.S. 286, 294 (1895) (holding that a defendant could face “liability in a civil action for negligence, but he could only be held criminally for an evil intent actually existing in his mind”).

⁷⁹ See 98 Ops. Cal. Atty. Gen. 505 (1998) (quoting *People v. Swenson*, 127 Cal. App. 2d 658, 663–64 (1954)).

⁸⁰ *Willful*, BLACK’S LAW DICTIONARY (11th ed. 2019).

proscribed conduct might implicitly suggest or require some mental state. For example, consider a perjury statute that makes it a crime for a person to “lie under oath.” The verb “lie” might entail both a false statement and knowledge of the statement’s falsity. An offense can have different mental states for different physical elements.⁸¹

From a functional perspective, my argument is straightforward. In the case of ineligible voting, the element that makes the conduct wrongful is the actor’s ineligibility. To properly link criminality with culpability, the offense must require a mental state for the ineligibility element. I refer to this requirement as status scienter.⁸² A more nuanced question is precisely which mental state should apply to the ineligibility element. I argue that knowledge is ideal, some subjective mens rea (i.e., recklessness) is minimally required, and negligence alone is insufficient. But my ultimate claim is that some mental state is required. A statute that criminalizes ineligible voting without any status scienter fails to distinguish between innocent and wrongful conduct.

Most states include mens rea terminology in ineligible voting statutes. Seven states use the term “fraudulently.”⁸³ Another seven states use the term “willfully.”⁸⁴ Since these terms generally connote awareness of wrongdoing, these ineligible voting provisions likely require status scienter. Note that some provisions use multiple mens rea terms, either conjunctively (“*willfully and knowingly*”)⁸⁵ or disjunctively

⁸¹ See, e.g., Kate E. Bloch, *A Rape Law Pedagogy*, 7 YALE J.L. & FEMINISM 307, 321 (1995) (contemplating a rape statute with “sexual touching” as the proscribed conduct, “without consent” as the attendant circumstance, purpose as the required mental state for the conduct element, and recklessness as the required mental state for the circumstance element).

⁸² Though the original Latin word “scienter” literally means “knowledge,” and the legal term “scienter” often connotes “knowledge or purpose,” the term may also refer to other subjective mental states like recklessness. See *United States ex rel. Schutte v. SuperValu Inc.*, 598 U.S. 739, 750 (2023) (“In short, either actual knowledge, deliberate ignorance, or recklessness will suffice. That three-part test largely tracks the traditional common-law scienter requirement for claims of fraud.” (first citing RESTATEMENT (SECOND) OF TORTS § 526 (1976); and then citing RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR ECONOMIC HARM § 10 (2018))); *Herman & MacLean v. Huddleston*, 459 U.S. 375, 378 n.4 (1983) (“The judge stated that reckless behavior could satisfy the scienter requirement . . . [W]e have explicitly left open the question whether recklessness satisfies the scienter requirement.”)).

⁸³ Those states are California, Connecticut, Idaho, New Jersey, New Mexico, Rhode Island, and South Carolina. See CAL. ELEC. CODE § 18560(a) (West 2025); CONN. GEN. STAT. § 9-360 (West 2025); IDAHO CODE § 18-2306 (West 2025); N.J. STAT. ANN. § 19:34-11 (West 2025); N.M. STAT. ANN. § 1-20-8.1 (West 2025); R.I. GEN. LAWS § 17-23-4 (West 2025); S.C. CODE ANN. § 7-25-20 (West 2025).

⁸⁴ Those states are Florida, Iowa, Massachusetts, Maryland, Michigan, Oklahoma, and West Virginia. See FLA. STAT. § 104.15 (West 2025); IOWA CODE § 39A.2(1) (West 2025); MASS. GEN. LAWS ch. 56, § 26 (West 2025); MD. CODE ANN., ELEC. LAW § 16-201(b) (West 2025); MICH. COMP. LAWS § 168.932a(c) (West 2025); OKLA. STAT. tit. 26, § 16-102 (West 2025); W. VA. CODE § 3-9-17(b) (West 2025).

⁸⁵ MD. CODE ANN., ELEC. LAW § 16-201(b)(4) (emphasis added) (“A person may not *willfully and knowingly* . . . vote in an election district or precinct without the legal authority to vote in that election district or precinct.” (emphasis added)).

(“*knowingly, willfully, or intentionally*”).⁸⁶ These counts include provisions with conjunctive use of either “willfully” or “fraudulently” but exclude provisions with disjunctive use unless the disjunction is “willfully or fraudulently.”

When the mens rea term is knowledge, it may be unclear whether the term applies to (1) the attendant circumstance of ineligibility, or just (2) the act of voting. For example, Colorado subjects to criminal punishment “[a]ny person voting in any election . . . *knowing that he or she is not entitled to vote.*”⁸⁷

The placement of the term “knowing” after the verb “votes” and immediately preceding the phrase “that he or she is not entitled to vote” unambiguously indicates that this mens rea term applies to the attendant circumstance of ineligibility. In contrast, North Dakota makes it a crime to “[k]nowingly vote when not qualified to do so.”⁸⁸ The placement of the term “knowingly” at the start of the clause makes its scope of applicability ambiguous.⁸⁹ Including Colorado, a total of sixteen states criminalize ineligible voting with a knowledge term that unambiguously modifies the ineligibility element.⁹⁰ Including North Dakota, a total of six states criminalize ineligible voting using a knowledge term with potentially ambiguous scope.⁹¹

⁸⁶ LA. STAT. ANN. § 18:1461.2(A)(2) (West 2025) (emphasis added) (“No person shall knowingly, willfully, or intentionally . . . [v]ote or attempt to vote, knowing that he is not qualified . . .”).

⁸⁷ COLO. REV. STAT. § 1-13-704.5(1) (West 2025) (emphasis added).

⁸⁸ N.D. CENT. CODE § 16.1-01-12(1)(g) (West 2025).

⁸⁹ A similar ambiguity occurs when a modifier appears at the end of a sentence featuring multiple potential referents for that modifier. For example, federal law imposes a mandatory minimum for possession of child pornography when the defendant has a prior conviction “relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward . . .” 18 U.S.C. § 2252(b)(2). Does the phrase “involving a minor or ward” modify only the last antecedent phrase (“abusive sexual conduct”) or each antecedent phrase (including “sexual abuse”)? This ambiguity triggers dueling canons of statutory interpretation, with the “rule of the last antecedent” favoring the former reading and the “series qualifier rule” favoring the latter. *See* Lockhart v. United States, 577 U.S. 347, 351–56, 361 (2016) (embracing the rule of the last antecedent).

⁹⁰ Those states are Alabama, Colorado, Georgia, Kentucky, Louisiana, Minnesota, Missouri, Nevada, North Carolina, Pennsylvania, South Dakota, Tennessee, Texas, Virginia, Vermont, and Washington. *See* ALA. CODE § 17-17-36 (West 2025); COLO. REV. STAT. § 1-13-704.5(1) (West 2025); GA. CODE ANN. § 21-2-571 (West 2025); KY. REV. STAT. ANN. § 119.165(5) (West 2025); LA. STAT. ANN. § 18:1461.3(A)(2) (West 2025); MINN. STAT. § 201.014 (West 2025); MO. REV. STAT. § 115.631(2) (West 2025); NEV. REV. STAT. § 293.775 (West 2025); N.C. GEN. STAT. § 163-275(5); 25 PA. CONS. STAT. § 3533 (West 2025); S.D. CODIFIED LAWS § 12-26-4; TENN. CODE ANN. § 2-19-107(a)(1) (West 2025); TEX. ELEC. CODE ANN. § 64.012(a)(1) (West 2025); VA. CODE ANN. § 24.2-1004(B) (West 2025); VT. STAT. ANN. tit. 17, § 2014 (West 2025); WASH. REV. CODE § 29A.84.660 (West 2025).

⁹¹ Those states are Arizona, Hawaii, Indiana, Kansas, North Dakota, and New York. *See* ARIZ. REV. STAT. ANN. § 16-1016 (West 2025); HAW. REV. STAT. § 19-3.5(2) (West 2025); IND. CODE § 3-14-2-9 (West 2025); KAN. STAT. ANN. § 25-2416(a)(1)(2) (West 2025); N.D. CENT. CODE § 16.1-01-12(1)(g) (West 2025); N.Y. ELEC. LAW § 17-132(1) (West 2025).

However, in one of those states, Hawaii, the statute has been construed to require knowledge of ineligibility.⁹²

A few states take different approaches. One state, Wisconsin, uses the term “intentionally” at the start of the clause.⁹³ One state, Indiana, uses the term “recklessly.”⁹⁴ Two states, New Jersey and Rhode Island, use negligence terminology that embraces actual or constructive knowledge.⁹⁵ Some provisions resist easy categorization. Utah combines a negligence standard with the term “fraudulently”: “An individual may not *fraudulently* vote on the individual’s behalf . . . by . . . voting in a voting district or precinct when the individual *knew or should have known* that the individual was not eligible.”⁹⁶

Eight states criminalize ineligible voting with no mens rea terminology: Arkansas, Delaware, Mississippi, Montana, Nebraska, Ohio, South Carolina, and Wyoming.⁹⁷

A ninth state (North Carolina) recently exited this category. It used to have an illegal voting statute with no mens rea term, which had been interpreted to impose strict criminal liability. A federal court declared that statute unconstitutional, and the legislature amended it to add an explicit knowledge term that unambiguously modifies the ineligibility element.⁹⁸

Even if a provision contains no explicit mens rea term, it may still be construed to require status scienter. An example is the federal multiple voting statute, which refers only to “vot[ing] more than once in [a covered] election”⁹⁹ but has been uniformly construed to require that the person acts “knowingly, willfully, and expressly for the purpose of having her vote count more than once.”¹⁰⁰ However,

⁹² McDonald v. Gonzales, 400 F.3d 684, 688 (9th Cir. 2005).

⁹³ WIS. STAT. § 12.13(1)(a) (West 2025) (“Whoever *intentionally* . . . [v]otes at any election or meeting if that person does not have the necessary elector qualifications and residence requirements.” (emphasis added)).

⁹⁴ IND. CODE § 3-14-2-10 (West 2025) (“A person who *recklessly* votes at an election, unless the person is a [properly] registered voter.” (emphasis added)).

⁹⁵ N.J. STAT. ANN. § 19:34-22 (West 2025) (“If a person not entitled to vote at any primary election . . . shall vote or offer to vote at such primary meeting or caucus *knowing or having reason to believe* himself not entitled to so vote.” (emphasis added)); 17 R.I. GEN. LAWS § 17-23-17(a)(4) (West 2025) (“Votes or attempts to vote at any election when he or she *knows or should know* that he or she is not qualified to vote.” (emphasis added)).

⁹⁶ UTAH CODE ANN. § 20A-1-603(1)(a)(vi) (West 2025).

⁹⁷ ARK. CODE ANN. § 7-1-104(a)(2) (West 2025); DEL. CODE ANN. tit. 15, § 5128(4) (West 2025); MISS. CODE ANN. § 97-13-35(1) (West 2025); MONT. CODE ANN. § 13-35-210(1) (West 2025); NEB. REV. STAT. § 32-1530 (West 2025); OHIO REV. CODE ANN. § 3599.12(A)(1) (West 2025); S.C. CODE ANN. § 7-25-190 (West 2025); WYO. STAT. ANN. § 22-26-106(a)(i) (West 2025).

⁹⁸ See N.C. GEN. STAT. § 163-275(5) (2023), *amended by* S.B. 747, § 38, Gen. Assemb., Reg. Sess. (N.C. 2023) (effective Jan. 1, 2024); N.C. A. Philip Randolph Inst. v. N.C. State Bd. of Elections, 730 F. Supp. 3d 185, 202 (M.D.N.C. Apr. 22, 2024); *infra* Section V.B.1.

⁹⁹ 52 U.S.C. § 10307(e)(1). The punishment may be up to five years imprisonment.

¹⁰⁰ United States v. Salisbury, 983 F.2d 1369, 1377 (6th Cir. 1993); *see also* United States

Wyoming defines the crime of “false voting” with no explicit mens rea terminology and then clarifies that “false voting” is a more serious offense when committed with knowledge of ineligibility.¹⁰¹ And according to Ohio’s intermediate appellate courts, its illegal voting statute criminalizes ineligible voting, wrong-place voting, and multiple voting on a strict liability basis. As we shall soon see, this means good-faith mistakes can result in criminal convictions, even when they involve brain damage, illiteracy, or simply transposing digits in an address.

II. STATE CRIMINALIZATION: OHIO’S ILLEGAL VOTING STATUTE

Ohio is the poster child for strict liability voting. This Part presents the relevant statutory provision and the appellate decisions embracing strict liability.

A. *The Ohio Code*

Ohio’s voter eligibility requirements are codified in both constitutional and statutory provisions.¹⁰² Title XXXV of the Ohio Code governs elections. The title’s final chapter, Chapter 3599, covers “Offenses and Penalties.”¹⁰³ Section 3599.42 provides that a “violation of any provision of Title XXXV . . . constitutes a prima-facie case of fraud.”¹⁰⁴ And many provisions of Chapter 3599 contain explicit mens rea requirements that limit their scope to fraudulent or otherwise wrongful conduct.

For example, Section 3599.28, captioned “False signatures,” makes it a felony for a “person, with *intent to defraud or deceive*, [to] write or sign the name of another person to any [electoral] record.”¹⁰⁵ Section 3599.13, captioned, “Unqualified person signing petitions,” punishes knowing conduct related to petition signing, making it unlawful for a person to “[s]ign . . . [a] petition knowing that the person is not at the time qualified to sign it”¹⁰⁶ or to “[k]nowingly sign [it] more than once.”¹⁰⁷

Section 3599.11 is captioned “False registration.” It punishes knowing conduct related to voter registration.

v. Hogue, 812 F.2d 1568, 1576 (11th Cir. 1987) (citing with approval trial court instructions that the “essential elements of the [double voting] offense . . . [included] that defendant [acted] . . . knowingly and willfully for the specific purpose of having his vote count more than once”); 29 C.J.S. Elections § 572.

¹⁰¹ Compare WYO. STAT. ANN. § 22-26-106(a)(i) (West 2025) (“False voting consists of . . . [v]oting, or offering to vote, when not a qualified elector entitled to vote at the election.”), with *id.* § 22-26-106(c) (“False voting committed *with the knowledge of not being a qualified elector entitled to vote* at the election or in that precinct is a high misdemeanor offense . . .”) (emphasis added).

¹⁰² OHIO CONST. art. V, § 1; OHIO REV. CODE ANN. § 3503.01(A) (West 2025).

¹⁰³ § 3599.

¹⁰⁴ *Id.* § 3599.42.

¹⁰⁵ *Id.* § 3599.28 (emphasis added).

¹⁰⁶ *Id.* § 3599.13(A)(1).

¹⁰⁷ *Id.* § 3599.13(A)(2).

No person shall knowingly register or make application or attempt to register in a precinct in which the person is not a qualified voter . . . or knowingly impersonate another or write or assume the name of another, real or fictitious, in registering or attempting to register . . . or knowingly swear or affirm falsely upon a lawful examination by or before any registering officer No person shall knowingly register under more than one name No person shall knowingly make any false statement on any form for registration¹⁰⁸

Other provisions similarly prohibit conduct only when the person acts knowingly.¹⁰⁹ But explicit mens rea terms are conspicuously absent from one provision in Chapter 3599. Section 3599.12, captioned “Illegal Voting,” makes enumerated conduct a fourth-degree felony punishable by up to 18 months in prison.¹¹⁰

(A) No person shall do any of the following:

- (1) Vote or attempt to vote in any primary, special, or general election in a precinct in which that person is not a legally qualified elector;
- (2) Vote or attempt to vote more than once at the same election by any means . . .
- (3) Impersonate or sign the name of another person, real or fictitious, living or dead, and vote or attempt to vote as that other person in any such election;
- (4) Cast a ballot at any such election after objection has been made and sustained to that person’s vote;

¹⁰⁸ *Id.* § 3599.11(A) (emphasis added). This offense is a fifth-degree felony punishable by up to one year in prison. *Id.* § 2929.14(A)(5).

¹⁰⁹ *Id.* § 3599.18(A) (Misconduct of registrars and police officers) (“No election official, person assisting in the registration of electors, or police officer shall *knowingly* do any of the following” (emphasis added)); *id.* § 3599.19(A) (misconduct of precinct election officials) (“No precinct election official shall *knowingly* do any of the following” (emphasis added)); *id.* § 3599.21(A) (absent voter’s ballot) (“No person shall *knowingly* do any of the following” (emphasis added)); *id.* § 3599.22(A) (printing of ballots) (“No person employed to print or engage in printing the official ballots shall *knowingly* do any of the following” (emphasis added)).

¹¹⁰ *Id.* § 3599.12(B); *id.* § 2929.14(A)(4).

(5) Knowingly vote or attempt to vote a ballot other than the official ballot.¹¹¹

Subsection 3599.12(A) has 5 clauses. Table 1 summarizes the elements of the crimes defined by each clause. The first clause targets both ineligible voting and wrong-place voting with place defined in terms of precinct.¹¹² The actus reus consists of proscribed conduct (“[v]ot[ing] or attempt[ing] to vote . . . in a precinct”) and an attendant circumstance (the defendant “is not a legally qualified elector” in that precinct).¹¹³ The second clause targets multiple voting, and the third targets voter impersonation.¹¹⁴ The actus reus for these two crimes consists solely of proscribed conduct with no attendant circumstance.¹¹⁵ For multiple voting, the proscribed conduct consists of “[v]ot[ing] or attempt[ing] to vote more than once.”¹¹⁶ For voter impersonation, the proscribed conduct consists of two acts—“[i]mpersonat[ing] or sign[ing] the name of another person” [and] “vot[ing] or attempt[ing] to vote as that other person.”¹¹⁷ The fourth clause targets “post-objection voting.”¹¹⁸ The actus reus consists of proscribed conduct (“[c]ast[ing] a ballot”) and an attendant circumstance (“after objection has been . . . sustained to that person’s vote”).¹¹⁹ The fifth clause targets “unofficial voting.” The actus reus consists of proscribed conduct (“[v]ot[ing] or attempt[ing] to vote”) and an attendant circumstance (an unofficial ballot).¹²⁰

Crucially, Clause (5) contains the mens rea term “knowingly,” but the other four clauses, unlike the fifth and other election crime provisions, contain no explicit mens rea term whatsoever.¹²¹ Every Ohio appellate court to consider the issue has concluded that this selective use of mens rea terminology reflects a legislative choice to impose strict liability under Subsections 3599.12(A)(1)–(4) and their statutory predecessors.¹²²

¹¹¹ *Id.* § 3599.12(A).

¹¹² *Id.* § 3599.12(A)(1).

¹¹³ *Id.*

¹¹⁴ *Id.* § 3599.12(A)(2).

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* § 3599.12(A)(3).

¹¹⁸ *Id.* § 3599.12(A)(4).

¹¹⁹ *Id.*

¹²⁰ *Id.* § 3599.12(A)(5).

¹²¹ *Id.* § 3599.12(A).

¹²² *State v. Workman*, 710 N.E.2d 744, 746 (Ohio Ct. App. 1998); *State v. Hull*, 728 N.E.2d 414, 419 (Ohio Ct. App. 1999); *State v. Worrell*, 2007-Ohio-7058, 2007 WL 4554455, at *3 (Ohio Ct. App. Dec. 28, 2007); *State v. Arent*, 981 N.E.2d 307, 311 (Ohio Ct. App. 2012); *State v. Urbanek*, 220 N.E.3d 146, 161 (Ohio Ct. App. 2023), *appeal not allowed*, 221 N.E.3d 853 (2023).

Table 1. The Five Clauses of Ohio Rev. Code Ann. § 3599.12(A)

CLAUSE	CRIMES	CONDUCT ELEMENT	ATTENDANT CIRCUMSTANCE	MENS REA TERM
(1)	Ineligible Voting Wrong-Place Voting	Vote or attempt to vote	in a precinct in which that person is not a legally quali- fied elector	[none]
(2)	Multiple Voting	Vote or attempt to vote more than once	[none]	[none]
(3)	Voter Imperson- ation	Impersonate <i>or</i> sign the name of another person . . . <i>and</i> vote or attempt to vote as that other person	[none]	[none]
(4)	Post-Objection Voting	Cast a ballot	after objection has been . . . sustained to that person's vote	[none]
(5)	Unofficial Voting	Vote or attempt to vote	[an unofficial ballot]	"Know- ingly"

Other than the selective use of explicit mens rea terminology, several drafting choices here are noteworthy. No definition is provided for the term "vote" or the phrase "vote more than once," in contrast to the federal statutory prohibition on multiple voting, which clarifies that the term as used in that statute excludes "the casting of an additional ballot if all prior ballots of that voter were invalidated."¹²³ The full language of Clause (2) suggests a broad scope.

(A) No person shall do any of the following: . . .

(2) Vote or attempt to vote more than once at the same election by any means, including voting or attempting to vote both by absent voter's ballots under [R.C. 3503.16(G)] and by regular ballot at the polls at the same election, or voting or attempting to vote both by absent voter's ballots under [R.C. 3503.16(G)] and

¹²³ 52 U.S.C. § 10307(e)(3); *see Urbanek*, 220 N.E.3d at 158–59 ("Unlike Ohio law, federal law . . . provides some guidance as to the meaning of voting more than once . . .").

by absent voter's ballots under [R.C. Chapter 3509] or armed service absent voter's ballots under [R.C. Chapter 3511] at the same election¹²⁴

While this language refers specifically to "regular ballot," "absent voter's ballots," and "armed service absent voter's ballots," it says nothing about a provisional ballot, even though federal law requires the state to permit people to cast a provisional ballot under specified circumstances.¹²⁵ Specifically, the Ohio law does not clarify whether the casting of a provisional ballot constitutes a "vote" under Clause (2), even if the provisional ballot is invalidated and even if the voter knows the provisional ballot is invalidated. It is not clear why Clause (4) alone uses the phrase "[c]ast a ballot" while the other clauses use the phrase "[v]ote or attempt to vote."¹²⁶ Nor is it clear whether these distinct phrases describe the same or different conduct. The provision also leaves undefined the term "legally qualified voter."

Finally, while only the final clause contains an explicit mens rea term, the other clauses contain several conduct verbs that might implicitly suggest or require some mental state. Arguably, the word "[i]mpersonate" in Clause (3) connotes a purposeful effort to assume another's identity. Similarly, the phrase "vote as that other person" in that clause might suggest that the voter has some mental state about the relationship between himself, the other person, and the vote. Specifically, there might be a legal distinction between voting *for* another, like when an aid completes a ballot on behalf of a person whose physical disabilities necessitate assistance, and voting *as* another, like when a person fraudulently assumes another's identity to cast a ballot in their stead without their knowledge or consent. A provision of the Ohio criminal code prohibits "impersonation of certain officers" and specifically defines the term "impersonate" to require a purpose to deceive.¹²⁷ However, Section 3599.12 leaves the term "impersonate" undefined. Similarly, the word "attempt" in the illegal voting statute might incorporate some mental state. A separate provision of the Ohio penal code defines a criminal attempt using explicit mens rea terminology.¹²⁸

How have Ohio courts construed the illegal voting statute in light of these various drafting choices?

¹²⁴ § 3599.12(A)(2) (emphasis added).

¹²⁵ 52 U.S.C. § 21082(a); *Sandusky Cnty. Democratic Party v. Blackwell*, 387 F.3d 565, 569 (6th Cir. 2004) ("Section 302 of [the Help America Vote Act] requires States to provide voters with the opportunity to cast provisional ballots . . .").

¹²⁶ § 3599.12(A)(4)–(5).

¹²⁷ *Id.* § 2921.51(A)(4) ("'Impersonate' means to act the part of, assume the identity of, wear the uniform or any part of the uniform of, or display the identification of a particular person or of a member of a class of persons *with purpose* to make another person believe that the actor is that particular person or is a member of that class of persons." (emphasis added)).

¹²⁸ *Id.* § 2923.02(A) ("No person, purposely or knowingly, and when purpose or knowledge is sufficient culpability for the commission of an offense, shall engage in conduct that, if successful, would constitute or result in the offense.").

B. Judicial Interpretation

The first courts to encounter this provision speculated or assumed that it required mens rea. In the 1960s, a trial court recognized that “[i]ntent is not specifically made an element” but thought “intent would probably be necessary” under the “general rule . . . that criminal intent is an essential element of crime.”¹²⁹ But this court concluded the required mens rea “would be at least subject to doubt” given conflicting case law on this point.¹³⁰ In the 1970s, an appellate court considered a case where a police officer who lived outside a city’s boundaries illegally voted in its municipal elections because local elections officials “assigned improper voting precincts” to the officer, his wife, and their neighbors.¹³¹ Though criminal charges were ultimately dropped, the mayor fired the police officer, citing his illegal voting as misconduct.¹³² The court essentially assumed the criminal statute was not a strict liability offense, stating the decision not to prosecute was “understandable [because if] . . . the Board brought charges against these people, certainly they would have had a perfect defense to the charges, i.e., it had assigned them to an improper polling place.”¹³³ However, the court upheld the mayor’s decision to remove the officer based on the pending charges.¹³⁴ And starting in the 1990s, when Ohio courts considered actual prosecutions under Section 3599.12, they uniformly construed the statute to impose strict criminal liability.

Workman. The first appellate decision to construe Ohio’s illegal voting statute came in the case of Edward Workman,¹³⁵ a case where bad facts made bad law. Edward was convicted after a bench trial of voter impersonation under the 1982 version of the illegal voting statute. The facts here are somewhat messy, but all agree on the broad outlines. Edward Workman’s son, Mark, resided in Stark County but traveled regularly as a railroad company employee.¹³⁶ Mark was on temporary work assignment in Kansas during the 1996 general election and realized he would be unable to return home for election day. Edward mailed a letter, dated October 25, 1996, to the Stark County Board of Elections, explaining Mark’s anticipated absence and disclosing that Mark had changed his address since the last voting period.¹³⁷ The

¹²⁹ *In re Sugar Creek Loc. Sch. Dist.*, 185 N.E.2d 809, 816 (Ohio Com. Pl. 1962) (quoting 29 C.J.S. Elections § 325).

¹³⁰ *Id.* at 816.

¹³¹ *Votava v. City of Bowling Green*, No. WD-76-33, 1977 WL 198514, at *1 (Ohio Ct. App. June 17, 1977).

¹³² Jennifer Feehan, *Long Police Career Had a Bumpy Start*, THE BLADE (June 12, 2006, 7:08 AM), <https://www.toledoblade.com/frontpage/2006/06/12/Long-police-career-had-a-bumpy-start.html> [<https://perma.cc/BNJ8-V5AE>].

¹³³ *Votava*, 1977 WL 198514, at *1.

¹³⁴ *Id.* at *3.

¹³⁵ *State v. Workman*, 710 N.E.2d 744, 745 (Ohio Ct. App. 1998).

¹³⁶ *Id.*

¹³⁷ *Id.* at 745–46.

Board of Elections then called Edward, explaining that an absentee ballot could not be sent so close to election day and the change of address necessitated in-person voting.¹³⁸ On October 30, 1996, Edward went to the local election office “to vote on behalf of his son.”¹³⁹ Edward completed paperwork (a change-of-address form and an application for absent voter’s ballot) with Mark’s information and signed Mark’s name. Edward was then given a ballot by one employee, which he completed and returned to another employee. That ballot was sealed but never counted.

That much is clear. But the parties disputed a critical detail about the instructions the Board of Elections gave Edward over the phone. According to the state, Edward was told that *Mark* would have to come vote in person.¹⁴⁰ According to the defense, Edward was told that *Edward* would have to come vote in person.¹⁴¹ And the parties had dramatically different versions of what transpired when Edward arrived at the local elections office to vote on Mark’s behalf. According to the state, Edward identified himself as Mark Workman when he approached the counter and repeatedly claimed he was Mark Workman; when an election official requested identification, he presented his own driver’s license with his thumb covering his name and address and the Social Security number cut out; only when the employee discovered his real identity did he claim that he had power of attorney to vote on his son’s behalf, yet he never produced documentation of this alleged power of attorney.¹⁴² According to the defense, as soon as Edward approached the counter, he produced a power of attorney and explained that he had come to submit an absentee ballot on his son’s behalf; the employee at the counter then gave him the necessary paperwork to complete and a ballot to fill out; but when he returned to the counter with his completed ballot, another employee took the ballot, requested Edward’s identification, reviewed his driver’s license, and declared that he was not Mark Workman; “[Edward] stated of course not and went on to explain that he was casting his son’s vote by virtue of a power of attorney”;¹⁴³ but the employee told Edward he could not vote for his son with a power of attorney.¹⁴⁴

Edward was convicted at a bench trial, so presumably, the judge, as fact-finder, accepted the State’s version of the facts and rejected Edward’s. Under the State’s version, Edward’s mental state was somewhat nuanced. His goal was to vote on his son’s behalf so his son could participate despite the work absence rather than to cast a ballot on his own behalf to aggrandize his own influence and distort the vote

¹³⁸ *Id.*

¹³⁹ *Id.* at 746.

¹⁴⁰ *Id.* at 745–46 (“The board of elections . . . informed [Edward] that . . . *Mark* would have to come [in] to vote.” (emphasis added)).

¹⁴¹ Appellant’s Memorandum in Support of Jurisdiction at 6–7, *State v. Workman*, 695 N.E.2d 264 (Ohio 1998) (No. 98-683) (“The Board of Elections . . . informed [Edward] that . . . *he* would have to come [in] to cast the vote.” (emphasis added)).

¹⁴² *Id.* at 3–4.

¹⁴³ *Id.* at 8.

¹⁴⁴ *Id.*

tally.¹⁴⁵ But his means were problematic, circumventing reasonable rules designed to protect the secret ballot and electoral integrity. And his duplicitous conduct indicated awareness of wrongful means. When Edward challenged his conviction at trial, the appellate court could have simply deferred to the trial court's factual determinations and concluded that mens rea was *satisfied*. Instead, the appellate court held that mens rea was *irrelevant* because the statute imposed strict criminal liability. The court reached this conclusion after two sentences of analysis.¹⁴⁶

Hull. The second case to impose strict criminal liability for ineligible voting involved a noncitizen named Michael Edward Hull.¹⁴⁷ Born in New Zealand, Hull was a citizen of Australia but a lawful permanent resident of the United States. Hull registered to vote in 1996 while renewing his vehicle registration. Hull told the DMV official he was born in New Zealand but “was never asked about his current citizenship status” and was never told that noncitizens cannot vote.¹⁴⁸ Hull, who had “limited reading and writing skills,” signed a voter registration form that included a citizenship attestation.¹⁴⁹ After receiving an Ohio voter registration card, Hull subsequently voted in his assigned precinct three times in 1996 and 1997. “When [Hull] was called for jury duty, his wife read the jury duty form,” which explained that noncitizens cannot vote or serve on juries.¹⁵⁰ Hull promptly “informed the court that he could not serve as a juror because he was not a United States citizen.”¹⁵¹

Hull pled no contest to three counts of illegal voting.¹⁵² The appellate court upheld the convictions. The Hull court readily conceded that “the record suggests [Hull] may have made an honest mistake in believing that he could vote.”¹⁵³ But the court concluded that the illegal voting statute validly imposes strict criminal liability.¹⁵⁴

Worrell. The next case to impose strict criminal liability for ineligible voting involved a married couple, Charles and Jerolynn Worrell.¹⁵⁵ This was a case where bad municipal boundaries made bad law. Barberton and New Franklin are two separate municipalities in Summit County, Ohio.

¹⁴⁵ *Id.* at 3–4.

¹⁴⁶ *State v. Workman*, 710 N.E.2d 744, 746 (Ohio Ct. App. 1998) (“It is well established that when a statute reads, ‘No personal shall,’ absent any reference to the requisite culpable mental state, this statute is clearly indicative of a legislative intent to impose strict liability. R.C. 3599.12, therefore, imposes strict liability on a person who commits any of the acts listed in the statute.” (internal citation omitted)).

¹⁴⁷ *State v. Hull*, 728 N.E.2d 414, 416 (Ohio Ct. App. 1999).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² The state dismissed one count of records tampering. *Id.*

¹⁵³ *Id.* at 418.

¹⁵⁴ *Id.* at 419.

¹⁵⁵ *State v. Worrell*, 2007-Ohio-7058, 2007 WL 4554455, at *1 (Ohio Ct. App. Dec. 28, 2007).

Figure 1. Barberton Municipal Boundaries

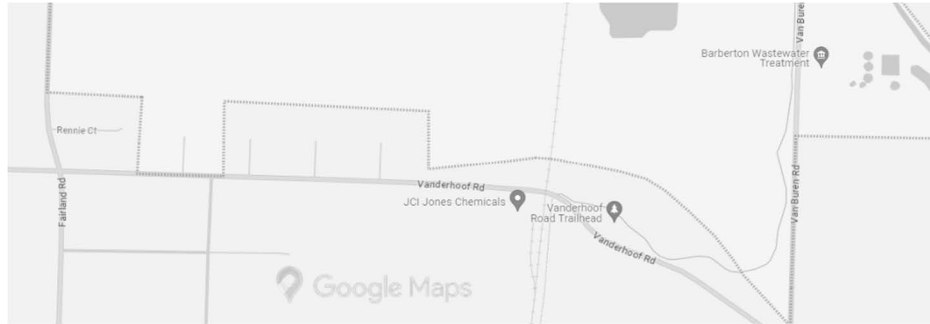
[Source: Google Maps]

Figure 2. New Franklin Municipal Boundaries

[Source: Google Maps]

Southeast Barberton shares an irregular boundary with Northwest New Franklin. Vanderhoof Road intersects a portion of this irregular boundary, such that some homes on this street are located in Barberton while others are located in New Franklin.

**Figure 3. Vanderhoof Road and the Irregular Border
Between Barberton and New Franklin**



[Source: Google Maps]

In August 2005, the Worrells moved to 2751 Vanderhoof Road.¹⁵⁶ When Charles completed their voter registration forms, he transposed the digits in their address, writing “2571 Vanderhoof Road” instead of “2751 Vanderhoof Road.”¹⁵⁷ As Figure 4 shows, the two addresses are only 0.3 miles apart, a one-minute drive straight across Vanderhoof Road. But that drive crosses the jurisdictional boundary between Barberton and New Franklin. The Worrell residence was actually located in Barberton, not New Franklin. (Confusing matters further, the residence was originally located in New Franklin but annexed to Barberton five years before the Worrells purchased it.) Based on this typo, the Worrells were registered in the wrong jurisdiction and voted in the 2005 New Franklin municipal election, where they were ineligible to vote.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

**Figure 4. 2571 Vanderhoof Rd., Barberton, Ohio v. 2751 Vanderhoof Rd.,
New Franklin, Ohio**



[Source: Google Maps]

Someone (it is unclear who) notified the county elections board that the Worrells voted in the wrong municipality.¹⁵⁸ The matter was referred from the county elections board to the county sheriff to the county prosecutor, who indicted Charles and Jerolynn with one count each of illegal voting.¹⁵⁹ Both were found guilty at a jury trial.¹⁶⁰ The appellate court affirmed, concluding that the illegal voting statute established a strict liability crime.

Was this an intentional typo? The appellate opinion is cryptic on this point. The opinion emphasizes several facts that might suggest deliberate conduct: the typo occurred on two separate forms at two different times; first, Charles transposed the digits on a voter registration card for Jerolynn, which she signed; the county elections board then notified Jerolynn that she registered to vote in New Franklin; subsequently Charles completed a new voter registration card for himself, changing the address from the correct address to the transposed address.¹⁶¹ Perhaps the appellate court at least suspected that Charles acted purposefully, and this suspicion motivated the court to affirm. On the other hand, these facts do not foreclose the possibility of mistake: Charles might have had a good reason to submit a new voter registration card unrelated to the address; once you get the wrong sequence of digits stuck in your head, you are liable to make the same typo twice; and there is no apparent motive for any chicanery. The opinion does not say that Charles acted purposefully, that the jury so found, or that prosecutors so alleged. And under the court's reasoning, since the illegal voting statute imposes strict criminal liability, Charles's mental

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

state is irrelevant, so he is guilty even if the typos were perfectly innocent mistakes. Here's the court's analysis of the evidence against Charles:

The record shows that [Charles] filled out a voter registration card with the address "2571 Vanderhoof Road." He then voted in the November 8, 2005, municipal election for mayor in New Franklin. However, [he] actually resided at "2751 Vanderhoof Road," which is located in Barberton, not New Franklin. Therefore, this Court cannot find that [his] conviction is against the manifest weight of the evidence.¹⁶²

Furthermore, Jerolynn was convicted, even though Charles entered the incorrect address on her voter registration form, and even though the appellate opinion mentions no fact probative of her mental state. Here's the court's analysis of the evidence against Jerolynn:

At trial, [Jerolynn] admitted to signing the voter registration card which was filled out by her husband. . . . [She] further admitted to voting in New Franklin on November 8, 2005. She also testified that on November 8, 2005, she was residing in Barberton. Based upon [her] testimony and this Court's conclusion that no mens rea is required under R.C. 3599.12(A)(1), we cannot conclude that her conviction was against the manifest weight of the evidence.¹⁶³

Judge Dickinson wrote a concurrence, which reads in its entirety:

I concur in the conclusion that the trial court's judgment must be affirmed, including the majority's determination that Section 3599.12 of the Ohio Revised Code is a strict liability statute. I write separately for the sole purpose of urging the legislature to consider whether Section 3599.12 should be amended to include a mens rea requirement.¹⁶⁴

Arent. The fourth appellate decision on the illegal voting statute came in the 2012 case of Gregory Arent, who was indicted for double voting in the 2008 general election.¹⁶⁵ The state asked the court to instruct the jury that the illegal voting statute

¹⁶² *Id.* at *3.

¹⁶³ *Id.* at *4.

¹⁶⁴ *Id.* at *6 (Dickinson, J., concurring).

¹⁶⁵ See generally *State v. Arent*, 981 N.E.2d 307 (Ohio Ct. App. 2012).

was a strict liability offense.¹⁶⁶ Opposing this request, defense counsel informed the court that the defendant's mental condition was central to the case.

There can be no dispute that Defendant suffered a severe stroke a few years before the alleged "offense" occurred, losing much of his brain capacity. There is also no dispute that due to circulatory problems, the Defendant's leg was amputated a few weeks before the alleged "offense", and that he was consequently on very high doses of pain relieving drugs that considerably impair mental functioning.¹⁶⁷

The state did not dispute these facts. The state simply argued they were irrelevant because the illegal voting statute imposed strict liability. The court agreed, concluding that the defense arguments "are logical," but the appellate courts "have ruled otherwise," citing *Workman* and *Hull*.¹⁶⁸ (Ironically, the court's judgment entry contains a numeric typo, listing the year of *Hull* as 1959 rather than 1999.)¹⁶⁹ The state filed a motion in limine to exclude "all evidence of the Defendant's medical history and current medical conditions."¹⁷⁰

Defendant will attempt to use this evidence in order to argue that he cannot be convicted of Illegal Voting because he suffers from memory loss and other mental defects, rendering him unable to remember whether or not he voted twice on November 4, 2008. This evidence is irrelevant. The State does not have to prove that the Defendant "knowingly" or "intentionally" violated the statute. The State must only prove that the Defendant did the act, regardless of his mental state at the time.¹⁷¹

The court granted this motion and convicted Arent at a bench trial.¹⁷²

While the court excluded all evidence regarding Arent's mental condition pursuant to the motion in limine, we have a sense of what that evidence would have

¹⁶⁶ State's Request for Jury Instructions at 2, *Arent*, 981 N.E.2d 307 (No. 2009-CR-0227).

¹⁶⁷ Defendant's Request for Jury Instruction with Motion to Deny State's Request for Jury Instruction at 1-2, *Arent*, 981 N.E.2d 307 (No. 2009-CR-0227).

¹⁶⁸ Judgment Entry on Request for Jury Instructions at 1, *Arent*, 981 N.E.2d 307 (No. 2009-CR-0227).

¹⁶⁹ *Id.*

¹⁷⁰ State's Motion in Limine to Exclude Evidence at 1, *Arent*, 981 N.E.2d 307 (No. 2009-CR-0227).

¹⁷¹ *Id.* at 2. This motion included the same numeric typo, listing 1959 rather than 1999 as the year *Hull* was decided. *Id.*

¹⁷² Judgment Entry on Court Trial at 2, *Arent*, 981 N.E.2d 307 (No. 2009-CR-0227).

been because the defense proffered a summary, which the appellate briefs discuss.¹⁷³ Arent had “a medical history of severe vascular disease, and long-term issues with deep venous thrombosis.”¹⁷⁴ In 2003, Arent suffered a medical event similar to a stroke.¹⁷⁵ As a result, his “memory had been severely compromised.”¹⁷⁶ In 2008, Arent “was admitted to the hospital again . . . for ongoing issues related to his peripheral vascular disease. . . . [and] his leg was eventually amputated.”¹⁷⁷ From October through December of 2008, to manage the pain associated with his leg amputation, Arent was “placed on strong dosages of oxycodone,” a medication that “can impair mental functioning.”¹⁷⁸ On Election Day, November 4, 2008, Arent was residing in a nursing home in Wood County.¹⁷⁹ He was “high as a kite on oxycodone” and suffering from “ongoing cognitive disability,” including “receptive/suppressive aphasia,” which involves “difficulty answering yes or no questions appropriately.”¹⁸⁰ Under these circumstances, Arent voted twice—first, in the morning, when nursing home staff took him to vote in Wood County, and then later that day, when Arent’s brother took him to vote in Ottawa County.¹⁸¹ When Arent cast the second ballot, he “had already forgotten about voting earlier in the day.”¹⁸²

The appellate court upheld Arent’s conviction, concluding that the court properly excluded all this evidence as irrelevant to his guilt under the strict liability offense defined by Ohio’s illegal voting statute.

Urbanek. Most recently, Edward Urbanek was convicted of double voting in violation of Section 3599.12(A)(2).¹⁸³ The precise facts of the case are difficult to discern because the trial court granted the state’s motion in limine, prohibiting the defendant from explaining his conduct. But the facts that emerged from the trial

¹⁷³ *Id.* at 1 (“Defense counsel then set forth the witnesses Defendant would have called [and] . . . a summary of what their testimony would have been.”); Brief of Appellant at 8–9, *Arent*, 981 N.E.2d 307 (No. 2009-CR-0227); Brief of Plaintiff-Appellee at 6, *Arent*, 981 N.E.2d 307 (No. 2009-CR-0227).

¹⁷⁴ Brief of Appellant at 8, *Arent*, 981 N.E.2d 307 (No. 2009-CR-0227).

¹⁷⁵ Brief of Plaintiff-Appellee at 2, *Arent*, 981 N.E.2d 307 (No. 2009-CR-0227) (“Arent [had] various physical and mental conditions resulting from a stroke-like occurrence.”); Brief of Appellant at 8, *Arent*, 981 N.E.2d 307 (No. 2009-CR-0227) (“A physician referred [Arent] to [a hospital] due to a suspected stroke in . . . 2003. [Arent] was seen at that time by two doctors, he was diagnosed as having acute cerebrovascular disease, and found to have a history of blood clots. He was dysarthric, had trouble speaking, and struggled to even complete a sentence. He essentially suffered from what is commonly referred to as a stroke.”).

¹⁷⁶ Brief of Appellant at 8, *Arent*, 981 N.E.2d 307 (No. 2009-CR-0227).

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ Brief of Plaintiff-Appellee at 2, *Arent*, 981 N.E.2d 307 (No. 2009-CR-0227).

¹⁸⁰ Brief of Appellant at 9, *Arent*, 981 N.E.2d 307 (No. 2009-CR-0227).

¹⁸¹ Brief of Plaintiff-Appellee at 7–9, *Arent*, 981 N.E.2d 307 (No. 2009-CR-0227).

¹⁸² Brief of Appellant at 9, *Arent*, 981 N.E.2d 307 (No. 2009-CR-0227).

¹⁸³ *State v. Urbanek*, 220 N.E.3d 146, 148 (Ohio Ct. App. 2023), *appeal not allowed*, 221 N.E.3d 853 (2023).

strongly suggest the following explanation: the defendant initially went to the wrong polling place, cast a provisional ballot there, and then drove to the correct polling place, where he cast another ballot, correctly anticipating that this second ballot would be counted in lieu of, rather than in addition to, the provisional ballot.¹⁸⁴

The *Urbanek* case presented a strange situation for defense counsel and trial court alike. The statute uses the language “vote or attempt to vote.”¹⁸⁵ But it does not define the term “vote,” and it does not address whether a provisional ballot is a “vote,” unlike federal statutory law, which clarifies that an invalidated prior ballot is not a vote. Prior case law found the illegal voting statute creates a strict liability offense, including *Arent*, a prior decision from the same appellate district, which specifically held that 3599.12(A)(2), the language criminalizing double voting, creates a strict liability offense.¹⁸⁶ *Urbanek* obviously cast two ballots in a literal sense. The only way defense counsel could avoid conviction was to somehow make it relevant (1) that the first ballot was not counted or (2) that *Urbanek* believed the first ballot would not be counted. Thus, the whole case turned on the first ballot’s legal status or the defendant’s belief about the first ballot’s legal status. But the court said it was irrelevant whether the first ballot was or was not counted.¹⁸⁷ And the court also said that motive, purpose, and intent were irrelevant.¹⁸⁸ So defense counsel made a creative argument: (A)(2) proscribes both double voting and attempted voting, and while double voting is a strict liability offense, any attempt offense requires specific intent.¹⁸⁹ Defense counsel ultimately got the prosecution to elect the attempt theory and got the judge to give a jury instruction on attempt.¹⁹⁰ Defense counsel also called two officials with the Summit County Board of Elections, both of whom testified that *Urbanek*’s provisional ballot did not constitute a vote because it was never counted.¹⁹¹ But the judge refused to define “provisional ballot” and instructed the jury not to consider whether the defendant’s votes were actually counted.¹⁹² The judge also gave both an attempt instruction and a strict liability instruction.¹⁹³ When the jury was confused, the judge gave no further guidance.¹⁹⁴

¹⁸⁴ *Id.* at 151.

¹⁸⁵ *Id.* at 157.

¹⁸⁶ *See Arent*, 981 N.E.2d at 311.

¹⁸⁷ *Urbanek*, 220 N.E.3d at 160.

¹⁸⁸ *Id.* at 156, 161.

¹⁸⁹ A separate provision of the Ohio criminal code uses mens rea terminology to define attempt. OHIO REV. CODE ANN. § 2923.02(A) (West 2025) (“No person, purposely or knowingly, and when purpose or knowledge is sufficient culpability for the commission of an offense, shall engage in conduct that, if successful, would constitute or result in the offense.”).

¹⁹⁰ *Urbanek*, 220 N.E.3d at 155–56.

¹⁹¹ *Id.* at 154–55.

¹⁹² *Id.* at 159–60.

¹⁹³ *Id.* at 149.

¹⁹⁴ An hour into their deliberations, the jury returned the following question: “On page

The appellate court affirmed, approving the trial court's refusal to define "provisional ballot" and instruction that the jury was not to consider whether the defendant's votes were actually counted.¹⁹⁵ Specifically, the appellate court deemed it irrelevant whether the provisional ballot was counted: "[Urbanek] voted in Ottawa County and, by voting provisionally after providing his Summit County address, either voted or attempted to vote in Summit County. Whether both or only one vote actually counted is, ultimately, of no consequence."¹⁹⁶

It appears the appellate court considered it equally irrelevant whether Urbanek believed the provisional ballot would not count, even if that belief was in good faith, reasonable, correct, and based on contemporaneous instructions from election officials: "[T]he fact that [Urbanek] voted or attempted to vote more than once was clearly established. His intent or purpose in doing so is irrelevant and evidence about the reasons for his conduct was properly excluded."¹⁹⁷

Under this interpretation, Ohio's prohibition on *double* voting will actually operate to prevent *eligible* voters from casting a *single* valid ballot. Ohio uses a precinct-based election system.¹⁹⁸ Ohio election law defines "precinct" as an intra-county district "established by the [county] board of elections . . . within which all qualified electors having a voting residence therein may vote at the same polling place."¹⁹⁹ An eligible voter may vote at his precinct's polling place—and nowhere else.²⁰⁰ To make matters more confusing, multiple precincts may share a common polling place.

After the 2000 election, Congress passed the Help America Vote Act (HAVA) in part to address "a significant problem voters experience[, which] is to arrive at the polling place believing that they are eligible to vote, and then to be turned away because the election workers cannot find their names on the list of qualified voters."²⁰¹ HAVA requires states to offer voters a provisional ballot in specified circumstances, including when an eligible voter shows up to vote at the polling location for the wrong precinct. Each county board of elections appoints and trains

eight, it delineates the different means of voting, i.e., poll, absentee, military, et cetera, but does not mention a provisional ballot. Does the same apply to a provisional ballot since that is what applies in this case?" *Id.* at 156. The judge declined to offer any additional guidance beyond the instructions already provided. *Id.*

¹⁹⁵ *Id.* at 159–60.

¹⁹⁶ *Id.* at 160.

¹⁹⁷ *Id.* at 161.

¹⁹⁸ *Ne. Ohio Coal. for the Homeless v. Husted*, No. 2:06-CV-896, 2012 WL 2711393, at *1 n.1 (S.D. Ohio July 9, 2012), *aff'd*, 696 F.3d 580 (6th Cir. 2012) ("A 'precinct' is an intra-county district established by the board of elections.").

¹⁹⁹ OHIO REV. CODE ANN. § 3501.01(Q) (West 2025).

²⁰⁰ *Compare id.* § 3503.01(A) ("Every citizen . . . may vote at all elections in the precinct in which the citizen resides."), *with id.* § 3599.12(A)(1) (2006) ("No person shall . . . vote . . . in a precinct in which that person is not a legally qualified elector.").

²⁰¹ *Sandusky Cnty. Democratic Party v. Blackwell*, 387 F.3d 565, 569 (6th Cir. 2004) (quoting H.R. Rep. 107-329 at 38 (2001)).

poll workers, who must direct voters to the correct precinct.²⁰² If a voter arrives to vote in the wrong precinct, state law instructs the poll worker to:

[D]irect the individual to the precinct and polling place in which the individual appears to be eligible to vote, explain that the individual may cast a provisional ballot at the current location but the ballot or a portion of the ballot will not be counted if it is cast in the wrong precinct, and provide the telephone number of the board of elections in case the individual has additional questions.²⁰³

Ohio voters cast provisional ballots in the wrong precinct with some frequency. In the 2010 election, 850 provisional ballots were cast by wrong-precinct voters in Hamilton County, and at least 27 of those were due to poll worker error.²⁰⁴ Ohio, with a population of about 11.8 million, is divided into 88 counties, ranging in population from about 12,800 (Vinton) to over 1.3 million (Franklin).²⁰⁵ Hamilton County, which includes the city of Cincinnati, has about 818,000 people, or just under 7% of the state's population.²⁰⁶

In short, lots of Ohio voters cast provisional ballots in the wrong precinct. However, according to the federal Sixth Circuit, HAVA does not require a state to count a provisional ballot cast in the wrong precinct.²⁰⁷ Ohio law prohibits the county elections board from counting a ballot cast by an otherwise eligible voter in the wrong precinct.²⁰⁸ Under Ohio's illegal voting statute, it is a crime for an eligible voter to "vote or attempt to vote" in the wrong precinct, and this crime appears to be a strict liability offense.²⁰⁹

Imagine you are an eligible Ohio voter who votes in the wrong precinct. Consider the implications of Ohio's regime of strict criminal liability. First of all, you

²⁰² *Husted*, 2012 WL 2711393, at *1 (citing OHIO REV. CODE §§ 3501.06, 3501.22, 3505.181(C)(1)).

²⁰³ § 3505.181(C)(1).

²⁰⁴ *State ex rel. Painter v. Brunner*, 941 N.E.2d 782, 787 (Ohio 2011).

²⁰⁵ America Counts Staff, *Ohio Population Climbs 2.3% from 2010 to 2020*, U.S. CENSUS BUREAU (Aug. 25, 2021), <https://www.census.gov/library/stories/state-by-state/ohio-population-change-between-census-decade.html> [<https://perma.cc/B6TB-2WZ6>].

²⁰⁶ *Id.*

²⁰⁷ *Sandusky Cnty. Democratic Party v. Blackwell*, 387 F.3d 565, 578 (6th Cir. 2004).

²⁰⁸ § 3505.183(4)(a)(ii) ("[I]f . . . the board determines that any of the following applies, the provisional ballot . . . shall not be counted: . . . The individual . . . is not eligible to cast a ballot in the precinct . . . in which the individual cast the provisional ballot."); *Hunter v. Hamilton Cnty. Bd. Elections*, 850 F. Supp. 2d 795, 809 (S.D. Ohio 2012) ("[T]he board will not open the provisional ballot envelope or count the ballot if . . . the individual is not eligible to cast a ballot in the precinct . . . in which the individual cast the provisional ballot.").

²⁰⁹ *See, e.g.*, § 3599.12(A)(1); *State v. Worrell*, 2007-Ohio-7058, 2007 WL 4554455, at *3 (Ohio Ct. App. Dec. 28, 2007).

have already committed a crime because you voted in the wrong precinct (while otherwise eligible to vote). You voted in that precinct because election officials instructed you to vote in that particular precinct, and you therefore reasonably concluded in good faith that you were voting in the right precinct. Hopefully, prosecutorial discretion will protect your liberty. (Though it did not protect Gregory Arent, the amputee stroke victim with brain damage who was on pain medication in his nursing home.) Second, your wrong-precinct ballot will be discarded. Even if a voter casts a ballot in the wrong precinct due to poll worker error, election officials cannot count that ballot—on that matter, there is no discretion.²¹⁰ So the ballot you just cast is not going to count. Election officials know this *ex ante*. Hopefully, you do, too. But, you may not know the third implication: even though the vote tabulation will not count your wrong-precinct ballot, that ballot still “counts” as a vote under Ohio’s illegal voting statute. So, if you go vote in the correct precinct, you will commit a second crime—double voting. Of course, you are not trying to vote twice. You just want to vote once—to cast one valid ballot. You know that your first ballot will be discarded. The only way to cast a valid ballot is to vote in the correct precinct. But that course risks criminal liability. In this way, the *Urbanek* decision transforms HAVA’s provisional ballot from a safe harbor to a trap. The ACLU of Ohio filed an amicus brief arguing that strict liability for *Urbanek* would eviscerate HAVA’s system of provisional balloting.²¹¹ But the appellate court declined to consider an argument raised by neither party.²¹² The Ohio Supreme Court declined review over the dissent of three justices.²¹³

At this point, intermediate appellate courts in five of Ohio’s twelve judicial districts have read the state election code to make ineligible voting, wrong-place voting, and multiple voting strict liability crimes. One judge has called for revisiting the question in an appropriate case.²¹⁴ Another has urged the legislature to add a *mens rea* term.²¹⁵ The Ohio Supreme Court has thus far declined all opportunities for review. Time will tell whether the Ohio Supreme Court will eventually resolve this question, and if so, whether it will endorse or reject strict criminal liability.

²¹⁰ When Secretary of State Jennifer Brunner tried to exercise that discretion, she was enjoined by the Ohio Supreme Court. *State ex rel. Painter v. Brunner*, 941 N.E.2d 782, 797–98 (Ohio 2011).

²¹¹ Brief for the American Civil Liberties Union of Ohio Foundation & the American Civil Liberties Union as Amici Curiae Supporting Appellant Edward Urbanek at 17–18, *State v. Urbanek*, 220 N.E.3d 146, 160 (Ohio Ct. App. 2023), *appeal not allowed*, 221 N.E.3d 853 (Ohio 2023) (No. 2022-OT-A).

²¹² *Urbanek*, 220 N.E.3d at 161.

²¹³ *See Urbanek*, 221 N.E.3d 853 (Kennedy, C.J., Donnelly & Brunner, JJ., dissenting).

²¹⁴ *Urbanek*, 220 N.E.3d at 162 (Zmuda, J., concurring).

²¹⁵ *State v. Worrell*, 2007-Ohio-7058, 2007 WL 4554455, at *6 (Ohio Ct. App. Dec. 28, 2007) (Dickinson, J., concurring).

III. FEDERAL CRIMINALIZATION: 18 U.S.C. § 611

The last Part showed how Ohio imposes strict criminal liability on mistaken ineligible voting. This Part shows how federal law does, too. First, I explain how the federal noncitizen voting ban, codified at 18 U.S.C. § 611, unlike other federal criminal laws, purports to prescribe a voter qualification (citizenship) for federal elections and then enforces that qualification with strict criminal liability. Second, I present the case of Ricardo Knight, which produced the first federal appellate opinion interpreting § 611. Third, I show that Ricardo Knight was one of fifteen noncitizens prosecuted in a pilot project for § 611. Finally, I summarize other criminal prosecutions and immigration adjudications based on this statute.

A. 18 U.S.C. § 611

Federal law has long criminalized ineligible voting, but it has usually targeted fraudulent conduct and deferred to state law on voter eligibility. 52 U.S.C. § 10307, a provision of the 1965 Voting Rights Act, contains three subsections that criminalize fraudulent conduct: “(c) False information in registering or voting”; “(d) Falsification or concealment of material facts or giving of false statements”; and “(e) Voting more than once.”²¹⁶ That first subsection, 52 U.S.C. § 10307(c), contains multiple mens rea terms and a verb (“conspires”) that entails a culpable mental state.

Whoever *knowingly* or *willfully* [1] gives false information as to his name, address or period of residence in the voting district for the *purpose* of establishing his eligibility to register or vote, or [2] *conspires* with another individual for the *purpose* of encouraging his false registration to vote or illegal voting, or [3] pays or offers to pay or accepts payment either for registration to vote or for voting shall [be subject to punishment].²¹⁷

The second subsection, 52 U.S.C. § 10307(d), similarly contains multiple mens rea terms and verbs (“falsifies,” “conceals”) that entail culpable mental states: “Whoever . . . *knowingly* and *willfully* *falsifies* or *conceals* a material fact, or makes any false, *fictitious*, or *fraudulent* statements or representations, or makes or uses any false writing or document *knowing* the same to contain any false, *fictitious*, or *fraudulent* statement or entry, shall be [subject to punishment].”²¹⁸

²¹⁶ 52 U.S.C. § 10307(c)–(e). Section 10307(e) was enacted in 1975 as an amendment to the Voting Rights Act of 1965. An Act to Amend the Voting Rights Act of 1965, Pub. L. 94-73, § 409, 89 Stat. 400 (1975); see Madeline C. Alagia, *Election Law Violations*, 59 AM. CRIM. L. REV. 609, 654 n.428 (2022).

²¹⁷ 52 U.S.C. § 10307(c) (emphasis added). The punishment may be up to five years imprisonment. *Id.*

²¹⁸ *Id.* § 10307(d) (emphasis added). The punishment may be up to five years imprisonment. *Id.*

In contrast, the third subsection, 52 U.S.C. § 10307(e), prohibits multiple voting with no explicit mens rea terminology: “Whoever votes more than once in [a covered] election . . . shall be [subject to punishment].”²¹⁹ However, this subsection protects provisional balloting by defining the term “votes more than once” to exclude “the casting of an additional ballot if all prior ballots of that voter were invalidated.”²²⁰ And despite the absence of mens rea terminology, the federal courts have read this language to criminalize multiple voting only when the person acts “knowingly, willfully, and expressly for the purpose of having his or her vote count more than once.”²²¹

Similarly, 52 U.S.C. § 20511, a provision of the National Voter Registration Act of 1993 (NVRA), criminalizes fraudulent registration and voting with language that contains multiple mens rea terms and verbs connoting a culpable mental state.

A person . . . who in any election for Federal office . . .

(2) knowingly and willfully deprives, defrauds, or attempts to deprive or defraud the residents of a State of a fair and impartially conducted election process, by—

(A) the procurement or submission of voter registration applications that are known by the person to be materially false, fictitious, or fraudulent under the laws of the State in which the election is held; or

(B) the procurement, casting, or tabulation of ballots that are known by the person to be materially false, fictitious, or fraudulent under the laws of the State in which the election is held,

shall be [subject to punishment].²²²

One federal statute departs from this pattern—dramatically. 18 U.S.C. § 611 makes it a federal crime, punishable by up to one year in prison, for a noncitizen to vote in a federal election.²²³ The statute was passed in 1996 as part of an omnibus

²¹⁹ *Id.* § 10307(e)(1). The punishment may be up to five years imprisonment. *Id.*

²²⁰ *Id.* § 10307(e)(3).

²²¹ 29 C.J.S. Elections § 572; *United States v. Salisbury*, 983 F.2d 1369, 1377 (6th Cir. 1993); *see also* *United States v. Hogue*, 812 F.2d 1568, 1576 (11th Cir. 1987) (citing with approval trial court instructions that the “essential elements of the [double voting] offense [included that defendant acted] knowingly and willfully for the specific purpose of having his vote count more than once”).

²²² 52 U.S.C. § 20511(2). The punishment may be up to five years imprisonment. *Id.*

²²³ 18 U.S.C. § 611(a). The statute permits a noncitizen to vote in state or local elections when state or local law authorizes it and when “voting for such other purpose is conducted

immigration law.²²⁴ Four years later, Congress added a retroactive exception to 18 U.S.C. § 611 for a noncitizen child of American parents who permanently resided in the United States prior to age 16 and reasonably believed at the time of voting that they were a U.S. citizen.²²⁵ Unlike other federal election offenses, § 611 purports to limit who can vote in federal elections and then enforces that limit without any *mens rea* terminology.

1. Franchise Restriction

18 U.S.C. § 611 appears to be the only provision of federal law that purports to impose a substantive limit on voter eligibility for federal elections. Other federal statutes have *expanded* the franchise by prohibiting literacy tests and similar devices,²²⁶ lowering the voting age to 18,²²⁷ or extending the vote to Americans living abroad.²²⁸ But 18 U.S.C. § 611 distinctively *restricts* the franchise.

Does Congress have constitutional authority to restrict the franchise? Congress enjoys broad power to enforce the Reconstruction Amendments and subsequent Voting Amendments.²²⁹ Congress can use this power to expand the franchise. For

independently of voting for a candidate for . . . Federal offices . . .” *Id.* § 611(a)(3). Under this provision, voting by a noncitizen is a misdemeanor punishable by up to one year of imprisonment. *Id.* § 611(b); *see also* U.S. DEPT. OF JUST., FEDERAL PROSECUTION OF ELECTION OFFENSES 63–64 (Richard C. Pilger ed., 8th ed. 2017).

²²⁴ The Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 216(a), 110 Stat. 3009.

²²⁵ 18 U.S.C. § 611(c); Child Citizenship Act of 2000, Pub. L. No. 106-395, § 201(D)(i), 114 Stat. 1631.

²²⁶ The Voting Rights Act of 1965 imposed a five-year ban on the continued use of literacy, educational, good moral character, or voucher tests in any federal, state, or local election in a jurisdiction where less than half of voting-age residents either registered or voted in the 1964 presidential election. § 4(a)–(c). In 1970, Congress extended the ban nationwide for an additional five years. Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, sec. 6, § 201(a), 84 Stat. 314, 314–15. In 1975, Congress made the ban permanent. Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, § 102, 89 Stat. 400, 400. The Court has repeatedly upheld these bans. *South Carolina v. Katzenbach*, 383 U.S. 301, 337 (1966); *Oregon v. Mitchell*, 400 U.S. 112, 113 (1970); *City of Rome v. United States*, 446 U.S. 156, 177 (1980).

²²⁷ The Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314, 318, lowered the voting age to eighteen for federal and state. A fractured Court held this change was valid for federal elections but not for state elections. *Oregon v. Mitchell*, 400 U.S. 112, 117–18 (1970). Within eight months, Congress proposed, and the states ratified, the Twenty-Sixth Amendment, which lowered the voting age to eighteen for all elections. U.S. CONST. amend XXVI, § 1.

²²⁸ Overseas Citizens Voting Rights Act of 1975, Pub. L. No. 94-203, 89 Stat. 1142 (1976); Uniformed and Overseas Citizens Absentee Voting Act, Pub. L. No. 99-410, 100 Stat. 924 (1986). The Court has never considered the constitutionality of these federal statutes. *See* Brian C. Kalt, *Unconstitutional but Entrenched: Putting UOCAVA and Voting Rights for Permanent Expatriates on a Sound Constitutional Footing*, 81 BROOK. L. REV. 441, 441 (2016).

²²⁹ U.S. CONST. arts. XIV §§ 2, 5, XV § 2, XVI § 2, XIX § 2.

example, the Court has repeatedly approved a federal ban on literacy tests and other devices as a valid exercise of congressional power to enforce the Fourteenth and Fifteenth Amendments.²³⁰ Some suggest that Congress can use its enforcement powers to ban felon disenfranchisement.²³¹ But the power to expand may not entail the power to restrict, because congressional enforcement powers are asymmetric. In the context of the Section Five power to enforce the Fourteenth Amendment, the Court has described this asymmetry as follows:

[Section Five] does not grant Congress power to exercise discretion in the other direction and to enact “statutes so as in effect to dilute equal protection and due process” Congress’ power under [Section Five] is limited to adopting measures to enforce the guarantees of the Amendment; [Section Five] grants Congress no power to restrict, abrogate, or dilute these guarantees.²³²

So Congress can ban literacy tests, but that does not mean Congress can mandate literacy tests. Likewise, even if Congress can prohibit felon disenfranchisement, that does not mean Congress can require it.²³³

Does Congress enjoy greater power to regulate voter qualifications in federal elections? The Elections Clause explicitly grants Congress power to regulate the “Times, Places, and Manner” of congressional elections.²³⁴ And the Court has construed this phrase capaciously.²³⁵ But for House Elections, Article I explicitly provides that “the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.”²³⁶ The Seventeenth

²³⁰ See cases discussed at *supra* note 226.

²³¹ See, e.g., Nicholas O. Stephanopoulos, *The Sweep of the Electoral Power*, 36 CONST. COMMENT. 1, 2 (2021); John Crain, *How Congress Can Craft a Felon Enfranchisement Law That Will Survive Supreme Court Review*, 29 B.U. PUB. INT. L.J. 1, 4–5, 66 (2019).

²³² *Katzenbach v. Morgan*, 384 U.S. 641, 651 n.10 (1966).

²³³ The Guarantee Clause provides: “The United States shall guarantee to every State in this Union a Republican Form of Government” U.S. CONST. art. IV, § 4. This clause is another potential source of congressional power over voter qualifications. But it too may be asymmetric, authorizing Congress to expand, but not restrict, the franchise. Some suggest that congressional power under the Guarantee Clause is judicially unreviewable, at least when Congress acts to expand voting rights. But if Congress were to assert authority to restrict the franchise under its Guarantee Clause power, I’m not certain the Court would or should deem that assertion nonjusticiable.

²³⁴ U.S. CONST. art. I, § 4 (“The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations”).

²³⁵ *Smiley v. Holm*, 285 U.S. 355, 366 (1932) (“[T]hese comprehensive words embrace authority to provide a complete code for congressional elections . . . to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved.”).

²³⁶ U.S. CONST. art. I, § 2.

Amendment fixes the same voter qualifications for Senate elections.²³⁷ Given these various provisions, does Congress or the States have the power to set voter qualifications in congressional elections? There are different ways to parse these provisions, leading to different conclusions regarding allocating this qualifications power. On a more nationalist reading, Congress's Elections Clause power to regulate the "Manner" of congressional elections includes the power to regulate voter qualifications. On a more federalist reading, Congress's Elections Clause power governs *how* congressional elections are run, but not *who* votes in them.

Over five decades ago, Justice Hugo Black championed the nationalist reading, but the precedential value of his opinion is subject to debate. In *Oregon v. Mitchell*, the Court considered a challenge to multiple provisions of the Voting Rights Act Amendments of 1970, including one that lowered the voting age to 18 for federal and state elections.²³⁸ The Court splintered, producing five different opinions, none commanding a majority.²³⁹ On the question of whether Congress could lower the voting age, the Court split three ways: four Justices answered "yes" for both state and federal elections, citing congressional power to enforce the Fourteenth Amendment;²⁴⁰ four Justices answered "no" for both state and federal elections, concluding no congressional power authorized this effort to regulate voter qualifications.²⁴¹ Like Solomon splitting the proverbial baby, Justice Black answered "no" for state elections but "yes" for federal elections, concluding that the Elections Clause empowered Congress to regulate voter qualifications in congressional elections.²⁴² Justice Black's opinion was thus controlling, and he announced the judgment of the Court, but no Justice joined his opinion.

The Court revisited these issues over four decades later in *Arizona v. Inter Tribal Council of Arizona*, which held that the NVRA pre-empted Arizona's proof-of-citizenship requirement for voter registration.²⁴³ Writing for a seven-member majority, Justice Scalia embraced the federalist reading of the Elections Clause,

²³⁷ U.S. CONST. amend. XVII.

²³⁸ See *Oregon v. Mitchell*, 400 U.S. 112, 112 (1970).

²³⁹ *Id.* at 117–35 (1970) (Black, J., announcing the judgment of the Court); *id.* at 135–52 (Douglas, J., concurring in part and dissenting in part); *id.* at 152–229 (Harlan, J., concurring in part and dissenting in part); *id.* at 229–81 (Brennan, White & Marshall, JJ., concurring in part and dissenting in part); *id.* at 281–96 (Stewart & Blackmun, JJ., Burger, C.J., concurring in part and dissenting in part).

²⁴⁰ *Id.* at 135–52 (Douglas, J., concurring in part and dissenting in part); *id.* at 280–81 (Brennan, White & Marshall, JJ., concurring in part and dissenting in part).

²⁴¹ *Id.* at 154 (Harlan, J., concurring in part and dissenting in part); *id.* at 281–82 (Stewart & Blackmun, JJ., Burger, C.J., concurring in part and dissenting in part).

²⁴² *Id.* at 119 (Black, J., announcing the judgment of the Court) ("[T]he responsibility of the States for setting the qualifications of voters in congressional elections was made subject to the power of Congress to make or alter such regulations . . ."). Justice Black thought Congress could regulate voter qualifications in all national elections, not just congressional elections. See *infra* note 254.

²⁴³ *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 1 (2013).

suggesting that Congress enjoys no Elections Clause power to regulate voter qualifications in congressional elections.

[T]he Elections Clause empowers Congress to regulate *how* federal elections are held, but not *who* may vote in them. The Constitution prescribes a straightforward rule for the composition of the federal electorate. . . . One cannot read the Elections Clause as treating implicitly what [Article I, § 2, cl. 1 and the Seventeenth Amendment] regulate explicitly.²⁴⁴

The majority opinion further stated that *Mitchell* was of “minimal precedential value” since no Justice joined Justice Black’s opinion.²⁴⁵ Indeed, the majority approvingly quoted Justice Harlan’s dissenting opinion, which rejected Justice Black’s nationalist reading.²⁴⁶ Justices Thomas and Alito dissented on the question of NVRA pre-emption but agreed that the power to prescribe voter qualifications in congressional elections belongs to the states, not to Congress.²⁴⁷

So, where does the nationalist reading stand today? On the one hand, *Mitchell* has never been overturned.²⁴⁸ That case sustained congressional power to lower the voting age to eighteen, but only for federal elections. Justice Black cast the crucial fifth vote for that decision. And Justice Black’s Elections Clause rationale is narrower than an enforcement power theory in the sense that it applies only to federal elections. So, one could argue that *Mitchell* is still good law, and its holding is the nationalist reading of the Elections Clause that Justice Black endorsed in his controlling opinion. The *Inter Tribal* majority’s discussion of *Mitchell* may be dicta.²⁴⁹ And that

²⁴⁴ *Id.* at 16. Justices Roberts, Ginsburg, Breyer, Sotomayor, and Kagan joined this opinion in full. Justice Kennedy “join[ed] all of the Court’s opinion except its discussion of the presumption against pre-emption.” *Id.* at 22 (Kennedy, J., concurring in part and concurring in the judgment).

²⁴⁵ *Id.* at 16 n.8 (majority opinion) (citing HENRY CAMPBELL BLACK, HANDBOOK ON THE LAW OF JUDICIAL PRECEDENTS 135–36 (1912)).

²⁴⁶ *Id.* at 16 (“It is difficult to see how words could be clearer in stating what Congress can control and what it cannot control. Surely nothing in these provisions lends itself to the view that voting qualifications in federal elections are to be set by Congress.”) (quoting *Mitchell*, 400 U.S. at 210 (Harlan, J., concurring in part and dissenting in part)).

²⁴⁷ *Id.* at 26 (Thomas, J., dissenting) (“Congress has no role in setting voter qualifications . . . aside from the powers conferred by the Fourteenth, Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments This power is instead expressly reposed in the States.”); *id.* at 38 (Alito, J., dissenting) (“Under the Constitution, the States, not Congress, have the authority to establish the qualifications of voters in elections for Members of Congress.”).

²⁴⁸ Stephanopoulos, *supra* note 231, at 52 n.299 (“*Mitchell* ‘remains good law unless overruled by the Court.’” (quoting Richard L. Hasen, *Too Plain for Argument: The Uncertain Congressional Power to Require Parties to Choose Presidential Nominees Through Direct and Equal Primaries*, 102 NW. U. L. REV. 2009, 2018 (2008))).

²⁴⁹ *Id.* (“[T]his was merely dicta . . .”). After all, the *Inter Tribal* majority concluded that the NVRA validly preempted Arizona’s proof-of-citizenship requirement for voter registration.

dicta may understate the precedential value of Justice Black's opinion.²⁵⁰ On the other hand, Justice Black's nationalist reading may be broader than an enforcement power theory because it applies equally to franchise expansion and franchise restriction.²⁵¹ So that reading may not actually be the holding of *Mitchell*. And that reading has been endorsed by zero Justices and repudiated by at least thirteen (four in *Mitchell* and nine in *Inter Tribal*), five of whom remain on the Court.²⁵² So if the Court were to revisit the question, there is good reason to predict it would embrace the federalist reading over the nationalist one.²⁵³ A similar analysis applies to the power over voter qualifications in presidential elections.²⁵⁴

²⁵⁰ Writing for the *Inter Tribal* majority, Justice Scalia claimed that "[f]ive Justices [in *Oregon v. Mitchell*] took the position that the Elections Clause did *not* confer upon Congress the power to regulate voter qualifications in federal elections." *Inter Tribal*, 570 U.S. at 16 n.8 (emphasis in original). Justice Scalia must be counting Justice Douglas as affirmatively rejecting Justice Black's nationalist reading. With that count, Justice Scalia can say that his federalist reading "commanded a majority in *Mitchell*," which supports his assertion that *Mitchell*'s result "is of minimal precedential value." *Id.* Professor Josh Douglas has disputed Justice Scalia's vote count. Joshua A. Douglas, *(Mis)trusting States to Run Elections*, 92 WASH. U. L. REV. 553, 592 (2015) ("Justice Scalia's vote count . . . is disingenuous, as Justice Douglas did *not* state explicitly that the Elections Clause did *not* confer this power; he instead simply rested his analysis on the Fourteenth Amendment."). In *Mitchell*, Justice Douglas did not endorse Justice Black's nationalist reading. He "concur[red] in the judgments as they affect federal elections, *but for different reasons*." *Inter Tribal*, 570 U.S. at 135 (emphasis added). But did he affirmatively reject that reading, or simply decline to address the question? I think it's a close call. To support his characterization, Justice Scalia appears to cite to this language in Justice Douglas's opinion: "Much is made of the fact that Art. I, § 4, of the Constitution gave Congress only the power to regulate the 'Manner of holding Elections,' not the power to fix qualifications for voting in elections. But the Civil War Amendments . . . made vast in[]roads on the power of the States." *Id.* at 143 (Douglas, J.). This phrasing appears to refer (in passive voice) to a point emphasized by others. Yet Justice Douglas refers to that point as a "fact" rather than a "proposition." This is not the slenderest of all reeds, but its bulk is modest.

²⁵¹ See Michael Morse, *Democracy's Bureaucracy: The Complicated Case of Voter Registration Lists*, 103 B.U. L. REV. 2123, 2136 n.44 (2023) ("[T]he Equal Protection theory endorsed by the four concurring Justices is not so much broader than Justice Black's Elections Clause theory as it is distinct from it." (internal quotations and citation omitted)).

²⁵² See *Inter Tribal*, 570 U.S. at 16 n.8; *id.* at 34 (Thomas, J., dissenting); *id.* at 42 (Alito, J., dissenting). The five Justices who remain on the Court are Justices Roberts, Thomas, Alito, Sotomayor, and Kagan.

²⁵³ See, e.g., Stephanopoulos, *supra* note 231, at 73 n.404 ("*Mitchell* is a controversial decision disfavored by the current Court."); Morse, *supra* note 251, at 2136 n.44 ("Some academics have suggested the federal government could override states' constitutional authority to set voter qualifications, but that theory is unlikely to succeed today.").

²⁵⁴ When it comes to regulating voter qualifications for presidential, as opposed to congressional elections, Article II speaks of expansive state authority and a limited congressional role. Compare U.S. CONST. art. II, § 1 ("Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of [Presidential] Electors. . . ."), with *id.* ("The Congress may determine the Time of chusing the [Presidential] Electors, and the Day on which they shall give their Votes . . ."). But the Necessary and Proper Clause grants Congress

For this reason, some have argued that § 611 is unconstitutional.²⁵⁵ Recall that § 611 permits noncitizen voting in state and local elections if authorized by state or local law. If a state permitted noncitizens (like lawful permanent residents) to vote for state legislators, those noncitizens would be included in the electorate for the more numerous branch of the state legislature but (thanks to § 611) excluded from the congressional electorate. This result would stand in tension with the explicit constitutional provisions linking these electorates.²⁵⁶ On the other hand, the federal noncitizen voting ban may implicate congressional power to regulate immigration, which the Court has often construed deferentially. Indeed, the law's sponsor explicitly described it as an exercise of congressional power to regulate voter qualifications in this way.²⁵⁷ At the least, § 611 presents a serious constitutional question regarding the scope of congressional power to regulate voter qualifications in this way. This constitutional question could be avoided if § 611 were read to prohibit noncitizen voting in federal elections *if the state prohibits noncitizen voting in elections for the more numerous branch of its state legislature*. This condition has been satisfied in every state for a century, so it would not impact the current operation of the statute. But it would formally add an attendant circumstance as an

power “[t]o make all Laws which shall be necessary and proper for carrying into Execution” not only its own enumerated “Powers, [but also] all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.” U.S. CONST. art. I, § 8, cl. 1. And from a structural perspective, the selection of the President, who represents the entire nation, implicates federal interests of the highest order. So, Congress has regulated presidential elections to some extent, with the Court’s blessing. *See* Dan T. Coenen & Edward J. Larson, *Congressional Power over Presidential Elections: Lessons from the Past and Reforms for the Future*, 43 WM. & MARY L. REV. 851, 903 (2002). Justice Black thought Congress could regulate voter qualifications in both congressional and presidential elections. *Oregon v. Mitchell*, 400 U.S. 112, 124 (1970) (Black, J., announcing the judgment of the Court) (“It cannot be seriously contended that Congress has less power over the conduct of presidential elections than it has over congressional elections.”). But the current Court is likely to be skeptical of congressional power to regulate voter qualifications in either.

²⁵⁵ *See, e.g.*, Stephen E. Mortellaro, *The Unconstitutionality of the Federal Ban on Non-citizen Voting and Congressionally-Imposed Voter Qualifications*, 63 LOY. L. REV. 447 (2017).

²⁵⁶ *See* U.S. CONST. art. I, § 2, cl. 1; *id.* amend. XVII. The Court has said these provisions do not “require an absolute symmetry of qualifications to vote in elections for Congress and the lower house of the state legislature” so long as “anyone who is permitted to vote for the most numerous branch of the state legislature [is] permitted to vote in federal legislative elections.” *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 226 (1986) (internal quotations and citation omitted). But if a state authorized noncitizens to vote for state legislators, § 611 would violate even this more relaxed requirement because a noncitizen would then be “permitted to vote for the most numerous branch of state” but *not* permitted to vote in federal legislative elections. *Id.*

²⁵⁷ 142 CONG. REC. S4019 (statement of Sen. Simpson) (“A doubt has been expressed about whether Congress has the authority to prohibit voting by aliens. . . . There are several constitutional grounds for this authority, including the plenary power of Congress over immigration matters . . .”).

element of the offense, which might prove relevant in a mens rea analysis. I consider this possibility in Section V.C.1.

2. Mens Rea

18 U.S.C. § 611 is distinctive for an additional reason. Unlike other federal laws criminalizing electoral conduct, this provision contains no mens rea term. And unlike the federal prohibition on multiple voting, every court that construes this provision has agreed that it imposes a form of strict criminal liability. More specifically, federal prosecutors and courts have construed this provision to require (1) knowledge that one's conduct constitutes voting and (2) knowledge that one is a noncitizen, but not (3) knowledge that noncitizens are ineligible to vote.²⁵⁸

How could a person possibly believe that noncitizens are eligible to vote? Judge James C. Dever III expressed this intuitive incredulity when he sentenced noncitizen Juan Francisco Landeros-Mireles for voting in violation of 18 U.S.C. § 611: “[I]t’s inconceivable to me, utterly inconceivable to me that I could travel to another country and think I could vote. It’s just absolutely up is down. It is just inconceivable that any rational human being could think they could just travel to some other country and vote.”²⁵⁹ As Judge Dever describes it, it sounds like Mr. Landeros took an Uber straight from the airport to the nearest polling place. In fact, when Mr. Landeros voted, he had been in the United States for almost five decades and a lawful permanent resident (LPR) for twenty-five years.²⁶⁰ More generally, when assessing the mental state of a noncitizen regarding their citizenship and voter eligibility status, context matters. Did the person enter lawfully or unlawfully? Does the person have a temporary status, like a student or work visa, or are they an LPR? Have they been in the country for weeks, months, years, or decades?

In some cases, a noncitizen mistakenly believes they are a citizen. It’s rare, but it happens. Alessandro Cannizzaro passed the naturalization test but never took the oath of citizenship; he was convicted under § 611.²⁶¹ Siavash Sobhani, the child of

²⁵⁸ U.S. DEPT. OF JUST., FEDERAL PROSECUTION OF ELECTION OFFENSES 63 (Richard C. Pilger ed., 8th ed. 2017) (“Section 611 states a general intent offense, i.e., the offender must have known that he or she was not a citizen, and that the act he or she performed was an act of voting. However, it is not necessary to prove that the offender knew that voting by non-citizens was illegal.”); *United States v. Knight*, 490 F.3d 1268, 1271 (11th Cir. 2007) (“Section 611 is a general intent crime.”); *Fitzpatrick v. Sessions*, 847 F.3d 913, 914 (7th Cir. 2017) (“[Section] 611 . . . does not require proof that the alien knew that only citizens can vote in federal elections.”); *Kimani v. Holder*, 695 F.3d 666, 669 (7th Cir. 2012); *Olaifa v. Mayorkas*, No. 18 CV 6801, 2021 WL 1057736, at *7 (N.D. Ill. Mar. 18, 2021) (“[E]ven if he did not know that it was illegal to vote, that does not diminish his guilt for the offense”); *Wood v. U.S. Att’y Gen.*, 853 F. App’x 475, 477 (11th Cir. 2021).

²⁵⁹ Transcript of Sentencing Hearing at 7, *United States v. Landeros-Mireles*, No. 5:18-CR-325-1 (E.D.N.C. Feb. 19, 2019).

²⁶⁰ *Id.*

²⁶¹ Transcript of Sentencing Hearing at 8, *United States v. Cannizzaro*, No. 5:18-CR-328-1

foreign diplomats, was born on U.S. soil and issued a passport 60 years ago; when he applied to renew his passport in 2023, the federal government concluded that he never attained birthright citizenship and his original passport was issued in error; after a year of limbo, and intervention by his Congressman, he was finally granted citizenship at a naturalization ceremony in 2024.²⁶² Recall that Congress amended § 611 four years after its initial passage, to codify a very narrow exception to the ban on noncitizen voting and related immigration provisions.²⁶³ Congress did so after learning of cases where Americans adopted children abroad but failed to submit the proper paperwork to complete the naturalization process, resulting in noncitizen voting and deportation.²⁶⁴

More commonly, the noncitizens punished for voting know they are not citizens but believe they can vote as long-time residents with LPR status. When I taught Professional Responsibility, I tried to draft multiple-choice questions for my students similar to those used on the Multi-State Professional Responsibility Exam (MPRE). Every question has four possible answers. Only one is correct (the “key option”) while the other three are wrong (the “distractors”); a good distractor is unambiguously wrong but still appealing to some test takers.²⁶⁵ How do you get bright law students who prepare for the MPRE to select a distractor that is unambiguously wrong? One effective strategy is to write a distractor that embodies a “fictitious rule,” i.e., a rule that sounds intuitively plausible but departs from the actual rules tested on the MPRE. When noncitizens mistakenly conclude they are eligible to vote, they often fall for a “fictitious rule” of voter eligibility. According to some

(E.D.N.C. Oct. 10, 2019) (“I applied for my citizenship . . . [and] I passed . . . [but] I was told that I had to come back because the rooms were full, they couldn’t swear me in. Then I called and called to check on it and they said I had to wait. I never received any notification by them.”). Cannizzaro came to the United States legally in 1985, applied for citizenship in 2003, and voted in 2016. *Id.*

²⁶² Theresa Vargas, *A Doctor Tried to Renew His Passport. Now He’s No Longer a Citizen*, WASH. POST (Nov. 25, 2023, 10:58 AM), <https://www.washingtonpost.com/dc-md-va/2023/11/25/virginia-doctor-passport-citizenship-nightmare/> [<https://perma.cc/4XFB-LMW5>]; Press Release, Congressman Gerry Connolly, Statement on Dr. Siavash Sobhani’s Naturalization (June 25, 2024), <https://connolly.house.gov/news/documentsingle.aspx?DocumentID=5068> [<https://perma.cc/L8QL-U4ES>].

²⁶³ Child Citizenship Act of 2000, Pub. L. No. 106-395, 114 Stat. 1631 (2000).

²⁶⁴ See, e.g., 146 CONG. REC. H7774, H7777 (statement of Rep. Delahunt) (“Some parents have discovered to their horror that their failure to complete the paperwork in time can result in their forced separation from their children . . .”).

²⁶⁵ Janet W. Fisher, *Multiple-Choice: Choosing the Best Options for More Effective and Less Frustrating Law School Testing*, 37 CAP. U. L. REV. 119, 129–30 (2008) (“The correct option is called the key option, and the other options are called distractors. Item writers should strive to ‘make all distractors plausible.’ A plausible distractor will appear to be correct to a student who possesses only a ‘low degree of knowledge.’ For that reason, ‘[i]n item-writing a good plausible distractor comes from a thorough understanding of common student errors.’” (quoting THOMAS M. HALADYNA, DEVELOPING AND VALIDATING MULTIPLE-CHOICE TEST ITEMS (3d ed. 2004))).

common fictitious rules, a noncitizen can vote if (1) they are an LPR; (2) they have been an LPR for X years; (3) they have applied, or are applying, for naturalization; or (4) their spouse is a U.S. citizen. According to a particularly perverse fictitious rule, voting will help a noncitizen attain U.S. citizenship.

A report by the North Carolina State Board of Elections (NCSBE) confirms this pattern of confusion:

A number of non-citizens said they were not aware that they were prohibited from voting. Interviews and evidence show that some non-citizens were misinformed about the law by individuals conducting voter registration drives or, in at least one documented case, by a local precinct official. One registrant in her 70s has lived in the United States for more than 50 years and believed that she was a citizen because she had been married to a U.S. citizen.²⁶⁶

So the question is not whether you can take an Uber from the airport to the nearest polling location. The question is whether a noncitizen is prohibited from voting in state or federal elections, even if they have lived in the United States for years, even if they have been an LPR for years, even if their family members are U.S. citizens, even if they are applying for naturalization. The answer is yes. For almost a century, every state in the union has limited voting to citizens for state and federal elections.²⁶⁷ It is irrelevant how long a person has lived in the United States or been a permanent resident. It does not matter if their family members are U.S. citizens or if they are applying for naturalization. But is it “conceivable” that a “rational human being could think” otherwise? If a person falls for one of these distractors, like Margarita Del Pilar Fitzpatrick, are they necessarily irrational, reckless, or negligent?

Consider some more context. The U.S. Constitution imposes citizenship requirements for some federal officials, but not for voters.²⁶⁸ Instead of setting a uniform national standard, Article I and the Seventeenth Amendment provide that voter qualifications for congressional elections will vary by state, based on the voter qualifications each state sets for the more numerous branch of its state legislature.²⁶⁹ In the nation’s first 150 years, from the Founding until the 1920s, some states based voter eligibility on residency rather than citizenship.²⁷⁰ In numerous other countries

²⁶⁶ N.C. STATE BD. OF ELECTIONS, POST-ELECTION AUDIT REPORT: GENERAL ELECTION 2016, at 5 (2017).

²⁶⁷ Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1391, 1397 (1993) (“Arkansas became the last state to abandon noncitizen suffrage in 1926.”).

²⁶⁸ U.S. CONST. art. I, §§ 2, 3; *id.* art. II, § 1.

²⁶⁹ *Id.* art. 1, § 2, cl. 1; *id.* amend XVII.

²⁷⁰ Raskin, *supra* note 267, at 1397–400. For other scholarship on the history of noncitizen

today, some noncitizens can vote in provincial or national elections.²⁷¹ Even in the United States today, some noncitizens can vote in local elections.²⁷² Indeed, Congress recognized this when enacting the federal noncitizen voting ban and included a carve-out for local elections.²⁷³ Some propose that states let some noncitizens vote in state and federal elections.²⁷⁴ And when it comes to campaign finance, rather than, voting, Congress draws the line at lawful permanent residents, not citizens.²⁷⁵ The D.C. Circuit Court of Appeals upheld this line in a decision authored by then-Judge Kavanaugh:

Congress may reasonably conclude that lawful permanent residents of the United States stand in a different relationship to the American political community than other foreign citizens do. . . . [In] two ways—their indefinite residence in the United States and their eligibility for military service—lawful permanent residents can be viewed as more similar to citizens than they are to temporary visitors²⁷⁶

So a lawful permanent resident occupies a somewhat nuanced liminal status in American democracy, where they can give candidates their money but not their vote.

voting in the United States, see generally Virginia Harper-Ho, *Noncitizen Voting Rights: The History, the Law and Current Prospects for Change*, 18 LAW & INEQ. 271 (2000); Gerald M. Rosberg, *Aliens and Equal Protection: Why Not the Right to Vote?*, 75 MICH. L. REV. 1092 (1977).

²⁷¹ Robin Liu, *Giving the People a Voice Where It Counts: A Presumption in Favor of Allowing Permanent Residents to Vote in Local Elections*, 32 DUKE J. COMP. & INT'L L. 211, 213 (2021) (“Noncitizens in many Latin American countries had the right to vote as early as the 1920s.”); Martin Ericsson, *Enfranchisement As a Tool for Integration: The 1975 Extension of Voting Rights to Resident Aliens in Sweden*, 38 IMMIGRANTS & MINORITIES 234, 235 (2021); Dan Ferris et al., *Noncitizen Voting Rights in the Global Era: A Literature Review and Analysis*, 21 J. INT’L MIGRATION & INTEGRATION 949, 949 (2019).

²⁷² Local jurisdictions that permit noncitizen residents to vote include the District of Columbia, Oakland, San Francisco, three cities in Vermont, and eleven municipalities in Maryland. *Laws Permitting Noncitizens to Vote in the United States*, BALLOTPEDIA, https://ballotpedia.org/Laws_permitting_noncitizens_to_vote_in_the_United_States#Noncitizen_voting_in_the_United_States [<https://perma.cc/BTU5-3NY9>] (last visited Feb. 19, 2025); see also Liu, *supra* note 271, at 230–31.

²⁷³ See *supra* note 223 and accompanying text.

²⁷⁴ See RON HAYDUK, DEMOCRACY FOR ALL: RESTORING IMMIGRANT VOTING RIGHTS IN THE UNITED STATES 87–107 (2006); Liu, *supra* note 271; Monet Gonnerman & Ryan Willett, *Noncitizen Voting: A Case Study of Oregon*, 25 LEWIS & CLARK L. REV. 361, 363 (2021).

²⁷⁵ Federal law prohibits campaign contributions and expenditures by “foreign nationals,” 52 U.S.C. § 30121(a)(1), but defines that term to exclude U.S. citizens, U.S. nationals, and lawful permanent residents, *id.* § 30121(b).

²⁷⁶ *Bluman v. FEC*, 800 F. Supp. 2d 281, 290–91 (D.D.C. 2011), *aff’d*, 565 U.S. 1104 (2012).

This nuance may yield confusion regarding whether an LPR can vote or even whether a person is an LPR or a citizen. Yaakov Shulman told an investigator that he was a citizen and produced his “green card” as proof, even though the “green card” actually establishes the defendant’s status as a noncitizen permanent resident; he was convicted under Ohio’s illegal voting statute.²⁷⁷ In its post-election audit report, NCSBE recommended better poll worker training, focusing on things like “green cards.”²⁷⁸

While noncitizens cannot vote, they can drive. So, they go to a DMV for a driver’s license. And sometimes they end up with a voter registration card. Like Margarita Del Pilar Fitzpatrick, who was invited by a DMV official (who knew she was a noncitizen) to register to vote and who responded by asking, “Am I supposed to?” The cryptic response (“It’s up to you”) that Fitzpatrick received “apparently follow[ed] a script that Illinois then required clerical officials to use,” ostensibly to comply with the National Voter Registration Act (NVRA).²⁷⁹ Congress enacted the NVRA in 1993 to make it easier for Americans to vote.²⁸⁰ One of the key innovations of the NVRA, often called the “Motor Voter Law,” is to turn state DMVs into federal voter registrars.²⁸¹ The NVRA commands each state to incorporate a federal voter registration application form into its driver’s license application.²⁸² And the NVRA prohibits DMV officials from “mak[ing] any statement to an applicant or tak[ing] any action the purpose or effect of which is to discourage the applicant from registering to vote.”²⁸³ The Illinois Secretary of State would subsequently “revise the department’s Field Operations Manual to require clerks to remind applicants that citizenship is essential to voting.”²⁸⁴ But Fitzpatrick was not a beneficiary of this more sensible policy. Indeed, it appears that Fitzpatrick would have been invited to register to vote even if she had entered “the DMV wearing a T-shirt that says, ‘I’m not a U.S. citizen.’”²⁸⁵

²⁷⁷ *State v. Schulman*, 157 N.E.3d 848, 852 (Ohio Ct. App. 2020) (“[The defendant] originally claimed he was a United States citizen and produced his green card, which more accurately noted he was a permanent resident, non-citizen.”).

²⁷⁸ N.C. STATE BD. OF ELECTIONS, *supra* note 266, at 5 (“NCSBE is developing additional poll worker training to address the nuances with terms like ‘permanent resident’ and ‘green card’ so that poll workers are better equipped to assist voters who are uncertain about their eligibility.”).

²⁷⁹ *Fitzpatrick v. Sessions*, 847 F.3d 913, 914–15 (7th Cir. 2017).

²⁸⁰ *See* 52 U.S.C. § 20501.

²⁸¹ *Id.* § 20504(a)(1).

²⁸² *Id.* § 20504(c)(1).

²⁸³ *Id.* § 20506(a)(5)(C).

²⁸⁴ *Fitzpatrick*, 847 F.3d at 915.

²⁸⁵ *Immigrant Who Wrongly Voted Wins Right to Stay*, CHI. TRIB. (Aug. 25, 2021, 6:13 AM), <https://www.chicagotribune.com/news/ct-xpm-2014-07-05-ct-immigrant-court-ruling-met-20140706-story.html> [<https://perma.cc/JA4F-HR9S>] (“If someone comes into the DMV wearing a T-shirt that says, ‘I’m not a U.S. citizen,’ would they still be asked to vote? The answer is yes.” (quoting Fitzpatrick’s attorney, Richard Hanus)).

For these reasons, some cases may arise where a noncitizen unlawfully votes in a federal election based on the mistaken belief that they are eligible to do so. Does 18 U.S.C. § 611 really criminalize this mistake?

B. Ricardo Knight

For its first eight years on the books, 18 USC § 611 was barely used.²⁸⁶ But on July 15, 2004, the United States indicted Ricardo Knight with one count of non-citizen voting in violation of § 611—his case ultimately produced the first appellate court opinion construing § 611 to validly punish mistaken noncitizen voting.²⁸⁷

Ricardo was born in Jamaica in 1973 but brought to the United States by his family when he was 10.²⁸⁸ He gained LPR status in 1991.²⁸⁹ Schools “placed [him] in special education courses and . . . considered [him] learning disabled.”²⁹⁰ He attended high school in Miami-Dade, where he had an individual education plan reflecting his eligibility for speech therapy and the school’s “Exceptional Student Program (ESE) for specific learning disability.”²⁹¹ According to a psychological evaluation proffered by the defense, he had “a borderline I.Q. of 76 and difficulty not just with learning but with comprehension and deficits in reasoning.”²⁹²

Prior to his prosecution under § 611, he had never been convicted, charged, or arrested for any criminal offense.²⁹³ Indeed, he wanted to be a police officer and took the entrance exam (unaware that noncitizens were ineligible), but failed.²⁹⁴ This was

²⁸⁶ It appears that § 611 was used twice prior to July 2004. Those two cases have been sealed. *See infra* Section III.D.

²⁸⁷ *United States v. Knight*, 490 F.3d 1268 (11th Cir. 2007). Since the trial court prevented Knight from offering evidence at trial, my discussion of the case relies not only on the trial record but also on undisputed factual statements in various court filings. I refer to these filings by their court assigned document number preceded by the defendant’s initials. *See* Offer of Proof of Contents of Documents in Support of Defense, *United States v. Knight*, No. 1:04-CR-20490-MGC (S.D. Fla. Aug. 10, 2005), ECF No. 46 [hereinafter RK 46]; Offer of Proof of Defense Exhibits at 3–4, *Knight*, No. 1:04-CR-20490-MGC, ECF No. 48 [hereinafter RK 48]; Exhibit List, *Knight*, No. 1:04-CR-20490-MGC, ECF No. 54 [hereinafter RK 54]; Defendant’s Sentencing Memorandum, *Knight*, No. 1:04-CR-20490-MGC, ECF No. 66 [hereinafter RK 66]; Notice of Filing, *Knight*, No. 1:04-CR-20490-MGC, ECF No. 67 [hereinafter RK 67] (letters from family members requesting leniency).

²⁸⁸ RK 48, *supra* note 287, at 2, 4; RK 66, *supra* note 287, at 1.

²⁸⁹ RK 66, *supra* note 287, at 1.

²⁹⁰ *Id.*

²⁹¹ RK 48, *supra* note 287, at 5.

²⁹² RK 66, *supra* note 287, at 1–2.

²⁹³ RK 67, *supra* note 287, at 4; Government’s Resp. to Standing Disc. Order at 1, *United States v. Knight*, No. 1:04-CR-20490-MGC (S.D. Fla. Aug. 10, 2005), ECF No. 10 [hereinafter RK 10] (“There does not appear to be any record of arrests or convictions for the defendant.”); RK 66, *supra* note 287, at 2.

²⁹⁴ RK 67, *supra* note 287, at 6; RK 48, *supra* note 287, at 4; RK 66, *supra* note 287, at 2.

part of a pattern of “numerous failed attempts [at] academic and vocational pursuits.”²⁹⁵ He registered to vote in Miami-Dade County in 1995 and voted in the November 2000 presidential election.²⁹⁶

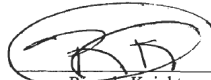
In 1997, he applied to become a U.S. citizen. In 2001, when Ricardo was interviewed by immigration officials for his citizenship application, he voluntarily informed them that he had voted.²⁹⁷ He consistently maintained that he was unaware of his ineligibility when he voted.²⁹⁸ According to a local election official, “[u]pon finding that he was not eligible to vote because of citizenship, he cancelled his registration”²⁹⁹ This occurred over two years prior to his indictment.

After his conviction, he submitted the following statement to the court³⁰⁰:

**DEFENDANT’S STATEMENT FOR
ACCEPTANCE OF RESPONSIBILITY**

Ricardo Knight, through undersigned counsel, submits the following Acceptance of Responsibility:

I am very sorry that I voted in the election. I did not know I was not allowed to vote. I never meant to hurt anyone. I will not do this again.


Ricardo Knight

Though § 611 contains no mens rea term, the prosecution argued it was a “general intent” offense that required mens rea for its actus reus but no more than that.³⁰¹ Since § 611 prohibits voting by noncitizens, its actus reus consists of two physical elements: voting (the proscribed conduct) and noncitizen status (the attendant circumstance). Under this theory, § 611 requires (1) knowledge that one’s conduct constitutes voting and (2) knowledge that one is a noncitizen, but not (3) knowledge that noncitizens are ineligible to vote.³⁰² To bolster this theory, the

²⁹⁵ RK 48, *supra* note 287, at 5.

²⁹⁶ It appears Knight registered to vote 3 times, first in February 1995, again in October 1997, and finally in May 1999. *See* RK 54, *supra* note 287, at 1; RK 46, *supra* note 287, at 4.

²⁹⁷ *United States v. Knight*, 490 F.3d 1268, 1269 (11th Cir. 2007).

²⁹⁸ RK 66, *supra* note 287, at 2.

²⁹⁹ RK 46, *supra* note 287, at 4.

³⁰⁰ Notice of Filing Defendant’s Statement Acceptance of Response at 3, *United States v. Knight*, No. 1:04-CR-20490-MGC (S.D. Fla. Aug. 10, 2005), ECF No. 64 [hereinafter RK 64].

³⁰¹ Government’s Response in Opposition to Defendant’s Objections to the Magistrate Judge’s Report & Recommendation Denying His Motions to Dismiss Indictment at 3, *Knight*, No. 1:04-CR-20490-MGC, ECF No. 40 [hereinafter RK 40].

³⁰² I critique this theory in Section V.C.1.

prosecution included mens rea terminology in the indictment that does not appear in the statute itself.

On or about November 7, 2000, . . . RICARDO KNIGHT, an alien, fully *knowing* he was not a United States citizen, did *knowingly* vote in an election held in part for the purpose of electing a candidate for federal office.³⁰³

Defense counsel filed a motion to dismiss the indictment with a supporting memorandum, arguing the offense was unconstitutional unless it included status scienter as an element.³⁰⁴ This motion was opposed by the United States and denied by the court.³⁰⁵ Defense counsel also had Ricardo examined by an expert who could help the jury understand his mental state. The report of the defense's proffered expert included the following observations from his clinical evaluation:

Attention, concentration, and persistence were variable throughout the evaluation. . . . His stream of thought is slow, there are word retrieval difficulties, and while many of his statements are goal oriented, his hesitation, uncertainty and interruptions in train of thought, denote internal cognitive turmoil. . . . Articulation is characterized by very simple sentence formation and at times there is a child-like quality to his thought processes Some deficits in cognitive processing are apparent and ability to reason abstractly and discriminatively is lacking. The communication process required simplification and clarification. Overall executive functioning appears compromised by underlying cognitive deficits.³⁰⁶

The United States filed a motion in limine "to exclude any expert or other testimony of the defendant's diminished capacity, cognitive deficits, or alleged mental defects."³⁰⁷ The trial court granted the motion.³⁰⁸ The trial court also refused to permit the defense to introduce the letter from the local official stating that

³⁰³ Indictment at 1, *Knight*, No. 1:04-CR-20490-MGC, ECF No. 1 [hereinafter RK 1] (emphasis added).

³⁰⁴ Motions to Dismiss Indictment at 4, *Knight*, No. 1:04-CR-20490-MGC, ECF No. 15 [hereinafter RK 15].

³⁰⁵ Government's Reply to Defendant's Response to Motion in Limine at 2, *Knight*, No. 1:04-CR-20490-MGC, ECF No. 41 [hereinafter RK 41].

³⁰⁶ RK 48, *supra* note 287, at 4.

³⁰⁷ RK 41, *supra* note 287, at 2.

³⁰⁸ Criminal Trial Minutes at 1, *Knight*, No. 1:04-CR-20490-MGC, ECF No. 45 [hereinafter RK 45].

“[u]pon finding that he was not eligible to vote because of citizenship, [Ricardo] canceled his registration.”³⁰⁹

So, in February of 2005, Ricardo went to trial, unable to present evidence to the jury to explain his conduct. Under the statutory construction advanced by the prosecution and accepted by the court, § 611 excused mistakes about citizenship but not mistakes about voter eligibility. So, the defense framed Ricardo’s confusion in terms of citizenship rather than voter eligibility. Recall that Ricardo applied for citizenship several years before his unlawful vote in the 2000 Presidential election.³¹⁰

Even though Ricardo was unable to present evidence regarding his mental condition, the jury was still hesitant to convict. During their deliberations, the jury submitted the following question to the judge:

IS IT CLEAR WHEN YOU FILL OUT THE APPLICATION FOR CITIZENSHIP THAT IT IS ALL THAT IS REQUIRED OR WHETHER A FOLLOW UP & SWEARING IN IS REQUIRED. BY CLEAR WE MEAN: IS IT IN WRITING? DOES SOMEONE AT INS TELL YOU?—OR—IS IT JUST COMMON KNOWLEDGE? DOES THE PERSON KNOW FOR A FACT THAT HE IS NOT A CITIZEN AFTER FILLING OUT THE APPLICATION AND SENDING IT IN?³¹¹

Unsatisfied with the judge’s response, the jury then announced it was deadlocked: “We as a jury have not been able to come to a unanimous decision and don’t feel that we will reach a unanimous decision. What is the next step we should take?”³¹²

Instead of declaring a mistrial, the court gave the jury a so-called modified “Allen” charge, asking them to “continue [their] deliberations in an effort to reach agreement upon a verdict and dispose of this case.”³¹³ These Allen charges are controversial, with critics arguing they pressure holdout jurors to convict.³¹⁴ Here

³⁰⁹ RK 46, *supra* note 287, at 4.

³¹⁰ See RK 54, *supra* note 287, at 1.

³¹¹ Question/Note from Deliberating Jury to the Court at 1, *Knight*, No. 1:04-CR-20490-MGC, ECF No. 58 [hereinafter RK 58].

³¹² Question/Note from Deliberating Jury to the Court at 1, *Knight*, No. 1:04-CR-20490-MGC, ECF No. 56 [hereinafter RK 56].

³¹³ Modified “Allen” Charge at 1, *Knight*, No. 1:04-CR-20490-MGC, ECF No. 59 [hereinafter RK 59].

³¹⁴ See generally, e.g., *On Instructing Deadlocked Juries*, 78 YALE L.J. 100 (1968); George C. Thomas III & Mark Greenbaum, *Justice Story Cuts the Gordian Knot of Hung Jury Instructions*, 15 WM. & MARY BILL RTS. J. 893 (2007); Emil J. Bove III, *Preserving the Value of Unanimous Criminal Jury Verdicts in Anti-Deadlock Instructions*, 97 GEO. L.J. 251, 253–54 (2008); Gary B. Ferguson, *An Argument for the Abandonment of the Allen Charge in California*, 15 SANTA CLARA LAW. 939 (1974).

is the relevant language from the modified Allen charge that might have influenced jurors reluctant to convict Ricardo Knight.

The trial has been expensive in time, effort, money and emotional strain to both the defense and the prosecution. . . . Obviously, another trial would only serve to increase the cost to both sides If a substantial majority of your number are in favor of a conviction, those of you who disagree should reconsider whether your doubt is a reasonable one since it appears to make no effective impression upon the minds of the others.³¹⁵

The jury returned a guilty verdict. The Eleventh Circuit affirmed, endorsing the prosecution's theory that § 611 is a "constitutionally-sound general intent offense."³¹⁶

C. The Florida 15

Ricardo Knight's was not the only § 611 case initiated in 2004 by the office of the U.S. Attorney for the Southern District of Florida. On the same day—July 15, 2004—that office charged fifteen noncitizens (including Knight) under § 611.³¹⁷ I refer to these defendants and their cases as "the Florida 15." Table 2 summarizes key information about the 11 cases with publicly accessible information.

It appears the Florida 15 cases represented a Department of Justice (DOJ) pilot project to prosecute noncitizen voting under § 611. In 2002, Attorney General Ashcroft launched the Ballot Access and Voting Integrity Initiative (BAVII), a "Department-wide" effort established in part "to increase the Department's . . . effectiveness in addressing election crimes" that produced a "marked increase in

³¹⁵ RK 59, *supra* note 287, at 1–2.

³¹⁶ *United States v. Knight*, 490 F.3d 1268, 1271 (11th Cir. 2007).

³¹⁷ See Indictment at 1, *United States v. Knight*, No. 2:04-CR-14047-DMM (S.D. Fla. Aug. 10, 2005) (filed July 15, 2004); Indictment at 1, *United States v. Bennett*, No. 2:04-CR-14048-DMM (S.D. Fla. Oct. 13, 2004) (same); Indictment at 1, *United States v. Francois*, No. 1:04-CR-20488-MGC (S.D. Fla. Nov. 19, 2004) (same); Indictment at 1, *United States v. Lubin*, No. 0:04-CR-60163-WPD (S.D. Fla. Sept. 17, 2004) (same); Indictment at 1, *United States v. McKenzie*, No. 0:04-CR-60160-JIC (S.D. Fla. Nov. 19, 2004) (same); Indictment at 1, *United States v. Exavier*, No. 0:04-CR-60161-KAM (S.D. Fla. Oct. 5, 2004) (same); Indictment at 1, *United States v. Palmer*, No. 0:04-CR-60159-WJZ (S.D. Fla. Oct. 4, 2004) (same); Indictment at 1, *United States v. Palmer*, No. 0:04-CR-60162-WJZ (S.D. Fla. Oct. 4, 2004) (same); Indictment at 1, *United States v. Phillip*, No. 9:04-CR-80103-WPD (S.D. Fla. Nov. 17, 2004) (same); Indictment at 1, *United States v. Rickman*, No. 1:04-CR-20491-JLK (S.D. Fla. Jan. 10, 2005) (same); Indictment at 1, *United States v. Shivdayal*, No. 0:04-CR-60164-JIC (S.D. Fla. Nov. 19, 2004) (same); Indictment at 1, *United States v. Sweeting*, No. 1:04-CR-20489-JAL (S.D. Fla. Dec. 2, 2004) (same); Indictment at 1, *United States v. Torres-Perrez*, No. 2:04-CR-14046-DLG (S.D. Fla. Jan. 31, 2005) (same); *United States v. O'Neil*, No. 0:04-CR-60165-KAM (S.D. Fla. Sept. 24, 2004) (same).

nationwide prosecutions and convictions for ballot fraud.”³¹⁸ As part of BAVII, the DOJ trained “a responsible official, the District Election Officials (DEOs), in every U.S. Attorney’s Office across the country.”³¹⁹ Karen Rochlin, the DEO for the Southern District of Florida, prosecuted all 15 of the § 611 cases filed by the office in 2004.³²⁰ Craig Donsanto, the Director of the Elections Crimes Branch of the DOJ’s Public Integrity Section, referred to these § 611 prosecutions as a “pilot project” to go after “individual offenders acting alone,” including “alien voters” who “vote when not eligible to vote,” unrelated to “conspiracies to corrupt the process.”³²¹ These comments were memorialized in an interview summary appended to a 2006 report of the U.S. Election Assistance Commission (EAC) on election crimes.³²²

The 11 cases summarized in Table 2 are remarkably similar. Like Ricardo Knight, each defendant was born outside the United States, either in the Caribbean or South America (Haiti, Jamaica, the Bahamas, Guyana, Trinidad and Tobago, or Colombia). Most had been a lawful permanent resident (LPR) when they first registered to vote. Many had family members (spouses, children, or both) who were U.S. citizens. Each one registered to vote and cast a ballot in at least one federal election based on a mistaken belief in their eligibility. All had no prior convictions when they were indicted under § 611 in 2004. Each one wanted to become a U.S. citizen and applied for naturalization. Each one freely disclosed their prior voting history on their naturalization application. In each case, immigration authorities posed follow-up questions about the prior voting history, often asking the person to complete an affidavit and/or a supplemental form, in some cases multiple times.

³¹⁸ CRAIG C. DESANTO ET AL., *FEDERAL PROSECUTION OF ELECTION OFFENSES*, at xiii–xiv (7th ed. 2007).

³¹⁹ *Fact Sheet: Protecting Voting Rights and Prosecuting Voter Fraud*, U.S. DEPT. OF JUST. (Oct. 31, 2006), https://www.justice.gov/archive/opa/pr/2006/November/06_crt_738.html [<https://perma.cc/Q5DF-YGZR>].

³²⁰ *See Fact Sheet: Protecting Voting Rights and Preventing Election Fraud*, U.S. DEPT. OF JUST., https://www.justice.gov/archive/opa/pr/2002/November/02_at_641.htm [<https://perma.cc/LQ58-Y8CL>] (last visited Feb. 19, 2025).

³²¹ U.S. ELECTION ASSISTANCE COMM’N, *EAC SUMMARY OF EXPERT INTERVIEWS VOTING FRAUD—VOTER INTIMIDATION RESEARCH 4* (2006).

³²² *See* U.S. ELECTION ASSISTANCE COMM’N, *ELECTION CRIMES: AN INITIAL REVIEW AND RECOMMENDATIONS FOR FUTURE STUDY 7–9* (Dec. 2006). Curiously, a footnote to the interview summary cryptically reports: “This interviewee did not agree with the consultants’ interpretation of his interview comments. Therefore, EAC made clarifying edits to this portion of the consultants’ interview summaries.” U.S. ELECTION ASSISTANCE COMM’N, *supra* note 321, at 2 n.1.

Table 2. Other Members of the Florida 15

NAME [INFO]	EXPLANATION TO IMMIGRATION AUTHORITIES
Kenneth Bennett [D, B, 56, 20]	<i>I was asked to get a voter's registration card for a job. As I do [not] read or write English well, someone in the office filled the application out for me. I did not understand the card and nobody explained it to me. I was not told it was improper to apply for a voter's registration card.</i>
Gerard Francois [D, B, 56, 10]	<i>Because I thought after 7 years of residence one person told me I had enough time to be citizen. I believe I was citizen. I filed after for passport but they told me I needed to file for citizenship first.</i>
Elizabeth Bain Knight [U, U, 52, 10]	<i>Called Clerk Office in Martin County and they told me because my husband was a citizen that I could vote in the US. They did not tell me that I have to be a citizen also. For that reason I am sorry. Everything was a misunderstanding.</i>
Jobero Lubin [D, B, 37, 5]	<i>I thought because I was in the process of becoming a citizen and because I was a permanent resident then I could vote.</i>
Syble McKenzie [D, B, 53, 10]	<i>I did not know I was not suppose to vote.</i>
Lloyd Palmer [D, B, 73, 4]	<i>Somebody came to my home . . . she told us that resident aliens are now eligible to vote, so we took her at her word, and a card came through the mail.</i>
Velrine Palmer [D, B, 56, 4]	<i>This Lady came to the house she always came and encouraged my aunt to vote because she had an eye problem so we know her . . . she told us permanent residents were now eligible to vote . . . once I received the voter registration card I thought it was the truth, if not I thought the card would be denied.</i>
Christiana Phillip [D, B, 34, 4]	<i>The person who solicited me told that it will help me get my citizenship and I want to be a part of the U.S. and I want to make this my home.</i>
Egbert Rickman [N, B, 59, 30]	<i>I was listening to a morning radio program on HOT 105 (Tom Joyner) in October 2000 that stated residence could register to vote by calling Hot 105 radio station. I call the radio station gave them my address, and they send a register card to sign. I Egbert Rickman, apologize to register to vote. I miss understood the program (Tom Joyner).</i>

NAME [INFO]	EXPLANATION TO IMMIGRATION AUTHORITIES
Troy Shivdayal [N, B, 23, 3]	<i>I did not understand the difference of citizen and non-citizen.</i>
Astrid Torres-Perez [I, W, 24, 9]	<i>Because some of my friends and I turned 18 years old. I believed that I needed to be 18 years old and have lived in the United States for at least 10 years. I was told I have the right to vote.</i>

Below each defendant's name, I note their party affiliation, race, age, and LPR duration in square brackets. Party affiliation and race are based on the voter registration forms included in the discovery packets. For party affiliation, D = Democratic, R = Republican, N = No Partisan Affiliation, U = Unknown. For race, B = Black, W = White, H = Hispanic, U = Unknown. Age is measured at the time of indictment. LPR duration is measured at the time the defendant first voted. All information in Table 2 is based on the discovery packets submitted by the prosecution.³²³

Table 2 excludes Ricardo Knight, whose case is already discussed in Section III.B. Table 2 also excludes three members of the Florida 15 whose publicly available discovery packets lack essential details: Barbara Sweeting, Helen Exavier, and Jerry St. Clair O'Neil.³²⁴ As I discuss below, Barbara Sweeting was acquitted after a jury trial.³²⁵ It appears that Helen Exavier was the daughter of Lloyd Palmer and

³²³ Government's Response to Standing Discovery Order at 5, 7–8, 18, *United States v. Bennett*, No. 2:04-CR-14048-DMM (S.D. Fla. Oct. 13, 2004); Government's Response to Standing Discovery Order at 6, 17–19, *United States v. Francois*, No. 1:04-CR-20488-MGC (S.D. Fla. Nov. 19, 2004); Government's Response to Standing Discovery Order at 7–8, 15, *United States v. Knight*, No. 2:04-CR-14047-DMM (S.D. Fla. Aug. 10, 2005); Government's Response to Standing Discovery Order at 5–6, 10, 17, *United States v. Lubin*, No. 0:04-CR-60163-WPD (S.D. Fla. Sept. 17, 2004); Government's Response to Standing Discovery Order at 15, 19, 21, *United States v. McKenzie*, No. 0:04-CR-60160-JIC (S.D. Fla. Nov. 19, 2004); Government's Response to Standing Discovery Order at 5–6, 12, 23, 26, *United States v. Palmer*, No. 0:04-CR-60159-WJZ (S.D. Fla. Oct. 4, 2004); Government's Response to Standing Discovery Order at 5–6, 10, 21–22, *United States v. Palmer*, No. 0:04-CR-60162-WJZ (S.D. Fla. Oct. 4, 2004); Government's Response to Standing Discovery Order at 5, 11, 15–16, *United States v. Phillip*, No. 9:04-CR-80103-WPD (S.D. Fla. Nov. 17, 2004); Government's Response to Standing Discovery Order at 6, 14–15, 17, *United States v. Rickman*, No. 1:04-CR-20491-JLK (S.D. Fla. Jan. 11, 2005); Government's Response to Standing Discovery Order at 6–7, 9, 24, *United States v. Shivdayal*, No. 0:04-CR-60164-JIC (S.D. Fla. Nov. 19, 2004); Government's Response to Standing Discovery Order at 7, 14, 18, 27, *United States v. Torres-Perez*, No. 2:04-CR-14046-DLG (S.D. Fla. Jan. 31, 2005).

³²⁴ Government's Response to Standing Discovery Order, *United States v. Sweeting*, No. 1:04-CR-20489-JAL (S.D. Fla. Dec. 2, 2004); Government's Response to Standing Discovery Order, *United States v. Exavier*, No. 0:04-CR-60161-KAM (S.D. Fla. Oct. 5, 2004); Government's Response to Standing Discovery Order, *United States v. O'Neil*, No. 0:04-CR-60165-KAM (S.D. Fla. Sept. 24, 2004).

³²⁵ See *infra* notes 338–49 and accompanying text.

Velrine Palmer, and lived with her parents when someone came to their home on a voter registration drive.³²⁶ In October 2004, the prosecution dismissed the cases against Helen, Lloyd, and Velrine.³²⁷ Jerry St. Clair O'Neil pled guilty, but I'm unable to access either his indictment or his plea agreement.³²⁸

In each case, the person complied, answering all questions asked and explaining their confusion about their voter eligibility. In each case, the prosecution intended to use these responses as evidence in the criminal prosecution. Many canceled their voter registration after their interaction with the immigration authorities. Many self-identified as Black and/or a Democrat on their voter registration form, which the prosecution included in the discovery packet.

The cases are not identical. Ricardo Knight had documented cognitive disabilities. One defendant registered to vote, at the age of eighteen, "with many of [her] friends from school."³²⁹ One was seventy-three years old.³³⁰ One required a Cajun interpreter throughout their federal court proceedings.³³¹ Some had LPR status for

³²⁶ Helen's indictment refers to her as "Helen Elizabeth Exavier a/k/a Helen Palmer." Indictment at 1, *Exavier*, No. 0:04-CR-60161-KAM. Lloyd's naturalization application lists Velrine as his spouse and "Helen Elizabeth Palmer" as a daughter who lives with him. Government's Response to Standing Discovery Order at 14, 16, *Palmer*, No. 0:04-CR-60159-WJZ. Velrine's naturalization application lists Lloyd as her spouse and "Helen Elizabeth Palmer" as a daughter who lives with her. Government's Response to Standing Discovery Order at 12, 14, *Palmer*, No. 0:04-CR-60162-WJZ. Lloyd's discovery packet includes an affidavit from a person stating, "I was present in the Palmer home in 2000, when a lady . . . who represented herself as a Community Activist for the Broward County Elections Office, advised Lloyd Palmer, Velrine Palmer & Helen Exavier that as Lawful Permanent Residents, they were entitled to register to vote." Government's Response to Standing Discovery Order at 9, *Palmer*, No. 0:04-CR-60159-WJZ.

³²⁷ Order of Dismissal, *Exavier*, No. 0:04-CR-60161-KAM; Order of Dismissal, *Palmer*, No. 0:04-CR-60159-WJZ.

³²⁸ Change of Plea, *O'Neil*, No. 0:04-CR-60165-KAM. The discovery packet in this case contains the following bare assertion: "On June 3, 1996, agents of the United States Department of State arrested the defendant for passport fraud and making a false claim of United States citizenship. No disposition appears. On that same date, the Immigration and Naturalization Service arrested the defendant on immigration charges and initiated deportation proceedings." Government's Response to Standing Discovery Order at 1, *O'Neil*, No. 0:04-CR-60165-KAM. If this assertion is true, this may be the one case of the Florida 15 involving fraud rather than mistake. But it's not clear whether Mr. O'Neil was actually subjected to arrest and deportation for immigration fraud eight years before his § 611 indictment. I can find no other federal case for this defendant. The only charge in this case is § 611, and the judge-imposed probation and a \$250 fine. My efforts to contact the defense attorney (two decades after the case ended) failed to yield clarifying information.

³²⁹ Government's Response to Standing Discovery Order at 6, 18, *United States v. Torres-Perez*, No. 2:04-CR-14046-DLG (S.D. Fla. Jan. 31, 2005).

³³⁰ See Government's Response to Standing Discovery Order at 12, *Palmer*, No. 0:04-CR-60159-WJZ.

³³¹ See Interpreter Required in Case at 1, *United States v. Francois*, No. 1:04-CR-20488-MGC (S.D. Fla. Nov. 19, 2004).

only four years when they first registered, while others had LPR status for thirty years when they voted.³³²

When asked why they voted, they provided different responses, but they were all variations on a similar theme: confusion and a mistaken belief in some fictitious rule about eligibility. Jobero Lubin thought he was eligible to vote because he was in the naturalization process.³³³ Christiana Phillip thought that filling out a voter registration card would help her become a citizen.³³⁴ The immigration authorities denied Kenneth Bennett's naturalization application on the ground that he lacked sufficient command of English and understanding of U.S. rules.³³⁵

These defendants responded differently to their indictments. Some hired private attorneys. Some were assigned a federal public defender. Most pled guilty without significant motions practice. Some moved to dismiss the indictment before ultimately pleading. Only three defendants went to trial. One was Ricardo Knight, who was convicted by a jury that heard no evidence about his mental condition.³³⁶ Another was Christiana Phillip, who accepted a plea while the jury was deliberating.³³⁷

The third was Barbara Sweeting, who went to trial and won.³³⁸ The trial took place on November 30, and December 1, 2004. The jury deliberated and returned their verdict of acquittal on December 2, 2004. The jury instructions provided the following guidance on mens rea: "In order to prove a violation of Section 611, it is not necessary for the government to prove that the defendant knew it was unlawful for an alien to vote."³³⁹

Jury deliberations included repeated interaction between the jury and the judge. In real life, it consisted of notes passed back and forth. I present it here as a colloquy:

³³² See, e.g., Government's Response to Standing Discovery Order at 6, 16, *United States v. Rickman*, No. 1:04-CR-20491-JLK (S.D. Fla. Jan. 11, 2005) (showing that Rickman had LPR status for about 30 years before voting in the 2000 presidential election); Government's Response to Standing Discovery Order at 12, 28, *Palmer*, No. 0:04-CR-60159-WJZ (showing that Lloyd Palmer had LPR status for about four years before voting in the 2000 primary).

³³³ Government's Response to Standing Discovery Order at 16, *United States v. Lubin*, No. 0:04-CR-60163-WPD (S.D. Fla. Sept. 17, 2004).

³³⁴ Government's Response to Standing Discovery Order at 11, *United States v. Phillip*, No. 9:04-CR-80103-WPD (S.D. Fla. Nov. 17, 2004).

³³⁵ Government's Response to Standing Discovery Order at 26, *United States v. Bennett*, No. 2:04-CR-14048 (S.D. Fla. Aug. 18, 2004).

³³⁶ See RK 54, *supra* note 287, at 1; see also Order Affirming Magistrate's Report & Recommendation & Denying Defendant's Motions to Dismiss Indictment at 1, *United States v. Knight*, No. 1:04-CR-20490-MGC (S.D. Fla. Aug. 10, 2005) (finding that "section 611 'is a . . . general intent offense'").

³³⁷ See Judgment in a Criminal Case at 1, *Phillip*, No. 9:04-CR-80103-WPD.

³³⁸ See Judgment of Acquittal, *United States v. Sweeting*, No. 1:04-CR-20489-JAL (S.D. Fla. Dec. 2, 2004).

³³⁹ Court's Instructions to the Jury at 7, *Sweeting*, No. 1:04-CR-20489-JAL.

JURY: WHY WAS THE VOTER REGIS CARD NOT PRESENTED? WHAT IS THE DATE OF THE VOTER REGIS CARD?³⁴⁰

JUDGE: Members of the Jury, You are to decide this case based upon the evidence received into the record and presented to you.³⁴¹

JURY: WHY DID THE GOVT BUREAUCRACY(CIES) ALLOW HER TO HAVE A VOTER REGIS CARD?³⁴²

JUDGE: Members of the Jury, You should resolve this case based upon the evidence and the instructions on the law which you have already received.³⁴³

JURY: Why does the voter regis card give no indication that she IS or IS NOT a citizen? WHY ARE WE HERE? (the word “knowingly”?) WHY DID THE GOV’T LET HER THROUGH THE SYSTEM?³⁴⁴

JUDGE: Members of the jury, Please refer to my prior responses.³⁴⁵

JURY: Why was the 2/24/1995 registration cancelled (Govt Ex #4)? Why was the word cancelled spelled improperly in Gov Ex #4?³⁴⁶

³⁴⁰ Question/Note from the Jury to the Court at 1, *Sweeting*, No. 1:04-CR-20489-JAL (10:45 AM).

³⁴¹ Response from the Court to the Jury Question at 1, *Sweeting*, No. 1:04-CR-20489-JAL (11:16 AM).

³⁴² Question/Note from the Jury to the Court at 1, *Sweeting*, No. 1:04-CR-20489-JAL. There is no time stamp on this docket entry, but if the docket entries are in order, it must have occurred between 11:16 AM and 11:32 AM.

³⁴³ Response from the Court to the Jury Question at 1, *Sweeting*, No. 1:04-CR-20489-JAL (11:32 AM).

³⁴⁴ Question/Note from the Jury to the Court at 1, *Sweeting*, No. 1:04-CR-20489-JAL (11:34 AM).

³⁴⁵ Response from the Court to the Jury Question, *Sweeting*, No. 1:04-CR-20489-JAL (11:40 AM).

³⁴⁶ Question/Note from the Jury to the Court, *Sweeting*, No. 1:04-CR-20489-JAL (12:25 PM).

JUDGE: Members of the Jury, Please refer to my prior responses.³⁴⁷

JURY: WE HAVE REACHED A VERDICT.³⁴⁸

That verdict was not guilty. This colloquy suggests that the jury resented the government's effort to prosecute voter mistake: they understood this was a case of mistake rather than fraud; they attributed the mistake at least partly to state officials rather than to Ms. Sweeting alone; they thought about the crime's mens rea requirements during their deliberations; and they did not think a criminal conviction of Ms. Sweeting was the appropriate response to this mistake. Figure 5 shows the third jury question.³⁴⁹

Figure 5. Jury Question

QUESTION/NOTE FROM THE
JURY TO THE COURT

① Why does the voter refuse card give no indication
that she IS or IS NOT a citizen?

WHY ARE WE HERE?
(the word "knowingly"?)

WHY DID THE GOV'T LET
HER THROUGH THE
SYSTEM?

The Florida 15 prosecutions represented a "pilot project[]" to determine . . . what works with juries in such matters to gain convictions."³⁵⁰ The Sweeting trial showed that at least some juries would resist the efforts of federal prosecutors to impose strict criminal liability in cases of mistaken noncitizen voting. But the Knight trial showed that other juries would go for it.³⁵¹ And most cases would never reach a jury because risk-averse defendants would plead.

³⁴⁷ Response from the Court to the Jury Question, *Sweeting*, No. 1:04-CR-20489-JAL (1:13 PM).

³⁴⁸ Question/Note from the Jury to the Court, *Sweeting*, No. 1:04-CR-20489-JAL (2:45 PM).

³⁴⁹ Question/Note from the Jury to the Court at 1, *Sweeting*, No. 1:04-CR-20489-JAL (11:34 AM).

³⁵⁰ U.S. ELECTION ASSISTANCE COMM'N, *supra* note 321, at 4.

³⁵¹ See Verdict, *United States v. Knight*, No. 1:04-CR-20490-MGC (S.D. Fla. Aug. 10, 2005).

D. Other § 611 Cases

In the twenty years since the Florida 15 prosecutions, how often has § 611 been used? To answer that question, I analyzed a dataset from the Federal Judicial Center (FJC) that codes every criminal prosecution in federal court since 1996, when § 611 was enacted. This dataset lists the first five charges at both the start and the end of the prosecution. I extracted every case listing 18 U.S.C. § 611 as one of the five charges at either the start or the end. Through this process, I identified fewer than 100 cases, including the Florida 15. About 40 of these cases were filed in North Carolina following the 2016 election by 2 Trump appointees, Robert J. Higdon, Jr., U.S. Attorney for the Eastern District of North Carolina, and Matthew G.T. Martin, U.S. Attorney for the Middle District of North Carolina.

Like the Florida 15 prosecutions, these North Carolina prosecutions appear to involve voter mistakes by noncitizens who reported § 611 violations to authorities. In a post-election audit, NCSBE ultimately identified 41 noncitizens who voted in the state's 2016 election.³⁵² First, using state and federal databases, investigators flagged 136 data matches between lists of noncitizens and lists of persons who voted, indicating potential cases of noncitizen voting.³⁵³ Then, in each of these 136 cases, the NCSBE sent a letter to the flagged individual notifying them of the flag, informing them that noncitizen voting is a crime, and inviting them to admit or deny their noncitizen status.³⁵⁴ Of the 136 persons sent a letter, 61 did not respond, 34 responded with proof of U.S. citizenship, and 41 admitted their noncitizen status.³⁵⁵ Over the next few years, Higdon and Martin initiated several dozen § 611 prosecutions. One of those cases was brought against Allesandro Cannizzaro, who passed his citizenship test but failed to take the oath of citizenship before voting.³⁵⁶

The FJC captures criminal prosecutions but not immigration cases. Noncitizen voting in violation of any state or federal law can trigger removability, inadmissibility, and a finding that the noncitizen lacks good moral character.³⁵⁷ Immigration officials can remove a noncitizen on this basis, even if the noncitizen has not been convicted of, or even charged with, a state or federal offense, so long as the officials can establish that the noncitizen unlawfully voted, though immigration officials must specify which law the noncitizen allegedly violated.³⁵⁸ If immigration officials

³⁵² N.C. STATE BD. OF ELECTIONS, *supra* note 266, at 2.

³⁵³ *See id.* at 4–5.

³⁵⁴ *See, e.g., id.* app. 4.1, at 7–9.

³⁵⁵ *Id.* at 4–5.

³⁵⁶ *See supra* note 261 and accompanying text.

³⁵⁷ *See supra* note 55.

³⁵⁸ Memorandum from William R. Yates on Procedures for Handling Naturalization Applications of Aliens Who Voted Unlawfully or Falsely Represented Themselves as U.S. Citizens by Voting or Registering to Vote 2 (May 7, 2002), https://www.uscis.gov/sites/default/files/document/memos/VoterMem_Plus86.pdf [<https://perma.cc/JML9-FVPP>].

specify a state law with mens rea requirements, they must show the noncitizen voted with the requisite mens rea.³⁵⁹ But if the noncitizen voted in a federal election, immigration officials can specify 18 U.S.C. § 611 as the relevant law and thereby obviate the need to show status scienter.³⁶⁰ When a federal prosecutor charges a noncitizen under § 611, the noncitizen has a right to a criminal trial before an Article III judge with the assistance of counsel and the full panoply of procedural rights accorded criminal defendants.³⁶¹ But when immigration officials seek to remove a noncitizen based on a § 611 violation, the noncitizen is accorded a civil proceeding before an Article I judge with no right to counsel, limited procedural protections, and deferential appellate review.³⁶²

Federal courts review some of these § 611 immigration cases, like Fitzpatrick's, producing opinions that are easy to find.³⁶³ But immigration cases rarely receive judicial review culminating in a published opinion by a federal appellate court. As far as I am aware, there is no comprehensive database of immigration cases analogous to the FJC database for criminal prosecutions. So, an exhaustive study of all § 611 cases lies beyond the scope of this Article. Its use by federal prosecutors is easier to document and limited—about 100 cases in almost 3 decades. Its use by immigration officials is harder to quantify but frequent enough to produce at least six published opinions by federal appellate courts.

IV. THE COSTS OF CRIMINALIZING VOTER MISTAKE

The preceding Parts documented how some jurisdictions treat voter mistake like voter fraud by prosecuting ineligible voting as a strict liability crime. This Part considers the costs of this practice on both criminal justice and American democracy.

A. Criminal Justice Costs

This Section explains how strict criminal liability for mistaken ineligible voting undermines criminal justice by severing criminality from culpability, punishing democratic participation, targeting marginalized populations, and amplifying systemic bias.

³⁵⁹ *Id.* at 4.

³⁶⁰ *Id.* at 2.

³⁶¹ See U.S. CONST. amend. VI; see also *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (holding that criminal defendants, regardless of citizenship status, have the right to counsel under the Sixth Amendment).

³⁶² See, e.g., *Chernosky v. Sessions*, 897 F.3d 923, 925 (8th Cir. 2018).

³⁶³ See, e.g., *Wood v. U.S. Att'y Gen.*, 853 F. App'x 475 (11th Cir. 2021); *Olaifa v. Mayorkas*, No. 18 CV 6801, 2021 WL 1057736 (N.D. Ill. Mar. 18, 2021); *Chernosky v. Sessions*, 897 F.3d 923 (8th Cir. 2018); *Kimani v. Holder*, 695 F.3d 666 (7th Cir. 2012); *Keathley v. Holder*, 696 F.3d 644 (7th Cir. 2012).

1. Criminality, Culpability, and Democratic Participation

Strict criminal liability for mistaken ineligible voting severs criminality from culpability while punishing democratic participation. Strict criminal liability is generally disfavored, and for good reason. A foundational concept of the Anglo-American legal system is that criminal liability requires moral culpability. Blackstone repeatedly emphasized this: “*Actus non facit reum, nisi mens sit rea*” (an act does not make a person guilty unless the mind is also guilty);³⁶⁴ “[T]he injury must be done with an intention; otherwise, the act is not a crime”;³⁶⁵ “[T]o constitute a crime against human laws, there must be, first, a vicious will.”³⁶⁶ There is simply a fundamental difference between purposeful and accidental conduct, between “being stumbled over and being kicked.”³⁶⁷ For this reason, “[t]he existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence.”³⁶⁸ Justice Jackson emphasized the doctrine’s fundamentality in an oft-quoted passage.

The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. A relation between some mental element and punishment for a harmful act is almost as instinctive as the child’s familiar exculpatory “But I didn’t mean to,” Crime, as a compound concept, generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand, was congenial to an intense individualism and took deep and early root in American soil.³⁶⁹

Strict liability is rightly criticized for weakening this essential link between crime and culpability.³⁷⁰ Strict criminal liability occupies a disfavored status with the

³⁶⁴ 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *21; EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 107.

³⁶⁵ 4 BLACKSTONE, *supra* note 364, at *21.

³⁶⁶ *Id.*

³⁶⁷ OLIVER WENDELL HOLMES, THE COMMON LAW 3 (1881).

³⁶⁸ *Dennis v. United States*, 341 U.S. 494, 500 (1951) (citing *Am. Comm’n Ass’n v. Douds*, 339 U.S. 382, 411 (1950)).

³⁶⁹ *Morissette v. United States*, 342 U.S. 246, 250–52 (1952).

³⁷⁰ See, e.g., Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 422–25 (1958); Herbert L. Packer, *Mens Rea and the Supreme Court*, 1962 SUP. CT. REV. 107, 107–10; James J. Hippard, Sr., *The Unconstitutionality of Criminal Liability Without Fault: An Argument for a Constitutional Doctrine of Mens Rea*, 10 HOUS. L. REV.

Court,³⁷¹ reflected in constitutional decisions demanding mens rea and statutory interpretations applying a strong presumption against strict criminal liability.³⁷² The Model Penal Code similarly disfavors strict criminal liability.³⁷³

While strict criminal liability is always problematic, it is especially so in the case of ineligible voting. It is particularly cruel to punish democratic participation by one excluded from the franchise when she is unaware of her exclusion. It is like punishing a boy for embracing his mother because, unbeknownst to him, she has given him up for adoption. In both cases, the relevant conduct can be criminalized: if your mother disowns you, she does not consent to you touching her, so your intended embrace is a battery; if the state disenfranchises you, she does not consent to you voting, so your intended participation is likewise a crime. But in each case, the proscribed conduct is not inherently evil, à la *malum in se*. Indeed, unlike most crimes, the proscribed conduct is better described as *bonum in se*, because it is generally considered highly prosocial. What transforms the conduct from virtuous to criminal is the attendant circumstance of the actor's exclusion—the boy was disowned by his mother; the woman was disenfranchised by her state. But the actor was unaware of their exclusion and thus acted without mens rea, a guilty mind or a culpable mental state. Yes, the boy intended to embrace his mother, and the woman intended to cast a ballot, but neither was aware of the critical element—the attendant circumstance of their exclusion—that transformed their conduct from virtuous to criminal. Punishment under these conditions offends elementary principles of criminal justice. It represents strict criminal liability at its worst.

This is partly why the case of Crystal Mason is so poignant. When the basis of ineligibility is a disqualifying felony conviction, the “perpetrator” of ineligible voting usually commits the crime after completing a term of incarceration, when they are released back to the community and going through the reentry process. They are trying to rejoin society. They are doing what reentry experts think will reduce recidivism and facilitate rehabilitation.³⁷⁴ In Crystal Mason's case, she was heeding her mother's exhortation to do her civic duty.³⁷⁵ And then she was punished for it. Noncitizen voting involves a similar bitter irony. In this case, the “perpetrator”

1039, 1039–40 (1973); Rollin M. Perkins, *Criminal Liability Without Fault: A Disquieting Trend*, 68 IOWA L. REV. 1067, 1067–70 (1983).

³⁷¹ See *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 437–38 (1978) (“[T]he limited circumstances in which Congress has created and this Court has recognized [strict liability] offenses . . . attest to their generally disfavored status.”).

³⁷² See *infra* Sections V.C.1 & V.C.2.

³⁷³ See MODEL PENAL CODE § 2.05(1)(b) (permitting strict criminal liability only when a “legislative purpose to impose [it] . . . plainly appears”).

³⁷⁴ See Kristen M. Budd & Niki Monazzam, *Increasing Public Safety by Restoring Voting Rights*, SENT'G PROJECT POL'Y BRIEF (Apr. 25, 2023), <https://www.sentencingproject.org/policy-brief/increasing-public-safety-by-restoring-voting-rights/#footnote-ref-1> [<https://perma.cc/Z7SF-PWCJ>].

³⁷⁵ See *Mason III*, 687 S.W.3d 772, 781 (Tex. App. 2024).

is often someone who has lived in the United States for years, has permanent resident status, and wants to become a citizen one day. Like many of the Florida 15, the person commits the crime by voting and then confesses to the crime while applying for citizenship. The prosecution literally uses the naturalization application as evidence against the applicant.

2. Marginalized Populations and Systemic Bias

Strict criminal liability for mistaken ineligible voting also targets marginalized populations and thereby amplifies systemic bias. By definition, ineligible voting is a crime that can only be committed by the disenfranchised. In some cases, the basis of ineligibility is not a source of stigma, e.g., youth or residency. But many cases of ineligible voting involve two marginalized groups: noncitizens and people with prior felony convictions. Both groups face adverse consequences that never apply to citizens without felony convictions. Noncitizens face removal, which might involve family separation. Persons with prior felony convictions might face revocation of probation or parole, or enhanced penalties based on prior convictions (which might trigger a statutory enhancement or simply serve as an aggravating sentencing factor). In a case where a person is disenfranchised due to a prior felony conviction but elects to vote, they are likely trying to get their life back on track after involvement in the criminal justice system. Prosecution for ineligible voting threatens to derail those efforts. Noncitizens are less likely to have written and oral English language fluency and familiarity with U.S. law. (Recall Kenneth Bennet, who was denied citizenship for these reasons, and Gerard Francois, who required a Creole interpreter.)³⁷⁶ Noncitizens are also less likely to question government authorities like DMV officials inviting them to register. (Recall Margarita Del Pilar Fitzpatrick, who was confused by her interaction at the DMV.) Noncitizens and persons with prior felony convictions might also be less able to afford private defense counsel and, thus, more likely to rely on under-resourced and systemically disadvantaged public defenders.

By targeting these marginalized populations, strict criminal liability for mistaken ineligible voting amplifies systemic bias. The outcome of ineligible voting prosecutions may turn crucially on the discretionary decisions of various actors, including prosecutors, judges, and juries. These decision-makers may be vulnerable to conscious or unconscious bias. Noncitizens are more likely to be people of color, people who are not native English speakers, and people with different religious and cultural traditions than decision-makers. Decision-makers might be biased against a noncitizen because she is a person of color, because English is not her native language, because of her religious or cultural traditions, because she is a noncitizen, or due to some combination of these factors. People with prior felony convictions are more likely to be poor and to be people of color.³⁷⁷ Decision-makers might be

³⁷⁶ See *supra* note 335.

³⁷⁷ Stephen B. Bright, *Rigged: When Race and Poverty Determine Outcomes in the*

biased against a person with a prior felony conviction because he is poor, because he is a person of color, because of his prior felony conviction, or due to some combination of these factors. In normal prosecutions, a person's prior criminal history or citizenship status is irrelevant, so prosecutors cannot mention it. In prosecutions for ineligible voting, it's the basis for eligibility, so it's front and center.

Also front and center is a defendant's party affiliation. In the Florida 15 prosecutions, the government used defendants' voter registration records as evidence.³⁷⁸ Those records usually indicated the defendant's self-identified race and party affiliation. As Table 2 shows, at least 7 of the Florida 15 identified as Democrats, and at least 9 identified as Black. And the prosecution knew that when deciding whether to pursue the case. This represents a crucial distinction between the lawmaker contemplating voting restrictions and a prosecutor contemplating voting charges. The lawmaker is less able to determine a law's partisan implications: any electoral reform will apply prospectively to all similarly situated persons; most reforms will impact both Republicans and Democrats; and the precise effects may be hard to anticipate. Lawmakers can sometimes succeed in targeting a disfavored group with "surgical precision,"³⁷⁹ but electoral reform is often a blunt instrument with uncertain partisan effects. The prosecutor can better predict and control the partisan implications of her decisions. She makes individualized charging decisions, often knowing each defendant's party affiliation *ex ante*. She wields a scalpel every time.

Bias might yield disparate charging or sentencing decisions. One person may suffer aggressive prosecution and harsh punishment, while another enjoys leniency from the prosecutor or judge. Crystal Mason, a Black woman, was sentenced to five years in prison for ineligible voting.³⁸⁰ In contrast, others received lighter sentences for more culpable conduct.

[I]n the same county where Ms. Mason was convicted, a Justice of the Peace who admitted to submitting fake signatures to get on the primary ballot received five years' probation. . . . In Fort

Criminal Courts, 14 OHIO ST. J. CRIM. L. 263, 265–66 (2016); ACLU & SENT'G PROJECT, SHADOW REPORT TO THE UNITED NATIONS ON RACIAL DISPARITIES IN SENTENCING IN THE UNITED STATES 1 (2022) ("Black and Latinx residents are incarcerated at rates five and three times higher than white residents, respectively."); Complaint for Declaratory and Injunctive Relief at 29, N.C. A. Philip Randolph Inst. v. N.C. State Bd. of Elections, 730 F. Supp. 3d 185 (M.D.N.C. Apr. 22, 2024) (No. 1:20-CV-00876) [hereinafter N.C. Complaint] ("While Black individuals account for only 22% of . . . North Carolina's population, they constitute 42% of those on probation or post-release supervision for a felony conviction in North Carolina state courts.").

³⁷⁸ See, e.g., Government's Response to Standing Discovery Order at 5, *State v. Bennett*, No. 2:04-CR-14048-DMM (S.D. Fla. Oct. 13, 2004).

³⁷⁹ N.C. State Conference of NAACP v. McCrory, 831 F.3d 204, 214 (4th Cir. 2016), *cert. denied*, 137 S. Ct. 1399 (2017).

³⁸⁰ See *Mason I*, 598 S.W.3d 755, 762 (Tex. App. 2020), *aff'd in part and remanded in part*, 663 S.W.3d 621 (Tex. Crim. App. 2022).

Worth, a precinct chairwoman who arranged for her son to vote in his father's name was sentenced to only probation. . . . In Harris County, a poll worker who pled guilty to forging her daughter's signature on a ballot served one day in prison. . . . And in Galveston, a man who pled guilty to voting absentee in two states in the 2012 general election was fined \$4,000.³⁸¹

Bias might influence credibility determinations when the defendant's version of relevant events conflicts with the version offered by someone else, like an election official or a probation officer. Bias might also manifest in a phenomenon I call *mens rea* dilution, where a decision-maker sub silentio substitutes a less culpable mental state for the one the law requires. For example, the decision-maker may formally convict the defendant of *knowing* conduct because they think the defendant acted *negligently*. It's a short leap from "you should have known" to "you must have known." And that leap may be shorter when decision-making is infected by conscious or unconscious bias against marginalized populations. By construction, *mens rea* dilution is difficult to document because it occurs behind the scenes, in jury deliberation rooms, or in the minds of judges and prosecutors.

B. Democracy Costs

Strict criminal liability for mistaken ineligible voting also undermines American democracy by chilling eligible voting, undermining electoral confidence, justifying electoral burdens, and deprioritizing more effective methods to reduce ineligible voting.

1. Chilling Eligible Voting Instead of Reducing Ineligible Voting

Deterrence is the primary justification for strict liability crime.³⁸² But when it comes to ineligible voting, public education and electoral administration practices are more effective tools. Just think of the Florida 15. Section 611 did nothing to deter them because they were unaware of both § 611 and their ineligibility to vote. But clarity regarding their eligibility would have done the trick. They all wanted to become U.S. citizens, not to risk deportation by illegal voting. While strict criminal liability fails to deter ineligible voters confused about their eligibility, it also threatens overdeterrence, chilling democratic participation by eligible voters.

Democracy cannot thrive when eligible voters are scared to vote. To protect democracy, we must address dynamics that threaten to chill eligible voting. That's

³⁸¹ Brief of Former Prosecutors as Amici Curiae in Support of Appellant Crystal Mason at 21–22, *Mason v. State*, 687 S.W.3d 772 (Tex. App. 2024) (No. PD-0881-20) (internal citations omitted).

³⁸² See Michael Serota, *Strict Liability Abolition*, 98 N.Y.U. L. REV. 112, 145–51 (2023).

why federal law prohibits voter intimidation, voter suppression, and stationing military troops at polling places.³⁸³ And “[i]t is difficult to imagine anything short of physical violence” with a more powerful chilling effect than the specter of “arrests and prosecutions.”³⁸⁴ Strict criminal liability for ineligible voting means a person must vote at their peril. An eligible voter who is uncertain of their eligibility may err on the side of caution and exclude herself from the democratic process.

Plenty of eligible voters may be uncertain of their eligibility. Under America’s distinctive system of electoral federalism, states set voter qualifications for federal elections,³⁸⁵ and states are permitted but not required to disenfranchise persons based on prior felony convictions.³⁸⁶ This system produces significant interstate and intertemporal variation in the eligibility of persons with prior convictions, and that variation produces complexity and confusion. Imagine a person with prior experience in the criminal justice system asks you whether they are eligible to vote. As any 1L knows, the answer is “it depends.” Depending on the jurisdiction, a person with a felony conviction might lose their voting rights (1) until release from incarceration; or (2) until completing probation or parole; or (3) until paying all legal financial obligations (LFOs) like fines, fees, costs and restitution; or (4) at some point after completing their sentence, either automatically or through a discretionary process; or (5) forever; or (6) not at all.³⁸⁷ The answer may depend not only on the jurisdiction but also on the offense. Was there a conviction or deferred prosecution, an Alford plea (accepting punishment but maintaining innocence), or a suspended sentence?³⁸⁸ If there was a conviction, what exactly was the offense of conviction? Was it a misdemeanor or a felony? If it was a felony, was it a disqualifying felony?³⁸⁹ A crime in one jurisdiction may have only imperfect analogues in another.

Persons with felony convictions face an even more daunting challenge when a state changes its eligibility rules. Until recently, Florida imposed a lifetime voting

³⁸³ See SEAN MORALES-DOYLE ET AL., *VOTERS SHOULD NOT BE INTIMIDATED* (2000).

³⁸⁴ *United States v. McLeod*, 385 F.2d 734, 740–41 (5th Cir. 1967).

³⁸⁵ See *supra* Section III.A.1.

³⁸⁶ *Richardson v. Ramirez*, 418 U.S. 24, 56 (1974).

³⁸⁷ *Disenfranchisement Laws*, BRENNAN CTR. JUST., <https://www.brennancenter.org/issues/ensure-every-american-can-vote/voting-rights-restoration/disenfranchisement-laws> [<https://perma.cc/SYJ5-F43C>] (last visited Feb. 19, 2025) (using Florida and the example jurisdiction from the site’s interactive map).

³⁸⁸ See, e.g., *State v. Rappaport*, 128 A.2d 270, 273 (Md. 1957) (holding that a suspended sentence does not constitute a disqualifying conviction under Maryland law).

³⁸⁹ See, e.g., *Thiess v. State Admin. Bd. of Election L.*, 387 F. Supp. 1038, 1040 n.3 (D. Md. 1974) (“The term ‘infamous crimes’, while never statutorily defined by the Maryland legislature, has been illumined somewhat by two opinion letters issued by the . . . [state] Attorney General.”); *Thompson v. Sec’y of State for the State of Ala.*, 65 F.4th 1288, 1309 (11th Cir. 2023) (Rosenbaum, J., concurring in part and dissenting in part) (“Alabama has defined the phrase ‘moral turpitude’ in contradictory or non-uniform ways. At one point, Alabama even allowed each local registrar to interpret the term for herself.”).

ban on anyone with a felony conviction.³⁹⁰ But in 2018, a ballot initiative called Amendment 4 passed with supermajority approval by Florida voters. Amendment 4 generally enfranchises persons with prior disqualifying convictions, providing that “voting rights shall be restored upon completion of all terms of sentence including parole or probation.”³⁹¹ However, Amendment 4 has a crucial exception—it maintains the lifetime voting ban for “person[s] convicted of murder or a felony sexual offense.”³⁹² If a person is aware of the Amendment’s general enfranchising provision but unaware of its exception, she might erroneously conclude that a person who has completed their sentence for murder or a felony sexual offense is now eligible to vote in Florida.

The situation is more complex for people who are eligible for rights restoration, but who may still owe money on their case. Shortly after Florida voters passed Amendment 4, the state legislature enacted an implementing statute. That statute narrowed the Amendment’s scope by defining the language “all terms of [a] sentence” to include payment of any LFO, i.e., any fines, fees, costs, or restitution “contained in the four concerns of the sentencing document.”³⁹³ Federal District Court Judge Robert Hinkle has explained how “determining the amount of a felon’s LFOs is sometimes easy, sometimes hard, sometimes impossible.”³⁹⁴ Indeed, Judge Hinkle described the difficulties encountered by a team of trained researchers, a Supervisor of Elections, and even the Director of the state’s division of elections.³⁹⁵

The task of determining eligibility was further complicated in the aftermath of Amendment 4’s passage because the law was a moving target: Amendment 4 passed in November 2018 but did not go into effect until January 2019; in June 2019,

³⁹⁰ Benjamin Plener Cover, *The Costs of Florida’s Ballot*, CANOPY F. INTERACTIONS OF L. & RELIGION (Oct. 30, 2020), <https://canopyforum.org/2020/10/30/the-cost-of-floridas-ballot/> [<https://perma.cc/XZB2-A6L9>]. Voting rights could only be restored through a discretionary process of executive clemency.

³⁹¹ FLA. CONST. art. VI, § 4(a).

³⁹² *Id.* § 4(b).

³⁹³ FLA. STAT. ANN. § 98.0751(2)(a) (West 2025).

³⁹⁴ *Jones v. DeSantis*, 462 F. Supp. 3d 1196, 1221 (N.D. Fla. 2020), *rev’d and vacated sub nom. Jones v. Governor of Fla.*, 975 F.3d 1016 (11th Cir. 2020), *aff’d*, 15 F.4th 1062 (11th Cir. 2021).

³⁹⁵ *Jones*, 462 F. Supp. at 1220 (“[A] professor specializing in this field with a team of doctoral candidates . . . made diligent efforts over a long period to obtain information on 153 randomly selected felons [but] found that information was often unavailable over the internet or by telephone and that, remarkably, there were inconsistencies in the available information for all but 3 of the 153 individuals.”); *id.* at 1221 (“[A] Supervisor of Elections said she had been unable to assist a person with a 50-year-old conviction for which records could not be found; the Supervisor could not determine the person’s eligibility to vote.”); *id.* (“The Director . . . did not know whether [a named plaintiff] would be allowed to vote only upon payment of the fine [as the question] would require further analysis . . . 18 months after adopting the pay-to-vote system, the State still does not know which obligations it applies to. And if the State does not know, a voter does not know.”).

Governor DeSantis signed into law the statute defining the language “all terms of sentence” to require payment of LFOs;³⁹⁶ in October 2019, Judge Hinkle preliminarily enjoined that statute; in February 2010, an Eleventh Circuit panel unanimously upheld this preliminary injunction; in May 2020, Judge Hinkle issued a permanent injunction; five weeks later, the Eleventh Circuit granted Florida’s extraordinary request for an initial hearing en banc and a stay, which replaced the orderly process Judge Hinkle carefully crafted with a legal limbo that confused both election officials and prospective voters; in August 2020, in the midst of early voting for Florida’s primary election, the en banc Eleventh Circuit held oral argument; and in September 2020, less than a month before Florida’s general election voter registration deadline, the Eleventh Circuit en banc reversed the trial court and sustained the LFO requirement.³⁹⁷

For these reasons, many eligible voters may be uncertain of their eligibility. This uncertainty, plus the threat of strict criminal liability for mistakes, may dissuade eligible voters from exercising their fundamental right to democratic participation.

The lawsuit challenging North Carolina’s (recently changed) regime of strict liability voting produced powerful evidence of this chilling effect in action. An arrest for mistaken ineligible voting can be a traumatizing experience that discourages future democratic participation. Consider the following testimony from members of the so-called Alamance 12, a group of defendants charged with ineligible voting by the local prosecutor in Alamance County, North Carolina.

Some of the individuals prosecuted under the Strict Liability Voting Law have expressed a deep-seated fear of voting in the future. “[I]t’s going to really take a mighty wind from heaven to make me vote again,” says Keith Sellars, a 45-year old Black member of the Alamance 12 who was “arrested . . . in the middle of a highway, while his 10- and 7-year old daughters cried in the back seat.”

Anthony Haith, another Black member of the Alamance 12, has said, “I am still fearful of voting now. I do not want to go to jail for voting. . . . I honestly do not know if I will ever vote again[.]” Mr. Haith has “said he would tell his four children also not to vote.”

Taranta Holman, also a Black member of the Alamance 12, has similarly said he will never cast another ballot. “Even when I get this cleared up, I still won’t vote. . . . That’s too much of a risk.”

³⁹⁶ § 98.0751(2)(a).

³⁹⁷ Cover, *supra* note 390.

Lanisha Bratcher, whose felony charges remain pending, says “[s]he’s not sure if she’ll ever vote again, even once she’s legally allowed to.”³⁹⁸

While the chilling effect may be strongest for those who are actually arrested and prosecuted (and those close to them), the effect can extend far beyond these individuals, impacting entire communities. One North Carolina community leader reported that residents with prior convictions “have a fear of voting and getting arrested for doing so.”³⁹⁹ Another said “African-American voters are discouraged from attempting to . . . vote because of the fear caused by the disenfranchisement laws and their enforcement. *This includes those with no felony records.*”⁴⁰⁰ Judge Gregory of the Wake County Superior Court has observed that this fear and confusion are exacerbated by the state’s “one-way notification protocol,” under which individuals receive official notice when their voting rights are suspended but not when their voting rights are subsequently restored.⁴⁰¹

[I]f a person has been convicted of a felony and . . . they believe that they can’t vote, even if they are . . . at a point now where they actually can vote, but they are afraid because they’ve received a letter previously saying, you can’t vote. Now they are eligible, but they are afraid because they don’t know because they haven’t received a letter telling them that they can vote. . . . [T]hat’s confusing.⁴⁰²

I discussed above why strict liability enforcement of ineligible voting entails a heightened risk of bias. When enforcement actors (like prosecutors, judges, and juries) exercise discretionary power in these cases, they will likely know a defendant’s race and party affiliation and possibly their citizenship status or prior criminal history. These actors may (consciously or unconsciously) disfavor certain defendants on the basis of these characteristics. If so, enforcement will have a disparate impact. When it comes to the associated chilling effect, the risk of disparate impact may be even greater because it depends on the enforcement system’s perceived, rather than actual, skew. Chilling effect is about prediction. By definition, a chilling effect occurs when an eligible voter refrains from democratic participation based on a fear of potential adverse consequences. So if a person believes the system is biased

³⁹⁸ N.C. Complaint, *supra* note 377, at 33–35.

³⁹⁹ Affidavit of Corey Purdie ¶ 23, Cmty. Success Initiative v. Moore (*CSI*), No. 19-CVS-15941 (N.C. Super. Ct. Mar. 28, 2022).

⁴⁰⁰ *Id.* (emphasis added) (quoting Brief of Amici Curiae, North Carolina Justice Center & Down Home NC at 1, *CSI*, No. 19-CVS-15941).

⁴⁰¹ *Id.* at 45–46, ¶ 82.

⁴⁰² *Id.*; *id.* at 46 (quoting Hearing Transcript at 173, *CSI*, No. 19-CVS-15941).

against her, she will anticipate more severe consequences and experience a more powerful chilling effect. This means the chilling effect may have a disparate impact on the basis of a characteristic (like race or party affiliation) if people believe (rightly or wrongly) that the system discriminates based on that characteristic. For example, in a particular jurisdiction, there may be a group of people with felony convictions who are actually eligible to vote but uncertain of their eligibility. That group may be evenly split between Republicans and Democrats. But if (say) Democrats are more fearful than Republicans of getting in trouble, the chilling effect may disproportionately deter eligible Democrats from voting. The same goes for race, which is often strongly correlated with party affiliation.

2. Undermining Electoral Confidence and Justifying Electoral Burdens

When the criminal justice system punishes voter mistake like voter fraud, the public conflates the two phenomena. This conflation fuels false narratives of widespread voter fraud, undermining trust in American democracy, and justifying unnecessary burdens on eligible voters.

This is where the Heritage Foundation comes in. The Heritage Foundation is a conservative think-tank cofounded by Paul Weyrich, who infamously said:

I don't want everybody to vote. Elections are not won by a majority of people. They never have been from the beginning of our country and they are not now. As a matter of fact, our leverage in the elections, quite candidly, goes up as the voting populace goes down.⁴⁰³

Heritage maintains a database that it calls the “Election Fraud Map.”⁴⁰⁴ Hans von Spakovsky, Manager of Heritage’s Election Law Reform Initiative, has called it “the only database in the country of recent cases of election fraud.”⁴⁰⁵ The website’s description of the database is replete with references to fraud. Here is an excerpt of the description with these references emphasized.

The Election *Fraud* Map presents a sampling of recent proven instances of election *fraud* from across the country. Each and every one of the cases in this database represents an instance in which a public official, usually a prosecutor, thought it serious

⁴⁰³ MICHAEL WALDMAN, THE FIGHT TO VOTE 185 (2022).

⁴⁰⁴ *Election Fraud Map: A Sampling of Proven Instances of Election Fraud*, HERITAGE FOUND. (Dec. 3, 2024), <https://electionfraud.heritage.org/> [<https://perma.cc/NBE5-UNKX>].

⁴⁰⁵ Hans A. von Spakovsky, *The Myth of Voter Suppression and the Enforcement Record of the Obama Administration*, 49 U. MEM. L. REV. 1147, 1150 (2019).

enough to act upon. And each and every one ended in a finding that the individual had engaged in *wrongdoing* in connection with an election

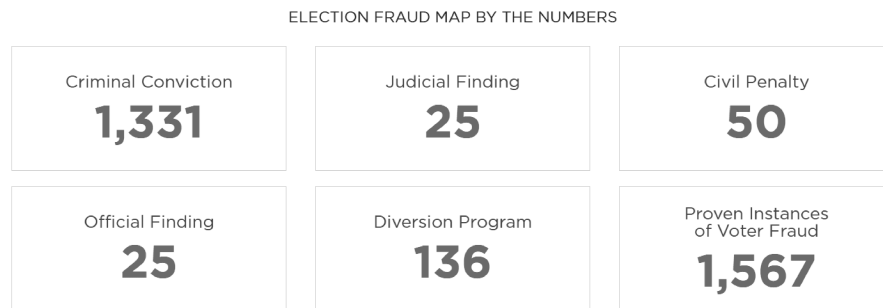
. . . .

This map is not an exhaustive or comprehensive database of all election *fraud* in the 50 states. It does not capture all cases and certainly does not capture reported instances or allegations of election *fraud* . . . that are not investigated or prosecuted . . . [E]lection *fraud* is relatively easy to commit and difficult to detect after the fact. Moreover, some public officials appear to be unconcerned with election *fraud* and fail to pursue cases that are reported to them. . . .

This map is intended to highlight cases of proven *fraud* and the many ways in which *fraud* has been committed across the U.S.⁴⁰⁶

As of this writing, the website specifically claims to contain over 1,567 “[p]roven instances of voter fraud,” including over 1,331 criminal convictions.⁴⁰⁷

Figure 6



NOTES: Last updated December 3, 2024. The Election Fraud Map presents a sampling of recent proven instances of election fraud from across the U.S. The map was first published in 2017.

This website leaves a distinct impression: that Heritage has compiled a fraud database; that the database documents 1,331 criminal prosecutions of electoral

⁴⁰⁶ *About the Election Fraud Map*, HERITAGE FOUND. (emphasis added), <https://electionfraud.heritage.org/about> [<https://perma.cc/D2D7-ZDLM>] (last visited Feb. 19, 2025).

⁴⁰⁷ *Id.* (fig. 6); *Categories of Election Fraud*, *supra* note 41 (fig. 6).

fraud; that in “each and every one” of these criminal cases, the defendant was convicted under a statute that criminalizes “wrongdoing” committed with fraudulent intent.⁴⁰⁸

That impression is wrong. The Heritage database fails to distinguish between voter fraud and voter mistake. It counts convictions for strict liability crimes as instances of voter fraud, without informing the reader the conviction requires no mens rea.

The database lists fifty-nine criminal convictions for the state of Ohio.⁴⁰⁹ But it never mentions that Ohio’s illegal voting statute, as uniformly construed by its state courts, imposes strict criminal liability for ineligible voting, wrong-place voting, and multiple voting. Nor does the database clearly specify which cases involved convictions under this statute, or instances where the defendant was charged under this statute, and then (facing strict criminal liability) pled to a less serious offense.

Consider how the database treats the case of Charles and Jerolynn Worrell.⁴¹⁰ The summary states that Charles “indicated that he lived at a Summit County address where he did not reside” and “was found guilty” after “a jury trial.”⁴¹¹ This highly misleading description makes it sound like the jury concluded that Charles intentionally made up a fake address for some nefarious purpose. It fails to mention that the Worrells lived right by an irregular boundary between two municipalities, that Charles transposed the digits in their address, that there was no finding that Charles did this intentionally, that the convictions were affirmed on the ground that the relevant statute imposes strict criminal liability, and that one of the appellate judges wrote separately to urge the legislature to add a mens rea element to the illegal voting statute.⁴¹² The summary also states that Charles “was found guilty of illegal voting for falsely registering and voting.” Indeed, the database codes this case with the fraud category of “False Registrations” rather than “Ineligible Voting.” This further misleads the reader. As explained above, the Ohio election code has two different statutes. R.S. 3599.11, captioned “False registration,” uses explicit mens rea terminology.⁴¹³ R.S. 3599.12, captioned “Illegal Voting,” lacks explicit mens rea

⁴⁰⁸ *Categories of Election Fraud*, *supra* note 41; *About The Election Fraud Map*, *supra* note 406.

⁴⁰⁹ *Explore the Data: Ohio*, HERITAGE FOUND., https://www.heritage.org/voterfraud/search?combine=&state=OH&year=&case_type=24487&fraud_type=All&page=3 [<https://perma.cc/Z7JU-JHYB>] (last visited Feb. 19, 2025). Two of these convictions are for John Burkman and Jacob Wohl. *See supra* note 59.

⁴¹⁰ The database has separate entries for Charles and Jerolynn, but each contains the same case summary. *Compare Charles Worrell*, HERITAGE FOUND., <https://electionfraud.heritage.org/case/200435> [<https://perma.cc/GJY7-Y2T7>] (last visited Feb. 19, 2025), with *Jerolynn Worrell*, HERITAGE FOUND., <https://electionfraud.heritage.org/case/200865> [<https://perma.cc/FNT7-ESUQ>] (last visited Feb. 19, 2025).

⁴¹¹ *Charles Worrell*, *supra* note 410.

⁴¹² *State v. Worrell*, Nos. 23378, 23409, 2007 WL 4554455, at *1, *3, *6 (Ohio Ct. App. Dec. 28, 2007).

⁴¹³ *See* OHIO REV. CODE ANN. § 3599.11 (West 2025).

terminology.⁴¹⁴ The Ohio courts have emphasized this selective use of mens rea terminology as support for their conclusion that the illegal voting statute imposes strict criminal liability. The Worrells were convicted of wrong-place voting under 3599.12, not false registration under 3599.11.⁴¹⁵

The way the Heritage database codes and describes this case paints a picture that bears little resemblance to reality. I do not speculate on whether this misrepresentation reflects the purpose, recklessness, or negligence of those responsible for the Heritage database. (Perhaps the coding error was a typo?) But it does not reflect careful and diligent research.⁴¹⁶

Or consider how the database treated the case of Crystal Mason.⁴¹⁷ (Figure 7.) The summary stated that Mason “claimed she was unaware of her ineligibility, despite signing an affidavit signifying she was not a felon prior to casting a provisional ballot.”⁴¹⁸

⁴¹⁴ See *id.* § 3599.12.

⁴¹⁵ *Worrell*, 2007 WL 4554455, at *3.

⁴¹⁶ Curiously, the database fails to include the cases of Workman, Hull, Arent, and Urbanek discussed in Section II.B. Since these four cases produced appellate court opinions readily accessible through a simple keyword search of Ohio case law, it would be surprising if Heritage staff were unaware of them. But if they are aware of these cases, it’s not clear why the database fails to include them.

⁴¹⁷ *Voter Fraud Report for Crystal Mason*, INTERNET ARCHIVE WAYBACK MACH., <https://web.archive.org/web/20240309152751/https://www.heritage.org/voterfraud/9711> [<https://perma.cc/43LQ-NZ6A>] (last visited Feb. 19, 2025) (accessing Heritage Foundation webpage from March 9, 2024, using the Wayback Machine).

⁴¹⁸ *Election Fraud Cases*, INTERNET ARCHIVE WAYBACK MACH., <https://web.archive.org/web/20240506024411/https://www.heritage.org/voterfraud-print/search> [<https://perma.cc/JV8R-9A6C>] (last visited Feb. 19, 2025) (accessing Heritage Foundation webpage from May 6, 2024, using the Wayback Machine) (purporting to list every case in its database but excluding the case of Crystal Mason). It appears the Heritage Foundation removed the Crystal Mason case from its database shortly after her acquittal, at some point between April 7, 2024, and April 10, 2024. *Compare Voter Fraud Map: Election Fraud Database*, INTERNET ARCHIVE WAYBACK MACH., <https://web.archive.org/web/20240410050117/https://www.heritage.org/voterfraud> [<https://perma.cc/2QF7-9MLV>] (last visited Feb. 19, 2025) (accessing Heritage Foundation webpage from April 7, 2024, using the Wayback Machine) (listing 1500 “Proven instances of voter fraud” and 1276 “Criminal convictions”), with *Voter Fraud Map: Election Fraud Database*, INTERNET ARCHIVE WAYBACK MACH., <https://web.archive.org/web/20240410050117/https://www.heritage.org/voterfraud> [<https://perma.cc/85DZ-S77Q>] (last visited Feb. 19, 2025) (accessing Heritage Foundation webpage from April 10, 2024, using the Wayback Machine) (webpage lists 1499 “Proven instances of voter fraud” and 1275 “Criminal convictions”).

Figure 7

STATE	YEAR	NAME	CASE TYPE	FRAUD TYPE	DETAILS
Texas	2017	Crystal Mason	Criminal Conviction	Ineligible Voting	^

Crystal Mason

Rendon, Texas native Crystal Mason voted in the 2016 election despite being a convicted felon. At the time, Mason was out on supervised release following three years' imprisonment on federal tax fraud charges. She claimed she was unaware of her ineligibility, despite signing an affidavit signifying she was not a felon prior to casting a provisional ballot. Mason decided to forego a jury trial, and a judge sentenced her to a five-year prison term for her illegal vote.

This is false. The affidavit Mason signed did not affirm that she was not a felon. Here is the exact language of the affidavit, which is appended to a published decision of a Texas intermediate appellate court: “I am a resident of this political subdivision, have not been finally convicted of a felony *or if a felon, I have completed all of my punishment including any term of incarceration, parole, supervision, period of probation, or I have been pardoned.*”⁴¹⁹ That court acquitted Crystal Mason on March 28, 2024, but the prosecution appealed, and the state’s high court granted review.⁴²⁰

In the Introduction, I described how the Heritage database omits essential context from its description of the case of Margarita Del Pilar Fitzpatrick. Most of the Florida 15 are also listed in the database. Their case descriptions do not mention that 18 U.S.C. § 611 criminalizes mistaken ineligible voting on a strict liability basis.⁴²¹ Alessandro Cannizzaro is also listed in the database.⁴²² His case description does not mention § 611 or the fact that he passed his naturalization test years before he voted.⁴²³

How many cases in the Heritage database involve strict liability statutes? I hope to provide a comprehensive answer in future work. I could start with the eight states identified in Section I.B that currently punish ineligible voting on a strict liability basis. But even if a state does not currently punish ineligible voting on a strict liability basis, it may have done so in the past. In North Carolina, the legislature only added a mens rea requirement to its illegal voting statute in 2023.⁴²⁴ In Texas, the state’s high court only clarified the mens rea requirement in its illegal voting statute in 2022.⁴²⁵ More generally, I would need to determine the statutory elements for each

⁴¹⁹ *Mason III*, 687 S.W.3d 772, 786 (Tex. Ct. App. 2024) (emphasis supplied).

⁴²⁰ *In re Mason*, PD-0300-24, rev. granted, Aug. 21, 2024 (Tex. Crim. App. LEXIS 602).

⁴²¹ See, e.g., *Ricardo Knight*, HERITAGE FOUND., <https://electionfraud.heritage.org/case/201345> [<https://perma.cc/2HUT-UQQF>] (last visited Feb. 19, 2025).

⁴²² *Voter Fraud Report: Alessandro Cannizzaro*, HERITAGE FOUND., <https://www.heritage.org/voterfraud/9773> [<https://perma.cc/2XZY-F48J>] (last visited Feb. 19, 2025).

⁴²³ *Id.*

⁴²⁴ See *infra* Section V.B.1.

⁴²⁵ See *Mason II*, 663 S.W.3d 621, 629 (Tex. Crim. App. 2022).

case in the relevant jurisdiction at the time of conviction, and statutes may have changed over time. (The database goes back to 1982.) The Heritage database does not specify which statute(s) a defendant was charged with or convicted of, and it only occasionally links to court documents. (It sometimes provides links to media accounts or links that are no longer active.) So, a review of these cases may involve searching court dockets in many different states. A further challenge is that the database does not separate out federal cases, so prosecutions under 18 U.S.C. § 611 may be scattered across the states. Finally, this Article has focused on ineligible voting, wrong-place voting, and multiple voting. These are all election crimes committed by voters. But election laws govern the conduct of people other than voters. A person involved in voter registration, or ballot collection, or gathering signatures for a ballot initiative, may be prosecuted for election crime. Some of those prosecutions may involve strict criminal liability. And some of those cases may appear in the Heritage database. I hope that one day every strict liability case in the Heritage database is identified and either appropriately contextualized or removed entirely. But that day is not today.

In the meantime, the Heritage database counts mistake as fraud, inflating its numbers, and fueling narratives of widespread voter fraud. And Heritage is embedded in a vast information ecosystem. Hans von Spakovsky served on President Trump's (ill-fated and short-lived) Voter Fraud Commission and did a presentation on the Heritage database at one of its public meetings.⁴²⁶ One law librarian identifies the database as "the most frequently cited source for proof of voter fraud in the United States."⁴²⁷ Ironically, many sources cite the database as evidence that voter fraud is rare: even according to the database of the group most concerned about voter fraud, the number of documented instances is small.⁴²⁸ But this assumes, at least arguendo, that each case in the database is one of fraud, rather than mistake.

⁴²⁶ See PRESIDENTIAL ADVISORY COMMISSION ON ELECTION INTEGRITY, MEETING MINUTES (2017).

⁴²⁷ See Virginia A. Neisler, *Voting by Mail: Issues and Resources*, 99 MICH. B. J. 46, 47 (2020).

⁴²⁸ See Erin C. Gianopoulos, *How Much Is Enough? Voter Registration List Maintenance Under the NVRA*, 68 WAYNE L. REV. 265, 276 (2022) ("The Heritage Foundation maintains a comprehensive list of all proven cases of voter fraud, and, in their collection, the total number of proven instances since the 1980s is only 1,302."); Bradley A. Smith, *Crisis and Disconnect: Electoral Legitimacy and Proposals for Election Reform*, 24 U. PA. J. CONST. L. 1053, 1088 (2022) ("Indeed, the Heritage Foundation's database of proven cases of fraud may actually indicate just how free of fraud American elections are."); Steven J. Mulroy, *Barriers at the Ballot Box Symposium Issue*, 49 U. MEM. L. REV. 957, 968 n.68 (2019) ("[O]f over 900 reported election fraud cases between 1979 and 2019 in a comprehensive database maintained by the conservative think tank The Heritage Foundation, only 2 came from Maine, and none came from Vermont."); Lisa Marshall Manheim & Elizabeth G. Porter, *The Elephant in the Room: Intentional Voter Suppression*, 2018 SUP. CT. REV. 213, 235 ("Though the foundation claims that the database reveals a broad and pernicious trend of fraud, in fact, the paltry number of alleged instances of alleged voter fraud (fewer than 1,200, as of early 2019), in a database that covers federal and state elections and dates back to 1979, proves the opposite.").

And it's not just the Heritage Foundation conflating voter mistake and voter fraud. In the case of Elizabeth Bain Knight, one of the Florida 15, who pled guilty to one count of § 611, the court's original judgment used the term "Election Fraud" to characterize the offense.⁴²⁹ Defense counsel filed an unopposed motion to amend the judgment to remove the term "Election Fraud":

Respectfully, the defendant objects to the conclusion that the offense of conviction is properly described as "Election fraud," and asks the Court to amend the judgment to eliminate the term "election fraud" from the description of the offense of conviction. As fraudulent action or intent is not charged as an element of the offense, it is inaccurate to describe the offense of conviction as "election fraud." . . . Significantly, the inaccurate label of "election fraud" may carry with it some negative connotation in any subsequent immigration proceeding.⁴³⁰

Five months later, the court issued an amended judgment without the term "Election Fraud."⁴³¹ When a federal judge confuses voter mistake and voter fraud, how are average Americans expected to keep things straight?

When voter mistake is mistaken as voter fraud, electoral confidence is needlessly undermined. We live in a moment when the legitimacy of our electoral systems is under attack. Public opinion polling indicates that the confidence of Americans, especially Republicans, in their electoral system has significantly and steadily decreased since 2000.⁴³² Researchers have found that "exposure to claims of voter fraud reduces confidence in electoral integrity."⁴³³ Specifically, "[i]n states where fraud was more frequently featured in local media outlets, public concerns about voter fraud were heightened."⁴³⁴

States then cite the specter of voter fraud to justify electoral burdens. The result is a vicious circle. The Court has concluded that states have a valid interest in enhancing the perceived legitimacy of the electoral system.⁴³⁵ This conclusion means

⁴²⁹ Indictment at 1, *United States v. Knight*, No. 2:04-CR-14047-DMM (S.D. Fla. Jan. 19, 2005).

⁴³⁰ Defendant's Unopposed Motion to Amend Judgment at 1–2, *Knight*, No. 2:04-CR-14047-DMM.

⁴³¹ See Amended Judgment at 1, *Knight*, No. 2:04-CR-14047-DMM.

⁴³² Charles Stewart III, *Trust in Elections*, 151 DAEDALUS 234, 240 (2022).

⁴³³ Nicolas Berlinski et al., *The Effects of Unsubstantiated Claims of Voter Fraud on Confidence in Elections*, 10 J. EXPERIMENTAL POL. SCI. 34, 34 (2023).

⁴³⁴ Adriano Udani et al., *How Local Media Coverage of Voter Fraud Influences Partisan Perceptions in the United States*, 18 STATE POL. & POL'Y Q. 193, 194 (2018).

⁴³⁵ See *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2340 (2021) ("One strong and entirely legitimate state interest is the prevention of fraud. . . . Fraud can also undermine

states can justify more electoral burdens if they persuade judges that people distrust the electoral system. This provides a perverse incentive for those who favor electoral burdens: the more distrust you sow, the more burdens you can justify. Unfortunately, it appears that scare tactics are more effective at decreasing trust than electoral burdens are at increasing trust.⁴³⁶ The net result is continually decreasing trust and continually increasing burdens.

V. CANVASSING POTENTIAL SOLUTIONS

This Part canvasses potential solutions to stop treating mistaken ineligible voting like fraud. Section A considers prosecutorial discretion. Section B proposes reforms for federal and state lawmakers. Section C presents doctrinal responses.

A. Prosecutors

When it comes to ineligible voting, the prosecutor's charging decisions are just as important as the lawmaker's drafting decisions. Even if the statutory text imposes strict criminal liability, a fair-minded prosecutor will decline to charge absent knowledge of ineligibility. Conversely, even if the statutory text includes strong mens rea protections, an overly aggressive prosecutor can still go after mistakes. And that prosecutor might win, thanks to a plea from a risk-averse defendant or mens rea dilution from a biased fact-finder.

In recent years, mistaken ineligible voting has brought out the best in some prosecutors, and the worst in others. Texas prosecutors have been going after Crystal Mason for seven years. But an impressive cadre of state and federal prosecutors filed a brief on Crystal Mason's behalf, stating unequivocally: "Ms. Mason's prosecution

public confidence in the fairness of elections and the perceived legitimacy of the announced outcome."); *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 197 (2008) ("[T]he State . . . has an interest in protecting public confidence in the integrity and legitimacy of representative government. While that interest is closely related to the State's interest in preventing voter fraud, public confidence in the integrity of the electoral process has independent significance, because it encourages citizen participation in the democratic process." (internal quotations and citations omitted)); *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) ("Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy. . . . Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised.").

⁴³⁶ Stephen Ansolabehere & Nathaniel Persily, *Vote Fraud in the Eye of the Beholder: The Role of Public Opinion in the Challenge to Voter Identification Requirements*, 121 HARV. L. REV. 1737, 1758–59 (2008); Charles Stewart III, Stephen Ansolabehere & Nathaniel Persily, *Revisiting Public Opinion on Voter Identification and Voter Fraud in an Era of Increasing Partisan Polarization*, 68 STAN. L. REV. 1455, 1466 (2016).

was far outside the bounds of any reasonable exercise of the prosecutorial power. . . . Simply put, Ms. Mason never should have been charged, much less convicted.”⁴³⁷ After its post-election audit, NCSBE identified 441 suspected cases of ineligible voting by persons with felony convictions across the state’s 100 counties.⁴³⁸ When NCSBE referred these cases to local prosecutors, many declined to prosecute, citing a lack of status scienter.⁴³⁹ But the District Attorneys for Alamance and Hoke Counties forged ahead, charging sixteen residents with ineligible voting.⁴⁴⁰ Notably, a federal district court concluded that North Carolina’s strict liability statute was void for vagueness because it failed to provide sufficiently clear standards to prevent this arbitrary enforcement.⁴⁴¹

I do not mean to diminish the critical importance of these prosecutorial decisions. Every effort should be made to nudge prosecutors in the right direction, giving credit and support to those prosecutors who distinguish voter mistake from voter fraud and criticizing those prosecutors who conflate the two. But prosecutorial discretion alone is unlikely to solve this problem. In the current political environment, there are strong incentives to aggressively prosecute voter mistake. And prosecutorial discretion leads to arbitrary and unequal treatment. About 20% of Alamance County residents are Black.⁴⁴² However, of the 12 individuals charged by the Alamance County DA with ineligible voting, 9 (75%) were Black.⁴⁴³ Of the 4 individuals charged by the Hoke County DA with ineligible voting, all 4 were Black.⁴⁴⁴ Of the 441 individuals flagged by the NCSBE, these 16 had the misfortune of living in counties with particularly aggressive local prosecutors.⁴⁴⁵

For these reasons, we must look beyond prosecutorial discretion to legislative reform.

B. Lawmakers

Strict criminal liability for mistaken ineligible voting is the product of statutes, like Ohio’s illegal voting statute and the federal noncitizen voting ban, that fail to explicitly and clearly require status scienter. The most straightforward way to address this problem is to amend these statutes. This Section considers these and

⁴³⁷ Brief of Former Prosecutors as Amici Curiae in Support of Appellant Crystal Mason at 5, *Mason v. State*, 663 S.W.3d 621 (Tex. Crim. App. 2022) (No. PD-0881-20).

⁴³⁸ N.C. Complaint, *supra* note 377, at 27–28, Ex. 2.

⁴³⁹ *Id.* at 28, Ex. 5.

⁴⁴⁰ *Id.* ¶¶ 50–53.

⁴⁴¹ *N.C. A. Philip Randolph Inst. v. N.C. State Bd. of Elections*, 730 F. Supp. 3d 185, 202 (M.D.N.C. 2024).

⁴⁴² N.C. Complaint, *supra* note 377, ¶ 50.

⁴⁴³ *Id.*

⁴⁴⁴ *Id.* ¶ 53.

⁴⁴⁵ *Id.* ¶¶ 49–50, 53.

related legislative reforms. First, I consider legislative options for the states. I then turn to legislative options for Congress.

1. The States

I briefly note that states could handle ineligible voting through administrative or civil law without resorting to criminal prosecutions. As I stated at the outset, it's not immediately obvious why we virtually *never* impose *any* punishment for *voting incorrectly* but virtually *always* impose *criminal* punishment for *incorrectly voting*. If state lawmakers elect to criminalize ineligible voting, they should use explicit language that requires knowledge of ineligibility. As the jurisdictional survey revealed, sixteen states already do this, and the eight states with no mens rea terminology should follow their lead.⁴⁴⁶

States should also amend statutes that criminalize multiple voting but fail to clearly define what it means to “vote more than once.” Following federal law, states should clarify that a voter does not commit a crime by “casting . . . an additional ballot if all prior ballots of that voter were invalidated.”⁴⁴⁷

Significant developments in recent years show that legislative reform is possible. North Carolina law used to make it a felony “[f]or any person convicted of a crime which excludes the person from the right of suffrage, to vote at any primary or election without having been restored to the right of citizenship in due course and by the method provided by law.”⁴⁴⁸ This provision, which has no mens rea term, was understood to impose strict criminal liability.⁴⁴⁹ Civil rights organizations brought a federal lawsuit challenging this statute’s constitutionality.⁴⁵⁰ Three years into the litigation, the legislature amended the statute to add explicit mens rea terminology.⁴⁵¹ The law now makes it a felony “[f]or any person convicted of a crime which excludes the person from the right of suffrage, to vote in any primary or election

⁴⁴⁶ See *supra* notes 90 and 97.

⁴⁴⁷ 52 U.S.C. § 10307(e)(3). See *State v. Urbanek*, 220 N.E.3d 146, 158–59 (Ohio Ct. App. 2023) (“Unlike Ohio law, federal law . . . provides some guidance as to the meaning of voting more than once.”), *appeal not allowed*, 221 N.E.3d 853 (2023).

⁴⁴⁸ N.C. Complaint, *supra* note 377, ¶ 60 (citing N.C. GEN. STAT. § 163-275(5) (2023), amended by S.B. 747, § 38, Gen. Assemb., Reg. Sess. (N.C. 2023) (effective Jan. 1, 2024)) (internal quotations omitted).

⁴⁴⁹ N.C. GEN. STAT. § 163-275(5) (2023), amended by S.B. 747, § 38, Gen. Assemb., Reg. Sess. (N.C. 2023) (effective Jan. 1, 2024). A federal district court found this law violates equal protection and due process. *N.C. A. Philip Randolph Inst. v. N.C. State Bd. of Elections*, 730 F. Supp. 3d 185 (M.D.N.C. Apr. 22, 2024).

⁴⁵⁰ See N.C. Complaint, *supra* note 377, ¶ 5.

⁴⁵¹ N.C. GEN. STAT. § 163-275(5) (2023), amended by S.B. 747, § 38, Gen. Assemb., Reg. Sess. (N.C. 2023) (effective Jan. 1, 2024). The North Carolina General Assembly enacted this law on October 10, 2023. The law went into effect on January 1, 2024.

knowing the right of citizenship has not been restored in due course and by the method provided by law.”⁴⁵²

In Texas, largely in response to public outcry over the Crystal Mason case, the legislature made three relevant changes to the illegal voting statute: (1) it strengthened the provision’s mens rea language, adding the phrase “knowingly or intentionally”; (2) it downgraded the offense from a felony to a misdemeanor; and (3) it added language specifying that “[a] person may not be convicted solely upon the fact that the person signed a provisional ballot affidavit.”⁴⁵³ Subsequently, the legislature has rolled back one of these changes, converting the crime from a misdemeanor back to a felony.⁴⁵⁴

2. The Congress

The legislative reform agenda for Congress is similar. First, Congress should address 18 U.S.C. § 611. One option is to simply repeal it. It may be unconstitutional.⁴⁵⁵ And states can enforce their own voter qualifications. If Congress won’t repeal § 611, it should amend it to explicitly require knowledge of ineligibility. It should similarly amend immigration law so that mistaken ineligible voting cannot trigger removability or other adverse consequences.

Beyond amending federal criminal and immigration law, Congress could pre-empt any state law that imposes strict criminal liability on ineligible voting. For federal elections, Congress can invoke its authority under the Elections Clause. Even if Congress cannot set voter qualifications in congressional elections, it can regulate the manner of those elections, including state efforts to enforce those qualifications. Based on this distinction between manner and qualifications, the Court held that Congress can validly pre-empt a state’s front-end enforcement efforts, like a requirement that documentary proof of citizenship accompany a federal voter registration form.⁴⁵⁶ This same distinction justifies federal pre-emption of a state’s back-end enforcement efforts, like strict criminal liability for noncitizen voting in federal elections. The Election Clause only applies to federal elections, or hybrid elections with both federal and state offices on the ballot. For nonfederal elections, Congress

⁴⁵² *Id.* § 163-275(5) (emphasis added).

⁴⁵³ S.B. 1 § 9.03, 87th Leg., 2d Spec. Sess. (Tex. 2021). The statute previously imposed criminal liability “if the person . . . votes or attempts to vote in an election in which the person knows the person is not eligible to vote.” *Id.* The statute now imposes criminal liability “if the person knowingly or intentionally . . . votes or attempts to vote in an election in which the person knows the person is not eligible to vote.” *Id.* It’s not clear if this revised language actually modifies the relevant mens rea requirement. It just emphasizes the importance of mens rea.

⁴⁵⁴ H.B. 1243 § 1(b), 88th Leg. (Tex. 2023).

⁴⁵⁵ *See supra* Section III.A.1.

⁴⁵⁶ *See Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 1 (2013).

has a good argument that this limited intervention represents a congruent and proportional exercise of its power to enforce the Fourteenth and Fifteenth Amendments. Or Congress may invoke its spending power, conditioning federal funding for state elections on mens rea requirements in illegal voting laws.

A final question is federal law on provisional balloting. After the 2000 election, Congress passed the Help America Vote Act (HAVA) in part to address “a significant problem voters experience[, which] is to arrive at the polling place believing that they are eligible to vote, and then to be turned away because the election workers cannot find their names on the list of qualified voters.”⁴⁵⁷ To address this problem, HAVA requires states to offer voters a provisional ballot in specified circumstances, including when an eligible voter shows up to vote at the polling location for the wrong precinct. Thus, federal law required Texas (and Ohio) to permit Crystal Mason (and Edward Urbanek) to cast a provisional ballot.

In a narrow, technical sense, both Texas and Ohio complied with this requirement. But Texas then prosecuted Crystal Mason for casting that ballot. Ohio refused to count Urbanek’s provisional ballot, but still treated it as a vote, rendering his subsequent voting a violation of the criminal prohibition on multiple voting. This raises the question of whether HAVA’s provisional balloting requirements pre-empt state laws that criminally punish those who cast provisional ballots.

Amici advanced this pre-emption argument in both cases.⁴⁵⁸ The Ohio intermediate appellate court declined to consider the issue because it was not raised by the parties.⁴⁵⁹ The Texas intermediate appellate court rejected the pre-emption argument.⁴⁶⁰ Specifically, that court concluded that “HAVA expressly requires a provisional voter to affirm that the voter is both registered and eligible under state law—thus placing that person at risk of federal and state criminal liability if the information is false.”⁴⁶¹

⁴⁵⁷ *Sandusky Cnty. Democratic Party v. Blackwell*, 387 F.3d 565, 569 (6th Cir. 2004) (quoting H.R. REP. 107-329, at 38 (2001)).

⁴⁵⁸ See Brief of American Civil Liberties Union as Amicus Curiae in Support of Defendant’s Amendment Motion for New Trial at 3, *Mason v. State*, No. D432-1485710-00 (Tex. Cnty. Crim. Ct. May 23, 2018), <https://www.aclu.org/cases/crystal-mason-v-state-of-texas> [<https://perma.cc/ETK5-K3TR>]; Brief of Election Law Scholars as Amici Curiae in Support of Appellant Crystal Mason at 20–22, *Mason v. State*, 663 S.W.3d 621 (Tex. Crim. App. 2022) (No. PD-0881-20); Brief of American Civil Liberties Union as Amici Curiae in Support of Appellant Edward Urbanek at 12, *State v. Urbanek*, 220 N.E.3d 146 (Ohio Ct. App. 2023) (No. OT-22-017), <https://www.acluohio.org/en/cases/state-v-urbanek-amicus> [<https://perma.cc/VD2N-8TK8>].

⁴⁵⁹ *Urbanek*, 220 N.E.3d at 161 (“The American Civil Liberties Union of Ohio Foundation and the American Civil Liberties Union have presented an amicus curiae brief which addresses issues not raised by the parties and we decline to address them.”).

⁴⁶⁰ *Mason I*, 598 S.W.3d 755, 783 (Tex. App. 2020), *aff’d in part and remanded in part*, 663 S.W.3d 621 (Tex. Crim. App. 2022) (“HAVA’s provisional-ballot procedure does not preempt Mason’s prosecution under state law.”).

⁴⁶¹ *Id.* (citing 52 U.S.C.A. §§ 21082(a), 20511(2)). The Texas Court of Criminal Appeals

But what if a person mistakenly believes they are eligible to vote? Or what if the person is unsure and wishes to cast a ballot only if they are eligible? Ideally, there would be a provisional ballot mechanism available in these scenarios that does not involve the peril of strict criminal liability. Whether HAVA establishes that mechanism presents legal issues beyond the scope of this Article. But the fundamental question is this: Does HAVA, in its present form, properly construed, pre-empt state laws that punish good-faith provisional balloting? If so, the proper course is a litigation strategy that successfully persuades courts to embrace the pre-emption theory. If not, the proper course is a legislative reform strategy focused on strengthening and clarifying HAVA, possibly by adding an express pre-emption provision.

C. Courts

This Section offers doctrinal responses. First, I canvass statutory construction techniques that favor mens rea when criminal provisions are silent or ambiguous. Second, I argue that ineligible voting triggers a constitutional requirement of subjective mens rea, like certain categories of unprotected speech, as strategic protection against a chilling effect. Third, I briefly consider one additional argument: that due process principles support a constitutional defense when people reasonably rely on official conduct.

This is not an exhaustive catalogue of doctrinal responses. Notably, civil rights groups successfully challenged North Carolina's strict liability statute on equal protection and due process grounds.⁴⁶² The litigation is still ongoing, but regardless of its ultimate outcome, it provides a helpful roadmap for challenges based on intentional racial discrimination or vagueness. However, these legal theories may turn on specific features of the challenged law inapplicable in other contexts: North Carolina's strict liability statute was adopted during the Redemption era with clear racially discriminatory purpose, its modern operation has had disproportionate racial impact,

also rejected a HAVA preemption argument, but only after concluding that the Texas illegal voting statute requires subjective knowledge of ineligibility. *See Mason II*, 663 S.W.3d 621, 633 (Tex. Crim. App. 2022).

⁴⁶² N.C. A. Philip Randolph Inst. v. N.C. State Bd. of Elections, 730 F. Supp. 3d 185 (M.D.N.C. 2024). The court determined the controversy was still live even though the legislature amended the statute. N.C. A. Philip Randolph Inst. v. N.C. State Bd. of Elections, No. 1:20-CV-00876, 2024 WL 1717482, at *4–6 (M.D.N.C. Apr. 22, 2024). North Carolina has appealed, urging mootness or reversal on the merits. Opening Brief of Defendants-Appellants at 2–5, N.C. A. Philip Randolph Inst. v. N.C. State Bd. of Elections, No. 24-1512 (4th Cir. Nov. 21, 2024). The Fourth Circuit is scheduled to hear oral argument in May 2025. U.S. CT. OF APPEALS FOR THE 4TH CIR., ORAL ARGUMENT CALENDAR (05/06/2025–05/10/2025 SESSION) 19, <https://www.ca4.uscourts.gov/cal/internetcalMay62025.pdf> [<https://perma.cc/K76Y-6Q8E>].

and dissensus regarding its mens rea requirement has produced disparate enforcement practices.⁴⁶³ For these reasons, I focus on three legal theories that are less developed but potentially more universal.

1. Statutory Construction

When an ineligible voting statute is silent or ambiguous, three canons of statutory constructions favor an interpretation that requires mens rea. In this Section, I discuss how these three canons apply to ineligible voting statutes and critique how prosecutors and judges have interpreted the federal noncitizen voting ban. I focus primarily on the presumption of scienter, but I also explain how the same result is favored by the constitutional avoidance canon and the rule of lenity.

When an ineligible voting statute is ambiguous, courts should read it to require a culpable mental state, like knowledge of ineligibility, sufficient to separate innocent from wrongful conduct. Three canons of statutory interpretation favor this approach: the constitutional avoidance canon, the rule of lenity, and the presumption of scienter.

The constitutional avoidance canon applies when an ambiguous statute is susceptible to two plausible readings: one that presents a constitutional question and one that avoids it. In this circumstance, the constitutional avoidance canon instructs courts to adopt the reading that avoids the constitutional question. Specifically, the avoidance canon “counsel[s] [courts] to adopt” a reading that is “fairly possible,” even if an alternative reading is better.⁴⁶⁴ A statute that criminalizes ineligible voting may be susceptible to two plausible readings: one that dispenses with a mens rea requirement and one that preserves it. Below I argue the constitution requires mens rea for ineligible voting to avoid a chilling effect on eligible voting, just as it does for categories of unprotected speech like defamation, incitement, obscenity, and true threats to avoid a chilling effect on protected speech. At the very least, a statute that criminalizes ineligible voting without adequate mens rea presents a constitutional question. The avoidance canon disfavors the reading that dispenses with mens rea and supports the reading that preserves mens rea.

The rule of lenity applies when an ambiguous criminal statute is susceptible to two plausible readings, one favoring the defendant and one disfavoring her. The rule

⁴⁶³ *N.C. A. Philip Randolph Inst.*, 730 F. Supp. 3d at 194 (“Defendants, in an extraordinary and telling concession, do not contest that the historical background from the original enactments of 1877 and 1899 are indefensible. Defendants further do not contest that the law currently impacts African-Americans at a higher rate than it does other citizens.” (internal quotations omitted)); *id.* at 202 (“Record evidence demonstrating this inconsistency in District Attorneys’ interpretation and enforcement of the Challenged Statute—that some believed that the Challenged Statute included a requirement of intent while others did not—compels the conclusion that the Challenged Statute permits a standardless sweep that allows prosecutors to pursue their personal predilections under the Challenged Statute.” (internal quotations omitted)).

⁴⁶⁴ *United States v. Hansen*, 143 U.S. 1932, 1936 (2023) (quoting *Jennings v. Rodriguez*, 583 U.S. 281, 296 (2018)).

instructs courts to adopt the reading that favors the defendant.⁴⁶⁵ Again, when an ineligible voting statute is ambiguous on mens rea, the rule of lenity favors a reading that preserves it over one that dispenses with it.

The presumption of scienter reads into an ambiguous statute sufficient mens rea to separate innocent from wrongful conduct. The Court has suggested that the rule of lenity supports the presumption of scienter.⁴⁶⁶ In a recent case, Justice Gorsuch emphasized the rule of lenity while Justice Kavanaugh emphasized the scienter presumption, but they agreed on the ultimate result.⁴⁶⁷ In short, all three interpretive principles point in the same direction. But whereas the avoidance canon applies to any ambiguous statute that implicates a constitutional question, and the rule of lenity applies to any ambiguous criminal statute, the presumption of scienter is an interpretive tool developed specifically for the problem of a criminal statute with ambiguous mens rea requirements. For this reason, like courts, I focus my analysis on the presumption of scienter, cognizant that the presumption gains strength from complementary interpretive principles like the avoidance canon and the rule of lenity.

The Court has repeatedly recognized a presumption of scienter that reads into ambiguous statutes sufficient mens rea to separate innocent from culpable conduct. The Court has explicitly applied the presumption on at least ten occasions: (1) in *Hansen*, the Court construed a statute to impose criminal liability on a person who “encourages or induces” illegal immigration only when the defendant satisfies the common law requirements (including mens rea) for solicitation or facilitation;⁴⁶⁸ (2) in *Ruan*, the Court construed the Comprehensive Drug Abuse Prevention and Control Act to criminalize the unauthorized distribution of a controlled substance only when the defendant knowingly or intentionally acted in an authorized manner;⁴⁶⁹ (3) in *Rehaif*, the Court construed a federal sentencing provision to punish gun possession by a person without lawful immigration status only when the person was aware he lacked lawful immigration status;⁴⁷⁰ (4) in *Elonis*, the Court construed another federal statute to criminalize threats only when the defendant was aware of the communication’s threatening nature;⁴⁷¹ (5) in *Staples*, the Court construed the National

⁴⁶⁵ *Bittner v. United States*, 598 U.S. 85, 101 (2023) (“Under the rule of lenity, this Court has long held, statutes imposing penalties are to be ‘construed strictly’ against the government and in favor of individuals.”).

⁴⁶⁶ *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 437 (1978) (“This Court, in keeping with the common-law tradition and with the general injunction that ‘ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity,’ has on a number of occasions read a state-of-mind component into an offense even when the statutory definition did not in terms so provide.” (internal citation omitted) (quoting *Rewis v. United States*, 401 U.S. 808, 812 (1971))).

⁴⁶⁷ *Wooden v. United States*, 595 U.S. 360 (2022).

⁴⁶⁸ *United States v. Hansen*, 599 U.S. 762 (2023) (construing 8 U.S.C. § 1324(a)(1)(A)(iv)).

⁴⁶⁹ *Ruan v. United States*, 597 U.S. 450 (2022) (construing 21 U.S.C. § 841).

⁴⁷⁰ *See Rehaif v. United States*, 139 S. Ct. 2191, 2194 (2019) (construing 18 U.S.C. §§ 922(g), 924(a)(2)).

⁴⁷¹ *See Elonis v. United States*, 575 U.S. 723, 737 (2015) (construing 18 U.S.C. § 875(c)).

Firearms Act to prohibit the possession of an unregistered machine gun only when the defendant knew the weapon had the characteristics that triggered its statutory coverage;⁴⁷² (6) in *X-Citement Video*, the Court construed the Protection of Children Against Sexual Exploitation Act to criminalize the sale of child pornography only when the defendant knew of the material's sexually explicit nature and the performer's minority;⁴⁷³ (7) in *Posters 'N' Things*, the Court construed a federal statute to criminalize interstate schemes to sell drug paraphernalia only when the defendant knows the relevant items are likely to be used with illegal drugs;⁴⁷⁴ (8) in *Liparota*, the Court construed a federal statute to criminalize the unauthorized acquisition or possession of food stamps only when the defendant knew the acquisition or possession was unauthorized;⁴⁷⁵ (9) in *U.S. Gypsum Co.*, the Court construed the Sherman Antitrust Act to criminalize price manipulation only when the defendant acted with anti-competitive intent;⁴⁷⁶ and (10) in *Morissette*, the Court construed a federal statute to criminalize conversion of U.S. property only when the defendant knew the property belonged to another.⁴⁷⁷

Drawing on the strong scienter presumption established by these cases, courts should read ambiguous ineligible voting statutes to require subjective mens rea for the ineligibility element. When interpreting criminal statutes, the Court "normally 'start[s] from a longstanding presumption, traceable to the common law, that Congress intends to require a defendant to possess a culpable mental state.'"⁴⁷⁸ The Court has "[a]ppl[ied] the presumption of scienter . . . [to] read into criminal statutes . . . that contain no *mens rea* provision whatsoever . . . that *mens rea* which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'"⁴⁷⁹

There is an exception to the scienter presumption for so-called regulatory or public welfare offenses, but ineligible voting clearly falls outside this exception.⁴⁸⁰ When the Court has categorized a crime as a public welfare offense, it has declined

⁴⁷² See *Staples v. United States*, 511 U.S. 600, 612 (1994) (construing 26 U.S.C. § 5861(d)).

⁴⁷³ See *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 78 (1994) (construing 18 U.S.C. § 2252(a)).

⁴⁷⁴ See *Posters 'N' Things, Ltd. v. United States*, 511 U.S. 513, 517–18, 524 (1994) (construing 21 U.S.C. § 857(a)(1), (d)).

⁴⁷⁵ See *Liparota v. United States*, 471 U.S. 419, 425 (1985) (construing 7 U.S.C. § 2024(b)(1)).

⁴⁷⁶ See *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 435 (1978) (construing 15 U.S.C. § 1).

⁴⁷⁷ See *Morissette v. United States*, 342 U.S. 246, 263 (1952) (construing 18 U.S.C. § 641).

⁴⁷⁸ *Ruan v. United States*, 597 U.S. 450, 457–58 (2022) (quoting *Rehaif v. United States*, 139 S. Ct. 2191, 2195 (2019)).

⁴⁷⁹ *Id.* at 458 (quoting *Elonis*, 575 U.S. at 736 (in turn quoting *Carter v. United States*, 530 U.S. 255, 269 (2000)) (internal quotations omitted)).

⁴⁸⁰ The term "public welfare offense" was coined by law professor Francis Sayre in an influential article repeatedly cited by the Court. Francis Bowes Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55 (1933); see *Staples v. United States*, 511 U.S. 600, 617 (1994) (citing Sayre twice).

to apply the scienter presumption. However, the Court has only recognized this exception in “limited circumstances.”⁴⁸¹ When classifying a crime as a public welfare offense, the Court has emphasized two factors: (1) the statute regulates some physically dangerous item that places the defendant “in responsible relation to a public danger”⁴⁸² and thereby “alert[s] [her] to the probability of strict regulation”;⁴⁸³ and (2) conviction entails limited penalties and reputational harm.⁴⁸⁴

Ineligible voting is not a public welfare offense. Not even close. Each factor points decisively to this conclusion. First, a public welfare offense generally regulates dangerous physical items like narcotic drugs, other misbranded or adulterated drugs, hand grenades, and sulfuric acid.⁴⁸⁵ The Court has described the relevant category of physical items with such formulations as “potentially harmful or injurious items”⁴⁸⁶ and “dangerous or deleterious devices or products or obnoxious waste materials.”⁴⁸⁷ Even though guns are regulated items that pose physical danger, the Court has distinguished guns from hand grenades based on the nation’s “long tradition of widespread lawful gun ownership by private individuals.”⁴⁸⁸ If “the gap between [a grenade] and [a gun] is too wide to bridge,” the gap between possession of an unregistered hand grenade and ineligible voting is a chasm.⁴⁸⁹ Ineligible voting involves no dangerous item whatsoever. To the extent ineligible voting involves any tangible object, it is the physical ballot. While paper beats rock in a children’s game, ineligible voting presents no risk of physical harm (paper cuts aside). The harm threatened by ineligible voting, distortion of the vote tally, is an intangible harm far removed from the physical dangers posed by heroin or sulfuric acid.

By focusing on physical items whose dangerous characteristics suggest strict regulations, the limited exception for public welfare offense generally reserves strict

⁴⁸¹ *Staples*, 511 U.S. at 607 (1994) (quoting *U.S. Gypsum Co.*, 438 U.S. at 437).

⁴⁸² *United States v. Dotterweich*, 320 U.S. 277, 281 (1943).

⁴⁸³ *Staples*, 511 U.S. at 607.

⁴⁸⁴ *E.g.*, *Ruan*, 597 U.S. at 460 (“carries only minor penalties”); *Morissette v. United States*, 342 U.S. 246, 256 (“penalties commonly are relatively small, and conviction does no grave damage to an offender’s reputation”); *People ex rel. Price v. Sheffield Farms-Slawson-Decker Co.*, 121 N.E. 474, 477 (N.Y. 1918) (Cardozo, J.) (“But in sustaining the power to fine we are not to be understood as sustaining to a like length the power to imprison.”).

⁴⁸⁵ *See* *United States v. Behrman*, 258 U.S. 280, 286 (1922) (“morphine, heroin, and cocaine”); *United States v. Balint*, 258 U.S. 250, 253 (1922) (“The Narcotic Act has . . . the incidental purpose of minimizing the spread of addiction to . . . poisonous and demoralizing drugs”); *Dotterweich*, 320 U.S. at 284 (“interstate commerce adulterated or misbranded drugs”); *United States v. Freed*, 401 U.S. 601, 609 (1971) (“hand grenades . . . are highly dangerous offensive weapons”); *United States v. Int’l Mins. & Chem. Corp.*, 402 U.S. 558, 564 (1971) (“sulfuric and other dangerous acids”).

⁴⁸⁶ *Staples*, 511 U.S. at 607.

⁴⁸⁷ *Int’l Mins. & Chem. Corp.*, 402 U.S. at 565.

⁴⁸⁸ *Staples*, 511 U.S. at 610.

⁴⁸⁹ *Id.*

liability for individuals with economic motivations to engage in a particular trade or profession that requires specialized knowledge of governing rules. A doctor prescribing morphine, heroin or cocaine, a business shipping sulfuric waste, or a bar owner who sells alcohol for a living, is in a position to avoid physical harm (and criminal liability) “with no more care than society might reasonably expect and no more exertion than it might reasonably exact from one who assumed his responsibilities.”⁴⁹⁰ Ineligible voting is also disanalogous in this respect. Voting is not a business, profession, or trade. It involves no money or specialized knowledge. It is something that average people do infrequently, not something a specialized group does on a daily basis.

Second, a public welfare offense entails limited penalties or reputational harm. For example, the *Morrisette* Court concluded that the relevant crime fell outside the narrow exception for public welfare offenses in part because they subjected those convicted to significant punishment and disrepute:

Stealing, larceny, and its variants and equivalents . . . stir a sense of insecurity in the whole community and arouse public demand for retribution, the penalty is high and, when a sufficient amount is involved, the infamy is that of a felony, which, says Maitland, is “. . . as bad a word as you can give to man or thing.”⁴⁹¹

Conviction under 18 U.S.C. § 611 subjects a noncitizen not only to criminal punishment of up to one-year imprisonment⁴⁹² but to removability and inadmissibility,⁴⁹³ which may entail family separation, as it did for Margarita Del Pilar Fitzpatrick. The Court has recognized that these adverse immigration consequences are so severe that incompetent legal advice regarding them may violate a defendant’s Sixth Amendment guarantee of effective assistance of counsel.⁴⁹⁴ In no plausible sense are these criminal and immigration consequences “minor penalties.” Furthermore, a noncitizen’s conviction for illegal voting entails severe reputational consequences. In today’s charged political atmosphere, illegal voting is an infamous crime viewed as odious by millions of Americans.

Since ineligible voting falls outside the narrow exception for public welfare offenses, it is subject to a strong presumption of scienter. Under this presumption, courts should construe ineligible voting to require knowledge of ineligibility in order to separate culpable from innocent conduct.

Consider 18 U.S.C. § 611. The statute criminalizes voting by noncitizens with no mens rea term whatsoever. But “silence on this point by itself does not necessarily

⁴⁹⁰ *Morrisette v. United States*, 342 U.S. 246, 256 (1952).

⁴⁹¹ *Id.* at 260 (quoting 2 POLLOCK & MAITLAND, HISTORY OF ENGLISH LAW 465 (1898)).

⁴⁹² See 18 U.S.C. § 611(b).

⁴⁹³ See 8 U.S.C. § 1227(a)(6).

⁴⁹⁴ See *Padilla v. Kentucky*, 559 U.S. 356, 374 (2010).

suggest that Congress intended to dispense with a conventional mens rea element.⁴⁹⁵ That is why the federal multiple-voting statute, which refers only to “vot[ing] more than once in a[n] [covered] election,”⁴⁹⁶ has been uniformly construed to require that the person act “knowingly, willfully, and expressly for the purpose of having her vote count more than once.”⁴⁹⁷ Indeed, no prosecutor or judge has ever read § 611 to dispense entirely with mens rea.⁴⁹⁸ Instead, they have construed § 611 as a so-called “general intent” crime that requires some mens rea, but only with respect to the two physical elements that comprise the actus reus—the proscribed conduct (voting) and the attendant circumstance (noncitizen status). Under this theory, § 611 requires (1) knowledge that one’s conduct constitutes voting and (2) knowledge that one is a noncitizen, but not (3) knowledge that noncitizens are ineligible to vote.

This theory is wrong for at least three reasons. First, there is no good explanation for why Congress would always excuse mistakes about immigration law (no matter how unreasonable) but never excuse mistakes about voter eligibility law (no matter how reasonable). Second, the theory relies heavily on the notion that most crimes are general intent in the sense that they require mens rea for their actus reus but nothing else. This is the rationale for distinguishing between the two classes of mistakes. It matters if the defendant mistakenly believes she is a U.S. citizen because that mistake concerns a physical element of the offense, the attendant circumstance of being a noncitizen. But it’s irrelevant if the defendant mistakenly believes a noncitizen can vote, because that mistake does not concern an element of the offense. This sort of technical argument is vulnerable to technical counterarguments. Recall that § 611 raises constitutional questions about congressional power to set voter qualifications.⁴⁹⁹ At the least, there is constitutional uncertainty about whether

⁴⁹⁵ *Staples v. United States*, 511 U.S. 600, 605 (1994).

⁴⁹⁶ 52 U.S.C. § 10307(e)(1). The punishment may be up to five years imprisonment. *Id.* § 10307(e)(2).

⁴⁹⁷ *United States v. Salisbury*, 983 F.2d 1369, 1377 (6th Cir. 1993); *see also* *United States v. Hogue*, 812 F.2d 1568, 1576 (11th Cir. 1987) (citing with approval trial court instructions that the “essential elements of the [double voting] offense [included that defendant acted] knowingly and willfully for the specific purpose of having his vote count more than once”); 29 C.J.S. Elections § 572.

⁴⁹⁸ Section 611(c) provides an explicit exception for a noncitizen child of American parents who permanently resided in the United States prior to age sixteen and reasonably believed at the time of voting that they were a U.S. citizen. Another interpretive canon, *expressio unius est exclusio alterius*, provides that express mention of one thing indicates exclusion of another “left unmentioned.” *NLRB v. SW Gen., Inc.*, 580 U.S. 288, 302 (2017). Applying this interpretive principle to the explicit exception in § 611(c), one could argue that Congress intended criminal liability for all outside the exception’s narrow scope. Under this reasoning, a reasonable belief in U.S. citizenship would not shield the defendant from criminal punishment if her permanent residence in the United States started at (rather than prior to) age sixteen or if one (but not both) of her parents were U.S. citizens. No prosecutor or judge has embraced this reading—for good reason. This exception was added to § 611 four years after its original enactment. Child Citizenship Act of 2000, Pub. L. No. 106-395, 114 Stat. 1631.

⁴⁹⁹ *See supra* Section III.A.1.

Congress can prohibit a noncitizen from voting in federal elections if a state affirmatively permits that noncitizen to vote in state elections. To avoid this constitutional question, courts could adopt a limiting construction, reading the statute to apply only if the state prohibits noncitizen voting. But this limiting construction would add one more element to the *actus reus*—the attendant circumstance that the state prohibits noncitizen voting. With this new element, a “general intent” reading requires *mens rea* for both citizenship status and voter eligibility.

Most fundamentally, by excusing citizenship mistakes but not eligibility mistakes, the prevailing interpretation of § 611 fails to adequately separate culpable from innocent conduct. The Court made this point most clearly in *Carter v. United States*.⁵⁰⁰ The Court examined a bank robbery statute that subjects to criminal punishment any person who “by force and violence, or by intimidation, takes . . . any . . . thing of value belonging to . . . any bank”⁵⁰¹ Like § 611, this statutory language contains no *mens rea* terminology. But the Court concluded that the presumption of scienter required “general intent,” i.e., *mens rea* with respect to each physical element comprising the crime’s *actus reus*.⁵⁰² The Court emphasized that “[t]he presumption in favor of scienter requires a court to read into a statute only that *mens rea* which is necessary to separate wrongful conduct from ‘otherwise innocent conduct.’”⁵⁰³ Since the specific statutory provision at issue requires a forceful taking, the Court concluded that general intent was sufficient and that the presumption of scienter did not require a specific “intent to steal or purloin.”⁵⁰⁴

[This provision] certainly should not be interpreted to apply to the hypothetical person who engages in forceful taking of money while sleepwalking (innocent, if aberrant activity), but this result is accomplished simply by requiring . . . general intent—i.e., proof of knowledge with respect to the *actus reus* of the crime. And once this mental state and *actus reus* are shown, the concerns underlying the presumption in favor of scienter are fully satisfied, for a forceful taking—even by a defendant who takes under a good-faith claim of right—falls outside the realm of the “otherwise innocent.” Thus, the presumption in favor of scienter does not justify reading a specific intent requirement—“intent to steal or purloin”—into [the provision].⁵⁰⁵

Crucially, this conclusion represented a case-specific determination that general intent suffices for this particular provision, not a global determination that general

⁵⁰⁰ See 530 U.S. 255, 269 (2000).

⁵⁰¹ *Id.* at 261–62 (quoting 18 U.S.C. § 2113(a)).

⁵⁰² See *id.* at 268.

⁵⁰³ *Id.* at 269 (internal quotations and citation omitted).

⁵⁰⁴ *Id.*

⁵⁰⁵ *Id.* at 269–70.

intent always suffices to separate wrongful from innocent conduct. On the contrary, the Court explicitly acknowledged that “some situations may call for implying a specific intent requirement into statutory text.”⁵⁰⁶ And the Court offered an illustrative example, a hypothetical statute that subjects to criminal punishment any person who “takes and carries away . . . any . . . thing of value in the . . . possession of any bank.”⁵⁰⁷ Since this hypothetical statute required no forceful taking, general intent would not protect a person who took money from a bank based on the mistaken belief that the money was his.

Such a statute would run the risk of punishing seemingly innocent conduct in the case of a defendant who peaceably takes money believing it to be his. Reading the statute to require that the defendant possess general intent with respect to the *actus reus*—*i.e.*, that he know that he is physically taking the money—would fail to protect the innocent actor. The statute therefore would need to be read to require not only general intent, but also specific intent—*i.e.*, that the defendant take the money with “intent to steal or purloin.”⁵⁰⁸

There’s nothing inherently wrongful about exiting a bank with money in your hands. What makes it wrongful is the fact that it’s not your money. So punishment requires knowledge that it’s not your money. So, too, with § 611. It’s not inherently wrongful for noncitizens to vote, as they lawfully do in the United States today in some local elections. What makes it wrongful is the fact that noncitizens are ineligible to vote (in state and federal elections). So punishment requires knowledge of ineligibility. The scienter presumption demands sufficient mens rea to separate wrongful from innocent conduct. Often general intent does the trick. But with § 611, just like with the hypothetical statute in *Carter*,⁵⁰⁹ general intent is not enough. Status scienter is required.

Why have prosecutors and courts ignored the teaching of *Carter*, neglected status scienter, and construed § 611 as a general intent statute? One explanation is that they misread *Carter* from the very start—when the U.S. Attorney’s Office for the Southern District of Florida prosecuted Ricardo Knight as part of its § 611 pilot project. Here’s the relevant passage from the government’s response to Ricardo Knight’s motion to dismiss.

Where a statute is silent as to intent, it becomes a question of legislative intent for a court to construe. Where no specific intent

⁵⁰⁶ *Id.* at 269.

⁵⁰⁷ *Id.* at 262.

⁵⁰⁸ *Id.* at 269.

⁵⁰⁹ *See id.* at 262.

element is apparent on the face of the statute, the crime is one of general intent. Put another way, any presumption in favor of scienter requires only proof of general intent, meaning that the defendant had knowledge of his actions in committing the offense. The defendant argues incorrectly for a presumption of specific intent, a claim the law does not support⁵¹⁰

This is a clear misreading of *Carter*. That case did not say the presumption of scienter requires general intent and nothing more. It said the presumption requires sufficient mens rea to separate innocent from wrongful conduct.⁵¹¹ It explained that general intent sufficed in some cases while others required specific intent. Since the prosecution misapprehended the relevant inquiry, it offered no explanation of how general intent sufficed to separate innocent from wrongful noncitizen voting. When the Eleventh Circuit ultimately endorsed this reading of § 611, it offered a similarly cursory analysis consisting of a similarly conclusory declaration: general intent is enough.

While Knight maintains that we must read a specific intent mens rea into § 611 in order to properly separate wrongful conduct from innocent conduct, a general intent requirement satisfies this goal. As a general intent crime, the government must still prove that the defendant knowingly engaged in the conduct prohibited by § 611. This is sufficient to separate proper conduct from improper actions.⁵¹²

Perhaps prosecutors and judges categorize the Florida 15 as culpable rather than innocent actors because, like Judge Devers, they find it “inconceivable that any rational human being could think they could just travel to some other country and vote.”⁵¹³ I have tried to explain why a rational human being, like Margarita Del Pilar Fitzpatrick, could realize they are not a U.S. citizen but still mistakenly believe they are eligible to vote. In some cases, this mistaken belief, while sincere, may be unreasonable. But that is a negligence standard. And while a negligence standard “is

⁵¹⁰ Governments Response in Opposition to Defendant Knight’s Motions to Dismiss Indictment at 9–10, *United States v. Knight*, No. 04-20490-CR (S.D. Fla. Aug. 11, 2005) (internal citations omitted).

⁵¹¹ *See Carter v. United States*, 530 U.S. 255, 269 (2000).

⁵¹² *United States v. Knight*, 490 F.3d 1268, 1271 (11th Cir. 2007) (internal citations omitted). The opinion repeats this conclusion three times. *Id.* at 1270 (“Section 611 is a constitutional general intent crime.”); *id.* at 1271 (“Section 611 is a general intent crime.”); *id.* (“The district court found § 611 to be a constitutionally-sound general intent offense. We agree.”).

⁵¹³ Transcript of Sentencing Hearing at 7, *United States v. Landeros-Mireles*, No. 5:18-CR-325-1 (E.D.N.C. Feb. 19, 2019).

a familiar feature of civil liability . . . [it] is inconsistent with the conventional requirement for criminal conduct—*awareness* of some wrongdoing.”⁵¹⁴

Whatever the explanation for the prevailing “general intent” reading of § 611, it is misguided. Under a proper application of the scienter presumption, and complementary canons of statutory construction, § 611 requires status scienter to separate wrongful from innocent conduct.

2. A Constitutional Requirement of Subjective Mens Rea

In prior Sections, I have advocated various approaches to avoid strict criminal liability for ineligible voting. Lawmakers could treat ineligible voting as a civil matter rather than a crime. If lawmakers insist on criminalizing ineligible voting, they should include robust and explicit mens rea requirements. If they do not, judges should use traditional canons of statutory construction to read in adequate mens rea requirements. If courts construe statutes to make ineligible voting a strict liability crime, a set of constitutional questions arise.

My primary argument is that the U.S. Constitution requires subjective mens rea for ineligible voting, just like it does for limited categories of unprotected speech like incitement, defamation, obscenity, and true threats. Ineligible voting is like unprotected speech. In both cases, a thin line separates protected from unprotected conduct. Without a mens rea requirement, people would steer clear of the line and refrain from protected conduct. This chilling effect would undermine the foundational values the protected conduct serves. To guard against this chilling effect, the Constitution demands subjective mens rea as a prerequisite to criminal punishment.

The Constitution requires subjective mens rea when constitutional protection turns on an attendant circumstance. Civil liability for defamation of public figures requires actual malice regarding the statement’s falsity.⁵¹⁵ Criminal punishment for incitement requires specific intent to cause imminent law-breaking.⁵¹⁶ Criminal punishment for obscene material requires knowledge of its contents.⁵¹⁷ And just last

⁵¹⁴ *Elonis v. United States*, 575 U.S. 723, 737–38 (2015) (internal quotations and citation omitted).

⁵¹⁵ *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964) (“The constitutional guarantees require . . . a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with ‘actual malice’—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.”).

⁵¹⁶ *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (“[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”); *Hess v. Indiana*, 414 U.S. 105, 109 (1973) (holding that the First Amendment prohibits defendant’s criminal punishment absent showing “that his words were intended to produce, and likely to produce, imminent disorder” (emphasis omitted)).

⁵¹⁷ *See Smith v. California*, 361 U.S. 147, 152–53 (1959) (“There is no specific

term, the Court concluded, 7–2, that criminal punishment for a true threat requires subjective mens rea for the communication’s threatening nature.⁵¹⁸ Writing for the majority, Justice Kagan explained that the Court has repeatedly insisted on subjective mens rea to guard against a chilling effect:

Yet the First Amendment may still demand a subjective mental-state requirement shielding some true threats from liability. The reason relates to what is often called a chilling effect. Prohibitions on speech have the potential to chill, or deter, speech outside their boundaries. A speaker may be unsure about the side of a line on which his speech falls. . . . The result is “self-censorship” of speech that could not be proscribed—a “cautious and restrictive exercise” of First Amendment freedoms.⁵¹⁹

So, too, here. Strict criminal liability for mistaken ineligible voting will chill democratic participation by eligible voters.⁵²⁰

And an important tool to prevent that outcome—to stop people from steering “wide[] of the unlawful zone”—is to condition liability on the State’s showing of a culpable mental state. . . . [That] added element reduces the prospect of chilling fully protected expression. As this Court has noted, the requirement lessens “the hazard of self-censorship” by “compensat[ing]” for the law’s uncertainties. Or said a bit differently: “[B]y reducing an honest speaker’s fear that he may accidentally [or erroneously] incur liability,” a mens rea requirement “provide[s] ‘breathing room’ for more valuable speech.”⁵²¹

So, too, here. A subjective mens rea requirement will encourage eligible voters to participate without fear that they may accidentally get in trouble. These First Amendment precedents in the unprotected-speech context should apply with equal

constitutional inhibition against making the distributors of food the strictest censors of their merchandise, but the constitutional guarantees of the freedom of speech and of the press stand in the way of imposing a similar requirement on the bookseller.”); *Mishkin v. New York*, 383 U.S. 502, 511 (1966) (“The Constitution requires proof of scienter to avoid the hazard of self-censorship of constitutionally protected material and to compensate for the ambiguities inherent in the definition of obscenity.”).

⁵¹⁸ See *Counterman v. Colorado*, 600 U.S. 66, 69 (2023). Justices Barrett and Thomas argued for objective mens rea, *id.* at 112–13 (Barrett & Thomas, JJ., dissenting), while Justices Gorsuch and Sotomayor insisted that the First Amendment required knowledge and not just recklessness, *id.* at 85–86 (Sotomayor & Gorsuch, JJ., concurring in part).

⁵¹⁹ *Id.* at 75 (internal citations omitted).

⁵²⁰ See *supra* Section IV.B.1.

⁵²¹ *Counterman*, 600 U.S. at 75 (internal citations omitted).

or greater force in the context of ineligible voting. These precedents ultimately reflect the Court's judgment on democracy's prerequisites: mens rea protection is essential to uninhibited speech, which in turn is essential to representative democracy. Writing for the *Sullivan* majority, Justice Brennan linked free speech to democratic debate and democratic responsiveness: "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system."⁵²²

Justice Black, in his *Sullivan* concurrence, warned that:

[A] representative democracy ceases to exist the moment that the public functionaries are by any means absolved from their responsibility to their constituents; and this happens whenever the constituent can be restrained in any manner from speaking, writing, or publishing his opinions upon any public measure, or upon the conduct of those who may advise or execute it.⁵²³

Justice Goldberg, in his *Sullivan* concurrence, similarly emphasized the instrumental role governmental criticism plays in an electoral democracy.⁵²⁴

If government is to "be responsive to the will of the people,"⁵²⁵ eligible voters must be free to vote without the specter of strict criminal liability chilling their democratic participation. That, too, is a fundamental principle of our constitutional system. And it likewise requires the strategic protection of subjective mens rea.

3. A Reliance Defense

The prior two Sections argued that status scienter is both favored by canons of construction and required by the Constitution. Strict criminal liability for mistaken

⁵²² N.Y. Times Co. v. Sullivan, 376 U.S. 254, 269 (1964) (quoting Stromberg v. California, 283 U.S. 359, 369); see also *id.* at 271 ("[T]he people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy." (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 310)).

⁵²³ *Id.* at 297 (Black, J., concurring, joined by Douglas, J.) (quoting 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES *297 (1803)).

⁵²⁴ *Sullivan*, 376 U.S. at 299 (Goldberg, J., concurring, joined by Douglas, J.) ("In a democratic society, one who assumes to act for the citizens . . . must expect that his official acts will be commented upon and criticized. Such criticism cannot . . . be muzzled or deterred by the courts at the instance of public officials under the label of libel. . . . In a democratic society where men are free by ballots to remove those in power, any statement critical of governmental action is necessarily 'of and concerning' the governors . . .").

⁵²⁵ *Id.* at 269 (majority opinion).

ineligible voting may be vulnerable to challenge on the basis of other legal theories. These lie beyond the scope of this Article, but I hope (and encourage others!) to explore them in future work.⁵²⁶ Here, I briefly discuss one more: a reliance defense. Fitzpatrick would never have voted if that DMV official had not invited her to register. This is a pattern in cases of mistaken ineligible voting: some interaction with a government official generates confusion and induces detrimental reliance. The Court has recognized that due process sometimes precludes criminal liability when a person reasonably relies on official conduct.⁵²⁷ Federal courts have applied this “official authorization defense” when a person mistakenly concludes they are eligible to possess a gun based on guidance from a federally licensed firearms dealer.⁵²⁸ But while some courts have been generous with this defense in the context of guns, other courts have been stingy with it in the context of voting. In Fitzpatrick’s case, the Seventh Circuit rejected the defense, concluding that the DMV official’s response, “[i]t’s up to you,” was a refusal to offer advice, not an assurance of her eligibility.⁵²⁹ The Seventh Circuit also suggested that Fitzpatrick was ineligible for the defense because she checked the box indicating she was a citizen.⁵³⁰ Other courts have suggested that defendants cannot invoke the official authorization defense when they rely on a state official regarding federal law.⁵³¹ But when it comes to federal elections, eligibility is determined by state law. The relevant inquiry is not what the DMV official intended to convey, but the reasonableness of Fitzpatrick’s reliance.

⁵²⁶ I have already discussed the question of HAVA preemption. *See supra* Section V.B.2. The North Carolina lawsuit raised claims of intentional racial discrimination and vagueness. *See generally* N.C. Complaint, *supra* note 377. Another issue worth exploring is a racial vote dilution claim under Section 2 of the Voting Rights Act.

⁵²⁷ *See* *Raley v. Ohio*, 360 U.S. 423, 425–26 (1959) (“[T]o sustain . . . [the convictions] would be to sanction an indefensible sort of entrapment by the State—convicting a citizen for exercising a privilege which the State had clearly told him was available to him.”); *Cox v. Louisiana*, 379 U.S. 559, 571 (1965) (overturning conviction of civil rights protestors for demonstrating “near” a courthouse when local officials “in effect told the demonstrators that they could meet where they did”); *United States v. Pa. Indus. Chem. Corp.*, 411 U.S. 655, 674 (1973) (“[T]o the extent that [agency] regulations deprived [the defendant] of fair warning as to what conduct the Government intended to make criminal, we think there can be no doubt that traditional notions of fairness inherent in our system of criminal justice prevent the Government from proceeding with the prosecution.”).

⁵²⁸ *See* *United States v. Tallmadge*, 829 F.2d 767, 774–75 (9th Cir. 1987).

⁵²⁹ *Fitzpatrick v. Sessions*, 847 F.3d 913, 914 (7th Cir. 2017).

⁵³⁰ *See id.* at 915 (“The defense is available to someone who makes complete and accurate representations to a public official and then receives permission from that official . . . [Fitzpatrick] did not make accurate disclosures when applying. She checked the box claiming U.S. citizenship. She is literate in English and has no excuse for making that misrepresentation.”).

⁵³¹ *See, e.g., United States v. Stewart*, 185 F.3d 112, 125 n.5 (3d Cir. 1999) (“[W]e are doubtful that a defendant can claim an entrapment by estoppel defense when . . . the government official is a state official who approves of the criminal conduct on state law grounds and the defendant is accused of violating federal law.” (internal citations omitted)).

And it's not clear why checking the wrong box should foreclose this defense, especially since Fitzpatrick only checked that box after the DMV official inspected her official documents, invited her to register, and then said, "[i]t's up to you."⁵³² In another case, where the box may have been checked by the official rather than the noncitizen, the Seventh Circuit remanded for reconsideration of the reliance defense.⁵³³ For these reasons, a reliance defense for ineligible voting cases warrants further consideration.

CONCLUSION

Imagine we imposed strict criminal liability on any election worker who counts an ineligible ballot. After all, the relevant harm, the distorting of the vote tally, occurs when the ballot is counted, not when it's cast. Why not make it a strict liability crime to count the wrong ballot?

Because that's a terrible idea. It's fundamentally unfair to criminally punish an election worker who sincerely believes the ballot she's counting is valid. But won't strict criminal liability encourage election workers to triple-check? And thus count fewer invalid ballots? Perhaps, but only at the cost of rejecting more valid ballots. And delaying the count. And discouraging anyone from serving as an election worker in the first place.

For these reasons, we should not and do not impose strict criminal liability on an election worker who counts an invalid ballot based on a sincere but mistaken belief in its validity. For similar reasons, we should not impose strict criminal liability on the person who casts that ballot based on a sincere but mistaken belief in their eligibility to vote.

Yet we do. We treat voter mistake like voter fraud. In this Article, I have documented this pattern, explained why it's so problematic, and suggested legal reforms to address it.

I conclude with one final thought. Voter fraud almost never occurs, but we talk about it incessantly. Voter mistake occurs far more frequently, but we almost never talk about it. It's time to recalibrate these inverted dynamics. Careful distinction between voter mistake and voter fraud must be a basic norm in media, advocacy, scholarship, and public discourse. Adherence to that norm must be a prerequisite to public credibility. For the Heritage Foundation, that means removing cases of voter mistake from its voter fraud database.

⁵³² *Fitzpatrick*, 847 F.3d at 914.

⁵³³ *See* *Keathley v. Holder*, 696 F.3d 644, 646–47 (7th Cir. 2012).