

# The Insidious Criminalization of a Voter Registration and Texas's Senate Bill 1

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*Since 2014, Texas rejected over 12,500 provisional ballots in Tarrant County alone, with voter ineligibility being the reason for about eighty-eight percent of those rejections. This represents only one out of two hundred fifty-four counties. Imagine how many provisional ballots are rejected across Texas and beyond the state because of voter ineligibility. Texas's recently enacted Senate Bill 1 (S.B. 1) both creates the mechanisms to prosecute every one of those rejected applicants and facilitates the prosecution process by requiring county registrars to refer individuals who are ineligible to vote and register to vote to the state's Attorney General, Secretary of State, and county and district attorneys. Officials in other states use similar statutory schemes to prosecute election offenses. In 2022, Tennessee officials sought the prosecution of a woman who attempted to register to vote despite being ineligible. Such prosecutions are reminiscent of the prosecution of Crystal Mason, a woman sentenced to five years in prison for casting a provisional ballot in Tarrant County when she was serving out a felony conviction. Mason did not know she was ineligible to vote. Following the enactment of S.B. 1, this Article draws on the parallels between Mason and individuals who register to vote and are unaware of their voter ineligibility. This Article provides a novel and timely analysis of the investigative and prosecutorial discretion Texas election officials and local prosecutors have when reviewing voter registration applications submitted by people who are ineligible to vote due to a felony conviction. This Article offers a handful of solutions that the Secretary of State, judges, and county officials can implement to protect unsuspecting individuals from additional criminal penalties.*

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## INTRODUCTION

On November 8, 2016, Crystal Mason left work and headed to her polling location to vote in the presidential election. It was a rainy night, and the polls in Texas were nearing to a close as the clock ticked closer to 7 p.m.<sup>1</sup> Mason could have decided not to go, but her mother insisted that she make her voice heard.<sup>2</sup> Since Mason was released from prison only three months before Election Day<sup>3</sup> after five years of incarceration,<sup>4</sup> participation in this election was likely significant to Mason and her mother. She almost did not reach the polls before they closed, but she got in line just in time.<sup>5</sup>

Despite arriving to the polling location in time, Mason could not vote that day. At the polling location, Mason ran into a problem encountered by many voters<sup>6</sup>—her name did not appear on the list of registered voters.<sup>7</sup>

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1. Vann R. Newkirk II, *When the Myth of Voter Fraud Comes for You*, ATLANTIC (Dec. 14, 2021), <https://www.theatlantic.com/magazine/archive/2022/01/voter-fraud-myth-election-lie/620846/> [https://perma.cc/X5PR-MVCM].

2. Christina Morales, *Her Ballot Didn't Count. She Faces 5 Years in Prison for Casting It*, N.Y. TIMES (Apr. 3, 2021), <https://www.nytimes.com/2021/04/03/us/texas-provisional-ballot-appeal.html> [https://perma.cc/ZT58-GYGG].

3. Steve Chapman, *Steve Chapman: Mark Meadows and the Real Voter Fraud*, CHI. TRIB. (Apr. 15, 2022, 2:58 PM), <https://www.chicagotribune.com/opinion/commentary/ct-column-mark-meadows-voter-fraud-trump-chapman-20220415-nlhlsrx7jffjhd7pu2zmwxm-story.html> [https://perma.cc/FFB7-S9Q2].

4. Sue Halpern, *How Crystal Mason Became the Face of Voter Suppression in America*, NEW YORKER (Dec. 18, 2019), <https://www.newyorker.com/news/news-desk/how-crystal-mason-became-the-face-of-voter-suppression-in-america> [https://perma.cc/A69V-53KE].

5. Newkirk, *supra* note 1.

6. Names may not appear on voter rolls for many reasons, including voter roll purges and instances where voters think they have registered to vote in time when they have not. See *Voter Purges*, BRENNAN CTR. FOR JUST, <https://www.brennancenter.org/issues/ensure-every-american-can-vote/vote-suppression/voter-purges> [https://perma.cc/YF9D-EFAL] (describing voter purges as the semi-regular deletion of names on registration lists by jurisdictions). In Texas, where voters must be registered to vote thirty days before Election Day, individuals who submit a new voter registration form after the deadline will not be able to participate in an upcoming election. See TEX. ELEC. CODE ANN. § 13.143(a) (listing the voter registration deadline). Additionally, voters who register through an online platform are not properly registered to vote without sending in a signed voter registration form to their county registrar. See Rebecca Ayala, *Voting Problems 2018*, BRENNAN CTR. FOR JUST. (Nov. 5, 2018), <https://www.brennancenter.org/our-work/analysis-opinion/voting-problems-2018> [https://perma.cc/ZE8T-Y9CF]. For example, days before a voter registration deadline in 2018, Texas election officials rejected 2,400 voter registrations that were submitted online by Vote.org. *Id.* Texas has also increased the amount of voter purges it performed before elections without properly notifying voters. *Id.* Election officials purged approximately 363,000 more voters in the period following *Shelby County v. Holder*, 570 U.S. 529 (2013), from 2012 to 2014 than they did from 2008 to 2010. Jonathan Brater, et al., *Purges: A Growing Threat to the Right to Vote*, BRENNAN CTR. FOR JUST. (2018), <https://www.brennancenter.org/our-work/research-reports/purges-growing-threat-right-vote> [https://perma.cc/H52X-84R6].

7. Michael Murney, *Years of Harassment Led Up to Neighbors Reporting Crystal Mason for Illegal Voting, She Says*, DALL. OBSERVER (Oct. 5, 2021), <https://www.dallasobserver.com/news/years-of-harassment-led-up-to-neighbors-reporting-crystal-mason-for-illegal-voting-she-says-12519227> [https://perma.cc/FM92-ZS2R].

Jarrold Streibich, a sixteen-year-old poll worker and Mason's neighbor, told her that she could cast a provisional ballot.<sup>8</sup> So, that's what Mason did.<sup>9</sup> "Like tens of thousands of Texas voters, and millions of Americans across the country, Mason cast a provisional ballot, and went home."<sup>10</sup>

As of Election Day, Mason was not aware that she was ineligible to vote. Mason's probation officers did not inform her that she could not vote, and she neither read nor was alerted by Streibich to the tiny print on her provisional ballot affidavit that covered the voter eligibility requirements for individuals serving out felony convictions.<sup>11</sup> This information was vital to know because Mason had not completed a sentence for a felony conviction, so she was not eligible to vote yet in Texas.<sup>12</sup> Mason did not know she could not vote, even though others suspected she could not; Jarrod Streibich "knew for a fact that she was just recently let out of prison [for a felony conviction, but he] . . . just forgot that she was ineligible to vote."<sup>13</sup> Streibich later informed Karl Dietrich, the election judge at Mason's polling location and another neighbor of Mason's, "of Mason's supervised release status."<sup>14</sup> Instead of letting the county reject her provisional ballot, Dietrich reported Mason's provisional ballot to the Tarrant County District Attorney, and a formal investigation was launched within the week.<sup>15</sup> Ultimately, Mason was sentenced to five years for an illegal voting offense.<sup>16</sup>

Crystal Mason attempted to vote while serving out a felony conviction.<sup>17</sup> But what happens when a person who is ineligible to vote due to a felony conviction registers to vote? For Pamela Moses from Memphis, Tennessee, she was in a similar position as Mason when simply registering to vote resulted in her prosecution.<sup>18</sup> In 2022, Moses was sentenced to six years for attempting to register to vote when she was ineligible due to her criminal

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8. See *id.* (detailing how her neighbor repeatedly and maliciously cut off her water supply).

9. *Id.*

10. Newkirk, *supra* note 1.

11. Sam Levine, *Texas Upholds Sentence for Woman Who Didn't Know She Was Ineligible to Vote*, GUARDIAN (Mar. 20, 2020, 12:00 AM), <https://www.theguardian.com/us-news/2020/mar/20/crystal-mason-texas-upholds-sentence-voter-suppression> [<https://perma.cc/LRU7-KN6Z>].

12. *Id.*

13. Sam Levine, *Texas Made an Example out of Crystal Mason – For Trying to Vote*, HUFFINGTON POST (July 29, 2019, 5:45 AM), [https://www.huffpost.com/entry/crystal-mason-prison-sentence\\_n\\_5d3b04e8e4b0c31569e9fb94](https://www.huffpost.com/entry/crystal-mason-prison-sentence_n_5d3b04e8e4b0c31569e9fb94) [<https://perma.cc/6NSZ-VKET>].

14. Murney, *supra* note 7.

15. *Id.*

16. *Id.*

17. *Id.*

18. Sam Levine, *The Black Woman Sentenced to Six Years in Prison over a Voting Error*, GUARDIAN (Feb. 3, 2022, 10:00 AM), <https://www.theguardian.com/us-news/2022/feb/03/fight-to-vote-tennessee-pamela-moses-convicted> [<https://perma.cc/67HN-DPTA>] [hereinafter *Black Woman Sentenced*].

history.<sup>19</sup> Moses, like Mason, was never told that she could not vote.<sup>20</sup> Unlike Mason, Moses's voter registration was never properly challenged or canceled as local election officials never took her off the voter rolls.<sup>21</sup> After launching a mayoral campaign, Moses learned in 2019 that she might not be able to run for office because she was still serving out a felony.<sup>22</sup> To obtain clarification on whether she was eligible to run for office and vote, Moses asked a judge to clarify her sentence and confirm if she was on probation.<sup>23</sup> Despite confirmation from the court that she was still on probation, she distrusted the judge's calculation of her sentence.<sup>24</sup> To get a second opinion, Moses asked her local probation office to also investigate if her felony sentence had ended.<sup>25</sup> A probation officer certified that her probation had ended, and immediately thereafter Moses submitted the certificate with a voter registration application.<sup>26</sup> On the following day, the corrections department notified the elections office that the probation officer made an error on the certificate, as Moses was still serving an active sentence.<sup>27</sup> Ultimately, she was convicted for making a false entry on a voter registration form.<sup>28</sup> Even though Moses was convicted in Tennessee, her prosecution may inspire similar convictions in Texas. Given the proper legal mechanisms, it may only be a matter of time until mistaken ineligible voter registrations become the next frontier of Texas election prosecutions.

In 2021, the Texas Legislature provided the legal mechanisms to pursue these types of election prosecutions through lesser-known provisions in the omnibus election bill, Senate Bill 1 (S.B. 1).<sup>29</sup> This Article primarily argues that S.B. 1 poses serious threats to individuals who mistakenly register to vote when they are ineligible. Curiously, S.B. 1 gives with one hand and takes with the other by including provisions which would prevent Mason's prosecution while also making Moses's prosecution possible.<sup>30</sup> S.B. 1 insidiously creates criminal referrals of voter registration, which facilitates prosecution.<sup>31</sup> Provisions such as these should greatly worry legislators, election officials, judges, voter advocates, and voters everywhere, particularly because of their reach. Since 2014, eighty-eight percent of the

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19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. See discussion *infra* Section I; Tex. S.B. 1, 87th Leg., 2d Spec. Sess. (2021).

30. See Tex. S.B. 1, 87th Leg., 2d Spec. Sess. (2021).

31. See discussion *infra* Section I.C.

over 12,500 people who voted using a provisional ballot in Tarrant County have had their ballot rejected because of voter ineligibility.<sup>32</sup> Tarrant County's data accounts for only one of the two hundred fifty-four counties in Texas.<sup>33</sup> Since 2014, hundreds of thousands of provisional ballots have likely been rejected in Texas alone. Because the number of people attempting to register to vote is significantly larger than the number of people casting ballots,<sup>34</sup> many Texans serving out felony convictions are vulnerable to additional prosecution if a voter registration attempt results in a criminal referral.

In Section I, this Article examines how S.B. 1 impacts individuals serving out felony convictions. It identifies how a provision that creates a criminal referral for a voter registration application is in direct tension with other S.B. 1 provisions designed to decriminalize innocent election offenses and educate individuals with felony convictions. In Section II, the Article examines how important the voter registration process is to educate people on their ineligibility status. By investigating how counties may statutorily perform voter eligibility checks, this Article finds that counties retain prosecutorial discretion in executing S.B. 1 provisions. In Section III, the Article offers solutions to alleviate the burdens this law places on individuals with felony convictions. Many of these solutions do not require passing more laws. Rather, these solutions urge election officials and judges to prevent the prosecution of ineligible individuals registering to vote. The Article does not try to encompass all possible solutions to the problems it identifies. But by detailing how individuals serving felony convictions are impacted by S.B. 1, perhaps felony-disenfranchised people will become a less-forgotten group of marginalized future voters.

## I. S.B. 1 & INDIVIDUALS WITH FELONY CONVICTIONS

Institutionally, Texas has never been friendly to voters who make innocent mistakes, particularly if those voters are people of color.<sup>35</sup> Over the

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32. Levine, *Texas Upholds Sentence for Woman Who Didn't Know She Was Ineligible to Vote*, *supra* note 11.

33. *Texas Counties*, TEX. COMPTROLLER, <https://comptroller.texas.gov/transparency/local/counties.php> [<https://perma.cc/8FFR-G6UD>].

34. Because every person must register to vote before they can cast a ballot, the number of registered voters is larger than the number of people voting if turnout is less than one hundred percent. *See* TEX. ELEC. CODE ANN. § 13.143(a) (requiring prospective voters to register to vote in order to cast a ballot).

35. Almost all people prosecuted by Greg Abbott's offices for voter fraud were Black or Latinx. For example, one case involved a Black woman, Gloria Meeks, who helped an elderly neighbor vote by mail, but the neighbor mistakenly did not include Meeks' information on the voter's ballot. Mimi Swartz, *Who Is Greg Abbott?*, TEX. MONTHLY (May 2022), <https://www.texasmonthly.com/news-politics/who-is-greg-abbott/#comments> [<https://perma.cc/K2GE-3TFD>]. A Black city council member, Willie Ray, and her granddaughter, Jamillah Johnson, were also prosecuted for the same offense, even though Ray thought she was simply teaching her granddaughter a civics

past fifteen years, Governor Greg Abbott's relentless investigations of alleged voter fraud foreshadowed Mason's prosecution and created institutional support for voter registration prosecutions.<sup>36</sup> By 2021, the Governor and the Legislature supported more election restrictions demonstrated through S.B.1, which included comprehensive election law changes.<sup>37</sup> In response to Harris County's innovative election policies in the midst of the COVID-19 pandemic,<sup>38</sup> the seventy-six pages of legislation swept in new restrictions on election administration, including prohibitions on overnight and drive-thru polling locations,<sup>39</sup> additional identification requirements on absentee ballots,<sup>40</sup> and prohibitions on the distribution of unsolicited ballot-by-mail applications by elected officials.<sup>41</sup> Although S.B. 1 was a priority bill for the Governor,<sup>42</sup> the public overwhelmingly voiced

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lesson. See Steven Rosenfeld, *Vote by Mail, Go to Jail*, TEX. OBSERVER (Apr. 18, 2008, 12:00 AM), <https://www.texasobserver.org/2738-vote-by-mail-go-to-jail-texas-attorney-general-greg-abbott-prosecutes-democrats-who-help-seniors-vote-by-mail-while-ignoring-republican-ballot-box-stuffing/> [<https://perma.cc/XR23-3KB2>]. Institutionally, voters of color are also depicted as the likely offenders of voter fraud in law enforcement training materials. *Id.* Governor Abbott's office suggested that certain mail-in ballots—such as ones with stamps that depict sickle cell anemia awareness—should be scrutinized more. *Id.*

36. Despite little evidence of widespread intentional voter fraud, Texas has dedicated many resources to investigating such cases. See Swartz, *supra* note 35 (reporting that Abbot's office invested \$1.5 million to investigate voter fraud).

37. Tex. S.B. 1, 87th Leg., 2d Spec. Sess. (2021) (Bill relating to election integrity and security, including fraud in the conduct of elections in this state; increasing criminal penalties; creating criminal offense).

38. Chuck Lindell, *From Polls to Ballots, Here's What a New Texas Voting Law Means for You*, AUSTIN AM. STATESMAN (Sept. 7, 2021, 11:22 AM), <https://www.statesman.com/story/news/2021/08/27/texas-voting-bill-sb-1-election-law-ballot-polls/5616452001/> [<https://perma.cc/47T2-H6ZZ>].

39. See TEX. ELEC. CODE ANN. § 85.005(a) (authorizing voting from 6:00 AM to 10:00 PM).

40. *Id.* § 84.002(a)(1-a).

41. *Id.* § 276.016.

42. Press Release, Office of the Texas Governor, Governor Abbott Announces Special Session Agenda (July 7, 2021), <https://gov.texas.gov/news/post/governor-abbott-announces-special-session-agenda> [<https://perma.cc/UT4K-NYCA>] (featuring “election integrity” as a priority in the first 2021 legislative special session); see also Press Release, Office of the Texas Governor, Governor Abbott Announces Second Special Session Date & Agenda (Aug. 5, 2021), <https://gov.texas.gov/news/post/governor-abbott-announces-second-special-session-date-agenda> [<https://perma.cc/XX6K-RR54>] (ranking “election integrity” as another priority).

opposition to S.B. 1<sup>43</sup> and previous iterations of it.<sup>44</sup> Despite all the public attention on S.B. 1, a handful of provisions that impacted individuals with felony convictions evaded public notice.

This section investigates those provisions that impact individuals serving out felony convictions. S.B. 1 substantially changes Texas's election laws in three respects. First, accidental voting and the casting of provisional ballots are no longer causes for criminal prosecution, Second, judges are required to inform individuals of their voting rights at the time a person is convicted of a felony. Lastly, voter registration attempts are now cause for a criminal referral. Interestingly, the former changes—the voting and voter education amendments—are facially undermined by the voter registration amendment. An investigation of the legislative intent of those former statutory changes shows that the voter registration criminal referral functionally runs afoul to the voting and voter education provisions.

#### A. Changes to Illegal Voting Offenses and the Harmonization of a *Mens Rea*

The primary impetus for the illegal voting and voter education statutory changes was to prevent the prosecution of illegal voting offenses that resulted from innocent mistakes.<sup>45</sup> S.B. 1 addresses how individuals who are serving

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43. During the second special session in the Senate State Affairs Committee, about twenty-one people registered in favor of the bill and about fifty-six people registered against it. See WITNESS LIST, S.B. 1 SENATE COMMITTEE REPORT, <https://capitol.texas.gov/tlodocs/872/witlistbill/pdf/SB00001S.pdf#navpanes=0> [<https://perma.cc/QB2L-4FLD>]. By the time S.B. 1 was heard in the House Constitutional Rights & Remedies Select Committee, about fifty-seven registered in favor of and about eighty-seven registered against the bill. See WITNESS LIST, S.B. 1 HOUSE COMMITTEE REPORT, <https://capitol.texas.gov/tlodocs/872/witlistbill/pdf/SB00001H.pdf#navpanes=0> [<https://perma.cc/R8QP-QWCU>]. While these public registry margins may not look like overwhelming public opposition, these hearings were the conclusion of multiple last-minute hearings over S.B. 1, sometimes with as much as a seventeen-hour-long wait for public testimony. See Alexa Ura, *Texas Testifying on GOP Voting Bill Faced a 17 Hour-Wait to Be Heard by Lawmakers in the Dead of Night*, TEX. TRIB. (July 11, 2021, 9:00 AM), <https://www.texastribune.org/2021/07/10/texas-legislature-gop-voting-bill/> [<https://perma.cc/4GXN-Y4SG>].

44. S.B. 1 and its counterpart H.B. 3 were substantially similar to omnibus election bills in earlier 2021 legislative sessions. H.B. 6 was the first iteration of H.B. 3 during the regular 2021 legislative session. Tex. H.B. 6, 87th Leg., Reg. Sess. (2021). In the Senate, S.B. 7 predated S.B. 1. See Tex. S.B. 7, 87th Leg., Reg. Sess. (2021). After both bills failed to pass the regular session, four hundred seven of the four hundred eighty-four people who registered an opinion in the House committee opposed the bill during the first special session. See Alexa Ura & Cassandra Pollock, *GOP Voting Bills Advance in Texas House and Senate After Overnight Committee Hearings*, TEX. TRIB. (July 11, 2021), <https://www.texastribune.org/2021/07/10/voting-bill-texas/> [<https://perma.cc/X4YK-VNPF>]. During the first special session, S.B. 1 saw a marginally larger divide with three hundred seventy-one out of four hundred thirty-nine registering against the bill. See WITNESS LIST, S.B. 1 HOUSE COMMITTEE REPORT, <https://capitol.texas.gov/tlodocs/871/witlistbill/html/SB00001S.htm> [<https://perma.cc/8WE2-PJJB>].

45. H.J. of Tex., 87th Leg., Reg. Sess. 210 (2021) [<https://perma.cc/SJ8P-4XDQ>]; Halpern, *supra* note 4.



a felony conviction may not accrue additional criminal offenses if they attempted to vote when they were not aware of their voter ineligibility.<sup>46</sup> House committee members stressed that the illegal voting statute Mason was prosecuted under was “intended to target those individuals who intentionally try to commit fraud in our election . . . . It is not intended to target people who make innocent mistakes about their eligibility.”<sup>47</sup> Thus, S.B. 1 created a more harmonious *mens rea* requirement for all illegal voting offenses under Section 64.012(a) of the Texas Election Code (herein, Election Code).<sup>48</sup>

The uniformity of the *mens rea* requirement for illegal voting creates substantial standardization within the Election Code. Previously, a person could be convicted of a second-degree felony if they committed any of the four illegal voting offenses:

- (1) Votes or attempts to vote in an election in which the person knows the person is not eligible to vote;
- (2) *Knowingly* votes or attempts to vote more than once in an election;
- (3) *Knowingly* votes or attempts to vote a ballot belonging to another person, or by impersonating another person; or
- (4) *Knowingly* marks or attempts to mark any portion of another’s ballot without the consent of that person, or without specific direction from that person how to mark the ballot.<sup>49</sup>

Section 64.012(a)(1)—the provision under which Mason was convicted<sup>50</sup>—is the only provision that excludes a “knowingly” standard for the casting of a vote or marking of a ballot.<sup>51</sup> The placement of “knows” in Section 64.012(a)(1) has significant consequences for individuals who claim that they voted without knowing that they were unable to vote. In Mason’s case, the Texas Court of Criminal Appeals held that Section 64.012(a)(1) had an unambiguous placement of the “know” descriptor in the statute.<sup>52</sup> “Knows” was placed *after* the *actus reus* verb and *before* the attendant circumstance of ineligibility.<sup>53</sup> As a result, what the State had to prove to

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46. H.J. of Tex., 87th Leg., Reg. Sess. 210 (2021) [<https://perma.cc/SJ8P-4XDQ>].

47. *Id.*

48. TEX. ELEC. CODE ANN. § 64.012(a); *see also* Tex. S.B. 1, § 9.03, 87th Leg., 2d Spec. Sess. (2021).

49. TEX. ELEC. CODE ANN. § 64.012(a) (emphasis added).

50. *Mason v. State*, 598 S.W.3d 755, 762 (Tex. App.—Fort Worth 2020), *aff’d in part and remanded*, 663 S.W.3d 621 (Tex. Crim. App. 2022).

51. TEX. ELEC. CODE ANN. § 64.012(a).

52. *Mason*, 598 S.W.3d at 769 n.12.

53. *Id.*

establish the *mens rea* of knowledge in Section 64.012(a)(1) was unambiguous:

[T]he State need only show beyond a reasonable doubt 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 vote under the law or that to vote while having that ineligibility is a crime.<sup>54</sup>

Consequentially, the placement of “knows” precluded a person from using an affirmative defense that a lack of voter ineligibility knowledge abated criminal liability.

The Texas Court of Criminal Appeals’s decision regarding the *mens rea* in Section 64.012(a)(1) contrasts sharply to Sections 64.012(a)(2)–(4). The “knowingly” standard preceding the *actus reus*’ verbs throughout the rest of Section 64.012(a) and the attendant circumstances arguably are ambiguous, creating different standards discernable only by an inquiry into legislative intent.<sup>55</sup> Relying on an 1888 decision, the court suggested that an underlying justification for preempting an affirmative defense is that the “effect would be that a conviction . . . could rarely be obtained[.]”<sup>56</sup> Since most illegal voting prosecutions are almost exclusively pursued under Section 64.012(a)(1),<sup>57</sup> the *mens rea* in Section 64.012(a)(1) has successfully

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54. *Id.* at 768.

55. The *Mason* court suggests that this ambiguity should apply to the rest of the statute because of its holding in *Delay v. State*. *Id.* at 769 n.12. However, the statutory language in *Delay* is more analogous to the other provisions in Section 64.012(a). In *Delay*, the court declared that a money laundering statute’s *mens rea* was “patently ambiguous.” *Delay v. State*, 465 S.W.3d 232, 246 (Tex. Crim. App. 2014). That statute provided that a person committed money laundering if they “knowingly . . . conduct, supervise, or facilitate a transaction involving the proceeds of criminal activity.” *Id.* In *Delay*, the court resolved the ambiguity by turning to legislative intent. *Id.* In *Mason*, the court explained that because the “knowingly” descriptor preceded the *actus reus* and the following attendant circumstances in *Delay*, the legislative intent inquiry in *Delay* did not apply under Section 64.012(a)(1). *Mason*, 598 S.W.3d at 769 n.12.

56. *Mason*, 598 S.W. 3d at 770 (citing *Thompson v. State*, 9 S.W. 486, 487 (Tex. App. 1888)).

57. See generally *Thompson*, 9 S.W. at 487 (prosecution for illegal voting due to a disqualifying criminal history); *Ortega v. State*, No. 02-17-00039-cr, 2018 WL 6113166 (Tex. App.—Fort Worth Nov. 21, 2018) (prosecution under § 64.012(a)(1)); *Heath v. State*, No. 14-14-005320-cr, 2016 WL 2743192 (Tex. App.—Houston [14th Dist.] May 10, 2016, pet. ref’d) (prosecution under § 64.012(a)(1) due to residency); *Doyle v. State*, No. 09-14-00458-cr, 2016 WL 908299 (Tex. App.—Beaumont Mar. 9, 2016, pet. ref’d) (prosecution under § 64.012(a)(1) due to residency); *Cook v. State*, No. 09-14-00461-cr, 2015 WL 7300664 (Tex. App.—Beaumont Nov. 18, 2015, pet. ref’d) (prosecution under § 64.012(a)(1)); *Jenkins v. State*, 468 S.W.3d 656 (Tex. App.—Houston [14th] 2015, pet. granted) (prosecution under § 64.012(a)(1) due to residency); *Medrano v. State*, 421 S.W.3d 869 (Tex. App.—Dallas 2014, pet. ref’d) (prosecution under § 64.012(a)(1) due to

become the culpable mental state most likely to lead to a prosecution for an election-related offense.

Additionally, the legislative history of Section 64.012(a) suggests that the *mens rea* for illegal voting offenses previously was not harmonious. Since the Election Code was recodified in 1985,<sup>58</sup> there have been no changes to the *mens rea* for any of these criminal offenses. Before the recodification, Article 15 of the Election Code covered a variety of illegal voting offenses with different required culpable mental states, like when Article 15.48 provided the following:

Whoever attempts to falsely personate at an election another person, and vote or attempt to vote on the authority of a voter registration certificate not issued to him by the county's registrar of voters, shall be confined in the penitentiary not less than three nor more than five years.<sup>59</sup>

Notably, there is no specified *mens rea* in the recodified provision.<sup>60</sup> The “knowingly” *mens rea* was included after the recodification,<sup>61</sup> suggesting that the Legislature may have intentionally created different *mens rea* for illegal voting offenses.<sup>62</sup> Even when the Legislature passed H.B. 54 in 2003 to create Section 64.012(a)(4), the Legislature mirrored the *mens rea* intent in Sections 64.012(a)(2)–(3) while leaving the *mens rea* in Section 64.012(a)(1) intact.<sup>63</sup> One may arguably infer that the Legislature intended Section 64.012(a)(1) to be prosecuted differently than the rest of the statute.

Now, a person must knowingly or intentionally commit any illegal voting offense before being convicted for it.<sup>64</sup> S.B. 1 created a *mens rea* requirement for all attendant circumstances in illegal voting offenses, including those stemming from a person knowing whether they are eligible to vote or not.<sup>65</sup> The statute now also expressly prohibits the conviction of a person in

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residency); *Calcoat v. State*, 39 S.W. 364 (Tex. Crim. App. 1897) (prosecution for illegal voting due to residency).

58. See Act of May 24, 1985, 69th Leg., Reg. Sess., ch. 211, § 1.

59. TEX. ELEC. CODE ANN. art. 15.48 (1984).

60. See *id.*

61. See Act of May 24, 1985, 69th Leg., Reg. Sess., ch. 211, § 1.

62. See Benjamin Levin, *Mens Res Reform and its Discontents*, 109 J. CRIM. L. & CRIMINOLOGY 491, 512 (2019) (describing that under the Model Penal Code, the “single most important rule” is establishing “recklessness” as the default *mens rea* whenever a legislature does not specify a specific *mens rea* in a statute).

63. See Act of June 20, 2003, 78th Leg., Reg. Sess., ch. 393, § 3.

64. TEX. ELEC. CODE ANN. § 64.012(a).

65. *Id.*

Mason's situation.<sup>66</sup> Unknowingly or unintentionally casting a provisional ballot alone cannot create the basis for a person's prosecution.<sup>67</sup> Fortunately, the Legislature did not just prevent the prosecution of individuals who are unaware of their voter ineligibility status; it also mandates that individuals receive some form of actual notice of their status.<sup>68</sup>

#### B. Voter Education by the Courts: Informed Disclosure of Voter Eligibility

Most people will have few, if any, opportunities to learn how their criminal history impacts their right to vote. One of the best times to inform a person of their voter ineligibility status is when their eligibility changes. For justice-impacted voters, this would be in the courtroom at the time a person is convicted of a felony. S.B. 1 attempts to do just this, continuing to demonstrate legislative intent to prevent the prosecution of illegal voting offenses based on an innocent mistake. At the time a person is found guilty of a felony offense, the court is required to "instruct the [person] regarding how the felony conviction will impact the [person's] right to vote in this state."<sup>69</sup> With this disclosure, individuals can hear directly from a judge how their voter eligibility is impacted.

Unfortunately, voter education by judges falls short of true informed disclosure. S.B. 1 does not specify the exact instructions a judge should provide to defendants nor does it direct how general or specific the instructions should be.<sup>70</sup> S.B. 1 also does not authorize any authoritative body to promulgate the instructions that should be given to defendants.<sup>71</sup> Further, S.B. 1 only applies to state judges; a Texas resident who is convicted of a felony outside of Texas or in a federal court may never be informed about their voter ineligibility, especially if instruction is deemed a procedural law.<sup>72</sup> Additionally, this disclosure only comes after a guilty adjudication following a trial,<sup>73</sup> so a person who pleads to a lesser felony offense without a trial may

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66. *Id.* § 64.012(c).

67. *Id.*

68. TEX. CODE CRIM. PROC. ANN. art. 42.0194; *see also Infra* Section II.

69. TEX. CODE CRIM. PROC. ANN. art. 42.0194.

70. *See id.* (failing to provide additional guidance outside the requirement of instruction).

71. The Texas Legislature frequently gives broad discretion to judicial bodies to create and promulgate rules and procedures governing the management of courtrooms. For example, the Texas Court of Criminal Appeals may promulgate rules of posttrial, appellate, and review procedure in criminal cases. *See* TEX. GOV'T CODE ANN. § 22.108. In a different context, the Office of Court Administration is required to assist presiding judges with the job monitoring, training, and compliance investigations of associate judges by developing procedures and written evaluation forms. *See* TEX. FAM. CODE ANN. § 201.1066.

72. *See generally* *Hanna v. Plumer*, 380 U.S. 460 (1965) (holding that if federal and state procedural law conflict, then federal procedural law applies).

73. Tex. S.B. 1, 87th Leg., 2d Spec. Sess. (2021) ("In the trial of a felony offense, if the defendant is adjudged guilty of the offense . . .").

never be warned of how a felony conviction affects their voter eligibility. Because less than two percent of felony criminal charges go to trial in Texas,<sup>74</sup> S.B. 1 creates a significant shortfall between those who do and do not receive information about their voter ineligibility.

Overall, the provisions in S.B. 1 are a good first step towards voter education but leave a lot to be desired. The voter education provisions need an enforcement mechanism to ensure that judges actually inform defendants. Currently, there are no consequences to a person being uninformed because the Texas Code of Criminal Procedure does not penalize courts or counties for failing to fulfill their mandate.<sup>75</sup> A lack of any penalty is contextually unique in the bill because there are various penalties that can be assessed against public officials and counties for failing to implement the new election law.<sup>76</sup> Additionally, the Texas Code of Criminal Procedure does not offer any remedies for individuals who are charged with illegal voting offenses due to an innocent mistake.<sup>77</sup> Even if a person is not convicted, Texas statutes do not authorize recoverable damages or court fees if a court failed to alert them to their voter ineligibility status.<sup>78</sup> Article 42.0194 may be consistent with the legislative intent in Section 64.012(a), but the statute must go further to actually achieve its mandate, if not its desired result.

### C. Criminal Referrals for Voter Registration Attempts

S.B. 1 creates significant changes to the Election Code regarding voter registration. Before, counties were only required to notify county or district attorneys that an unregistered voter voted.<sup>79</sup> Now, a county's registrar must notify the Texas Attorney General, Secretary of State, and the county or district attorney that a person ineligible to vote votes *or* registers to vote.<sup>80</sup> As a result of the criminal referral, a person serving out a felony conviction risks additional prosecution if they turn in a voter registration application.<sup>81</sup>

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74. *Texas Criminal Procedures*, TEX. CRIM. DEF. LAWYERS, <https://www.mytexasdefense-lawyer.com/texas-criminal-court-procedures/> [<https://perma.cc/9SPU-G935>].

75. *See* TEX. CODE CRIM. PROC. ANN. art. 42.0194.

76. *Infra* Section II.C.

77. *See* TEX. CODE CRIM. PROC. ANN. art. 42.0194.

78. *See generally* TEX. CODE CRIM. PROC. ANN. (failing to provide such a remedy); Tex. S.B. 1, 87th Leg., 2d Spec. Sess. (2021) (paralleling the Code of Criminal Procedure's failure to provide such a remedy).

79. In Texas, county and district attorneys are elected local prosecutors. Texas counties may have both county and district attorneys (e.g., Travis County) or just a district attorney (e.g., Galveston County). *See Texas District Attorney*, TEX. ASSN. COUNTIES, <https://www.county.org/About-Texas-Counties/About-Texas-County-Officials/Texas-District-Attorney> [<https://perma.cc/K56Y-XRSB>].

80. TEX. ELEC. CODE ANN. § 15.028.

81. *See id.*

The criminal referral is not a meaningless or symbolic activity; the criminal penalties are steep for turning in a voter registration form falsely claiming to be an eligible voter.<sup>82</sup> Under Section 276.018 of the Election Code, a person may be convicted of a state jail felony if they knowingly or intentionally make or swear to a false statement on a voter registration application with an intent to deceive.<sup>83</sup> The “intent to deceive” *mens rea* may benefit an applicant who is unknowingly ineligible to vote, since satisfying the intent to deceive element is a more searching *mens rea* standard.<sup>84</sup> Unfortunately, Section 276.018 is only one of three statutes that can lead to a conviction.<sup>85</sup>

Prosecution is also possible under Section 13.007, which prohibits a person from knowingly or intentionally making a false statement on a voter registration application.<sup>86</sup> Unlike Section 276.018, there is no “intent to deceive” *mens rea*.<sup>87</sup> Historically, fraudulent voter registration application cases have been pursued only when a person submitted an application claiming a false identity.<sup>88</sup> There are few, if any, examples of prosecutions under Section 13.007 of an ineligible person making a false statement on a voter registration application. Although there are few instances of individuals being prosecuted for innocent mistakes on an application, S.B. 1 increased the Section 13.007 offense to a Class A misdemeanor and authorized prosecutions to be pursued either solely under Section 13.007 or in conjunction with another statute.<sup>89</sup> As such, a person serving out a felony conviction may be prosecuted under Sections 276.018 and 13.007.<sup>90</sup>

Unfortunately, Texas has criminalized voter registration applications before.<sup>91</sup> Article 15.43 of the Election Code of 1951 had a similar effect of criminalization.<sup>92</sup> In particular, Article 15.43 stated that a person who “shall

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82. *See id.* §§ 276.018, 13.007; TEX. PENAL CODE ANN. § 37.10.

83. TEX. ELEC. CODE ANN. § 276.018.

84. *See 4.2 Criminal Intent, in* CRIM. L. (U. Minn. Libraries Publishing, 2015), <https://open.lib.umn.edu/criminallaw/chapter/4-2-criminal-intent/> [<https://perma.cc/F4DR-LLFS>] (“Intent is a notoriously difficult element to prove because it is locked inside the defendant’s mind. Ordinarily, the only direct evidence of intent is a defendant’s confession, which the government cannot forcibly obtain because of the Fifth Amendment privilege against self-incrimination. Witnesses who hear the defendant express intent are often unable to testify about it because of evidentiary rules prohibiting hearsay.”).

85. *See* TEX. ELEC. CODE ANN. § 13.007; TEX. PENAL CODE ANN. § 37.10.

86. TEX. ELEC. CODE ANN. § 13.007(a)(1).

87. *See id.* (failing to include any fraudulent intent element).

88. *See Sepulveda v. State*, 729 S.W.2d 954, 958 (Tex. App.—Corpus Christi—Edinburg 1987, pet. ref’d) (prosecuting a defendant who submitted a voter registration application of a deceased person and signed the application herself, purporting to be the deceased person).

89. TEX. ELEC. CODE ANN. § 13.007(b)–(c).

90. *See id.*

91. *See* Tex. Att’y Gen. Op. No. JM-611, 1986 WL 219435 at \*4 (Dec. 31, 1986).

92. *Id.*

swear falsely as to his own qualifications to vote” is guilty of a third-degree felony.<sup>93</sup> After the 1985 recodification, Article 15.43 was excluded.<sup>94</sup> In 1986, the Texas Attorney General stated that this omission was likely not an oversight, and that the only way in which an ineligible person could be prosecuted for turning in a voter registration application was under Section 37.10(a)(1) of the Penal Code.<sup>95</sup> Under this statute, a person who knowingly makes a false statement on a government document, which includes voter registration applications, may be convicted with a third-degree felony.<sup>96</sup> Consequentially, an ineligible person may be prosecuted under a third statute: Section 37.10(a)(1).<sup>97</sup>

There are few, if any, examples of individuals being prosecuted under Section 13.007 of the Election Code or Section 37.10(a)(1) of the Penal Code. However, the lack of prosecution could be attributed to the Attorney General’s opinion finding a clear legislative intent to exclude voter registration attempts from prosecution.<sup>98</sup> S.B. 1 signals a departure from the 1985 recodification. Prosecutors may use Section 37.10(a)(1) of the Penal Code and Sections 13.007 and 276.018 of the Election Code against a person who registers to vote without knowing that they are ineligible to vote.

The criminal referral also has statutory enforcement power to ensure compliance by election officials.<sup>99</sup> If a registrar does not provide notice within seventy-two hours of determining that an ineligible person voted or registered to vote, the Secretary of State is required to penalize the registrar.<sup>100</sup> Penalties come in the form of required training courses, audited county voter registration lists, and, for substantial noncompliance, a civil penalty assessed against the county for \$1,000 each day a county registrar fails to take “overt action” of compliance following an audit.<sup>101</sup> Given the severity of substantial noncompliance over long periods of time, registrars—especially registrars of smaller counties with smaller budgets—may feel coerced to acquiesce to the prosecution of individuals registering to vote.<sup>102</sup>

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93. *Id.*

94. *Id.*

95. *Id.*; *see also* TEX. ELEC. CODE ANN. § 63.012(a)(1); TEX. PENAL CODE ANN. § 37.10(a)(1).

96. TEX. PENAL CODE ANN. § 37.10(d)(2)(A).

97. *See also* TEX. ELEC. CODE ANN. § 13.007(c) (authorizing a prosecution to be pursued in conjunction with another statute, like Section 37.10).

98. *See* Tex. Att’y Gen. Op. No. JM-611, WL 219435 at \*4 (1986) (describing the omission of the statute as intentional).

99. *See* TEX. ELEC. CODE ANN. § 18.065 (listing penalties to counties).

100. *See id.* § 15.028.

101. *Id.* § 18.065(e)–(f).

102. While this Article implies that fines can be coercive for smaller localities, a state’s imposition of a fine for noncompliance by a county is not completely analogous to how Congress can pass coercive legislation when controlling the federal funds provided to states. For a brief discussion on how Congress can impermissibly turn pressure into compulsion through monetary

Courts also have reason to believe that ineligible individuals submitting voter registrations would be punished more harshly than illegal voting offenses after S.B. 1's enactment. Courts hearing voter registration cases may revert to the *mens rea* arguments asserted in *Mason v. State*, in which the court held that a person knowingly attempts to register to vote if they knew of the attendant circumstances that made them ineligible to vote.<sup>103</sup> The "intent to deceive" *mens rea* in Section 276.018 likely would not prevent a conviction, either, since Section 37.10(a)(1) of the Penal Code and Section 13.007 of the Election Code do not have an express "intent to deceive" element.<sup>104</sup> Furthermore, the severity of punishment for voter registrations departs from the standardized illegal voting offenses. S.B. 1 first reduced the punishment of an illegal voting offense from a second-degree felony to a Class A misdemeanor, even though the Texas Legislature amended the statute in 2023 back to a second-degree felony offense.<sup>105</sup> Now, illegal voting offenses range from a state jail felony for an attempt to a second-degree felony offense for a successful act.<sup>106</sup> Offenses that could be prosecuted for a voter registration range from a Class A misdemeanor to a third-degree felony.<sup>107</sup> Consequently, an ineligible person could be punished more harshly for registering to vote than a person who actually casts a ballot.

Ultimately, the voter registration criminal referral of ineligible persons directly conflicted with the legislative intent behind the reformed illegal voting offenses in S.B. 1, notwithstanding the Legislature's changes in 2023.<sup>108</sup> The expressed provision in Section 64.012(c) of the Election Code prevents people like Crystal Mason from being convicted due to attempting to cast a provisional ballot.<sup>109</sup> While voter registration and voting offenses have harmonious *mens rea* standards, the Election Code lacks a provision to prevent the prosecution of a person who registers to vote without knowing that they are ineligible to vote. In addition, S.B. 1 does not provide any specific voter registration education to defendants, as opposed to general

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incentives and penalties, see Andrew B. Coan, *Commandeering, Coercion, and the Deep Structure of American Federalism*, 95 B.U. L. REV. 1, 10–12 (2015).

103. See *Mason*, 598 S.W.3d at 769 (finding that a person "knowingly" commits an illegal voting offense if they knew of the attendant circumstances that made them ineligible to vote).

104. See generally TEX. ELEC. CODE ANN. §§ 13.007(a), 276.018; TEX. PENAL CODE ANN. § 37.10.

105. See TEX. ELEC. CODE ANN. § 64.012(b) (amended by Tex. S.B. 1, 87th Leg., 2d Spec. Sess., ch. 1, § 9.03 (2021)) (amending the language in the Election Code from "[a]n offense under this section is a Class A misdemeanor" to "[a]n offense under this section is a felony of the second degree unless the person is convicted of an attempt, in which event it is a state jail felony").

106. *Id.*

107. *Id.* §§ 13.007(a)(2), 63.012(d)(2)(A).

108. See *id.* § 64.012(b) (providing offenses for casting a ballot and not for registering to vote).

109. *Id.* § 64.012(c) ("A person may not be convicted solely upon the fact that the person signed a provisional ballot affidavit . . . unless corroborated by other evidence that the person knowingly committed the offense.").



voter education about voter eligibility. While a person with a felony conviction might suspect criminal penalties from voting with a felony, they may not be aware of penalties related to voter registrations specifically. Criminal referrals undermine the purpose of the S.B. 1 provisions discussed in this Article, which serve to protect people like Mason. Consequently, these referrals—and the process that leads to those referrals—should be closely scrutinized to ensure that individuals are not needlessly incurring additional criminal penalties.

## II. VOTER REGISTRATION PROCESS & CRIMINAL HISTORY CHECKS BY COUNTIES

The voter registration process is an important resource for justice-impacted individuals. Unsurprisingly, many do not have adequate resources to successfully inquire whether their criminal history currently impacts their right to vote.<sup>110</sup> While felony disenfranchisement resources exist to discern voter eligibility,<sup>111</sup> individuals may have questions about their particular eligibility status and may not have access to attorneys, judges, county clerks, or elected officials who can readily provide answers.<sup>112</sup> Without other resources, people who are determined to participate in an election rely on information solely on the voter registration form and the voter registration process to determine if they are eligible to vote.<sup>113</sup> This trial-and-error practice may have been an effective learning tool before S.B. 1. After S.B. 1,

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110. See, e.g., Ann Cammett, *Shadow Citizens: Felony Disenfranchisement and the Criminalization of Debt*, 117 PENN ST. L. REV. 349 (2012) (explaining that for many disenfranchised people, informal barriers, such as criminal justice debt, debt accrued during incarceration, and child support debt, prevent them from regaining the right to vote, and many disenfranchised people fail to learn about these impediments due to a lack of resources offered by the government). For a discussion of how unregistered nonvoters, which includes people who are disenfranchised, view the voter registration process, see R. Michael Alvarez, et al., *How Hard Can It Be: Do Citizens Think It Is Difficult to Register to Vote?*, 18 STAN. L. & POL'Y REV. 382, 397 (2007) (finding that in a sample of 2,025 survey respondents, the percentage of nonvoters who reported that they thought the voter registration process was difficult was more than double the percentage of voters who thought the same).

111. See, e.g., *Restore Your Vote: I Have a Felony Conviction. Can I Vote?*, CAMPAIGN LEGAL CTR., <https://campaignlegal.org/restoreyourvote> [<https://perma.cc/5NFT-VEFD>] (offering an online tool to help people determine whether they are eligible to vote based on their state's laws).

112. See *id.* (demonstrating a need for individualized assistance exists by ostensibly providing contact information for users with “question[s] about [their] convictions”); see generally Amanda Emerson, et al., *Voter Registration and Jail-Incarcerated Women: Are Justice-Involved Women Civically Engaged?*, 30 WOMEN CRIM. JUST. 172 (2020) (remarking how researchers were surprised by the number of incarcerated women in a study who had inaccurate understandings of how the justice system impacted their voter eligibility).

113. See, e.g., *Voter Registration Application*, TEX. SEC'Y OF STATE, <https://vrapp.sos.state.tx.us/index.asp> [<https://perma.cc/KH84-9Q3B>] (prompting applicants through an online application to answer “yes or no” questions and providing eligibility requirements at the end for applicants to verify).

it is risky for unsuspecting people who are simply registering to vote and not attempting to defraud elections.

In this section, the Article will preview how voter registration applications and the notice process from rejected applications and challenged registrations are a resource for people with felony convictions. This section also explores how counties statutorily perform their voter eligibility checks and which state and local offices are empowered to prosecute election-related offenses. It also undergoes this investigation to best identify where discretion and inconsistencies within practices may harm individuals with felony convictions. Although voter registration is heavily regulated statutorily, counties have a significant amount of discretion in terms of when, how, and to what extent they investigate voter eligibility.

#### A. Voter Registration Applications Currently Provide Individuals with the Most Personalized and Accurate Disclosure of Their Voter Eligibility Status

Voter education is foundational—if not expressly required—for counties and the Secretary of State to administer elections.<sup>114</sup> Elections involve many moving pieces, which may be influenced or controlled directly by state and federal statutes, the Secretary of State’s office, and internal county policies.<sup>115</sup> A county’s elections and voter registration office must communicate election dates, polling locations, voter registration

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114. See *Veasey v. Abbott*, 830 F.3d 216, 242 (5th Cir. 2016) (discussing the state requirement to engage in voter education campaigns following the passage of a voter identification law and court-mandated remedies); see generally *7 Tips to Strengthen Voter Education Programs*, U.S. ELEC. ASSISTANCE COMM’N 1 (2014), [https://www.eac.gov/sites/default/files/eac\\_assets/1/28/EducatingVoters%5B3%5D-508%20Compliant.pdf](https://www.eac.gov/sites/default/files/eac_assets/1/28/EducatingVoters%5B3%5D-508%20Compliant.pdf) [<https://perma.cc/Z2P5-A889>] (providing guidance to election officials on best practices for voter education programs because “programs impact voter turnout” by motivating and encouraging citizen participation). Cf. Jim Malewitz, *Study: Texas Voter Education Campaign Failed to Prevent ID Confusion*, TEX. TRIB. (Apr. 11, 2017, 12:00 AM), <https://www.texastribune.org/2017/04/11/study-texas-voter-education-campaign-failed-prevent-id-confusion/> [<https://perma.cc/5GWF-K94G>] (“Texas’ court-ordered \$2.5 million voter education campaign failed to prevent widespread confusion about the state’s identification rules ahead of the 2016 General Election, according to a new study.”); Nusaiba Mizan, *Texas Has Less to Spend on Voter Outreach as Election Approaches Under New Rules*, AUSTIN AM.-STATESMAN (Sept. 21, 2022, 6:05 AM), <https://www.statesman.com/story/news/politics/state/2022/09/21/texas-election-2022-voter-education-campaign-has-less-money-spend/69506679007/> [<https://perma.cc/Z5H9-CGGA>] (explaining that the Texas Secretary of State traditionally has dedicated significant resources towards public voter education due to limited budget allocations).

115. See Scott Klein, *One Reason U.S. Election Administration Is So Complex*, PROPUBLICA (Oct. 12, 2016, 5:17 AM), <https://www.propublica.org/article/one-reason-u-s-election-administration-is-so-complex> [<https://perma.cc/SG8M-H62U>] (“One of the reasons that election administration in the U.S. is so complex and, at times, chaotic, is that the system was designed to be decentralized. . . . The dispersal of responsibility for election administration has made it impossible for a single centrally controlled authority to dictate how elections will be run, and thereby be able to control the outcome.”).

requirements, and more to voters.<sup>116</sup> A significant portion of this “and more” is voter eligibility. However, voter registration applications may be one of the best sources of voter eligibility education for individuals who have felony convictions. Because voter registration rejection notices inform individuals why they could not register to vote, individuals may have a better opportunity to learn about their personal voter eligibility status from these notices than from election officials and county clerks.<sup>117</sup>

Voter registration applications are informational because standard voter registration applications include voter eligibility qualifications in a small font at the top of a form.<sup>118</sup> A person must attest to the accuracy of the information provided on an application by signing a statement under perjury, which also includes an attestation to voter eligibility requirements.<sup>119</sup> An applicant must attest that:

- [(1)] I am a resident of this county and a U.S. citizen;
- [(2)] I 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; and
- [(3)] I have not been determined by a final judgment of a court exercising probate jurisdiction to be totally mentally incapacitated or partially mentally incapacitated without the right to vote.<sup>120</sup>

Thus, the form informs applicants of voter eligibility qualifications twice.<sup>121</sup> Yet, neither section highlights whether people with a felony conviction should—or should not—fill out the form.<sup>122</sup>

Unfortunately, voter registration applications might be the only source of information a person receives regarding how a felony conviction impacts the right to vote. As many as sixty-one percent of surveyed disenfranchised

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116. See TEX. SEC’Y OF STATE, WEB POSTING REQUIREMENTS AND BEST PRACTICES FOR A USER FRIENDLY WEBSITE 3 (2022), <https://www.sos.state.tx.us/elections/forms/web-posting-requirements-and-best-practices.pdf> [<https://perma.cc/3PLJ-7CCM>] (requiring counties to post election information on a website).

117. See TEX. ELEC. CODE ANN. § 13.075.

118. *Texas Voter Registration Application*, TEX. SEC’Y OF STATE, <https://www.sos.state.tx.us/elections/forms/vr-with-receipt.pdf> [<https://perma.cc/WEU7-C6QZ>]. Counties may tailor voter registration forms as long as they obtain certain information, such as an applicant’s full name, their voter residence, and a statement about voter eligibility. See TEX. ELEC. CODE ANN. § 13.002.

119. *Texas Voter Registration Application*, *supra* note 118.

120. *Id.*

121. *Id.*

122. See *generally id.* (failing to direct applicants with felony convictions on what should be done).

individuals have reported never receiving any information regarding disenfranchisement laws from anyone, including from a lawyer, judge, and election officials.<sup>123</sup> Yet, the form itself cannot be the only source of information. Half of survey respondents were grossly misinformed about how a state's disenfranchisement laws applied to their exact situation.<sup>124</sup> In addition to not knowing one's own state laws, a person might also be confused about what their criminal history even means.<sup>125</sup> For example, a deferred adjudication disposition does not impact voter eligibility,<sup>126</sup> since it is not a final conviction,<sup>127</sup> but an average person with no legal expertise likely does not know what constitutes a final conviction or what deferred adjudication means.<sup>128</sup> To avoid any confusion, applicants need help deciphering felony disenfranchisement laws.<sup>129</sup>

Before S.B. 1, the voter registration application process provided substantial deciphering assistance. The Election Code mandates that registrars notify applicants if their voter registration application has been rejected, the reason why it was rejected, and the available appeal process.<sup>130</sup>

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123. ERNEST DRUCKER & RICARDO BARRERAS, STUDIES OF VOTING BEHAVIOR AND FELONY DISENFRANCHISEMENT AMONG INDIVIDUALS IN THE CRIMINAL JUSTICE SYSTEM IN NEW YORK, CONNECTICUT, AND OHIO, SENT'G PROJECT 9 (2005), [https://www.prisonpolicy.org/scans/sp/fd\\_studiesvotingbehavior.pdf](https://www.prisonpolicy.org/scans/sp/fd_studiesvotingbehavior.pdf) [<https://perma.cc/MUH3-L739>].

124. *Id.* at 8.

125. See Emerson, Allison & Ramaswamay, *Voter Registration and Jail-Incarcerated Women: Are Justice-Involved Women Civically Engaged*, 30 WOMEN CRIM. JUST. 172–87 (2020) (mentioning that survey participants had inaccurate information about their voter eligibility).

126. Memorandum from Ann McGeehan, Dir. of Elections, Tex. Sec'y of State, to Voter Registrars, Effect of Felony Conviction on Voter Registration (Aug. 3, 2004), <https://www.sos.state.tx.us/elections/laws/effects.shtml> [<https://perma.cc/C57Y-EBVE>].

127. TEX. CODE CRIM. PROC. ANN. art. 42A.101.

128. Attorneys have often remarked about how confusing deferred adjudication dispositions are for clients. See *Deferred Adjudication and Texas Concealed Handgun Licenses (Texas License to Carry)*, LAPIN LAW OFFICES (Apr. 19, 2015), <http://www.lapinlawtx.com/firearms-blog/deferred-adjudication-and-texas-concealed-handgun-licenses> [<https://perma.cc/4PPV-A3QZ>] (“There seems to be much confusion regarding the legal effect and consequences of Texas deferred adjudication, as evidenced by the number and frequency of inquiries on this subject.”); *Pre-Trial Diversion vs. Deferred Adjudication*, CHAPPELL, LANEHART & STANGL, <https://lubbockcriminaldefense.com/pre-trial-diversion-vs-deferred-adjudication/> [<https://perma.cc/53HN-WYPD>] (“Many people confuse pretrial diversion with deferred adjudication, probation and orders of non-disclosure . . . .”); *Deferred Adjudication v. Regular Probation (Community Supervision)*, CARL DAVID CEDER, ATT'Y AT L., [https://www.carlcederlaw.com/deferred-adjudication-vs-probation-in-texas/?cf\\_chl\\_tk=WcjDnAqKrAuPLjVSyeUY22hSrEM\\_ILRXzesm5xMzj0-1650426445-0-gaNycGzNB70](https://www.carlcederlaw.com/deferred-adjudication-vs-probation-in-texas/?cf_chl_tk=WcjDnAqKrAuPLjVSyeUY22hSrEM_ILRXzesm5xMzj0-1650426445-0-gaNycGzNB70) [<https://perma.cc/4QK5-4B3Q>] (“There's a lot of confusion about the terms 'deferred disposition' and 'deferred adjudication' in Texas.”).

129. See DRUCKER & BARRERAS, *supra* note 123, at 10–11 (concluding that “there should be practical education about voting rights and the impact of disenfranchisement laws on the specific communities from which these populations come. These educational programs (and access to registration forms) should be offered in close proximity to release and probation/parole programs, as well as in the many programs that work with re-entering populations in the community at the time of discharge.”).

130. TEX. ELEC. CODE ANN. § 13.075.

This means that if individuals do not receive any information about how their right to vote is impacted by their criminal history, then the notice provided by the registrar is the first—and perhaps only—opportunity for a person to learn about their personal voter eligibility status. Since S.B. 1 creates a criminal referral, counties should have a duty to inform individuals of their voter eligibility status before a person even fills out the form.

Yet, one may wonder if people—as opposed to a registration notice—could serve as a better resource in practice. As discussed above, a judge providing information following a trial does not adequately inform all individuals.<sup>131</sup> Even if a person was informed of their ineligibility following a guilty conviction at trial, the same person may have eligibility questions months or even years after the judge’s initial disclosure. Election officials and county clerks, however, are not necessarily better resources because they are not always the most accurate resource for individuals looking to assess their own voter eligibility. In a 2008 survey that interviewed election officials from fifteen states, of which Texas was not an examined state, some election officials demonstrated that they did not know their state’s own felony disenfranchisement laws.<sup>132</sup> Some officials thought people who were in fact ineligible to vote could vote in their state.<sup>133</sup> As a result, election officials could provide inaccurate information to ineligible people.<sup>134</sup> Communication with election officials may not always be ideal, too, as elected officials may refuse to provide information.<sup>135</sup> For instance, in the 2008 survey, some election officials would refuse to answer phone calls, hang up on callers, tell callers that no elections staff were available to answer questions, or refer callers to other offices without the expertise to answer any voting questions.<sup>136</sup> Mason herself was a victim of inaccurate information when she relied on the advice and instructions of a poll worker to cast a provisional ballot.<sup>137</sup> It is not inconceivable that election officials throughout Texas’s diverse and numerous counties could be offering inaccurate or no information to inquirers.

Furthermore, even court personnel may face legal hurdles to answering personalized questions about voter eligibility. If a person contacts a clerk to ask whether they should register to vote with their criminal history, a county

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131. See discussion *supra* Section I.B.

132. ERIKA WOOD & RACHEL BLOOM, DE FACTO DISENFRANCHISEMENT, ACLU & BRENNAN CTR. FOR JUST. 5 (2008), <https://www.aclu.org/other/de-facto-disenfranchisement?redirect=cpre-direct/36992> [<https://perma.cc/A9SR-VBCE>].

133. *Id.*

134. *Id.*

135. See *id.* at 7.

136. *Id.*

137. Murney, *supra* note 7.

clerk may be construed as giving legal advice if they answer.<sup>138</sup> Legal advice is “telling a member of the public what to do rather than how to do it.”<sup>139</sup> If a clerk is interpreting some aspect of the law, recommending a specific course of conduct, or applying the law to a person’s specific factual circumstances, then the clerk is giving legal advice.<sup>140</sup> Providing legal advice violates the principles of impartiality and neutrality, in addition to possibly engaging in the unauthorized practice of law by non-attorney clerks.<sup>141</sup> Consequently, clerks are prohibited from giving legal advice, although they may provide legal information.<sup>142</sup> Although clerks can explain the meaning of terms and answer general election questions, such as election deadlines and due dates, clerks may not be able to learn about a person’s criminal history, research how their specific criminal history impacts their right to vote, and recommend a person to register to vote.<sup>143</sup>

The distinction between legal advice and legal information should not actually prevent county clerks from assisting people with felony convictions. County clerks, election administrators, and tax assessors are all responsible for administering aspects of elections, which includes properly educating voters of voter eligibility requirements and helping individuals discern if they are eligible to vote or not.<sup>144</sup> Most, if not all, county clerks and election officials will not hesitate, for example, to ask a seventeen-year-old their birthday to discern if a young person is old enough to register at seventeen-years and ten-months-old.<sup>145</sup> This question is not posed in the context of providing legal advice, despite the young person providing personal information about their birthdate in response. County clerks and election officials are empowered to answer personalized felony disenfranchisement questions without the worry that they are providing legal advice since they are only helping individuals discern whether they are eligible to vote.

Lastly, seeking voter eligibility information from an attorney is also not a viable option for most people with felony convictions. A person must know that they should consult an attorney with any eligibility questions prior to

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138. See TEX. OFF. OF CT. ADMIN., LEGAL INFORMATION VS. LEGAL ADVICE 5 (2015), <https://www.txcourts.gov/media/1220087/legalinformationvslegaladviceguidelines.pdf>.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.* at 4.

143. See *id.*

144. See *Election Duties*, TEX. SEC’Y OF STATE, <https://www.sos.state.tx.us/elections/voter/county.shtml> [<https://perma.cc/NNR4-WD6N>] (providing a list of county clerks and election administrators for each county). See also *County Voter Registration Officials*, TEX. SEC’Y OF STATE, <https://www.sos.state.tx.us/elections/voter/votregduties.shtml> [<https://perma.cc/EB9X-5VJY>] (providing a list of election administrators, voter registrars, and tax assessors for each county).

145. The minimum age to register to vote in Texas is seventeen-years- and ten-months-old. See TEX. ELEC. CODE ANN. § 13.001(b).

registration, yet indigent people cannot afford private attorneys.<sup>146</sup> Criminal attorneys assigned to indigent clients may also not be equipped to answer voting rights questions as civil rights matters. Furthermore, an estimated 4.7 million Texans have some kind of criminal record in Texas<sup>147</sup>—over seventeen percent of the Texas population<sup>148</sup>—and 1.7 million of those Texans have a felony conviction.<sup>149</sup> Overworked, underpaid, and understaffed public defense organizations likely do not have the time to educate individuals on their voting rights during or after their representation.<sup>150</sup> Even pro bono or legal aid civil attorneys cannot provide individualized voter registration advice when ninety percent of civil legal needs are currently unmet in Texas.<sup>151</sup> Given their cost and limited availability, attorneys are unlikely to be a realistic source of information for most people with felony convictions.

If election officials, county clerks, court personnel, or attorneys cannot answer the personalized voter eligibility questions of the vast majority of disenfranchised people, individuals with felony convictions must rely on a voter registration application's acceptance as their most personalized and accurate source of voter education. However, S.B. 1 creates significant risks of criminal penalties when a person registers to vote to determine if they indeed are an eligible voter.<sup>152</sup> Despite the statutory provisions, which threaten a registrar for not issuing a criminal referral,<sup>153</sup> the real risk of accruing an additional criminal offense depends on how counties perform criminal history checks on voter registration applications. Counties, however, do not perform uniform voter eligibility checks.

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146. The median cost of a private attorney in Texas in 2019 was \$291 an hour, which can be cost-prohibitive for many people. *See 2019 Income and Hourly Rate*, TEX. STATE BAR 3, [https://www.texasbar.com/AM/Template.cfm?Section=Demographic\\_and\\_Economic\\_Trends&Template=/CM/ContentDisplay.cfm&ContentID=54950](https://www.texasbar.com/AM/Template.cfm?Section=Demographic_and_Economic_Trends&Template=/CM/ContentDisplay.cfm&ContentID=54950) [<https://perma.cc/72WW-6TNQ>].

147. HELEN GAEBLER, CRIMINAL RECORDS IN THE DIGITAL AGE: A REVIEW OF CURRENT PRACTICE AND RECOMMENDATIONS FOR REFORM IN TEXAS 8 (2013), <https://law.utexas.edu/wp-content/uploads/sites/27/Criminal-Records-in-the-Digital-Age-Report-by-Helen-Gaebler.pdf> [<https://perma.cc/BUV4-6STV>].

148. There were over 26.44 million people in Texas in 2013, so 4.7 million divided by 26.44 million equates to 17.7 percent. *See United States and Texas Populations 1850-2017*, TEX. STATE LIBR., AND ARCHIVES COMM'N (Jan. 8, 2020), <https://www.tsl.texas.gov/ref/abouttx/census.html> [<https://perma.cc/M58J-DT3F>].

149. GAEBLER, *supra* note 147.

150. For example, in New Orleans, a public defender only has time to spend up to seven minutes on an individual case. *The Sad State of the Public Defender in America*, FRED DAHR TEX. DEF. ATT'Y, <https://www.texasdefenselaw.com/library/sad-state-public-defender-america/> [<https://perma.cc/L8KV-YHYP>].

151. ROGER ENRIQUEZ, ET AL., TEXAS UNMET LEGAL NEEDS SURVEY 1 (2015), [https://www.teajf.org/news/docs/Final\\_TAJF\\_Report\\_summer\\_2015.pdf](https://www.teajf.org/news/docs/Final_TAJF_Report_summer_2015.pdf) [<https://perma.cc/CWK8-B3Y4>].

152. *See* discussion *supra* Section I.C.

153. TEX. ELEC. CODE ANN. § 18.065.

## B. Counties Have Significant Discretion on Voter Eligibility Investigations

Despite all the regulations controlling the administration of elections, election officials retain a lot of discretion to effectively run elections in light of limited resources.<sup>154</sup> Mason's casting of a provisional ballot exemplifies how election officials' discretion is an essential component to the criminalization of a voter registration.<sup>155</sup> In Mason's case, the poll worker and election judge could have let the electoral process invalidate Mason's provisional ballot without reporting her to the district attorney.<sup>156</sup> However, the election judge decided to alert the district attorney, which resulted in her five-year sentence.<sup>157</sup> Discretion during the investigation of voter registration applications can lead to similar consequences.

As a general matter, a person must be a qualified voter to register to vote.<sup>158</sup> The Election Code locally empowers county registrars to review voter registration applications<sup>159</sup> and challenge voter eligibility, as opposed to vesting these powers with the Secretary of State.<sup>160</sup> Importantly, because county registrars must accept every application they receive,<sup>161</sup> their assessment of voter eligibility on an application matters because they are required to review voter registration forms that are in compliance with voter eligibility requirements, even if *how* they determine this is discretionary.<sup>162</sup> Counties may consider the voter eligibility of an applicant at two distinct stages of the voter registration process: (1) During an initial review of the voter registration application; and (2) In formal investigations following the approval of a voter registration application. In both of these stages, discretion is significant.

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154. For example, county clerks can recommend locations of polling places. TEX. ELEC. CODE ANN. § 43.002(a).

155. Murney, *supra* note 7.

156. *Id.*

157. *Id.*

158. *See* TEX. ELEC. CODE ANN. § 13.001(a).

159. *Id.* § 13.071.

160. Motions on behalf of defendants, in which the Secretary of State is one of the named defendants, argue this in an attempt to prevent lawsuits against the Secretary of State. *See, e.g.*, Def.'s Mot. To Dismiss, Tex. Democratic Party v. Hughs, No. 5:20-cv-00008-OLG, 2020 WL 6115723 (W.D. Tex. Feb. 28, 2020). As statutory authority relates to standing challenges, this paper does not argue that the Secretary of State has no or insignificant power. Instead, it suggests that the Election Code invests power primarily to counties and is silent about the Secretary's specific role over counties in regards to reviewing voter eligibility on applications. Despite this, the Secretary, as the chief election official, can still provide advice to counties on how to review and perform voter eligibility challenges. TEX. ELEC. CODE ANN. §§ 31.001, 31.003, 31.004.

161. Voting for Am., Inc. v. Steen, 732 F.3d 382, 400 (5th Cir. 2013).

162. *See* TEX. ELEC. CODE ANN. § 13.071.



### 1. Initial Review of the Voter Registration Application

Voter registration practices by counties are statutorily set up to provide counties with the most effective process to compile lists of registered voters for each election, with some minor notice requirements. County registrars should use their discretion to administer elections for the benefit of *all* voters. Yet, a review of the Election Code illustrates that these practices do not specifically consider individuals with felony convictions. As a result, registrars may only harm these individuals who earnestly want to be involved in the electoral process, and this harm can be seen in the initial review of a voter registration application.

Once a person submits a voter registration application, the county registrar is required to review the application “to determine whether it complies with [Section] 13.002 and indicates that the applicant is eligible for registration” within seven days of receiving the form.<sup>163</sup> Compliance with Section 13.002 requires an applicant to include their full name, their birthday, statements confirming their voter eligibility, a residence address, and a driver’s license number or the last four digits of their social security number.<sup>164</sup> If the application is missing any of this information, or if the voter eligibility statements indicate that a person is not eligible to vote, the registrar rejects the application.<sup>165</sup> Because the eligibility statement at the end of an application groups all eligibility requirements into one attestation, a county registrar can encounter two situations when they initially review a voter registration form: (1) A person does not sign the eligibility statement at the bottom of the application at all; or (2) A person currently serving out a felony conviction may affirmatively declare that they are an eligible voter.

A person may not sign the voter eligibility statement because they are unsure of their eligibility status. However, forgoing a signature does not guarantee that a registrar will prevent a criminal referral. Once receiving an incomplete application, the registrar should immediately reject the application.<sup>166</sup> After rejecting the applicant, the registrar must notify the applicant, stating why the application is rejected if they are rejecting the applicant in-person.<sup>167</sup> By notifying the applicant, the county registrar could explain that the application was rejected due to incompleteness.<sup>168</sup> If the registrar does not provide any explanation for the rejection or *only* states that incompleteness caused the rejection, this notification could provoke a person serving out a felony conviction to believe that they should have signed the

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163. TEX. ELEC. CODE ANN. § 13.071.

164. *Id.* § 13.002.

165. *Id.* § 13.071(c).

166. *Id.* § 13.072(c).

167. *Id.* § 13.073.

168. *Id.*

application. Consequently, a person could turn in another application with a signature if they are not properly informed that a felony prevents them from being a qualified voter.

Even if the person does not return another voter registration application to a registrar, the initial registration attempt may be enough under S.B. 1 to trigger a criminal referral. Section 15.028 of the Election Code states, “If the registrar determines that a person who is not eligible to vote registered to vote or votes in an election . . .”<sup>169</sup> The language in this statute does not distinguish between a successful registration or an attempt to register.<sup>170</sup> This is notable in comparison to the rest of the Election Code, in which attempts are distinguishable from successful actions.<sup>171</sup> Registrars may construe an ambiguity present in “registered to vote” and interpret the statute to include an attempt that requires reporting the applicant to the Secretary of State, the Attorney General, and the district attorney or county attorney. Alternatively, a registrar might interpret this statute to exclude attempts. If the framers of S.B.1 included statutory changes that explicitly included attempts in other prohibited election activities, then they reasonably would not have wanted attempts to be included in Section 15.028. Regardless, registrars may think that it is unclear if a registration attempt precludes a criminal referral.

As discussed in Section I, a person serving out a felony conviction may innocently sign the eligibility statement on an application because they either do not understand the effect a criminal offense has on their voter eligibility or do not understand the disposition of their felony conviction. In either case, the registrar is not required to immediately accept the application if a person submits a completed and signed application.<sup>172</sup> The Secretary of State has even indicated that counties are obliged to perform some preliminary investigation to accept or challenge registration.<sup>173</sup> In fact, the Election Code spells out the exclusive procedure for a challenge.<sup>174</sup> A county registrar must first review the application to determine that it is completely filled out and

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169. *Id.* § 15.028.

170. *See id.*

171. *See e.g., id.* § 64.012 (listing “vote or attempts to vote” in the illegal voting offenses); *id.* § 13.002 (“requests, commends, coerces, or attempts to induce”); *id.* § 276.013(b)(2) (explaining that an attempt under this statute is its own lower grade criminal offense); TEX. GOV’T CODE ANN. § 22.304(c) (“A person, including a public official, commits an offense if the person communicates with a court clerk with the intention of influencing or attempting to influence the composition of a three-justice panel assigned a specific proceeding under this section.”).

172. Even if the review process is more ministerial than it is discretionary, a registrar still must perform some type of review when they receive an application. *See* TEX. ELEC. CODE ANN. § 13.071.

173. Def.’s Reply to Resp. to Mot. to Dismiss for Failure to State a Claim Under FRCP 12(b)(6), *LULAC v. Whitley*, No. 5:19-cv-00074-fb, 2019 WL 5859578 (W.D. Tex. Mar. 25, 2019) (citing the Secretary of State’s response).

174. Tex. Att’y Gen. Op. No. JM-611, WL 219435 at \*5 (1986).

confirm that a voter claimed to be eligible to vote.<sup>175</sup> Again, applicants indicate that they are eligible if they check the boxes that the applicant is a U.S. citizen and will be eighteen years of age on or by an upcoming Election Day.<sup>176</sup> Completed applications also require applicants to sign the eligibility statement at the bottom of the application.<sup>177</sup> If the county registrar “has reason to believe” that the applicant is not eligible to vote, a challenge is initiated within two days of determining that an applicant attested to being eligible.<sup>178</sup>

There are no official guidelines for what investigations a registrar must perform to verify voter eligibility during the initial review of an application. “Has reason to believe” is not statutorily defined or interpreted by state courts. However, parallels from “has reason to believe” in Section 13.704 may be drawn to post-initial application approval challenges in Chapter 16 of the Election Code. In Section 16.033, a registrar may use “any lawful means to investigate” voter eligibility after a person is registered, and they may challenge a registration if these investigations lead them to believe that the person is ineligible.<sup>179</sup> One universal source of information comes from the Department of Public Safety (DPS).<sup>180</sup> The DPS provides the Secretary of State with weekly criminal record reports for every final felony conviction a person receives.<sup>181</sup> The Secretary compares information provided by the DPS to its list of registered voters across the state and then sends information to each county for the registrar to formally investigate.<sup>182</sup> While DPS reports normally challenge current voter registrations,<sup>183</sup> a registrar could have reason to believe that a person is not a qualified voter due to information in a DPS report, an online criminal history search, a news article indicating someone’s conviction, a tip provided from a registered voter,<sup>184</sup> or any other reason. The Secretary of State advises registrars to not use DPS data to reject

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175. TEX. ELEC. CODE ANN. § 13.074(a).

176. *Texas Voter Registration Application*, *supra* note 113.

177. *Id.*

178. *Id.*

179. TEX. ELEC. CODE ANN. § 16.033(a).

180. The Secretary of State has indicated that this information is sent to counties by the Secretary. Def.’s Reply to Resp. to Mot. to Dismiss for Failure to State a Claim Under FRCP 12(b)(6), *LULAC v. Whitley*, No. 5:19-cv-00074-fb, 2019 WL 5859578 (W.D. Tex. Mar. 25, 2019) (citing Secretary of State’s response).

181. TEX. ELEC. CODE ANN. § 16.003.

182. See NAT’L ASSOC. OF SECRETARIES OF STATE, NASS REPORT: MAINTENANCE OF STATE VOTER REGISTRATION LISTS 100 (2017), <https://www.nass.org/sites/default/files/reports/nass-report-voter-reg-maintenance-final-dec17.pdf> [<https://perma.cc/FNV6-79CS>]. The Secretary of State also provides similar information to counties in regards to citizenship. See Def.’s Mot. to Dismiss, *Whitley*, 2019 WL 589580.

183. See *infra* Section III(B)(ii).

184. Similar to Section 16.091 of the Texas Election Code, a registered voter may challenge a voter registration before the voter registrar even has initially approved the application.

new applications because statutorily this practice is not called for.<sup>185</sup> However, just as the Election Code does not call for DPS data to be used to reject new applications, it also does not prohibit DPS data from being used to reject new applications.

In light of recent state policies, accepting tips from the public for investigative purposes may be an encouraged practice, too. Crystal Mason's prosecution was facilitated by her neighbor, who had a history of harassing Mason and her family.<sup>186</sup> Although the tip was provided by an election worker, Mason's neighbor decided to report her, instead of letting county officials customarily reject her provisional ballot.<sup>187</sup> Lieutenant Governor Dan Patrick even encouraged public reporting of alleged illegal voting offenses by offering \$1,000,000 in cash to any informant.<sup>188</sup> Public informants are encouraged to be a part of other civil rights investigations, as Senate Bill 8 encourages the public to report and sue anyone who performs, aids or abets, or intends to aid or abet an abortion after six weeks of pregnancy.<sup>189</sup> Parents of transgender youth are also investigated as a result of public tips.<sup>190</sup> Notably, Section 13.704 does not limit a registrar's investigative methods by discouraging public tips.

The ambiguity in the Election Code and lack of guidance by the Secretary of State, the Legislature, and the courts create significant discretion for registrars to use when verifying eligibility requirements. Counties do not—and are not required to—publicize how they perform their initial voter eligibility verification on voter registration applications. As a result, discretionary investigatory practices are largely unknown across all Texas counties. These discretionary practices ultimately hurt applicants. A person serving out a felony conviction would get a notice if their application was challenged on the grounds that they were not a qualified voter,<sup>191</sup> and they would be provided an opportunity to challenge the cancelation.<sup>192</sup> However, these notices and hearing opportunities are remedies primarily for individuals who are qualified voters. For people who are serving out felony convictions, they may learn why they are unqualified voters, but the initial issue of the criminal referral exists at the time the application is turned in. This lack of

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185. McGeehan, *supra* note 126.

186. Murney, *supra* note 7.

187. *Id.*

188. *Id.*

189. Peter Holley & Dan Solomon, *Your Questions About Texas's New Abortion Law, Answered*, TEX. MONTHLY (Oct. 7, 2021), <https://www.texasmonthly.com/news-politics/texas-abortion-law-explained/> [<https://perma.cc/7DJ8-PQNU>].

190. Letter from Tex. Governor Greg Abbott to Comm'r Jaime Master of the Tex. Dep't of Family and Protective Servs. At 1 (Feb. 22, 2022), <https://www.texasattorneygeneral.gov/sites/default/files/opinion-files/opinion/2022/kp-0401.pdf> [<https://perma.cc/BG9T-JZ9Z>].

191. TEX. ELEC. CODE ANN. § 16.031, 16.033.

192. *Id.* § 16.061

transparency conceals how individuals might verify their own eligibility, as well as fails to inform individuals that a criminal referral could be created.

## 2. Voter Registration Cancellation Post-Initial Approval

Just as a registrar verifies eligibility before approving an application, a registrar can later verify and challenge an eligibility status after an application is approved.<sup>193</sup> While a majority of these investigations involve canceling a registration after a person receives a final felony conviction, these investigations are a concern for registrars who approve an application that should have initially been or later denied. Ultimately, counties can receive reports from a variety of sources, including DPS and other state reports, to inform post-initial approval investigations.<sup>194</sup>

Post-initial approval investigations primarily come from the circulation and use of DPS data. After receiving DPS data on all persons who have been finally convicted of a felony, the Secretary of State forwards information to counties to officially investigate and then cancel voter registrations.<sup>195</sup> The use of DPS data as the basis for a challenge is a questionable practice because DPS data does not always portray an accurate depiction of a person's current criminal history. As the Secretary of State has recognized, DPS data can be inaccurate for the following reasons:

- (1) Individuals can be convicted under different names,<sup>196</sup> triggering an inaccurate report for a false name;<sup>197</sup>
- (2) Final convictions can result in very short sentences, and “it is possible that a finally convicted [person] may complete [their] punishment and be released from all

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193. *See generally id.* Ch. 16.

194. *See* Transcript of Trial at 30, *State v. Mason*, No. 1485710D (432nd Dist. Ct., Tarrant County, Tex. Mar. 28, 2018).

195. McGeehan, *supra* note 126; *see also* TEX. ELEC. CODE ANN. § 16.003, 16.031.

196. A person can change their name for any reason after petitioning a court for a legal name change; legal name changes are common after a marriage or divorce and for transgender and non-binary people. *Name Changes in Texas*, TEX. STATE L. LIBRARY (Jan. 16, 2024), <https://guides.sll.texas.gov/name-changes> [<https://perma.cc/RHR2-JQJ9>]. Arresting agencies may enter a person's name incorrectly or incompletely when a person is arrested, so an inaccurate name may be associated with a person's criminal history. McGeehan, *supra* note 126. For these reasons, a DPS criminal history report usually details every alias associated with a person. *See* TEX. DEP'T OF PUB. SAFETY, CRIMINAL JUSTICE INFORMATION SYSTEM COMPUTERIZED CRIMINAL HISTORY ELECTRONIC DISPOSITION REPORTING GUIDE 31 (2019), [https://www.dps.texas.gov/sites/default/files/documents/administration/crime\\_records/docs/cjis/cchejiselecdisprptngguide.pdf](https://www.dps.texas.gov/sites/default/files/documents/administration/crime_records/docs/cjis/cchejiselecdisprptngguide.pdf) [<https://perma.cc/P62B-57DQ>] (listing all names under “AKA” on a criminal history report).

197. McGeehan, *supra* note 126.

disabilities in a very short amount of time (in some cases, days or months from [the] date of conviction);<sup>198</sup> and

(3) Because the DPS gets its information from local criminal justice agencies,<sup>199</sup> localities can report incomplete or inaccurate criminal history to the DPS, which causes registrars to have incomplete or inaccurate information.

Additionally, although the Secretary advises counties to investigate eligibility before canceling a registration, investigations may only be pursued to the extent that a contested voter must prove their own eligibility. After a registrar decides a registration should be canceled, the county sends a written notice to the voter explaining that the registration is challenged and then waits for the voter to contest.<sup>200</sup> Assuming that the voter actually receives the notice,<sup>201</sup> the voter's registration will still be canceled if they do not contest the challenge within thirty days of the notice.<sup>202</sup> This creates a circular problem: If a voter must prove that they are eligible, then they must know that they are eligible (i.e., know what their criminal history means and how it interacts with their voter eligibility status).

Curiously, from the Secretary of State's perspective, counties' investigative practices occur exclusively *after* an application is approved, through DPS data. During Texas's State Affairs Senate Committee hearing on S.B.1, State Senator Beverly Powell questioned Keith Ingram, the Elections Director for the Secretary of State at the time, about the eligibility verification process:

Powell: How is a registrar to determine if someone is eligible to vote at the time they register, and does your office have mechanisms or resources that they will provide to help them identify that?

Ingram: So most of our list maintenance activities are after the fact; someone is already registered to vote and their name pops up on a list of possible deceased or a [person

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198. *Id.*

199. *Crime Records, Popular Services, Crime Records Services Overview*, TEX. DEP'T OF PUB. SAFETY, <https://www.dps.texas.gov/section/crime-records> [<https://perma.cc/9DPR-E6TK>].

200. *Id.*

201. Election mail issues are common. Notices and voter registration certifications are sent to the mailing address provided on a registration form. However, if a voter is incarcerated, for example, they may not get that notice. For voters who have not updated their mailing address, even when their voting residence has not changed, this mailing issue is problematic when a person does not have actual notice of a post-initial approval voter registration challenge.

202. TEX. ELEC. CODE ANN. § 16.033(d).

convicted of a felony] or something like that. There's no way a voter registrar would know at the time of voter registration, unless a voter affirmatively indicates on the application "I'm not a citizen, or I'm not over 18." Sometimes those come through—just registered anyway—because of a clerk error. That's the only conceivable place I think this would come up under current law.<sup>203</sup>

Ingram's answer illuminates that the initial eligibility investigatory efforts by counties pale in comparison to the post-initial approval investigatory efforts. Despite the statutory basis for an initial investigation, counties in actuality might not perform any initial investigation. As Ingram states, "there's *no way* a voter registrar would know [that a person is ineligible] at the time of voter registration."<sup>204</sup> In reality, counties are using their discretion to not investigate.

Contrary to what Ingram suggests, S.B.1 poses significant threats to individuals serving out felony convictions. DPS data could be inaccurate if counties only use it when deciding to challenge a voter registration. If counties are simply approving all applicants who attest to voter eligibility requirements, then registrars could be haphazardly subjecting a person to a criminal referral without an initial investigation. Additionally, even clerk error could spawn a criminal referral, similar to Pamela Moses' criminalized voter registration issues in Tennessee.<sup>205</sup> With limited resources, counties are not adequately equipped to protect individuals from needlessly accruing additional criminal penalties by registering to vote. Since registrars can be penalized for not referring ineligible individuals for attempting to register to vote,<sup>206</sup> courts, if not the Legislature, must place limitations on the prosecution of these individuals.

### C. Limitations Placed on Attorney General from Pursuing Criminal Referrals

Courts have already begun to limit who may prosecute election law offenses. Because S.B. 1 requires the Secretary of State, the Attorney General, and the county or district attorney to be notified of ineligible people registering to vote,<sup>207</sup> S.B. 1 creates meaningful opportunities for government actors to prosecute. At the time that S.B. 1 was enacted, the Attorney General

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203. Tex. Senate Comm. on Senate Affairs, 87 Leg., 2d Spec. Sess. (2021) (Statement of Keith Ingram).

204. *Id.* (emphasis added).

205. Levine, *Black Woman Sentenced*, *supra* note 18.

206. TEX. ELEC. CODE ANN. § 18.065.

207. *Id.* § 15.028.

had statutory authority to prosecute election law offenses.<sup>208</sup> Since December 2021, this authority has been declared unconstitutional.<sup>209</sup>

The Attorney General cannot unilaterally begin prosecutorial proceedings against an individual for an election offense.<sup>210</sup> In *State v. Stephens*, the Texas Attorney General learned that a district attorney declined to prosecute the defendant, Stephens.<sup>211</sup> Under its authority in Section 273.021 of the Election Code, the Attorney General presented Stephens' case to a grand jury in an adjourning county, ultimately indicting him on three counts.<sup>212</sup> When the Texas Court of Criminal Appeals heard *Stephens*, the Court reviewed the Attorney General's authority to initiate a prosecution of the defendant under the Election Code.<sup>213</sup> Under Section 273.021, "[t]he attorney general may prosecute a criminal offense prescribed by the election laws of this state."<sup>214</sup> However, "the Attorney General has never had authority to institute a criminal prosecution."<sup>215</sup> The Texas Constitution clearly separates the judicial and executive branches with the Attorney General falling into the executive branch.<sup>216</sup> County and district attorney fall into the judicial departments.<sup>217</sup> Attempts to interfere with the delegated powers of one branch makes the attempt null and void.<sup>218</sup> The Attorney General may assist a local prosecutor with the prosecution, but it cannot unilaterally initiate prosecution proceedings without the local prosecutor.<sup>219</sup>

*Stephens* does not make criminal referral problems moot. *Stephens* only prevents the Attorney General from prosecuting a person serving out a felony conviction without the consent of a local prosecutor.<sup>220</sup> Additionally, a local prosecutor may still prosecute a person on their own.<sup>221</sup> Indeed, given how much time and financial resources Governor Abbott has dedicated to prosecute election offenses, local prosecutors might elect to involve the

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208. *See id.* § 273.021.

209. *See State v. Stephens*, No. pd-1032-20, 2021 WL 5917198, at \*1 (Tex. Crim. App. Dec. 15, 2021).

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.* at \*3.

214. TEX. ELEC. CODE ANN. § 273.024(a).

215. *Stephens*, WL 5917198, at \*3 (citing *Saldano v. State*, 70 S.W.3d 873 (Tex. Crim. App. 2002)).

216. *Id.*

217. *Id.*

218. *Id.* (citing *Meshell v. State*, 739 S.W.2d 246, 252 (Tex. Crim. App. 1987)).

219. *Id.* at \*8.

220. *See generally id.*

221. *See discussion supra* Section I.C. (listing three statutes under which a person can be prosecuted).



Attorney General to bring even more election-related cases.<sup>222</sup> Prosecutions like Mason's and Moses's still threaten people serving out felony convictions after *Stephens*.

The only advantage of the Attorney General having prosecutorial authority of election offenses was that defendants statewide might know that the Attorney General's office investigates and prosecutes election offenses. Before *Stephens*, individuals could even properly file injunctions against the Attorney General if they wanted to challenge the criminal referral for a voter registration attempt under Section 276.018. After *Stephens*, all the prosecutorial authority lies with counties.<sup>223</sup> Defendants likely do not have any transparency regarding whether local prosecutors ever intend to prosecute an election offense or ask the Attorney General to help. This lack of transparency compounds with the fact that defendants also lack transparency regarding how individual counties perform criminal history checks. The entire voter eligibility verification process is a black box.

In summation, individuals serving out felony convictions are not systemically educated about their personal voter eligibility status. They rely on others, such as judges, elected officials, county clerks, court personnel, and attorneys, to learn this information. However, when external resources are not available, individuals rely on the acceptance of their voter registration application to find out if they are eligible to vote. Yet, counties statutorily have significant discretion when verifying that a person is an eligible voter before and after approving a voter registration application. County discretion implies that counties are not uniformly undergoing the same process, which contributes to the lack of transparency and confusing practices of election administration. The voter eligibility verification process does not have to be a black box; Texans serving out felony convictions do not need to risk a criminal referral in order to find out if they are eligible voters. Section II highlighted inconsistencies and areas of concern within the Election Code and election administration practices as they relate to disenfranchised voters and their voter registration applications. Section III presents various solutions to help alleviate the negative impacts S.B. 1 has on people serving out felony convictions.

### III. MITIGATING THE IMPACTS OF S.B. 1 ON JUSTICE-IMPACTED PEOPLE

Perhaps the most obvious solution to the issues outlined so far is to repeal the statutes that facilitate the prosecution of ineligible persons who submit

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222. Abbott created a \$1.5 million investigation unit in the Attorney General's office in 2006. Swartz, *supra* note 35. Additionally, some of the most expensive lawsuits defended by the Texas government were dedicated to upholding voting rights restrictions, such as the \$1,000,000 lawsuit over Texas's voter ID laws in 2011. *Id.*

223. See *Stephens*, 2021 WL 5917198, at \*1–8 (Tex. Crim. App. Dec. 15, 2021).

erroneous voter registrations. However, even if legislators were motivated to repeal these statutes, legislatures that are reactive, as opposed to proactive, might feel inconvenienced to pass any new legislature until a person is already prosecuted. Immediate relief would solely be the prevention of any new criminal referrals. The following solutions offer exactly this, and a number of them should be implemented simultaneously to minimize the negative impacts of S.B. 1.

A. Interpret Statutes to Exclude Voter Registration Attempts and Apply a Uniform Mens Rea

Election officials and the Secretary of State should discourage criminal referrals because the court system may not have as much discretion with election offenses. County and district clerks do not act as neutral parties in the filling of election offenses. As a result of S.B. 1, a plain reading of Section 23.301 of the Government Code requires county and district clerks to docket Election Code proceedings.<sup>224</sup> Private citizens and public officials may seek a writ of mandamus from the Texas Supreme Court or the Court of Appeals to force clerks to docket an Election Code criminal proceeding.<sup>225</sup> Thus, applied discretion before a criminal referral is important.

The criminal referral in Section 15.028 of the Election Code should also be interpreted strictly. Section 15.028 reads “if the registrar determines that a person who is not eligible to vote *registered to vote* or voted in an election, the registrar shall . . .”<sup>226</sup> While prosecutors may broadly interpret the statement to include attempts, the statute plainly excludes attempts. The Secretary of State may take advantage of the discretion county registrars have before approving an application by insisting that they do not report attempts to prosecutorial offices. Registrars are not empowered to determine whether an applicant knowingly or intentionally registered to vote as an ineligible person, and they arguably could not be empowered to make these determinations as non-judicial actors. Thus, county registrars should use the discretion they are given to not perpetuate a system of prosecuting mistaken individuals of election offenses. Registrars should be discouraged from referring applicants who submit incomplete or unsuccessful registrations.

By discouraging registrars from referring voter registration attempts, the Secretary of State may also interpret provisions in the Election Code more uniformly. As discussed in Section I(A), the Legislature created a more uniform *mens rea* requirement because it intended to prevent prosecutions like Crystal Mason’s. As Section 15.028 currently stands, it is not uniform with the rest of the Election Code. Knowing that one’s self is ineligible to

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224. TEX. GOV’T CODE ANN. § 23.301.

225. *Id.* § 23.301(e).

226. TEX. ELEC. CODE ANN. § 15.028 (emphasis added).

vote is arguably an attendant circumstance that prosecutors must prove under the illegal voting offenses in Section 64.012(a) of the Election Code. Even though registrars are not empowered to make *mens rea* determinations, their actions of referring applicants who are unaware of their voter eligibility status evades the legislative intent in the illegal voting offenses in Section 64.012(a).

Finally, judges should interpret the “knowingly” and “intentional” *mens rea* in Section 276.018 to include attendant circumstances. Although Section 276.018 does not expressly exclude attempts, its *mens rea* precludes the convictions of individuals who mistakenly register to vote while ineligible to vote. In Section 276.018, a person commits an offense if they, with the intent to deceive, “knowingly or intentionally make[] a false statement or swear[] to the truth of a false statement (1) on a voter registration application.”<sup>227</sup> The “intent to deceive” portion itself should preclude mistaken attempts. However, even without the “intent to deceive,” judges could also observe the holding in the *Mason* court in regards to *Delay v. State*, in which ambiguous placements of *mens rea* would require legislative intent inquiries.<sup>228</sup> In *Mason*, placing the *mens rea* after the *actus reus* meant that the court did not have to do a legislative intent inquiry with an unambiguous *mens rea*.<sup>229</sup> In Section 276.018, the *mens rea* falls before the *actus reus* (i.e., swearing to a false statement) and the attendant circumstances (i.e., swearing on a voter registration application). This creates an ambiguity because the *mens rea* might require that a person know that their statements are indeed false on the application. It also requires that a person (1) make a false statement, and (2) know that they made it on the form. Since the legislature intended to decriminalize innocent mistakes in regards to voter eligibility, judges, too, should not criminalize innocent mistakes on applications.

#### B. Instruct Texas Courts to Inform All People Battling Criminal Offenses of Their Eligibility

Because the courts are not neutral parties under S.B. 1’s new election laws,<sup>230</sup> the courts should play an active role of informing defendants convicted of felonies of their voter eligibility status. In addition to telling a person about their eligibility status,<sup>231</sup> judges should explain how a felony conviction will impact their ability to register to vote. Even though defendants might not be concerned with voter registration activities at the time they are convicted of a felony offense, this type of disclosure may be

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227. *Id.* § 276.018.

228. *Mason v. State*, 598 S.W.3d 755, 769 n.12 (Tex. App.—Fort Worth 2020), *aff’d in part and remanded*, 663 S.W.3d 621 (Tex. Crim. App. 2022).

229. *Id.*

230. See discussion *supra* Section III.A.

231. TEX. CODE CRIM. PROC. ANN. art. 42.0194.

one of the only resources defendants will have to receive information about how a voter registration attempt can result in a criminal referral. Because judges are already required to discuss voter eligibility with defendants, discussing voter registration with defendants would not be an onerous addition for local courts.

Courts are not limited to who they inform either. Judges can help convicted defendants who do not go to trial by informing them of the perils of a voter registration criminal referral and voter eligibility statuses, too. Because defendants may plead guilty to a felony before a trial, these individuals should not be deprived of important voter information. Judges should develop a practice of telling every convicted defendant about voter registration criminal referrals and how to avoid them.

The Office of Court Administration and the Texas Center for the Judiciary could facilitate providing judges with information to provide to defendants. These organizations are designed to provide judges with judicial education<sup>232</sup> and resources for the efficient administration of courts.<sup>233</sup> Unfortunately, Bench Books and other policies at the time of the writing of this Article do not inform judges of their legal mandate to inform defendants of their voter eligibility status. It would be beneficial for these two organizations to develop educational trainings and campaigns for local courts, as well as include these new legal mandates and other recommendations in their written resources.

### C. Explain Felony Disenfranchisement on the Voter Registration Application Form

Another avenue to better inform individuals serving out felony convictions of the voter eligibility requirements is to properly warn them on the application form itself. It is not enough for a voter registration form to list the voter eligibility requirements, as the standardized Secretary of State form does. If the application is the place where individuals get most of their information about voter eligibility, the form should properly explain the nuances of felony disenfranchisement laws in Texas and the consequences of submitting a voter registration application if a person is ineligible. If paired with the right advisory policies by the Secretary of State's office, this suggestion works to the benefit of both the county registrar and the individual serving out a felony conviction.

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232. *About Us*, TEX. CTR. FOR THE JUDICIARY, [https://www.yourhonor.com/web/Online/About\\_Us/Online/About\\_Us/Texas\\_Center.aspx?hkey=d1e1f43b-bc7a-4f51-8e84-e8b50bef47ca](https://www.yourhonor.com/web/Online/About_Us/Online/About_Us/Texas_Center.aspx?hkey=d1e1f43b-bc7a-4f51-8e84-e8b50bef47ca) [https://perma.cc/879U-DTB4].

233. *Welcome to the Office of Court Administration*, OFF. OF CT. ADMIN., <https://www.txcourts.gov/oca/> [https://perma.cc/99S8-JU2L].

The standard voter registration application does not adequately allow an election official to facially assess whether a person is eligible to vote due to a felony conviction. One concern of the criminal referral in S.B. 1 is that county officials may be employing various techniques to verify voter eligibility requirements. On an application, an applicant has two mandatory questions at the top of the form to facially verify eligibility: (1) A United States citizenship question; and (2) A minimum age requirement question. For some county registrars, as long as these boxes are checked in the affirmative and the attestation is signed, a person's voter registration application will be approved in regards to eligibility. The Secretary of State does not require that an applicant check a box to verify that they are not disenfranchised due to a felony conviction. A person only attests to not being ineligible to vote due to a felony conviction in a statement grouped with all other eligibility requirements at once. A felony disenfranchisement box placed at the top of the application would allow county registrars and applicants to better determine eligibility in regards to criminal history.

A felony disenfranchisement box would also inform people filling out a voter registration application form of their voting rights in a clear and concise manner. This could avoid confusion that sometimes arises in other areas of the application. In some cases, a person will sign a voter registration form while checking "no" to the U.S. citizenship and age requirement boxes. In some instances, a person may have mistakenly checked those boxes. In other instances, a person may have not read or misunderstood the attestation they signed. Providing a separate felony disenfranchisement box at the top gives the applicant the opportunity to reflect on how their criminal history might impact their right to vote.

To best facilitate reflection, the form should also explain what it means to be finally convicted of a felony. As of now, individuals must attest that they "have never been finally convicted of a felony, or if a felon, . . . have completed all of [their] punishment including any term of incarceration, parole, supervision, period of probation, or . . . have been pardoned."<sup>234</sup> This statement does not immediately alert applicants to the fact that to be finally convicted means to not be seeking an appeal of a sentence. This statement in the attestation also relies on applicants to make a series of inferences about their right to vote and their criminal history. Namely, the applicant must infer the following from the statement:

- (1) A finally convicted person will lose the right to vote in Texas;

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234. *Texas Voter Registration Application*, *supra* note 113.

- (2) A person convicted of a felony gets the right to vote back at some point;
- (3) If a person has completed all terms of a felony conviction, including any term of incarceration, parole, supervision, and period of probation, then the person gets the right to vote back; and
- (4) A person's right to vote is immediately restored at the conclusion of their final felony conviction.

The applicant should not be forced to infer this information.

Additionally, the application form should explain the consequences of submitting a voter registration application if a person is currently serving out a felony conviction. Currently, the form states, "I understand that giving false information to procure a voter registration is perjury, and a crime under state and federal law. Conviction of this crime may result in imprisonment up to one year in jail, a fine up to \$4,000, or both."<sup>235</sup> The statement does not capture the severity of prosecution stemming from a S.B. 1 criminal referral. A person who is not eligible to vote may think that the statement refers to providing false information in terms of identity, which is non-eligibility information, such as a residence address, name, or social security number. The application form should notify individuals that prosecution for ineligible applicants is possible.

Of course, one danger of a felony disenfranchisement box is that it draws attention to an applicant's criminal history and providing more information regarding penalties on the application could have a chilling effect for otherwise eligible applicants. Thus, the Secretary of State should issue an advisory policy to county registrars to avoid reporting voter registration attempts to a local county or district attorney if an applicant checks a box indicating that they are serving out a felony conviction. Ideally, a disenfranchisement box is only implemented simultaneously with this policy to protect individuals from easily being identified for a criminal referral and prosecution. As discussed above, county registrars have discretion in their investigation techniques, and Section 15.028 should be interpreted to exclude unsuccessful voter registration attempts. A felony disenfranchisement box ensures that county registrars can better identify unsuccessful voter registration attempts, but should not be used to aid in prosecutions.

#### CONCLUSION

Crystal Mason was prosecuted despite her lack of knowledge about her voter ineligibility. Her prosecution has attracted significant criticism from all

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235. *Id.*

sides of the partisan spectrum<sup>236</sup> because many legal advocates and scholars, elected officials, prosecutors, and everyday citizens believe that her prosecution is inconsistent with the values of a democratic society. The fact that the Republican-backed and Governor Abbott-signed S.B. 1,<sup>237</sup> which contained provisions that prevented repeat scenarios like Mason's, illustrates that even in one of the most politically polarized times in decades<sup>238</sup> prosecutions like Mason's are widely viewed as unjust. For people like Pamela Moses, the prosecution of a person serving out a felony conviction for registering to vote is even more egregious; elections are not undermined<sup>239</sup> by a person registering to vote and many individuals rely on the voter registration process to learn about their voter eligibility status<sup>240</sup> after the criminal justice system systemically deprives them of this information.

Registering to vote is not the same action as voting because a person does not yet participate in an election when they register to vote. A person may *never* vote, even if they always have an active and up-to-date voter registration. A disenfranchised person may innocuously believe that they can register to vote and attempt to do so for identification and social welfare purposes only. Counties are required to send all registered voters a free voter

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236. See generally, Taylor Goldenstein, *Texas Republicans Clash over Measure to Stop Innocent Mistakes from Being Prosecuted as Voter Fraud*, HOUS. CHRON. (Aug. 27, 2021, 7:03 PM), <https://www.houstonchronicle.com/politics/texas/article/Texas-Republicans-clash-over-measure-to-stop-16417894.php> [<https://perma.cc/NF4H-D2Y2>] (the late-add Mason Amendment provision to S.B. 1 was a part of a bipartisan as the “right thing to do”); see also Clark Nelly, et al., *Mason v. Texas*, CATO INST. (Dec. 15, 2020), <https://www.cato.org/legal-briefs/mason-v-texas> [<https://perma.cc/HPV5-GW28>] (arguing that Mason's prosecution was unjust and that the court misinterpreted the *mens rea* in the statute).

237. As Section II details, Greg Abbott has a history of supporting the investigation of voter fraud; indeed, S.B. 1 was a priority piece of legislation for his office throughout the 2021 legislative sessions. Governor Abbott marketed S.B. 1 as the bill to “secure election integrity in Texas” and cut down on election fraud. See Frank Heinz, *Texas Gov. Greg Abbott Announces ‘Legislative Efforts to Ensure Election Integrity in Texas’*, NBC DFW (Mar. 15, 2021, 5:49 PM), <https://www.nbcdfw.com/news/local/texas-news/watch-gov-greg-abbott-to-discuss-legislative-efforts-to-ensure-election-integrity-in-texas/2579498/> [<https://perma.cc/9HLB-NQWP>]. Even though the Mason amendment as proposed by Briscoe Cain was included in the enacted bill, its addition was a part of a longer bipartisan negotiation process to add the amendment to S.B. 1, reaching some level of media attention and drawing attention to the current provisions addressed in this Article that later were passed and signed into law. See Goldenstein, *supra* note 236.

238. See *The Partisan Divide on Political Values Grows Even Wider*, PEW RSCH. CTR 11–13 (2017), <https://www.pewresearch.org/politics/2017/10/05/the-partisan-divide-on-political-values-grows-even-wider/> [<https://perma.cc/CAJ9-PEU7>].

239. Elected officials have commonly claimed that illegal voting offenses must be investigated and prosecuted so that elections can be more “secure” and cut down on fraud. See Heinz, *supra* note 237; see also Bill Chappel, *Here Are the Texas GOP's Reasons for Voting Restrictions — And Why Critics Disagree*, NPR (June 1, 2021, 10:43 AM), <https://www.npr.org/2021/06/01/1002101600/here-are-the-texas-gops-reasons-for-voter-restrictions-and-critics-replies> [<https://perma.cc/4LGE-CLWH>].

240. See *infra* Section III (A).

registration certificate when they register to vote.<sup>241</sup> These certificates can be used as a form of supporting documentation for state identification, like a driver license,<sup>242</sup> or other state welfare, like Supplemental Nutrition Assistance Program (SNAP) and Temporary Assistance for Needy Families (TANF) benefits.<sup>243</sup> Criminalizing a person for erroneously registering to vote is not only unjust, but it is also cruel, as it creates an additional barrier for many justice-impacted individuals<sup>244</sup> seeking access to social welfare.

Additionally, the prosecution of an ineligible person for submitting a voter registration application assumes that some ineligible people register to vote even though they know that they are ineligible. Yet, in-person voter fraud in elections is extremely rare. In Texas particularly, the chief law enforcement official admitted to knowing of only one convicted and one guilty plea that involved an in-person voter fraud prosecution.<sup>245</sup> If the number of intentional voter fraud cases indicates anything about ineligible people submitting voter registration applications, one likely would find that very, very few people submit applications with the intent to defraud an election.<sup>246</sup> Since there is a dearth of evidence of widespread voter fraud, the real targets of criminal referrals will likely be ineligible people who are mistakenly turning in voter registration applications.

S.B. 1's full impacts on individuals serving out felony convictions is insidiously detrimental to democratic participation. While S.B.1 had included provisions to prevent future illegal voting prosecutions, it aids to the future prosecutions of people like Mason for voter registrations attempts. Texas statutes like Sections 13.007, 15.028, and 276.018 of the Election Code and Section 37.10(a)(1) of the Penal Code work together so that a prosecution for a voter registration is possible. Pamela Moses' voter registration prosecution in Tennessee should serve as a cautionary tale to all that facilitating the process for the prosecution of people committing innocent mistakes only aids in the prosecution of those individuals.

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241. See TEX. ELEC. CODE ANN. § 13.144.

242. TEX. DEP'T OF. PUB. SAFETY, WHAT TO BRING WITH YOU WHEN APPLYING FOR A TEXAS DRIVER LICENSE OR IDENTIFICATION CARD, <https://www.dps.texas.gov/internetforms/Forms/DL-15.pdf> [<https://perma.cc/3S6M-P7ZR>].

243. *A-620 Verification Requirements, SNAP and TANF*, TEX. HEALTH & HUM. SERVS, <https://www.hhs.texas.gov/handbooks/texas-works-handbook/a-620-verification-requirements> [<https://perma.cc/U9EQ-TDLQ>].

244. Only individuals with felony drug convictions are barred from receiving TANF and SNAP benefits in Texas. See TEX. ADMIN. CODE ANN. § 372.501.

245. *Debunking the Voter Fraud Myth*, BRENNAN CTR. FOR JUST. 3 (2017), [https://www.brennancenter.org/sites/default/files/analysis/Briefing\\_Memo\\_Debunking\\_Voter\\_Fraud\\_Myth.pdf](https://www.brennancenter.org/sites/default/files/analysis/Briefing_Memo_Debunking_Voter_Fraud_Myth.pdf) [<https://perma.cc/C3WN-KMTW>].

246. See generally *id.* (reporting that impersonation fraud at the polls is nearly non-existent, and that government investigations have not identified large-scale fraud).