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WHY BUSING VOTERS TO THE POLLING STATION IS PAYING PEOPLE TO VOTE

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ABSTRACT. In this paper, we argue that the widespread practice in the United States of busing voters to the polling station on Election Day is an instance of paying people to vote. We defend a definition of what it means to pay people to vote, and on this definition, busing voters to the polling station is an instance of paying people to vote. Paying people to vote is illegal according to United States federal election law. However, the United States courts have historically considered the practice of busing voters to the polling station legally permissible. The United States legal system, therefore, faces a dilemma: either the courts must change their interpretation of current federal election law such that busing voters to the polling station is a violation of federal election law, or federal election law must be changed so that at least some instances of paying people to vote are legally permissible. We argue that choosing either horn of the dilemma has a controversial implication for the United States legal system.

I. INTRODUCTION

This paper is about an aspect of United States (US) election law. Two federal statutes forbid paying individuals to vote. 42 U.S.C. § 1973i(c) says:

Whoever knowingly or willfully [...] pays or offers to pay or accepts payment either for registration to vote or for voting shall be fined not more than \$10,000 or imprisoned not more than five years, or both.¹

18 U.S.C. § 597 says:

Whoever makes or offers to make an expenditure to any person, either to vote or withhold his vote, or to vote for or against any candidate; and Whoever solicits, accepts, or receives any such

¹ The public health and welfare, 42 U.S.C. §1973i(c) (2010).

expenditure in consideration of his vote or the withholding of his vote – Shall be fined under this title or imprisoned not more than one year, or both.²

The legal status of paying people to vote is of interest in connection with the phenomenon of busing voters to the polling station on Election Day.³ This phenomenon is common in the US.⁴ One might think that busing voters to the polling station is legally impermissible in light of § 597 or § 1973i(c). The idea would here be that the individual or organization behind the transportation service violates US federal law in virtue of paying (by covering the costs of transportation to the polling station) an identifiable person (the prospective voter who gets a seat on the bus) to vote. However, *The Federal Prosecution of Election Offenses*⁵ – and a court case – show that busing voters to the polling station on Election Day is *not* a violation of US federal law. Busing voters to the polling station (as well as employers giving employees paid time off to go vote) are activities that the courts consider legally permissible. To wit, these two activities do not count as paying people to vote:

However, not all irregularities in the election process are appropriate for criminal prosecution. It is, for example, not a federal crime to transport voters to the polls.⁶

Likewise, the opinion accompanying the ruling in *United States v. Lewin* says:

More specifically, Lewin avers that civic-minded individuals or groups who encourage voter registration by, for example, providing transportation would be in literal violation of the statute, as would employers who continued wages during time off for the employee to register. [...]. We

² Crimes And Criminal Procedure, 18 U.S.C. §597 (2018).

³ Note that § 597 has a broader scope than § 1973i(c). The former statute criminalizes the act of paying individuals to vote as well as the act of paying individuals to abstain. § 1973i(c) is silent on the issue of paying individuals to abstain.

⁴ See Marshall Cohen, 'Michigan Judge Blocks Law that Banned Paid Transportation to Polls', CNN, September, 18' 2020, <https://www.cnn.com/2020/09/17/politics/election-2020-michigan-paid-transportation-polls/index.html>.

⁵ Craig C. Donsanto and Nancy L. Simmons, *Federal Prosecution of Election Offenses*, 7th ed. (Washington, D.C.: U.S. Dept. of Justice, Public Integrity Section, 2007).

⁶ (Donsanto and Simmons, *Federal Prosecution of Election Offenses*, 7th ed, p. 11). Donsanto and Simmons presents an official US Department of Justice perspective on federal election legislation and on how to investigate and prosecute election offenses. The book is published by the US Department of Justice and has this passage at the very beginning of chapter one: 'This book was written to help federal prosecutors and investigators discharge the responsibility of the United States Department of Justice in attacking corruption of the election process with all available statutes and theories of prosecution. It addresses how the Department handles all federal election offenses, other than those involving civil rights, which are enforced by the Department's Civil Rights Division. This Overview summarizes the Department's policies, as well as key legal and investigative considerations, related to the investigation and prosecution of election offenses'. Donsanto and Simmons, *Federal Prosecution of Election Offenses*, 7th ed, p. 1.

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are unpersuaded that the statute [42 U.S.C. §1973i(c)] is vague or proscribes efforts by civic groups or employers to encourage people to register. The statute uses the word 'pay'. It in no way prohibits assistance rendered by civic groups to prospective voters.⁷

It is legally permissible for an individual to offer free transportation to a polling station even if the individual makes proof of eligibility to vote and/or proof of voting a condition for getting a seat on the bus. This point about providing proof of voting is an important one in US federal election law. It is legally permissible for individuals and organizations to hand out free food and offer discounts on various types of commercial products on Election Day as part of election festivals or campaigns.⁸ However, these organizations are obligated to make their offers available to everyone. It is legally impermissible for these organizations to make proof of voting a requirement for receiving free items. If they demand such proof, the organizations run afoul of § 1973i(c) and § 597: they are paying individuals to vote.⁹ In this paper, we defend the following conclusion:

(C) Busing voters to the polling station on Election Day is an instance of paying people to vote.

There is an important conceptual difference between 'vote buying' and 'turnout buying'. Here is an explication of what vote-buying is: 'Vote buyers pay vote sellers to vote for a particular candidate or policy'.¹⁰ Cases of turnout buying are 'cases where people are paid to vote (or, in the negative case, to abstain from voting), not to (not) vote for a certain candidate'.¹¹ What we mean with (C) is that busing voters to the polling station is an instance of turnout buying, not vote buying.

If (C) is true, then the US legal system faces a dilemma. This is so because US courts currently interpret § 597 and § 1973i(c) such that

⁷ United States v. Lewin, 467 F.2d 1132 (United States Court of Appeals, 7th Cir. 1972). USA.

⁸ See Donald P. Green and Oliver A. McClellan, 'Election Festivals and Voter Turnout: An Overview of Recent Research', SSRN Journal (March 4, 2020) for a detailed account of the defining characteristics of election festivals as well as the impact of such festivals on turnout.

⁹ See Bolder Advocacy, Can a Nonprofit Provide Incentives to Encourage Citizens to Register to Vote or Vote? Bolder Advocacy, 2016, <https://www.bolderadvocacy.org/wp-content/uploads/2016/04/Can-a-Nonprofit-Provide-Incentives.pdf>; Byron Tau, 'Election Day Giveaways Steer Toward the Right Side of the Law', The Wall Street Journal, October 31, 2020, <https://www.wsj.com/livecoverage/election-live-updates-trump-biden-2020-10-30/card/Ag7pzgu79eW5Z5ZMSk28>.

¹⁰ Christopher Freiman, 'Vote Markets', Australasian Journal of Philosophy 92(4) (2014): pp. 759–774.

¹¹ Kasper Lippert-Rasmussen, 'Vote Buying and Election Promises: Should Democrats Care about the Difference?' Journal of Political Philosophy 19(2) (2011): pp. 125–144. Nichter provides a useful discussion of the difference between vote buying and turnout buying. Simeon Nichter, 'Vote Buying Or Turnout Buying? Machine Politics and the Secret Ballot', The American Political Science Review; Am Polit Sci Rev 102(1) (2008): pp. 19–31.

busing voters to the polling station on Election Day is legally permissible. However, if busing voters to the polling station is an instance of paying people to vote, then US courts currently permit an activity (namely busing) that is an instance of something (namely paying people to vote) that is explicitly considered legally impermissible by two federal statutes. To solve this dilemma, the US courts must either change their interpretation of § 597 and § 1973i(c) such that busing voters to the polling station is considered to be a violation of federal election law, or US federal election law must be changed so that at least *some* instances of paying people to vote (e.g., busing voters to the polling station) are legally permissible.

Before proceeding, we want to make clear that by defending (C) we neither endorse the moral permissibility, nor the legal permissibility of paying people to vote.¹² We defend a proposition about what busing voters to the polling station amounts to. In addition, we show that if this proposition is true, then it has significant implications for either the design of US federal election law or the interpretation of current US federal election law. This paper is not a descriptive paper about what the current US federal election law looks like. Neither is it a purely normative paper about how the US ought to design the aspect of its legal system that covers election issues. Rather, it is a paper that takes as its starting point current US federal election law, and several recent examples of how US courts have interpreted US federal election law. Based on this starting point, we argue that the courts *should* interpret the practice of busing voters to the polling station in a particular way, namely as an instance of paying people to vote.

An important premise in our arguments is the idea that US federal courts are subjected to a general requirement of analogical reasoning. We use the concept of ‘analogical reasoning’ in this way: ‘An analogical argument in legal reasoning is an argument that a case

¹² It is commonly accepted that turnout buying and vote buying are morally objectionable; Robert E. Goodin, *Reflective Democracy* (Oxford: Oxford University Press, 2005): p. 167; David Copp, *Capitalism Versus Democracy: The Marketing of Votes and the Marketing of Political Power*, 2000): p. 88; Alexandru Volacu, ‘Electoral Quid Pro Quo: A Defence of Barter Markets in Votes’, *Journal of Applied Philosophy* 36(5) (2019): pp. 769. However, several theorists have recently defended markets in votes. Freiman defends a legal right to buy and sell votes. Christopher Freiman, *Vote Markets*, pp. 759–774. Taylor and Brennan defend a moral right to buy and sell votes. James Stacey Taylor, ‘Two (Weak) Cheers for Markets in Votes’, *Philosophia* 46(1) (2018): pp. 223–239; Jason Brennan, *The Ethics of Voting* (Princeton: Princeton University Press, 2011). Volacu says that there are at least two plausible *prima facie* reasons in favor of barter voting markets Alexandru Volacu, ‘Electoral Quid Pro Quo: A Defence of Barter Markets in Votes’, pp. 769–784.

should be treated in a certain way because that is the way a *similar* case has been treated'.¹³ Arguments from precedent and analogy are two central forms of reasoning found in Common Law systems and the US legal system is a common law system.¹⁴

The paper is structured as follows: in Section 2, we defend a particular conception of what it means to pay people to vote, and we use this conception to defend (C). We then show how (C) generates a dilemma for the US legal system. In Section 3, we consider, and reject, three objections to our argument. The first objection is entitled the 'Assistance/Payment Objection' and it seeks to undermine our argument for (C). The second and third objections are, respectively, entitled the 'Turnout Objection' and the 'Incentives/Disincentives Objection'. Both objections rest on the assumption that (C) is true. That is, they do not take aim at our argument for (C). Rather, they seek to show that (C) does not generate a dilemma for the US legal system. In Section 4, we make a few concluding remarks.

II. WHY BUSING VOTERS TO THE POLLING STATION IS PAYING PEOPLE TO VOTE

Let us begin by noting that § 1973i(c) talks about paying people to vote, while § 597 talks about making an expenditure to someone to make that person vote. Throughout the paper, we only talk about paying people to vote, and we take the concept of 'x paying y to do z' to include cases where what is being transferred from x to y is money, vouchers, food stamps, stocks, bonds, Frequent Flyer Miles, Bitcoins, or provisions (e.g., gold). We speculate that § 597 invokes the broader concept of 'making an expenditure', as opposed to the concept of 'paying', to capture the intuitive idea that if it is wrong for x to pay y to vote with money, then it is also wrong for x to pay y to vote with any of the other items on the list above. This intuitive idea should be familiar from legal statutes aimed at curbing corruption. Typically, if something is an instance of corruption and it involves an illicit transfer of money, the same thing would be an instance of

¹³ Grant Lamond, 'Precedent and Analogy in Legal Reasoning', in Edward N. Zalta. (ed.), *The Stanford Encyclopedia of Philosophy*, Spring 2016 ed. (Stanford: Metaphysics Research Lab, Stanford University, 2016).

¹⁴ Grant Lamond, *Precedent and Analogy in Legal Reasoning*.

corruption if it involved an illicit transfer of, say, provisions instead of money.

What does it mean to ‘pay someone to vote’? Here is one conception which we denote the ‘transaction conception of paying someone to vote’. This conception has the following definition:

X pays Y to vote if, and only if, 1) X transfers money (or vouchers or provisions) to Y and 2) the exchange is a quid pro quo exchange where Y receives money (or vouchers or provisions) from X in exchange for voting simpliciter.¹⁵

Note that the transaction conception of paying people to vote is quite similar to what Lippert-Rasmussen has in mind when he talks about turnout buying.¹⁶ Furthermore, note that what the two statutes (§ 1973i(c) and § 597) make legally impermissible is *inter alia* the type of behaviour that the transaction conception of paying people to vote picks out. Both statutes outlaw turnout buying (§ 597 also outlaws vote-buying).

The transaction conception of paying people to vote squares well with our semantic intuitions about particular cases. Consider the following example which we take to be a paradigmatic example of paying someone to vote. Political operative Rich from a major political party walks around on Election Day and approaches Voter. Rich asks Voter if she is registered to vote, if she has already voted, and if she is planning on voting. If Voter answers ‘yes’ to the first question and ‘no’ to the latter two questions, Rich offers Voter money in exchange for voting. Voter accepts Rich’s money and goes voting. On the transaction conception of paying someone to vote, Rich is paying Voter to vote. It is also an implication of the transaction conception of paying someone to vote that Rich is paying Voter to vote in a scenario in which Voter accepts Rich’s offer but would have voted even if Rich had not approached her and offered her money in exchange for voting. We suggest that it is the transaction conception of paying someone to vote (or at least a concep-

¹⁵ The transaction conception of paying someone to vote is a conception of turnout buying. However, it could easily be changed into a conception of vote buying by substituting ‘simpliciter’ with ‘for a particular candidate/policy’.

¹⁶ Kasper Lippert-Rasmussen, *Vote Buying and Election Promises: Should Democrats Care about the Difference?* pp. 127.

tion close to it) that the US legal system invokes in § 1973i(c) in virtue of using the phrase ‘pays [...] for voting’.¹⁷

So far, we have defended the transaction conception of paying someone to vote. Let us now continue our defence of (C) by introducing a thought experiment. Consider Walker. He is a middle-aged man who is not in great physical shape. He appreciates socializing with members of his community, and he finds it important to signal that he is a member of his community, and that he is a virtuous person who complies with his civic duty to vote. Walker is somewhat interested in politics and has registered to vote. On Election Day, Walker wakes up and - despite his initial intentions to vote does not really feel like walking to the polling station. However, he would vote if he could get transportation to the polling station. Voting comes with certain costs for Walker.¹⁸ Walking the one mile to the polling station and back is possible for Walker, but it would take a while, and the walk would mean that Walker would experience moderate physical discomfort. If Walker does not receive transportation assistance, he will not vote. In short, if someone does not cover his costs for voting (moderate physical discomfort), Walker will abstain. Benefactor is a well-off citizen who believes that voting is a civic duty, and on Election Day, she organizes a free return bus service to the polling station. Benefactor calls her project ‘Driving Up Turnout’, and this name is printed on her bus and used in her social media posts to attract attention to her bus service. Benefactor contacts Walker and makes an offer to take him to the polling station if he can prove that he is registered to vote and, on the return-journey, Walker answers ‘yes’ to Benefactor’s explicit question of whether he has voted.¹⁹ Walker accepts the offer because

¹⁷ Note that US courts have historically interpreted § 1973i(c) to apply even if the voter in question decided not to vote after the transaction took place. Craig C. Donsanto, *Federal Prosecution of Election Offenses*, 5th ed. (Washington, D.C.: U.S. Dept. of Justice, Criminal Division, Public Integrity Section, 1988), p. 19.

¹⁸ In this section, we invoke a broader conception of ‘costs’ than a narrow one that is tightly connected to the monetary value of something. On this broader conception, particular types of behavior can have costs that cannot easily be measured in money.

¹⁹ Benefactor does not ask Walker for a kind of proof of voting that would yield information about what Walker voted. Asking for such proof would jeopardize the secret ballot, and jeopardizing this would be highly controversial given that the secret ballot is an entrenched democratic institution. Sarah Birch and Bob Watt, ‘Remote Electronic Voting: Free, Fair and Secret?’ *The Political Quarterly* 75(1) (2004): p. 62; Robert A. Dahl, *On Democracy* (New Haven: Yale University Press, 1998: p. 96).

it means that he can vote in comfort and because being on the bus gives him a welcome opportunity to socialize.

It should be recognized that some electors have special needs, and that a just society should provide special aid to voters with special needs so that they can vote without facing unreasonable difficulties. Such state aid is proper because it is important that the political voice of everyone is heard in a democracy. By stipulation, Walker has received *all* the help in the electoral process that the state considers necessary and reasonable. Benefactor's offer of free transportation to the polling station is an offer that comes from a private party and is an offer that comes in addition to, and on top of, whatever resources the US government has made available to Walker for him to vote. Given that Walker is a voter in a US federal election, he had the possibility of voting from the comfort of his home by mail.²⁰ He did not take advantage of this possibility. The 'Voting Accessibility for the Elderly and Handicapped Act of 1984' requires accessible polling places in federal elections for elderly individuals and people with disabilities. Where no accessible location is available, voters must be provided an alternative means of voting on Election Day.²¹ Walker is not entitled to assistance under this Act. He is neither elderly, nor handicapped. In light of the facts that Walker had the possibility of voting by mail and that he is not entitled to assistance under the above-mentioned Act, it is plausible to say that Walker is not below a baseline that demarcates those voters who *cannot* vote without significant difficulty, from those voters who *can* vote without such difficulty.

In the example of busing Walker to the polling station, Benefactor pays Walker to vote on the transaction conception of paying someone to vote. To see this, note that conditions 1) and 2) are satisfied: 1) Benefactor transfers a provision (the seat on the bus) to Walker, 2) the exchange is a quid pro quo exchange where Walker

²⁰ In 34 states and Washington, D.C., any qualified voter may vote an absentee/mail ballot without offering an excuse. In the remaining states, an excuse is required. See NCSL, Voting Outside the Polling Place: Absentee, All-Mail and other Voting at Home Options, National conference of state legislatures, published July 12, 2022, <https://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx>.

²¹ See U.S. Department of Justice, The Americans with Disabilities Act and Other Federal Laws Protecting the Rights of Voters with Disabilities, U.S. Department of Justice, Civil Rights Division Disability Rights Section, Published September 2014, https://www.ada.gov/ada_voting/ada_voting_ta.htm.

receives a provision from Benefactor in exchange for voting. So, (C) is true.

One might question that 2) is satisfied because it is unclear that Walker receives the provision from Benefactor in exchange for *voting*. Perhaps he receives it in exchange for doing something other than voting. We find this objection unconvincing. The circumstances of the exchange between Benefactor and Walker make it clear that Walker receives the provision in exchange for voting. Consider, for example, that Benefactor arranges her bus service only on Election Day, that the bus only takes Walker to and from the polling station (where one normally goes to vote), and that Benefactor makes it explicitly clear that the purpose of arranging the bus service is to help more people exercise their right to vote.²² In short, neither Walker nor Benefactor can plausibly deny that Walker received the provision in exchange for voting.

Note that providing Walker with a seat on the bus is for Benefactor to provide Walker with something that has a clear monetary equivalent. To see this, consider that instead of providing Walker with a seat on the bus, Benefactor could pay for a taxi that will take Walker to and from the polling station. Alternatively, Benefactor could give Walker a transportation voucher for return transportation to the polling station. Benefactor could even provide Walker with cash, so that Walker could pay for his own transportation. If Benefactor did any of these things, she would be paying for the removal of Walker's mobility barrier to voting, just like she does when she offers him a free seat on the bus.

Given that (C) is true, and given a general requirement of legal analogical reasoning, the US legal system faces a dilemma. Call it the busing dilemma:

Horn A) The courts must change their interpretation of § 597 and § 1973i(c) such that busing voters to the polling station is considered to be a violation of federal election law.

Horn B) Federal election law must be changed so that at least some instances of paying people to vote (e.g., busing voters to the polling station) are legally permissible.

²² These three features of Benefactor's bus service mimic the contingent features that real-life busing services typically have. See, for example, Black Votes Matter, BVM bustour, accessed June 9, 2022, Blackvotesmatter, <https://blackvotesmatterfund.org/bvm-bus-tour/> and Lauren Edwards, 'Churches in Kalamazoo offering voters free rides to and from the polls', Fox17, November 06, 2018, <https://www.fox17online.com/2018/11/06/churches-in-kalamazoo-offering-voters-free-rides-to-and-from-the-polls>.

Choosing either horn of the busing dilemma has a controversial implication. Choosing Horn A has the controversial implication that if Benefactor assists Walker by providing him with a seat on a bus, then both Benefactor and Walker commit a criminal offense which can be punished with up to five years of imprisonment (on § 1973i(c)).²³ Choosing Horn B has the controversial implication that US federal election law no longer has a blanket prohibition on paying people to vote. The disappearance of such a prohibition means that the US legal system cannot justify the legal impermissibility of Rich's behaviour towards Voter by merely saying that Rich *pays* Voter to vote. The US legal system must explain why this particular way of paying people to vote is impermissible whereas other ways of paying people to vote are permissible. On Horn B of the busing dilemma, the US legal system therefore faces an explanatory challenge. We argue that it cannot overcome this challenge.

III. OBJECTIONS

A. *The Assistance/Payment Objection*

The first objection is that (C) is false because what Benefactor is doing is not *paying* Walker to vote, but merely *assisting* him in overcoming a (mobility) barrier to voting. Recall the wording in *United States v. Lewin*: 'It [§ 1973i(c)] in no way prohibits *assistance* rendered by civic groups to prospective voters' [*italics added*].²⁴ The argument that the courts could put forward, then, is that busing voters to the polling station is acceptable because it is an assistance that serves the valuable end of assisting voters in exercising their voting rights.²⁵ Contrary to this, handing out free drinks, food, vouchers, or even money to voters on Election Day may have the

²³ The US Justice Department's Criminal Division has a policy against prosecuting voters for 'selling their votes'. Although § 1973i(c) explicitly prohibits selling one's vote, the main purpose of the statute is to prohibit the buying of other people's vote. Donsanto, *Federal Prosecution of Election Offenses*, 5th ed., p. 19. Nevertheless, it does not seem implausible to suggest that a legal system in which the criminal offense of providing a voter with free transportation to the polling station carries a maximum penalty of five years imprisonment violates the principle of proportionality in criminal law – that penalties be proportionate in their severity to the gravity of the defendant's criminal conduct. For more on this principle, see Andrew von Hirsch, 'Proportionality in the Philosophy of Punishment: From "Why Punish?" to "How Much?"', *Israel Law Review*; *Isr. Law Rev* 25(3–4) (1991): pp. 549–580.

²⁴ *United States v. Lewin*, 467 F.2d 1132 (United States Court of Appeals, 7th Cir. 1972). USA.

²⁵ It is a common view that voting is a civic duty. P. S. Karlan, 'Not by Money but by Virtue Won? Vote Trafficking and the Voting Rights System', *Virginia Law Review* 80(7) (1994): pp. 1472; Richard L. Hasen, 'Vote Buying', *California Law Review* 88(5) (2000): pp. 1358.

effect of driving up turnout, but it cannot be said of any of these things that they provide assistance to voters. Such activities are instances of paying individuals to vote akin to paying someone for having performed a specific act, and they are, therefore, according to the interpretation of the courts, legally impermissible in light of § 597 and § 1973i(c).

For the sake of argument, we accept that it makes sense to use the word ‘assistance’ in describing Benefactor’s behaviour towards Walker. However, from the fact that Benefactor is *assisting* Walker in voting, it does not follow that Benefactor is not also *paying* Walker to vote. Distinct concepts can, after all, have the same extension (pick out the same thing in the world). For instance, an activity that can be correctly described as the giving of a gift can also be correctly described as an act of corruption. Consider businessperson x who offers politician y a week’s free stay in a luxury rental home in exchange for a building permit. Politician y accepts the offer. What x does is plausibly *both* an act of giving a gift, *and* an act of corruption. What we contend is that even on the assumption that Benefactor is assisting Walker in voting, it *also* makes sense to say that Benefactor is paying Walker to vote. By saying that Benefactor is assisting Walker in voting, the courts have therefore not done anything to show that Benefactor is not also paying Walker to vote.

The courts might now respond by saying that they reject the proposed transaction conception of paying someone to vote. To this, we say that we are, in principle, open to the suggestion that the proposed conception of what it means to pay someone to vote is incorrect. Perhaps it cannot account for semantic intuitions we have about some important cases. But before we have been presented with such cases, it is reasonable to believe that the transaction conception of paying someone to vote is correct. Moreover, if the courts reject the transaction conception of paying someone to vote, the courts need to present and defend an alternative conception. In § 1973i(c) the concept of paying someone to vote plays an essential role. For this statute to have significant action-guiding power for citizens who are subject to it, it must be the case that the concept of paying someone to vote, used by the courts, has a relatively clear and well-defined meaning.²⁶ So, on the assumption that the courts think that this statute has significant action-

²⁶ See Joseph Raz, ‘The Rule of Law and its Virtue’, in Joseph Raz. (ed.), *The Authority of Law: Essays on Law and Morality* (Oxford: Oxford University Press, 1979), pp. 213 for an argument that laws must be action-guiding.

guiding power, the courts must come up with an alternative conception of what it means to pay someone to vote.

It is important to stress that this alternative conception must satisfy at least the following three criteria: a) it must be independently plausible so that it captures common semantic intuitions, in a broad range of contexts, about what it is for 'x to pay y to do z', b) it must imply that Benefactor is *not* paying Walker to vote, and c) it must imply that Rich is paying Voter to vote. We do not know of a place where the US legal system explicitly tackles the conceptual question of what it means to pay someone to vote. However, in the following paragraph, the US Department of Justice attempts to explain why standard examples of busing are legally permissible and therefore do not count as instances of paying people to vote.²⁷

In addition, the concept of "payment" does not reach things such as rides to the polls or time off from work which are given to *make it easier* for those who have decided to vote to cast their ballots. Such "facilitation payments" are to be distinguished from gifts made personally to prospective voters for the specific purpose of stimulating or influencing the more fundamental decision to participate in an election.²⁸

Taking their cue from this paragraph, the courts might say that they will not permit Rich's behaviour towards Voter because Rich is paying Voter to vote. He is doing so in virtue of giving a 'gift made personally to a prospective voter for the specific purpose of stimulating or influencing the more fundamental decision to participate in an election'. However, if this explanation is meant to capture what it means to pay someone to vote and to function as a reason why Rich's behaviour towards Voter is legally impermissible, then the very same reasoning applies to the case involving Benefactor and Walker. Walker is a prospective voter. On Election Day, he has decided not to vote unless he gets help with transportation to the polling station. Benefactor gives a gift personally to Walker. She offers him a seat on the bus, and she offers this gift to Walker 'for the specific purpose of stimulating or influencing the more fundamental decision to participate in an

²⁶ See Joseph Raz, 'The Rule of Law and its Virtue', in Joseph Raz. (ed.), *The Authority of Law: Essays on Law and Morality* (Oxford: Oxford University Press, 1979), pp. 213 for an argument that laws must be action-guiding.

²⁷ The purpose of this US Department of Justice publication is 'to present a current summary of the criminal laws dealing with the subject of elections, and to discuss the policy and procedural considerations which bear on the administration of federal criminal justice in this complex and important area' Donsanto, *Federal Prosecution of Election Offenses*, 5th ed. p. v.

²⁸ Donsanto, *Federal Prosecution of Election Offenses*, 5th ed. p. 18.

election'. After all, Benefactor wants to *change* Walker's fundamental decision on Election Day not to vote. Benefactor wants Walker to vote, and that is why she personally offers Walker a gift. So, if the courts think that Rich pays Voter and does something illegal, then they are forced to say that Benefactor pays Walker in the same sense of 'paying' and therefore also does something illegal. Accepting the US Department of Justice's own explanation, Benefactor's (busing) assistance to Walker is not correctly described as a 'facilitation payment'. It is correctly described as the kind of payment to vote that the courts find instantiated in Rich's behaviour towards Voter and which the courts consider to be legally impermissible. And if the courts consider Rich's behaviour to be legally impermissible, they must take the same stance on Benefactor's behaviour.

B. *The Turnout Objection*

The second objection is that even on the assumption that (C) is true, there is no busing dilemma. The US legal system can choose Horn B without incurring an insurmountable explanatory challenge. Contrary to our claim, the US legal system can explain why busing should be legally permissible whereas other ways of paying people to vote should continue to be legally impermissible (for example, the way in which Rich pays Voter to vote). The reason for giving the practice of busing special legal treatment is that, for contingent reasons, few voters other than *poor* voters are likely to accept the offer of a ride to the polling station. Busing voters to the polling station is therefore likely to drive up turnout rates in general, and particularly among poor voters. Moreover, it is a good thing – for several reasons – that turnout rates among the poor are increased.²⁹ For instance, for reasons related to political legitimacy, and for reasons related to diversity of viewpoints represented in the democratic process, it would be a good thing if the turnout rates among underrepresented poor voters were increased. Thus, the objection goes, if we want to drive up turnout rates among underrepresented poor voters, we should allow the practice of busing voters to the

²⁹ Jason Brennan and Lisa Hill, 'Part II - Compulsory Voting Defended', in J. Brennan and L. Hill. (ed.), *Compulsory Voting: For and Against* (Cambridge: Cambridge University Press, 2014), pp. 109–204; Arend Lijphart, 'Unequal Participation: Democracy's Unresolved Dilemma Presidential Address, American Political Science Association, 1996', *The American Political Science Review*; *Am Polit Sci Rev* 91(1) (1997): pp. 1–14.

polling station, even if it is – technically speaking – an instance of paying people to vote.³⁰

There is reason to be sceptical of this objection: *if* the objection is true, then it implies – controversially – that it is morally permissible to pay, in the manner Rich pays Voter, someone to vote just because that person is a member of an underrepresented minority group, such as poor people. If the fact that we want poor people to vote is a sufficiently strong reason to allow the practice of busing voters to the polling station – even if it is an instance of paying people to vote – then we should also allow other instances of paying people to vote, if the voters in question are poor. Then we should allow offering money to people who are poor, if doing so makes them vote. This is in itself a controversial implication.

To this one might reply that the fact that busing is legally permissible does *not* mean that it should be legally permissible for Rich to pay Voter even if Voter is sufficiently poor. Pragmatic differences between the two cases could justify that they are treated differently by the law.³¹ One pragmatic difference is the following: for contingent reasons, only poor people are likely to accept the offer of a seat on the bus. This particular instance of paying people to vote is therefore likely to be effective in driving up turnout rates primarily among those voters whose political participation we have special reasons to promote. By contrast, giving Rich *carte blanche* to pay any voter cash as long as the voter in question is sufficiently poor, is a policy that, for contingent reasons, is likely to drive up turnout rates also among the *wrong* group of voters (the non-poor). This is so because it is difficult for Rich to determine who is poor enough to be entitled to payment. Inevitably, Rich will end up paying some non-poor people to vote. Moreover, it is going to be difficult and costly for the legal system to distinguish between Rich's legitimate and illegitimate payments to voters. Having a clause in the law that says that Rich can only pay a poor voter makes enforcement of the law practically complicated because it is difficult to verify whether a given recipient of payment is poor enough to be entitled to Rich's payment.

³⁰ We thank an anonymous reviewer from *Law and Philosophy* for bringing this objection to our attention.

³¹ We thank an anonymous reviewer from *Law and Philosophy* for bringing this objection to our attention.

We accept the idea that a pragmatic difference between two cases that are morally analogous (when considered in isolation) can sometimes justify that the law treats the two cases differently. However, in the present case, we do not think that an appeal to this idea can justify that the US legal system treats Benefactor's payment to Walker differently from the way it treats Rich's payment to a poor voter. The US legal system could decide that it allows busing *and* the type of payment Rich offers to Voter as long as Voter is a recipient of, say, federal food stamps or some other federal provision of assistance targeted at the poor.³² If the US legal system makes this requirement, the two types of payment become identical in terms of both scope and pointedness. Both types of payment are likely to be accepted by a relatively small subset of voters (restricted scope) and they are likely to drive-up turnout rates primarily among poor voters (pointedness). Note, that if one thinks that pointedness is important in the sense that one finds it important to have turnout schemes that precisely target poor voters, then the US legal system should favour Rich's offer to Voter over Benefactor's offer to Walker. After all, Rich can verify that Voter is in fact poor by asking for proof that Voter is a recipient of federal aid of the relevant kind. By contrast, under current regulations, Benefactor is under no obligation to verify that Walker is in fact poor. So, it is likely that some non-poor people end up on Benefactor's bus.

The courts may now come back and say that there is another practical difference that explains why it should be legally impermissible for Rich to pay Voter to vote, while it should be legally permissible for Benefactor to pay Walker by offering him a seat on the bus or by giving him cash to arrange his own transportation. The practical difference is that there is a natural ceiling to how much money Benefactor can offer Walker to overcome his mobility barrier: the ceiling is the price of a return taxi ride to the polling station. By contrast, there is no natural ceiling to how much money Rich can pay to Voter in a quid pro quo exchange to make Voter vote. In principle, Rich could pay Voter US\$10,000 to vote. The courts could now say that it would be problematic if it were legally permissible for Rich to pay poor voters such a massive amount of money.

³² For a description of the conditions, one must meet to qualify for receiving food stamps, see USAGov, Food Assistance, The United States government, Updated June 16, 2022, <https://www.usa.gov/food-help>.

This would be problematic, according to the courts, because allowing Rich to pay Voter a lot of money to make Voter vote, would create a perverse incentive for Voter and other poor people to withhold their votes unless they are paid a substantial amount of money to vote. In effect, this would likely mean that poor voters would vote for the *wrong* reasons. They would not vote out of a civic duty to participate in democracy, but out of an interest in earning a lot of money. Moreover, it could frustrate non-poor voters because, unlike poor voters, they are not entitled to receive money for voting, but are expected to vote purely out of a sense of civic duty. Non-poor voters could reasonably ask why the civic duty of voting is supposedly enough to make them vote, but not enough for poor voters. Poor voters apparently need something extra to be persuaded to vote, namely a monetary reward.

For the sake of argument, we accept this line of reasoning from the courts. But there is an easy fix to the problem: the courts could simply decide to set a ceiling for how much money Rich is allowed to pay to Voter. This ceiling does not have to be arbitrary. A court case from Alaska suggests that some state courts are sympathetic to setting a ceiling for cash transfers that help increase turnout. The case showed that it was permissible to reimburse voters' transportation costs to and from the polling station. It was permissible to reimburse expenses for up to ten gallons of gasoline on the condition that the voter in question submitted a ballot stub and swore that the gasoline had been used for return transportation to the polling station.³³ Federal courts can mimic this approach and say that if Benefactor chooses to give cash to Walker for Walker to organize his own transportation to the polling station, then there is a ceiling to how much money Benefactor can give to Walker. The ceiling could, for example, be the price of ten gallons of gasoline. The courts could now say that Rich cannot give Voter an amount of money that lies above this ceiling.

One worry about setting a price ceiling for how much money Rich can legally pay a poor voter in exchange for voting is that a price ceiling would also be difficult and costly to enforce. It may have been relatively easy and costless in Alaska, because voters had to submit their own ballot stubs, and because the practice was to

³³ See *Dansereau v. Ulmer*, 903 P.2d 555 (Supreme Court of Alaska, 1995) USA, <https://law.justia.com/cases/alaska/supreme-court/1995/s-6894-1.html>.

reimburse voters after the election had taken place, not to pay them to vote before the election.

However, it is not clear why setting a ceiling for how much money Rich can legally pay a poor voter in exchange for voting should be too difficult or costly to enforce given how the state operates in other domains of the law. The US Internal Revenue Service (IRS) recognizes a type of benefits entitled 'De Minimis Fringe Benefits'. The term 'De Minimis Fringe' denotes any property or service the value of which is (after taking into account the frequency with which similar fringes are provided by the employer to the employer's employees) so small as to make accounting for it unreasonable or administratively impracticable.³⁴ The value of a De Minimis Fringe benefit is not, according to US tax law, included in the employee's gross income. The employee can receive such a benefit without having to pay tax of its value. Cash cannot be a De Minimis benefit, and a De Minimis benefit cannot be used as normal wage compensation. Whether an item or service is De Minimis depends on all the facts and circumstances of the transaction between the two parties. A gift certificate that allows an employee to receive a specific item that is minimal in value, provided infrequently, and is administratively impractical to account for, can be a De Minimis benefit, depending on the facts and circumstances of the transaction. The IRS has ruled that items with a value exceeding US\$100 cannot be a De Minimis benefit, even under unusual circumstances.³⁵ So, according to US tax law there is a price ceiling for how valuable a De Minimis benefit can be.

It is difficult and costly for the state to monitor gift transactions between citizens to determine whether the value of a particular De Minimis benefit exceeds the price ceiling. It would be easier and less costly to have a more general rule that does not entail one legal response to cases under the ceiling, and another response to similar cases above the ceiling. Still, US tax law operates with a price ceiling. Considering this, it plausible to suggest, as we do, that the mere fact that a price ceiling is difficult and costly to enforce is not a sufficiently good reason to reject our proposal – especially given that

³⁴ See Internal Revenue, 26 Electronic Code of Federal Regulations (e-CFR), § 1.132-6 – De minimis fringes (<https://www.law.cornell.edu/cfr/text/26/1.132-6>).

³⁵ See IRS, De Minimis Fringe Benefits, <https://www.irs.gov>, Updated July 6, 2022, <https://www.irs.gov/government-entities/federal-state-local-governments/de-minimis-fringe-benefits>.

some of the existing methods for enforcing price ceilings in tax law can also be used to enforce price ceilings for paying people to vote. We propose that whatever methods the state deems appropriate to enforce the price ceiling for De Minimis benefits in tax law (did the value of the gift card that an employee received from her employer exceed US\$100?) are ones that it can use to enforce the price ceiling for payments to vote (did the payment that a poor voter received from Rich in exchange of voting exceed the price ceiling?).

Before closing this section, let us summarize. If the US legal system chooses Horn B of the busing dilemma, they face an explanatory challenge. We have discussed two ways in which the US legal system might attempt to meet this challenge. The first one is to claim that Benefactor's offer is more pointed towards poor voters than Rich's offer is. The second one is to claim that there is a natural ceiling to Benefactor's offer, while there is no natural ceiling to Rich's offer. We have shown that both of these attempts to meet the challenge fail. Consequently, the US legal system is still faced with an explanatory challenge, if they choose Horn B of the busing dilemma.

C. *The Incentives/Disincentives Objection*

The third objection also takes as its starting point that (C) is true. However, according to the objection, (C) does not generate the busing dilemma because the US legal system can unproblematically choose Horn B. The reason it can do this is that there is a relevant difference between *removing a disincentive* and *creating an incentive*. When Benefactor provides Walker with a seat on the bus, she removes a *disincentive* for voting for Walker, and in virtue of the fact that this particular way of paying someone to vote removes a disincentive for voting, Benefactor's payment to Walker should be legally permissible. By contrast, when Rich pays Voter cash to vote, he creates an *incentive* for voting. And in virtue of the fact that this particular way of paying someone to vote creates an *incentive* for voting, Rich's way of paying Voter to vote should continue to be legally *impermissible*. To see the difference between removing disincentives and creating incentives, consider that an offer of trans-

portation to the polling station removes a disincentive for voting because it is primarily useful for someone who already intends to vote.³⁶ By contrast, an offer of cash to go vote creates an incentive to vote because it is useful for anyone, even those who have no real barriers to voting but nevertheless intend not to vote. Exactly this difference between the way Benefactor pays Walker, and the way in which Rich pays Voter, explains why the US legal system could easily accept Horn B. Or so the objection goes.

We have two replies to this objection. For the sake of argument, we accept that there is a relevant distinction between removing disincentives and creating incentives. However, by invoking this distinction, the courts cannot justify treating Rich and Benefactor differently under the law. There are two reasons for this.

First, removing disincentives as well as creating incentives can have real effects on election outcomes. To see how, consider the fact that Walker would *not* have voted if it were not for Benefactor's offer. So, even if there is a conceptual difference between removing disincentives for voting and creating incentives for voting, this difference seems practically irrelevant in the present context. The strategy of removing a disincentive for voting (for example by offering someone a seat on the bus to the polling station) and the strategy of creating an incentive for voting (for example by offering someone cash to vote) can both be used to turn non-voters into voters and potentially decide elections. And – importantly – Benefactor can use both strategies for tactical purposes.

It is plausible to suggest that busing is used tactically in some US elections. The plausibility of this suggestion stems from the fact that there are court cases where a politically partisan group challenges a legal decision to annul a state ban on busing. The partisan group presumably makes the significant effort of making a legal challenge because it is convinced that busing voters is likely to have an adverse effect (from the perspective of the partisan group) on the election result. For example, in October 2020, the US Court of Appeals for the 6th Circuit ruled in favour of Michigan's Republican-led Legislature, reinstating the state's ban on hiring transportation to carry

³⁶ Recall that, according to the US legal system, busing is a type of 'facilitation payment' that is 'given to make it easier for those who have decided to vote to cast their ballots'. Donsanto, *Federal Prosecution of Election Offenses*, 5th ed. p. 18.

voters to the polls after a state court issued an injunction against the Michigan law.³⁷

Benefactor's busing scheme is likely to be most effective, as a tactical scheme to win elections, in elections that are close. If Benefactor has good reasons to believe that Walker and many other voters in Walker's electoral district will vote for Benefactor's preferred candidate, Benefactor would be well advised to offer her bus service in Walker's electoral district. There are several examples of remarkably close federal elections. In the 2000 US presidential race, George Bush won Florida. He got 537 more votes than Al Gore.³⁸ A more recent example is the 2020 election for Iowa's 2nd congressional district. Six votes separated the winner from the runner up.³⁹ So, even if busing only removes disincentives, it can be – and already is – used for tactical purposes to affect election results. Especially in close elections, busing a few more party faithful voters to the polls can be pivotal.

Second, the practice of paying people cash to vote, and the practice of busing people to the polling station, both remove disincentives for voting and create incentives for voting. So, it is not true that busing only removes disincentives while paying people cash to vote only creates incentives. Let us illustrate this by considering in turn the behaviour of Rich and the behaviour of Benefactor. Let us begin with Rich's behaviour. Rich *removes disincentives* when people spend the cash on removing some of their barriers to voting. They might, for instance, spend the cash on transportation to the polling station, or they might spend it on a babysitter to take care of their children while they go vote, or on takeout meals to their children to free up time to go vote. Obviously, Rich's behaviour also *creates incentives* for voting because paying people cash to vote makes more people vote – even people who had no real barriers to voting but nevertheless intended not to vote, perhaps because they are simply uninterested in politics.

³⁷ See Clara Hendrickson, 'Court upholds state ban on hiring transportation to bring voters to the polls', Detroit Free Press, accessed June 9, 2022, <https://bit.ly/3hOFWQO>.

³⁸ For statistics on this election, see (Ron Elving, 'The Florida Recount Of 2000: A Nightmare That Goes On Haunting', NPR, November 12, 2018, <https://n.pr/3bTETv7>).

³⁹ See Zachary Oren Smith, 'Iowa's 2nd Congressional District: What you need to know about the nation's closest election between Miller-Meeks and Hart', Iowa City Press-Citizen, Accessed June 9, 2022, <https://bit.ly/3wzSKi1>.

What about Benefactor's behaviour? Benefactor also removes disincentives as well as creates incentives. For instance, Benefactor *removes a disincentive* for Walker, namely the disincentive consisting in having to experience moderate physical discomfort by walking to the polling station and back. Benefactor also *creates incentives* for voting. For example, offering Walker a seat on the bus gives Walker the opportunity to socialize with other community members on the bus and at the polling station. More importantly, Benefactor's behaviour creates an incentive for voting by offering Walker the opportunity to engage in 'fidelity signalling'. Roughly, fidelity signalling is communicating to one's peers that one is loyal to them. Being on the bus gives Walker an opportunity to signal to his fellow community members that he is a loyal member, and that he is on the same political team as them. In addition to fidelity signalling, Benefactor's behaviour also creates the incentive for voting by allowing Walker to engage in 'virtue signalling'. Roughly, virtue signalling is to communicate to other people that one is a morally good person. Being on the bus signals to other people that Walker is a virtuous person who complies with his civic duty to vote. One of the reasons as to why Walker accepted Benefactor's offer of a seat on the bus was that it removed one of Walker's disincentives to vote, namely that he had to walk to the polling station. But the opportunity to socialize, and the opportunity to engage in fidelity signalling and virtue signalling, were also significant reasons. So, Benefactor's behaviour removed disincentives for voting as well as created incentives for voting.

The strengths of the incentives to vote that consist of the opportunity to engage in fidelity signalling and virtue signalling should not be underestimated. They are not just fringe incentives that only a small subset of voters has.⁴⁰ Most voters are like Walker when it comes to caring about signalling effects. In fact, empirical studies repeatedly show that these signalling effects are some of the primary drivers for voter participation in elections.⁴¹ Much more so than actually caring about the content of particular policies. To illustrate how powerful these signalling incentives are in the context of busing, note that many voters in real elections choose to make use

⁴⁰ Christopher Freiman, *Why It's OK to Ignore Politics* (Milton: Taylor and Francis, 2020).

⁴¹ Christopher H. Achen and Larry M. Bartels, *Democracy for Realists: Why Elections Do Not Produce Responsive Government* (Princeton; Oxford: Princeton University Press, 2016).

of the offer of a seat on the bus, even though they had the chance to vote by mail from the comfort of their home. They could have voted quietly without having to worry about transportation to the polling station. Yet, many people choose to accept the offer of a bus ride anyway. Moreover, typically the buses themselves and the passengers on them are not exactly unpartisan in their political display. The buses are often sponsored by interest groups who have their own political agenda. The buses are typically filled with people who carry large banners, yell political slogans through megaphones, and wear t-shirts and hats displaying their favoured candidates.⁴² One readily available explanation of why many people engage in this behaviour is exactly that they care a lot about signalling to their community members and political peers that they are on the same team as them, and that they care a lot about signalling to everyone that they are a virtuous people who comply with their civic duty to vote. Compared to voting by mail and compared to travelling to the polling station on your own, taking the bus trip provides an extra opportunity to send these signals – which again creates a strong incentive to vote.

Let us sum up our twofold reply to the Incentives/Disincentives Objection. First, removing disincentives for voting and creating incentives for voting can both be used strategically to affect election outcomes. Second, the practice of paying people cash to vote and the practice of busing people to the polling station both *remove disincentives* for voting and *create incentives* for voting. So, even if there is a relevant distinction between removing disincentives and creating incentives, this distinction alone cannot be invoked to explain why paying people cash to vote and busing people to the polling station should be treated differently under the law.

IV. CONCLUDING REMARKS

In this paper, we have argued that the widespread practice in the United States of busing voters to the polling station on Election Day is an instance of paying people to vote. If this is correct, then the United States legal system faces a dilemma: either the courts must change their interpretation of current federal election law such that busing voters to the polling station is a violation of federal election

⁴² See footnote 22.

law, or federal election law must be changed so that at least some instances of paying people to vote are legally permissible. We have argued that choosing either horn of the dilemma has a controversial and therefore unattractive implication for the United States legal system. Therefore, the dilemma persists.⁴³

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⁴³ We would like to thank two anonymous reviewers from *Law and Philosophy*, Jens Damgaard Thaysen, Simone Marsilio, Derek T. Muller, Rick Hasen, and an audience at Aarhus University for very insightful and constructive comments on earlier versions of this paper.