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ABSTRACT

Felon disenfranchisement laws do not just disenfranchise. They also confuse. By imposing heavy penalties for failing to correctly navigate complex provisions, these statutes confuse eligible voters and discourage them from exercising their right to vote. In this way, felon disenfranchisement laws resemble modern voter suppression laws: they deter eligible voters from voting. Modest reforms can and should be implemented to affirmatively inform formerly incarcerated individuals of their restored voting rights.

* J.D., Stanford Law School 2016; Ph.D. Candidate, Stanford Political Science Department. I worked as a Skadden Fellow for the Voting Rights Project of the ACLU from 2017–19 and draw on some of my experiences there. I am grateful for the opportunity to have seen some of the problems of voter confusion up close and privileged to have worked with colleagues and voting rights advocates who litigated some of the cases I cite in this paper. But nothing in this article should be construed as representing the views of the ACLU or the Voting Rights Project.

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INTRODUCTION

Modern voter suppression efforts have given special force – and sinister undertone – to the old political adage of "if you can't convince them, confuse them."[1] This tactic applies not only to the content of policy proposals and candidate positions but also to the nuts and bolts of election laws themselves: who can vote, when to vote, where to vote, how to vote, and what is needed to vote. Voter suppression laws include those imposing identification or proof of eligibility requirements for voting as well as those restricting opportunities to vote and to register to vote. In addition to directly disenfranchising otherwise eligible voters, many of these laws also suppress the vote by imposing severe information costs. Put simply, disenfranchisement through confusion has become a distinct feature of modern voter suppression and should be addressed.

Felon disenfranchisement laws – while long pre-dating the post-*Shelby County v. Holder* wave of voter suppression laws[2] – also contain this same feature. Indeed, given the complexity of many felon disenfranchisement regimes, especially when and how voting rights are restored, disenfranchisement can also operate through confusion. In this way, felon disenfranchisement straddles the world of first and second generation voter disenfranchisement.[3] As a remnant of the first generation, some felon disenfranchisement laws still directly, cruelly, and widely disenfranchise a significant segment of the population. But, as many of these laws take root and adapt to life in the second generation world, they have also acquired a voter suppressive effect derived from confusion. And so, felon disenfranchisement laws today combine two distinct strategies: disenfranchise a lot of people and make many others unsure about whether they are disenfranchised.

This Article first describes these two strategies and then focuses on the second generation tactics. It explains the similarities between the voter confusion costs of modern voter suppression and those of felon disenfranchisement. These similarities derive largely from the complexity of compliance. In the felon disenfranchisement context, such complexity is compounded by the fact that it has two temporal stages: when voting rights are taken away and when they are given back. Moreover, not only are felon disenfranchisement laws potentially more confusing than modern voter suppression laws, they also

1. This apocryphal quote is often incorrectly attributed to Harry Truman. Although he did quote it, he did not coin it. *See* Garson O'Toole, *If You Can't Convince Them, Confuse Them*, QUOTE INVESTIGATOR (Dec. 2, 2013), https://quoteinvestigator.com/2013/12/02/confuse-them/ [perma.cc/P6S7-37DD].

2. Shelby Cty. v. Holder, 570 U.S. 529 (2013). These laws are described *infra* note 7.

3. I differentiate between first- and second-generation voter suppression strategies for ease of contrast between the time periods in which the strategies were operational, and also in the kinds of laws that were enacted to implement them. For ease of reference, they can be thought of broadly as the delineation between Parts I and II of ALEX KEYSSAR, THE RIGHT TO VOTE (2000).

inspire – and warrant – more risk aversion in voting. For affected voters, mistaking whether one is in fact eligible to vote risks committing a crime, the very reason these voters were subject to felon disenfranchisement laws in the first place. Finally, this Article suggests reforms for doctrine and policy to reduce voter confusion in felon disenfranchisement laws.

I. NEW TRICKS

In the post-*Shelby County* era,[4] first-generation voter disenfranchisement meets second-generation voter suppression. Distinguishing between the two generations not only helps demarcate the eras in which these strategies were operational, but also helps to identify the features and strategies of voter suppression borne of the two different eras. It is the combination of first- and second-generation aspects of felon disenfranchisement law that produces a voter suppression strategy that is more than the sum of its parts. No voter suppression law is more first-generation than that disenfranchising felons.[5] Felon disenfranchisement is one of the original sins of our democracy, outlasting its peers such as literacy tests and poll taxes.[6] In the modern era, it blushes with anachronism: no other law so outrightly, widely, and shamelessly disenfranchises so many people.

Despite its age, felon disenfranchisement is a pivotal tool in modern voter suppression as well.[7] What never went away as a first-generation strategy of disenfranchisement has now acquired the undesirable characteristics of its second-generation peers as well. And it is its place among the second-generation voter suppression strategies that I focus on in this Article. As reforms slowly

4. In *Shelby County v. Holder*, the Supreme Court effectively ended the pre-clearance regime under the Voting Rights Act, which required certain jurisdictions with histories of racial discrimination in voting to subject changes in voting laws to approval from the Department of Justice before they could be implemented. 570 U.S. at 556–57. Many states responded to the decision by passing voter suppression laws, some of which are discussed in further detail in this article. *See also The Effects of Shelby County v. Holder*, BRENNAN CTR. FOR JUST. (Aug. 6, 2018), https://www.brennancenter.org/analysis/effects-shelby-county-v-holder [perma.cc/E6FT-ZTNJ].

5. For a history of felon disenfranchisement laws, *see* ALEX KEYSSAR, THE RIGHT TO VOTE, 50–51 (2000); JEFF MANZA & CHRISTOPHER UGGEN, LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY (2006).

6. Avi Brisman, *Toward a More Elaborate Typology of Environmental Values: Liberalizing Criminal Disenfranchisement Laws and Policies*, 33 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 283, 333–34 (2007) (quoting Andrew L. Shapiro, *Challenging Criminal Disenfranchisement under the Voting Rights Act: A New Strategy*, 103 YALE L.J. 537, 538 (1993)).

7. I describe modern voter suppression laws as second-generation laws for ease of comparison to the first generation variety. To connect the concept of second-generation voter suppression with the literature, it is synonymous with what Dan Tokaji describes as the "New Vote Denial." Daniel P. Tokaji, *The New Vote Denial in Applying Section 2 to the New Vote Denial*, 50 HARV. C.R. & C.L. L. REV. 439, 439–40 (2015).

erode outright bans on voting for large swathes of the population, felon disenfranchisement laws increasingly suppress voting by confusing eligible voters. This confusion has special force in the low information environments that voters who are implicated by felon disenfranchisement laws inhabit.

In order to better understand the specific aspects of felon disenfranchisement laws that suppress – and deter – voting through confusion, this section surveys how second-generation voter suppression laws employ confusion. Then, the following section identifies those elements and strategies of confusion in felon disenfranchisement laws.

A. Confusion from Complexity

Many of felon disenfranchisement's modern peers derive their voter suppression effects from confusion over how to properly comply with requirements for voting. Lacking the political cover to implement outright restrictions on the franchise or the legal cover to explicitly target racial minorities, modern voter suppression relies, in part, on confusing voters about what it takes to vote.[8] To be sure, these laws are often focused on disenfranchising individuals who cannot meet the implemented requirements (e.g., not possessing photo ID or inability to vote except during the early voting period). But confusion helps extend the voter suppressive effects beyond individuals facially affected by the law.

Complexity engenders confusion. Voter ID laws demonstrate this well. What constitutes and – more importantly – what does *not* constitute acceptable ID for purposes of voting can be confusing and unexpected. Take, for example, the voter ID law that Wisconsin implemented in the wake of *Shelby County v. Holder*.[9] The law considers military IDs to be acceptable but not Veteran IDs.[10] Student IDs from accredited Wisconsin universities or colleges are acceptable while those from Wisconsin's sixteen two-year technical colleges are not.[11] Students must additionally proffer a document "showing that he or she is currently enrolled."[12] Even the basic question of when a photo ID is required to vote is not easily answered by the law. For example, some – but not all – mail-in absentee voters must provide ID, even though election administrators cannot match the voter casting the ballot to an ID photo for any mail-in ballots.[13]

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8. *See* Danielle Root & Adam Barclay, *Voter Suppression During the 2018 Midterm Elections*, CTR. FOR AM. PROGRESS (Nov. 20, 2018), https://www.americanprogress.org/issues/democracy/reports/2018/11/20/461296/voter-suppression-2018-midterm-elections/ [perma.cc/M4P2-NEW7].

9. Frank v. Walker, 17 F. Supp. 3d 837, 843 (E.D. Wis. 2014) (order denying stay of permanent injunction pending appeal of the Wisconsin ID law, codified as amended in scattered sections of chapters 5 and 6 of the Wisconsin statutes).

10. *Id*.

11. *Id*.

12. *Id*.

13. *Id*. at 844.

Kansas's Documentary Proof of Citizenship ("DPOC") Law demonstrates the same problem of voter confusion.[14] In 2011, Kansas passed a law requiring all prospective voter registrants to submit documentary proof of citizenship.[15] The district court described the process of registering to vote under the new regime at the Department of Motor Vehicles ("DMV") as "burdensome, confusing and inconsistently enforced."[16] For example, two of the plaintiffs in the case were asked whether they wished to register to vote at the DMV. Since they answered in the affirmative, they believed they had properly been registered to vote.[17] However, because they lacked DPOC, these plaintiffs were never actually registered.[18] Indeed, the plaintiffs' confusion was matched by that of election workers: one of the plaintiffs returned to the DMV to provide his DPOC, only to be told he was already registered to vote when, in fact, he was not.[19] The confusion was further compounded by the fact that Kansas did not consistently provide notice to individuals who failed to provide DPOC that they must do so if they desired to vote.[20]

These examples demonstrate that the voter suppression effects of any given law cannot simply be measured by the number of individuals it disenfranchises on its face. For instance, the suppressive effect of Wisconsin's voter ID law extends far beyond the number of individuals without valid ID or with ID that is expired for purposes of voting.[21] Voter suppression also derives from the complexity of the legal regime for voting. When the State constructs a complex legal landscape that voters must be informed about and then correctly navigate, it puts pressure on the ability and confidence of voters to get the law right. When such cognitive demands are severe, either because of sheer complexity or lack of reasoning that voters can intuit, voter confusion is virtually guaranteed.

B. Confusion Over Safeguards Diminishes Their Value

The strategy of using complexity to induce confusion and hence uncertainty about voter eligibility is especially obvious when considering the safeguards provided supposedly to help voters. With voter ID laws, permitting IDs to be used past expiration might be considered a safeguard – except that the rules governing expired IDs are often confusing. Consider, for instance, how

14. Fish v. Kobach, 189 F. Supp. 3d 1107, 1134 (D. Kan. 2016). The court enjoined the law and it remains enjoined while the case is on appeal.

15. *Id.* at 1115–16. For most voters, DPOC is a birth certificate, passport, or naturalization certificate.

16. *Id*. at 1134.

17. *Id.* at 1135.

18. *Id*.

19. *Id*.

20. *Id*. at 1136.

21. Frank v. Walker, 17 F. Supp. 3d 837, 852 (7th Cir. 2014).

long each kind of voter ID could be used post expiration in Wisconsin.[22] Most IDs are not valid if they expired after the most recent general election, even though a passport or a driver's license from more than two years ago can serve as valid verification of an individual's identification – the general features of one's face, name, gender and date of birth rarely change significantly over time.[23] Naturalization certificates, which do not themselves expire, are given an artificial expiration date for voter ID purposes.[24]

Yet in contrast to the Texas voter ID law, which bars all use of IDs expiring sixty days before the date of presentation at the polls,[25] the Wisconsin voter ID law might appear comparatively virtuous as it permits some expired IDs to be used for voting.[26] On paper, at least, there are some expired IDs that can be used for voting in Wisconsin and not in Texas.[27] But the patchwork of expiration dates mapped onto various IDs demonstrates how confusion can diminish the beneficial effects of these safeguards.

Provisions in identification laws that allow voters who do not already possess the requisite identification to obtain it for free or seek an exemption perhaps demonstrate this principle even more clearly. Even the harshest second-generation laws – those that veer closest to first-generation restrictions – have had to include in their terms provisions for eligible voters who cannot comply with the law.[28] The Voter ID laws address gaps in ID possession with the provision of supposedly free identification for purposes of voting. But how to actually obtain a free ID is far from clear. In evaluating the Wisconsin voter ID law, the U.S. District Court for the Eastern District of Wisconsin painstakingly detailed the procedural hoops low-income voters who lack ID must jump through in order to obtain a free state ID issued by the DMV.[29] Often, the documentation required to obtain a free state ID itself necessitates an additional frustrating and opaque administrative process.[30] But that process begins only if a voter even gets that far. On the website the state of Wisconsin runs, purportedly to educate voters about the law, the link to "If you do not have one of these photo IDs, learn how to get a free state ID card"[31] leads to a non-existent YouTube video. With respect to the Texas voter ID law, a voter without photo ID may obtain an election identification certificate from the Department of Public Safety, but in order to obtain such a certificate, a voter must present the same underlying documents she would have had to produce in order to obtain

22. *Id.* at 843.
23. *Id.*
24. *Id*.
25. Veasey v. Perry, 71 F. Supp. 3d 627, 641 (S.D. Tex. 2014).
26. *Frank*, 17 F. Supp. 3d at 843.
27. *Id.*
28. *Id.* at 844.
29. *Id.* at 855–61.
30. *Id.* at 858.
31. *Do I Have the Right Photo ID?*, BRING IT TO THE BALLOT, (last visited Sep. 3, 2019) https://bringit.wi.gov/do-i-have-right-photo-id [perma.cc/3MWN-B3DD].

a photo ID.[32] As for the Kansas DPOC law, while the statute provided a "safety net" to voters who do not possess DPOC, the bureaucratic morass and opacity of the process meant that "only three Kansas citizens have availed themselves of this procedure in the more than three years that the statute ha[d] been in effect."[33]

The complexity of the supposed safeguards explains why litigants challenging these laws have favored an alternative safeguard: providing voters with an opportunity to affirm their identity or eligibility under pain of perjury.[34] The requirement functions as a strong deterrent against falsifying one's identity while being straightforward enough for eligible voters to comply with and election workers to administer.[35] It also does not demand that voters be well versed or well informed about how to comply with such laws in advance. Instead, it enables all voters, whether conversant in the laws or not, to register to vote if they are eligible and cast a ballot if they are registered.[36] It is telling when states insist on administering complex safeguards in place of a simple but powerful affirmation requirement. Perhaps the complexity and the ensuing confusion it causes is not merely incidental but crucial to the regime.

C. Federalism Magnifies Confusion

Moreover, our system of federalism, in which voter requirements are determined on a state-by-state basis, magnifies the potential for voter confusion about what is actually required for voting in one's own state.[37] Voters might simply expect the worst given the scraps of information they receive about voting laws across the country. The national pervasiveness of second-generation voter restrictions might magnify voters' confusion about the state-specific requirements that govern them when they go to the polls. Cross-border voter confusion has been captured by surveys. For instance, in a nationwide survey of registered voters, Dr. Charles Stewart found that many voters in states without voter ID laws answered that they were required to show ID in order to vote.[38] Similar confusion has also been observed anecdotally. When I did voter protection work in the 2018 general elections, voters routinely approached me to ask whether they needed to present an ID in order to vote, and if so, what would be necessary. Others kept the registration card from when

32. *Veasey*, 71 F. Supp. 3d at 653.

33. Fish v. Kobach, 189 F. Supp. 3d 1107, 1137 (D. Kan. 2016).

34. *Id.*

35. The evidence in the Kansas DPOC case supports this. *Id.* at 1138. Very few noncitizens successfully registered to vote under a pure attestation regime in Kansas prior to the introduction of the DPOC law. *Id.*

36. *Id.*

37. Martha Guarnieri, *Civil Rebirth: Making the Case for Automatic Ex-Felon Voter Restoration*, 89 TEMP. L. REV. 451, 481 (2017).

38. Charles Stewart III, *Voter ID: Who Has Them? Who Shows Them?*, 66 OKLA. L. REV. 21, 48 (2013).

they registered to vote, thinking it was necessary in order to verify their registration before voting. But I was in New Mexico, a state that did not and does not have a general voter ID requirement.[39]

What do all of these sources and elements of confusion add up to? When one's ability to comply with voting laws is not clear ex ante, why try? These questions reflect the voter suppression aspect of confusion – to make it so that eligible voters do not vote. Moreover, confusion afflicts not only voters but also line-level election administrators.[40] They may unevenly apply voting laws that are less than clear. When the carve-outs, safeguards, and details for voting requirements are hard to understand, the large corps of election administrators, most of whom work on a volunteer basis, may have difficulty correctly administering the law.[41] And especially when busy, they may be inclined to turn away individuals with questionable abilities to comply with the law in favor of those they are sure can vote.[42]

II. THIS OLD DOG

The aforementioned harms of second-generation voter suppression apply *a fortiori* to felon disenfranchisement. Felon disenfranchisement regimes are, if anything, more complex. This next section details the aspects of complexity in felon disenfranchisement regimes, and the voter suppressive – if not voter intimidation – effects of these laws.

A. Confusion a fortiori

Many aspects of felon disenfranchisement regimes are confusing. For instance, whether a criminal conviction leads to disenfranchisement can be a complex legal question. This is especially true for states that differentiate disenfranchisement between parole and probation, the boundaries of which may have technical significance for the state but are not clear to individuals subject to their limitations.[43] Risk of confusion can also be especially strong in states

39. *Voting and Elections*, N.M. SECRETARY OF ST., https://www.sos.state.nm.us/voting-and-elections/voting-faqs/voting/ [perma.cc/6CXF-R23V]. The state does require voters registering for the first time by mail to present identification when voting, but this pertains to a very small percentage of the voting population. *Id.*

40. *Understanding Election Administration & Voting*, DEMOCRACY FUND 4 (2017) https://www.democracyfund.org/media/uploaded/Elections-Summary_2017aug31.pdf [perma.cc/22ND-G9DQ].

41. *Id.* at 8.

42. *Id.* at 5.

43. For a full list of states in this category, *see Felony Disenfranchisement Laws in the United States*, THE SENT'G PROJECT, (April 28, 2014), https://www.sentencingproject.org/publications/felony-disenfranchisement-laws-in-the-united-states/ [perma.cc/BK5G-GMYS].

that prolong disenfranchisement post-sentence, especially if disenfranchisement is contingent on the type of offense.[44] While individuals may have knowledge of the facts underlying their offense, the classification of their offense may not be straightforward.

Where felon disenfranchisement laws are especially confusing relates to two important temporal questions: when rights are taken away and when they are restored. To be sure, this confusion does not apply in states with lifetime bans on individuals with criminal convictions.[45] But confusion presents a challenge for voters attempting to comply with laws in many other states. The insight from Jeremy Travis's book on re-entry after incarceration, apparent from its title *But They All Come Back*, applies with full force to voting rights restoration after initial disenfranchisement.[46] Except in states implementing lifetime disenfranchisement, most individuals with a criminal record will, at some point, be given the right to vote back. When disenfranchisement ceases is murky. A particularly vicious but hidden barrier is the requirement that individuals not only serve their sentences, but that they satisfy all legal financial obligations ("LFOs") as well. A majority of states require this, whether by statute or through practice.[47] Research indicates that this requirement can present a high barrier for individuals;[48] a study conducted in Alabama suggests that the median amount owed is almost $4,000.[49] Moreover, whether one owes LFOs and how much can be hard to figure out.[50] That the Florida legislature passed a law requiring all LFOs to be fulfilled before voting rights can be restored on the heels of the passage of Amendment 4,[51] which largely repealed

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44. *Id*.

45. *Id.* States with lifetime bans on individuals with criminal convictions include: Florida prior to the adoption of Amendment 4; Virginia prior to the governor's rights restoration order; Iowa; and Kentucky. *Id.*

46. *See generally* JEREMY TRAVIS, BUT THEY ALL COME BACK: FACING THE CHALLENGES OF PRISONER REENTRY (Jeffrey Butts et al., eds. 2005).

47. Allyson Fredrickson & Linnea Lassiter, *Disenfranchised by Debt: Millions Impoverished by Prison, Blocked from Voting*, ALLIANCE FOR JUST. SOC'Y 5 (March 2016) http://allianceforajustsociety.org/wp-content/uploads/2016/03/Disenfranchised-by-Debt-FINAL-3.8.pdf [perma.cc/ZRK6-F44L].

48. While the extent of LFOs are not well understood or estimated by scholars for data availability reasons, scholars have taken LFOs seriously. LFOs constitute an active area of research. Their significant anticipated effects are evident from the fact that they are more widespread than any other method of criminal punishment. *See generally* Karin D. Martin, et al., *Monetary Sanction: Legal Financial Obligations in U.S. Systems of Justice*, 1 ANN. REV. OF CRIMINOLOGY 471 (2018).

49. Marc Meredith & Michael Morse, *Discretionary Disenfranchisement: The Case of Legal Financial Obligations*, 46 J. LEGAL STUD. 309, 311 (2017).

50. Rebekah Diller, *The Hidden Cost of Florida's Criminal Justice Fees*, BRENNAN CTR. FOR JUST. 6–7 (Mar. 2016) https://www.brennancenter.org/sites/default/files/legacy/Justice/FloridaF&F.pdf [perma.cc/3FJX-WGCK].

51. Patricia Mazzei, *Floridians Gave Ex-Felons the Right to Vote. Lawmakers Just Put a Big Obstacle in Their Way*, N.Y. TIMES (May 3, 2019)

Florida's lifetime ban, provides some hint of what legislators believe to be the requirement's suppressive effect.

Even lifetime ban states provide methods of rights restoration on paper.[52] But achieving rights restoration given the complexity of these procedures is not realistic. In Virginia, for instance, one of the first acts of the Governor's office in attempting to address the severity of the State's lifetime disenfranchisement ban was to relax requirements for rights restoration.[53] These efforts included streamlining the thirteen-page application down to a single page for some applicants, reducing the waiting period, and removing the requirement that individuals fulfill all court costs.[54] Former Governor McAuliffe restored the rights of more individuals than of those under the past seven governors *combined*, which demonstrates just how high the barriers presented for individuals seeking rights restoration were.[55] The complexity and burdensomeness of the rights restoration process, like safeguards for individuals not possessing voter ID, can negate any utility of their existence.[56]

The complexity of disenfranchising and re-enfranchising conditions requires voters to apply a complicated set of facts to a confusing set of laws. In other words, they are asked to act like lawyers. This puts an immense burden on voters not only to be aware of the legal requirements of the state in which

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https://www.nytimes.com/2019/05/03/us/florida-felon-voting-amendment-4.html [perma.cc/2XJ8-R6KK0].

52. *See, e.g.*, *infra* notes 53 and 56.

53. News Release, Governor McAuliffe Restores Voting and Civil Rights to Over 200,000 Virginians, (Apr. 22, 2016) https://www.governor.virginia.gov/newsroom/all-releases/2017/mcauliffe-administration/headline-826610-en.html [perma.cc/E335-G99C]; *see also Restoration of Rights: Policy Updates and Timeline*, SEC. OF THE COMMONWEALTH, https://www.restore.virginia.gov/policy-updates-and-timeline/ [perma.cc/3RDM-XF6T] (last visited Sept. 25, 2019).

54. News Release, *supra* note 53.

55. *Id*.

56. *See* Hand v. Scott, 285 F. Supp. 3d 1289, 1292 (N.D. Fla. 2018). Florida's regime is an extreme example of this. *Id.* Its rights restoration regime was as first generation as its lifetime ban. *Id.* Instead of using confusion, the law simply made it virtually impossible for voting rights to be restored following a criminal conviction. *Id.* The rights restoration process was the target of the lawsuit in *Hand v. Scott*, and its harshness is described in the district court's opinion granting summary judgment to plaintiffs. *Id.* In order to even apply for clemency before the Board, an individual must first wait either five or seven years after completion of their sentence and fulfillment of any fines and fees. *Id*. at 1293. The applications then go before the Florida Commission on Offender Review, which provides a non-binding recommendation to the Board. *Id*. The Board is entirely unrestrained in substance or procedure as to how to make their decisions. *Id*. at 1294. For instance, there are no time limits at all on when the Board must act on any application. *Id*. at 1304. The actual number of individuals whose rights were stored under this regime is sufficient evidence of the difficulty of the rights restoration process and the slim likelihood of success: in the seven years since 2011, less than 3,000 individuals in a lifetime disenfranchisement state received restoration. *Id.* at 1301.

they are eligible to vote but also to be competent in applying those requirements to their own distinctive situations. How well voters will navigate this process depends on their access to both factual and legal information, their appetite for risk, and their desire to vote. As with second generation voter suppression laws, the variety and ubiquity of felon disenfranchisement regimes across states can similarly lead to false and risk-averse assumptions that the regime is harsher than it actually is. Given the many legal and practical difficulties presented by life after incarceration, formerly incarcerated individuals might expect the worst of legal policies, including those governing if and when voting rights are restored. In addition, as other observers have already noted, confusion on the part of election administrators also contributes to the de facto disenfranchisement of so many individuals with criminal convictions.[57]

None of the confusion caused by felon disenfranchisement laws serve any legitimate state purpose, separate and apart from any purpose that might be served by felon disenfranchisement itself.[58] As Professor Pam Karlan has demonstrated, disenfranchising individuals with former criminal convictions only conceivably serves a punitive purpose.[59] And the only purpose of confusion over whether one is actually disenfranchised is to deter the exercise of that right. No valid criminal justice objective justifies making compliance with felon disenfranchisement laws difficult or taxing.[60]

B. It Bites

Felon disenfranchisement's layering of the second-generation strategy of confusion onto an already draconian regime not only fails to serve any legitimate state purposes but also produces especially pernicious effects and unique harms. These harms harken back to the roots of felon disenfranchisement in the first generation era through intimidation and threat of punishment. For all their evils, second-generation voter suppression strategies are satisfied with excluding eligible voters from the ballot. Confusion over whether a particular ID is valid for purposes of voting, at worst, results in the denial of one's right to vote. Though that is a harm to take seriously, it pales in comparison to the risk of illegally voting as a former convicted felon. A confusing felon disenfranchisement regime elevates the risk of voter suppression for two reasons: the vulnerability of the population affected and the political nature of prosecutions for felon voting. By definition, individuals implicated by felon disenfranchisement statutes have already been through the criminal legal system. As a result,

57. Ericka Wood & Rachel Bloom, *De Facto Disenfranchisement*, BRENNAN CTR. FOR JUST. 1 (2008) https://www.brennancenter.org/sites/default/files/legacy/publications/09.08.DeFacto.Disenfranchisement.pdf [perma.cc/B776-UN8F].

58. *See* Pam Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate over Felon Disenfranchisement*, 56 STAN. L. REV. 1147, 1149–55 (2004).

59. *Id.*

60. *Id.*

risk aversion is likely very high. Access and appetite to seek out information are also likely poor given the many challenges of re-entry.[61]

The risk that even unintentional illegal voting could lead to criminal conviction is no mere abstraction. Prosecutors have exercised their discretion to pursue individuals who illegally voted, even when the facts clearly indicated that those individuals did so without any intent to commit a crime.[62] This happened to twelve voters in Alamance County in North Carolina.[63] While a statewide audit discovered that 441 individuals had voted improperly in the 2016 elections under the State's felon disenfranchisement regime, only the prosecutor from Alamance County decided to pursue these cases criminally.[64] In Iowa, two individuals who were encouraged by precinct workers to cast provisional ballots were charged with felony election misconduct charges.[65] In Texas, an individual received a five-year prison sentence for illegal voting.[66] Even when prosecutors are not inclined to prosecute, highly motivated members of the public have made use of publicly available criminal justice and voter files to implicate individuals and put pressure on prosecutors to bring charges.[67] In many of these instances, the implicated individuals were confused about whether being on probation, parole, or supervised release disqualified them from voting.

These high-profile instances of prosecution are sobering. Mr. Frank Swanger, one of the individuals prosecuted in Iowa, succinctly encapsulated the lesson he learned: "You try to do the right thing, and then you're penalized. Even if I get a chance to have my [voting] rights restored, I will never vote again. No."[68] Mr. Taranta Holman, prosecuted in North Carolina, expressed

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61. *See generally*, TRAVIS, *supra* note 46.

62. Sam Levine, *They Didn't Know They Were Ineligible to Vote. A Prosecutor Went After Them Anyway*, HUFFPOST (Aug. 13, 2018) https://www.huffpost.com/entry/almance-county-felon-voting_n_5n714d8e4b0530743cca87d [perma.cc/R9QH-CXPK].

63. Jack Healy, *Arrested, Jailed and Charged with a Felony. For Voting*, N.Y. TIMES (Aug. 2, 2018) https://www.nytimes.com/2018/08/02/us/arrested-voting-north-carolina.html [perma.cc/ZM9N-WE67].

64. *Id*.

65. Jason Clayworth, *Dozens of Felons Have Been Caught Illegally Voting in Iowa. So Why Aren't They Being Punished?*, DES MOINES REG. (Jan. 20, 2019) https://www.desmoinesregister.com/story/news/investigations/2019/01/20/iowa-election-felons-caught-illegally-voting-not-punished-felon-rights-prosecuting-kim-reynolds/2583138002/ [perma.cc/2B8H-FSRY].

66. Vanessa Romo & Sasha Ingbern, *Texas Woman Sentenced to 5 Years for Illegal Voting*, NPR (Mar. 31, 2018) https://www.npr.org/sections/thetwo-way/2018/03/31/598458914/texas-woman-sentenced-to-5-years-for-illegal-voting?t=1559499591522 [perma.cc/5762-G8WT].

67. Dan Christensen, *Were 275 Votes Cast by Florida Felons Illegally? Miami-Dade Prosecutors Investigate*, MIAMI HERALD, (Aug. 14, 2018) https://www.miamiherald.com/news/politics-government/article216694645.html.

68. Clayworth, *supra* note 65.

the identical sentiment: "Even when I get this cleared up, I still won't vote. That's too much of a risk."[69] This is not only a message felt by the individuals targeted but also one that, when publicized, deters other potential voters with criminal convictions from voting. The public nature of these prosecutions, coupled with the particular sensitivities of the intended audience of similarly situated voters, produces a climate of fear and deterrence and reminds us all that while felon disenfranchisement has adapted to a second-generation world, it has not forgotten its first-generation roots.

III. TAMING THE BEAST

How might doctrine and policy better take the costs of confusion seriously in the context of felon disenfranchisement? Mitigating the most pernicious aspects of confusion about felon disenfranchisement is relatively straightforward. But the broader question of how doctrine and policy might account for the costs of confusion is much more uncertain.

A. Muzzle

Preventing the prosecution of unintentional illegal voting by individuals with former criminal convictions is legally straightforward, if not politically feasible. Illegal voting statutes should be rewritten to require that the defendant, if ineligible to vote due to a criminal conviction, has specific intent to vote illegally. In other words, prosecutors should have to prove that individuals who illegally voted due to a criminal conviction knew that their criminal conviction rendered them ineligible to vote and voted anyway.

Such a requirement, while not ubiquitous in criminal law, has a long history in federal criminal tax law. In *Cheek v. United States*, Justice Byron White detailed the reasoning and historical development behind the specific intent requirement.[70] The "complexity of the tax laws" warranted a departure from the general rule that ignorance of the law or a mistake of law is no defense to criminal prosecution.[71] Such a departure was executed both by Congress in drafting and by the Court in interpreting those statutes as requiring specific intent to violate them.[72] As the Court clarified through a series of cases, violation of federal criminal statutes that Congress required to be "willful" occurs when a defendant commits a "voluntary, intentional violation of a known legal duty."[73]

As the prior section of this Article detailed, felon disenfranchisement laws can be dizzyingly complex.[74] The rationale giving rise to the specific intent

69. Healy, *supra* note 63.
70. Cheek v. United States, 498 U.S. 192, 199–200 (1991).
71. *Id*. at 199.
72. *Id*. at 200.
73. *Id*.
74. *See supra* Part II.

requirement in federal criminal tax laws applies with equal force to requiring the same in felon illegal voting statutes. Legal complexity over what leads to disenfranchisement (and re-enfranchisement) is severe and gives rise to "bona fide misunderstandings" as to whether one is prohibited from voting.[75] Prosecutorial overreach of accidental illegal voting would be precluded by an explicit statutory requirement of specific intent. Stopping short of that, legislatures can revise statutes to explicitly permit mistake of law defenses in illegal voting cases. Depending on the kind of felon disenfranchisement statute in the state, the legislature could craft tailored mistake of law defenses relating to predictable and understandable factual and legal mistakes.

B. And Then?

The broader question of how doctrine might take confusion into account is much more elusive. Traditionally, confusion is rarely a stand-alone claim in voting rights litigation. Unlike in the trademark context in which confusion (of consumers) relates to the actual injury claimed, confusion (of voters) is rarely itself the claim in voting rights litigation, although litigants challenging confusing statutes often plead and prove facts related to confusion to present a holistic picture of the harms caused by the law.[76]

Specifically, in litigation challenging felon disenfranchisement, the legal claims rarely address the confusion injuries produced by these statutes.[77] The legal claim most appropriate for addressing confusion is constitutional vagueness. Such a claim would allege that a criminal voting statute is too vague to provide "fair warning" to voters of what the law prohibits and hence is

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75. United States v. Murdock, 290 U.S. 389, 396 (1933).

76. The relatively holistic framework for *Anderson/Burdick* challenges theoretically allows litigants to allege voter confusion as a burden on the right to vote. Brief of Professor Erwin Chemerinsky as Amici Curiae Supporting Neither Party at 6–9, Crawford v. Marion Cty. Election Bd., 553 U.S. 181 (2008) (Nos. 07-21, 07-25). But the case law has not developed such that voter confusion can be brought as a distinct and certainly not as a standalone basis for an *Anderson/Burdick* challenge. *Id.*

77. Traditionally, challenges to felon disenfranchisement statutes have in large part focused on the racial impact of these laws. *See* Johnson v. Gov. of Fla., 405 F.3d 1214, 1218 (11th Cir. 2005); Farrakhan v. Washington, 338 F.3d 1009 (9th Cir. 2003). Racial claims can hardly be used to address confusion harms, as it is implausible that there are significant racial differences in confusion. *See Johnson*, 405 F.3d at 1218. Further, challenges to LFO requirements in felon disenfranchisement statutes are typically that they constitute poll taxes or discriminate based on poverty, but neither claim goes to the informational barriers that LFO fulfillment present to the franchise. *See* Jason Weber, *Equal Protection – Felon Disenfranchisement Scheme that Requires Completion of all Terms of Sentence Including Full Payment of Any Legal Financial Obligations is Constitutional Under Both Washington's Privileges and Immunities Clause and the Equal Protection Clause of the Federal Constitution*, 39 RUTGERS L.J. 1101, 1109 (2008).

unconstitutional.[78] However, the doctrine of constitutional vagueness as currently constituted is inadequate and inapt for challenging most felon disenfranchisement statutes.

The limited utility of constitutional vagueness is best demonstrated through the case of *Thompson v. Alabama*, which challenges what is likely the most confusing of the extant felon disenfranchisement statutes.[79] Alabama, as it has since 1901, disenfranchises on the basis of crimes "involving moral turpitude," the contours of which remained elusive for decades.[80] Until *Thompson* was filed, the State did not provide an authoritative definition of crimes involving "moral turpitude."[81] The newly provided definition was codified by statute, which enumerates a list of more than forty offenses that disenfranchise.[82] Consequently, the court determined that while the statute had many other deficiencies such that plaintiffs survived Alabama's motion to dismiss on several claims, the claims alleging vagueness were properly dismissed.[83]

Unconstitutional vagueness, while addressing one superficial facet of voter confusion, is too weak of a doctrine to address the entrenched and persistent harm resulting from an overly complex and opaque statute. The doctrine reflects what I, requiring prescription glasses from a young age, think of as the optometrist's limitation. Like an eye test, unconstitutional vagueness doctrine helps only with clarity, not comprehensibility. The most an optometrist can help with is making letters clear; she cannot help provide meaning to nonsensically ordered letters. Unconstitutional vagueness doctrine is content with definitions, however intricate, and unconcerned with needless complexity or even the irrationality of statutory provisions.[84]

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78. United States v. Davis, 139 S. Ct. 2319, 2333 (2019).

79. Thompson v. Alabama, 293 F. Supp. 3d 1313, 1321 (M.D. Ala. 2017).

80. Hunter v. Underwood, 730 F.2d 614, 615–16 (11th Cir. 1984); *Thompson* 293 F. Supp. 3d at 1316. For the ugly history of Alabama's statute, *see Hunter*, 730 F.2d at 618–20. The *Hunter* Court evocatively described the uncertainty engendered by the law as a "serpent . . . [that] crawl[s] into the Eden of trial administration." 730 F.2d at 616 n.2.

81. *Thompson*, 293 F. Supp. 3d at 1318.

82. *Id.* at 1318–19.

83. *Id.* at 1328.

84. The modest application of unconstitutional vagueness doctrine means that some of the policy goals underlying the doctrine cannot be satisfied. One of the reasons for the doctrine is that "regulated parties should know what is required of them so they may act accordingly." F.C.C. v. Fox Television Stations, Inc., 567 U.S. 239, 253 (2012). Excruciatingly detailed but obscure statutes like the one implemented in Alabama in response to *Thompson* do not help affected voters know how to comply with them. Moreover, the breadth of disqualifying offenses and the uncertainty over whether intent is a necessary component of illegal voting does not provide "precision and guidance" to "those enforcing the law," or prevent them from acting in "an arbitrary or discriminatory" manner. *Id*.

C. Inform

Where doctrine fails to produce satisfying solutions, policy may provide the answer. States can do more to affirmatively inform eligible voters of their rights. Especially given the temporal nature of disenfranchisement, many individuals may not be aware of when their rights reattach relative to their progression through the criminal legal system. A few innovator states have started to take notification of rights restoration seriously, and others would do well to follow suit. For instance, in 2005, Iowa individually notified residents whose rights were restored, although this policy was revoked in 2011 despite having had an appreciable positive impact on participation.[85] Other states, like New Mexico, New York, and North Carolina also have notification laws. However, they are much weaker and hence have had little impact.[86] In Virginia, the law of unintended consequences triumphed to produce a policy of individualized notification of rights restoration. Following the Virginia Supreme Court striking down the Governor's criteria-based order of voting rights restoration, the Governor's office began issuing restoration individually and sending individualized notices of rights restoration.[87]

It is not hard to see why individualized notification can have a huge impact. In states that have complex felon disenfranchisement statutes with durational bars on voting or that differentiate between crimes committed, individualized notification can be especially invaluable in dispelling any risk aversion to voting created by confusing statutes. Moreover, notification from the State, as opposed to civic organizations, conveys a legal certainty that is hard to rival. The State is also a more powerful messenger for the social desirability of voting.

CONCLUSION

The interaction of first-and second-generation features in felon disenfranchisement produces unique doctrinal and policy challenges for addressing the harms exacted on voter confidence and participation. In particular, felon disenfranchisement's similarity to second-generation voter suppression laws presents unique challenges to voters attempting to navigate complex disenfranchising and re-enfranchising laws that differ greatly across the fifty states. Given the heavy informational and cognitive challenges that affected voters

85. Marc Meredith & Michael Morse, *The Politics of Restoration of Ex-Felon Voting Rights: The Case of Iowa*, 10 Q. J. POL. SCI 41, 44 (2015).

86. Marc Meredith & Michael Morse, *Do Voting Rights Notification Laws Increase Ex-Felon Turnout?*, 651 ANNALS AM. ACAD. POL. & SOC. SCI. 220, 228–33 (2014).

87. Vann R. Newkirk II, *How Letting Felons Vote is Changing Virginia*, THE ATLANTIC (Jan. 8, 2018), https://www.theatlantic.com/politics/archive/2018/01/virginia-clemency-restoration-of-rights-campaigns/549830/ [perma.cc/XJ28-XQ5E].

face, policy-makers and reformers must do more to ensure that felon disenfranchisement laws are not only less harsh but also less confusing.