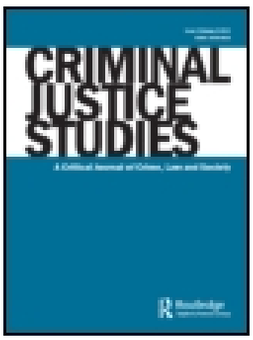

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Barriers to the ballot: implications for the development of state and national crime policies

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ABSTRACT

In 2013, the Supreme Court of the United States ruled in *Shelby County v. Holder* that Section 4(b) of the Voting Rights Act, which included the preclearance formula for determining which state and local jurisdictions needed to obtain federal approval before changing their election laws and voting procedures, was unconstitutional. By requiring federal approval, this provision prevented historically repressive jurisdictions from enacting covert policies to hinder non-whites from voting. The ruling in *Shelby County* is problematic because methods in use across the country prevent non-white citizens from casting their ballots, leaving their interests unaddressed. As people of color hold different attitudes and views than whites towards specific criminal justice measures, contemporary barriers to the ballot have potential implications for criminal law and policy. Consequently, analyses of two contemporary methods of denying non-whites a voice in government are warranted: felon disenfranchisement and voter identification laws. After considering the disproportionate effects of these laws on non-white voting, the paper reveals the potential harm that may result from *Shelby County* if similar laws spread to jurisdictions no longer covered by the Voting Rights Act.

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Laws passed by elected officials at the state and national levels of government dictate the operation of the criminal justice system (Magleby, Light, & Nemacheck, 2014; Marion, 2011). Since officeholders theoretically respond to the demands of those who elect them, the right to vote is an important tool for those who wish to change or reform the policies and procedures governing the system (Siegel, 2011). The relationship between political power and the right to vote is problematic for non-whites, who some argue are unfairly targeted by felon disenfranchisement and voter identification laws and therefore lose their voice in government at disproportionate rates (Ochs, 2006; Overton, 2006). Proponents of such laws, however, claim that they are a color-blind and thus legitimate means of preventing voter fraud and ensuring there is a morally prudent electoral pool (Atkeson, Alvarez, Hall, & Sinclair, 2014; Clegg, Conway, & Lee, 2006).

The debate over these policies takes on new weight when evidence suggesting that whites and African Americans hold divergent views regarding certain criminal justice policies

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is taken into consideration (Johnson, 2008; Peffley & Hurwitz, 2010). If felon disenfranchisement and voter identification laws disproportionately limit the suffrage rights of non-whites, these citizens would be subjected undemocratically to a criminal justice system they largely disagree with, due to their inability to vote for state and national politicians (Magleby et al., 2014; Marion, 2011; Siegel, 2011). The Supreme Court's decision to overrule part of the Voting Rights Act of 1965 in *Shelby County v. Holder* (2013) compounds this issue by opening the possibility for these policies to spread into new jurisdictions (Brown & Clemons, 2015; Gaughan, 2013). Consequently, an examination into felon disenfranchisement and voter identification laws and their effects on non-white voting is necessary to determine the extent to which these individuals may be denied a voice in matters concerning crime policies and procedures in a post-*Shelby County* United States.

Who makes crime policy?

In the United States, state governments create and implement the majority of criminal justice statutes (Magleby et al., 2014). They determine what constitutes criminal behavior and the appropriate punishments for such conduct (Magleby et al., 2014). For most of the country's history, the federal government played a limited role in crafting criminal codes; however, starting in the 1960s, it began reaching into what was traditionally the states' issue of crime management (Klein & Grobey, 2012; Marion, 2011). Known as the 'federalization of crime,' this process began for several different reasons (Marion, 2011, p. 2; see also Klein & Grobey, 2012).

One common explanation involves the fact that some forms of criminal conduct, such as those associated with organized crime, do not remain quarantined within the state they originate; instead, they spread throughout the country, thereby becoming national issues (Klein & Grobey, 2012; Marion, 2011). Due to jurisdictional restraints and limited resources, states need the assistance of the federal government to combat these crimes; consequently, the federalization of crime started out of practical necessity (Marion, 2011). The states' struggle to combat the drug epidemic of the 1960s is a similar, but more specific, example of why the federalization of crime began (Marion, 2011). The American people viewed drug smuggling as both a national and international issue, therefore placing regulations for such conduct within the realm of the more capable and resource-rich national government (Marion, 2011).

The fact that the federal government has become increasingly influential in the development of the criminal justice system creates serious challenges for reformers (Klein & Grobey, 2012; Marion, 2011). To change the criminal justice system, groups and individuals now must influence *two* different levels of government: state and federal. Citizens use their vote as a tool to pressure elected officials at both levels to act (Rabinowitz & MacDonald, 1989). Thus, an examination into the rules governing the elections for these separate layers of government is warranted.

With few exceptions, state governments determine the procedures for state and local elections (Kropf, Vercellotti, & Kimball, 2013; Magleby et al., 2014). Aside from regulating their own elections, states also have the authority to determine how national elections will be carried out; however, the federal government does have some control over the matter as well (Kropf et al., 2013; Magleby et al., 2014). While constitutional amendments prevent states from making these distinctions based on race, sex, and age, states can use other criteria – such as felon status and identification requirements – to limit the franchise

(Kropf et al., 2013; Magleby et al., 2014). Once in place, these criteria determine access to the ballot for state and national elections (Kropf et al., 2013; Magleby et al., 2014). If these statutes disproportionally target non-white voters, they may impact crime policies enacted at both levels of government. A better understanding of how these laws fit within the overall context of non-white disenfranchisement requires an examination of the single most influential piece of voting legislation: the Voting Rights Act of 1965 (Brown & Clemons, 2015).

The Voting Rights Act and *Shelby County v. Holder* (2013)

The Voting Rights Act of 1965 sought to eliminate the methods many southern jurisdictions used to block African Americans from voting (Clegg et al., 2006). For example, Section 2 of the act prohibits any jurisdiction in the United States from passing requirements onto voters that would deny them access to the ballot due to factors associated with race (52 U.S.C. § 10,301). The two symbiotic components of the act, Sections 4(b) and 5, were the real focal points of the legislation (Gaughan, 2013). Section 4(b) included a set of criteria, or perhaps more accurately a formula, for deciding which jurisdictions were subject to Section 5 of the act, which required those select jurisdictions gain federal approval before making any adjustments to their election laws and procedures (52 U.S. Code § 10,304).

In *Shelby County v. Holder* (2013), however, the Supreme Court of the United States ruled Section 4(b) unconstitutional. Writing for the Court, Chief Justice John Roberts argued that the Voting Rights Act of 1965 infringes upon two basic governmental principles: equal sovereignty among the states and federalism (*Shelby County v. Holder*, 2013). Section 4(b) undermines equal state sovereignty by targeting only certain states, therefore applying Section 5 to jurisdictions in a discriminatory manner (*Shelby County v. Holder*, 2013). In addition, by requiring states to obtain federal approval before altering election laws – an action the states are otherwise constitutionally empowered to take – the Voting Rights Act comes in direct conflict with the concept of federalism (*Shelby County v. Holder*, 2013).

Chief Justice Roberts acknowledged that these infringements were warranted when the Voting Rights Act was first enacted in the 1960s, due to the widespread disenfranchisement of African Americans in the South at the time (*Shelby County v. Holder*, 2013). The majority noted, however, that despite significant increases in African American voting and office holding in Southern states, the requirements of Sections 4(b) had not been modified in the slightest (*Shelby County v. Holder*, 2013). The preclearance formula, Chief Justice Roberts argued, made distinctions among the states on criteria that were irrelevant half a century after the act's passage (*Shelby County v. Holder*, 2013). The preclearance formula of Section 4(b) was outdated and therefore arbitrarily – and unconstitutionally – targeted certain states and not others through its application of Section 5 (*Shelby County v. Holder*, 2013). As such, only Section 4(b) of the act was struck down by the Court (*Shelby County v. Holder*, 2013).

In her dissenting opinion, Justice Ruth Bader Ginsburg argued that Section 4(b) remained relevant because political actors continue attempting to reduce the voice of non-whites during elections (*Shelby County v. Holder*, 2013). She claimed that these maneuvers, called second generation barriers to voting, do not aim to prevent non-whites from reaching the polls, but instead weaken their collective voting power (*Shelby County v. Holder*, 2013). The intentional redistricting of legislative boundaries, for example, may result in large communities of non-whites being split into different jurisdictions, therefore diluting their electoral influence (*Shelby County v. Holder*, 2013).[1] It is important to note, however, that Justice

Ginsburg concentrated solely on methods that weaken non-white voting rather than discussing felon disenfranchisement and voter identification laws, which some argue directly prevent non-whites from reaching the polls (Ochs, 2006; Overton, 2006).

Regardless of their absence from her opinion, widespread apprehension exists among non-whites that certain policies that disproportionally target them, such as voter identification laws, now will spread to jurisdictions no longer covered by the Voting Rights Act of 1965 as a result of *Shelby County* (Gaughan, 2013). In fact, within months of being freed from federal oversight, North Carolina's state government enacted a voter identification policy (Brown & Clemons, 2015). The following sections assess the extent to which the proliferation of these laws may impact non-white voting.

Felon disenfranchisement laws

Felon disenfranchisement laws deprive those who have been convicted of felonies from having a voice in governmental affairs by suspending their right to vote in elections (Bowers & Preuhs, 2009). Depending on the specific law, the suspension of voting rights can be attached to the sentence itself and expire once it has been served or continue afterwards (Bowers & Preuhs, 2009). Disenfranchisement statutes are so widespread that 6.1 million individuals were projected to be ineligible to vote in 2016 due to these state-enacted policies, a figure that has steadily increased from 1.1 million individuals in 1976 (Uggen, Larson, & Shannon, 2016). By the beginning of the twentieth century, the number drew near the 4.7 million mark and reached roughly 6 million by the election of 2012 (Uggen et al., 2016). Despite the increases in the raw count of those disenfranchised, however, the rates have remained relatively stable throughout the last decade: state disenfranchisement policies impacted 2.42% of the population in 2006 and 2.5% in 2010 (Uggen et al., 2016). The rate actually decreased slightly in 2016, dropping to 2.47% (Uggen et al., 2016).

With the exception of Maine and Vermont, every state employs some variation of a felon disenfranchisement law that restricts the voting rights of those convicted of felonies in their jurisdictions (Brennan Center for Justice, 2016; Mauer, 2011; Uggen et al., 2016; Uggen, Shannon, & Manza, 2012). Twelve states eliminate the voting rights of ex-felons by continuing to suspend their access to the ballot following the completion of their sentences (Brennan Center for Justice, 2016; Uggen et al., 2016).[2] One such state, Florida, contributed up to 27% of the 2016 national total of those legally restrained from voting due to criminal convictions (Uggen et al., 2016). Four states deny offenders who are serving their time either in prison or through parole from voting, while a total of 30 extend this restriction to individuals simply on probation (Brennan Center for Justice, 2016; Uggen et al., 2016).[3] Ultimately, most individuals legally restrained from voting under these forms of felon disenfranchisement laws are not even in prison; instead, they are living and interacting as members of the general population (Uggen et al., 2016). In 14 states and the District of Columbia, the bar on voting rights only targets current felons and is applied while individuals serve their prison sentences (Brennan Center for Justice, 2016; Uggen et al., 2016).[4]

These laws have not escaped legal scrutiny. In 1974, a California felon disenfranchisement policy was challenged before the Supreme Court of the United States in *Richardson v. Ramirez*. The defendants, ex-felons prohibited from voting due to a provision in California's state constitution banning those convicted of certain crimes from voting, claimed the policy violated the Fourteenth Amendment's guarantee of equal protection of the laws because it

discriminated against those convicted of felonies (*Richardson v. Ramirez*, 1974). Writing for the majority, Chief Justice William Rehnquist pointed out that aside from guaranteeing equal protection of the laws, the Fourteenth Amendment also explicitly mentions the states' right to regulate the voting franchise when it comes to criminal convictions (*Richardson v. Ramirez*, 1974). This provision is located within the second section of that specific amendment and reads, 'when the right to vote at any election … is denied to any of the male inhabitants of such state … except for participation in rebellion, *or other crime*, the basis of representation therein shall be reduced …' (U.S. Const. amend. XIV § 2, emphasis added). Accordingly, Chief Justice Rehnquist argued that this direct inclusion of felon disenfranchisement policies into the Constitution's text separated them from other laws the Court previously struck down on equal protection grounds (*Richardson v. Ramirez*, 1974).

Additional challenges focus on the impact of felon disenfranchisement on the African American community, 74% of whom were denied suffrage by felon disenfranchisement policies in 2016 (Uggen et al., 2016). For non-African Americans, however, under 2% were disenfranchised during the same period (Uggen et al., 2016). This disparity demonstrates how these laws disproportionately impact the African American community (Uggen et al., 2016). Similar disparities led to another Fourteenth Amendment challenge to a felon disenfranchisement law in the Eleventh Circuit case of *Johnson v. Bush* (2005); unlike *Richardson*, however, the issue in this case was raised explicitly on racial grounds. The defendants claimed that Florida's felon disenfranchisement law specifically targeted non-white voters and therefore violated their equal protection rights (*Johnson v. Bush*, 2005). In addition, they claimed that it also violated Section 2 of the Voting Rights Act, which prevents election laws from being passed that have a discriminatory affect, regardless of the intent (*Johnson v. Bush*, 2005).

Judge Phyllis Kravitch defended the law against the equal protection claim by elaborating on the history of Florida's disenfranchisement policy (*Johnson v. Bush*, 2005). By demonstrating that some version of it dated back to 1845, when African Americans were not even legally qualified to vote, she reasoned that it was enacted without racial motive (*Johnson v. Bush*, 2005). She then addressed the argument that the Florida law violated Section 2 of the Voting Rights Act (*Johnson v. Bush*, 2005). Relying on the logic used in *Richardson*, Judge Kravitch pointed to the second section of the Fourteenth Amendment, which explicitly grants states the right to regulate the voting franchise when it comes to the commission of criminal conduct (*Johnson v. Bush*, 2005). Since the Constitution shields these policies, the fact that felon disenfranchisement laws have discriminatory effects does not immediately invalidate them under Section 2 of the Voting Rights Act (*Johnson v. Bush*, 2005).

Though the judiciary has repeatedly declared these laws constitutionally sound, the fact that they disproportionally disenfranchise non-white voters is in no way diminished (Ochs, 2006; Uggen et al., 2016). These policies severely impact the African American community, as evidenced by the fact that one African American is disenfranchised for every 13 who are old enough to cast a ballot (Uggen et al., 2016). Ochs (2006) underscores how this racial disparity in suffrage denial increases as felon disenfranchisement policies become more punitive. He highlights that the impact of these policies on African Americans is more pronounced for the most stringent laws, such as those prohibiting voting rights from ever being reclaimed, as opposed to the more lenient ones, such as those that return voting rights after the sentence is served (Ochs, 2006).

Furthermore, the impact of these laws reaches beyond those convicted of felonies to influence the voting patterns of the broader African American community (Bowers & Preuhs, 2009). One possible explanation for this involves the fact that when large segments of a population are disenfranchised, those who legally can cast a ballot are unlikely to do so because they have not been socialized to appreciate the importance of that privilege (Bowers & Preuhs, 2009). Others hypothesize that when several members of a population legally are prohibited from having a voice in governmental affairs, the remainder of that population views the government to be improper and against its interests and voluntarily abstains from voting (Bowers & Preuhs, 2009).

Such considerations underscore the true impact felon disenfranchisement laws have on the African American community. Aside from directly banning African American felons from voting, these laws have the indirect effect of dissuading African American non-felons from casting their ballots as well (Bowers & Preuhs, 2009). To add a social dimension to the consequences of these laws, many ex-felons perceive a relationship between suffrage and successful reintegration into society (Miller & Spillane, 2012). Depriving people of the right to vote hampers social restoration (Miller & Spillane, 2012; Siegel, 2011). Ultimately, these policies have far-reaching consequences beyond what originally may have been known (Bowers & Preuhs, 2009; Miller & Spillane, 2012).

A crucial deduction from the preceding paragraphs is that despite several legal challenges, felon disenfranchisement laws still prevail and effectively limit the degree to which non-whites are represented in state and national governments (Ochs, 2006; Uggen et al., 2016). Since state and national governments control the criminal justice system (Magleby et al., 2014; Marion, 2011), felon disenfranchisement laws place the African American community at an extreme disadvantage in shaping crime policy and the behavior of those within the system. It should be noted that although a certain policy is in accordance with the text of the Constitution, it does not mean that it is wise, morally prudent, or beneficial to society. No matter their constitutionality, these laws have tangible, far-reaching consequences for the lives of those they disproportionally impact (Bowers & Preuhs, 2009; Miller & Spillane, 2012; Ochs, 2006; Uggen et al., 2016).

Voter identification laws

In addition to felon disenfranchisement laws, several states require their citizens to show certain forms of identification to cast their ballots (Overton, 2006). The rationale behind these measures is the belief that voter identification laws obstruct attempts of committing voter fraud (Hood & Bullock, 2008; Overton, 2006). Since identification requirements for other activities are so widespread in contemporary society, proponents of these laws argue that applying these same requirements for voting would burden very few people (Overton, 2006). If an individual was motivated to vote come election time, he or she would have responsibly gone through the process of obtaining the necessary documentation (Overton, 2006).

Opponents of voter identification laws, however, claim that they disproportionally prevent certain groups of individuals from casting their ballots (Overton, 2006). They assert that African Americans and other non-whites – as well as individuals living in poverty – are hindered from reaching the polls because they do not have the resources needed to acquire the necessary documentation (Atkeson et al., 2014; Hood & Bullock, 2008). This limitation is

especially problematic since these groups of individuals can influence the outcomes of elections (Atkeson et al., 2014). Some individuals even go so far as to argue that these laws are drafted to intentionally keep certain people from voting (Overton, 2006). In fact, Overton (2006) claims that these regulations are, in effect, tools implemented by politicians in power to ensure they retain their seats in office come election time. Despite these assertions, however, studies examining the extent to which voter identification policies impact non-white voting offer conflicting results (Cobb, Greiner, & Quinn, 2012; Gaughan, 2013; Hood & Bullock, 2008; Mycoff, Wagner, & Wilson, 2009; Rocha & Matsubayashi, 2014).

While the debates over the utility of voter identification laws and whether they obstruct non-white voting are common in the political arena, there remains a severe lack of research backing the claim that these state regulations negatively affect African Americans and Latinos (Rocha & Matsubayashi, 2014). Some studies even refute this claim (Mycoff et al., 2009; Rocha & Matsubayashi, 2014). Rocha and Matsubayashi (2014), for example, found that voter identification laws – and even their stricter variant, photo-identification laws – did not have disparate effects on the voter turnout of any of the three largest racial and ethnic groups in the United States in general elections in the past 30 years. This conclusion directly conflicts with the common assertion that non-whites are most vulnerable to these laws.

There are several possible explanations for this unexpected finding, as well as convincing evidence that voter identification laws are incapable of suppressing non-white voters, regardless of whether they are enacted to achieve that effect or not (Gaughan, 2013; Mycoff et al., 2009). One such explanation as to why these voting regulations may not have the disparate effect that many assume they do involves the response that occurs when these laws are enacted (Gaughan, 2013; Mycoff et al., 2009). Due to the highly controversial nature of these statutes, non-white voters actively mobilize when such regulations are enacted in their respective jurisdictions (Gaughan, 2013; Mycoff et al., 2009). Ironically, these policies have led to greater non-white voter turnout in the South, due to the animosity non-whites have towards them (Gaughan, 2013). In other words, when states implement voter identification laws, it motivates non-whites to vote in response to the perceived attempt to suppress their voice in government (Gaughan, 2013).

Aside from galvanizing non-white electors, voter identification laws may not have the anticipated effect of suppressing their access to the ballot because of shifting racial demographics in the United States, most notably in the southern region (Gaughan, 2013; Lichter, 2013). Since the population of non-whites living in the United States is increasing, voter identification laws are unlikely to effectively suppress their voice in government and are becoming immune to attempts to block their access to the ballots (Gaughan, 2013).

While empirical evidence shows that voter identification laws do not disparately disadvantage any of the three largest racial or ethnic groups in the United States regarding voter turnout, there is evidence that ground-actors apply these laws in discriminatory ways (Cobb et al., 2012). For example, a study conducted in Boston examined disparities in the groups of people that poll workers requested identification from before letting them cast their ballots (Cobb et al., 2012). Non-whites were far more likely to be asked to show appropriate forms of identification than their white counterparts (Cobb et al., 2012). This disparity did not end with race; non-English speakers, for example, also were found to be at an increased likelihood of being asked to show identification compared to English speakers (Cobb et al., 2012). Overall, evidence suggests that voter identification laws do not disparately prevent

non-whites from voting, but are implemented in discriminatory ways (Cobb et al., 2012; Rocha & Matsubayashi, 2014).

Despite these findings and the lack of research supporting the claim that these laws systematically deny suffrage rights of African Americans and other non-whites, the courts have become extremely critical of voter identification policies. In one instance, the United States Court of Appeals for the Fourth Circuit eliminated North Carolina's voter identification requirement in July of 2016 (Wines & Blinder, 2016). This holding is the latest in a trend of such decisions occurring throughout the United States (Wines & Blinder, 2016). Of significant importance to North Carolina's policy is the fact that it was enacted during a massive revision of the state's election procedures following the decision in *Shelby County* (Brown & Clemons, 2015; Wines & Blinder, 2016). Once the Court freed North Carolina from the federal oversight requirement of the Voting Rights Act, the state immediately implemented this highly suspect form of voter regulation, which the Court saw as racially motivated (Wines & Blinder, 2016).

In analyzing the effects of both felon disenfranchisement and voter identification laws on non-white voting behavior, an interesting pattern emerges. Ironically, felon disenfranchisement laws, which empirical evidence has shown to impact non-white voters disparately, typically are upheld by the courts (Bowers & Preuhs, 2009; Ochs, 2006; *Richardson v. Ramirez*, 1974; Uggen et al., 2016). Identification laws that do not share the same level of empirical support, however, are being invalidated vigorously on legal grounds (Hood & Bullock, 2008; Rocha & Matsubayashi, 2014; Wines & Blinder, 2016). This disparity is a blatant example of the gap that exists between academic research, policy decision-making, and case law construction. Consequently, voter identification laws are being struck down while the more potent voter suppression policies of felon disenfranchisement laws survive (*Richardson v. Ramirez*, 1974; Wines & Blinder, 2016).

Implications for the legitimacy of the criminal justice system

Given popular understanding of the ballot as a means of influencing policy and a marker of American citizenship, the potential spread of felon disenfranchisement and voter identification laws in the wake of *Shelby County v. Holder* (2013) raises concerns about the quality of political representation in non-white communities. More specifically, felon disenfranchisement policies spur serious questions about the legitimacy of the criminal justice system in the United States. White and non-white communities experience disparate treatment at the hands of the criminal justice system and register significant differences in their views of that system. Moreover, given the disparate treatment, felon disenfranchisement laws restrict the ability of those in non-white communities to influence their representatives. Together, these two components demonstrate how felon disenfranchisement policies undermine the democratic legitimacy of the criminal justice system.

The United States penal system is defined by both its exceptionally high rate of imprisonment and disproportionately harsh treatment of non-whites (Gottschalk, 2015). With as many as two million individuals imprisoned, the United States' incarceration rate exceeds that of other western countries, including France, Germany, Denmark, and Sweden (Sentencing Project, 2015). Moreover, of the two million, African Americans and Latinos are imprisoned at rates five and nearly one-and-a-half times higher than whites, respectively (Nellis, 2016). The way in which the United States conducts its war on drugs plays a key role in these disparities (Gottschalk, 2015; Nellis, 2016). Decisions ranging from which

neighborhoods receive police attention to the use of discriminatory law enforcement procedures – including stop-and-frisk – directly contribute to non-whites being affected disproportionally by drug policies (Gottschalk, 2015; Nellis, 2016). Additionally, sentencing disparities, such as those associated with crack and powder cocaine usage, cause non-whites to experience harsher sentences than their white counterparts (Palamar, Davies, Ompad, Cleland, & Weitzman, 2015). These criminal justice developments and disparate rates of incarceration build the foundation for felon disenfranchisement laws to disproportionately impact non-whites, thereby excluding a discrete segment of society from civil engagement (Nellis, 2016; Palamar et al., 2015; Uggen et al., 2016).

The exclusion of non-whites from the democratic process is especially problematic given the fact that whites and non-whites generally do not share the same perceptions of the criminal justice system (Cochran & Chamlin, 2006; Johnson, 2008; Peffley & Hurwitz, 2010; Saad, 2007). In one study, Johnson (2008) found that whites tended to be more supportive of harsh criminal justice policies than African Americans. They also were far more likely than African Americans to believe that offenders of violent crimes are punished too leniently (Johnson, 2008). Aside from differing in their degrees of punitiveness, African Americans and whites also held different views regarding a wide spectrum of specific criminal justice sanctions (Johnson, 2008). Whites, for example, tended to view policies that waive juveniles to adult court and three-strikes laws far more favorably than African Americans (Johnson, 2008). Other studies have found a measurable difference between how whites and African Americans viewed the death penalty, with the latter being far less comfortable with it (Cochran & Chamlin, 2006; Peffley & Hurwitz, 2010; Saad, 2007; Unnever & Cullen, 2007).

These attitudinal disparities extend beyond stances on specific criminal justice sanctions, and include opinions on how certain components of the system should operate (Johnson, 2008; Peffley & Hurwitz, 2010). One such diverging point of view between whites and African Americans was their stances on parole boards (Johnson, 2008). Whites were more likely than African Americans to believe that parole boards should be more critical of the respondents who come before them (Johnson, 2008). African Americans, however, were more likely to approve of innovative techniques to combat drug usage, such as job programs (Peffley & Hurwitz, 2010). Overall, evidence suggests that whites and African Americans view several facets of the criminal justice system differently (Cochran & Chamlin, 2006; Johnson, 2008; Peffley & Hurwitz, 2010; Saad, 2007). Their range of disagreements includes questions of process, sanctions, and the overall means the system should use to achieve its ends (Johnson, 2008; Peffley & Hurwitz, 2010). Consequently, the disproportionate impact of felon disenfranchisement policies systematically suppresses distinct views that often run counter to those of the white majority (Johnson, 2008; Peffley & Hurwitz, 2010; Uggen et al., 2016).

An ideal democratic design is one in which the right to vote is spread equally throughout the population, ensuring adequate representation for all individuals and groups within society (Manza & Uggen, 2006). Manza and Uggen (2006) claim that two criteria need to be met to raise concerns over the legitimacy of a democratic political arrangement. First, the opinions of a distinct group must be marginalized and overlooked by the governing institutions (Manza & Uggen, 2006). Second, that same population must have limited access to the ballot (Manza & Uggen, 2006). Taken together, the effects of electoral capture and felon disenfranchisement policies meet these criteria.

Electoral capture occurs when a segment of society finds itself bound to a single political party, which in the case of African Americans is the Democratic Party (Frymer, 1999). Since

the Republican Party does not actively fight to win the non-white vote out of fear of alienating and losing its core electorate, the Democrats essentially possess a monopoly over the non-white constituency (Frymer, 1999). Knowing that non-whites are electorally captured and have no political alternative, Democratic officeholders lack incentive to fight exhaustively for their interests and concerns (Frymer, 1999). Since the interests of non-whites are not politically prioritized due to a lack of competition over their votes between the two dominant parties, electoral capture satisfies the first component of democratic illegitimacy (Frymer, 1999; Manza & Uggen, 2006).

Felon disenfranchisement statutes satisfy the second component since non-whites are disproportionally barred from voting by these policies (Bowers & Preuhs, 2009; Manza & Uggen, 2006; Ochs, 2006; Uggen et al., 2016). Consequently, the state of political representation of non-whites in the United States – a distinct segment of the population possessing divergent views from the white majority over the administration of justice – raises concerns about the legitimacy of the American criminal justice system (Manza & Uggen, 2006). This review has demonstrated that both the necessary electoral inclusion and representation for democratic legitimacy are not enjoyed by the non-white community (Bowers & Preuhs, 2009; Frymer, 1999; Manza & Uggen, 2006; Ochs, 2006; Uggen et al., 2016).

The hampering effects of electoral capture on the adequacy of representation of non-whites, in conjunction with felon disenfranchisement policies, raise a serious issue regarding the nature of the institutions governing the administration of justice. A review of contemporary demographic trends in the United States adds to these concerns. Since 2012, the United States electorate increased by 10.7 million eligible voters, with most of these individuals being non-whites (Krogstad, 2016). Consequently, non-whites comprised 31% of the electorate who could vote in the 2016 elections, with white voters being at their lowest point ever (Krogstad, 2016; Summers, 2016). This shift among the electorate first began in the 1980s, when 88% of the eligible voting population identified as white (Summers, 2016). After slowly declining over a period of three decades, the proportion of white voters fell to 72% in 2012 (Summers, 2016). This change is attributable to the fact that the white population is aging at higher rates than that of non-whites (Krogstad, 2016; Summers, 2016). Simultaneously, the rate of non-whites among younger populations is increasing (Krogstad, 2016; Summers, 2016). This trend leads some estimates to predict that the continuation of this pattern will result in whites losing their status as a majority group within the next half-century (Summers, 2016).

Conclusion

The criminal justice system operates at the discretion of the individual state governments within the union. Since the federalization of crime began in the 1960s, however, the national government has been increasing its role in managing crime (Marion, 2011). As states primarily decide election rules and procedures, the policies they enact regulating voting – such as felon disenfranchisement and voter identification laws – determine who participates in both state and national elections, and therefore who influences crime policies at both levels of government (Magleby et al., 2014; Marion, 2011).

An increasingly diverse constituency could demand fundamental alterations to the criminal justice system. As this review has shown, however, felon disenfranchisement policies could hinder or reduce effects stemming from America's shifting racial composition.

Moreover, the discriminatory policies and procedures that govern the criminal justice system cannot be amended by the very portion of the population they unfairly target. The United States, a nation founded on issues of political representation, has developed a criminal justice system that actively limits the potential for non-whites to express their will through the ballot box.

Future research should consider any direct effects felon disenfranchisement and voter identification laws have on the structure and behavior of the criminal justice system. The implications of these laws are even more significant when considered in the context of electoral capture in American democracy. Scholars subsequently should explore how the combination of electoral capture and felon disenfranchisement and voter identification laws call into question the legitimacy of criminal justice policy, particularly given changes in demographic trends.

Notes

1. A substantial amount of literature exists on racial gerrymandering, although a discussion on the topic exceeds the scope of this paper (see, generally, Waymer & Heath, 2016).
2. The states that extend disenfranchisement beyond the completion of individual sentences are Alabama, Arizona, Delaware, Florida, Iowa, Kentucky, Mississippi, Nebraska, Nevada, Tennessee, Virginia, and Wyoming.
3. The states that restrict the franchise of individuals on probation are Alabama, Alaska, Arizona, Arkansas, Delaware, Florida, Georgia, Idaho, Iowa, Kansas, Kentucky, Louisiana, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Jersey, New Mexico, North Carolina, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. California, Colorado, Connecticut, and New York all restrict the franchise of individuals who are serving their sentences in prison or through parole.
4. The states that limit disenfranchisement to those in prison are Hawaii, Illinois, Indiana, Massachusetts, Maryland, Michigan, Montana, New Hampshire, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, and Utah.

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References

Atkeson, L. R., Alvarez, R. M., Hall, T. E., & Sinclair, J. A. (2014). Balancing fraud prevention and electoral participation: Attitudes toward voter identification. *Social Science Quarterly, 95*, 1381–1398.

Bowers, M., & Preuhs, R. R. (2009). Collateral consequences of a collateral penalty: The negative effect of felon disenfranchisement laws on the political participation of nonfelons. *Social Science Quarterly, 90*, 722–743.

Brennan Center for Justice. (2016). [Graphic illustration of state disenfranchisement policies]. *Criminal disenfranchisement laws across the United States*. Retrieved from http://www.brennancenter.org/criminal-disenfranchisement-laws-across-united-states

Brown, D. L., & Clemons, M. L. (2015). *Voting rights under fire: The continuing struggle for people of color*. Santa Barbara, CA: Praeger.

Clegg, R., Conway, G. T., & Lee, K. K. (2006). The bullet *and* the ballot? The case for felon disenfranchisement statutes. *Journal of Gender, Social Policy & the Law, 14*(1), 1–26.

Cobb, R. V., Greiner, D. J., & Quinn, K. M. (2012). Can voter ID laws be administered in a race-neutral manner? Evidence from the City of Boston in 2008. *Quarterly Journal of Political Science, 7*(1), 1–33.

Cochran, J. K., & Chamlin, M. B. (2006). The enduring racial divide in death penalty support. *Journal of Criminal Justice, 34*, 85–99.

Frymer, P. (1999). *Uneasy alliances: Race and party competition in America*. Princeton, NJ: Princeton University Press.

Gaughan, A. J. (2013). Has the South changed? *Shelby County* and the expansion of the voter ID battlefield. *Texas Journal on Civil Liberties & Civil Rights, 19*, 109–146.

Gottschalk, M. (2015). *Caught*. Princeton, NJ: Princeton University Press.

Hood, M. V., & Bullock, C. S. (2008). Worth a thousand words? An analysis of Georgia's voter identification statute. *American Politics Research, 36*, 555–579.

Johnson, D. (2008). Racial prejudice, perceived injustice, and the Black-White gap in punitive attitudes. *Journal of Criminal Justice, 36*, 198–206.

Johnson v. Bush, 405 F.3d 1214 (9th Cir., 2005).

Klein, S. R., & Grobey, I. B. (2012). Debunking claims of over-federalization of criminal law. *Emory Law Journal, 62*(1), 1–120.

Krogstad, J. M. (2016, February 3). *2016 electorate will be the most diverse in U.S. history*. Pew Research Center. Retrieved from http://www.pewresearch.org/fact-tank/2016/02/03/2016-electorate-will-be-the-most-diverse-in-u-s-history/

Kropf, M., Vercellotti, T., & Kimball, D. C. (2013). Representative bureaucracy and partisanship: The implementation of election law. *Public Administration Review, 73*, 242–252.

Lichter, D. T. (2013). Integration or fragmentation? Racial diversity and the American future. *Demography, 50*, 359–391.

Magleby, D. B., Light, P. C., & Nemacheck, C. L. (2014). *State and local: Government by the people* (16th ed.). Upper Saddle River, NJ: Pearson.

Manza, J., & Uggen, C. (2006). *Locked out: Felon disenfranchisement and American Democracy*. New York, NY: Oxford University Press.

Marion, N. E. (2011). *Federal government and criminal justice*. New York, NY: Palgrave Macmillan.

Mauer, M. (2011). Voting behind bars: An argument for voting by prisoners. *Howard Law Journal, 54*, 549–566.

Miller, B. L., & Spillane, J. F. (2012). Civil death: An examination of ex-felon disenfranchisement and reintegration. *Punishment & Society, 14*, 402–428.

Mycoff, J. D., Wagner, M. W., & Wilson, D. C. (2009). The empirical effects of voter-ID laws: Present or absent? *PS: Political Science & Politics, 42*, 121–126.

Nellis, A. (2016). *The color of justice: Racial and ethnic disparity in state prisons*. Washington, DC: Sentencing Project.

Ochs, H. L. (2006). "Colorblind" policy in black and white: Racial consequences of disenfranchisement policy. *Policy Studies Journal, 34*, 81–93.

Overton, S. (2006). *Stealing democracy: The new politics of voter suppression*. New York, NY: W.W. Norton.

Palamar, J. J., Davies, S., Ompad, D. C., Cleland, C. M., & Weitzman, M. (2015). Powder cocaine and crack use in the United States: An examination of risk for arrest and socioeconomic disparities in use. *Drug and Alcohol Dependence, 149*, 108–116.

Peffley, M., & Hurwitz, J. (2010). *Justice in America*. New York, NY: Cambridge University Press.

Rabinowitz, G., & MacDonald, S. E. (1989). A directional theory of issue voting. *The American Political Science Review, 83*, 93–121.

Richardson v. Ramirez, 94 S. Ct. 2655 (1974).

Rocha, R. R., & Matsubayashi, T. (2014). The politics of race and voter ID laws in the states *Political Research Quarterly, 67*, 666–679.

Saad, L. (2007, July 30). *Racial disagreement over the death penalty has varied historically*. Gallup News Service. Retrieved from http://www.gallup.com/poll/28243/racial-disagreement-over-death-penalty-has-varied-historically.aspx

Sentencing Project. (2015). *Fact sheet: Trends in U.S. corrections*. Washington, DC: Author.

Shelby County v. Holder, 133 S. Ct. 2612 (2013).

Siegel, J. A. (2011). Felon disenfranchisement and the fight for universal suffrage. *Social Work, 56*, 89–91.

Summers, J. (2016, November 8). *The decline of the white voter: How the electorate has changed in 2016*. CNN Politics. Retrieved from http://www.cnn.com/2016/11/08/politics/2016-election-demographics-white-voters/

Uggen, C., Larson, R., & Shannon, S. (2016). *6 million lost voters: State-level estimates of felony disenfranchisement, 2016*. Washington, DC: Sentencing Project.

Uggen, C., Shannon, S., & Manza, J. (2012). *State-level estimates of felon disenfranchisement in the United States, 2010*. Washington, DC: Sentencing Project.

Unnever, J. D., & Cullen, F. T. (2007). The racial divide in support for the death penalty: Does white racism matter? *Social Forces, 85*, 1281–1301.

U.S. Const. amend. XIV.

Voting Rights Act of 1965. 52 U.S.C. § 10301.

Waymer, D., & Heath, R. L. (2016). Black voter dilution, American exceptionalism, and racial gerrymandering: The paradox of the positive in political public relations. *Journal of Black Studies, 47*, 635–658.

Wines, M., & Blinder, A. (2016, July 29). Federal appeals court strikes down North Carolina voter ID requirement. *The New York Times*. Retrieved from http://www.nytimes.com/2016/07/30/us/federal-appeals-court-strikes-down-north-carolina-voter-id-provision.html?_r=1