GET FREE, STAY FREE

". . . to hold a man forever between
a lack and an excess, a lack of work,
and an excess of punishment."
--Les Miserables, Victor Hugo (1802-85)

In 1988, the then Chief Judge of the New York Court of Appeals directed the Judicial Commission On Minorities to examine the presence and effects of racism in the state's criminal courts. In April 1991, the Commission reported that there was, in fact, evidence of race-based disparities in the justice system's rate of conviction and type of sentence imposed.[1] This invidious trend continues into the 21st century. In 2006, 93% of New York's prison population is people of color (though only 23% of the state's population).

Recently, a Russian prisoner observed how, in Russia, when a prisoner misbehaves, the result is an increased work detail. In the penal realms of New York, when a prisoner violates the sanctity of bounded space (institutional rules), termination from one's work assignment is a routine result. The Russian captive observes that this practice is "backwards." The official excuse for the continuance of this questionable practice is that, in the penal realms--as in free society--work is a privilege that provides the prisoner with the incentive to obtain and maintain employment, once released from captivity. A recent article in a New York City newspaper provides further evidence of how bounded space distorts reality. The article, by Julie Moult, is headlined:

1. See Baker v. Pataki, 85 F.3d 919 (2d Cir. 1986); Muntaqim v. Coombe, 366 F.3d 102 (2d Cir. 2004)

RACIAL OUTRAGE IN N.Y. JOB HUNT. In part, it reads:

> "A white man with a criminal record has a better chance of getting an entry-level job in New York than a black man with a squeaky-clean record, a study has found."[2]

This study establishes a curious nexus between current penal practices and joblessness among men of color released from captivity. This nexus between race-based disparities in the "justice system" and planned poverty is a symptom of the social affliction this author has coined **Malus Chronos**[3], that is, manufactured misfortune. For it is **Malus Chronos** that fuels the engines of recidivism among ex-offenders and is not likely to be cured by persons who feast on it. Thus, prisoners of color in New York's penal realms should be encouraged to commit suicide--that is, <u>political</u> suicide.

> "Greater than armies is an idea whose time has come."
> --Victor Hugo

Political suicide is an idea whose time is long overdue. It consists of the re-enfranchisement (restoration of voting rights) of state prisoners of color, for the purpose of curing the racial injustice characterizing New York's "justice system." The official rationale for **Malus Chronos** is "demographics," an intentional misdiagnosis concocted by Bread and Power advocates to mislead the public into believing that,

2. <u>The New York Post</u>, 17 June 2005
3. <u>Bad times (Greek)</u>, i.e., the manufactured snares, traps, and pitfalls of Jim Crow justice.

but for people of color, crime in New York would virtually cease. Contrary to the fiction of an exclusive black criminality, the report of the Judicial Commission on Minorities found, in part, that "Blacks were incarcerated where whites were not on similar charges, received longer prison sentences than whites with similar criminal histories and charges." The image of an exclusive black and Latino criminality is a false god, to which free persons of color are held political hostage.

Article II, § 3, of the New York Constitution mandates political disenfranchisement for individuals convicted of "infamous crime." Though, on its face, Article II is racially neutral, the Judicial Commission On Minorities report indicates that the criminal courts (via racial disparities in convictions and sentence type) are using the state Constitution as an instrument of political discrimination that adversely affects the voting power of all persons of color.[4]

In a recent decision,[5] the Supreme Court declined to reverse a Ninth Circuit Court of Appeals case that allowed Washington state prisoners to challenge a felon disenfranchisement law that, like New York's, violates the 1965 Voting Rights Act (VRA). However, the Supreme Court let stand the Second Circuit's ruling in Muntaqim v. Coombe, holding that the "results test" (the 1982 amendment of the VRA) cannot be applied to challenge the validity of New York's disenfranchisement law, because the VRA is "silent" regarding said laws.

4. Over 80% of state prisoners hail from N.Y.C. Assembly Districts that are largely nonwhite: Harlem, Brownsville, E. New York, Bedford-Stuyvesant, Lower East Side, South Bronx, Jamaica.
5. See Farakhan v. Washington, 338 F.3d 1009 (9th Cir. 2003)

In view of Farrakhan, the Second Circuit, on its own vote, agreed to review its prior ruling in Muntaqim. Hence, on 4 May 2006, an en banc panel of the Second Circuit Court of Appeals rendered a dual ruling in Muntaqim and Hayden v. Pataki, a similar New York case. In an 8-5 split decision, the Circuit Court ruled that the 1965 and 1982 Congresses did not intend for the Voting Rights Act to apply to New York's felon disenfranchisement law! This ruling "intuitively" concludes that the two Congresses would not enfranchise felons, even if states use disenfranchisement laws in a racially unconstitutional manner! Obviously, such a conclusion defies commonsense. For as late as 1982, state governments were employing many types of bogus policies to deny and dilute the non-white vote. In 1982, Congress responded by amending the VRA of 1965 with a "results test" that made litigation more plaintiff-friendly. Thus, in New York, the Muntaqim and Hayden plaintiffs have presented solid proofs that New York's penal system (virtually all disenfranchised prisoners of color) is the result of racial discrimination in state government policies.

The majority ruling in Muntaqim and Hayden is a good example of judges making political decisions. Clearly, the re-enfranchisement of prisoners would radically alter the manner in which state government does business with people of color. A re-constituted voting-block of color would assign legislative representatives the task of changing the laws governing census-taking. Currently, prisoners are counted, not as members of the political districts from which they hail, but as a part of the district wherein their prison is

located. Thus, each felony conviction in New York City deletes from communities of color increments of economic power and improperly transfers it to the communities surrounding the penal realms.[6]

Secondly, a re-constituted voting-block of color will insure that, for the first time, state government possesses a fiscally responsible stake in preventing ex-offenders from twisting, turning, and wheeling about in the penal system's revolving door mechanism; a money-grabbing mechanism aimed at "swelling the ranks of sinners" for the benefit of Bread and Power, long after containment in the barred cage stops making sense. Re-enfranchisement as political suicide is not a legal jail-break; not all prisoners go free. In the hand of the re-enfranchised prisoner of color, the ballot is a surety against the racial injustices described in the 1991 report of the Judicial Commission On Minorities. In the hand of the re-enfranchised prisoner of color, the ballot is the surety that the 21st century freedman (woman) has been properly educated and equipped to get free and stay free.

> "Twist about, turn about
> Jump Jim Crow
> Every time I wheel about,
> I do just so."
> --The Oxford Nursey Rhyme Book

Obviously, Jim Crow (racial injustice) was not legislated out of existence by the Voting Rights Act of 1965; he simply changed his name to **Malus Chronos** and relocated to the bounded

6. The New York State Constitution, Article 2, § 4, requires the absentee ballots of enfranchised prisoners to be counted towards the districts from which they hail.

spaces of New York's penal realms. There **Malus Chronos** touts the deception that racial oppression (replete with frequent unlawful beatings of prisoners) in a totalitarian order is somenow reformative of character; there he has people of color twisting, turning, wheeling about--doing the recidivistic snuffle unto death. The cemeteries within the penal realms are swollen with prisoners <u>not</u> sentenced to death, but who died before getting free.

—> Wherefore, the political suicide of state prisoners of color (this voting of his/her surplus numbers out of existence) is a timely Testimony of Freedom that must be encouraged by <u>all</u> persons (on both sides of prison walls) who actively believe that racial justice is an idea whose time is overdue.

Your letter of support to the Circuit Justice of the United States Supreme Court is such a Testimony of Freedom.

Citizens and Prisoners For More Democracy

Canadian Prisoners Can Vote

The Canadian Supreme Court ruled in February, 1996 that prisoners at Canadian federal prisons have the right to vote. Prisoners will cast their ballots in their prior residences, rather than in the location of the institution in which they are being held. In the decision, the Supreme Court Justice wrote, "The electorate chooses the government; the government does not choose the electorate."

* * * *

If you believe that the re-enfranchisement of New York state prisoners is an idea whose time is overdue; if you support more democratic decision-making in the federal courts regarding this life and death issue; if you really believe in racial justice and want to do something to promote it, as a first step, write a letter to:

Hon. Ruth Bader Ginsberg
Circuit Justice
U.S. Supreme Court Bldg.
1 First Street N.E.
Washington, D.C. 20543

Re: Hayden v. Pataki

Tell Justice Ginsberg that the Voting Rights Act must apply to racial discrimination in New York's criminal justice system. Tell her that all American citizens should have the right to vote.

En Banc Panel Rejects Bid to Challenge Law On Felon Voting Rights

BY MARK HAMBLETT

AN ATTACK on the constitutionality of a New York law barring prisoners and convicted felons on parole from voting was derailed yesterday by the U.S. Court of Appeals for the Second Circuit.

By an 8-5 majority, a sharply divided en banc session of the court found that Congress did not intend to allow challenges to the felon disenfranchisement law under the Voting Rights Act.

The court's consideration of *Hayden v. Pataki*, 04-3886, produced a flurry of opinions on an issue of nationwide and electoral significance that has split other circuits and seems destined to be resolved by the U.S. Supreme Court.

Judge Jose A. Cabranes wrote for the majority. On the key issue, the intent of Congress, he was joined by Chief Judge John M. Walker Jr. and Judges Dennis Jacobs, Chester J. Straub, Robert D. Sack, Reena Raggi, Peter W. Hall and Richard C. Wesley. All but Judges Hall and Wesley issued concurring opinions.

Judge Barrington D. Parker Jr. wrote a dissent that was joined by Judges Guido Calabresi, Rosemary Pooler and Sonia Sotomayor. Judges Calabresi, Sotomayor and Robert A. Katzmann dissented in separate opinions.

The decision will be published Wednesday.

The Parker dissent said the majority missed the mark by ignoring its obligation to read the Voting Rights Act broadly to ban practices that "result" in discriminatory voting restrictions. And, it said, the plaintiffs had stated a case for such a result in charging that blacks and Latinos are "prosecuted, convicted and sentenced to incarceration at rates substantially disproportionate to those of Whites."

The court took the *Hayden* case directly from Southern District Judge Lawrence M. McKenna and combined it with the case of Jalil Abduul Muntaqim, a black prisoner serving a life sentence for the murder of two New York City police officers. Mr. Muntaqim challenged New York Election Law 5-106 under §2 of the Voting Rights Act, 42 U.S.C. §1973(a) because it "results in a denial or abridgement of the right...to vote on account of race."

Northern District Judge Norman A. Mordue granted summary judgment for the state and was upheld by a three-judge panel in *Muntaqim v. Coombe*, 01-2260-cv.

Yesterday, the full circuit issued a per curiam opinion ordering the dismissal of the case because Mr. Muntaqim lacked standing.

Hayden, which was dismissed by Judge McKenna, raised almost identical claims, with the plaintiffs challenging §5-106 on the grounds that the law resulted in unlawful vote denial and vote dilution.

To the disappointment of the 21 plaintiffs in *Hayden*, a group that includes six current prisoners and four convicted felons on parole, the court rejected

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...d Rejects Challenge to Ban on Felon Voting

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ieir ability to challenge the law on ie grounds that it has a discriminatory impact on blacks and Latinos.

They presented the case as a class ıction with three subclasses: currently ncarcerated felons, those now on parole, and blacks and Latinos denied the equal opportunity to participate in the political process because of the high rate of incarceration of people from their communities.

The issue before the court was an amendment to the Voting Rights Act passed in 1982 as §1973(b), which states that a violation of §1973(a) "is established if, based on the totality of circumstances, it is shown that...members [of protected minority groups] have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."

Congressional Intent

The original language required a showing of "discriminatory purpose" and the amendment was made to tighten that by prohibiting voting qualifications or standards that merely "result" in the denial to vote "on account of" race.

Judge Cabranes said there were several "persuasive reasons" to believe Congress had no intention of including felon disenfranchisement laws, including the "explicit approval given such laws in the Fourteenth Amendment" and the "long history and continuing prevalence" of such laws throughout the United States.

Statements and reports in Congress explicitly exclude the laws and there was no "affirmative consideration" of such laws when the Voting Rights Act was passed in 1965 and revised in 1982, he said, and bills were introduced, but not passed, that were "specifically intended to include felon disenfranchisement provisions within the VRA's coverage."

And for the same reasons, Judge Cabranes said, the plaintiffs' voter dilution claim cannot proceed.

Part of Judge Cabranes' opinion was not joined in by a majority of the judges: his belief that the text of the statute was sufficiently ambiguous to invoke the "clear statement" rule and his conclusion, after applying that rule, that Congress has not "clearly signaled" its intent to alter the balance between the states and federal government by applying the Voting Rights Act to felon disenfranchisement statutes.

The court issued a limited remand on the vote-dilution claim, instructing the lower court to see whether plaintiffs properly raised, and may prevail on, their claim that the votes of non-felon plaintiffs suffer dilution of their vote because of the apportionment process.

That claim was based on the fact that for purposes of apportionment in New York, election officials count prisoners as residents, thereby increasing the population of the upstate communities that host prisons and decreasing the clout of minority communities in New York City.

Broader Reading

In dissent, Judge Parker said the majority "reaches the wrong result about §2 for a host of reasons, not the least of which is that it attacks the wrong question."

The question was not "whether a historic policy of felon disenfranchisement, read next to odds and ends from legislative histories" shows that Congress meant to exclude such laws from the coverage of the VRA, Judge Parker said. "Rather, this appeal begins and ends with the simple question of whether we should read an unambiguous remedial statute, intended to have, as the Supreme Court has emphasized, the broadest possible scope. I believe we should."

Judge Parker said the complaint alleged "stark differences in incarceration rates for Blacks and Latinos in New York, as opposed to Whites, have resulted from discrimination in New York's criminal justice system."

For purposes of the appeal, he said, the court must treat as "unassailable," allegations that state a "paradigmatic claim of discriminatory disenfranchisement."

The Supreme Court in *Chisom v. Roemer*, 501 U.S. 380 (1991), he said, stated, "Even if serious problems lie ahead in applying the 'totality of the circumstances' standard" in §2(b) "that task, difficult as it may prove to be, cannot justify a judicially created limitation on the coverage of the broadly worded statute."

Judge Parker said the majority was precluding, hypothetically, the *Hayden* plaintiffs from showing that "Whites receive probation three times as frequently as similarly situated Blacks or Latinos for similar crimes," or that the focus of the "war on drugs" in minority neighborhoods was made while comparatively little attention was spent on "areas where Whites were abusing those same illegal drugs at the same rates."

"Neither showing is remotely beyond the realm o possibility in New York, and I believe this type of proof would constitute some evidence of a VRA violation," Judge Parker said.

And the fact that §2 of the Fourteenth Amendment acknowledges the rights of the states to pass felon disenfranchisement statutes "does not mean they are always constitutional."

Separate Opinions

Chief Judge Walker's concurring opinion said that, even if the dissent was right and the plain language of the Voting Rights Act applied to §5-106, "this case presents the rare and exceptional circumstance" where the plain meaning of a statute does not dictate the congressional intent nor the proper outcome.

Judge Walker also said that, even if no congressional intent were evident, "I believe that, as applied, the VRA would be unconstitutional because Congress would have exceeded its enforcement power under the Reconstruction Amendments."

Judge Jacobs said the dissenters failed to read subsections (a) and (b) together.

"Section 1973, read as a whole, does not allow a reading that would consider felons to be members of any 'class of citizens protected by subsection (a),'" he said.

"Section 1973 reads unambiguously as a guarantee of rights for free people, and has nothing to do with the voting of persons who are not permitted to make unmonitored phone calls, or to go at large, or to eat their food with knives and forks," he said. "Arguments to the contrary demean the Voting Rights Act."

Judge Calabresi in his dissent, targeted Judge Jacobs and others in the majority for apparently believing that Congress never could have intended the absurd result of enfranchising felons—and that some of his colleagues were interpreting the law as the present Congress would, not the congresses of 1965 and 1982.

He said Judge Jacobs "intuitive" approach was "both inappropriate and highly dangerous."

Judge Calabresi noted that the lead plaintiff, Joseph Hayden, and others, are on parole.

"As a result, as far as this law concerns these plaintiffs, none of the horribles that Judge Jacobs raises apply," he said. "Mr. Hayden, and others like situated, can, as far as I know, pass out leaflets, make public speeches about candidates, and eat with a knife and a fork."

Judge Jacobs shot back with a footnote of his own, saying the issue here was congressional intent.

"As to that intent, I agree with Judge Calabresi that the present Congress would not enfranchise death row; I do not share his apparent belief that some earlier Congress thought this would be a good idea," Judge Jacobs said.

Theodore M. Shaw of NAACP Legal Defense & Educational Fund, said the case, part of a nationwide effort, was "an uphill struggle" at the Second Circuit and the fund was reviewing the decision to examine whether to petition the U.S. Supreme Court for review.

Mr. Shaw said he was "heartened" by the 8-5 split on the court, a split he said echoed the debate taking place around the country over felon disenfranchisement.

Deputy Solicitor General Michelle M. Aronowitz argued for the state. Janai S. Nelson argued for the NAACP Legal Defense & Educational Fund.

The attorney general's office had no comment.

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