

# 01-7260-cv

# 04-3886-pr

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IN THE  
*United States Court of Appeals*  
for the  
*Second Circuit*

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JALIL ABDUL MUNTAQIM, A/K/A ANTHONY BOTTOM; JOSEPH HAYDEN; LUMUMBA AKINWOLE-BANDELE; WILSON ANDINO; GINA ARIAS; WANDA BEST-DEVEAUX; CARLOS BRISTOL; AUGUSTINE CARMONA; DAVID GALARZA; KIMALEE GARNER; MARK GRAHAM; KERAN HOLMES, III; CHAUJUANTHEYIA LOCHARD; STEVEN MANGUAL; JAMEL MASSEY; STEPHEN RAMON; NILDA RIVERA; MARIO ROMERO; JESSICA SANCLEMENTE; PAUL SATTERFIELD; AND BARBARA SCOTT, ON BEHALF OF THEMSELVES AND ALL INDIVIDUALS SIMILARLY SITUATED

*Plaintiffs-Appellants,*

— v. —

PHILLIP COOMBE; ANTHONY ANNUCCI; LOUIS F. MANN; GEORGE PATAKI, GOVERNOR OF THE STATE OF NEW YORK; CAROL BERMAN, CHAIRPERSON, NEW YORK BOARD OF ELECTIONS; GLENN S. GOORD, COMMISSIONER OF NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES,

*Defendants-Appellees.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURTS  
FOR THE NORTHERN AND SOUTHERN DISTRICTS OF NEW YORK

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**EN BANC BRIEF SUBMITTED ON BEHALF OF CERTAIN  
CRIMINOLOGISTS AS AMICI CURIAE IN SUPPORT OF APPELLANTS  
AND IN SUPPORT OF REVERSAL**

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DEREK S. TARSON, ESQ.  
Debevoise & Plimpton LLP  
919 Third Avenue  
New York, NY 10022  
(212) 909-6000

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## **INTRODUCTION AND INTEREST OF THE AMICI**

This controversy addresses whether the Voting Rights Act, 42 U.S.C. § 1973, can and should be applied to New York State’s felon disenfranchisement statute, N.Y. Election Law § 5-106. A panel of this Court held that the Voting Rights Act may not be applied because “[i]f New York State uses disenfranchisement merely as a tool to punish people who violate its laws, the application of § 1973 to § 5-106 would upset ‘the sensitive relation between federal and state criminal jurisdiction.’” Muntaqim v. Coombe, 366 F.3d 102, 122, cert. denied, 125 S. Ct. 480 (2004) (citations omitted). Despite the use of the conditional word “if,” however, the panel assumed that New York State does use disenfranchisement as a valid penological tool, citing the “longstanding practice in this country of disenfranchising felons as a form of punishment.” Id. at 123.

The panel’s assumption is important to the holding, because if § 5-106 serves no significant state purpose, no constitutional concerns arise from the application of the Voting Rights Act. Moreover, in evaluating whether a given practice violates Section 2 of the Voting Rights Act, courts are directed to scrutinize a variety of objective factors, including the asserted state interest furthered by the practice in question. Thus, the State’s penal interest – or lack thereof – in § 5-106 is at the heart of the “totality of circumstances” test and goes to the En Banc Court’s question 3(d) about the evidence to be tried if this case is remanded.

The proposed amici curiae in this action contest the assumption that disenfranchisement is a valid tool for punishment of offenders. The mere fact that disenfranchisement is a longstanding practice does not mean that it serves a legitimate

state interest. See, e.g., Hirst v. The United Kingdom, [2004] ECHR 121 (Eur. Ct. H.R.), at ¶ 41 (holding that the United Kingdom’s blanket disenfranchisement of incarcerated felons violated the Convention for the Protection of Human Rights and Fundamental Freedoms because laws denying suffrage could not be justified when they “derive, essentially, from unquestioning and passive adherence to a historic tradition”); see also Buckley v. City of New York, 56 N.Y.2d 300, 305 (1982) (“The continued vitality of a rule of law should depend heavily upon its continuing practicality and the demands of justice, rather than upon its mere tradition.”).

The proposed amici are all social scientists and criminologists who have studied and continue to study the impact of state laws and policies on criminal offenders. They are experts in community corrections, and some have served as government officials or officers in administering programs of probation or parole. They are familiar with, and have made important contributions to, the body of academic literature on this subject. In addition, many of them participated as amici curiae in New Jersey State Conference – NAACP v. Harvey, an action currently pending before the Appellate Division of the Superior Court of New Jersey, challenging the New Jersey disenfranchisement statute as it applies to offenders on parole and probation. Accordingly, these criminologists seek leave to appear as amici curiae because they have reasoned opinions on the issue of disenfranchisement of offenders, share an interest in bringing their views before the Court, and desire to assist the Court as it addresses the complex and important issues raised by the parties in this matter.

Disenfranchisement of offenders does not serve any legitimate goal of punishment. While certainly the State has a legitimate interest in punishing felons, denying suffrage to offenders violates the retributive, “just deserts” rationale for criminal punishment, which rests on the tenet that punishment must be proportionate to the blameworthiness of the criminal and the severity of harm caused. This concept is reflected in the New York Legislature’s directive that one of the purposes of punishment is “[t]o differentiate on reasonable grounds between serious and minor offenses and to proscribe proportionate penalties therefor.” N.Y. Penal Law § 1.05(4) (emphasis added). More importantly, denying suffrage to offenders also violates the rehabilitative purpose of punishment, a purpose the State legislature has declared in no uncertain terms. See N.Y. Penal Law, § 1.05(6) (listing “preventing the commission of offenses through . . . the rehabilitation of offenders” as a primary purpose of punishment); see also People v. McConnell, 49 N.Y.2d 340, 346 (1980) (noting the “strong public policy of rehabilitating offenders”). More than simply failing to effect rehabilitation, disenfranchisement actually impedes rehabilitation by dissociating felons from the rights and responsibilities of citizenship and obstructing their reintegration into a democratic society.

Because New York does not use § 5-106 as a valid tool for punishing people convicted of felonies, no imbalance between the state and federal governments would be caused by granting the petitioners their requested relief. In the absence of such an imbalance, the “clear statement” of Congressional intent is unnecessary, and this Court should allow the Voting Rights Act to be applied to § 5-106.

The list of criminologists who have signed on as amici curiae are as follows:

**Katherine Beckett** is an Associate Professor of Sociology at the University of Washington in Seattle.

**Alfred Blumstein** is a Professor and Former Dean, H. John Heinz III School of Public Policy and Management; Carnegie-Mellon University in Pittsburgh.

**George Bridges** is the Dean and Vice-Provost, Undergraduate Studies, and a Professor of Sociology at the University of Washington in Seattle.

**Robert Bursik, Jr.** is a Professor in the Department of Criminology and Criminal Justice at the University of Missouri in St. Louis.

**Johnna Christian** is an Assistant Professor in the School of Criminal Justice; Rutgers University in Newark, New Jersey.

**Todd Clear** is a Professor and the Director of the Doctoral Program at John Jay College of Criminal Justice; City University of New York.

**Cavit Cooley** is an Assistant Professor; Department of Criminal Justice; Mercer County Community College.

**Robert D. Crutchfield** is a Professor of Sociology at the University of Washington in Seattle.

**Francis Cullen** is a Distinguished Research Professor; Division of Criminal Justice; University of Cincinnati. He is also a Past-President of the American Society of Criminology and a Past-President of the Academy of Criminal Justice Sciences.

**Malcolm Feeley** is a Professor, School of Law (Boalt); University of California at Berkeley.

**Irwin Garfinkel** is a Professor of Contemporary Urban Problems in the Faculty of Social Work; School of Social Work; Columbia University.

**David Garland** is a Professor, School of Law, and a Professor of Sociology; New York University.

**David Greenberg** is a Professor of Sociology; New York University.

**John Hagan** is a Professor of Sociology; Northwestern University.

**M. Kay Harris** is an Associate Professor; Department of Criminal Justice; Temple University.

**Philip Harris** is an Associate Professor; Department of Criminal Justice; Temple University.

**Milt Heumann** is a Professor of Political Science; Rutgers University in New Brunswick, New Jersey.

**Julie Horney** is the Dean and Professor for the School of Criminal Justice; State University of New York in Albany.

**Drew Humphries** is a Professor and the Director of Criminal Justice; Department of Sociology, Anthropology, and Criminal Justice; Rutgers University in Camden, New Jersey.

**Michael Israel** is a Professor Emeritus; Department of Sociology and Criminal Justice; Kean University.

**Lauren Krivo** is a Professor of Sociology; The Ohio State University in Columbus, Ohio.

**Jeff Manza** is an Associate Professor of Sociology and the Acting Director of the Institute for Policy Research at Northwestern University. He is the co-author of Lost Voices: The Civic and Political Views of Disfranchised Felons.

**Candace McCoy** is an Associate Professor for the School of Criminal Justice; Rutgers University in Newark, New Jersey.

**John Mollenkopf** is a Distinguished Professor, Departments of Political Science and Sociology; City University of New York; Graduate Center.

**Devah Pager** is an Assistant Professor of Sociology at Princeton University.

**James Short** is a Professor Emeritus; Department of Sociology; Washington State University in Spokane, Washington.

**Jonathan Simon** is a Professor, School of Law (Boalt); University of California at Berkeley.

**Jerome H. Skolnick** is a Professor of Law; New York University School of Law.

**Bruce Western** is a Professor of Sociology at Princeton University.

**Deanna Wilkinson** is an Assistant Professor; Department of Criminal Justice at Temple University.

## ARGUMENT

### I. THE STATE'S PENAL INTEREST IN THE CHALLENGED VOTING BAN IS CENTRAL BOTH TO THE APPLICABILITY OF THE VOTING RIGHTS ACT AND TO THE ACT'S "TOTALITY OF CIRCUMSTANCES" TEST.

The Muntaqim panel erred in holding that Section 2 of the Voting Rights Act should not be applied to the statute that plaintiffs challenge. Its assumption that "New York State uses disenfranchisement merely as a tool to punish people who violate its laws" was essential to its conclusion that "the application of § 1973 to § 5-106 would upset 'the sensitive relation between federal and state criminal jurisdiction.'" Muntaqim, 366 F.3d at 122. An analysis of New York's potential interest in § 5-106 as a legitimate means for criminal punishment is therefore central to the threshold issue of whether the Voting Rights Act applies in this case.

In addition, if this case is remanded, the State's purpose for the challenged voting ban must be scrutinized. A voting qualification violates Section 2 of the Voting Rights Act if "based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State . . . are not equally open to participation by members of [a protected class] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973. To guide courts in investigating claims under Section 2, the Supreme Court has identified objective factors that may, in the totality of circumstances, support a claim of vote dilution or vote denial. These factors, which come from the Senate Report accompanying the 1982 amendments to

Section 2, include “whether the policy underlying the state or political subdivision’s use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.” Thornburg v. Gingles, 478 U.S. 30, 37 (1986) (quoting S. Rep. No. 97-417, at 28-29 (1982)).

An inquiry into whether the State’s interest in § 5-106 is valid will thus be central to the evidentiary analysis if this case is remanded. The greater the disparate impact of a voting practice on a racial group, the greater is the burden on the State to justify that practice. Where a practice has a racially disparate impact, an inquiry into a state’s interest may “indicate that the policy is unfair.” United States v. Marengo County Comm’n, 731 F.2d 1546, 1571 (11th Cir. 1984); accord League of United Latin American Citizens, Council No. 434 v. Clements, 986 F.2d 728, 753 (5th Cir.), rev’d en banc on other grounds, 999 F.2d 831 (5th Cir. 1993). Even a practice that serves a state interest that is more than tenuous may be invalid under Section 2, where the practice significantly impedes a protected group’s access to voting rights. “[E]ven a consistently applied practice premised on a racially neutral policy would not negate a plaintiff’s showing through other factors that the challenged practice denies minorities fair access to the practice.” Marengo County Comm’n, 731 F.2d at 1571 (quoting S. Rep. 97-417, at 207 n.117 (1982)); see also League of United Latin American Citizens, 986 F.2d at 753; Sanchez v. State of Colorado, 97 F.3d 1303, 1325 (10th Cir. 1996). Thus, an analysis of the State’s interest in a challenged practice is an integral part of the totality of circumstances test.

II. SWEEPING DISENFRANCHISEMENT OF FELONS CANNOT BE JUSTIFIED AS A PUNITIVE MEASURE BECAUSE IT DOES NOT SERVE ANY OF THE LEGITIMATE GOALS OF PUNISHMENT.

It has long been established that punishment is, or should be, justified by some mixture of four penological goals – incapacitation, deterrence, rehabilitation, and retribution. See, e.g., Ewing v. California, 538 U.S. 11 (2003); People v. McConnell, 49 N.Y.2d 340, 346 (1980). The New York Legislature has also recognized these goals in the New York Penal Law. N.Y. Penal Law § 1.05. In addition, that statute guarantees certain protections for offenders. See id. (making sentencing proportional and individualized, and giving notice of the types of sentences to be imposed).

Disenfranchising offenders serves neither the four goals of sentencing, nor the statutory safeguards.

A. Incapacitation or Prevention Is Not a Valid Justification for Felon Disenfranchisement Because the Public Is Not Harmed by Felons Voting.

Incapacitation is not a valid justification for felon disenfranchisement. Incapacitation, which is also termed “protection,” “restraint,” or “isolation,” comprises the notion that “society may protect itself from persons deemed dangerous because of their past criminal conduct by isolating these persons from society.” 1 Wayne R. LaFave & Austin W. Scott, Jr., Substantive Criminal Law § 1.5 (2d ed. 2003). In the context of disenfranchisement, this translates into the idea that offenders will taint the electoral process by voting, and that disenfranchisement is necessary to incapacitate the offender from doing so.

The possible rationales for disenfranchisement as incapacitation reduce to two basic arguments. The first is the concern that, because the individuals are criminals, they would commit electoral fraud. The second is the fear that they would use their votes to achieve immoral ends. Neither of these arguments, upon examination, offers a permissible reason to deprive offenders of the right to vote.

1. Disenfranchisement Does Not Logically Prevent Electoral Fraud.

The alleged justification for disenfranchisement as a method of incapacitation is that it prevents electoral fraud. Preventing felons from voting, though, would only make sense as incapacitation if either (1) the offender were convicted of an electoral fraud offense, or (2) the mere fact that the person had been convicted of a felony indicates that he or she is likely to commit electoral fraud or otherwise denigrate the electoral process. With regard to the first alternative, the amici concede that there is a reasonable regulatory rationale in preventing those convicted of electoral offenses from voting. However, in New York State, the number of felons now incarcerated or serving parole for electoral offenses does not justify the overbreadth of § 5-106. See Marc Mauer, Felon Voting Disenfranchisement: A Growing Collateral Consequence of Mass Incarceration, 12 Fed. Sentencing Rep. Mar./Apr. 2000, at 248, 250 (noting that “more than 99 percent of felons have not been convicted of electoral offenses”).

The second alternative corresponds to the theory of maintaining “the purity of the ballot box.” This justification is based either on the idea that an offender is more likely to commit electoral fraud, so disenfranchisement purifies the electoral process, or that an

offender would use his or her vote for immoral purposes, so disenfranchisement purifies electoral results. Both of these justifications are flawed.

The fear that it is more likely that an offender would commit electoral offenses, because such people have a propensity to commit future crimes, is a questionable proposition, at best. As succinctly written, in reference to a Tennessee law, “[c]rimes such as bigamy, destruction of a will, and breaking into an outhouse . . . simply have no correlation with the electoral process and do not logically indicate a greater propensity on the part of the [offender] to commit election crime.” Mark E. Thompson, Comment: Don’t Do The Crime If You Ever Intend To Vote Again: Challenging the Disenfranchisement of Ex-Felons as Cruel and Unusual Punishment, 33 Seton Hall L. Rev. 167, 191 (2002).

While the offense of breaking into an outhouse is not enumerated as a felony triggering disenfranchisement in New York, as it is in Tennessee, there are other felonies in New York – equally unrelated to election fraud – that strip offenders of the right to vote. See, e.g., N.Y. Penal Law § 255.15 (bigamy); N.Y. Penal Law § 145.23 (desecration of a cemetery); N.Y. Penal Law § 220.65 (selling a prescription for a controlled substance); N.Y. Penal Law § 165.72 (trademark counterfeiting). As a commission authorized to draft a penal code for New Jersey recognized, banning those convicted of felonies from voting, without further justification, is based on nothing more than “an assumption of continuing dishonesty . . . [that is] unwarranted and self-defeating.” 2 Final Report of the New Jersey Criminal Law Revision Commission: The New Jersey Penal Code: Commentary 363 (1971) (emphasis added).

Moreover, even if the fear that offenders are more likely to commit election fraud had some grounding in truth, blanket disenfranchisement would be an excessive solution to the problem. See Note: The Disenfranchisement of Ex-Felons: Citizenship, Criminality, and the “Purity of the Ballot Box”, 102 Harv. L. Rev. 1300, 1303 (1989). Such a solution is comparable to enacting a law to prevent any ex-convict from entering a bank for fear that he or she would rob it. The Legislature has less restrictive and less burdensome means at its disposal to forestall vote fraud. See, e.g., Dunn v. Blumstein, 405 U.S. 330, 353 (1972) (“[The state] has at its disposal a variety of criminal laws that are more than adequate to detect and deter whatever fraud may be feared.”).

2. The State Cannot Prevent Individuals from Voting for Fear of How They Might Vote.

Section 5-106 also cannot be justified by the fear that offenders would use their votes to achieve immoral ends. The idea of disenfranchisement functioning as a quarantine to maintain the health of the body politic has long been supplanted. For forty years, the United States Supreme Court has decried any legislative attempt to prevent individuals from voting for fear of how they might vote. Carrington v. Rash, 380 U.S. 89, 94 (1965) (“‘Fencing out’ from the franchise a sector of the population because of the way they may vote is constitutionally impermissible.”); Romer v. Evans, 517 U.S. 620, 634 (1996) (expressly rejecting the Mormon disenfranchisement case, Davis v. Beason, which had concluded that advocates of polygamy could be disenfranchised because of their support for an illegal practice).

Romer and Carrington thus make obsolete the reasoning of this Court's 1967 decision, adopted by the Muntaqim panel, that:

“it can scarcely be deemed unreasonable for a state to decide that perpetrators of serious crimes shall not take part in electing the legislators who make the laws, the executives who enforce these, the prosecutors who must try them for further violations, or the judges who are to consider their cases.”

Muntaqim, 366 F.3d at 123 (quoting Green v. Board of Elections, 380 F.2d 445 (2d Cir. 1967), cert. denied, 389 U.S. 1048 (1968)). Such a rationale is nothing short of viewpoint discrimination, and it is no longer constitutionally allowed.

Instead, Carrington, Romer, and their progeny recognize the vital importance to the democratic process of protecting views hostile to those of the temporal majority from suppression. “The ballot is the democratic system’s coin of the realm. To condition its exercise on support of the established order is to debase that currency beyond recognition.” Richardson v. Ramirez, 418 U.S. 24, 82-83 (1974) (Marshall, J., dissenting). Indeed, the Supreme Court of Canada, in its decision striking down the Canadian disenfranchisement statute, declared the principle, applicable equally to Canada and the United States, that “[d]enial of the right to vote on the basis of attributed moral unworthiness is inconsistent with the respect for the dignity of every person that lies at the heart of . . . democracy.” Sauvé v. Canada, [2002] 3 S.C.R. 519, 550 (Canada).

Even the view that felon disenfranchisement is merely a means to promote informed and conscientious voting, as opposed to deterring viewpoints hostile to society, is not supported by modern jurisprudence. The United States Supreme Court “has

consistently rejected restrictions on the franchise as a reasonable means of promoting intelligent or responsible voting.” Pamela S. Karlan, Convictions and Doubts: Retribution, Representation, and the Debate Over Felon Disenfranchisement, Stanford Law School, Public Law Working Paper No. 75, at 8 (2004), available at <http://papers.ssrn.com/abstract=484543> (citing Dunn v. Blumstein, 405 U.S. at 354-56; Kramer v. Union Free School District, 395 U.S. 621, 632 (1969)).

Furthermore, there is neither logical nor empirical evidence supporting the view that offenders would vote for a candidate based on that candidate’s platform on criminal justice issues. Empirical evidence, in fact, shows that offenders do not hold positions more permissive than the general public, and that they will not necessarily vote against incumbents or politicians with conservative views. See Christopher Uggen & Jeff Manza, Lost Voices: The Civic and Political Views of Disenfranchised Felons, in Imprisoning America: The Social Effects of Mass Incarceration 165-204 (Mary Pattillo et al. eds., 2004) [hereinafter “Uggen & Manza, Lost Voices”].

Regardless of how felons would vote if they were allowed to do so, however, the State cannot constitutionally withhold the franchise from them to prevent them from voting one way or the other. Carrington, 38 U.S. at 94. This policy sustains the essence of democracy. While “[u]npopular minorities may seek redress against an infringement of their rights in the courts, . . . they can only seek redress against a dismissal of their political point of view at the polls.” Sauvé, 3 S.C.R. at 546. In short, a political quarantine is not a legitimate State purpose.

B. Deterrence Does Not Justify Felon Disenfranchisement.

Deterrence also logically fails as a justification for stripping offenders of the right to vote. Deterrence includes two concepts. General deterrence is defined as the idea that “the sufferings of the criminal for the crime he has committed are supposed to deter others from committing future crimes, lest they suffer the same unfortunate fate.” LaFave & Scott, Substantive Criminal Law, supra, at § 1.5. Particular (or “specific”) deterrence, also sometimes called prevention, “aims to deter the criminal himself (rather than to deter others) from committing further crimes, by giving him an unpleasant experience he will not want to endure again.” Id.

General deterrence depends upon a punishment being widely known to those it hopes to deter. Felon disenfranchisement, however, belongs to that class of sanctions called “invisible punishments.” “Invisible punishment” is a term coined by the criminologist Jeremy Travis to describe, among other things, those criminal sanctions that operate to diminish “the rights and privileges of citizenship and legal residency in the United States.” Jeremy Travis, Invisible Punishment: An Instrument of Social Exclusion in Invisible Punishment: The Collateral Consequences of Mass Imprisonment 15-16 (Marc Mauer & Meda Chesey-Lind eds., 2002). Such sanctions are invisible for three reasons.

First, it is impossible to gauge either the effectiveness or the impact of these sanctions as they “operate largely beyond public view.” Id. at 16. Second, they are generally defined as “‘disabilities’ rather than punishments” and operate by law rather than by judicial sentencing decision. Id. They thus consistently evade review in

sentencing policy debates by “legislators, criminal justice officials, and legal analysts.” Id. Finally, “[u]nlike sentencing statutes, [these sanctions] are not typically considered by judiciary committees[,] . . . are often added as riders to other, major pieces of legislation, and therefore are given scant attention in the public debate over the main event.” Id. It is obvious that, if a punishment is invisible, it cannot operate as an effective general deterrent because few are even aware of its existence.

Particular deterrence also fails as a justification because, even after criminal conviction, many offenders themselves are probably unaware of their disenfranchised status. Judges are not required to inform convicts of the loss of voting rights at sentencing. Unlike probation conditions, in which notification to the offender is statutorily guaranteed by requiring the judge to supply a written copy of the conditions, N.Y. Criminal Procedure Law § 410.10, no statute requires anyone to inform an offender that he or she will lose the right to vote upon conviction. Offenders can therefore experience no preventive deterrent effect.

Empirical data also support the conclusion that felon disenfranchisement fails to act as a deterrent of any kind. States with disenfranchisement provisions have a greater per capita crime rate than nearby states that do not disenfranchise their convicted offenders. Howard Itzkowitz & Lauren Oldak, Note: Restoring the Ex-Offender’s Right To Vote: Background and Developments, 11 Am. Crim. L. Rev. 721, 734 & n.96 (1973); see also Fed. Bureau of Investigation, Crime in the United States, tbl. 5 (2003) (reflecting, inter alia, the per capita crime rate of New Jersey, disenfranchising parolees and probationers, at 2910.2 per 100,000 inhabitants, that of Pennsylvania,

disenfranchising only inmates, at only 2829.3, and that of Delaware, disenfranchising all felons as well as ex-felons for five years following completion of their sentences, at a staggering 4042.4), available at [http://www.fbi.gov/ucr/cius\\_03/xl/03tbl05.xls](http://www.fbi.gov/ucr/cius_03/xl/03tbl05.xls). These data are unsurprising in view of other studies showing that “lengthy prison sentences are not effective deterrents, while fear of arrest, conviction, and even the simple possibility of incarceration are.” Itzkowitz & Oldak, supra, 11 Am. Crim. L. Rev. at 734. If lengthy prison sentences do not deter crime, then collateral consequences of conviction, such as disenfranchisement, are also likely to be poor deterrents. Id.

Furthermore, disenfranchisement runs a strong risk of sending the wrong kind of message to offenders. Rather than the desired deterrent message that crime does not pay, disenfranchisement “sends the message that those who commit serious breaches are no longer valued as members of the community, but instead are temporary outcasts from our system of rights and democracy.” Sauvé, 3 S.C.R. at 548. In other words, disenfranchisement cannot deter offenders from committing crimes; it can only alienate them.

C. Retribution Is Not a Justification for Stripping Felons of the Right to Vote Because Blanket Disenfranchisement Renders Punishment Disproportionate.

Retribution may not even qualify as a legitimate purpose of punishment in New York. There is a line of cases that holds that the only goals of punishment are prevention (incapacitation), deterrence, and rehabilitation, and finds that “[t]here is no place in the scheme [of criminal justice] for punishment for its own sake, the product simply of vengeance or retribution.” People v. Oliver, 1 N.Y.2d 152, 160 (1956); accord People v.

Farrar, 52 N.Y.2d 302, 305 (1981) (listing only “societal protection, rehabilitation, and deterrence” as the purposes of a penal sanction); People v. Broadie, 37 N.Y.2d 100, 114 (1975) (“[P]ut aside as [purposes of penal sanctions] are motives of retribution or stimulus to vigilantism.”); People v. Denton, N.Y.L.J., Feb. 7, 2005, at 23 (N.Y. Sup. Ct., Feb. 1, 2005) (approving the quotation from Oliver as an accurate statement of law).

Even if retribution is a recognized purpose of punishment in New York, however, blanket disenfranchisement does not apply the retributive principle correctly. That is because retributive justice encompasses the concept of proportionality, and disenfranchisement is a gratuitous “add-on” to otherwise deserved punishment.

Retribution, as a theory of punishment, involves the imposition of punishment “because it is fitting and just that one who has caused harm to others should himself suffer for it.”

LaFave & Scott, Substantive Criminal Law, supra, at § 1.5.

“The propensity for retribution is deeply ingrained in man’s nature and can be traced as far back as the biblical concept of ‘an eye for an eye, a tooth for a tooth’” Itzkowitz & Oldak, supra, 11 Am. Crim. L. Rev. at 735-36 (quoting Exodus 21:23-25). But, as any Biblical or legal scholar will be quick to point out, the concept of proportionality is clearly part of that retributive statement. Society may require an eye for an eye, but it may not demand an eye for a fingernail. See Broadie, 37 N.Y.2d at 111 (“Prohibited . . . are punishments grossly disproportionate to the crime.”); see also Atkins v. Virginia, 536 U.S. 304, 311 (2002) (“[I]t is a precept of justice that punishment for crime should be graduated and proportioned to [the] offense.”) (quoting Weems v. United States, 217 U.S. 349, 367 (1910)).

Professor Andrew von Hirsch, often called “the father of ‘just deserts sentencing,’” succinctly sets out the tenets of retribution-based sentencing:

Severity of punishment should be commensurate with the seriousness of the wrong. Only grave wrongs merit severe penalties; minor misdeeds deserve lenient punishments. Disproportionate penalties are undeserved – severe sanctions for minor wrongs or vice versa. This principle has variously been called a principle of “proportionality” or “just deserts” . . . the offender deserves punishment – but the question of how much . . . carries implications of degree of reprobation.

Andrew von Hirsch, Doing Justice: The Principle of Commensurate Deserts, in Sentencing 243, 246 (A. von Hirsch & S. Gross eds., 1981) (emphasis added).

Blanket disenfranchisement violates proportionality in two ways. First, it does not distinguish among felons as to the degree of culpability and severity of their crimes. The bigamist is just as disenfranchised as the serial killer. Second, insofar as disenfranchisement is a collateral consequence of conviction, it adds extra suffering over and above that which would be deserved from the sentence judicially imposed for the crime convicted.

While there are certain restrictions that are always imposed upon prisoners in a sweeping fashion regardless of the severity of the prisoners’ offenses, such restrictions are necessary incidents to incarceration. Alec Ewald, Punishing at the Polls 29 (2003), available at <http://www.demos-usa.org/pub109.cfm>. Depriving incarcerated felons of the right to assemble or to enjoy privacy are appropriate safeguards for protecting society, but depriving both incarcerated felons and parolees of the right to vote is not. Id. As noted by social scientist Marc Mauer:

[C]riminal convictions do not otherwise result in the loss of basic rights: convicted felons maintain the right to divorce, to own property, or file lawsuits. The only restrictions generally placed on these rights are ones that relate to security concerns within a prison.

Marc Mauer, Felon Voting Disenfranchisement: A Growing Collateral Consequence of Mass Incarceration, 12 Fed. Sentencing Rep., Mar./Apr. 2000, at 248, 250.

Moreover, the “[u]se of disenfranchisement as punishment for the sake of punishment can only exacerbate such hostility as exists between the criminal and society and, indeed, may lead to further injury to the community.” Itzkowitz & Oldak, supra, 11 Am. Crim. L. Rev. at 736. Criminologists note that offenders accept punishment that they know they deserve; this is fundamental to “just deserts” retributive sentencing. But disproportionate punishment is not just and only fosters resentment. In the words of one parolee interviewed for a study of disenfranchisement’s effects:

I think that just getting back in the community and being a contributing member is difficult enough . . . But I, hopefully, have learned, have paid for that and would like to someday feel like a, quote, “normal citizen,” . . . and you know that’s hard when every election you’re constantly being reminded, “Oh yeah, that’s right, I’m ashamed.” . . . It’s just like a little salt in the wound. . . . [H]aven’t I paid enough yet?

Uggen & Manza, Lost Voices, supra, at 183.

D. Rehabilitation Not Only Fails to Be Effected by Stripping Offenders of the Right to Vote, But Is Actually Impeded by Disenfranchisement.

Most importantly, disenfranchisement serves no rehabilitative ends. The American Bar Association and numerous social scientists and criminologists have voiced their concerns that not only does disenfranchisement fail to rehabilitate, but it operates as

a barrier between the offender and society and counteracts the rehabilitative goal of preparing the offender to re-enter society. See ABA Criminal Justice Standards on Collateral Sanctions and Discretionary Disqualification of Convicted Persons, at R-7; available at <http://www.abanet.org/leadership/2003/journal/101a.pdf> (“The criminal justice system aims at avoiding recidivism and promoting rehabilitation, yet collateral sanctions and discretionary barriers to reentry may . . . perpetuate [an offender’s] alienation from the community.”); Jeremy Travis, Invisible Punishment: An Instrument of Social Exclusion, *supra*, at 26 (“It is hard to discern rehabilitative goals in these punishments. In fact they place barriers to successful rehabilitation and reintegration.”); Itzkowitz & Oldak, *supra*, 11 Am. Crim. L. Rev. at 732 (“The offender finds himself released from prison, ready to start life anew and yet at election time still subject to the humiliating implications of disenfranchisement, a factor that may lead to recidivism.”).

Nor are these concerns merely academic conjecture. The parolee interviewed by Christopher Uggen and Jeff Manza makes it clear that disenfranchisement is impacting real human beings in a tangible, oppressive way. Uggen & Manza, Lost Voices, *supra*, at 183 (“You’ve already got that wound and it’s trying to heal . . . [but] you telling me that I’m still really bad because I can’t [vote] is like making it sting again.”).

Although some have argued that disenfranchisement serves an educative purpose by teaching offenders respect for the law, that argument is severely flawed. This proposition, as the Sauvé court determined, has it “exactly backwards.” Sauvé, 3 S.C.R. at 544. As that court noted, “denying [felons] the right to vote is bad pedagogy. It misrepresents the nature of our rights and obligations under the law, and it communicates

a message more likely to harm than to help respect for the law.” Id. at 543. The message it actually sends is that “the basis of democratic legitimacy” may be arbitrarily denied.

Id. at 544. As the Sauvé Court stated:

It says that delegates elected by the citizens can then bar . . . citizens . . . from participating in future elections. But if we accept that governmental power in a democracy flows from the citizens, it is difficult to see how that power can legitimately be used to disenfranchise the very citizens from whom the government’s power flows.

Id. Disenfranchisement, quite simply, serves no rational rehabilitative or educative purpose.

Voting, however, does foster rehabilitation and successful community re-entry. Unquestionably, the goal of rehabilitation is “to return [the offender] to society so reformed that he will not desire or need to commit further crimes.” LaFave & Scott, Substantive Criminal Law, supra, at § 1.5. The right, and even the obligation, to vote is held out daily to members of our society as one of the privileges and proud duties of being an American. Disenfranchisement, therefore, signals to offenders that they are not truly the same as the rest of us, even while they are simultaneously being told that one of the aims of their sentence is to help them become full citizens. This double message surely would confuse and alienate any citizen.

The restoration of the right to vote, however, tells the offender that to become aware of political issues in the community and that to participate in voting is a positive pro-social endeavor. See Sauvé, 3 S.C.R. at 547. This message has both the

psychological and sociological effect of weaving the offender back into the community –  
the very goal of rehabilitation.

### III. LOCKE'S SOCIAL CONTRACT THEORY DOES NOT JUSTIFY DENYING FUNDAMENTAL RIGHTS TO OFFENDERS.

The Muntaqim panel's reliance on the "social contract"<sup>1</sup> theory, developed by John Locke, is misplaced. Under the social contract theory, as accurately reflected in the Muntaqim decision,

“[B]y entering into society[,] every man ‘authorizes the society, or . . . the legislature thereof, to make laws for him as the public good of the society shall require, to the exclusion whereof his own assistance (as to his own decrees) is due.’ A man who breaks the laws he has authorized his agent to make for his own governance could fairly have been thought to have abandoned the right to participate in further administering the compact.”

Muntaqim, 366 F.3d at 123 (quoting Green v. Board of Elections, 380 F.2d 445, 451 (2d Cir. 1967) (quoting John Locke, An Essay Concerning the True Original, Extent and End of Civil Government in Two Treatises of Government, ch. 7, § 89, available at <http://www.constitution.org/jl/2ndtreat.htm>)). To put it simply, “if you break the rules, you don’t get to help make the rules.” Ewald, supra, at 23. The Muntaqim panel, however, did not apply Locke’s theories correctly.

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<sup>1</sup> The terms “social compact” and “social contract” are used interchangeably by social scientists in referring to the theories of John Locke, Jean-Jacques Rousseau, and Thomas Hobbes. Modern philosophers who take their intellectual foundations from Locke and Rousseau, most notably the respected contemporary philosopher John Rawls, prefer “social contract theory.” It is that term, therefore, that amici will use to refer to the doctrine, except when actually quoting, notwithstanding the use of the term “social compact” by the Muntaqim panel.

A. Fundamental Rights Are Not Entirely Extinguished by a Societal Offense, and Blanket Application of Social Contract Theory Is Irreconcilable with Recognized Constitutional Rights of Offenders.

Social contract justifications for denying the right to suffrage may sound just and reasonable at first blush, but an examination of fundamental democratic principles and constitutional jurisprudence proves otherwise. Americans do not, for instance, limit an offender’s right to freedom of speech or to the press or to petition, even while the offender is in custody. Granting these freedoms, however, can be as influential as voting, if not more so, in affecting public policy and the creation of laws. As Alec Ewald notes, “[a] well-placed op-ed essay or letter to the editor – which [any offender, whether in custody or not,] may write – will influence an election much more than any single ballot.” Ewald, supra, at 32. The United States Supreme Court, moreover, has recognized that “[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution.” Turner v. Safley, 482 U.S. 78, 84 (1987) (collecting cases). Rights of free speech or to petition the government are viewed as being so fundamental that they cannot be taken away by the government absent a “clear and present danger.” See id.; see also Ewald, supra, at 32 (internal citation omitted).

In order for us to truly adhere to Locke’s social contract theory, offenders would have to be ejected from the community in a form of societal excommunication to prevent their interference with our social contract. Yet we do not do this. The Supreme Court of Canada succinctly epitomized both Canadian and American principles by noting that:

The social compact requires the citizen to obey the laws created by the democratic process. But it does not follow that failure to do so nullifies the citizen's continued membership in the self-governing polity. Indeed the remedy of imprisonment for a term rather than permanent exile implies our acceptance of continued membership in the social order. Certain rights are justifiably limited for penal reasons, . . . [b]ut whether a right is justifiably limited cannot be determined by observing that an offender has . . . withdrawn from the social compact. Indeed, the right of the state to punish and the obligation of the criminal to accept punishment are tied to society's acceptance of the criminal as a person with rights and responsibilities.

Sauvé, 3 S.C.R. at 551.

B. The Social Contract Theory Demands a Degree of Proportionality and Rationality that Blanket Disenfranchisement Does Not Possess.

Even if the social contract theory were accepted, application of the theory to disenfranchisement of offenders does not comport with Locke's teachings. First, "rationality and proportionality sharply limit the power to penalize ceded to the state by Locke's contracting individuals." Note: The Disenfranchisement of Ex-Felons: Citizenship, Criminality, and the "Purity of the Ballot Box", *supra*, 102 Harv. L. Rev. at 1306; see also Locke, Two Treatises of Government, *supra*, at ch. 2 § 8 (noting that the power to punish extends only "so far as calm reason and conscience dictate what is proportionate to [the] transgression"). As noted previously, though, blanket disenfranchisement is not proportionate, see Section II.C supra; thus Locke's theories cannot be applied to § 5-106 ab initio.

A second objection exists because the social contract rationale for punishment entails that those who have broken the contract have chosen freely to do so.

Section 5-106, however, strips the right to vote from those individuals who have committed crimes of lesser mental states. E.g., N.Y. Penal Law § 105.00 et seq. (liability for conspiracy, i.e., the act of another); N.Y. Penal Law § 125.20(2) (liability for manslaughter “under the influence of extreme emotional disturbance”). Thus, § 5-106 penalizes even those who have not willfully broken the social contract.

While “social contract” theory was instrumental in establishing the foundations of the American criminal justice system, it cannot properly be used as a justification for felon disenfranchisement. In the absence of a legitimate penological rationale, social contract theory cannot supply the missing link to justify the practice of stripping the right to vote from offenders.

### **CONCLUSION**

The denial of suffrage to felons has persisted out of inertia and a respect for an historical motivation that is no longer constitutionally permissible. It serves no rational punitive purpose and it obstructs the rehabilitation of offenders into society by promoting dissociation and alienation. Where a voting practice serves no significant state interest, no sensitive relation between the federal government and the states would be offended by applying the Voting Rights Act to remedy the racially discriminatory results of that practice. Thus, this Court should apply the Voting Rights Act to § 5-106 without reservation.

For these reasons, and all the others mentioned above, the amici curiae request this Court to grant the Petitioners' requested relief and remand the case for further proceedings.

Dated: New York, New York  
March 30, 2005

Respectfully Submitted,

Debevoise & Plimpton LLP  
919 Third Avenue  
New York, New York 10022  
(212) 909-6000

BY: \_\_\_\_\_  
Derek S. Tarson  
  
Attorney for Amici Curiae  
Criminologists

**RULE 32(a)(7) CERTIFICATE OF COMPLIANCE**

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,811 words, excluding the parts of the brief exempted by Fed R. App. P. 32(a)(7)(B)(iii).

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I certify that the foregoing is true and correct.

Dated: New York, New York  
March 30, 2005

DEBEVOISE & PLIMPTON LLP

By: \_\_\_\_\_  
Derek S. Tarson, Esq.

919 Third Avenue  
New York, New York 10022  
Tel: (212) 909-6000

Attorneys for the Amici Curiae  
Criminologists

**ATTORNEY'S CERTIFICATION OF SERVICE**

I, Derek Tarson, am an attorney at law in the State of New York. I am associated with Debevoise & Plimpton LLP, attorneys for amici curiae criminologists.

On the 30th day of March, 2005, I caused to be served two (2) copies of the within En Banc Brief Submitted On Behalf Of Certain Criminologists As Amici Curiae In Support Of Appellants And In Support Of Reversal by personal delivery upon each of the counsel for the other parties to this action at the following addresses in the City of New York:

Janai Nelson, Esq.  
NAACP LEGAL DEFENSE & EDUCATION FUND  
99 Hudson Street  
New York, NY 10013

Gregory Klass, Esq.  
OFFICE OF THE ATTORNEY GENERAL  
120 Broadway  
New York, NY 10271

Nancy Northup, Esq.  
THE BRENNAN CENTER FOR JUSTICE  
161 Avenue of the Americas  
New York, NY 10013

and to be served by overnight delivery by Express Mail upon each of the counsel for the other parties to this action at the following addresses outside the City of New York:

Jonathan Rauchway, Esq.  
DAVIS, GRAHAM, & STUBBS, LLP  
1550 17th Street  
Denver, CO 80202

Julie Sheridan, Esq.  
OFFICE OF THE ATTORNEY GENERAL  
The Capitol  
Albany, NY 12224

Richard Freshour, Esq.  
OFFICE OF THE ATTORNEY GENERAL  
The Capitol  
Albany, NY 12224

Patricia L. Murray, Esq.  
NEW YORK STATE BOARD OF ELECTIONS  
40 Steuben Street  
Albany, NY 12207

I certify under the penalty of perjury that the foregoing is true and correct.

Dated: New York, New York  
March 30, 2005.

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Derek S. Tarson