The New Grandfather Clause:

How Louisiana Defies the Voting Rights Act and Their Own Constitution

By Bruce Scottus Reilly

Since 1997, twenty-three states eliminated or eased barriers to the ballot box for people with felony convictions. Nine states ended lifetime bans.[1] Voter Disenfranchisement is a historic civil rights controversy, requiring nearly two centuries to officially condemn disenfranchisement with racial intent. The existing method for mass disenfranchisement targets those with felony convictions, and each state's unique provisions require unique legal (or referendum) challenges.

The two most common voting standards are (1) allowing all people outside of prison to vote, and (2) re-enfranchising all who have completed parole and probation.[2] Louisiana, a historic home of disenfranchisement controversy, falls into the latter category. A close inspection of their current barriers reveals the Louisiana legislature has run afoul of their own constitution, and is wrongfully abridging voting rights of probationers.[3] The problem arises with Louisiana's Constitutional Convention of 1974, which had to address (among other things) the federal Voting Rights Act of 1965, and use of the phrase "order of imprisonment."[4] Former Louisiana Attorney

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[1] Wendy R. Weiser & Lawrence Norden, Brennan Center for Justice, *Voting Law Changes in 2012*, at 34 (2012).
[2] Fourteen jurisdictions allow probationers and parolees to vote: DC, Haw., Ill., Ind., Mass., Mich., Mont., N.H., N.D., Ohio, Or., Pa., R.I., Utah. Eighteen states allow voting after completing *all* supervision: Alaska, Ark., Ga., Idaho, Kan., La., Md., Minn., Mo., N.J., N.M., N.C., Okla., S.C., Tex., Wash., W.Va., Wis.
[3] For an excellent analysis on the Louisiana Legislature overstepping their authority on voting rights, *see*: Robert Stockstill, *Voting and Election Law in the Louisiana Constitution*, 46 La. L. Rev. 1253 (1986).
[4] 42 U.S.C.A. § 1973.

General William "Billy" Guste, reasoned (in 1975): "order of imprisonment includes persons on parole but not persons on probation."[5] But that is not the law in place today.

Louisiana's 1974 Constitution, as amended

Louisiana's current disenfranchisement policies are rooted in the legislature's re-interpretation of their 1974 constitution.[6] When the question of probationers and parolees arose, the state looked to Louisiana's Attorney General for guidance. Using the principles of statutory construction and the question of "intent," A.G. Guste looked to the notes and actions of the Constitutional Convention. His contemporary 1975 opinion, holding the force of law, found that the phrase applied to parolees, but not probationers.

For an example of the amendment process, Consider that in 1997 the legislature proposed a change in Section 10, regarding those eligible for *elected office*, choosing to bar:

> "A person who has been convicted within this state of a felony and who has exhausted all legal remedies, . . . and has not afterwards been pardoned . . ."[7]

Following proper procedure to amend the constitution, the proposal received two-thirds of each elected house and was placed on the ballot for the voters to decide.[8] It was approved by a majority of voters in 1998. Curiously, the language concerning voter disenfranchisement stands.

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[5] La. Op. Att'y Gen. No. 75-131 (May 2, 1975). Such Advisory Opinions have the force of law unless the legislature overrides them. William "Billy" Guste is Louisiana's longest serving Attorney General.
[6] Voting rights may be suspended when one is "under an order of imprisonment for conviction of a felony." La. Const. art. I, § 10
[7] Act No. 1492, S.B. No. 321; *Elective Office—Disqualification of Convicted Felons* (La. 1997).
[8] La. Const. Art. 13, § 1.

It leaves the language of 1974 in place that, according to the Attorney General of the time, bars parolees because:

> "while the parolee may not be actually physically located in a penitentiary, he is legally in custody of the institution. We believe that a parolee is therefore under an order of imprisonment."[9]

He distinguishes the probationers as under the Division of Parole and Probation Supervision, and "those persons are not under an order of imprisonment, as the granting of probation by the judge amounts to a suspension of sentence."[10]

A.G. Guste points out that the 1974 Constitution explicitly added Article I, Section 20, which restores "full rights of citizenship" *upon completion of supervision*. This language was decidedly not inserted into Section 10, regarding voting rights, and he is (as one would expect) well aware that voting rights are not the totality of "full rights of citizenship," thus deserve separate sections.

The Legislature Re-defines *"Under Order of Imprisonment"*

Following this 1975 interpretation, the Louisiana legislature attempted to put the hole around the peg rather than fit the peg in the hole. They passed a law in 1977 that bars probationers and parolees from voting, without putting it to the voters as a constitutional amendment, and without getting pre-clearance from the federal government.[11] Part of this law, regarding politicians, has

[9] La. Op. Att'y Gen., Id. (*Citing* La. Code Crim. Proc. Ann. Art. 893.) This is aligned with a body of cases that consider parole as a continuation of a prison sentence, but done "at liberty."
[10] Id.
[11] Louisiana is a "covered" jurisdiction under the VRA, requiring federal approval to alter voting rights (*Supra*).

subsequently survived judicial challenge, however the arguments did not address voting.[12] Consider the later opinion of A.G. Guste, who fails to weigh the expansion of disenfranchisement *via legislation*, rather than constitutional amendment:

> "No person shall be permitted to register or vote who is:
> (1) Under an order of imprisonment, as defined in R.S. 18:2(2), for conviction of a felony. . . An 'order of imprisonment' is defined in R.S. 18:2(2) as:
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> . . . a sentence of confinement, *whether or not suspended, whether or not the subject of the order has been placed on probation, with or without supervision, and whether or not the subject of the order has been paroled.*" (Emphasis added).

The 1977 quasi-amendment added, in paragraph (2), "whether or not the subject of the order has been placed on probation, with or without supervision."

In 1984 the question again arose, and A.G. Billy Guste issued another Opinion:

> "On the basis of the above cited statutes, an individual who has received a definitive conviction for a felony and received a suspended sentence and probation is ineligible to

[12] The case in question was directed at the *second* section of the constitution, applying to disqualifying candidates for office. This section was properly put to voters in 1998, and the case is unique in applying to a candidate who was free, pending appeal of his prison sentence. "Constitutional provision disqualifying a person 'actually under an order of imprisonment' for felony conviction as a candidate for elective public office does not mean that 'actual imprisonment' is required for disqualification, but rather constitutional provision is consistent with statutory definition of phrase." *See*: La. Const. Art. 1, § 10(B)(2); La. Rev. Stat. Ann. §18:2(8). *Rosamond v. Alexander*, 846 So. 2d 829 (2003).

remain on the voter registration rolls. Insofar as Attorney General's Opinion No. 75-131 conflicts with this opinion, said opinion is recalled."[13]

If, in fact, the proper interpretation of the 1974 constitution is that (according to Guste) probationers are not disenfranchised, the subsequent new language, by statute, is not a legitimate method of defining voting rights in Louisiana. Furthermore, the racial impact (regardless of intent) must be cleared by the federal government under Section 5 of the Voting Rights Act (VRA).

Voting Rights Act (VRA), Louisiana, and "Intention" of the Law

When disenfranchised plaintiffs in the state of Washington argued that the criminal justice system is racially prejudiced on every level, from policing to prosecution to prison to parole, the state offered no evidence in opposition.[14] The Ninth Circuit initially ruled that the state's voter disenfranchisement law, connected to criminal convictions, is thus a violation of Section 2 of the VRA. Subsequently, the Ninth Circuit Court of Appeals, on rehearing en banc, ruled that this prejudice and discrimination must be *intentional* to violate the VRA. The ruling was potent, but the issue remains. Based on the legal principle that intention can be inferred from one's actions, there is an argument to be made that the "intent" can be proven.[15]

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[13] La. Atty. Gen. Op. No. 1984-639

[14] There was no evidence of intentional discrimination in operation of Washington's criminal justice system, and thus, Washington's felon disenfranchisement law did not violate VRA provision prohibiting denial or abridgment of right to vote on account of race. *Farrakhan v. Gregoire*, 623 F.3d 990, (9th Cir. 2010).

[15] "A person is presumed to intend the natural and probable consequences of his voluntary acts." Black's Law Dictionary, 6th Ed., p.1185. One "is not required in crimes to prove that a defendant intended the precise consequences of his act and his criminal intent can be inferred from his act." p.1067.

Louisiana, unlike Washington state, is one of eight states considered "covered jurisdictions" within Section 5 of the Voting Rights Act.[16] This means any change in voting laws must be pre-cleared by the federal government. To obtain Section 5 pre-clearance, Louisiana would have to demonstrate that a proposed voting change "does not have the purpose *and will not have the effect* of" discriminating based on race or color (emphasis added). This distinguishes Louisiana from Washington state, as well as sites of other disenfranchisement legal challenges in recent years, as it entails what is typically known as "disparate impact."[17] This bypasses the question of intent, and looks rather at the *results*.

To give a subtle context for the pre-1965 voting laws climate, Louisiana was sued by the United States for its provision that potential voters understand and give reasonable interpretation of any section of the state or federal constitutions. Judge Wisdom's Fifth Circuit opinion is blunt: "To Louisianians familiar with the history of their state, it must seem an exercise in futility for the Court to labor the proof of the true reason for the understanding or interpretation test."[18]

Naturally, the Court then belabors to present just such a history, which created a state where roughly one percent of all voters were Black between 1898 and 1944. At the conclusion of the 1898 Constitutional Convention, Governor Foster said:

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[16] Section 5 of the Voting Rights Act of 1965, as amended (42 U.S.C.A. § 1973c), requires a "covered jurisdiction" under § 4(a) of the Act (42 U.S.C.A. § 1973b) to refrain from implementing any new "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964.

[17] Massachusetts disenfranchised its prisoners in 2000, and an ongoing case has decided that this was done with "punitive intent," with further questions to be resolved on remand. "If a state enacts a law which disenfranchises felons with the intent of disenfranchising blacks, that state has run afoul of Equal Protection Clause." *Simmons v. Galvin*, 575 F.3d 24 (1st Cir. 2009) *cert. denied*, 131 S. Ct. 412 (U.S. 2010). See also: Hayden v. Pataki, 449 F.3d 305 (2nd Cir. 2006);

[18] United States v. State of La., Id.

> "The white supremacy for which we have so long struggled at the cost of so much precious blood and treasure, is now crystallized into the Constitution as a fundamental part and parcel of that organic instrument, and that, too, by no subterfuge or other evasions. With this great principle thus firmly imbedded in the Constitution, and honestly enforced, there need be no longer any fear as to the honesty and purity of our future elections."[19]

The Court summarizes a very rich history lesson by stating:

> "The Louisiana Codes Noir of Colonial times and the Black Codes of the eighteen sixties; the pre-Civil War denial of the vote to Negroes, even to wealthy and educated free men of color; the ebb and flow of Negro rights in the Constitutions of 1864 and 1868; the 1879 transfer of political power from police juries and the legislature to the Governor; the close election of 1892 and the 1896 victory for white supremacy; the grandfather clause and the complicated registration application form in the Constitution of 1898; the invalidity of the grandfather clause and the consequent resort to Mississippi's understanding and interpretation clause; the effectiveness of the white primary as a means of disfranchising Negroes; the invalidity of the white primary and the consequent need to revive enforcement of the interpretation test; the White League and the Citizens' Councils; the Black League and the N.A.A.C.P.; the Battle of Liberty Place in 1874 and the Ouachita voting purge of 1956- these are all related members of a series, all reactions to the same dynamics that produced the interpretation test and speak eloquently of its purpose. In sum, the interpretation test is another grandfather clause. Its purpose is rooted in the same history. It has the same objective the delegates to the Constitutional

[19] La. Senate Journ. 1898, 33-35

> Convention of 1898 envisaged for the grandfather clause. It is capable of producing the same effective disfranchisement of Negroes today that the grandfather clause produced sixty-five years ago."[20]

It is difficult to overlook the timing of what is known as the "Drug War" against American people, and difficult to believe that such a history of race-based voter suppression could evaporate in 1965, particularly when felony convictions are serving to disenfranchise so many People of Color.

The Drug War, "Tough on Crime", and Racial Impact

It would have been difficult to imagine that, in 1971, the federal government's Drug War would eventually spawn what is now called "The New Jim Crow"[21] and the "Prison Industrial Complex."[22] Whereas a full analysis of mass incarceration and race is not warranted here, let us turn to the facts in Louisiana, a Covered Jurisdiction with a history of voter suppression.

The number of people incarcerated in Louisiana has risen steadily from 17,000 in 1992 to 43,000 today.[23] With the number of prisoners exponentially growing each decade, the realities of racial impact demand fresh inspection of disenfranchisement laws. The average sentence length is

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[20] United States v. State of La., 225 F. Supp. 353, 380-81 (E.D. La. 1963) aff'd sub nom. Louisiana v. United States, 380 U.S. 145 (1965)

[21] Michelle Alexander, *The New Jim Crow: Mass Incarceration in an Age of Colorblindness*, (2010), provides a succinct history of incarceration and race in America.

[22] A phrase attributed to scholar Mike Davis and popularized by anti-prison activists such as Critical Resistance, it relates to the ominous warning President Eisenhower gave in his 1961 farewell speech, to beware the power of the military industrial complex; i.e. those profiting off the need for war or, in this scenario, prisons.

[23] Department of Public Safety and Corrections, *Population Trends – Total Adult Offenders* (6/29/11). 40,000 prisoners in state facilities: La. DOC statistics (2010). There are at least 3000 prisoners in privately owned facilities: BJS Bulletin, *Prisoners 2008*, Appx. Table 19 (Rev. 6/30/2010).

fourteen years, while the DOC racial data is stark: 69% Black and 30% White.[24] The 26,000 parolees are roughly 60% Black. Add to those figures the *43,000 unconstitutionally disenfranchised probationers* (52% Black) and there are 65,000 disenfranchised Black people in Louisiana, 22,360 of whom were not included in the original 1974 constitutional interpretation.

Of 3.4 million voting age Louisianans, only one million are Black (857,000 are registered). The disenfranchised are 13% of the total registered Black voters.[25] These numbers are compounded by the recognized theory of community dissipation, arguing that voting is done as a family and group experience, and so a large swath of disenfranchisement creates a rippling effect. The 21,000 probationers living in Orleans Parish[26] are kept from the polls, and kept from positively engaging in a fundamental civic activity that also affects their children. Add in the 5,900 New Orleanians currently confined in the penitentiary, and the number under active government control starts to be a large percentage of the 230,000 Orleans Parish registered voters. Ultimately, 11% of Orleans Parish is denied the right to vote.

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[24] James M. LeBlanc, Louisiana Department of Public Safety and Corrections, *Demographic Profiles of the Adult Correctional Population* (6/30/2011). Of the 584 children sentenced in adult prison, 84% are Black and 16% White. The practical lack of Hispanic/Latino group is attributable to the ongoing struggle for identification in demographic data, and the labeling done by DOC. It is likely that a considerable portion of the "White" prisoners, probationers, and parolees are actually of Hispanic heritage; they too would be a protected minority under the VRA.

[25] Office of the Sec'y of State of La., *La. Voter Registration*, (7/1/11). *See:* http://69.2.40.145/voter_stats/. It should be noted that this is a conservative figure, as the convicted and imprisoned actually span into a web of juvenile prisons (children are increasingly being convicted as adults), federal, and privately-owned prisons. Many prisons are labeled as "facilities," and privately-owned prisons are generally adverse to Open Records laws. With Louisiana Gov. Jindahl currently making news regarding the possible sale of state prisons to private corporations (and then renting the cells from the corporation), people are often being moved from one entity's spreadsheet to another.

[26] DOC data, Id.

Studies have long established that drug use is consistent across racial lines, yet the racial impact of the "War on Drugs" has disproportionately affected Black and Latino Americans.[27] When assessing racial impact, whether intentionally disproportionate or collateral damage to another intent, one must ultimately decipher how a state that is 63% White can have a prison that is only 30% White, and a probation system that is only 48% White? The exploration must begin at the first point of contact with the criminal justice system, i.e., why do Black communities have more police than White communities. Secondly, why does the court system filter a higher rate of White people to probation and Black people to prison? New Orleans is the most incarcerated city in the most incarcerated state in the most incarcerated country in the world. With as many as 65 million Americans having criminal convictions, a critical mass is being reached.[28]

Conclusion

The issue of felon disenfranchisement (and legal slavery upon conviction) has roots in the 13th Amendment, while the pursuit of equality grows from the tree of the 5th and 14th Amendments, the Voting Rights Act, and Section 1983 of the United States Code. Official rationale to pass the VRA explicitly identified racist disenfranchisement laws, and as the D.C. Circuit recently wrote: "None of this new voting legislation mentioned race on its face, but it was nonetheless 'motivated entirely and exclusively by a desire to exclude the Negro from voting.'"[29]

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[27] Ryan S. King & Marc Mauer, The Sentencing Project, *Distorted Priorities: Drug Offenders in State Prisons* (2002). *Citing* 1997 DOJ statistics: 79% of drug prisoners were Black or Hispanic, although Black and Hispanic people only accounted for 22% of all drug users.

[28] Michelle Natividad Rodriguez & Maurice Emsellem, National Employment Law Project, *"65 Million Need Not Apply" – The Case for Reforming Criminal Background Checks* (2011).

[29] *Shelby County, Ala. v. Holder*, CIV.A. 10-0651 JDB, 2011 WL 4375001 (D.D.C. Sept. 21, 2011), *quoting* H.R.Rep. No. 89–439, at 2443, 2451.

The courts have managed to avoid tackling felon disenfranchisement under "disparate impact," while legislatures and governors have vacillated across the nation. At what point, some have asked, will the 8th Amendment prohibition against "cruel and unusual punishment" enter the fold? The move towards re-enfranchisement in the past decade has seen regression, proving that voting rights can exist at the whim of an executive order.[30]

In Louisiana, the courts should rule that the legislature overstepped their bounds in 1977 when redefining a constitutional phrase to disenfranchise probationers. "Under order of imprisonment" cannot be redefined by the legislature, after the state's top lawyer underwent a constitutional construction process to decipher its meaning. Only a ballot initiative that is pre-cleared by the Department of Justice will suffice. In a state where Black probationers are disenfranchised at a rate 2.4 times as high as White people, the issue of disparate impact requires a full examination. A true account of the disenfranchisement regime includes parolees and prisoners, but the portion regarding probationers is currently an illegal practice under the most basic legal framework.

[30] Weiser & Norden, *Voting Law Changes in 2012*, Id. at 34-35. In 2010, Iowa and Florida governors reversed executive orders, and returned to disenfranchisement regimes. Iowa changed back to one of four with permanent disenfranchisement, while Florida's new policy is more restrictive than before, and affects as many as a million people. Five states have introduced bills to further restrict voting rights, and Nevada's governor vetoed a bill that would have restored rights after the completion of probation and parole.