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"In the Shadow of the Thirteenth Amendment"

- James Morse

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In the wake of the 1992 riot in Los Angeles, *The New York Times* published an editorial entitled "Young Black Men", which rejects the prevalent presumption that young men of color are "inherently criminal", as their overwhelming numbers in the state prison system suggests. In an immediate reply to this editorial, dated May 7, 1992, an executive of the Federation of Welfare Agencies laments the fact that the criminal justice system in New York, as elsewhere, is the only institution that eagerly welcomes young Black and Latino males. The author then mentions one of the most dreaded consequences of imprisonment: scarcity of available resources to aid ex-offenders re-entering free society--a traditional disincentive to a law-abiding lifestyle.

Responding to another editorial of November 29, 1992, entitled "The Inmate Riddle and Its Moral", a professor of sociology and criminology at John Jay College, refers to the "consistent findings" of direct ties between street crime and the brutal realities of life in the urban slums. Also, under the bold caption "Children of Prisoners Face Grim Inheritance", another response in *The New York Times* Editorial / Letters section affirms the fact that a child with a parent in prison possesses five times the likelihood of becoming a prisoner too. Clearly, like welfare, imprisonment possesses intergenerational ramifications.

Responding to this predicament, a group of New York State prisoners, dubbed" inmate scholars", have developed a revealing perspective called "The Non-traditional Approach To Criminal Justice". In part, it uncovers a direct political relationship, a "symbiosis", between a minority specific state prison population and a few low-income urban enclaves in New York City. The non-traditionalists espouse that ex-offenders returning to these select enclaves should somehow arrive there as upstanding, crusading reformers, potential leaders in their blighted communities. Since most prisoners are eventually released from prison, this continues to be an aim worth pursuing. To accomplish this goal, the non-traditionalists would, for instance, mandate that community service become an element of parole conditions. According to one source, they even propose a model prison to be solely administered by prisoners -- no doubt a type of penal utopia.

Most importantly, the non-traditionalists have formed an organization called the Community Justice Institute to lobby their outlook in Albany and, undoubtedly, to educate the denizens of the select enclaves regarding their traditional relationship to the state's prison system.

Because the problem of state prisons in New York combines two of the most volatile domestic issues in contemporary America--crime and race--no one can fault the non-traditionalists for treading lightly, tentatively even, during these ultra-conservative times. Apparently wishing to establish an outlook that would coexist with the fashionably narrow view concerning an ever expanding minority specific prison system, the non-traditionalists have opted to focus primarily upon the geo-political aspects of the current criminal justice operation in New York City.

Also, due to the current popularity among minority prisoners of criminal justice conspiracy theories--which tend to be rawly blunt and accusative--prisoner strategists seeking to build widely based support coalitions may find it politically correct to steer clear of potentially controversial issues such as race, but at the risk of diluting the moral force of their strategies. Nonetheless, because a perpetually expanding minority based prison system is pushing free society closer to the brink of certain disaster, a bold interpretation of the facts is urgently required. At the risk of alienating moderate advocates of penal reform in the short term, a bold interpretation of the facts--many of which are hidden--has the superior advantage of producing more suitable solutions that are likely to become increasingly fitting as the present crisis progresses and intensifies, as it is certain to do.

As stale as last week's headlines is the fact that, though males of African descent comprise only six percent of the nation's general population, they are forty-seven percent of the

national male prison population. According to recent reports[1], in New York, one of every four young males of color is under some form of criminal justice supervision, as if born in the shadow of the Thirteenth Amendment to the United States Constitution, and thereby verifying all of the superstitious portents that the number thirteen signifies. This ominous shadow of crime and punishment casts a permanent shade upon a few select, prisoner specific enclaves in New York City that are characterized by intense poverty, drug-induced violent crime, substandard housing, and de facto segregated public school systems. Together these enclaves comprise the eighteen assembly districts—out of New York's 150--that seventy-five percent of all state prisoners originate from and return to when released from confinement. These enclaves are located in Harlem, Brownsville, East New York, Bedford-Stuyvesant, Lower East Side, South Bronx, and Jamaica.

Importantly, these urban sectors are not "neighborhoods" in the traditionally middle-class sense of socially stable, economically viable residential areas. Owing largely to the polarizing effect of conservative economics during the Reagan-Bush debacle--whereby the rich became super-rich and the poor became super-poor--these sectors are principally pockets of extremely low income and dependency, exhibiting a constant and rapid turnover of residents that establishes social instability as the prevailing norm. Promoting this social instability, and characterizing these enclaves as prisoner specific, is the perpetual outflow and influx of myriads of individuals to and from the state's prison system. According to current estimates, each year, 26,000 individuals are admitted to state prisons and 23,000 are released, and the prisoner specific enclaves are the locus of three quarters of this traffic.

In a 1990 report, published by a quasi-official agency, the Federation of Protestant Welfare Agencies ("FPWA"), it is disclosed that persons of color are pre-eminently arrestable and convictable due to an almost exclusive concentration of police anti-drug operations within these select urban enclaves, which has contributed to the swell of a minority-based prison system during the past few years. The report highlights the contradiction in law enforcement operations whereby white, middle-class persons are acknowledged as being far more active in the sale and use of illicit drugs than ghettoites, but much less likely to be apprehended, not to mention imprisoned when they are. According to the report, what differentiates the middle-class from the ghetto-class for law enforcement officials is that within the blighted urban enclaves, drug activity is more visible, and drug-induced violent crime is more prevalent. This official rationalization of selective prosecution of enclaved minorities seems to suggest that if only the poor were middle-class, notwithstanding drug use and sales, they too would be virtually immune to arrest and conviction.

After documenting evidence that the end result of criminal justice in New York is basically a segregated penal apparatus--from which whites are systemically excluded--the authors of the report coyly disclaim a conclusive finding of unfairness to minorities in sentencing practices "without researching the actual offenses and criminal histories" of imprisoned offenders (FWPA, 1990). This disappointing inconclusiveness unfortunately represents the traditional rub, the classical blind spot in advocate/under people relations wherein well-meaning advocates sometimes are unable to stand in the shoes of under people and perceive the essential picture, not because advocates are insincerely motivated, but rather because the outsider typically experiences the problem differently from the people at the bottom of the heap. Also, the role of advocacy may be complicated by the necessity of listening to the clash of opposing voices, which often places the advocate between the why and wherefore, the pro and the con, literally speaking. Frequently, the under people themselves even fail to grasp the essential picture. And, having waived the right to speak up, under people are mute or whisper.

Thus, what urgently needs to be said, loud and clear, is that regardless of why or wherefore, when the criminal justice process results in a basically segregated penal system--in a society wherein racial segregation is unlawful--then the result itself is criminally unjust. Put another way, "each tree is known by its own fruit". Therefore, it would certainly be unusual for a person to stand in an apple orchard and surmise: "Yes, it looks like an apple, smells like an apple, and even tastes like an apple, but I first must research the origin of the tree before I can be conclusive". Actually, disrobed of euphemisms, the "correctional facility" emerges as a segregated

entity that is no less denigrating a process than a segregated lunch counter, a mandate to sit in the back of the bus, or the" separate but equal" disquality of life legalized by *Plessy* v. *Ferguson* [163 U.S. 537 (1896)]. No matter how it comes about, regardless of how well it is hidden from public view, segregation is the visual representation of broken promises. And for the person of color, the penal totalitarian setting is necessarily experienced as a retrogression in American race relations, exclusive of crime and punishment, which fosters the socially divisive presumption that criminal justice is race specific and, in the historical sense, business-as-usual.

It is no coincidence that the Jim Crow prison system emerges as a teeming incubator for cultural myths and racial stereotypes. Owing to the customary configurations of a mainly all-white staff of over people ruling a prison population of mainly all-minority under people, in rural upstate New York, the old, enduring images of the black slave/white master archetype spring readily to life from the mildewed, worm-eaten chronicles of yesteryear. Nothing more accurately defines the dominant images, themes, and self-concepts of persons within a social setting than the argot they utilize, which unveils the realities that such expressions identify. Though not of recent vintage in the prisoner lexicon, the word "nigger" is a tellingly prevalent argot expression, used frequently by young prisoners of color and Latino[2] to describe themselves and their peers. In the minority-based prison system, the historical definition of "nigger" has become so institutionalized that it readily anticipates the persons cast into the setting. For young Blacks and Latinos, "nigger" appropriately embodies a stereotype and worldview imposed by separate and unequal life opportunities before, during, and after imprisonment. Thus, these young men too are troubled by conflict and ambivalence: "Yes, I violated the law, but must I be denigrated as a consequence, with little likelihood of recovery"?

This is the pain that spawns all of the so-called criminal justice conspiracy theories indigenous to the segregated penal setting. While the prisoners of the current generation are, on the whole, not as politically sophisticated as their forerunners, it is true that one need not be a weatherman--or a prisoner scholar--to tell which way the wind is blowing. Environmentally speaking, no one need ever utter the word "nigger"--the setting itself speaks loud and clear. For, as a rule of thumb, white males get the breaks in life, and "niggers" get imprisoned.

Let us turn aside momentarily to briefly examine one of the formative social institutions of which the average young prisoner of color is an alumnus. The public school system throughout the network of New York City's prisoner specific enclaves and the state penal system possess numerous characteristics in common. Both are traditionally segregated with a preponderance of Black and Latino youth as clients. Because the enclave school and the prison always service more persons than they are designed to, overcrowding--the familiar practice of "packin' em' in there"--gives both these social institutions the appearance of being perpetually pregnant, but without great expectations. Consequently, fiscal resources are stretched to the point where "programs" are eliminated or they qualitatively decline. Since the staffs of the enclave school and the prison alike are overwhelmingly white, the problem of absent or ineffective role models for minority males is standardized. Minorities in both social institutions typically complain of staff insensitivity, which in the segregated prison setting has evolved into open hostility. In a large number of enclave public schools, the metal detector and the security guard are as standard as they are in the prisons. As a result, in both social institutions, "academic freedom" becomes the handmaiden to "security" concerns. Regardless of the why or wherefore of segregated social institutions, the result is uniformly inferior and damaging.

It is widely acknowledged that segregated social institutions in a free society are self-defeating because they tend to normalize the abnormal, imposing a kind of caste status and outlook upon the segregated. For the average young prisoner of color--who has gone from one segregated social institution to the other--the enclave public school and the prison complement each other in producing diminishing prospects for entry into the mainstream of American society. Even the average alumnus of the enclave public school, who has not been to prison, is likely to remain enclave-bound for life, while the average ex-offender returns to the enclave with increasing possibilities of ending up prison-bound for life. To one degree or another, the political purpose of the enclave is to keep racial expendables conveniently out of sight and out of the way.

Emblematic of the fashionably narrow view of a minority based prison system is the public apathy concerning the extent to which New York's penal apparatus has been transformed into an entrenched representation of "the color line" predicted to be "the problem of twentieth century": the solidification of the "two societies, one black, one white--separate and unequal", forewarned by the Kerner Commission twenty-eight years ago. What is broadly viewed and experienced by the public, especially by minorities, is the telltale effect of this racial fault line in the social landscape, which ascribes to all persons of color a moral differential that imputes an automatic mistrust and suspicion that is all too familiar. The males are viewed as potentially violent, and the females, regardless of rank or standing are viewed as quintessential seductresses. The concrete basis of this perceptual distortion is the present minority-based prison system, which inevitably casts a very, very long shadow. In the unavoidable terms of social relativity, not even affluent persons of color can completely evade the omnipresent shadow of the Jim Crow prison system; relentlessly, it follows them to the suburbs, to the boardroom, to the first class vacation abroad. In spite of material acquisitions, individual acceptance, and professional distractions, the shadow is always there, looming like a "friendly reminder". And the inescapable truth is that the more the segregated prison system expands, the longer the shadow becomes.

Unlike the rare middle-class offender whose fall into prison renders "rehabilitation "--the future restoration of prior status [New York Penal Law, Article 1, Section, 1.05, Subdivision 6.] -- a viable possibility, the young prisoner of color arrives from the enclave to the prison gate in bad shape. And unless he is a die-hard fatalist, during his "vacation" from the lethal pitfalls of the urban ghetto, he usually envisions something better than restoration to his prior status. For his biographical profile is the standard underclass testimonial: he was raised by a single parent in or near the prisoner specific enclave, became maladjusted to the shocks of poverty and the routine incidents of racial discrimination, dropped out of the segregated public school system to become under-unemployable--the traditional stepping stones to the perils of street-life, the quick/slick dollar, crime and, ultimately, the Jim Crow prison system, beckoning with open arms. Because the prisoner of color usually possesses some degree of willingness to better his future prospects (and because he usually desires to get out of prison), he invests his time and energy in the rehabilitation fantasy mandated by the Penal Law, in the guise of "inmate programs". In this manner, he is subtly indoctrinated into believing that he, exclusive of all other factors, is the sole problem in his life, and that inmate programs--in the segregated prison--will miraculously render him invincible to all of the external influences and criminogenic factors that made him a prime candidate for prison in the first place. Meanwhile, back in the prisoner specific enclave--for which the young prisoner of color is inescapably earmarked--overall conditions are further deteriorating, and recidivistic activity is booming at the rate of forty-seven per cent.

Concomitant with the process of being "restored to prior status", the young prisoner of color is the object of an operational concept also mandated by the Penal Law called "deterrence", whereby the prison sentence is supposedly executed to forewarn other potential offenders. This is the case despite the fact that within the prisoner specific enclave, where the perpetual going to and coming from prison is a cultural norm, deterrence competes very poorly against inducements to "get paid" and incitements to rebel. In fact, in the enclave, where existential reversals are institutionalized in a manner that the middleclass mentality cannot fathom, deterrence regularly produces the opposite result: the more individuals imprisoned, the more criminogenic the prisoner specific enclave becomes. Therefore, though deterrence, as a judicial practice, is far less effective than say, a beneficial education leading to the assurance of gainful employment, an examination of deterrence's most active principle--the "principle of less eligibility"--reveals the reasons for its abiding appeal, even as it produces the very results that it claims to prevent.

The principle of less eligibility was popularized in England by a utilitarian philosopher, Jeremy Bentham, as the foundation for the then new concept of the penitentiary. Simply, convicts were deemed less eligible to enjoy the same privileges of citizenship and standard of living possessed by the non-criminalized. It was theorized that, in order for the poor to be sufficiently deterred from crime, prison conditions had to be worse than the living conditions of the poorest in society. Otherwise the prisons would be perceived as attractive. As

applied to the young prisoner of color, in particular (who was born less eligible), the principle of less eligibility enjoys a wide and enthusiastic usage on both sides of the prison wall. For example, in one New York prison, a degree program in social work was abruptly terminated on the grounds that prisoners, from an "ethical" standpoint, are less eligible to become social work professionals. Actually, it was feared that prisoners, by virtue of their "peculiar" status, would necessarily "degrade" the profession of social work--a precept that has its basis in New York Correctional Law.

Generally, and in a manner that prompted one perceptive observer to remark that "mistrust is the mother of recidivism", the young prisoner of color is deemed indelibly less eligible to be trustworthy, even if the offense committed occurred ten, fifteen, twenty years ago--officially, the offense remains fresh, as if it occurred yesterday. Importantly, although the majority of young prisoners could be positively induced through a system of escalating rewards to alter their behavior patterns, the principle of less eligibility demands unwavering dosage of mistrust and suspicion to achieve" deterrence", which accounts in large part for the neurotic tone of prison operations, and a high recidivism rate. Once released from prison and restored to the prisoner specific enclave, the ex-offender is less eligible to reside in a community that is not infested with drugs and violent crime; less eligible to obtain gainful employment because, while in prison, he was less eligible to obtain job training related to the current job market. In short, for the young prisoner of color, a four-year prison sentence all but guarantees a lifetime of social disability.

Back amid the teeming temptations of life in the enclave, the young ex-offender of color realizes that his bulging portfolio of prison program certificates does not amount to a hill of beans in the real world-even to display them invites the familiar mistrust and suspicion. Thus, he feels that he has been duped, lied to, especially if he left prison expecting to be welcomed with open arms. Demoralized and angry, he lapses into his old ways, thereby becoming just another criminogenic factor in the confines of the prisoner specific enclave. Once he recidivates, which is very likely, he is then pre-eminently less eligible to escape the draconian mandatory sentencing statutes that, once applied, trigger the same denigrating cycle once more. This penological rope-a-dope is carried out in the name of "public safety" [Penal Law, Article 1, Section 1.05, Subdivision 6.]. Hence, it is estimated by the non-traditionalists that, annually, less eligibly restored ex-offenders will be responsible for 11,000 new offenses--many of them violent in nature, which coincides with the findings of the National Research Council that persons of color are far more likely to become victims of crime than whites.

Speaking from experience, the root cause of the vast majority of the current violence within the prisoner specific enclave is externally generated by the influx of illicit drugs. What better target for the consumption of drugs and alcohol than the minority "expendables" permanently confined to the misery of the enclave? The citizens of affluence who ultimately reap the great wealth from the enclave drug traffic remain safely beyond the reach of law enforcement officials. The real "drug czars" do not build mansions in the South Bronx or East New York, but in more genteel environs. Curiously powerless to halt this violence inducing influx of illicit drugs, law enforcement officials take the easy way out by declaring a "war on drugs", and invading the prisoner specific enclaves. Yet, for all the casualties and prisoners of the war, this strange campaign does little except inject fresh blood into the market. For every single street-level drug dealer imprisoned, at least two new ones appear to fill the empty slot. In fact, it is not at all unusual for street-level drug dealers to work with the police and inform on each other in order to comer a bigger share of the street market for themselves: so much for deterrence. After all, every "war" has its quislings. After successive campaigns, the prisoner specific enclave begins to resemble an underdeveloped third world country. For in addition to the initial drug epidemic, and the ensuing "war on drugs", the enclave is also the locus of a perpetual crime wave.

One of the most common offenses for which the enclave bound youth of color is imprisoned is robbery. The drug habit demands instant and constant tribute, and when all else fails, the compulsion for relief leaps all prior bounds of personal limits, and a robbery ensues. On the average, each kilo of crack cocaine sold in the prisoner specific enclave is guaranteed to generate at least eighty robberies--two robberies per ounce, which is a conservative estimate. Typically, along the rough road to the prison

house, the robber himself has been a target of the drug epidemic, a casualty of the "war on drugs", and a victim of the crime wave too. In fact, the most enduring rationale for succumbing to drug abuse initially is: "Since I have to put up with all of this crap, I may as well use drugs too"! But once the young inmate of color is packed tightly into the cellblock, he alone is stamped as the principal social malefactor, a violent threat to "public safety". Meanwhile, back in the enclave, that same kilo of crack cocaine is now generating one hundred robberies, not to mention its quota of homicides, assaults, burglaries, and other assorted miseries. Consequently, even law-abiding persons begin to wonder if the so-called "war on drugs" is just a war on people; the most vulnerable, people of color.

Light years away from reality, what the prison official sees as a socially useful operation--inept "inmate programs" that, in most cases, lead nowhere except back to square one--the young prisoner of color experiences as business-as-usual, this time aimed merely to occupy his attention while confined. During quiet moments, the under person-in-the-cell hangs his head between his hands and wonders, "How much longer"? Ultimately, the answer is: Not long! From the lofty heights of their hands-off points of view, what the "tough-on-crime" proponents are unable to perceive is how every essentially unjust situation necessarily generates an incipient moral dynamic to annul it, to make it right. Typically, this incipient moral dynamic is very quiet and difficult to pin-point. Seemingly nonexistent, it is like the proverbial seed that is haphazardly thrown upon the ground and forgotten about, only to leap forth in a blooming excitation. Because the young prisoner of color is actually a real human being, he too is subject to this moral dynamic and is thereby amenable to the expiating force of imprisonment, which is officially unacknowledged but equally unconquerable.

Simply stated, in the segregated prison system; whether the prison sentence is just, unjust, or too long, whether the instrument of pain is the cage, the room, or the dormitory; the vast majority of prisoners feel the bite of confinement, experience suffering, and are thereby uplifted and empowered. Although this moral dynamic is too often nullified by the process of less eligibility, it is not for nothing that prisoners suffer and die in prison. Like all bitter harvests, this one also must be reaped in time. Characteristically, when the young prisoner of color becomes fully conscious of, and motivated by the expiating force of punishment, he is likely to utter something unusual like, "The life-snatchers have me, but they won't get my children"! Hence, the young prisoner of color entertains vivid dreams of returning to the enclave, not as a ready recidivist who is less eligibly restored, but as a person empowered to serve as a positive role-model for troubled youth. But to the fawning patrons of business-as-usual, and to the iron-clad proponents of "more is better" (i.e., more prisons, more time) -- to whom it is politically incorrect to acknowledge that the young prisoner of color is amenable to expiating forces--such talk of becoming a shepherd in the enclave is so much discordant idealism. For, as a rule, once the young prisoner's destiny has been imposed, it must not be altered--he must be less eligibly restored, no matter what.

Thus, when the prison official urges that the addict robber or addict burglar[3] is much too violent to be less eligibly restored in the foreseeable future, the public yields to the mis-belief that the prisoner can only be subdued by the cell, the gun tower, or the Special Housing Unit. In the majority of cases, this is an official self-serving exaggeration. Anyone who has lived in a maximum security prison for any length of time--especially one wherein violence is institutionalized--observes that violence for the mere sake of violence is manifested by only a small percentage of prisoners. When all is said and done, the only force that prevents the majority of prisoners from destroying the prison and each other (as in a prison riot) is nothing more than their individual choices not to do so. This moral choice--which prison staff do not acknowledge, but bet their lives on each working day--is largely due to the expiating force of punishment, of suffering, evidenced by the fact that many prisoners turn to religion and education while confined. Once removed from the influences of the enclave's criminogenic factors, plucked out of the man-made concentration of recidivism --which prisoners humorously refer to as being "rescued"--the average young prisoner of color appeals to his higher self and becomes more human, in the existential sense. As one prison official sardonically remarked, the prisoner now desires meals and dental appointments.

A further affirmation of this truth is that each business day of the year prisoners are

transported from state prisons throughout the state to county courthouses to stand in judgment for new Penal Law offenses committed while in prison. Newly committed offenses range in magnitude from possession of illicit drugs to homicide, which proves that there are opportunities in prison to be lawless. Again, in the end (and for many, many prisoners with eternal life sentences, this is the end) if the majority of prisoner were truly inherently violent, criminal, and untrustworthy, the prisons would be ungovernable. Hence, it is inevitable that as the young prisoner of color arrives at a clearer understanding of his assignment in relation to the prisoner specific enclave, and as the denizens of the prisoner specific enclave more clearly understand their assignment in relation to the segregated prison, Jim Crowism will reap diminishing returns. After all, from a historical perspective, how long can a good thing last?

The apologists for the penal status quo--feigning astonishment at the very existence of a segregated prison system--instinctively counter that the criminal justice system selects its clients according to criteria other than race, and that the resulting disproportions of minority prisoners is merely "demographically coincidental". "Demography" is the new code word used to deflect the fact that segregation is the culmination of past discrimination. Only when pressed by the weight of the evidence will it be reluctantly conceded that the criminal justice apparatus customarily removes offenders from the de facto[4] segregated enclave, thereby creating a de jure segregated prison system, only to less eligibly restore the ex-offender to the enclave--three distinct movements that suggest intent and design. It is precisely because the de facto form of segregation is continuously the precondition for the de jure form, and vice versa, that the state's minority-based penal system is the most egregious violation of both state and federal guarantees of "equal protection of the laws" [New York State Constitution, Article 1, Section II. United States Constitution, Amendment XIV, Section 1.]. Throughout this denigrating process, the prevailing official presumption is that segregation, and the inevitable discrimination that accompanies it, is quite normal to minorities.

Even when social malpractices are widely acknowledged, they may be traditionalized to the extent of being accepted as "lesser evils" which is itself a very traditional political ploy calculated to appeal to the fears and insecurities of the populace. The "lesser evil" formula cleverly pays tribute to virtue by exaggerating the imminence of vice. Hence, the business-as-usual proposition that the de jure segregated prison system can only be eliminated at the risk of more crime in the streets. This formulated artifice incorporates the same degree of conflict and ambivalence of purpose exhibited in justifying the prototypical injustice: "Yes, slavery is morally wrong, but what about the cotton"? However, as long as the "lesser evil" rationale flies with the public, its proponents will be amenable to a limited degree of compromise and cosmetic changes that do not threaten the continuation of the malpractice. Therefore, the establishment of a prisoner administrated prison, for instance, is really not so far-fetched because it would actually validate the practice of penal segregation.

Typically, the moment that the swell of minority prisoners began attracting critical attention and alarm, the practice of the "lesser evil" began to be propagated as an outright "positive good". We now read testimonials about the "benefits of an unwelcome trend" -- of what an economic boost prison expansion is to upstate rural communities. Townships avidly compete for new prisons to be erected in their locales, and town supervisors rhapsodize about "recession proof" and "environmentally safe" prisons. Business-as-usual patrons may even be seen on local television extolling the virtues of prison expansion for all of the jobs it creates, all of which is an insulting irony to prisoners of color who are destined to remain historically under-unemployable, especially in New York City where the ratio of black/white joblessness is nearly three to one.

In order to clearly understand how joblessness and penal segregation have become the twin towers of contemporary racism, it is necessary to briefly re-examine its source. From 1619, when the first Africans set foot on North American soil, until the present time, people of color have been the continuous objects of adverse labor relations. During the first constitutional convention in 1787, the course of adverse labor relations was firmly set when the free states of the North acceded to the demands of the Southern slavers in three well known respects: a provision to count a slave as three fifths of a person for the purpose of sending

Southern representatives to the lower house and to the electoral college; a clause to force the federal government from prohibiting the importation of slaves for twenty years; a clause to mandate the return of slaves who had escaped to free states. Although these constitutional provisions [Article 1, Section 1 and II; Article IV, Section II] were eventually amended, the rising degree of penal segregation bears a curious relationship to the Thirteenth Amendment and the constitution remains a pro-slavery document.

This curious relationship between penal segregation and the Thirteenth Amendment can be traced to the final months of the American civil war when Northerners outlawed the chattel slavery of African Americans, but modified the practice for other usages, as if this traditional form of adverse labor possessed a residual appeal. The Thirteenth Amendment, ratified in December 1865, formally introduced penal slavery and involuntary servitude as punishment applicable to all individuals "duly" convicted of criminal offenses. Surprisingly, lawmakers believed that legislative action alone would transmute an uncivilized practice into a socially useful one. Currently, over one half of American states have similar provisions in their constitutions authorizing a penal form of slavery and involuntary servitude for individuals convicted of criminal offenses. State constitutions that do not explicitly authorize this form of punishment provide for de facto penal bondage systems that ultimately conform to the spirit of, and are authorized by the Thirteenth Amendment.

Although the constitution of New York State does not explicitly authorize penal slavery and involuntary servitude, a historical reading of the applicable state laws reveals that penal bondage is in fact the end result of imprisonment. Significantly, Article II, Section 3, of the state constitution mandates disfranchisement of voting privileges for individuals convicted of "infamous crime". Since it is principally persons of color who are imprisoned for such crimes in New York, this disfranchisement code, in its effect, bears a historical resemblance to the Northern "black laws" of the antebellum period that were used to render people of color political nonentities in free society. Also, the New York Correction Law either completely arrogates, or severely limits, all personal freedoms guaranteed by the Bill of Rights, such as the right to privacy, and to be free from arbitrary searches and seizures. The young prisoner of color is thus rendered a total penal bondsman of the state government, the polar opposite of the individual at liberty to come and go as one chooses; to exercise autonomy over one's person; to freely associate with individuals of one's choice;-and, most importantly, to freely profit from one's labor.

Historically, an involuntary servant is a person of color who is forced to perform menial labor, either without payment or for a meager pittance. A slave is a person of color who possesses no political rights, and who is owned as property by another individual or entity, such as a company, or the state. It is in both of these senses that prisoners of color have traditionally referred to themselves as "state property"—a self-evident acknowledgement of the old substance in the new practice. That the white prisoners in prison rarely, if ever, refer to themselves as "state property" is due to the fact that, having no historical references to themselves as property, imprisonment to white prisoners (and to the overwhelmingly white staff) is received and experienced in an altogether different existential realm.

Regarding the pivotal question of labor, Article VII, Section 171, of the Correctional Law of New York affirms penal bondage as the foundation *of* New York's de jure segregated prison system. Not only may prisoners be compelled to labor ("other than Sundays", as in the antebellum situation), but other enactments in the same article specifically prohibit a prisoner's labor and time (read lifetime) from being contracted out to private individuals and entities. Also, the penal labor and time of prisoners may not be disposed of on the free market to compete with the labor and time of free persons. By law, any product of prisoner labor or time--mainly license plates and office furniture--may only be marketed by prison industries to other agencies within the state government.

Thus, in effect, Article VII guarantees that the average prisoner of color leaves the prison poorer than the day he arrived, which is why many ex-offenders "throw a brick" ["throw a brick at the penitentiary"; i.e., commit a crime] within the first few hours of being released. Other enactments in Article VII [Section 187 and 200.] provide that prisoners "may" be compensated for their labor, and for participation

in academic and vocational programs. Hence, the median daily pay for an prisoner is about seventy cents--an extremely meager "incentive" even by prison standards. The result is that in many prisons, services that are supposed to be free--laundry, haircut, legal assistance, et cetera --come with a price tag. Every prison has a brisk underground economy, literally speaking, a black market. In a setting where the strong customarily prevail over the weak, protection rackets are not uncommon. Since basic daily survival in prison requires mush more than the state provides, most prisoners rely upon the largesse of their families to supplement the prison diet and to dress warmly, a situation that prison staff have long regarded with sour resentment and a growing appetite.

Knowing from observation that the average prisoner struggles to make ends meet, and that he never is paid enough to support "dependent relatives" as Section 189 so grandly provides for, prison officials nonetheless propagate the self-serving deception that they provide all the basics for survival. This fiction has solidified into an official worldview that is then used as the basis of court decisions, *[Sanchez et al.* v. *Coughlin, et al* (Sullivan Co. Sup. Ct. 1992)] which then provides prison officials with a legal basis to view all incoming aid from families as surplus and fair game for seizure. With the recent prison building binge having stretched fiscal resources to the limit, prison officials have not only devised schemes to take back the few dollars per month provided to prisoners as an incentive, but also have deployed shrewd strategems to hold prisoners financially hostage to their families, who are mostly the enclaved poor.

Even many indigent prisoners who relied upon court appointed lawyers arrive in prison owing the court system a one hundred and fifty-two dollar surcharge for each felony conviction. Prison officials then become the debt collectors, and the prisoner's account is docked --sometimes for years--until the debt is paid. Articles such as laundry bags and knit caps that were formerly provided to prisoners are now sold in the prison commissary. If an prisoner receives a misbehavior report and fails to prevail during the ensuing administrative hearing, his account is then docked for a five dollar "surcharge" *[Born Allah* v. *Coughlin* (S. Ct. Ulster C. 1992)]. Even freedom now comes at a cost in that, once the ex-offender is less eligibly restored to the enclave, he must then pay a thirty dollar per month fee for parole supervision.

By far, the most sinister plot devised to keep the young prisoner of color poor and pointed backwards is the newly imposed twenty-five dollar application fee for the General Equivalency Diploma examination. Although a New York Department of Education regulation exempts prisoners from this fee [8 N.Y.C.C.R., Section 100 (i)(ii)(c)] a recent court ruling *[Sanchez,* Ibid] affirms the right of prison officials to override the Department of Education regulation and impose the fee. At a time when the American Council on Education reports that "minority students are far less likely to finish high school than white students", the imposition of this fee requirement upon a prison population that is ninety-five percent minority clearly functions as a discouragement and a prohibition to obtaining a G .E.D. Not surprisingly, the court in the *Sanchez* case ruled that since the fee requirement is applied to all prisoners, there are no grounds upon which to allege racial discrimination! Here is a very good example of how prison officials and the state courts exploit the presence of a few white prisoners to deny the reality of de jure segregation. Like the other curious relationships discussed above, this educational stumbling block is aptly reminiscent of the antebellum prohibition against teaching a slave to read and write, for an educated penal slave is a contradiction in terms, and a potential problem.

Essentially, from the standpoint of political economy, the young prisoner of color is still "pickin' cotton" and remains a complete stranger to the product of his labor and time. Importantly, within the contemporary penal economy, there is no such thing as an "idle" prisoner. Although the prisoner's labor and time is of no value to him, even if he did nothing except sleep and eat, he is thereby producing value for his keepers. By merely being a prisoner, he renders valuable the labor and time of his masters (prison employees collectively). To the prisoner of color, this value is alien and hostile because it is no sooner produced than it turns against him, threatening his very existence. Thus, the more value the young prisoner of color produces, the more impoverished he necessarily becomes; the more license plates he manufactures, the more he contributes to his own economical plight. For within the global economy of the real world, the

young prisoner of color is conditioned to be dependent.

The Article VII prohibitions that render the prisoner's labor and time of no value to him highlights the historical antagonisms between free and slave labor that crystallized into the Free Soil politics of the 1840s. The Free Soil Party held its first convention in Buffalo, New York, in August 1847. Under the banner "Free Speech, Free Labor, Free Men", this party opposed the expansion of chattel slave labor into unsettled territories such as Kansas and Nebraska. It was this protracted, heated discord between the free enterprise industrial capitalism of the North and the slave agricultural economy of the South that eventually erupted into the civil war. Free Soilers, like contemporary labor unions and business interests, insisted that slave labor and its products depressed the free enterprise economy through the unfair competition of cheap, un-free labor. Thus, in keeping with free market principles, the solution, then and now, is to bar slave labor and its products from the free market. As a result, prisoner labor— which is preponderantly black labor--is wanting of even reformative value because it is economically inferior, a deformity traditionally despised by free tabor.

This festering problem of adverse labor relations reveals the segregated prison system as a towering monument of the work-related stereotypes that have traditionally undermined the economic well being of African Americans, particularly the males. It was during the antebellum struggle between the free labor economy of the North and the slave economy of the South that white labor became indelibly typed as superior and black labor typed as inferior, which accorded with the standard perception of black personhood generally.

In the public view, white free labor was more efficient because it was voluntary, whereas black slave labor was inefficiently driven by the whip--hence, the origin of the tenacious myths of the black worker as "shiftless", "lazy", and "unproductive". This stereotype became institutionalized to the extent that labor associated with blacks was viewed as dishonorable, and even despised by poor whites as "degrading". While the abolition of chattel slavery was essential for the liberation of free labor, it still has not liberated people of color from an exclusionary labor market. The rise of penal segregation in contemporary America is the highest, most resistantly fortified expression of adverse labor relations since antebellum slavery. What has evolved is an intergenerational ethic of under-unemployability that establishes a direct relationship between joblessness and a de jure segregated prison system, wherein all of the traditional stereotypes achieve full force.

It is a generally accepted truism that social evils, like personal ones, possess their own seeds of disaster. The most telling factor that has set the current practice of penal segregation upon the same collision course as its antebellum predecessor is the "more is better" phenomenon; that is, the inherent tendency of institutional slavery and involuntary servitude to rapidly proliferate and expand. For example, in 1982, there were thirty-eight state prisons and eleven years later there are over *sixty-two* prisons. Likewise, in 1983, New York State prisons housed 28,499 inmates, a total that increased to 63,000 by 1993. With each new prison built, the original penal segregation became more pronounced and institutionalized. Rather than wisely investing fiscal resources to address the social problems of racial discrimination, poverty, and crime concentrated in the prisoner specific enclaves -- which includes a mere twelve percent of New York's general population--elected officials, goaded by personal vanity and the violent rhetoric of the war on drugs, chose instead to invest billions of dollars in the expansion of a segregated prison system that is visibly a memorial to Jefferson Davis, J.E.B. Stuart, Stonewall Jackson, and Robert E. Lee . The revenue used for prison expansion was provided by the Urban Development Corporation, a bond issuing authority established by Governor Rockefeller as a memorial to Dr. Martin Luther King, Jr. The original purpose of U.D.C. was to build housing for the poor.

Determined to "pack' em in there", but fiscally restrained from building even more prisons, there is now a movement afoot in the state legislature to house two prisoners in a little cage that is far too small for one prisoner. Basically, "double bunking", as this proposal is called, is but a cunning maneuver aimed at expanding penal segregation internally rather than externally. Against all of the weight of historical evidence to the contrary, slavery and involuntary servitude is again accepted as a positive good, and "mo' better" again appears to be reasonable and logical, especially to the

patrons of business-as-usual who seek the immediate gratifications of the paycheck. In fact, the minority based prison system has become so central to the upstate rural economy that the mere mention of decreasing the prison population triggers an instant protest from union representatives, replete with picket lines in front of the prisons. Ominously, the potential for history to repeat itself is striking.

In truth, "mo' better" is not better but worse because ultimately a free society will be judged by its record of producing life-giving values--be they material or social--as opposed to the negative, alienating values generated by penal bondage and segregation. Any government that squanders its fiscal resources by making "war" on its most excluded, vulnerable, and poorest citizens in effect makes war against itself by creating its own internal enemies. An expansive Jim Crow prison system is never a life-giving value to free society because a segregated entity-- regardless of why or wherefore--is a superseding icon of injustice, and a monument of shame that casts a very long shadow of contention and unrest across the whole social landscape.

Having presented detailed proofs of how penal slavery and involuntary servitude is the legal basis of New York's de jure segregated penal system and, having demonstrated the direct relationship between the current practice and its antebellum prototype, it is sufficiently clear that a truly "nontraditional" approach to criminal justice in New York must necessarily address the problem of prisons within the broader context of racial justice, which is presently a dominant theme within the greater society.

Over one hundred years ago, when New York's prison population was predominantly white, the New York Prison Commission reported that,

> Protracted incarceration destroys the better faculties of the soul. . . Most men who have been confined for long terms are distinguished by a stupor of both the moral and intellectual facilities. . . Reformation is then out of the question [quoted in CANY and NYSCCJ, 1990].

These compelling observations spurred the initiatives called the "Irish system", consisting of computation of prison sentences, and tickets of leave to reduce the length of confinement as a reward for good behavior. A parole system was the next initiative in this decarceration plan, which was supplemented further by legislative action allowing for a one third deduction off of minimum sentences. These powerful measures, fortified with post-release services, were not implemented to reduce overcrowding or expenditures but to avert the proliferation and expansion of a bad practice that although still in its infant stage, was clearly and predictably antithetical to public safety. The fact that the current incarceration rate for whites in New York is relatively low is evidence that decarceration initiatives are very effective, when tailored to the social needs of the prison population.

That the one third deduction off of minimum sentences was repealed by the legislature in 1970 [Correction Law, Article 9, (Section 230)], just when minority prisoners were becoming the overwhelming majority, is another curious coincidence. The result, however, has been the permanent ruination of myriads of good persons who deserved a break in life, and could have been enabled to take advantage of good opportunities, which they were forced to miss. As opposed to negative incentives, which are abundant, a decent opportunity to advance in life is so rare in the lives of young men of color that, once missed, it is usually gone forever. Presently, in the segregated prison system, the same person who deserves a break, a chance to be out there for that once in a lifetime encounter with opportunity, remains locked-down and at the mercy of a different kind of prisoner who looks forward to nothing more than the next recreation period in the yard, the next episode of the daily soap opera on television, the next conflict with the staff and other prisoners.

For decades, it has been axiomatic among prison officials that, as in free society, it is only the minority of prisoners who routinely trouble the waters of the prison order, thereby precipitating one thousand and one petty restrictions throughout the prison. Within the resulting tyranny, the prisoner who is diligently attempting to do something positive with the remnant of life left to him ends up suffering the same fate as the prisoner who is wholly indifferent and generally a loose cannon. Thus, in a cruel reversal of normal proprieties, the prisoner who consistently walks a straight line becomes a mere anonymous figure who is regularly taken - for granted, or draws the bizarre suspicion of officialdom for not acting like "a

real inmate". In this manner, all attention is focused upon a few prisoners who typify what staff persons expect from all prisoners. These few prisoners often fare better in the negative scheme of things owing to the inducements they receive to behave. As it is presently constituted, the prison system n tied as it is to the dead carcass of the prisoner specific enclaves -- rarely leads to anything except the certainty of ruination.

That there should be a one third deduction off of minimum sentences for prisoners who are opportunity-ready and merit an early release from penal segregation has been a foregone conclusion for years. However, the current resistance to this just policy in the state legislature by double-bunking advocate lawmakers, who would no doubt expand penal bondage to eternity, is a sure sign that certain legislators are determined to keep the segregated prison system on the collision course to the bitter end. This is exactly why a genuine nontraditional approach to criminal justice must disseminate the ugly truth and enlighten citizens of New York-- in prison and in free society -- concerning the necessity of focusing attention and resources upon the issues in front of the problem, where the focus belongs. Criminal justice and penal bondage have evolved to the point where it cannot reform itself. What Thomas Jefferson observed about the South in 1820, is quite fitting for New York in 1993: it has "the wolf by the ears and cannot let go".

Now that bondage and segregation have reunited into the most pristine and potent form of racism, it is unquestionable that, to the degree that slavery/involuntary servitude is legally practicable, African Americans - and other minorities such as Latinos, will necessarily preponderate in penal bondage. This is true because within the context of American history the recessive tendencies of racism, according to its inherent logic, always aim to reestablish the original injustice, and the de jure segregated prison system it is. Thus, as a long-term strategy, a nontraditional approach to criminal justice must aim to repeal the exception clause of the Thirteenth Amendment to eliminate forever the enduring relationship between people of color and the institution of bondage, in any form. Once the exception clause is repealed, the Thirteenth Amendment will then read:

> Neither slavery nor involuntary servitude shall exist within the United States, or any place subject to their jurisdiction.

Until Americans are convinced that penal bondage, with its flagrantly racist characteristics, is inconsistent with the inclusive aims of a democratic society, people of color in New York and their allies must employ short-term, viable solutions to prevent the ruination of future generations of minorities, who are definitely earmarked for penal bondage. One viable solution is a radical affirmative action initiative (not another "program") to exclude African and Latino Americans from being disproportionately "selected" for penal bondage, and thus proportionately included in the opportunities to be real Americans too. Such an affirmative action initiative will have to be based upon a quota system that would limit the imprisonment of minorities to the percentage of their representation in New York's total population. If persons of color represent, say, fifteen per cent of the general population, then they should represent no more than that percentage within the state prison population. There is no other method of forcing state government officials--who exhibit a process addiction to imprisoning minorities for social control--to remove their fiscal resources from the back of social problems that lead directly to penal bondage and re-deploy such resources to the front of these problems, where they will be most effective.

In a number of Supreme Court decisions, like *Brown* v. *Board of Education* [349 U.S. 294 (1955)], the legal principle has been well established that the government has an obligation to remove all of what one Justice in 1883 described as the "badges and incidents" of slavery. Such "badges and incidents" include the long history of joblessness in New York City that has been the scourge of minorities for generations, leading to economic inequalities directly responsible for the advent of prisoner specific enclaves, with their substandard housing, abject poverty, and de facto segregated public school systems. Now, having failed so spectacularly in removing these "badges and incidents" of slavery, it is as if the state government has announced, "If you can't beat 'em, join 'em", and erected the most ironclad badge and incident of slavery of them all, the Jim Crow prison system! In the *Brown* decision, the Court noted that de jure segregation has the greater negative impact because it gives to

segregation the official seal of approval. Thus, a radical affirmative action plan is urgently needed to eliminate this present effect of past discrimination. And if a de jure segregated penal system, that sucks the life-blood from a mere twelve per cent of the population, does not qualify as a present effect of past discrimination, then the narrow view has progressed to total blindness.

Once such a quota system is in place, and it is clear that the old skin game does not work anymore, it won't take long for fiscal resources and manpower to encircle the social problems directly related to segregated penal bondage. Fortunately it is not as if the site of these social problems is scattered all over creation. No, the worst of these social ills are highly concentrated in only a few prisoner specific enclaves within a mere eighteen assembly districts. By being so conveniently concentrated, these locales seem to be begging for help. Once law enforcement is emancipated from the never-winning "war on drugs", and the politics thereof, then maybe it can figure out a way to keep the drugs out of the entire state? No! Only out of the seven targeted enclaves in only eighteen assembly districts, for starters! This penal quota system would also save many lives and lots of money by freeing resources for "drug treatment", which every official and his brother is always talking about. Now there would be less talk and more action. And best of all, once the penal quota system is implemented, minority males in New York, especially, would not be born in the shadow of the Thirteenth Amendment anymore.

But, as sure as daybreak, and as predicable as nightfall, the first thing that Mr. "Business-as-usual" will say to Mr. "Mo' Better" is: "What about my paycheck"?! Sooner or later, one way or the other, Mr. "Business-as-usual" will arrive at the understanding that his "labor" for the segregated penal system produces value, "yes, but" value of a socially negative and alienating type. For if it is the goal of social institutions to produce positive, life-giving values, then it must be conceded that when the young prisoner of color, who was born less eligible, is lesser eligibly restored to the prisoner specific enclave with very little except a forty-seven per cent certainty of becoming just another criminogenic factor, then it is very likely that if Mr. "Business as- usual" is more productively re-deployed to the front of the problem too, his labor would then be more creative

As for Brother "Mo' Better"; as perennial residents of the prisoner specific enclaves and the segregated prison systems "of this world"' we understand, and much mo' better than you, that many of us need to be imprisoned, but not excessively, and without the penal bondage, please--it smacks too much of the antebellum thing. That the Auburn State Prison was in existence for forty-five years before the Thirteenth Amendment was ratified is proof that an individual can be properly locked-down without being subject to the legalities of penal bondage, which people of color very rarely recover from, if at all, even when it is applied in small dosages.

As for the well-meaning non-traditionalists who would establish prisons administered solely by prisoners themselves? No matter who administers the segregated prison system in New York, we do not want our children in them, thank you anyway.

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[1] See: Correctional Association of New York and New York State Coalition for Criminal Justice (1990); and Federation of Protestant Welfare Agencies *(1990).*

[2] Together Blacks and Latinos comprise ninety-five percent of the state prison population. Both ethnic groups usually originate from and return to the same prisoner specific enclaves.

[3]Penal Law, Section 70.02, Subdivision b, classifies Burglary in the Second Degree as a violent felony.

[4]De facto segregation is due mainly to residential patterns, while the de jure form is government imposed/influenced.