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Prison Race Rights: An Easy Case for Segregation

Sarah Spiegel

Prison "Race Riots": An Easy Case for Segregation?

Sarah Spiegel†

INTRODUCTION

On February 23, 2000, California's Pelican Bay State Prison placed two of its units on a full lockdown after an allegedly race-motivated prison riot involving nearly 300 inmates.[1] In suppressing the violence, prison guards shot seventeen prisoners, killing one.[2] Andrew Escalera, an inmate at Pelican Bay at the time of the incident, was not involved in the violence.[3] Nevertheless, because prison administrators classified him as a "Southern Hispanic," from Southern California, and because they viewed Southern Hispanics as more "tight[ly]-knit, organized, and dangerous" than other ethnic groups, Escalera was kept on lockdown for the next four months.[4] Two years later, hundreds of inmates remained on full lockdown, generally confined to their cells, unable to participate in work or education programs, and denied contact visits and outdoor exercise.[5] Southern Hispanics comprised the majority of these inmates and were significantly overrepresented among inmates on lockdown.[6] The prison warden conceded that the prison still managed prisoners based on their ethnic affiliations, despite a planned shift to using individualized assessments of gang ties or violent tendencies.[7] Similar race-based lockdowns targeting

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1. *See* Escalera v. Terhune, 2004 Cal. App. Unpub. LEXIS 1293, at *2 (Cal. Ct. App. Feb. 10, 2004).

2. *See id.*

3. *See id.*

4. *Id.*

5. *See id.* at *2, *6 (prisoners on full lockdown got one or two hours of outdoor exercise per week, less than the amount allowed to inmates in the Security Housing Unit).

6. *See id.* at *6.

7. *See* Escalera v. Terhune, 2004 Cal. App. Unpub. LEXIS 1293, at *6 (Cal. Ct. App. Feb.

black and Latino prisoners occur with disturbing frequency in California prisons.[8]

The state appellate court reviewing the lockdown of Mr. Escalera in *Escalera v. Terhune* found the treatment unacceptable because the lockdowns exceeded the permissible time limit for a "short term emergency" response.[9] However, this ruling was surprising in light of the Ninth Circuit's previous approval of similar lockdowns at Pelican Bay that targeted "Southern Hispanics" for race-based restrictions.[10] The Ninth Circuit had reasoned that "[i]t was . . . reasonable to believe that Hispanics were, as a group, more likely to be violent than other groups and thus more worthy of closer scrutiny."[11] In Orwellian language, the court continued that "[p]rison officials need not wait for an unknown instigator to incite riot before acting against him."[12]

Despite such blatant race-conseious language, prison racial segregation has slipped under the radar in equal protection jurisprudence. The current judicial understanding holds that the Equal Protection Clause generally forbids racial classifications. Prison segregation policies must therefore be subjected to strict scrutiny, meaning the government cannot implement segregation policies unless they are narrowly tailored to achieve a compelling government interest. Unfortunately, the legal academy has contributed to the judiciary's belief that, because preventing prison violence is an important interest, segregation policies may easily withstand strict scrutiny.

This Comment takes a different approach. Starting from the premise that the Constitution forbids practices that operate to subordinate minority groups, I use the lens of the social meaning test proposed by Charles Lawrence and other scholars to expose the racist meaning of race-based lockdowns and question the received wisdom that such lockdowns present an easy case for race-based classification. The social meaning test recognizes that modern America's repressed racism has found subtle ways to express itself through racially coded cultural symbols; in order to decode these symbols, we may examine evidence including the historical roots of purportedly neutral ideas and practices.[13]

In Part I of this Comment, I highlight the lax treatment of racial lockdowns subsequent to race riots in the writings of legal scholars and Supreme Court Justices. I identify three assumptions about prison racial segregation that animate this understanding of prison segregation as an easy

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10, 2004).

8. *See, e.g.*, Parker v. Kramer, No. CV-F-02-5117, 2005 U.S. Dist. LEXIS 36750, at *6-17 (E.D. Cal. Aug. 29, 2005); *see also* Walker v. Gomez, 370 F.3d 969, 971 (9th Cir. 2004).

9. *Escalera*, 2004 Cal. App. Unpub. LEXIS 1293, at *8.

10. *See* Ramirez v. Reagan, No. 95-15048, 1996 U.S. App. LEXIS 9710, at *6, *20 (9th Cir. Apr. 9, 1996).

11. *Id.* at *20.

12. *Id.*

13. *See* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 356, 366-68 (1987).

case. First, prison segregation is a "neutral" practice, or perhaps even beneficial to minorities. Second, prisoners' racial animosity toward other inmates is the source of most prison violence. Finally, prison segregation, at least in emergency situations, easily passes strict scrutiny. The academic literature has failed to contest these assumptions. Indeed, many progressive scholars rely on them.

In Part II, I present a brief history of prison segregation and prison racial violence, from the segregated conviet lease system in the South following the Civil War to the recent prison violence in Los Angeles County. This perspective serves as a foundation for the social meaning critique of both segregation policies and academic scholarship downplaying the constitutional significance of these policies.

In Part III, I draw on this history to contest the three assumptions discussed in Part I. I argue first, that prison segregation is problematic not only because it entails racial classification, but because it carries a racist social meaning; second, that the personal race prejudice of inmates is not the primary source of prison violence; and third, that scholars have erred in brushing off prison segregation as an easy example of a practice that survives strict scrutiny.

I
ASSUMPTIONS ABOUT RACE IMPLICIT IN THE ACADEMIC AND JUDICIAL DISCUSSION OF PRISON SEGREGATION

In this Part, I discuss first, the legal academy's portrayal of prison segregation as an "easy case," and second, the recent Supreme Court decision in *Johnson v. California*. Finally, I uncover the assumptions about race and racism implicit in these discussions of race-based lockdowns.

A. Prison Race Riots as an Easy Case

Prison segregation stands out as a lone exception to the current anti-classification understanding of the Equal Protection Clause. Even liberal legal scholars have treated racial segregation prompted by prison violence as an easy case that merits almost no analysis. Constitutional law professor Paul Brest explained that he disfavored an across-the-board ban on racial classifications because such a ban would preclude beneficial uses of race such as "the temporary segregation of prisoners during a race riot, or the integration of a . . . school system."[14] In half a sentence, he legitimized the segregation of prisoners. With only slightly more analysis, Brest's colleague John Hart Ely similarly presented a hypothetical race riot as the quintessential case satisfying strict scrutiny. He urged readers to accept "the case where the prison warden temporarily separates the black and white prisoners in order to quell a race

14. Paul Brest, *In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 15 (1976).

riot," explaining that "the fit is essentially perfect . . . and beyond that the goal, of preserving the lives and limbs of prisoners of both races, is one we can count as compelling."[15]

Brest and Ely laid the foundation for later writers and judges to accept raeial segregation as a legitimate response to prison rioting. In his oft-cited concurrence in *Richmond v. J.A. Croson*, Justice Antonin Scalia gave prison segregation the Supreme Court's seal of approval, writing that "only a social emergency rising to the level of imminent danger to life and limb—for example, a prison race riot, requiring temporary segregation of inmates . . . can justify an exception to the principle embodied in the Fourteenth Amendment that '[o]ur Constitution is colorblind.'"[16]

Dozens of legal commentators have adopted Justice Scalia's conclusions in increasingly emphatic language, creating a chorus of support for racial lockdowns. One scholar writes that "it would be crazy" not to segregate antagonists in a race riot.[17] Another implies that no one litigates prison race riot cases because "everyone would agree" that segregation is legitimate.[18] A third describes race-based lockdowns as "[o]ne of the few examples on which almost all critics can agree."[19] This third scholar has proved most perceptive. Not a single voice, either from the legal academy or from the courts, has contested the characterization of prison race riots as the prototypical example of a situation that satisfies strict scrutiny.[20]

B. Johnson v. California – the Supreme Court's Treatment of the "Easy Case"

A close examination of both the majority and dissenting opinions in *Johnson v. California*, a 2005 case involving a challenge to California's prison racial segregation policy, reveals that these academic assumptions about prison racial segregation are reflected in Supreme Court jurisprudence. In *Johnson*, the United States Supreme Court found that strict scrutiny applied to California's policy of temporarily segregating new or transferred prison

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15. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 148 (1980).

16. Richmond v. J.A. Croson, 488 U.S. 469, 521 (1989) (Scalia, J., concurring) (citation omitted). Although Scalia's statement was in a concurrence, it has been incorporated into Supreme Court majority opinions including the recent decision in *Johnson v. California*. *See* 543 U.S. 499, 512-13 (2005).

17. Michael H. Shapiro, *Is Bioethics Broke?: On the Idea of Ethics and Law "Catching Up" with Technology*, 33 IND. L. REV. 17, 59 (1999).

18. Gail Heriot, *Thoughts on* Grutter v. Bollinger *and* Gratz v. Bollinger *as Law and as Practical Politics*, 36 LOY. U. CHI. L. J. 137, 160 n.117 (2004).

19. Wayne McCormack, *Emergency Powers and Terrorism*, 185 MIL. L. REV. 69, 128 (2005).

20. A recent search on Lexis revealed forty-three references to prison race riots (search terms "prison /5 racc /5 riot"); all of thcse authors either cited Justice Scalia uncritically, or expressed independent support for scgregation during riots. (Scarch executed June 30, 2006).

inmates by race.[21] California's unwritten policy was to place all new male inmates and all male transfers with cellmates of the same race for a sixty-day evaluation period.[22] The California Department of Corrections (CDC) defended its policy as vital to the prevention of violence caused by racial gangs.[23] Plaintiff Garrison Johnson, an African-American inmate whom prison officials had repeatedly double-celled with other African-American inmates, filed an equal protection challenge to the policy.[24]

The majority opinion, authored by Justice Sandra Day O'Connor, [25] reaffirmed the Court's position that strict scrutiny applies to all racial classifications. In so doing, she relied heavily on cases that applied strict scrutiny to purportedly benign programs.[26] Thus, she cited *Adarand Constructors v. Pena*, which had applied strict scrutiny to strike down a federal plan granting financial incentives to contractors who hired minority subcontractors, and *Grutter v. Bollinger*, which upheld a university affirmative action plan under a strict scrutiny analysis.[27] To the CDC's claim that the policy was "neutral" because it did not burden any particular group, she responded that even neutral classifications merited strict scrutiny.[28] Here, she cited *Shaw v. Reno*, a case that struck down North Carolina's redistricting plan that had created two majority-black districts.[29] In all three cases, the Court strictly scrutinized programs that would have promoted minority achievement and political participation, and in two of them, the Court derailed the programs as a result. By relying on these cases, O'Connor suggests that CDC's was policy as similarly beneficial to minorities.

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21. *See* 543 U.S. 499 (2005). *Johnson* marks a rare case in which strict scrutiny has been employed in favor of a minority plaintiff. Since the articulation of the strict scrutiny standard, heightened review, ostensibly created to protect the interests of racial minorities, has primarily been used to strike down affirmative action programs and other policies designed to benefit minorities. *See also* Pamela S. Karlan, *John Hart Ely and the Problem of Gerrymandering: The Lion in Winter*, 114 YALE L.J. 1329, 1344 (2005). Karlan refers to this as "the deep irony in the entire enterprise of strict scrutiny." *Id.* The only other case to employ strict scrutiny in a racially progressive manner was *Loving v. Virginia*, 388 U.S. 1 (1967), which struck down Virginia's antimiscegenation statute. *See id.* at n.70.

22. *See Johnson*, 543 U.S. at 502.

23. *See id.* Prison representatives reportedly downplayed the segregation policies before the Supreme Court; in reality, prisons practice widespread race-conscious decision-making, from housing to job assignments. *See* Jeralyn, *Race Based Prisons in California*, TALKLEFT: THE POLITICS OF CRIME, Jan. 20, 2005, http://www.talkleft.com/new_archives/009397.html (last visited January 22, 2008).

24. *See Johnson*, 543 U.S. at 503.

25. Justice O'Connor was joined in her opinion by Justices Kennedy, Souter, Ginsburg, and Breyer; Justice Kennedy filed a dissenting opinion, and Justice Thomas filed a dissenting opinion in which Justice Scalia joined; Justice Rehnquist took no part in the decision. *See id.* at 501.

26. *See id.* at 505.

27. *See id.* (citing Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995), and Grutter v Bollinger, 539 U.S. 306 (2003)).

28. *See id.* at 506.

29. *See id.* (citing Shaw v. Reno, 509 U.S. 630, 651 (1993)).

The *Johnson* Court did not decide whether the CDC's policy was constitutional. Instead, it remanded the case for consideration under strict scrutiny.[30] The application of strict scrutiny should have doomed the segregation policy; however, O'Connor's opinion provided a means to save it. She declared that preserving prison security was a compelling state interest that might justify facially racial classifications.[31] As support, she relied on Justice Scalia's *Croson* concurrence discussing segregation in response to prison race riots as a practice that withstands strict scrutiny, and then cautioned that strict scrutiny is not "'strict in theory, but fatal in fact.'"[32] A district court following O'Connor's opinion could find that prisons generally present a "social emergency" justifying prophylactic segregation.

Justice Clarence Thomas's vigorous *Johnson* dissent, in which Justice Scalia joined, argued that the Equal Protection Clause did not demand strict scrutiny for racial classifications within prison walls.[33] Thomas dismissed the equal protection argument as theatrical and silly, writing that "[t]he majority is concerned with sparing inmates the indignity and stigma of racial discrimination. California is concerned with their safety and saving their lives."[34] Thus Justice Thomas neatly glossed over Johnson's equal protection argument by carefully reframing the issue of prison segregation. First, as the above quotation demonstrates, Thomas explicitly presented the CDC's policy as designed to protect minorities. He described the racial gangs as preying on African-American inmates.[35] He cited three interracial murders perpetrated by racial gangs, two of which involved African-American victims and white supremacist killers.[36] He provided no statistics to support a claim that white-on-African-American crime motivated the CDC's policy; however these anecdotes strongly implied that the segregation policy primarily functioned to protect African-Americans from racist whites.

Next, Thomas's dissent built a case for the compelling need justifying the CDC policy by stressing the pervasive violence of prison gangs, especially those organized along racial lines.[37] He credited the opinions of prison guards

30. *See* Johnson v. California, 543 U.S. 499 (2005).

31. *See id.* at 513-14. In fact, the case was never considered on remand because the CDC agreed to settle the case in December of 2005. According to the settlement, the CDC would immediately end the policy of segregating new and transferred inmates; within two years, the CDC would end all segregation in California prisons. *See* Cicero A. Estrella, *State agrees to desegregate prisons: Inmates had been assigned cellmates based solely on race*, S.F. CHRON., Dec. 20, 2005, at B5, *available at* http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2005/12/20/BAG72GAQ291.DTL&hw=johnson+settlement+prison+segregation&sn=001&sc=100 (last visited January 22, 2008)

32. *Johnson*, 543 U.S. at 512-14 (quoting *Adarand*, 515 U.S. at 237).

33. *See id.* at 524 (Thomas, J., dissenting).

34. *Id.* (Thomas, J., dissenting) (citations omitted).

35. *See id.* at 534 (Thomas, J., dissenting).

36. *See id.* (Thomas, J., dissenting).

37. *See id.* at 534 (Thomas, J., dissenting).

and administrators, who believed that full integration would lead to widespread and serious violence.[38] In so doing, he continued his ostensible focus on protecting the needs of minorities by referring both to an amicus brief for the National Association of Black Law Enforcement Officers[39] and to Johnson's own statement that he was afraid of racial violence.[40] However, Thomas extended the problem of racial violence in prisons to the outside world by arguing that "street gangs are often just an extension of prison gangs, their 'foot soldiers' on the outside."[41] This fear-inducing language linked prison violence with street gangs, calling up familiar tropes of minority criminality.

Finally, Thomas trivialized the impact of the CDC's policy by framing the segregation concern as a matter of association rather than subordination. Crediting the CDC's willingness to make occasional exceptions to the rule, he explained that Garrison Johnson never requested to be housed with a person of a different race.[42] Thomas noted that Johnson lived with African-Americans for the sixteen years that he was permitted to choose his cellmate, insinuating that Johnson did not sincerely wish to associate with members of other races.[43] Thomas defended the segregation policy because there were alternative means for prisoners to "exercise the restricted right" by interacting with members of different races.[44] Johnson was free to interact with many non-African-American inmates in the dining hall and the exercise yard, and according to Thomas, Johnson had no constitutional complaint.[45]

Having presented segregation as a means of protecting minorities, emphasized the dangers of prison gangs, and discredited Johnson's claimed desire to interact with whites, Justice Thomas easily concluded that the Court need not exercise strict scrutiny. Instead, he endorsed deferential scrutiny, which the CDC's policy clearly survived. Thomas urged, however, that the segregation policy was likely to withstand even strict scrutiny.[46] Thomas agreed with the majority that the state interest in maintaining prison order and security was compelling. The only issue on remand was whether the policy was narrowly tailored, and here Thomas again advocated deference to prison

38. *See id.* at 537 (Thomas, J., dissenting).

39. *See id.* at 532 (Thomas, J., dissenting) (citing Brief for the National Association of Black Law Enforcement Officers, Inc. as Amicus Curiae Supporting Respondents, Johnson v. California, 543 U.S. 499 (2005) (No. 03-636), at 12 [hereinafter NABLEO Brief]. The NABLEO supports its interest as *Amicus Curiae* by declaring that "NABLEO members know first hand the serious problems of racial discrimination that continue to plague the administration of criminal justice . . . . Our experience as law enforcement professionals strongly confirms . . . that aecomplishment of important objectives – including basic public safety responsibilities – will sometimes require the adoption of policies that take race into account." NABLEO Brief, at 1).

40. *See Johnson*, 543 U.S. at 535 (Thomas, J., dissenting).

41. *Id.* at 533 (Thomas, J., dissenting) (citation omitted).

42. *See id.* at 528 (Thomas, J., dissenting).

43. *See* Johnson v. California, 543 U.S. 499, 550 (2005) (Thomas, J., dissenting).

44. *Id.* at 536 (Thomas, J., dissenting).

45. *See id.* (Thomas, J., dissenting).

46. *See id.* at 547 (Thomas, J., dissenting).

officials.[47]

C. Assumptions about Prison Racial Segregation

The way in which courts and commentators have treated prison race segregation reveals a set of arguments and assumptions about race and racism. First, judges and legal scholars have presented race-based lockdowns as neutral, or even beneficial to minorities. For example, liberal scholar Brest compared racial segregation in prisons to racial integration in schools, presenting both as instances in which the state may legitimately take race into account. Ely emphasized protecting the "lives and limbs" of inmates. Similarly, conservative Justice Thomas repeatedly portrayed the CDC's policy as a means of protecting minorities.

Second, scholars present prison violence as stemming from the prejudice of inmates toward other inmates. By referring to "race riots," these writers imply that the violence is caused by race or racism. Thomas confirmed this understanding, writing that "[a]nyone familiar with prisons understands the seriousness of the problems caused by prison gangs that are fueled by actively virulent racism and religious bigotry."[48]

Third, the discourse of "race riots" assumes that prison racial segregation and lockdowns serve a compelling state interest and are narrowly tailored. Moreover, it presents prisons as the clearest case where race matters. Brest, Ely, and Scalia all chose to highlight prison riots as the prototype for the acceptable use of racial classifications. All the commentators who uncritically cited Scalia lent further legitimacy to the idea that prisons are a unique setting justifying race-based measures.

The rest of this Comment tests these assumptions by exploring the history and reality of prison segregation. I aim to provide context for the discourse of prison race riots by recounting a history of race and the prison system that scholars have too often ignored.

II
THE HISTORY OF PRISON SEGREGATION IN AMERICA

In this Part, I present a brief historical account of segregation and racial violence in prisons, highlighting aspects that have been left out of the discussions of prison segregation. I begin with prison segregation in the Deep South from Emancipation through the early twentieth century. Then I describe prison integration in the 1960s and the notorious prison violence of the 1970s. Here, I focus on the Attica prison riot, one of the best-known incidents of prison violence. I also discuss connections between the Attica uprising and the

47. *See id.* at 548 (Thomas, J., dissenting).

48. *Johnson*, 543 U.S. at 532 (Thomas, J., dissenting) (quoting Stefanow v. McFadden, 103 F.3d 1466, 1472 (9th Cir. 1996)).

California prison reform movement. Finally, I discuss current prison racial violence, focusing on California. These episodes form the basis for the application of the social meaning test in Part III, *infra*.

A. Prisons in the Deep South – Slavery Perpetuated

The roots of the segregated prisons lie deep in the Southern history of slavery and explicit racial subordination.[49] Shortly after slavery ended, Southern prisons filled with African-Americans, many convicted of property crimes.[50] Lack of adequate jail space prompted Mississippi to develop the "convict lease" system, where convicts did hard labor for white plantation owners.[51] These ex-slave-masters segregated their workers by race and put African-Americans to work in brutal conditions that led to a 10 to 15 percent annual mortality rate.[52] The system proved profitable, filling the labor shortage left by the demise of slavery, and reinforcing the South's cherished ideals of white supremacy.[53] Often, local law enforcement officials conspired with businessmen to provide labor by systematically arresting African-American men on trumped up charges such as "disorderly conduct," and then leasing them to employers.[54] Soon convict leasing spread across the South.[55]

The convict lease system in the Deep South persisted through the turn of the twentieth century.[56] Vast plantation-style prisons such as Mississippi's Parchman Farm, where segregation, hard labor, and corporal punishment were the norm, marked the next trend in mass incarceration.[57] Supervised by African-American "trusties" (gun-wielding convicts) and guarded by white sergeants, the convicts lived essentially as they had under slavery.[58] While a few inmates were white, the prisoners were overwhelmingly African-American.[59] White prisoners often received more comfortable accommodations than African-Americans.[60] This inequity is underscored by the fact that when prisons were integrated, white prisoners objected to being forced to use the substandard facilities in the formerly African-American sections.[61]

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49. *See generally* DAVID M. OSHINSKY, WORSE THAN SLAVERY: PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE (1996).

50. *See id.* at 34.

51. *See d.* at 35-36.

52. *See id.* at 45-46.

53. *See id.* at 56-57.

54. *See id.* at 71.

55. DAVID M. OSHINSKY, WORSE THAN SLAVERY: PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE 57-60 (1996).

56. *See id.* at 68-70.

57. *See id.* at 138, 143, 149.

58. *See id.* at 141.

59. *See id.* at 162.

60. *See, e.g.*, McClelland v. Sigler, 327 F. Supp. 829, 834 (D. Neb. 1971).

61. *See, e.g.*, Dixon v. Duncan, 218 F. Supp. 157, 158 (E.D. Va. 1963). In *Dixon*, a white inmate objected to prison integration. In addition to the inadequacy of the facilities, he complained that African-Americans had a high rate of communicable diseasc and he feared impending

B. Desegregation, Riots, and Prison Reform

Before the 1960s, courts generally refused to review the constitutionality of prison rules and practices.[62] Judges reasoned that they lacked the expertise to rule on prison operations effectively, and deferred to the judgments of prison officials.[63] This "hands-off" policy led to a "tradition of lawlessness" in the administration of prisons.[64] In this context of extreme deference to prison officials, courts permitted prisons and jails to maintain racially segregated facilities.

The Supreme Court did not declare prison segregation unconstitutional until 1968, in *Washington v. Lee*, fourteen years after *Brown v. Board of Education* declared school segregation unconstitutional.[65] As with *Loving v. Virginia*,[66] which legalized interracial marriage thirteen years after *Brown*, *Lee* demonstrated that the most deeply entrenched of social practices take the longest to disestablish.

In the 1960's, Southern prisons were still governed by the same Jim Crow laws that demanded racial segregation in all aspects of life.[67] However, prison racial segregation was a phenomenon that occurred nationwide. California segregated its inmates as late as 1959[68] and Washington State kept inmates of different races separate until 1965.[69] New York kept Attica Prison, the site of America's deadliest prison uprising, segregated through the 1960s.[70]

During the 1960's and 1970s, prison violence increased sharply.[71] Some attributed this to prison integration.[72] After Parchman Farm's plan to

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violence. *See id.* Declaring that "our constitution is color blind," the district court found an equal protection violation because whites were forced to integrate while blacks had the choice to remain in all-black dormitories. *See id.* at 159-160.

62. *See, e.g.*, James E. Robertson, *The Majority Opinion as the Social Construction of Reality: The Supreme Court and Prison Rules*, 53 OKLA. L. REV. 161, n.69 (2000); *see also* William Bennett Turner, *Establishing the Rule of Law in Prisons: A Manual For Prisoners' Rights Litigation*, 23 STAN. L. REV. 473 (1971).

63. *See* Turner, *supra* note 62, at 473.

64. *Id.*

65. *See Washington v. Lee*, 390 U.S. 333 (1968), *aff'g* 263 F. Supp. 327 (M.D. Ala. 1966).

66. 388 U.S. 1 (1967).

67. *See* Garner v. Louisiana, 368 U.S. 157, 180-81 (1961) (Douglas, J., concurring) (noting that in 1960, segregation of the races was required in Louisiana prisons as a part of the Jim Crow system that was "basic to the structure of Louisiana as a community.").

68. *See* Nichols v. McGee, 169 F. Supp. 721 (N.D. Cal. 1959) (detailing segregation in Folsom Prison).

69. *See* Toles v. Katzenbach, 385 F.2d 107, 108 (9th Cir. 1967).

70. *See* NEW YORK STATE SPECIAL COMMISSION ON ATTICA, ATTICA: THE OFFICIAL REPORT 80 (1972).

71. *See* REID H. MONTGOMERY & GORDON A. CREWS, A HISTORY OF CORRECTIONAL VIOLENCE: AN EXAMINATION OF REPORTED CAUSES OF RIOTS AND DISTURBANCES 74 (1998). In the first half of the century, there were twenty-four reported prison riots; this number spiked in the following decades. In the 1950s, there were eighty-seven reported riots, in the 1960s, there were fifty-eight, and in the 1970s, there were 242. *See id.*

72. *See* OSHINSKY, *supra* note 49, at 250.

"integrate" by placing one African-American inmate in the all-white camp, and one white inmate in the all-African-American camp failed, it instituted full integration, and experienced a surge in inmate-on-inmate violence.[73] Parchman officials blamed racial gangs:

[W]e are dealing with the scum of the earth . . .[P]ower is the name of the game. It is won in two ways: by physical force and by appeals to the worst prejudices . . . that builds black and white gangs that stalk each other, do horrible shit to each other, and hold together with constant reminders of the blood that flows.[74]

But the causes of prison violence were more complex than racism alone. An examination of the circumstances surrounding the 1971 Attica prison uprising reveals the many underlying causes of the riot at that institution, which came to symbolize all American prisons during the volatile period of the 1970s.[75] Although the Attica revolt was commonly understood as a prison "race riot," its causes were multifaceted.

On September 9, 1971, inmates at Attica Prison broke through a gate, seized forty hostages, and maintained control of the prison for four days.[76] On September 13th, at the order of Attica's Commissioner, and with the blessing of New York State Governor Nelson Rockefeller, 211 armed troops stormed the prison to reassert state control.[77] After six minutes of heavy gunfire, the inmates surrendered.[78] Twenty-nine inmates and ten hostages lay dead or dying from bullet wounds inflicted by the troops.[79]

The Attica uprising received an enormous amount of media coverage, both during and after the revolt.[80] This attention exposed the generally cloistered prison world to public view.[81] Shocking images of the bloody aftermath of the recapture, of dead and wounded inmates and hostages, and of huge numbers of prisoners stripped naked and abused by police officers, revealed a horrible vision of Attica to the American public.[82]

In the media's rush to publicize the recapture, several newspapers ran stories based on false reports that inmates had killed the hostages in cold blood by slitting their throats.[83] The New York Times editorialized that "the deaths of

73. *See id.* at 249-50.

74. *See id.* at 250.

75. The Special Commission wrote that "Attica is every prison; and every prison is Attica." NEW YORK STATE SPECIAL COMMISSION, *supra* note 70, at xii.

76. *See id.* at 471-73.

77. *See id.* at 328, 366.

78. *See id.* at 373.

79. *See id.* at 373.

80. *See* Justin Brooks, *How Can We Sleep while the Beds Are Burning? The Tumultuous Prison Culture of Attica Flourishes in American Prisons Twenty-five Years Later*, 47 SYRACUSE L. REV. 159, 161 (1996).

81. *See id.*

82. *See* NEW YORK STATE SPECIAL COMMISSION, *supra* note 70.

83. *See id.* at 455-56.

[the hostages] refleet a barbarism wholly alien to our civilized society. Prisoners slashed the throats of utterly helpless, unarmed guards."[84] Others presented the uprising as the result of a pre-planned, well-organized plot by politically radical inmate leaders.[85]

These false reports eontributed to a media "credibility crisis" which prompted Governor Rockefeller and the New York State Legislature to launch an investigation into the actual events of the Attica riot.[86] The investigation took the form of an appointed Special Commission, which produced a detailed account of the uprising, including explanations of the violence.[87]

Contrary to media reports, the Special Commission concluded that the Attica revolt was not the product of a planned revolutionary plot.[88] It found that several factors combined to create the spontaneous violence. First, prisoners at Attica had developed a newfound social consciousness related to the gcneral societal unrest of the late 1960s and early 1970s.[89] The Civil Rights movement had not led to true racial equality, and its energy fizzled with the murder of several of its leaders.[90] The same disillusionment that fueled the development of militant groups such as the Black Panthers and that sparked urban rioting across America in the summer of 1967 contributed to mounting tensions in Attica in the early 1970s.[91] Many African-American inmates joined the Nation of Islam, which argued forcefully for political and social reform, especially in the arena of criminal justice; inmates of all races joined a sociology class to discuss methods of achieving social change.[92]

Second, animosity between prison officials and inmates added to the growing tensions. Prison guards interviewed by the Commission shared the view that inmates had forfeited their rights when they committed the crimes that landed them in prison.[93] One guard's remarks are typical of the contcmpt with which they greeted inmates' demands for rights and respect: "they cry about their rights . . . but what about the rights of their victims? Did they worry about the rights of the man they killed or the woman they raped?"[94] Widening this divide between inmates and staff, the prison guards at Attica were all white residents of rural towns, while 63 percent of the prisoners were African-

84. *Id.* (quoting *Massacre at Attica*, N.Y. TIMES, Sept. 14, 1971, at 40).
85. *See id.* at 104.
86. *See id.* at xxiii.
87. *See id.* at xi.
88. *See* NEW YORK STATE SPECIAL COMMISSION ON ATTICA, ATTICA: THE OFFICIAL REPORT 105 (1972).
89. *See id.* at 107.
90. *See id.* at 114-15.
91. *See id.* at 115-17.
92. *See id.* at 121-24.
93. *See id.* at 120.
94. NEW YORK STATE SPECIAL COMMISSION ON ATTICA, ATTICA: THE OFFICIAL REPORT 120 (1972). (citation omitted)

American or Puerto Rican and nearly three-fourths were from urban areas.[95] Resentment between inmates and officers led to open racism and daily confrontations.[96]

Finally, the Commission found that poor prison management aggravated the relationship between guards and inmates. In 1970, the Attica prison guard union bargained for the ability to bid for job assignments based on seniority.[97] The more senior officers quickly fled the jobs that required them to have contact with inmates; inexperienced, insecure young guards were left to supervise the inmates, generating bitterness among the prison population.[98]

The processes that created tension and violence in Attica were mirrored in California prisons in the 1970s. First, in California, as in Attica, prisoners came to develop a new social awareness fueled by political consciousness and manifested in inmate self-education groups.[99] Inmates devoured political books such as *The Autobiography of Malcolm X*, *The Communist Manifesto*, Richard Wright's *Native Son*, and Eldridge Cleaver's *Soul on Ice*.[100] For many of California's illiterate prisoners, these books were their introduction to reading.[101] Prison gangs such as the Black Guerilla Family and La Nuestra Familia developed highly organized educational systems that taught political awareness along with reading skills.[102]

Additionally, in California, as in Attica, inexperienced white guards made crucial mistakes when dealing with minority inmates. In one notorious incident, a young white prison guard at California's Soledad prison shot and killed three African-American prisoners after a race-related fistfight broke out in the prison yard.[103] African-American inmates reacted with fury, and after a grand jury ruled the shootings justifiable homicides, another inexperienced white Soledad guard was thrown to his death from an upper level of the prison.[104] Several African-American inmates including prison activist George Jackson were charged with his death.[105]

California prison activists and Attica inmates influenced each other in their ideological development as they faced these similar circumstances. In November, 1970, prisoners at California's Folsom Prison went on a mass strike with a list of demands including an end to indeterminate sentencing,

95. *See id.* at 491, 116.
96. *See id.* at 81, 107.
97. *See id.* at 126.
98. *See id.*
99. *See* ERIC CUMMINS, THE RISE AND FALL OF CALIFORNIA'S RADICAL PRISON MOVEMENT 134-140 (1994).
100. *See id.* at 134, 138.
101. *See id.* at 136.
102. *See id.* at 136-40.
103. *See id.* at 163.
104. *See id.* at 164-65.
105. *See* ERIC CUMMINS, THE RISE AND FALL OF CALIFORNIA'S RADICAL PRISON MOVEMENT 164-65 (1994).

compliance with minimum wage laws, and compliance with state occupational safety standards.[106] Then, only a few weeks before the Attica uprising in 1971, the killing of George Jackson by California prison guards sparked a widespread showing of solidarity among Attica prisoners.[107] Attica prisoners echoed the calls of the Folsom strikers in July, 1971 as they drafted a manifesto with almost identical demands.[108] The House Committee on Internal Security cited the similarity of demands to support a claim that the intervention of Marxist revolutionaries spurred inmate activists both at Attica and at Folsom.[109] But there was no revolutionary conspiracy; rather, the similarities demonstrated that American prisoners confronted comparable prison systems and shared common grievances.[110]

C. Current Prison Conditions in California – Harsh Reforms, Violent Response

The prison activism movements and prison violence of the 1970s brought unintended changes to prisons across the country. At first, the aftermath of Attica led activists to demand reforms, but quickly a conservative law-and-order backlash led to increased prison security.[111] In California, prison officials installed televisions with carefully selected programs to discourage inmates from reading and writing subversive literature.[112] Prison administrators sought increased control over prisoners' views by terminating educational programs, preventing outside teachers from entering prisons, decimating library services, and abandoning the rehabilitation philosophy.[113]

As the American conservative movement flourished during the 1980s, California dramatically increased prison funding and built new prisons across the state.[114] These prisons, like Attica, were generally built in rural areas and small towns, far from urban centers.[115] California also developed a new style of prison that exerted an even harsher control over prisoners' everyday lives.[116]

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106. *See id.* at 200-01.

107. *See* NEW YORK STATE SPECIAL COMMISSION, *supra* note 70, at 139-40.

108. James and Rodriguez, *The Attica Liberation Faction Manifesto of Demands and Anti-Depression Platform*, WARFARE IN THE "HOUSEHOLD," July 20, 2004, *available at* http://www.brown.edu/Departments/African_American_Studies/JJames/incarceration/attica_manifesto.pdf (last visited....).

109. *See* CUMMINS, *supra* note 99, at 230. In 1973, the Internal Security Committee cited the "similarity of rhetoric" between the "so-called Attica Manifesto" and Folsom demands to demonstrate the existenee of an external conspiracy. *See id.*

110. Even Eric Cummins, who takes great pains to dispute the leftist accounts of Attica and the California prison movement, argues that Marxist revolutionaries were not to blame for the violence and activism. *See id.*

111. *See id.* at 222-23.

112. *See id.* at 238.

113. *See id.* at 248-50.

114. *See id.* at 270.

115. *See* ERIC CUMMINS, THE RISE AND FALL OF CALIFORNIA'S RADICAL PRISON MOVEMENT 270 (1994).

116. *See id.*

Pelican Bay State Prison, built in remote northern California, an eight-hour drive from San Francisco and a thirteen-hour drive from Los Angeles, was the first of a new breed of prisons designed to suppress inmate unrest.[117] Half of the Pelican Bay inmates live in the Security Housing Unit (SHU), where they are kept in complete isolation from guards and other inmates.[118] Inmates earn placement in the SHU by committing disciplinary violations while in prison; they are not allowed out unless they renounce their alleged gang membership and reveal the names of inmate gang members.[119] No longer do prison officials attempt to rehabilitate prisoners; now, they are content to immobilize them.

Despite greater control over prisoners, prison violence has not dissipated, although its character has changed. Increasingly, prison violence arises out of gang-related confrontation between inmates in racially-affiliated gangs instead of conflicts between inmates and guards.[120] In California, as gang violence has increased, prison guards have manipulated inmate gang rivalries in order to create violence as a spectacle. During the 1990s, inmates reported that guards at California's Corcoran State Prison set up gladiator-style combat by releasing known rivals into the prison yard at the same time and allowing them to fight each other.[121] When violence ensued, guards would fire into the crowd, often wounding or killing inmates.[122] Eventually, the Corcoran guards were acquitted for their participation. At Calipatria State Prison, guards reportedly set up similar fights between rival gang members, joking about the prospect of violence and then firing tear gas at combatants.[123]

Prison guards and courts have cited this gang-related violence to justify segregating prisons by race. The guards accused of inciting yard fights blamed integrated yard policies and violent inmates for the incidents.[124] Justice Thomas, in *Johnson*, cited the Calipatria case to demonstrate that prisons must take race into account or face civil suits by inmates; however, Thomas overlooked the role that the guards played in creating the violence.[125]

Race-related violence continues in California prisons. Recently, California has faced a wave of prison riots, leading to race-based lockdowns. In early February, 2006, violence broke out at the Pitchess Detention Center in Los Angeles County.[126] In a series of fights reportedly sparked by a street conflict,

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117. *See id.*

118. *See id.*

119. *See id.* at 270, 272.

120. *See* MONTGOMERY & CREWS, *supra* note 71, at 70-71.

121. *See* Mark Arax, *8 Prison Guards Acquitted in Corcoran Battles*, L.A. TIMES, June 10, 2000, at A1.

122. *See id.*

123. *See* Robinson v. Prunty, 249 F.3d 862, 864-65 (9th Cir. 2001).

124. *See* Mark Arax, *Guards on Trial in Corcoran Shootings Blame the Prisoners*, L.A. TIMES, April 24, 2000, at A3.

125. *See Johnson*, 543 U.S. at 546.

126. *See* John Pomfret, *Jail Riots Illustrate Racial Divide in California; Rising Latino Presence Seen as Sparking Rivalry with Blacks that Sometimes Turns Violent*, WASH. POST, Feb.

Latino gang-affiliated inmates attacked African-Americans, injuring dozens and killing two.[127] Rioting spread to other California jails and prisons. More than 2,000 inmates were involved in the rioting.[128] Prison officials responded to the violence by segregating prisoners and implementing widespread lockdowns.[129] Several commentators blamed rising racial conflict between African-Americans and Latinos, citing economic competition and hate crimes between the two races.[130] Others argued that overcrowding and poor prison conditions were responsible for the violence.[131] The practice of prison race segregation, which traces its history to the postbellum South, thus lives on in California prisons.

III
TESTING THE ASSUMPTIONS ABOUT PRISON RACE SEGREGATION

I began with three assumptions about prison racial segregation that underlie the writings of judges and legal academics. Having set forth a brief and seldom-told history of prison segregation and prison racial violence, I rely on this context to contest these three assumptions. First, I argue that racial segregation and race-based lockdowns are not neutral processes; rather, they carry a racist social meaning. Second, I dispute the idea that prison violence is "race-based" in the sense that it stems from the racism of individual inmates toward each other. Third, I contest the assumptions that segregation as a response to prison violence easily passes constitutional muster and that segregation in anticipation of violence (as in *Johnson*) may pass strict scrutiny. Here I also argue that using prison segregation as the paradigm example of what passes strict scrutiny carries its own troubling racist social meaning, regardless of the constitutionality of such segregation.

A. The Social Meaning of Prison Segregation

According to the anticlassification interpretation of the Fourteenth Amendment embraced by the Supreme Court, the Equal Protection Clause disfavors all racial classifications, permitting only those that are narrowly tailored to achieve a compelling state interest.[132] This understanding,

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21, 2006, at A1.

127. *See id.*

128. *Gang War Erupts, Spreads through California Corrections Facilities; Segregation Becomes Primary Means of Control*, 11 CORRECTIONS PROFESSIONAL, Feb. 24, 2006.

129. *Gang War Erupts*, *supra* note 128.

130. *See* Pomfret, *supra* note 126, at A1.

131. *See id.*; *see also* Silja J.A. Talvi, *Race Riot?: It's far too easy to pin recent violence in the L.A. County Jail on ethnic tensions*, IN THESE TIMES, Mar. 27, 2006, *available at* http://www.inthesetimes.com/site/main/article/2569/ (last visited January 22, 2008) (citing other causes for prison violence).

132. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) ("[A]ll racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed

exemplified by Justice O'Connor's opinion in *Johnson v. California*, requires no inquiry into the nature of race-based classifications; all are equally suspect, and equally subject to strict judicial scrutiny.[133] To progressive scholars and activists, this anticlassification interpretation of the Fourteenth Amendment is dissatisfying because it places Jim Crow segregation on the same constitutional footing as affirmative action programs and other policies intended to aid underrepresented minorities.[134] These scholars argue that the anticlassification approach profoundly misunderstands the nature of race and racism by treating all governmental uses of race as equivalent.

In this Part, I discuss an alternative understanding of the Fourteenth Amendment, the antisubordination approach, whose proponents argue that practices merit strict scrutiny if they subordinate racial minorities, regardless of whether they entail racial classifications. In order to understand whether prison race segregation should be subject to strict scrutiny, I use the "social meaning" model proposed by Charles Black, Charles Lawrence, Deborah Hellman, and others. I argue that while application of this test may not be appropriate in every Equal Protection controversy, the test helps illuminate the problematic nature of prison lockdowns and segregation policies. I argue that, given the history of racial segregation in prisons, as well as our nation's racialized conception of crime and punishment, prison race segregation conveys a social meaning that contributes to the subordination of minorities. Thus, we must understand prison racial segregation as harmful to minorities, not as a benign or neutral practice.

1. The Social Meaning Test

Charles Black provided a refreshingly simple defense of the desegregation decisions by declaring it laughable to ask whether Jim Crow segregation offended against equality principles.[135] He echoed Justice Harlan's famous dissent in *Plessy v. Ferguson*, which proclaimed that "[e]very one knows" that segregation was intended to maintain white racial purity by keeping out African-Americans.[136] Black and Harlan set the stage for inquiry into the social meaning of race-conscious policies as a way of determining their constitutionality. The social meaning understanding of the Equal Protection clause differs from the anticlassification model because its proponents would

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by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.")

133. *See* Johnson v. California, 543 U.S. 499, 505 (2005).

134. *See, e.g.*, Neil Gotunda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1 (1991); *See also* Alan Freeman, *Legitimizing Racial Discrimination through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978).

135. *See* Charles Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 425 (1960).

136. Plessy v. Ferguson, 163 U.S. 537, 557 (1896) (Harlan, J., dissenting).

not bar racial classifications altogether; rather, they reject those that demonstrate racial animus. The social meaning inquiry explains why such segregation is constitutionally problematic in a way that uses of race which benefit minorities, such as affirmative action policies and race-conscious redistricting to enhance minority representation, are not.

Charles Lawrence proposed the cultural meaning test as a way of getting at the unconscious racism undergirding governmental policies with racially disparate impacts.[137] He intended it to ferret out unconscious racism, arguing that because our society no longer tolerates overt racist attitudes, our repressed racist beliefs have found more subtle ways to express themselves through racially coded cultural symbols.[138]

Although it is particularly helpful in disparate impact cases, the social meaning test can also help us determine whether a purportedly neutral racial policy is "benign" or "invidious." Lawrence's first example of an "easy case" was *Brown v. Board of Education*; he argued that the purportedly neutral racial segregation carried the cultural meaning of racial subordination.[139] Deborah Hellman articulated a similar version of the cultural meaning test that inquires into the "expressive content" of state actions.[140] She used several examples of facial classifications including school segregation, sexual orientation discrimination, and distinctions based on non-citizen status.[141]

Black, Lawrence, and Hellman employed several different factors to determine whether policies carried forbidden social meanings; these factors are helpful in evaluating the social meaning of prison segregation. For example, Charles Black looked to the history of segregation, from slavery through the black codes, to twentieth-century Jim Crow laws.[142] He also examined the ways in which racial segregation paralleled other social practices; that is, African-Americans in segregated communities were also denied participation in the political process and were threatened with physical violence.[143] Charles Lawrence similarly looked to history, as well as attitudinal survey evidence and the credibility of any nonracial rationales offered to justify the policy in question.[144] He also credited the "gut feeling" arising from a particular policy.[145] Deborah Hellman proposed a Habermasian model where the judge is the arbiter of a discussion between parties with competing understandings of a

137. *See* Lawrence, *supra* note 13, at 355.
138. *See id.* at 356.
139. *See id.* at 362-63.
140. Deborah Hellman, *The Expressive Dimension of Equal Protection*, 85 MINN. L. REV. 1, 3 (2000).
141. *See id.* at 8, 42.
142. *See* Black, *supra* note 135, at 424-25.
143. *See id.* at 425-26.
144. *See* Lawrence, *supra* note 13, at 366-68.
145. *See id.* at 370.

given law or policy.[146]

The social meaning factors may prove troublesome or difficult to apply. We do not all share the same "gut feeling" about particular practices, and our understandings of history are often incomplete.[147] However, Black, Lawrence, and Hellman have successfully identified one common principle for understanding the Fourteenth Amendment. The social meaning test is particularly helpful in understanding prison race segregation because it requires examination into the context of a supposedly neutral practice.

2. *Applying the Social Meaning Test to Johnson*

In *Johnson*, the CDC argued that prison race segregation carried no prohibited meaning because it was "neutral."[148] Justice O'Connor did not challenge this assertion. Thomas's dissent implied a permissible social meaning: race segregation protects minorities from violent white supremacists.[149] Some aeademics share Thomas' view, defending prison segregation on the basis of protecting minority rights and safety.[150]

In fact, the social meaning test demonstrates that prison segregation and race-based lockdowns raise Equal Protection concerns for three reasons. First, the history of segregation within and outside of prisons reveals the culturally loaded nature of contemporary prison segregation policies. Second, current eonnections between race, crime, and punishment create a context in which explicit racial segregation can only denote the subordination of racial minorities. And third, both scholars and some sections of the general public view segregation as essential to protecting white inmates from minority aggressors, demonstrating that the social meaning reinforccs negative

146. *See* Hellman, *supra* note 140, at 23-24.

147. Unlike Lawrence and Hellman, I do not believe that the social meaning test is the only mediating principle underlying the Equal Protection Clause. Indeed, their analyscs miss practices that I would classify as forbidden discrimination. For example, Hellman argues that civil service preferences for veterans, which disproportionately help men, did not violate the cultural meaning test underlying the Equal Protection Clause although the disparate impact was because of overt policies disfavoring women's participation in the military. *See id.* at 48-49; *See also* Pers. Adm'r of Massachusetts v. Feeney, 442 U.S. 256, 283-84 (1979). Hellman argues that the veterans' preferences expressed honor for veterans, not disregard for women. *See* Hellman, *supra* note 140 at 48-49. Leaving aside the doubtfulness of this assertion about a system that perpetuated the almost exclusive male domination of desirable civil service posts, Hellman's analysis fails because it does not recognize that policies may impermissibly harm minorities without expressing anything at all.

148. *See Johnson*, 543 U.S. at 506.

149. *See id.* at 534 (Thomas, J., dissenting).

150. *See, e.g.*, WILLIAM WILBANKS, THE MYTH OF A RACIST CRIMINAL JUSTICE SYSTEM 128-30 (1987) ("[P]rison officials generally seek the racial and ethnic segregation of inmates at some level to ensure the safety of those in their charge ... 'Thousands of prisoners, black, white, and Hispanic, live in greater danger and insecurity because of what the symbol of an integrated society means to people whose own lives and institutions are far less integrated than those of prisoners.'" (citation omitted)).

stereotypes about non-whites.

The history of prison race segregation (discussed in Part II, *supra*) reveals that segregated prisons emerged in the South in the aftermath of the Civil War. They functioned to extend slavery by perpetuating a system of uncompensated African-American labor and unbridled white supremacy. Segregated prisons existed across the South alongside Jim Crow laws, and remained constitutional far beyond *Brown*. Outside of the South, some states also segregated their prisons, likely for the same "violence prevention" rationales that undergirded the CDC's policy in *Johnson*.

The *Johnson* Court failed to take into account the context of the CDC's segregation policy. The policy had been in place for more than twenty-five years;[151] however, as an unwritten rule, it may have roots in past eras when racial segregation was universally accepted. But O'Connor gavc no background as to the history of prison segregation or the presence of contemporary attitudes linking race and crime. Unsurprisingly, then, the Court failed to identify the loaded social meaning expressed by the segregation policy.

Contemporary attitudes about race and crime underscore the racist social meaning of prison segregation. African-Americans and other racial minorities are vastly overrepresented in prisons.. Paul Butler notes that in 1993, African-American men, who constituted only 13 percent of the male population, represented 51 percent of the male prison population.[152] These statistics remain generally the same today.[153] The stark racial disparities were before the *Johnson* Court; in an amicus brief, the American Civil Liberties Union cited evidence of inequality in the criminal justice system to support the application of strict scrutiny.[154] However, Justice O'Connor chose not to situate the race segregation in *Johnson* in the context of ongoing inequities in the criminal justicc system. Nor were these figures new to the Court; eighteen years before, in *McCleskey v. Kemp*,[155] the Court had confronted and disregarded statistics showing a gulf between courts' treatment of African-American and white murder defendants.

The disparity between the experiences of whites and minorities, particularly African-American men,[156] in our criminal justice system reflects several factors. First, American society has created an unspoken identification of crime and criminality as minority problems, and in particular, as African-

151. *See* Brief for the Petitioner at 3, Johnson v. California, 543 U.S. 499 (2005) (No. 03-636).

152. *See* Paul Butler, *Affirmative Action and the Criminal Law*, 68 U. COLO. L. REV. 841 (1997).

153. *See* Brief for American Civil Liberties Union et al. as Amici Curiae Supporting Petitioner at 11-12, Johnson v. California, 543 U.S. 499 (2005) (No. 03-636).

154. *See id.*

155. 481 U.S. 279 (1987).

156. 1 focus on African-Americans here because much of the literature in this field deals with black-white disparities.

American problems. Richard Delgado has argued that society began to construct African-Americans as violent criminals as a way of limiting the gains made by blacks during the 1960s.[157] He further contended that societal fears have been misdirected at the crimes generally associated with African-Americans instead of focusing on equally harmful crimes committed by whites.[158]

Having constructed crime as an African-American problem, our public policy defines crime in racial ways. Actions become criminal by association with racial minorities; this is particularly evident with drug crimes, where substances associated with African-Americans (crack cocaine) receive harsh penalties while substances associated with whites receive milder penalties (cocaine) or are the subject of legalization eampaigns (marijuana).[159] Because of this divergent treatment, the War on Drugs led to the incarceration of African-Americans for drug crimes at vastly disproportionate rates, despite the fact that African-Americans are no more likely to deal or use drugs than whites.[160]

In addition to the racially-determined definitions of crime, disproportionate minority criminality stems from the social and economic subordination of African-Americans and other racial minorities resulting during centuries of white supremacy. The correlation of crime and poverty, combined with the continuing disproportionate rates of poverty in communities of color, may explain disparities crime rates. Paul Butler has argued that "African American criminality is a predictable response to the United States' historical policy of official hatred toward the black race."[161] Anthony Alfieri has urged us to see black offenders as rationally and defiantly resisting racial subordination.[162] Whether we view minority "criminality" as a defiant protest against white supremacy or simply as a response to conditions of indigence and lack of opportunity, these explanations contribute to a racialized understanding of crime.

Finally, racism within our criminal justice system leads to disparate results. Juries are more likely to convict African-American defendants who commit crimes against whites, and judges impose harsher sentences on

157. *See* Richard Delgado, *Rodrigo's Eighth Chronicle: Black Crime, White Fears – On the Social Construction of Threat*, 80 VA. L. REV. 503, 514-15.

158. Delgado, *supra* note 157, at 524.

159. *See* Kenneth B. Nunn, *Race, Crime, and the Pool of Surplus Criminality: Or Why the "War on Drugs" was a "War on Blacks,"* 6 J. GENDER RACE & JUST. 381, 434 (2002); *See also* Dorothy E. Roberts, *Punishing Drug Addicts who have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419 (1991).

160. *See* Nunn, *supra* note 159, at 393-95. Contrast this to thc situation in prohibition, which led to an increase in the number of white prisoners after the passage of the Eighteenth Amendment in 1919. *See* OSHINSKY, *supra* note at 49. Prohibition was repealed in 1933.

161. Butler, *supra* note 152, at 861.

162. *See* Anthony Alfieri, *Defending Racial Violence*, 95 COLUM. L. REV. 1301, 1304 (1995).

African-American defendants than on whites for the same offenses.[163] In *McCleskey v. Kemp*, the Court declared that it would not intervene even in the direst circumstance, where evidence showed that capital punishment was meted out in racially disparate manner.[164] The *McCleskey* Court effectively condoned the racist imposition of punishment by treating race as an irrelevant factor, and then protesting that courts could not be expected to review all sentences to be sure that no arbitrary factors had come into play.[165] The Court failed to understand race as qualitatively different from arbitrary characteristics such as physical attractiveness.[166]

Contemporary racism thus plays a powerful role in creating a prison system that continues to imprison African-Americans and Latinos at shockingly high rates relative to whites.[167] In this context, any race-conscious actions in the prison system should be immediately suspect. Charles Black pointed out that Jim Crow laws paralleled other social practices subordinating African-Americans; similarly, prison race segregation policies exist alongside a criminal justice system that systematically imprisons people of color and separates them from the rest of society. In this context, prison segregation conveys a deeply problematic social meaning.

Not only does racism in the criminal justice system discredit purportedly neutral race-based prison policies, but also, contrary to the claims of Justice Thomas and others, prison race segregation in particular is neither benign nor neutral. As the following discussion demonstrates, academics have consistently portrayed whites as victimized by violent minorities in prison, and some sectors of the American public share this understanding. Thus, prison race segregation confirms negative stereotypes about minorities and contributes to their ongoing subordination. Whether or not white inmates actually face sexual violence from minorities, the social meaning of segregation is far from the image depicted by Justice Thomas, in which prison officials implement segregationist policies in order to shield minorities from white racists.

Some scholars have described prisons as sites where members of racial minorities (who comprise the vast majority of prisoners) achieve revenge against whites for the racism of society.[168] Particularly in discussing sexual assault, scholars have identified African-Americans and Hispanics as

163. *See* Delgado, *supra* note 157, at 530-31.

164. 481 U.S. 279 (1987).

165. *Id.* at 314-19.

166. *Id.*

167. *See* The Sentencing Project, Hispanic Prisoners in the United States, available at www.sentencingproject.org/pdfs/1051.pdf (last visited January 22, 2008) (noting that in 2001, 4% of Hispanic males in their 20s and 30s were in prison or jail, as compared to 1.8% of white males).

168. *See, e.g.*, Christopher D. Man & John P. Cronan, *Forecasting Sexual Abuse in Prison: The Prison Subculture of Masculinity as a Backdrop for "Deliberate Indifference,"* 92 J. CRIM. L. AND CRIMINOLOGY 127, 160 (2001).

perpetrators and whites as victims.[169] For example, one study found that 28 percent of all inmates were sexual targets; in contrast, nearly three-fourths of white inmates experienced sexual victimization.[170] One article described "common sense" as a guide for when one prisoner will sexually assault another, and then provided the following example:

A nineteen-year-old white, and nonviolent offender, who stood 5'8" and weighed 136 pounds, was forced to share a cell with a 6'1", 290-pound Black inmate who had been classified as a high-risk prisoner because of his history of violence and sexual assault. It is hardly a surprise that a sexual assault occurred the first night they shared the cell.[171]

Race was clearly part of the "common sense" in determining who would attack whom within the prison. These scholars did not explicitly argue that high rates of white victimization justify prison racial segregation. However, at least some have urged prisons officials to engage in "mindful cell blocking."[172] That is, they asserted that prisons should be segregated based on "propensity to become sexual aggressors or victims"[173] or that officials should "implement strict behavioral classification procedures to aid in identifying, housing, and monitoring violent inmates."[174] As these same scholars had previously identified a correspondence between race and victimization in prisons, their later policy recommendations were could be used to support calls for racial segregation, cloaked in neutral rhetoric.[175]

Academics have been careful not to support a policy by explicitly invoking negative stereotypes about minorities; however, members of the American public have not always been so inhibited. The public reaction to the Attiea riots and to the *Johnson* decision demonstrated that many Americans view prison violence as highly racialized, and they understand race-conscious policies as the only realistic solution. Several laypeople castigated the Supreme Court for its ivory-tower remove; they viewed the insistence on race-neutrality as a naïve and idealistic response to prison violence.[176]

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169. *See id.*; *see also* James E. Robertson, *Cruel and Unusual Punishment in United States Prisons: Sexual Harassment Among Male Inmates*, 36 AM. CRIM. L. REV. 1, 40 (1999); *see also* Richard D. Vetstein, *Rape and AIDS in Prison: On a Collision Course to a New Death Penalty*, 30 SUFFOLK U. L. REV. 863, 902.

170. *See* James E. Robertson, *Cruel and Unusual Punishment in United States Prisons: Sexual Harassment Among Male Inmates*, 36 AM. CRIM. L. REV. 1, 40 (1999).

171. *See* Man & Cronan, *supra* note 168, at 139, 182.

172. Man & Cronan, *supra* note 168, at 183.

173. *Id.* at 184.

174. Richard D. Vetstein, *Rape and AIDS in Prison: On a Collision Course to a New Death Penalty*, 30 SUFFOLK U. L. REV. 863, 902.

175. *See* David K. Ries, *Duty to Protect Claims after the Prison Rape Elimination Act*, 13 J.L. & POL'Y 915 (2005). Ries notes that being white is a risk factor for being sexually abused in prison; he then argues that the *Johnson* holding would not prevent segregating "vulnerable" inmates from "predatory" inmates, beeause the elassifications would not be strictly racial. *Id.* at 990.

176. Several blogs responded derisively to *Johnson v. California*. VDARE.com, a

conservative web log that publishes articles from the Lexington Research Institute and The Center for American Unity, ran an article titled "Who rapes in prison?" after the Supreme Court granted certiorari in *Johnson*. *See* Sam Francis, *Who Rapes in Prison?*, VDARE.com, Mar. 8, 2004, http://www.vdare.com/francis/prison_rape.htm (last visited January 22, 2008). The article explicitly asserted that prison segregation would protect whites:

> The *Times* doesn't mention it, but the in-prison segregation needs to be preserved for yet another reason—to keep non-white inmates from raping whites, which they reportedly do routinely and with little concern for punishment or retaliation.
>
> In a 2001 report published by the liberal Human Rights Watch, a researcher named Joanne Mariner disclosed facts the mainstream media have long ignored or denied: There are more men raped in the United States—about 90,000 every year—than women—a mere 40,000. Most of the male rapes take place in prison, and good many of them are interracial, with blacks and Hispanics searching out and raping white men.

Id. The article goes on to insinuate that Garrison Johnson simply desired to gain access to white victims: "All of which helps explain why prison authorities want to keep the races segregated, at least until newcomers learn their way around. It may also explain why Garrison Johnson brought the lawsuit in the first place."

Id. Another blog compared segregation in prisons to racial segregation of shelters following 2005's Hurricane Katrina. *See* Katrina and Segregation, http://althouse.blogspot.com/2005/09/katrina-and-segregation.html (Sept. 3, 2005, 10:10 EST) (last visited January 22, 2008). Readers again described segregation as aimed at protecting whites from victimization by blacks:

> I think racial segregation now would be a terrible idea because it would reinforce the idea that blacks are being victimized by a racist government and cause great emotional pain to the blacks who are segregated--they would know *why* the segregation was put in effect: because they're presumed to be a bunch of violent thieves and rapists! At the very least, they're not "good enough" to be in with the white people. I just wonder how much more likely whites are to be attacked in an integrated shelter, either in racially-motivated violence, or just because there are more black criminals in the shelter than white criminals. I suspect it's a non-trivial increase, but I don't think we have any way of knowing ... If you get your way and the shelters are integrated, and a white woman is raped by a black man, would you be able to look her in the eyes and tell her that your decision was the right one?

Posting of Daryl Herbert to Katrina and Segregation, http://althouse.blogspot.com/2005/09/katrina-and-segregation.html (Sept. 4, 2005, 12:38 EST) (last visited January 22, 2008). This writer clearly views himself as a racial "liberal" – he thinks segregation is a terrible idea, and seeks to avoid causing great emotional pain to blacks. Nevertheless, he endorses negative stereotypes of blacks as criminals, thieves, and rapists.

A third blogger characterized the *Johnson* decision as political correctness run amok, in an article titled "New York Times to White Prisoners: 'Bend Over and Take It.'" *See* Nicholas Stix, *New York Times to White Prisoners: 'Bend Over and Take It,'* Nov. 22, 2004, http://geocities.com/nstix/nyttowhiteprisoners.html (last visited January 22, 2008). Addressing Justice Stephens, who dissented in Johnson, Nicholas Stix wrote

> Let's see. If we break up the white minority of inmates in most maximum security California prisons, and pair them off with racist, ultraviolent, black and Hispanic gangbangers, will that discourage racial gangs or racial violence? In a word, Mr. Justice: No. But such a policy would give us the penal equivalent of busing, another program that rich leftists who are insulated from its consequences have always loved. ... In an irony that is likely lost on Justice Stevens, the only white male prisoners who are reasonably safe are the ultraviolent, neo-Nazi sociopaths who are members of white supremacist gangs. The white gang members protect each other.

Id. Again, this blogger styles himself as politically neutral, if not a racial liberal. He condemns the "ultraviolent, neo-Nazi sociopaths" as well as the "racist, ultraviolent, black and Hispanic gangbangers," giving the impression of neutrality. However, he shares the view prison segregation functions to protect whites from the sexual victimization of minorities: "[t]argeting white inmates for rape based on the color of their skin has long been a sport among the black (and to a lesser degree, Hispanic) prisoners who dominate so many prisons in this country, and who consider such racial attacks their birthright." *Id.*

While bloggers may represent the fringes of political discourse, this means that they are not bound by the same standards that govern our national conversation about race. Thus, they

Some might interpret studies showing that white inmates suffer sexual assault at higher rates than African-American or Hispanic inmates as reason to segregate prisons. I do not contest or endorse these studies; I argue only that the meaning of prison segregation carries with it images of African-American criminality and sexual violence that have long supported unspeakably harsh treatment. In the reconstruction-era South, lynch mobs were easily whipped to a frenzy after hearing (often untrue) reports of African-American men raping white women.[177] Whether or not evidence supports the greater victimhood of white inmates, the segregation policy reinforces longstanding negative stereotypes about African-American and Latino men. When Justice Thomas characterized segregation as a means of protecting minorities, he ignored the history of fear-fueled imagery of African-Americans and the contemporary understanding of prison violence.[178]

Prison race segregation expresses fear of inmates of color; it is far from the "neutral[]" practice extolled by the CDC in *Johnson*. It perpetuates a system that began after the Civil War as a way to extend slavery. It introduces explicit race-consciousness into our criminal justice system, which already functions to imprison minorities at far higher rates than whites. And to many, it expresses the protection of white inmates from sexual assault by minorities. For these reasons, prison segregation is not neutral, but laden with a social meaning that contributes to the subordination of minorities. The policy warrants strict scrutiny not simply because it classifies, but because it expresses views of minorities as slaves, criminals, and sexual predators.

B. Prison Segregation and Views of Race/Racism

The framers of the dominant discourse on prison race riots and prison racial violence understand prison violence as stemming from the personal prejudices of individual inmates. They therefore subscribe to the "perpetrator" model of racism, where racial discrimination consists of a series of wrongful

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may help to crack the colorblind "semantic code" that generally dictates that race must not be mentioned aloud. *See* Reva B. Siegel, *Discrimination in the Eyes of the Law: How "Color Blindness" Discourse Disrupts and Rationalizes Social Stratification*, 88 CALIF. L. REV. 77, 96 (2000). These views reveal that at least to some, prison racial segregation carried the social meaning of protecting whites from minorities (and should be supported on those grounds).

177. *See* Emma Coleman Jordan, *A History Lesson: Reparations for What?* 58 N.Y.U. ANN. SURV. AM. L. 557, 595 (2003). Jordan debunks the myth that most lynchings were due to actual black-on-white rape; nevertheless, she agrees that sexual violence was the commonly-understood justification for lynching. *See id.* at 564.

178. To take this one step further, the prison rape studies *might* argue for a compelling need for prison segregation, but they also demonstrate the urgency of imposing strict judicial scrutiny. Because the CDC policy reinforces negative images of African-American men, it must receive exacting scrutiny. This argument differs from the Supreme Court's holding, which rests on anti-classification, and it differs from Justice Thomas's portrayal of segregation as a means of protecting minorities.

race-based actions by individuals.[179] Some commentators, notably Justice Thomas in his *Johnson* dissent, have also minimized Equal Protection concerns by presenting racial justice as a matter of association – African-Americans simply want the right to mingle with members of other races.[180] In this Section, I discuss this discourse, and offer an alternative view of the dynamic underlying "race riots."

Paul Brest and John Hart Ely use "race riots" to describe the situation in which prison segregation is permissible. The term suggests that prison violence is caused by racial animosity or racial difference, in the same way that a "religious argument" is an argument fueled by religious differences. Justice Thomas shares the same understanding when he discusses the dangers of prison gangs motivated by "actively virulent racism and religious bigotry."[181]

This description misunderstands much of the prison violence that it attempts to describe. For example, the Attica prison riot, while represented at the time as a race war,[182] was in fact the product of several factors including increased social consciousness among prisoners, tension between the all-white staff and the mostly minority prisoners, and poor prison management.[183] The demands made by the Attica prisoners were not primarily racial; they sought higher wages, better food and medical care, greater educational opportunities, sensitivity training for officers, and inmate grievance councils.[184] Understanding Attica as a race war belittles the legitimate demands of prisoners for reform by implying that the true cause of the unrest was simple racial animosity.

In a similar example, a recent book on prison violence published by the American Correctional Association includes these as examples of riots caused by "racial tension":

On July 10, 1952, a prison riot occurred at the St. Louis, Missouri Jail. This riot was caused when prison officials forced black and white inmates to eat dinner together. Five hundred inmates participated in the riot.

Eighty inmates participated in a prison riot at the Texas Ruck State

179. *See* Alan David Freeman, *Legitimizing Racial Discrimination through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1053 (1978).

180. *See Johnson*, 543 U.S. at 536.

181. *Johnson*, 543 U.S. at 532 (Thomas, J., dissenting). Here, Thomas cites a Ninth Circuit case, *Stefanow v. McFadden*, 103 F.3d 1466, 1472 (9th Cir. 1996), that upheld a prison's policy to ban an anti-Semitic text from prisons on the grounds that it overtly advocated racism and violence. The *Stefanow* decision discussed a particular kind of overt advocacy of racism, but did not purport to describe all prison gangs. *See id.*

182. *See* D.J.R. Bruckner, *In Between Riots, Prisons Become 'Invisible' but Problems Get Worse*, L.A. TIMES, September 20, 1971, at B6. "The Attica uprising, and the crushing of it, are said by many to constitute race war. Maybe that is true." *Id.* However, Bruckner went on to note that "the rebellious prisoners did not make demands that are essentially racial." *Id.*

183. *See supra* nn. 76 - 111 and accompanying text.

184. *See* NEW YORK STATE SPECIAL COMMISSION, *supra* note 70, at 222.

Hospital on April 17, 1955. This six-hour riot was triggered by black inmates' demands that a recreation area be provided to them, as it had been for white inmates. Three prison staff members were held hostage. Five correctional officers and eight inmates were injured.[185]

From the limited description, the first example seems to qualify as a riot caused by racial tension. Because of racial animosity, black and white inmates did not want to eat dinner with one another; when they were forced to, violence ensued. The second example presents a very different sort of riot, more similar to those which occurred at Attica. Here, African-American inmates rioted (possibly against correctional officers), demanding racial equality. One riot could be said to be a riot caused by racism of inmates toward each other, while the second could be described as a riot *against* racism. Nevertheless, the book lumped them together under the heading "Racial Tension," downplaying the important differences between these two models.

Observers continue to employ the perpetrator perspective, viewing riots as caused by the racism of individual prisoners. In February, 2006, when riots erupted in L.A. county jails, newspapers quickly adopted the race riot label.[186] The common understanding was that rising racial tensions between African-American and Latino prisoners caused the wave of prison violence.[187] However, this understanding obscured the true causes of the violence: as one commentator called it, "an overcrowded, overburdened and often dehumanizing method of incarceration."[188] Although racial tensions exist, prison gangs are the primary source of violence in prisons, and while these gangs are often organized along racial lines, they also perpetrate intraracial violence (Northern against Southern Hispanics, African-American members of the Bloods against African-American Crips).[189]

When we understand prison violence as resulting from the prejudice of inmates, we need not examine institutional causes. According to this myth, racial violence within prisons is irrational and fueled by the race-hatred of individual prisoners, who are afflicted with hateful tendencies that the rest of society rejects. The prison system itself bears no responsibility for fostering the violence by creating overcrowded conditions or employing racist officers. Society deserves no criticism for creating vast racial inequities in the administration of the criminal justice system. The perpetrator model thus absolves law-abiding members of society from any moral culpability but vastly misapprehends the nature of prison violence.

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185. *See* MONTGOMERY & CREWS, *supra* note 71, at 13.

186. *See, e.g.*, Charles Ornstein and Julie Cart, *Another Inmate Dies in Racial Fighting*, L.A. TIMES, Feb 13, 2006, at A1.

187. *See* Silja J.A. Talvi, *Race Riot?: It's far too easy to pin recent violence in the L.A. County Jail on ethnic tensions*, IN THESE TIMES, Mareh 27, 2006, http://www.inthesetimes.com/site/main/article/2569/ (last visited January 22, 2008).

188. *Id.*

189. *See id.*

On the other hand, views that downplay the importance of desegregation belittle minorities' legitimate claims for freedom from racial subordination. When Justice Thomas defended prison segregation on the grounds that during most of their time in prison, inmates may choose their cellmates and companions, he echoed the "free association" logic that legal scholars employed to rationalize Jim Crow laws.[190] In 1959, Herbert Wechsler articulated his bemusement with the school desegregation cases, writing:

> [I]f the freedom of association is denied by segregation, integration forces an association upon those for whom it is unpleasant or repugnant. . . Given a situation where the state must practically choose between denying the association to those individuals who wish it or imposing it on those who would avoid it, is there a basis in neutral principles for holding that the Constitution demands that claims for association should prevail?[191]

A similar understanding animated Justice Thomas's discussion of prison segregation. While Thomas did not dispute the undesirability of segregation, he presented the only cost to minority prisoners as their lost ability to associate with whites.[192] Like Herbert Wechsler, he failed to understand the potential evil of segregation: the state-enforced subordination of one race by another. Just as school integration was not a matter of black schoolchildren's rights to mingle with white children, Garrison Johnson was not asserting his right to have a white cellmate. Rather, he was asserting the constitutional right to be free from race-based decisions that harmed him as a member of a racial minority. Thus Thomas's insinuation that Johnson was not genuine in his desire for integration misconstrued the true issue at stake for minority inmates.[193]

In a recent article about the *Johnson* case, Professor James Robertson expressed similar views.[194] Although he disagreed with Justice Thomas in that he ultimately found prison segregation highly problematic, he joined Thomas in treating "self-segregation" as similar to prison segregation policies.[195] He wrote:

Wardens appear to have little resolve to buck common sense racism and forbid "freedom-of-choice" in selecting cellmates . . . "Common sense" would

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190. *See Johnson*, 543 U.S. at 536. Thomas writes that "the CDC submits ... that all other facets of prison life are fully integrated: work, vocational, and educational assignments; dining halls; and exercise yards and recreational facilities." *Id.* This was not entirely true; the segregation system was apparently far more pervasive than the CDC acknowledged. *See* Jeralyn, *supra* note 23. Also, Garrison Johnson was probably subject to the same segregation and race-based lockdowns in response to prison violence that all California prisoners face. *See infra* Part IV.D.

191. *See* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 34 (1959).

192. *See Johnson*, 543 U.S. at 536.

193. *See id.*

194. James E. Robertson, *"Separate But Equal" in Prison: Johnson v. California and Common Sense Racism*, 96 J. CRIM. L. & CRIMINOLOGY 795, 834 (2006).

195. *See id.*

suggest that prison officials' timidity in confronting inmate self-segregation can be partly attributed to the same pejorative "background ideas of race" that congeal as common sense racism.[196]

He argued that *Johnson* will be ineffective because wardens will fail to enforce integration. Although Robertson intended to attack racism in prison management, he fell into the trap of considering prisoners' choices as to whom to live with as carrying the same weight as prison officials' housing policy decisions. We need not attack prisoners' freedom of association in order to attack policies that carry pernicious social meanings.

The common discourse on prison race riots thus understands racism from a perpetrator perspective, where race riots are caused by the racism of individual inmates. Institutional causes drop out of the picture, and the social meaning and social context of prison segregation are obscured. Moreover, courts and commentators have also analyzed segregation claims along "freedom of association" lines, misunderstanding and downplaying prisoners' rights to be free from invidious state-imposed segregation.

C. Does Prison Segregation Survive Strict Scrutiny? Implications of the "Easy Case" Reasoning

John Hart Ely, Paul Brest, Justice Scalia, and dozens of others have held up prison race segregation in response to race riots as the prime example of a race-conscious policy that survives strict scrutiny.[197] Several judges and commentators discussing the CDC's policy intimated that even preventive prison segregation might pass strict scrutiny under similar reasoning.[198] Courts and commentators have rationalized certain instances of race-conscious state action by treating them as easy cases, without examining the social realities supposedly justifying this action.

The greater leeway given to the government in the prison setting is in keeping with a trend within Equal Protection jurisprudence that permits racial classifications for the sake of safety or national security. The fallacy of the segregation-for-safety's-sake argument becomes clear when we compare the case for segregation in prison with the segregation of minorities into prison camps during wartime. Commentators have long realized that civil rights and civil liberties suffer unnecessarily in wartime.[199] *Korematsu v. United States*,[200]

196. *Id.* at 833.

197. *See supra* Part II.A.

198. *See Johnson*, 543 U.S. at 547-48 (Thomas, J., dissenting); *see also* Johnson v. California, 336 F.3d 1117, 1121 (9th Cir. 2003) (Ferguson, J., dissenting to denial of reh'g *en banc*).

199. *See* Mark Tushnet, *Defending Korematsu: Reflections on Civil Liberties in Wartime*, 2003 WIS. L. REV. 273, 273-74 ("After each perceived security crisis ended, the United States has remorsefully realized that the abrogation of civil liberties was unneeessary. But it has proven unable to prevent itself from repcating the error when the next crisis came along." (quoting Justice William J. Brennan, Jr., *The Quest to Develop a Jurisprudence of Civil Liberties in Times of*

in which the Court upheld the internment of Japanese Americans during World War II, is commonly regarded as the prime example of this unwarranted dilution of constitutional rights.[201]

Troublingly, the rationale of *Korematsu* lives on in modern Equal Protection jurisprudence. In his seminal discussion of race and the Equal Protection Clause, Paul Brest not only cites the principle of security trumping civil liberties, but also cites *Korematsu* itself with approval.[202] He writes that the Japanese Internment might be an example of a decision disadvantaging minorities on "entirely legitimate" grounds, and went on to consider what other situations might pass muster.[203] His two examples were school integration and prison segregation following a race riot.[204] He thus equates the much-maligned *Korematsu* decision with the oft-cited example of prison segregation, endorsing both.

Paul Brest's views received a resounding endorsement from the legal academy, which has universally treated prison riots as the "easy case" for segregation. Yet none of these commentators engaged with the realities of prison race riots. Paul Brest and John Hart Ely, both liberal defenders of the Warren Court, use the language of "prison race riots" without providing context although they were writing following a period of great unrest in American prisons that was tied to institutional racism. Brest in 1976 and Ely in 1980 cited prison race riots with no explicit discussion of either the Attica uprising (widely understood as a "race war") or the California prison reform violence and activism. Although their writings subtly invoke Attica, one of the best-known and deadliest prison riots, they brush off prison segregation without discussing it. Using the social meaning test to examine the context of Brest and Ely's cursory statements legitimizing segregation in response to "prison race riots," it becomes clear that, by choosing to cite prison race riots as the "easy case," Brest and Ely whitewashed the prison violence in the 1970s.

At the time of *Korematsu*, conservatives had not yet begun to champion the "colorblind" understanding of the Equal Protection clause that has come to dominate today's discourse. Recently, in both the criminal justice and national security settings, conservatives have bent their otherwise "colorblind" approach to allow racial distinctions to influence policies. One of the most striking

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Security Crises, 18 ISR. Y.B. HUM. RTS. 11 (1988))).

200. 323 U.S. 214 (1944).

201. *See, e.g.*, Alfred C. Yen , Praising With Faint Damnation -- The Troubling Rehabilitation of Korematsu, 19 B.C. THIRD WORLD L.J. 1 (1998). Other non-racial examples of unnecessary assaults on civil liberties range from the Alien and Sedition Acts in the Eighteenth Century to Lincoln's suspension of the right of habeas corpus during the Civil War, to the modern USA PATRIOT Act.

202. *See* Brest, *supra* note 14, at 15.

203. *See id.*

204. *See id.*

examples of this is *Wittmer v. Peters*,[205] in which Judge Posner, a staunch conservative, voted to uphold affirmative action in the selection of prison guards for a boot camp in which the inmates were overwhelmingly African-American. *Wittmer* is one of the only recent opinions to uphold affirmative action for reasons other than diversity.

Posner was persuaded by the exigencies of the prison situation, explaining that absent an affirmative action policy:

> a security staff less than 6 percent black (4 out of 71), with no male black supervisor, would be administering a program for a prison population almost 70 percent black in a prison the staff of which is expected to treat the inmates with the same considerateness, or rather lack of considerateness, that a marine sergeant treats recruits at Parris Island.[206]

Posner allowed this statement to speak for itself, evoking the possibility of a race riot without articulating the consequences he foresaw. While progressives may not be troubled by affirmative action in general, they should be concerned when judges sacrifice their constitutional principles so quickly at the sound of government buzzwords such as "national security" or "prison safety."

By accepting and perpetuating the race-riot example, the legal academy has contributed to a situation where courts need not rigorously engage in the typical strict scrutiny analysis of articulating a compelling state interest and searching for a narrowly-tailored means of accomplishing the asserted goals.[207] "Narrow tailoring" generally means that there must be no less-restrictive alternative.[208] Under the logic set forth by Brest and Ely, courts need not question the underlying prison system that creates violence; prisons need not search for other alternatives to reduce racial strife, such as creating conflict-resolution programs[209] or developing inmate rehabilitation or anger management curricula. Instead, courts may accept the practice of racial segregation in a system laden with the history and meaning of racial subordination.

Johnson leaves room for this glossing-over of institutional causes: O'Connor's majority opinion goes out of its way to point out that prison

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205. 87 F.3d 916 (7th Cir. 1996); *see also* Leti Volpp, *The Citizen and the Terrorist* 49 UCLA L. REV. 1575, 1576 (2002), for a discussion of racial profiling following September 11, 2001.

206. *See Wittmer*, 87 F.3d at 920.

207. *See* Grutter v. Bollinger, 539 U.S. 306, 326 (2003).

208. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 17 (1973).

209. *See* California Prison Focus, *An Update: What We Know About B Yard at Pelican Bay*, July 2000, on file with the author ("Prisoners universally decry the absence of any meaningful vehicle for conflict resolution among prisoners. Prisoners who have served time in other states or the federal system state that they have never seen a penal system that so completely neglects dispute resolution among prisoners. Not coincidentally, no other state penal system exhibits the level of racial hostility that exists in California.").

segregation could survive strict scrutiny, and she cites Scalia's troubling use of "race riots" as the easy case satisfying strict scrutiny. The forceful dissent in Johnson is even more troubling, since it explicitly argues for minimal constitutional scrutiny in prison segregation cases. Notably, the O'Connor majority was joined by only four other justices; Justices Thomas and Scalia joined in the dissent, and then-Chief Justice Rehnquist took no part in the decision (though he would likely have joined Thomas's dissent). With a swing of only a few votes, the watered-down strict scrutiny set forth in *Johnson* could become the minimal review advocated by Thomas.

The treatment of prison segregation as an "easy case" thus works three injustices. First, it obscures and denies the history of race segregation and rioting. Second, by choosing the example of "prison race riots" to define when racial classifications are constitutional, Brest, Ely, and others continue to invoke images of minorities as violent and criminal. Third, it dilutes the Equal Protection principles applied to such cases, meaning that a broad segregation policy such as the CDC's might survive strict scrutiny without much consideration of alternatives. In contrast, they could have chosen examples of segregation in response to non-prison race riots instigated by whites, and avoided perpetuating the powerful myth of minority violence.[210]

CONCLUSION

The typical law student has learned that all race classifications are subjected to strict scrutiny, which is nearly always "strict in theory, but fatal in fact."[211] The academic portrayal of prison segregation has confirmed this understanding, suggesting that race-based lockdowns are rare responses to extreme violence. Justice Scalia writes that prison segregation is an appropriate response to a "social emergency";[212] Brest discusses prison segregation alongside of *Korematsu*, a one-time use of race during wartime. One might easily believe that prison segregation comes only in response to situations like nationally publicized, well-known prison riots such as Attica, which might be termed social emergencies.

In reality, race-based prison lockdowns are commonplace in California. Andrew Escalera and other Southern Hispanic inmates at Pelican Bay were on lockdown for nearly four years.[213] K. Jamel Walker, an African-American inmate in California's Calipatria prison, was plaeed on lockdown once in 1994

210. They would have had plenty of incidents of white racial violence to choose from. *See, e.g.*, Jordan, *supra* note 177, at 558 (discussing the prevalence of lynch mobs and white race riots in the late nineteenth and early twentieth ccnturies). Race segregation to protect minorities would have been a plausible solution in those cases as well.

211. *E.g.* Adarand Constructors v. Pena, 515 U.S. 200, 237 (1995); *e.g.*, Fullilove v. Klutznick, 448 U.S. 448, 519 (1980).

212. Riehmond v. J. A. Croson Co., 488 U.S. 469, 521 (1989).

213. *See* Escalera v. Terhune, 2004 Cal. App. Unpub. LEXIS 1293, at *19 (Cal. Ct. App. Feb. 10, 2004).

and three times in 1995; each time, he was removed from his position as the prison's law-library clerk, while white inmates were permitted to work.[214] Judge Kozinski, finding Walker's treatment unconstitutional, noted that "the record here indicates that lockdowns occur fairly frequently . . . [m]oreover, there appear to be no limits on [their] duration."[215] The frequency of race-based lockdowns underscores the problem with brushing them off as the paradigm case of what survives strict scrutiny.

The reason to reject prison segregation in almost all cases is not simply that it entails racial classifications, as O'Connor's *Johnson* opinion holds. Rather, a look at history reveals that the modern prison evolved in a way that maintained white supremacy. Because of this past and present social meaning, all prison race segregation must face the most exacting scrutiny, including inquiry into less restrictive alternatives. Courts and the legal academy have failed to demand this examination because they have employed a consistent rhetoric defining "prison race riots" as the prototypical situation justifying racial classifications. In so doing, they have miscast "race riots" as caused by the personal prejudices of inmates, thereby obscuring institutional causes. We must reexamine that rhetoric in order to ensure that we do not lightly sacrifice cherished constitutional rights.

214. *See* Walker v. Gomez, 370 F.3d 969, 971 (9th Cir. 2004).

215. *Id.* at 977. Kozinski nevertheless found that the prison officials possessed qualified immunity because the constitutional right was not clearly established. *See id.* at 977-78.