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SUPREME COURT REVIEW

FOREWORD: "SEPARATE BUT EQUAL" IN PRISON: *JOHNSON V. CALIFORNIA* AND COMMON SENSE RACISM

JAMES E. ROBERTSON*

INTRODUCTION

How could the Ninth Circuit Court of Appeals—reputed to be the nation's most liberal federal appellate court[1]—reject a constitutional challenge to "separate but equal" housing of blacks and whites[2] in prison reception centers? "Common-sense," replied the circuit court in *Johnson v. California*.[3] It did not matter that the ruling invited comparison to *Plessy v. Ferguson*,[4] which upheld the Jim Crow laws of the post-Reconstruction South.[5]

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[1] Jerome Farris, *Judges on Judging: The Ninth Circuit—Most Maligned Circuit in the Country—Fact or Fiction?*, 58 OHIO ST. L.J. 1465, 1471 (1997) ("Some observers contend that the Ninth Circuit is reversed so often because it is the most liberal circuit in the country and because the Supreme Court is currently conservative."). *But see* Erwin Chemerinsky, *The Myth of the Liberal Ninth Circuit*, 37 LOY. L.A. L. REV. 1, 2-3 (2003) ("On the other hand, people often forget that, for every liberal on the Ninth Circuit, there is a judge who occupies the exact opposite place on the ideological continuum.").

[2] Unless otherwise indicated, references to "whites" designate non-Hispanic Caucasians.

[3] 321 F.3d 791, 798 (9th Cir. 2003), *rev'd*, 543 U.S. 499 (2005).

[4] 163 U.S. 537 (1896).

[5] Jim Crow was a metaphor for the complex array of laws and customs dictating separation of the races in public life in the post-Reconstruction South. *See generally* RAY STANNARD BAKER, FOLLOWING THE COLOR LINE (Corner House Publishers 1973) (1908)

When considering *Johnson v. California*, the Ninth Circuit had before it the most "illiberal" practice: the California Department of Corrections ("CDC") employed race as the determinative classification criterion in assigning inmates to the double-occupancy cells of its reception centers.[6] New male inmates as well as males transferred within the CDC prison system resided there for some sixty days.[7] Segregation by race invariably resulted;[8] to do otherwise would invite interracial violence, particularly among inmates affiliated with rival gangs—or so the defendants asserted.[9]

(examining de jure racial segregation in the South and de facto segregation in the North at the beginning of the twentieth century); DOUGLAS S. MASSEY & NANCY DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 25 (1993) (describing the "Jim Crow system"). The origin of this term "is lost in obscurity." C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 7 (2d rev. ed. 1966). C. Vann Woodward described the pervasiveness of Jim Crow:

> [U]p and down the avenues and byways of Southern life appeared with increasing profusion the little signs: "Whites Only" or "Colored." Sometimes the law prescribed their dimension in inches, and in one case the kind and color of paint. Many appeared without the requirement by law—over entrances and exits, at theaters and boarding houses, toilets and water fountains, waiting room and ticket rooms.

Id. at 98.

With the intent of challenging state-imposed segregation of African-American railroad passengers, Homer Plessy suffered arrest for his attempt to sit with whites. *See* RICHARD KLUGER, SIMPLE JUSTICE 73 (1977). The railway company had a "professed distaste for the segregation law" and "almost certainly" had prearranged the arrest of Homer Plessy. *Id.* Homer Plessy claimed violations of the Thirteenth and Fourteenth Amendments, with the latter being "[t]he nub of the case." *Id.* at 73-74. Using a "reasonableness" standard, the Supreme Court held that the Louisiana law did not violate the Fourteenth Amendment. *Plessy*, 163 U.S. at 550-51. In finding the statutorily-mandated separation of the races not inconsistent with the equal protection of the law, the Court, in one telling passage, posited:

> Laws permitting, and even requiring, their separation, in places where they are liable to be brought into contact, do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power. The most common instance of this is connected with the establishment of separate schools for white and colored children, which have been held to be a valid exercise of the legislative power even by courts of States where the political rights of the colored race have been longest and most earnestly enforced.

Id. at 544.

[6] *Johnson*, 321 F.3d at 794 ("Although race is only one of many factors, it is a dominant factor . . . .").

[7] *See id.*

[8] *See* Transcript of Oral Argument at 10, Johnson v. California, 543 U.S. 499 (2005) (No. 03-636) (stating that "[t]he record is clear that there's a near 0 percent chance that any black person could be housed with any white person").

[9] *See Johnson*, 321 F.3d at 794 (observing that "race is very important to inmates and it plays a significant role in antisocial behavior"); *id.* at 801 ("The CDC simply does not have to wait until inmates and guards are murdered specifically because race is not considered . . .

Though corrections officials proffered no empirical evidence of racial violence in the reception centers to substantiate their fears,[10] the court of appeals ruled in their favor.[11] In *Johnson*, the Ninth Circuit concluded that "common-sense" dictated that the races be separated to abate possible violence.[12]

Common sense may have its virtues, but not when adjudicating equal protection claims. The Ninth Circuit's reliance on common sense in its means-ends scrutiny resulted in a decision influenced by "everyday maxims, beliefs and ideas about race"[13]—the normative basis for common sense racism.

The Supreme Court in its 2004 Term overturned the Ninth Circuit's ruling in *Johnson v. California*.[14] Justice O'Connor's majority opinion in *Johnson* brings to mind F. Scott Fitzgerald's reprise in *The Great Gatsby*: "So we beat on, boats against the current, borne back ceaselessly into the past."[15] On the one hand, the Court departed from its longstanding policy of deferring to "the reasonable judgments of [prison] officials."[16] On the

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instead, *Turner* allows the administrators to stave off potentially dangerous policies without first 'seeing what happens.'").

[10] *See* Transcript of Oral Argument, *supra* note 8, 7-8 ("The State of California has been unable to identify a single incident of a—of interracial violence between cellmates."). The circuit court did state that "in the administrators' experience," various ethnic groups "tend to be at odds with one another." *Johnson*, 321 F.3d at 794. In addition, the court wrote that an associate warden "testified that if race were not considered . . . she is certain that there would be racially based conflict in the cells and in the yard." *Id.*

[11] *See Johnson*, 321 F.3d at 807.

[12] *Compare id.* at 802 ("Given the admittedly high racial tensions and violence already existing within the CDC, there is clearly a common-sense connection between the use of race as the predominant factor in assigning cell mates for 60 days until it is clear how the inmate will adjust to his new environment . . . ."), *with* Stewart v. Rhodes, 473 F. Supp. 1185, 1188 (S.D. Ohio 1979) (asserting that "an equally 'common sense' attitude . . . would indicate that the segregation of inmates rather than their integration tends to create racial misunderstandings and tensions").

[13] John D. Brewer, *Competing Understandings of Common Sense Understanding: A Brief Comment on "Common Sense Racism,"* 35 BRIT. J. SOC. 66, 68 (1984); *see also infra* notes 118-33 and accompanying text (elaborating on the concept of common sense racism).

[14] Johnson v. California, 543 U.S. 499, 515 (2005).

[15] F. SCOTT FITZGERALD, THE GREAT GATSBY 189 (Simon & Schuster 1995) (1925).

[16] *Johnson*, 543 U.S. at 524 (Thomas, J., dissenting); *see also infra* note 201 (citing cases mandating deference). For the greater half of the twentieth century, courts embraced a "hands-off" approach to prisoners' civil rights claims. *See, e.g.*, Douglas v. Sigler, 386 F.2d 684, 688 (8th Cir. 1967) ("[C]ourts will not interfere with the conduct, management, and disciplinary control of this type of institution except in extreme circumstances."); United States *ex rel.* Atterbury v. Ragen, 237 F.2d 953, 955 (8th Cir. 1956) ("We think that it is well settled that it is not the function of the courts to superintend the treatment and discipline of prisoners . . . .") (internal quotation marks and citations omitted); Garcia v. Steele, 193 F.2d

other hand, the Court crafted a "tamed" version of *Brown v. Board of*

276, 278 (8th Cir. 1951) ("[C]ourts have no supervisory jurisdiction over the conduct of the various institutions."); Taylor v. United States, 179 F.2d 640, 643 (9th Cir. 1950) ("It is not within the province of the courts to supervise the treatment of prisoners in the penitentiary, but only to deliver from prison those who are illegally detained there."); United States *ex rel.* Palmer v. Ragen 159 F.2d 356, 358 (7th Cir. 1947) ("Under repeated decisions, state governmental bodies, who are charged with prosecution and punishment of offenders, are not to be interfered with except in case of extraordinary circumstances.") (internal quotation marks and citations omitted).

Commencing in the late 1960s lower federal courts broke with their "hands-off" doctrine and expanded the rights of inmates. *See, e.g.*, Knell v. Bessinger, 489 F.2d 1014, 1018 (7th Cir. 1973) (identifying a right to due process in classification decisions); Woodhouse v. Virginia, 487 F.2d 889, 890 (4th Cir. 1973) (identifying a right to be free of inmate violence); Thomas v. Brierley, 481 F.2d 660, 661 (3d Cir. 1973) (identifying a right to be free of racial discrimination); Fitzke v. Shappell, 468 F.2d 1072, 1076 (6th Cir. 1972) (identifying a right to medical care); Hamilton v. Covington, 445 F. Supp. 195, 202 (W.D. Ark. 1978) (identifying a right to be free from fire hazards); Padgett v. Stein, 406 F. Supp. 287, 299 (M.D. Pa. 1975) (identifying a right to be free from overcrowding); Sinclair v. Henderson, 331 F. Supp. 1123, 1128-29 (E.D. La. 1971) (identifying a right to exercise). Numerous commentators of the period chronicled these developments. *See, e.g.*, Fred Cohen, *The Discovery of Prison Reform*, 21 BUFF. L. REV. 855 (1972); Daryl R. Fair, *The Lower Federal Courts as Constitution-Makers: The Case of Prison Conditions*, 7 AM. J. CRIM. L. 119 (1979); Harvard Ctr. for Criminal Justice, *Judicial Intervention in Prison Discipline*, 63 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 200 (1972); Richard G. Singer, *Prisoners' Rights Litigation: A Look at the Past Decade and a Look at the Coming Decade*, 44 FED. PROBATION 3 (1980); Michael S. Fieldberg, Comment, *Confronting Conditions of Confinement: An Expanded Role for the Courts in Prison Reform*, 12 HARV. C.R.-C.L. L. REV. 367 (1977).

In 1979, in *Bell v. Wolfish*, 441 U.S. 520 (1979), the Supreme Court began a concerted effort to end the expansion of prisoners' rights by espousing a policy of deference to prison staff:

> [C]ourts must heed our warning that "[penal] considerations are peculiarly within the province and professional expertise of correctional officials and in the absence of substantial evidence in the record to indicate that officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters."

Id. at 540 n.23 (quoting Pell v. Procunier, 417 U.S. 817, 827 (1974)); *see also* Hedieh Nasheri, *In the Spirit of Meanness: Courts, Prisons and Prisoners*, 27 CUMB. L. REV. 1173, 1188-89 (1997) ("The turning point in the Court's approach to prison litigation occurred in 1979, the beginning of the Deference Period. In *Bell v. Wolfish*, the Court dramatically altered the framework for considering prisoners' constitutional claims.") (footnotes omitted).

After *Wolfish*, in case after case the Supreme Court disappointed prisoners' rights advocates. *See, e.g.*, Laura B. Meyers & Sue Titus Reid, *Modern Prisons: 1960 to the Present*, in ENCYCLOPEDIA OF AMERICAN PRISONS 239, 243 (Marilyn D. McShane & Frank P. Williams III eds., 1996) ("In the 1980s and 1990s, the pendulum appears to have shifted back with a more conservative Supreme Court once again emphasizing the need for institutional security, upholding more restrictive administrative policies."). The consistent theme in these cases was one of deference. *See infra* note 201 (citing cases). Hence, Justice Thomas's dissenting opinion is quite correct in asserting that "[t]he Constitution has always demanded less within the prison walls." *Johnson*, 543 U.S. at 524 (Thomas, J., dissenting).

Education[17] that cannot undo the de facto racial segregation pervading the prison community, including its inmate subculture. Like the ruling of the Ninth Circuit, the *Johnson* Court will be haunted by the ghost of Homer Plessy.

Part I of this Article addresses "location, location, location." This mantra for defining prime real estate also applies to racially identified space—that is, space that comes to symbolize the stereotypical features of a racial group. Currently, the prison is the nation's most racialized type of real estate. This is the context in which *we*—and in this instance I am especially referring to white people like me—must understand why the Ninth Circuit's ruling in *Johnson* reminds one of *Plessy v. Ferguson.* The prison confining petitioner-inmate Garrison Johnson, much like the segregated railroad that would have transported Homer Plessy, is a large-scale institution that brings the races into physical proximity of one another, while impeding their social interaction through the race-based division of confined space.

Part II examines the contemporary origins of common sense as a juridical tool, its propensity to embrace common sense racism, and the likeness of common sense racism in the cultural portrait of incarcerated black men drawn by the Ninth Circuit in *Johnson.* I believe that a majority of the Ninth Circuit judges failed to recognize that "[c]ommon sense . . . is what the mind filled with presuppositions concludes,"[18] and thus for white judges comes replete with race inequality norms. Common sense adjudication thereby invites application of common sense racism. Because white people often lack a conscious racial identity, common sense racism is largely invisible to white judges.

In Part III, the Article returns to the adjudication of the CDC's "separate but equal" housing scheme before the Supreme Court. The *Johnson* Court swept aside the Ninth's Circuit's "factless" jurisprudence in favor of strict scrutiny of the CDC's "express racial classification."[19] While

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[17] Brown v. Bd. of Educ., 347 U.S. 483 (1954). Professor Strauss, for reasons that will be later provided, referred to the "taming" of *Brown* some three decades after its pronouncement. David A. Strauss, *Discriminatory Intent and the Taming of* Brown, 56 U. CHI. L. REV. 935, 938 (1989).

[18] CLIFFORD GEERTZ, LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETATIVE ANTHROPOLOGY 84 (1983).

[19] *Johnson,* 543 U.S. at 524 (Thomas, J., dissenting). In *City of Cleburne. v. Cleburne Living Center, Inc.*, 373 U.S. 432 (1985), the Supreme Court succinctly explained when and how strict scrutiny operates:

> [R]ace, alienage, or national origin] are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy—a view that those in the burdened class are not as worthy or deserving as others. For

the Court's ruling in *Johnson* reinvigorates judicial scrutiny of express race-based prison policies, it will not end the widespread de facto racial segregation in American prisons. As long as inmates can exercise "freedom-of-choice" in selecting cellmates, there will likely be a "separate but equal" outcome. Moreover, the *Johnson* decision will not purge common sense racism from the adjudication of penal policies that side-step express racial classifications or are themselves the product of "background ideas of race,"[20] which rarely evince discriminatory intent.

Part IV argues that empathy for the likes of Homer Plessy and Garrison Johnson is a value implicit in the equal protection model advanced by the *Carolene Products*' famous footnote four[21] and should be incorporated into the Court's multi-tiered equal protection test. Because empathy teaches equal concern and respect, courts must presume purposeful

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> these reasons and because such discrimination is unlikely to be soon rectified by legislative means, these laws are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest. Similar oversight by the courts is due when state laws impinge on personal rights protected by the Constitution.

Id. at 440 (citations omitted).

The government usually fails to meet its burden, prompting one commentator to write that strict scrutiny is "'strict' in theory and fatal in fact." Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972); *see also, e.g.*, *In re* Griffiths, 413 U.S. 717, 721 (1973) (barring aliens from practicing law violated the Equal Protection Clause); Graham v. Richardson, 403 U.S. 365, 372 (1971) (restricting welfare benefits on the basis of alienage violated the Equal Protection Clause); McLaughlin v. Florida, 379 U.S. 184, 192 (1964) (criminalizing the cohabitation of interracial unmarried couples violated the Equal Protection Clause); Bolling v. Sharpe, 347 U.S. 497, 499 (1954) (ruling that segregated schools violated the Equal Protection Clause). *But see* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995) ("[W]e wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'" (quoting Fullilove v. Klutznick, 448 U.S. 448, 519 (1980) (Marshall, J., concurring))).

An intermediate level of scrutiny arises for quasi-suspect criteria. *See, e.g.*, United States v. Virginia, 518 U.S. 515, 531 (1996) (requiring "heightened scrutiny," in which the government must provide an "exceedingly persuasive justification" for sex discrimination); Craig v. Boren, 429 U.S. 190, 197 (1976) ("To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.").

All other classifications simply require a rational basis and enjoy a strong presumption of constitutionality. *See, e.g.*, *City of Cleburne*, 473 U.S. at 440 ("[L]egislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest."); City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976) (observing that rationality review "presume[s] the constitutionality of the statutory discrimination").

[20] *See infra* notes 129-33 and accompanying text (attributing and examining the "background ideas of race" concept).

[21] United States v. Carolene Prods., 304 U.S. 144, 152-53 n.4 (1938).

discrimination against empathy-deprived groups when they are subject to a cellmate-selection procedure that does not ensure racial integration. Finally, Part V inquiries what a youthful, imprisoned namesake of Homer Plessy would tell us about "doing time" in the new "peculiar institution," the prison of the twenty-first century. This is an institution immersed in common sense racism.

I. FOLLOWING THE COLOR LINE: THE RAILROAD CAR THAT BECAME A PRISON

A. "SEPARATE BUT EQUAL" IN THE CDC

It is not outside the realm of common sense to speculate that inmate Garrison Johnson's great-great-grandfather left the Reconstruction South for the North. If so, he might have traveled by railroad car on June 7, 1892, the day that Homer Plessy had run afoul of Louisiana's Jim Crow legislation.[22] Homer Plessy's challenge to racially segregated passenger coaches[23] finds an unlikely parallel in Garrison Johnson's contesting a prison policy that ensured "separate but equal" multiple-occupancy cells.[24]

Prisons, like railroads of Homer Plessy's America, have historically been afflicted by racism and the separation of the races. The "separate but equal" doctrine applied with full force to the housing of inmates in the pre-*Brown* South.[25] Moreover, Northern prisons typically segregated inmates.[26] Not until 1968 did the Supreme Court in *Lee v. Washington*[27] find the practice unconstitutional. In *Lee,* Alabama law mandated racial segregation

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[22] *See supra* note 5 (recounting the events leading to the *Plessy* decision).

[23] *See generally* CHARLES S. MANGUM, JR., THE LEGAL STATUS OF THE NEGRO 181-222 (1940) (discussing statutory provisions segregating African Americans on railroads prior to World War II).

[24] *See supra* notes 6-9 and accompanying text (discussing the CDC's assignment of inmates to double-occupancy cells in its reception centers).

[25] *See, e.g.,* JAMES B. JACOBS, NEW PERSPECTIVES ON PRISONS AND IMPRISONMENT 63-64 (1983) (writing that laws in the South "often required . . . racially homogeneous facilities"); MANGUM, *supra* note 23, at 223 (describing segregation in charitable and penal institutions as "an established fact" in the South and border states).

[26] *See, e.g.,* Leo Carroll, *Racial Conflict, in* ENCYCLOPEDIA OF AMERICAN PRISONS, *supra* note 16, at 377 (recounting that "[o]utside the South, the policy in most prisons has been, until recently, to segregate inmates by race within the same prison"); JACOBS, *supra* note 25, at 64 (observing that racial segregation "also characterized northern prisons").

[27] 390 U.S. 333 (1968) (per curiam).

in prison cellblocks.[28] The Court's per curiam decision did no more than affirm the district court's order for "complete and total desegregation."[29] Justice Black's concurring opinion, on the other hand, would frame the contemporary debate over the deference due prison staff. Arguably premised on the belief that integration would bring discord and violence rather than mutual respect and empathy, he called for an exception to "complete" and permanent desegregation: "that prison authorities have the right, acting in good faith and in particularized circumstances, to take into account racial tensions in maintaining security, discipline, and good order in prisons and jails."[30] In its subsequent ruling in *Cruz v. Beto,*[31] the Court embraced Justice Black's assertion that "the necessities of prison security and discipline" permitted temporary racial segregation.[32] What constitutes "particularized circumstances" has been a question repeatedly before lower federal courts.[33]

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[28] Washington v. Lee, 263 F. Supp. 327 (M.D. Ala. 1966), *aff'd*, 390 U.S. 333 (1968) (per curiam).

[29] *Lee*, 390 U.S. at 333.

[30] *Id.* at 334 (Black, J., concurring). A majority of the Justices embraced this exception in *Cruz v. Beto*, 405 U.S. 319, 321 (1972).

[31] *Cruz*, 405 U.S. at 319.

[32] *Id.* at 321 (quoting *Lee*, 333 U.S. at 334 (Black, J., concurring)).

[33] *See, e.g.*, Sockwell v. Phelps, 20 F.3d 187, 191 (5th Cir. 1994) ("Although this Court has not specifically defined the 'particularized circumstances' exception in *Lee v. Washington*, the general rule is clear: a generalized or vague fear of racial violence is not a sufficient justification for a broad policy of racial segregation.") (footnote omitted); United States v. Wyandotte County, Kan., 480 F.2d 969, 971 (10th Cir. 1973) ("We cannot construe this caveat as authorizing the consistent and settled practice of 'Negroes to the East tank, whites West tank,' we have before us. The use of the words 'particularized circumstances' is significant . . . ."); Mason v. Schriro, 45 F. Supp. 2d 709, 714 (W.D. Mo. 1999) ("The court finds that defendants have not provided any specific evidence of the security dangers that are implicated if inmates of different races are housed together . . . ."); Simpson v. Horn, 25 F. Supp. 2d 563, 574 (E.D. Pa. 1998) (rejecting defendants motion for a summary judgment partly because "[d]efendants offer no evidence of particularized circumstances justifying a general policy of cell assignments by race"); Finney v. Mabry, 534 F. Supp. 1026, 1043 (E.D. Ark. 1982) (rejecting a classification system that permitted inmates to refuse integrated housing by merely "say[ing] the right thing"); McClelland v. Sigler, 327 F. Supp. 829, 834 (D. Neb. 1971) (declaring that if inmates threaten violence in the face of desegregation they should be disciplined and thus "feel the weight of the consequences of their overt bigotry"); Rentfrow v. Carter, 296 F. Supp. 301, 303 (N.D. Ga. 1968) (calling for disciplinary measures to maintain order rather than honoring inmates' preference for segregated housing). The above rulings fell in line with *Watson v. Memphis*, 373 U.S. 526 (1963), in which the Supreme Court held that the "personal speculations or vague disquietudes" about racial violence would not justify the segregation of public parks. *Id.* at 536; *see also* Cooper v. Aron, 358 U.S. 1 (1958) (holding that vague fears of racial violence does not justify delaying desegregation of public schools). *But see* Walker v. Gomez, 370 F.3d 969, 980-81 (9th Cir. 2004) (applying *Turner's* rational basis test in finding that "[i]t

Nonetheless, contemporary inmates live in racially divided institutions. In many prisons, informal race-based rules govern the relations among inmates much like the Jim Crow laws.[34] "Racism," wrote a particularly astute prisoner, "still determines where you go, how you go, who you go with, what you do when you arrive, who you arrive with, and what you say when finally there."[35] The commonplace aspects of confinement include racially segregated housing,[36] with racial homogeneity in cell assignments the statistical norm.[37] Racial balkanization extends into the prison yard, cafeteria, and other public places.[38] Prison administrators often acquiesce to this apartheid-like arrangement,[39] sometimes with the expectation of exploiting racial divisions.[40]

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was not irrational (though it may have been unnecessary) to keep all African-Americans, as well as all other inmates who had non-critical jobs, locked-down until everything—including gang membership or association—got sorted out"); Harris v. Greer, 750 F.2d 617, 619 (7th Cir. 1984) ("Racial separation brought about by policies founded exclusively on a bona fide, colorblind concern for the safety of prisoners in our nation's dangerous prisons does not violate the equal protection clause."); White v. Morris, 832 F. Supp. 1129, 1133 (S.D. Ohio 1993) (applying *Turner's* reasonableness test in concluding that "[f]orcing the random celling policy at this time would pose security problems and would ignore pragmatic penological concerns").

[34] *See* VICTOR HASSINE ET AL., EDS., LIFE WITHOUT PAROLE: LIVING IN PRISON TODAY 69 (3d ed. 2004) ("In many prisons, unwritten race-based rules of behavior are common, and minor infractions of these rules can have serious consequences.").

[35] K.C. CARCERAL, BEHIND A CONVICT'S EYES: DOING TIME IN A MODERN PRISON 137 (Thomas J. Bernard et al., eds., 2004); *see also* HASSINE ET AL., *supra* note 34, at 69 ("An inmate's race may still determine where he can stand, sit, or work, and what he can say and to whom he may speak."); JEFFREY IAN ROSS & STEPHEN C. RICHARDS, BEHIND BARS: SURVIVING PRISON 51 (2002) ("With few exceptions, black prisoners associate with blacks, whites with whites, and Hispanics with Hispanics.").

[36] *See, e.g.*, HASSINE ET AL., *supra* note 34, at 70 (describing "[d]e facto segregation" as "very much alive"); ROSS & RICHARDS, *supra* note 35, at 51 (stating that race is the "primary dividing line"); MICHAEL WELCH, CORRECTIONS: A CRITICAL APPROACH 275 (1996) (describing de facto racial segregation in prison); Carroll, *supra* note 26, at 378 (concluding that "[r]ace relations among prisoners is characterized by extreme segregation and avoidance").

[37] *See infra* note 47 and accompanying text (estimating that thirty percent of multiple-occupancy cells are integrated).

[38] *See, e.g.*, LEO CARROLL, HACKS, BLACKS, AND CONS 147-71 (1988) (describing race relations in a Rhode Island prison); JACOBS, *supra* note 25, at 71, 81 (documenting the separation of inmates by race); JOCELYN M. POLLOCK, PRISONS AND PRISON LIFE 106 (2004) (describing de facto racial segregation wherever inmates assemble); James E. Robertson, *Psychological Injury and the Prison Litigation Reform Act: A "Not Exactly," Equal Protection Analysis*, 37 HARV. J. ON LEGIS. 105, 129 (2000) (concluding that "[d]e facto segregation in housing and communal activities, such as recreation, meals, and 'hanging out,' prevails throughout the federal and state prison systems").

[39] *See infra* notes 243-48 and accompanying text (surveying wardens and finding that most do little to integrate their prisons); *see also* HASSINE ET AL., *supra* note 34, at 70

Just as Jim Crow laws strengthened racial identities,[41] so too has de facto racial segregation in the contemporary prison. Prior to their incarceration, white inmates had been oblivious to their whiteness and the privileges it brings.[42] The onset of their imprisonment often spurs a racial awakening. One inmate observed:

> During my first years of lockup, I could not escape the fact that, in other prisoners' eyes, I was white. The black prisoners reminded me daily, almost hourly, how white I was. The white prisoners reminded me how black the black prisoners were. The racial lines were continually drawn and handed to the new fish.[43]

In preparing new inmates for the prison environment, the CDC, like Homer Plessy's South, embraced "racial essentialism"—the notion that race and ethnicity matter most in assigning one's place in the social order.[44] Just as railroad workers had designated the light-skinned Homer Plessy a "colored person," the CDC assigned Garrison Johnson a racial identity—that of a black man—to determine where he would reside in the reception center.[45] Thereafter, he would be permitted to select a cellmate of any

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(observing that the prison staff "did its part" to ensure de facto segregation and did not cell African Americans and whites together).

[40] *See* ROSS & RICHARDS, *supra* note 35, at 51 (describing the use of "racial conflict as a means to divide and conquer the inmate population").

[41] *See* GRACE ELIZABETH HALE, MAKING WHITENESS: THE CULTURE OF SEGREGATION IN THE SOUTH, 1890-1940 130 (1998) ("Segregation [in the post-Reconstruction South] made racial identity visible in a rational and systemic way . . . . Racialized spaces could counter the confusion of appearances created by the increased visibility of a well-dressed, well-spoken black middle class.").

[42] *See infra* note 119 and accompanying text (introducing the "transparency phenomenon").

[43] CARCERAL, *supra* note 35, at 137.

[44] The term race essentialism appears to have its origins in critiques of feminism. Most notably, Angela P. Harris asserted:

> The result of essentialism is to reduce the lives of people who experience multiple forms of oppression to addition problems: "racism + sexism = straight black women's experience," or "racism + sexism + homophobia = black lesbian experience." Thus, in an essentialist world, black women's experience will always be forcibly fragmented before being subjected to analysis, as those who are "only interested in race" and those who are "only interested in gender" take their separate slices of our lives.

Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 588-89 (1990); *see also* Jim Thomas, *Racial Codes in the Prison Culture, Snapshots of Black and White*, *in* RACE AND CRIMINAL JUSTICE 126, 142 (Michael J. Lynch & E. Britt Patterson eds., 1991) ("[T]he prison experience is a racial experience for all who participate in the prison culture.").

[45] *See* Johnson v. California, 321 F.3d 791, 794 (9th Cir. 2003), *rev'd*, 543 U.S. 499 (2005):

> Generally, inmates are listed in four general ethnic categories, black, white, Asian, and other. Within each of these categories, officials at the reception center further divide inmates, for

race.[46] Such a choice, on a national level, will only infrequently match a black inmate with his white counterpart because a mere thirty percent of the nation's multiple-occupancy prison cells—the concrete cages inmates call "home"—are racially integrated.[47]

B. "COMMON SENSE" ON THE NINTH CIRCUIT

Like Homer Plessy, Garrison Johnson challenged the use of race as a classification criterion for determining where he would temporarily reside.[48] No runaway train, the Ninth Circuit looked to case law for guidance. The court did not find it in *Lee v. Washington* or *Brown v. Board of Education*, but rather in *Turner v. Safley*.[49] While the facts of *Turner* addressed race-neutral prison regulations forbidding inmates from marrying and severely restricting inmate-to-inmate correspondence,[50] the Ninth Circuit read *Turner* to require application of its easily met means-end, rational basis test[51] to a prison policy creating "separate but equal" housing.[52]

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example Japanese and Chinese inmates are generally not housed together, nor are Laotians, Vietnamese, Cambodians, and Filipinos. Also, Hispanics from Northern California and Hispanics from Southern California are not housed together because, in the administrators' experience, they tend to be at odds with one another.

[46] *Id.* at 794-95.

[47] *See* Chad R. Trulson & James M. Marquart, *Inmate Racial Integration: Achieving Integration in the Texas Prison System*, 82 PRISON J. 498, 512 (2002).

[48] But for Garrison Johnson's persistence, his case would have hit the proverbial "brick wall" in that he originally filed his complaint *pro se* in 1995, only to have it and subsequent amended complaints dismissed by the district court. *Johnson*, 321 F.3d at 795. Not until the year 2000 did the Ninth Circuit remand the case for trial upon holding that he had stated a claim for which relief was available. *See id.* (recounting his long and winding judicial trek to the Ninth Circuit). Unlike Homer Plessy, little is known of Garrison Johnson except that he was convicted in 1987 of murder, robbery, and assault. *See* Johnson, Garrison v. California, et al.—Medill—On the Docket, http://docket.medill.northwestern.edu/archives/000805.php (last visited June 9, 2006).

[49] Turner v. Safley, 482 U.S. 78, 89 (1987).

[50] *See id.* at 81-82 (describing the regulations and their consequences).

[51] According to the *Turner* Court, the constitutionality of the regulation in question rests on four considerations:

- "First, there must be a 'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it." *Id.* at 89 (citation omitted).
- "A second factor . . . is whether there are alternative means of exercising the right that remain open to prison inmates." *Id.* at 90.
- "A third consideration is the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally . . . . When accommodation of an asserted right will have a significant 'ripple effect' on fellow inmates or on prison staff, courts should be particularly deferential to the informed discretion of corrections officials." *Id.*

The Ninth Circuit had good reason, at least in terms of precedent, for using the *Turner* test: the Supreme Court stated on two occasions that this four-pronged standard applies to all constitutional challenges to prison regulations.[53] Moreover, lower federal courts had already applied the *Turner* test to equal protection challenges to dissimilar treatment based on race,[54] gender,[55] and religious affiliation.[56]

- "[I]f an inmate claimant can point to an alternative that fully accommodates the prisoner's rights at de minimis cost to valid penological interests, a court may consider that as evidence that the regulation does not satisfy the reasonable relationship standard." *Id.* at 91.

The first-prong is the centerpiece of the test. *See, e.g.,* Shaw v. Murphy, 432 U.S. 223, 229-30 (2001) ("If the connection between the regulation and the asserted goal is 'arbitrary or irrational,' then the regulation fails, irrespective of whether the other factors tilt in its favor.") (citation omitted); Prison Legal News v. Cook, 238 F.3d 1145, 1151 (9th Cir. 2001) (describing the first-prong as the "sine qua non"); Walker v. Sumner, 917 F.2d 382, 385 (9th Cir. 1990) ("The first of these factors constitutes a sine qua non.").

The origins of the *Turner* test reside in the Court's long-standing policy of "due deference" to the actions of prison staff. *See Turner*, 482 U.S. at 90 ("[C]ourts should be particularly conscious of the measure of judicial deference owed to corrections officials . . . in gauging the validity of the regulation.") (internal quotation marks and citations omitted). The four-prongs give the appearance of a balancing model, but, as one commentator observed, "what is striking about the Court's application of the *Turner* test is the way in which the *Turner* factors are crafted (or, critics might contend, contrived) to generally foreordain a finding against a prisoner's constitutional claim." Lynn S. Branham, *"Go Sin No More": The Constitutionality of Governmentally Funded Faith-based Prison Units*, 37 U. MICH. J.L. REFORM 291, 297 (2004).

[52] See *Johnson*, 321 F.3d at 798-99 (*"Turner,"* asserted the Ninth Circuit, "was not merely a cosmetic change in the [Supreme] Court's language [in *Lee v. Washington*]. *Turner* ostensibly expanded the definition of . . . 'necessary for security and discipline,' and lowered the prison administrators' burden to justify race-based policies.") (citation omitted).

[53] *See, e.g.,* Shaw v. Murphy, 532 U.S. 223, 229 (2001) (describing the *Turner* test as a "unitary, deferential standard for reviewing prisoners' rights claims"); Washington v. Harper, 494 U.S. 210, 224 (1991) ("We made quite clear that the standard of review we adopted in *Turner* applies *to all circumstances* in which the needs of prison administration implicate constitutional rights.") (emphasis added).

[54] The District Court for the Southern District of Ohio in *White v. Morris*, 832 F. Supp. 1129 (S.D. Ohio 1993), broke new ground by being the first to apply the *Turner* test to a lawsuit brought over racially segregated cells. Prison officials instituted racial segregation in cell assignments following a riot caused in part by integrated celling. *See id.* at 1130. In addition, the rioting led to the destruction of prisoners' files that, according to the defendants, prevented them from making "race neutral, random celling." *Id.* at 1132. Citing *Turner* and its progeny, the court examined the constitutionality of segregated celling under the deferential reasonableness standard of review. *See id.* at 1135-37. Moreover, its language clearly indicated that this standard applied to no less than all challenges to prison policies addressing security concerns. *See id.* at 1136 ("Thus, the federal courts must judge any prison policy addressing security concerns that impinge on prisoners' constitutional rights under a reasonableness standard of review."). Giving "considerable deference" to the defendant prison authorities, the court held in their favor. *Id.* at 1133; *see also* Simpson v.

Moreover, prior to the *Johnson* litigation, the Ninth Circuit, Second Circuit, and District of Columbia Circuit had used common sense in gauging the reasonableness of various prison rules.[57] For instance, in *Kimberlin v. Department of Justice*,[58] the District of Columbia Circuit upheld prison regulations banning electric and electronic musical devices.[59] Regarding the all-important first prong of the *Turner* test, the *Kimberlin* court found the prohibition "reasonably related to the asserted goal [of] conserving correctional funds."[60] The court reached this conclusion without needing any empirical evidence; "[c]ommon sense," posited the three-judge panel, "tells us . . . that a prisoner's possession and use of an electric guitar costs correctional institutions money for electricity, upkeep, storage, and supervision."[61]

Horn, 25 F. Supp. 2d 563, 570 (E.D. Pa. 1998) (stating in dicta that the defendant's double-celling policy, which considered race as one of several "compatibility factors," was permissible under the *Turner* test).

[55] Klinger v. Dep't of Corr., 31 F.3d 727, 729 (8th Cir. 1994).

[56] Shabazz v. Barnauskas, 790 F.2d 1536, 1539 (11th Cir. 1986).

[57] *See, e.g.*, Kimberlin v. Dep't of Justice, 318 F.3d 228, 233 (D.C. Cir. 2001) (using "[c]ommon sense" to determine that the energy used for electric instruments justifies their ban as a rational means of advancing penal aims); Frost v. Symington, 197 F.3d 348, 357 (9th Cir. 1999) (finding a "common-sense connection" between prison security and banning a publication depicting sexual penetration); Ametal v. Reno, 156 F.3d 192, 199 (D.C. Cir. 1998) ("We do not think . . . that common sense must be a mere handmaiden of social science data or expert testimonials . . . . Nor do we think that *Safley* requires more."); Giano v. Senkowski, 54 F.3d 1050, 1055 (2d Cir. 1994) (using common sense to uphold a policy that allows commercial erotic literature but bars semi-nude photos of girlfriends or wives). Later, however, in *Wolf v. Ashcroft*, 297 F.3d 305, 308-09 (3d Cir. 2002), the Second Circuit qualified its use of common sense:

> While the connection may be a matter of common sense in certain instances, such that a ruling on this issue based only on the pleadings may be appropriate, there may be situations in which the connection is not so apparent and does require some factual development. Whether the requisite connection may be found solely on the basis of "common sense" will depend on the nature of the right, the nature of the interest asserted, the nature of the prohibition, and the obviousness of its connection to the proffered interest. The showing required will vary depending on how close the court perceives the connection to be.

Id. at 308-09. *But see Giano*, 54 F.3d at 1060 (Calabresi, C.J., dissenting) (arguing that prison staff's "self-serving assertions" do not justify the majority's "common sense determination" that nude photographs of prisoners' wives could lead to violence among inmates).

[58] *Kimberlin*, 318 F.3d 228.

[59] *See id.* at 229-30 (describing the Zimmer Amendment, also known as the No Frills Prison Act).

[60] *Id.* at 233.

[61] *Id.*

Against this backdrop, the Ninth Circuit in *Johnson* concluded that *Turner* had "lowered the prison administrators' burden [from that required by *Lee* and by implication *Brown v. Board of Education*] to justify race-based policies."[62] Indeed, the Ninth Circuit embraced the least demanding of the equal protection tests—the one used when hot dog vendors complain of discriminatory treatment[63]—by inquiring whether there existed a rational basis for de jure racial segregation. The court answered as follows:

> Given the admittedly high racial tensions and violence already existing within the CDC, *there is clearly a common-sense connection* between the use of race as the predominant factor in assigning cell mates for 60 days until it is clear how the inmate will adjust to his new environment and reducing racial violence and maintaining a safer environment.[64]

"Common-sense" could be rebutted if the plaintiff overcame a "heavy burden."[65] Only then would the *Johnson* court require the CDC to make an evidentiary showing.[66] The plaintiff's evidence fell short of this mark, despite referencing an empirical study establishing that desegregation of prison cells in Texas led to a drop in inmate-on-inmate violence.[67]

By embracing common sense, the Ninth Circuit joined the *Plessy* Court in legitimating a "separate but equal" standard. But more importantly, it emulated the *Plessy* Court in using racialized knowledge—that is, "embedded social practices that reflect racial thinking."[68] In *Plessy*, the Court had openly attributed racial segregation to acceptable cultural

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[62] Johnson v. California, 321 F.3d 791, 798-99 (9th Cir. 2003).

[63] Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 61 n.428 (1992) (observing that "bipolar, two-tier equal protection review treated discrimination against blacks as suspect, but not discrimination against opticians, hot dog vendors, or debt adjusters").

[64] *Id.* at 798 (emphasis added). The court brought to bear "common-sense" when addressing the first of the four-prongs in the *Turner* test, which, as the Third Circuit observed in *Waterman v. Farmer*, 183 F.3d 208 (3d Cir. 1999), "'looms especially large' because it 'tends to encompass the remaining factors, and some of its criteria are apparently necessary conditions.'" *Id.* at 213-14 (quoting Amatel v. Reno, 156 F.3d 192, 196 (D.C. Cir. 1998)); *see also supra* note 51 (citing cases describing the first prong as the "sine qua non" of the *Turner* test).

[65] *Johnson*, 321 F.3d at 798, 801 (internal quotation marks and citation omitted).

[66] *See id.* at 803.

[67] Chad Trulson & James W. Marquart, *The Caged Melting Pot: Toward an Understanding of the Consequences of Desegregation in Prisons*, 36 LAW & SOC'Y REV. 743, 774 (2002) (concluding that "[i]ntegration did not result in disproportionate violence; rather, over the long term, the rate of violence between inmates segregated by race in double cells surpassed the rate among those racially integrated").

[68] Ian F. Haney López, *Legal Violence and the Chicano Movement*, 150 U. PA. L. REV. 205, 243 (2001).

norms, a repository of common sense.[69] In *Johnson*, the Ninth Circuit likely did not know that it relied upon racialized knowledge when it set aside empiricism in favor of common sense. The circuit's failure to recognize its use of racialized knowledge comports with the "new racism" paradigm, in which racism expresses itself diffusely[70] and often arises from what Ian Haney López calls "background ideas of race."[71]

The following Part of this Article elaborates upon the central concepts in play: common sense as a juridical tool, its interface with common sense racism, and the role of common sense and common sense racism in the *Johnson* litigation. As demonstrated below, judges applying common sense to resolve equal protection issues in prison enter an arena suffused with common sense racism.

II. CLOSING THE CIRCLE: COMMON SENSE AND RACISM

A. THE JURISPRUDENCE OF COMMON SENSE

Judges' use of common sense—what "everybody knows"[72]—hardly seems inappropriate. Surely all judges are sometimes forced to make their

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[69] In finding the de jure "separation of the two races in public conveyances" to be reasonable, the *Plessy* Court invoked as its "standard" "the established usages, customs, and traditions of the people, and . . . the preservation of the public peace and good order." Plessy v. Ferguson, 163 U.S. 537, 550 (1896); *see also* Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1129 (1997) (stating that the *Plessy* "decision conformed to 'common sense' intuitions about the meaning of equality" during that historical period).

[70] *See* John O. Calmore, *Racism Lost and Found: The Fair Housing Act at Thirty*, 52 U. MIAMI L. REV. 1067, 1078 (1989) ("[T]his new racism reflects diffuse negative feelings toward blacks and other nonwhites. These feelings derive from early political and racial socialization and not from personal experience or competition with blacks.") (footnote omitted); *cf., e.g.,* Alan J. Tomkins et al., *Subtle Discrimination in Juvenile Justice Decisionmaking: Social, Scientific Perspectives and Explanations*, 29 CREIGHTON L. REV. 1619, 1637 n.123 (1996) ("Social scientists have proposed a number of theories to describe contemporary forms of racism, including such labels as 'symbolic racism,' 'modern racism,' and 'aversive racism.' While these theories are distinguishable on a conceptual level, they share the same basic assumptions about the complexity and nature of racial attitudes."). *But see* Angel R. Oquendo, *Re-Imagining the Latino/a Race*, 12 HARV. BLACKLETTER L.J. 93, 109 (1995) ("The rise of this modern racism does not mean that the old fashioned racism has completely disappeared. In fact, there has recently been a resurgence of old fashioned racism. Modern racism seems to have made old fashioned racism fashionable again.").

[71] IAN F. HANEY LÓPEZ, RACISM ON TRIAL: THE CHICANO FIGHT FOR JUSTICE 7 (2003) (stating in part that common sense racism "is unconsidered and reflexive, the product of thoughtless reliance on background ideas of race").

[72] Richard K. Sherwin, *Dialects and Dominance: A Study of Rhetorical Fields in the Law of Confessions*, 136 U. PA. L. REV. 729, 737 (1988).

"best guess" about cause and effect, relying on common sense because of lack of empirical information.[73] After all, as one commentator observed, "common-law judges have been finding the 'common sense' of the situation for centuries by relying, in part, on their intuitions."[74]

But would the "arch-apostle of common-law judging,"[75] Oliver Wendell Holmes, have embraced the common sense that permitted the racial segregation of California inmate Garrison Johnson? Greatly influenced by pragmatism,[76] which posited that truth lay in coherence of ideas,[77] Holmes would have been troubled that common sense often contradicts itself; to wit, "a penny saved is a penny earned," but "you have to spend money to make money."[78] Common sense lacks coherence for a good reason: its attributes include what Clifford Geertz described as "immethodologicalness" because "it caters at once to the pleasures of

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> The first dialect may be described as the rhetoric of ordinary common sense ("OCS"). In the prereflective attitude of common sense, the meanings I share with others in the routines of everyday life inform my world, my sense of self, and the way I interact with others. What I know is "self-evident"; it is "what everybody knows." We thus share a common language that supplies the terms that construct reality.

Id.

Siegwart Lindeberg asserts that common sense rests on three assumptions: (1) "considerable uniformity of nature . . ."; (2) "considerable uniformity of human nature . . ."; and (3) "considerable uniformity of human experience." Siegwart Lindeberg, *Common Sense and Social Structure: a Sociological View*, *in* COMMON SENSE 199, 200 (Frits van Holthoon & David R. Olson eds., 1987).

[73] *See* David L. Faigman, *"Normative Constitutional Fact-Finding": Exploring the Empirical Component of Constitutional Interpretation*, 139 U. PA. L. REV. 541, 545 (1991) ("Historically, most constitutional fact-finding depended on the Justices' best guess about the matter."); *see also* Lindeberg, *supra* note 72, at 208 (observing that "[w]here common sense is operative it cannot fail to find its way into constitution and law"); Richard E. Redding, *How Common Sense Psychology Can Inform Law and Psycholegal Research*, 5 U. CHI. L. SCH. ROUNDTABLE 107, 114 (1998) ("Like everyone, lawyers and judges make implicit assumptions about human behavior.").

[74] Randy E. Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 VA. L. REV. 821, 908 (1992).

[75] Nadine Strossen, *Religion and Politics: A Reply to Justice Antonin Scalia*, 24 FORDHAM URB. L.J. 427, 441 (1997).

[76] *See* Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787, 792 (1989) ("presenting Holmes through the lens of pragmatism").

[77] Catharine Wells Hantzis, *Legal Innovation Within the Wider Intellectual Tradition: The Pragmatism of Oliver Wendell Holmes, Jr.*, 82 NW. U. L. REV. 541, 552 (1987) (explaining that "a pragmatic coherence theory of truth sees truth as a coherence among ideas").

[78] *Cf.* Richard E. Redding, *Reconstructing Science Through Law*, 23 S. ILL. U. L.J. 585, 602 (1999) (listing "the three greatest surprises to our common sense understanding of the world . . . : the discovery that the earth is round, Darwin's theory of evolution, and the discovery of the unconscious mind").

inconsistency";[79] it is neither universal nor systematically collected and analyzed.[80] "Common sense," wrote anthropologist Nancy Levitt, "is dependent on cultural fabric, on social, ethnic, and geographic variations, and on historical traditions."[81] This list ought to include the power elite's influential, privileged view of reality.[82]

Holmes faced-off against classical jurisprudence, which dominated legal thought in the nineteenth century[83] and provided the foundation for laissez-faire constitutionalism.[84] Classical jurisprudence defined law as asocial; it spoke of immutable concepts, and divided and subdivided the legal cannon into mutually exclusive categories and *a priori* principles.[85] Judging primarily entailed finding the correct legal solution within the

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[79] GEERTZ, *supra* note 18, at 88.

[80] *See, e.g.*, Sherwin, *supra* note 72, at 737:

> Since common sense is unself-conscious, it neither seeks, nor could it achieve, the consistent and systematic deployment of principles that characterize other ways of thinking and talking. Indeed, the exponent of common sense rarely considers that her knowledge has a conceptual basis. For common sense, reality is tangible, and ideas, concepts, and metaphors simply provide the means to describe it.

See also GEERTZ, *supra* note 18, at 85 (characterizing common sense as "immethodological[]"). For an unorthodox view of common sense, *see* Jennifer Nedelsky, *Communities of Judgment and Human Rights*, 1 THEORETICAL INQUIRIES L. 245, 250 (2000) ("For Kant, the ground for the 'common sense' is the identical cognitive faculties of imagination and understanding that all human beings share.").

[81] Nancy Levitt, *Practically Unreasonable: A Critique of Practical Reason: A Review of the Problems of Jurisprudence*, 85 NW. U. L. REV. 494, 502 (1991) (book review).

[82] *See* Redding, *supra* note 78, at 602 ("[The law's common sense] tends to represent the wisdom of society's power elites, privileging their view(s) of reality."); *see also* Levitt, *supra* note 81, at 513 ("[L]egitimating the dominant voice to the exclusion of others, 'common' sense marginalizes outgroups.").

[83] *See* Andrew M. Jacobs, *God Save This Postmodern Court: The Death of Necessity and the Transformation of the Supreme Court's Overruling Rhetoric*, 63 U. CIN. L. REV. 1119, 1122-23 (1995) (discussing the impact of classical jurisprudence on nineteenth century legal thought).

[84] *See* Gary Peller, *The Metaphysics of American Law*, 73 CAL. L. REV. 1151, 1193-1219 (1985) (addressing the "liberty of contract era" and its formalistic distinction between the "public" and "private" realms of social life).

[85] *See* Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 NW. U. L. REV. 251, 255 (1997) (describing the classical model and identifying it with Harvard's Christopher Columbus Langdell).

unchanging legal cannon.[86] Logic, uncontaminated by culture, supposedly dictated the outcome.[87]

In turn, classical jurisprudence placed law on a doctrinal level distinctly superior to and apart from fact. Often fact-finding constituted little more than guesses and hunches. "[T]here was little place for empirical reality" in classical jurisprudence.[88]

Oliver Wendell Holmes would have none of this. "Holmes," according to one commentator, "argued that the meaning of law as well as the nature of truth is contingent upon events, competition, and historical context."[89] For Holmes, classical jurisprudence fell woefully short of its claims of objectivity and autonomy.[90] His was a sociological jurisprudence, resting on a foundation of pragmatism[91] and empiricism.[92] According to Holmes, law should be purposive: what counts is the welfare of the

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[86] *See* John Monahan & Laurens Walker, *Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law*, 134 U. PA. L. REV. 477, 479 (1986) ("At the turn of this century, American law was dominated by classical jurisprudence—the belief that a single, correct legal solution could be reached in every case by the application of logic to a set of natural, self-evident principles.").

[87] *See id.* (concluding that classical jurisprudence viewed adjudication "to be purely rational and exclusively deductive and thus produced a formal and mechanical approach to decisionmaking").

[88] Rachel N. Pine, *Speculation and Reality: The Role of Facts in Judicial Protection of Fundamental Rights*, 136 U. PA. L. REV. 655, 658 (1987) ("In the world of 'natural law' there was little place for empirical reality.").

[89] Gary Minda, *One Hundred Years of Modern Legal Thought: From Langdell and Holmes to Posner and Schlag*, 28 IND. L. REV. 353, 376 (1995).

[90] *See* Catharine Pierce Wells, *Holmes on Legal Method: The Predictive Theory of Law as an Instance of Scientific Method*, 18 S. ILL. U. L.J. 329, 335 (1994) ("For Holmes, legal logic shaped legal decision making but it was only a part of the story.").

[91] *See* Grey, *supra* note 76, at 788 ("[W]hile there are indeed multiple and apparently clashing strands in Holmes' thought, most of them weave together reasonably well when seen as the jurisprudential development of certain central tenets of American pragmatism."); *see generally* Hantzis, *supra* note 77, at 545 (observing that Holmes' jurisprudence is difficult to classify because he embraced several intellectual traditions over the course of his adult life).

[92] *See* Heidi Margaret Hurd, *Relativistic Jurisprudence: Skepticism Founded on Confusion*, 61 S. CAL. L. REV. 1417, 1432 (1988) (footnote omitted):

> Yet while Holmes' skepticism invited the criticism of those suspicious of relativistic or subjectivist ethics, few who followed him questioned Holmes' conclusion that the law is an empirical science rather than an axiomatic formal system excluding all value choices by judges. As Pound was to acknowledge, Holmes ushered in "sociological jurisprudence"—the philosophical precursor of legal realism.

majority; toward that end, judges should embrace empiricism so as to render law a social science both in content and method.[93]

The Great Depression and the political triumph of the New Dealers led to the ascendancy of sociological jurisprudence. Whereas classical jurisprudence built a towering conceptual wall between law and fact, sociological jurisprudence put them on equal footing, rendering law and fact codependent because the truth of an idea—in the Constitution or elsewhere—turns on its "verif[ication] in the real world."[94]

The sociological jurisprudence practiced by the New Deal Court,[95] and arguably by every subsequent Court, rendered equal protection the product of balancing various interests.[96] These interests, according to Roscoe Pound, consisted of individual interests, governmental interests, and social interests.[97] Yet balancing greatly depended upon empiricism; through empirical observations one assigned "weight" to various interests. Moreover, the validity of an interest rested in part on empirical facts.[98]

How can judges evaluate putative "empirical facts" without "legislating" from the bench? Indeed, ad hoc balancing would grant judges open-range upon which to sow their ideological preferences.[99] For Holmes

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[93] *See* Phillip Thompson, *Silent Protest: A Catholic Justice Dissents in* Buck v. Bell, 43 CATH. LAW. 125, 131 (2004) ("As a jurist, Holmes demonstrated these utilitarian sympathies in his consequential reasoning. The ends are selected not because of any historical, cultural, or a priori rules or principles, but flow from current opinion. The aim of the law is to efficiently design public policy to implement these desires.") (footnote omitted).

[94] WILLIAM JAMES, PRAGMATISM, A NEW NAME FOR SOME OLD WAYS OF THINKING: POPULAR LECTURES IN PHILOSOPHY 201 (1907).

[95] *See* Logan Everett Sawyer III, *Jurisdiction, Jurisprudence, and Legal Change: Sociological Jurisprudence and the Road to* International Shoe, 10 GEO. MASON L. REV. 59, 86 (2001) ("When the Supreme Court handed down *International Shoe* in 1945, all but one member of the court owed his position to FDR. These new Justices not only shared FDR's political philosophy, but most of them also supported the basic tenets of sociological jurisprudence.").

[96] *See* T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 945 (1987) (defining balancing as "the identification, valuation, and comparison of competing interests"); Sullivan, *supra* note 63, at 60 n.238 (defining balancing as "standard-like in that it explicitly considers all relevant factors with an eye to the underlying purposes or background principles or policies at stake").

[97] *See* Roscoe Pound, *A Survey of Social Interests*, 57 HARV. L. REV. 1, 2-3 (1943).

[98] *See, e.g.*, Tracey L. Meares, *Three Objections to the Use of Empiricism in Criminal Law and Procedure—And Three Answers*, 2002 U. ILL. L. REV. 851, 855 ("Balancing analyses lend themselves to assessments of empirical research."); Daniel J. Solove, *The Darkest Domain: Deference, Judicial Review, and the Bill of Rights*, 84 IOWA L. REV. 941, 954 (2000) ("At its very foundations, judicial balancing is an approach to judicial review that emphasizes the importance of factual and empirical data.").

[99] *See* Eugene Gressman & Angela C. Carmella, *The RFRA Revision of the Free Exercise Clause*, 57 OHIO ST. L.J. 65, 80 (1996) (recounting the "severe criticism" leveled at ad hoc

and the legion that embraced his pragmatism, the answer lay in deference to legislative facts.[100] Given the centrality of facts to the balancing process, deference of this sort, what Kathleen Sullivan calls "deferential balancing,"[101] almost assures that the government interest will prevail.[102]

Deference of this sort also concerned Justice Harlan Fiske Stone. However, he feared for unpopular and powerless minority religious, racial, and ethnic groups; their "spoiled" identities[103] made it unlikely that they would receive empathy from the majoritarian branches of government.[104]

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balancing and acknowledging that "ad hoc balancing smacks of indeterminacy and subjectivity").

[100] As R. Randall Kelso described,

> [f]or a Holmesian, it is up to the legislature and executive to respond to social change and "the felt necessities of the times," not the courts. Reflecting this fact, virtually all Holmesian references to a notion of evolving concepts in the Constitution occur in the context of deference to governmental decision.

R. Randall Kelso, *Styles of Constitutional Interpretation and the Four Main Approaches to Constitutional Interpretation in American Legal History*, 29 VAL. U. L. REV. 121, 199 (1994) (footnotes omitted); *see also* G. EDWARD WHITE, JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF 487 (1993) (excepting his First Amendment views, Holmes "pioneered the development of 'deferential' judging in a majoritarian constitutional democracy").

[101] Kathleen M. Sullivan, *Post Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293, 295 (1993).

[102] *See, e.g.*, FCC v. Beach Commc'ns, 508 U.S. 307, 314 (1993) ("On rational-basis review, a classification in a statute . . . comes to us bearing a strong presumption of validity . . . .") (citation omitted); Heller v. Doe, 509 U.S. 312, 320 (1993) (positing that the party challenging the constitutionality of a statute must negate "every conceivable basis which might support [it]" it (quoting Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 364 (1973))).

[103] *See* ERVING GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY 43 (1963). Goffman defines a "spoiled identity" as contaminated by "stigma," that is, "an attribute that is deeply discrediting," such as a criminal conviction. *Id.* at 3. He delineates three kinds of stigma: 1) "abominations of the body," such as physical deformities; 2) "blemishes of individual character," which would include imprisonment; and 3) "tribal stigma of race, nation, and religion." *Id.* at 4.

[104] *See* Robert W. Bennett, *Reflections on the Role of Motivation Under the Equal Protection Clause*, 79 NW. U. L. REV. 1009, 1015 (1984) (concluding that *Carolene Products'* minorities were to receive special judicial protection because they are not likely "to be treated empathetically in the political arena"). In turn, footnote four gave rise to "the countermajoritarian difficulty":

> [M]ost of the important policy decisions are made by our elected representatives (or by people accountable to them) . . . . Judges, at least federal judges—while they obviously are not entirely oblivious to popular opinion—are not elected or reelected. "[N]othing can finally depreciate the central function that is assigned in democratic theory and practice to the electoral process; nor can it be denied that the policy-making power of representative institutions, born of the electoral process, is the distinguishing characteristic of the system. Judicial review works counter to this characteristic."

In footnote four of *United States v. Carolene Products*,[105] Justice Stone outlined what would become the prevailing multi-tiered model of equal protection.[106] The most famous footnote written by the Court,[107] it called for "more searching" or "more exacting" judicial inquiry—and thus the absence of deference—when government action limited the exercise of specific textual rights, interfered with democratic processes, or discriminated against "discrete and insular minorities."[108]

Sociological jurisprudence's embrace of social facts and footnote four's concern for empathy-deprived minorities found expression in *Brown*

JOHN HART ELY, DEMOCRACY AND DISTRUST 4 (1982) (quoting ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH 19 (1978)).

[105] 304 U.S. 144, 152-53 n.4 (1938).

[106] *See supra* note 19 (discussing the various tiers of scrutiny); *see also* ELY, *supra* note 104, at 75 (asserting that footnote four foreshadowed the groundbreaking decisions of the Warren Court); Daniel A. Farber & Philip P. Frickey, *Is* Carolene Products *Dead? Reflections on Affirmative Action and the Dynamics of Civil Rights Legislation*, 79 CAL. L. REV. 686, 690 (1991) (stating that "[f]ootnote four encompasses much of the ensuing half-century of constitutional law"); *cf.* Lewis F. Powell, Jr., Carolene Products *Revisited*, 82 COLUM. L. REV. 1087, 1088 (1982) ("[M]any scholars think [footnote four] actually commenced a new era in constitutional law."). *But see, e.g.*, Geoffrey Miller, *The True Story of* Carolene Products, *in* 1987 SUP. CT. REV. 397, 428 (Philip B. Kurland et al., eds., 1988) ("The political theory underlying the *Carolene Products* footnote needs to be updated."); Lawrence Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1064 (1980) (implying that footnote four is "radically indeterminate and fundamentally incomplete").

[107] *See, e.g.*, LIEF H. CARTER, CONTEMPORARY CONSTITUTIONAL LAWMAKING 86 (1985) (describing footnote four as "the commonly cited justification for . . . active [judicial] protection of civil rights and liberties"); Pamela S. Karlan, Note, *Discriminatory Purpose and Mens Rea: The Tortured Argument of Invidious Intent*, 93 YALE L.J. 111, 115 n.25 (1983) (observing that "[t]he famous . . . footnote four first suggests that the normal presumption of constitutionality may not operate in cases involving certain distinctions").

[108] *Carolene Prods.*, 304 U.S. at 152-53 n.4:

> There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth . . . .
>
> It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment . . . .
>
> Nor need we inquire whether similar considerations enter into the review of statutes directed at particular religious . . . or national . . . or racial minorities: whether prejudice against discrete and insular minorities may be a specific condition, which tends seriously to curtail and operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

v. Board of Education.[109] Demonstrating "special solicitude" to powerless and stigmatized African Americans, Chief Justice Warren, writing for the Court, invoked social science research to rebut the *Plessy* Court's assertion that the separation of the races did not communicate inferiority.[110] Nowhere did the plain-spoken Chief Justice invoke "common sense" in finding that the "separate but equal" doctrine created "inherently unequal" segregation.[111]

Whereas the *Brown* Court had forsaken deference to state lawmakers, nearly fifty years later the Ninth Circuit made deference the lynchpin of its ruling in *Johnson*. It did so at the behest of *Turner v. Safley*[112] and its progeny.[113] In requiring constitutional challenges to prison rules to be evaluated according to its four-pronged test of reasonableness,[114] the *Turner* Court had explicitly sought to constrain judicial activism by the lower federal courts on behalf of inmates.[115] Moreover, the Ninth Circuit took deference to one more level: prison officials would be freed from establishing a factual basis for their actions if common sense bridged the empirical gap between segregating inmates and advancing institutional security.[116] Ironically, sociological jurisprudence had spawned such anxiety

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[109] 347 U.S. 483 (1954).

[110] *See id.* at 495 n.11. "Footnote 11 was merely a list of seven works by contemporary social scientists," wrote Richard Kluger, who quotes Warren's law clerk as follows: "The only reason for having included footnote #11 was as a rebuttal to the cheap psychology of *Plessy* that said inferiority [arising from segregation] was only in the mind of the Negro." KLUGER, *supra* note 5, at 705-06.

[111] *See Brown*, 347 U.S. at 495.

[112] 482 U.S. 78, 89 (1987).

[113] *See, e.g.*, Overton v. Bazzetta, 539 U.S. 126, 131-36 (2003) (ruling that institutional regulations restricting prisoner visitation satisfied the *Turner* test); Thornburgh v. Abbott, 490 U.S. 401, 419 (1989) (ruling that institutional regulations restricting the receipt of prescription publications satisfied the *Turner* test); O'Lone v. Estate of Shabazz, 482 U.S. 342, 350-53 (1987) (ruling that institutional regulations restricting prisoners' exercise of religion satisfied the *Turner* test).

[114] *See supra* note 51 (delineating the four prongs).

[115] Writing for the Supreme Court in *Turner*, Justice O'Connor rejected application of the strict scrutiny test to prison regulations limiting inmate correspondence. *Turner*, 482 U.S. at 89. Strict scrutiny, she explained, would require federal courts to "become the primary arbiters of what constitutes the best solution to every administrative problem . . . ." *Id.*

[116] The Supreme Court in *Overton* came close to embracing common sense. It viewed empirical data about prison visitation as irrelevant and instead upheld the regulations because one could hypothesize a rational relationship between the resulting restrictions and a penal objective. *See Overton*, 539 U.S. at 133 ("MDOC's regulation prohibiting visitation by former inmates bears *a self-evident* connection to the State's interest in maintaining prison security and preventing future crimes.") (emphasis added).

about judicial activism that the Ninth Circuit openly embraced "one of the intellectually weakest methods of analysis"[117]—common sense.

B. A PRIMER ON COMMON SENSE RACISM

Everybody knows race in America but not everybody is conscious of race. I am conscious of the race of my sole African American colleague, but not of myself as a white person or the whiteness of the other departmental professors. In turn, I am conscious of the nation's racism,[118] but I am rarely conscious of the privileged position that my whiteness has provided to me. Barbara Flagg, also a white professor, describes lack of white race consciousness as "the transparency phenomenon," which denotes "[t]he tendency of whites not to think about whiteness, or about norms, behaviors, experiences, or perspectives that are white-specific."[119] My lack of white consciousness is hardly accidental. As Grace Elizabeth Hale observed in her study of the social construction of the white identity in the pre-*Brown* South:

> Central to the meaning of whiteness is a broad, collective American silence. The denial of white as a racial identity, the denial that whiteness has a history, allows the quiet, the blankness, to stand as the norm. This erasure enables many to fuse their absence of racial being with the nation, making whiteness their unspoken but deepest sense of what it means to be an American.[120]

Because the transparency phenomenon thrives on presupposed beliefs,[121] white people fail to recognize that common sense incorporates "cultural identity norms,"[122] a subset of which contain shared meanings and assumptions about race, including pejorative notions about people of color.

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[117] Levitt, *supra* note at 81, at 502.

[118] *See* Jody Armour, *Stereotypes and Prejudice; Helping Legal Decisionmakers Break the Prejudice Habit*, 83 CAL. L. REV. 733, 739 (1995):

> Americans share a common historical and cultural heritage in which racism has played and still plays a dominant role. Because of this shared experience, we also inevitably share many ideas, attitudes, and beliefs that attach significance to an individual's race and induce negative feelings and opinions about nonwhites. To the extent that this cultural belief system has influenced all of us, we are all racists.

[119] Barbara J. Flagg, *"Was Blind, But Now I See": White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 969 (1993).

[120] HALE, *supra* note 41, at xi.

[121] *Cf.* Frits van Holthoon & David R. Olson, *Common Sense: An Introduction*, *in* COMMON SENSE, *supra* note 72, at 1, 2-3 (describing common sense as "sufficiently ambiguous to incorporate not only knowledge but also judgment").

[122] *See* Frank Rudy Cooper, *Cultural Context Matters:* Terry's *"Seesaw Effect,"* 56 OKLA. L. REV. 833, 844-45 (2003) (defining cultural identity norms as "the set of prevailing popular assumptions about categories of identity existing at a given moment and a given place") (footnote omitted).

Consequently, common sense can—and often does—effect a disguised endorsement of white racial superiority.

Let me elaborate. As a storehouse for "local knowledge," common sense among whites includes ideas about race ("racial ideas"), and, as Ian Haney López observes, "[w]hen we uncritically rely on racial ideas, we often, in turn, practice racism."[123] Haney López and others speak of "racism as common sense"[124] or "common sense racism."[125] For Haney López, common sense racism is no sideshow. "Common sense is so integral to racism in the contemporary United States," he writes, "that I suggest a new definition: racism is action arising out of racial common sense and enforcing racial hierarchy."[126]

John Brewer introduced the concept of common sense in addressing racism confronting blacks in the United Kingdom.[127] He tentatively defined common sense racism as a "finite set of pejorative everyday maxims, beliefs and ideas about race, which are taken-for-granted and are widespread and which predicate a widespread set of taken-for-granted 'official' and everyday activities and practices toward blacks."[128]

Haney López, who provides us with the most thorough examination of common sense racism, locates its content in widely shared "background ideas of race."[129] These "background ideas," the counterpart to Brewer's "pejorative everyday maxims," constitute a racialized subset of cultural identity norms, i.e., the prevailing assumptions about identity found in a culture, which "compete to be perceived as the common sense interpretation."[130] Because they are culturally received, "background ideas of race" seem, according to Haney López, "natural and inevitable . . . that everything is normal and alright."[131] Hence, Haney López posits that one

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[123] HANEY LÓPEZ, *supra* note 71, at 7.

[124] *Id.*

[125] *See, e.g.*, JODY DAVID ARMOUR, NEGROPHOBIA AND REASONABLE RACISM: THE HIDDEN COSTS OF BEING BLACK IN AMERICA 73-77 (1997).

[126] HANEY LÓPEZ, note 71, at 127.

[127] *See* Brewer, *supra* note 13.

[128] *Id.* at 68.

[129] HANEY LÓPEZ, *supra* note 71, at 127; *see also* Marlee Kline, *Race, Racism, and Feminist Legal Theory*, 12 HARV. WOMEN'S L.J. 115, 120 n.16 (1989) ("Whereas clearly stated racism definitely exists, the more problematic aspect for us is this common sense racism . . . . It is in these diffused normalized sets of assumptions, knowledge, and so-called cultural practices that we come across racism in its most powerful, because pervasive, form." (quoting Himani Bannerji, *Introducing Racism: Notes Towards an Anti-Racism Feminism*, 16 RESOURCES FOR FEMINIST RESEARCH/DOCUMENTATION 10, 11 (1987))).

[130] Cooper, *supra* note 122, at 845.

[131] HANEY LÓPEZ, *supra* note 71, at 249.

does not have to consciously intend to be racist to hold common sense racist views.[132] Conversely, good intentions do not preclude judges from embracing cultural identity norms that foster racial hierarchy.[133]

C. COMMON SENSE RACISM ON THE NINTH CIRCUIT

In a thinly veiled reference to his fellow Ninth Circuit judges, the lone dissenter in the en banc session of the court in *Johnson* lamented, "our society, as well as our prisons, contains an abundance of persons who *believe* that *any* cross-racial interaction is dangerous, regardless of whether their beliefs are based in fact."[134] His brethren had no need for "fact." They trusted their common sense. However, their common sense portrait of inmates is a racialized one grounded in part in pejorative cultural stereotypes of imprisoned young black men—the very stuff of common sense racism.

John Sloop's *The Cultural Prison* provides a gallery of portraits of inmates incarcerated between 1950 and 1993.[135] The gallery's collection from the 1950s reveals a homogenous inmate subculture consisting of three attributes: 1) inmates' white skin;[136] 2) their capacity for altruism, as illustrated by the inmates who became guinea pigs for pharmaceutical companies and research institutions;[137] and 3) their capacity for redemption, as portrayed in warden Clinton Duffy's telling description of "men behind bars . . . [as] human beings in trouble and in need of a helping hand."[138] The next two eras, from 1960 to 1974 and 1975 to 1993, reveal a chasm within the inmate population. From the increasingly racialized prison emerged two new inmate portraits: the caring and redeemable white

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[132] *See id.* at 128.

[133] *See id.* at 129; *see also* Charles R. Lawrence III, *The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 356 (1987) (writing that "[i]n a society that no longer condones overt racist attitudes and behavior, many of these attitudes will be repressed and prevented from reaching awareness in an undisguised form").

[134] Johnson v. California, 336 F.3d 1117, 1120 (9th Cir. 2003) (Ferguson, J., dissenting from denial of Suggestion for Rehearing En Banc), *rev'd*, 543 U.S. 499 (2005).

[135] *See* JOHN M. SLOOP, THE CULTURAL PRISON 31-185 (1996). Sloop acknowledges that the media must operate within the boundaries of what is "ideologically acceptable" to its audience. *Id.* at 11.

[136] *See id.* at 56-57 (observing that non-whites are conspicuously absent from depictions of this era).

[137] *See id.* at 34-36 (observing that it was "common practice" for inmates to be test subjects).

[138] *Id.* at 38.

inmate,[139] and the incorrigible, naturally violent, and irrational African American inmate, who possesses these attributes *because* of his race.[140]

How would Sloop describe the prisoner of the twenty-first century? The demise of the rehabilitative ideal[141] and the ascendancy of the penal harm movement[142] have led to the collective devaluation of all inmates. Regardless of race, their cultural image is "spoiled"[143] if for no other reason than their imprisonment. "Doing time" constitutes a highly durable "stigma symbol," that is, "an attribute that is deeply discrediting."[144] The "pains of imprisonment"—restrictions on liberty, personal goods and services, heterosexual relationships, autonomy, and safety[145]—all serve to mark the offender as "not one of us." Indeed, "[t]he status lost by the prisoner," observed Gresham Sykes, "is, in fact, similar to . . . the status of citizenship—that basic acceptance of the individual as a functioning member of the society in which he lives."[146] Justice Stevens got it right when he wrote that "[p]risoners are truly the outcasts of society."[147]

Nor is the "spoiled" character of inmate washed clean upon his departure from prison. The cultural construction of the prison-as-revolving-door, replete with high rates of re-imprisonment,[148] conveys the once-an-

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[139] *See id.* at 65-71, 92-102.

[140] *See id.* at 154-67 (observing that white prisoner violence is viewed as the result of social conditions, but African Americans are "violent and irrational regardless of conditions").

[141] *See* Francis A. Allen, *Criminal Justice, Legal Values and the Rehabilitative Ideal*, 50 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 226, 226-27 (1959) (defining the rehabilitative ideal as the notion that crime arises from antecedent causes and consequently offenders ought to be rehabilitated).

[142] *See* Francis T. Cullen, *Assessing the Penal Harm Movement*, 32 J. RES. CRIME & DELINQ. 338, 340 (1995) (charging that "creative strategies to make offenders suffer" has become the goal of penal policy). The penal harm movement finds its ideological origins in the English Poor Laws of the nineteenth century and the principle of less eligibility—that inmates should live no better than the poorest of the poor. *See, e.g.*, LEON RADZINOWICZ & ROGER HOOD, THE EMERGENCE OF PENAL POLICY IN VICTORIAN AND EDWARDIAN ENGLAND 339-55 (1990) (discussing the origins and impact of the Poor Law Act of 1834 in England and Wales); Edward W. Sieh, *Less Eligibility: The Upper Limits of Penal Policy*, 3 CRIM. JUST. POL'Y REV. 159, 159-60 (1989) (identifying the origins and concept of less eligibility).

[143] *See* GOFFMAN, *supra* note 103, at 43 (defining a "spoiled" identity).

[144] *Id.*

[145] GRESHAM M. SYKES, THE SOCIETY OF CAPTIVES 65-78 (1958).

[146] *Id.* at 66-67 (footnote omitted).

[147] Hudson v. Palmer, 468 U.S. 517, 557 (1984) (Stevens, J., dissenting).

[148] *See* James Austin, *The Proper Use of Risk Assessment in Corrections*, 16 FED. SENT. RPT. 194, 2004 WL 2189131, at *3 (2004):

> The data show that, by in large, there has been no change in the recidivism rates between prisoners released in 1983 and those released in 1994. While the return to prison rate is not as

outlaw, always-an-outlaw representation of prisoners. Jack Henry Abbott, a self-described "fanatically defiant and alienated individual who cannot [imagine] what forgiveness is, or mercy or tolerance, because he has no experience of such values,"[149] embodies this representation. In his life, where not even fame can prevent his returning to the prison for a homicide committed after his sixth week of freedom,[150] we envisage a penal system that fails to punish adequately.[151] Hence, offenders leave prison without having paid their full debt to society and are rightly subject to social exclusion via disenfranchisement and other civil disabilities.[152]

For the African American inmate, the "spoilage" has festered in a cultural environment that envisages crime and imprisonment as colored black. Media representations of crime,[153] the public's racial typification of crime,[154] and the mass incarceration of young African American men[155] have reinforced a historic and widely shared stereotype: the black male as "fearsome, threatening, unemployed, irresponsible, potentially dangerous,

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high as some might believe (about 40 percent), the data also show that over 60% of offenders are being re-arrested, albeit for mostly property and drug related crimes. Only about half of the returns to prison are for new felony convictions with the other half being for technical violations.

[149] JACK HENRY ABBOTT, IN THE BELLY OF THE BEAST: LETTERS FROM PRISON 13 (Vintage Books ed. 1991) (1981).

[150] Jack Henry Abbott, author of *In the Belly of the Beast*, which chronicled a life spent almost entirely behind bars, committed homicide shortly after his much publicized release from prison. *See* Stephen D. Sowle, *A Regime of Social Death: Criminal Punishment in the Age of Prisons*, 21 N.Y.U. REV. L. & SOC. CHANGE 497, 502-03 (1994) (recounting the tragic life of Abbott).

[151] *See* STUART A. SCHEINGOLD, THE POLITICS OF LAW AND ORDER: STREET CRIME AND PUBLIC POLICY 64 (1984) (describing the public perception that the prison failed to punish adequately as the "myth of crime and punishment").

[152] *See infra* notes 309-11 and accompanying text (examining the civil disabilities that attach to a felony conviction).

[153] *See* Franklin D. Gilliam, Jr. et al., *Crime in Black and White: The Violent, Scary World of Local News*, 1 HARV. INT'L J. PRESS/POLITICS 6, 8 (1996) (describing how the media activates pre-existing, pejorative stereotypes).

[154] *See* MATTHEW SILBERMAN, A WORLD OF VIOLENCE 194 (1995) (stating that the large-scale incarceration of inner-city African Americans "identifies blacks with criminality in the public mind, at least for the white public"); Ted Chiricos et al., *Racial Typification of Crime and Support for Punitive Measures*, 42 CRIMINOLOGY 359, 360, 380 (2004) (describing a "belief system" that "essentializes race in terms of crime and crime in terms of race, thereby 'demonizing' blacks as the locus of threat"); Donna Coker, *Foreword: Addressing the Real World of Racial Discrimination in Criminal Justice*, 93 J. CRIM. L. & CRIMINOLOGY 827, 864 (2003) (addressing "the deeply embedded belief among whites of black criminality").

[155] *See* PAIGE M. HARRISON & ALLEN J. BECK, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2004, at 8 tbl.11 (2005), *available at* http://www.ojp.usdoj.gov/bjs//pub/pdf/p04.pdf (indicating that at the close of 2004, per 100,000 black males in the nation, there were 3,218 black male inmates, as juxtaposed to 1,220 Hispanic male inmates per 100,000 Hispanic males and 463 white male inmates per 100,000 white males).

and generally socially pathological."[156] As a slave, he was the "loyal Negro."[157] After emancipation, he became the "beast rapist."[158] Today, he is in the mold of Willie Horton—the Republican poster child for coddled convicted rapists.[159]

The prison itself comes well equipped to embrace, magnify, and transmit the social construction of the bestial black man. First, this institution's most basic day-to-day social practices represent racialized knowledge—"embedded social practices that reflect racial thinking."[160] Witness the following similarities between prison social practices and plantation slavery:

> (1) [prisoners'] keepers, like the keepers of slaves, dictate routine daily activities; (2) just as slaves typically lived in remote areas, inmates often ["do time"] far from major cities; and (3) inmates' cultural insignia of "hard labor," distinctive dress, and the "clanking of chains" mirror that of slavery.[161]

In addition, the prison both pressures and rewards African American inmates to live the cultural myth of the bestial black man. It does so through the sexualized norms of the inmate subculture that prize

[156] Joan W. Howarth, *Representing Black Male Innocence*, 1 J. GENDER, RACE & JUST. 97, 104 (1997); *see also, e.g.*, Jewelle Taylor Gibbs, *Young Black Males in America: Endangered, Embittered, and Embattled*, *in* YOUNG, BLACK, AND MALE IN AMERICA: AN ENDANGERED SPECIES 1, 2-3 (Jewelle Taylor Gibbs ed. 1988) (observing that "young black males are stereotyped by the five 'd's': dumb, deprived, dangerous, deviant, and disturbed"); HASSINE ET AL., *supra* note 34, at 71 (stating that white prison staff "seemed to believe that only white inmates could be reformed into law-abiding citizens"); KATHRYN RUSSELL, THE COLOR OF CRIME 3 (1998) (stating that "the picture that comes to mind when most of us think about crime is the picture of a young Black man"); N. Jeremi Duru, *The Central Park Five: The Scottsboro Boys, and the Myth of the Bestial Black Man*, 25 CARDOZO L. REV. 1315, 1320 (2004) (examining the "persistence of the mythic Bestial Black Man"); D. Marvin Jones, *"We're All Struck Here for a While": Law and the Social Construction of the Black Male*, 24 J. CONTEMP. L. 35, 57 (1998) (concluding that African American men are essentialized as "super masculine menial").

[157] HALE, *supra* note 41, at 73.

[158] *See id.*

[159] *See* SILBERMAN, *supra* note 154, at 194-95 ("The symbolism of a black Willie Horton raping a white woman used by a Republican presidential campaign still evokes the fears of white Americans of black maleness and sexuality that produced lynchings in the Old South.").

[160] *See* Haney López, *supra* note 68, at 243.

[161] Robertson, *supra* note 38, at 135 (footnote omitted) (quoting Adam J. HIRSCH, THE RISE OF THE PENITENTIARY 71 (1992)); *see also* CARROLL, *supra* note 38, at 131 (noting that some plantation terminology finds expression in the contemporary prison); MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE 155-57 (1998) (noting that the slave plantation and some of its traditions provided the model for the prisons of the American South).

hypermasculinity[162] and deem acts of violence, including sexual assault, as validation of "real man" status.[163] "[W]eakness is shunned and strength is worshipped" by inmates of all races as well as by prison personnel.[164] Because staff cannot, and in some instances will not ensure their safety,[165] otherwise non-violent inmates must be willing to do battle with their fellow inmates.[166] Any lesser measure can render the inmate a "non-man," a status deplored by inmates[167] and prison workers alike.[168]

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[162] *See, e.g.*, Carl Bryan Holmberg, *The Culture of Transgression: Initiations into the Homosociality of a Midwestern State Prison*, *in* PRISON MASCULINITIES 78, 89 (Don Sabo et al. eds., 2001) (describing the social relationships among men in prison as "magnif[ying] masculinity, taking it to the extremes of hypermasculinity"); Wilbert Rideau & Billy Sinclair, *Prison: The Sexual Jungle*, *in* MALE RAPE: A CASEBOOK OF SEXUAL AGGRESSIONS 3, 5 (Anthony M. Scacco, Jr. ed., 1982) (describing the prison as "ultramasculine").

[163] *See* Lee H. Bowker, *Victimizers and Victims in American Correctional Institutions*, *in* THE PAINS OF IMPRISONMENT 63, 64 (Robert Johnson & Hans Toch ed., 1988) ("[V]ictories in the field of battle reassure the winners of their competence as human beings in the face of the passivity enforced by institutional regulations. This is particularly important for prisoners whose masculinity is threatened by the conditions of confinement.").

[164] SILBERMAN, *supra* note 154, at 2.

[165] *See, e.g.*, Peter Scharf, *Empty Bars: Violence and the Crisis of Meaning in Prison*, *in* PRISON VIOLENCE IN AMERICA 27, 28 (Michael C. Braswell et al., 2d ed. 1994) (noting that "[p]risons are largely unable to protect the physical safety of their inmates"); James E. Robertson, *"Fight or F. . ." and Constitutional Liberty: An Inmate's Right to Self-Defense when Targeted by Aggressors*, 29 IND. L. REV. 339, 339 (1995) (documenting that "staff cannot or will not protect [inmate] from rape, assault, and other forms of victimization") (footnote and citation omitted); Note, *Sexual Assaults and Forced Homosexual Relationships in Prison: Cruel and Unusual Punishment*, 36 ALB. L. REV. 429, 438 (1972) (concluding that victims of prison assaults "receive little protection from prison authorities").

[166] *See* Robertson, *supra* note 165, at 345 ("To 'make it' in prison . . . requires one to embrace intimidation and violence as operative principles of everyday life.") (footnote omitted).

[167] *See* James E. Robertson, *A Punk's Song About Prison Reform*, 24 PACE L. REV. 527, 534 (2004) (explaining that an inmate who does not fight but seeks the protection of another inmate in exchange for sexual activity becomes a "punk," an otherwise heterosexual inmate who assumes a passive, "female" role and thus descends to the bottom of the inmate status system).

[168] *See, e.g.*, James E. Robertson, *A Clean Heart and an Empty Head: The Supreme Court and Sexual Terrorism in Prison*, 81 N.C. L. REV. 433, 446 (2003) ("In their eyes, inmates who refrain from combat become unworthy of protection.") (footnote omitted) [hereinafter Robertson, *A Clean Heart*]; James E. Robertson, *Cruel and Unusual Punishment in United States Prisons: Sexual Harassment Among Male Inmates*, 36 AM. CRIM. L. REV. 1, 43 (1999) (observing that "inmates who do not fight are seen by some prison workers as unworthy of protection") (footnote omitted).

Some staff accept inmate-on-inmate violence—especially inmate-on-inmate rape—as legitimate, extra-legal punishment. *See, e.g.*, HASSINE ET AL., *supra* note 34, at 176 ("Some staff members now seem to view prison rape as part of the punishment-risk that lawbreakers take when they commit their crimes. Others see it simply as retribution carried out at an interpersonal level."); Robertson, *A Clean Heart*, *supra* note 168, at 446 ("According to

For correctional officers, whose historic whiteness renders them vulnerable to common sense racism,[169] the cultural image of the bestial black man has led them to warn of a racial "blood bath" featuring the prison's racial groups.[170] Their ranks included an associate warden in the *Johnson* litigation, who "testified that if race were [sic] not considered . . . there would [likely] be racially based conflict in the cells and in the yard."[171] Studies do suggest that prison assaults more often than not pit African American aggressors against white inmates,[172] but factors other than race may be at play, such as perceptions of who is most vulnerable.[173] In Texas, a state with a huge and diverse prison population,[174] rates of interracial and intraracial violence are about equal.[175] Moreover, rates of assault did not rise after the desegregation of Texas prison cells.[176]

The Ninth Circuit's "common-sense" drew upon an additional feature of the African American inmate's cultural portrait: he is a likely gang member[177] and thus even more dangerous. Inmate Garrison Johnson had

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some inmates, staff regard rape as a legitimate deterrent to crime and a just dessert for its commission.").

Prison staff also use violence as a management tool. *See, e.g.*, Helen M. Eigenberg, *Correctional Officers' Definitions of Rape in Male Prisons*, 28 J. CRIM. JUST. 435, 437 (2000) ("[P]erhaps officers may tolerate coercive acts because they facilitate divisions among inmates, making them, as a group, more manageable.").

[169] *See* JACOBS, *supra* note 25, at 160 (observing that correctional officials historically have been drawn from conservative rural areas, where racial prejudice was prevalent). *See generally* Robert Freeman, *Correctional Officers: Understood and Misunderstood*, *in* PRISONS TODAY AND TOMORROW 306 (Jocelyn M. Pollock ed., 1997) (examining the working environment of the prison guard).

[170] POLLOCK, *supra* note 38, at 106.

[171] Johnson v. California, 321 F.3d 791, 794 (9th Cir. 2003), *rev'd*, 542 U.S. 499 (2005).

[172] *See* Richard Tewksbury, *Fear of Sexual Assault in Prison Inmates*, 69 PRISON J. 62, 63 (1989) (citing studies showing a high frequency of black aggressors).

[173] Nobuhle R. Chonco, *Sexual Assaults Among Male Inmates: A Descriptive Study*, 69 PRISON J. 72, 73 (1989) (speculating that sexual assault of white inmates is related to their perceived weakness rather than their race per se).

[174] *See* HARRISON & BECK, *supra* note 155, at 1 (listing Texas as imprisoning 168,105 persons for more than a year in 2004).

[175] Chad Trulson & James Marquart, *Racial Desegregation and Violence in the Texas Prison System*, 27 CRIM. JUST. REV. 233, 251 (2002) (finding that "[t]he rate of interracial cell partner assaults was not disproportionate to the rate of intraracial cell partner assaults").

[176] Trulson & Marquart, *supra* note 67, at 774.

[177] The California Department of Corrections defines a "gang" as:

> [A]ny ongoing formal or informal organization, association or group of three (3) or more persons, which has a common name or identifying sign or symbol whose members and/or associates engage or have engaged, on behalf of that organization, association or group, in two or more activities which include planning, organizing, threatening, financing, soliciting, or committing unlawful acts or acts of misconduct classified as serious . . . .

the misfortunate of "doing time" in an era when gang violence captured the attention of the media and, consequently, the public. As one study observed, "[p]rior to 1985, national polls on community problems did not find that gangs or gang problems registered as a major concern among those polled; however, by 1994, gang violence ranked as the third most important issue facing America—behind education and drugs and before crime."[178] Fear of gangs likely led to a moral panic,[179] their ranks demonized as "carriers of moral disease within the social body,"[180] with all young black males being "metaphorical[ly] link[ed]" to gang membership.[181]

The cultural portrait of a gang member as a person of color departs considerably from an empirically-drawn account.[182] Take, for instance, the exclusively white, non-Hispanic, Aryan Brotherhood.[183] Racial bias of a

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Madrid v. Gomez, 889 F. Supp. 1146, 1240 n.183 (N.D. Cal. 1995) (quoting CALIF. DEP'T OF CORR., CALIFORNIA DEPARTMENT OF CORRECTIONS OPERATIONS MANUAL § 55070.16).

[178] Charles M. Katz et al., *Fear of Gangs: A Test of Alternative Theoretical Models*, 20 JUS. Q. 95, 95-96 (2003) (internal source notation omitted). One commentator chronicled the dramatic transformation of the public's perception of gangs as follows:

> Prior to the 1970s, gang violence was usually seen by the public as some version of *West Side Story* (1961) male ethnic youths fighting with fists and knives over turf, respect, or romance. Gang members were typically envisioned as "foreigners," southern European or Latin American immigrants with hot-blooded, violent ways.
>
> By the 1990s, the movies *Scarface* (1983), *Colors* (1988), and *New Jack City* (1991) had popularized a different image: cold-blooded minority gangsters shooting it out in drive-bys or disputes over drugs. The dark foreigner was replaced by the dark African American or Latino. To the established image of violent gang rivalries was added a lethal mix of drugs, guns, and easy money.

John M. Hagedorn, *Gang Violence in the Post Industrial Era*, 24 CRIME & JUST. 365, 367 (1998) (internal source notation omitted).

[179] Jodi Lane, *Fear of Gang Crime: A Qualitative Examination of the Four Perspectives*, 39 J. RES. CRIME & DELINQ. 437, 466 (2002) (presenting several theoretical models that might explain why fear of gang violence in parts of Southern California exceeded the actual danger of gang violence, and characterizing fear of gang violence as a "likely local and national presence of a moral panic about gangs").

[180] Howarth, *supra* note 156, at 124 (internal footnote and quotation marks omitted).

[181] *Id.* at 113.

[182] *See* Paul A. Perrone & Meda Chesney-Lind, *Representations of Gangs and Delinquency: Wild in the Streets?*, 24 SOC. JUST. 96, 97 (1997) (finding that "individuals with the most direct contact with gang members . . . find media portrayals of gangs to be especially improbable").

[183] *See* Linda S. Beres & Thomas D. Griffith, *Demonizing Youth*, 34 LOY. L.A. L. REV. 747, 763 (2001) (footnotes omitted):

> [T]he burden of the demonization of youth and youth gangs falls most heavily on minorities, especially young minority males. The names entered on gang databases are almost exclusively those of minorities. Gang membership is so closely associated with minority youth that in some jurisdictions most of the young minority males are considered by the police to be gang members or associates. The close association of gang membership and minority status permits politicians

common sense nature can be faulted: "[t]he overstatement of gang membership by minorities is often matched by a reluctance to view middle-class whites as gang members. Groups of White middle-class youth who engage in delinquent behavior may not be labeled as gangs even when they have a 'gang name' and wear distinctive 'gang clothing.'"[184]

Prison officials' contention that gangs cause much of the violence in prisons[185] also finds limited empirical support.[186] Besides, gang members do not constitute a monolithic force: inmates at the periphery of gang life are no more likely to engage in prison violence than their unaffiliated peers, and "time in the gang" is negatively related to prison violence.[187]

Nonetheless, correctional orthodoxy posits that prison gangs represent a threat on par with Al Qaeda. As the editor of *Corrections Management Quarterly* wrote, "[p]rison gangs . . . are very difficult to manage because they will risk anything and any member to be successful. Correctional administrators must [consequently] play by a different set of rules . . . ."[188] His countermeasures seem fitting for the global war on terrorism:

> The challenge of prison gangs for correctional administrators is that there is never an end to what must be done to control their behavior . . . . Correctional administrators can never hesitate, stop gathering intelligence, or fail to stay ahead of the gangs' operations. In this sense both sides continuously plot strategies to better position themselves to counter moves by the other. For the individual correctional staff

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> and commentators to "play the race card" indirectly. . . . [Thus] gangs become a proxy for race.

See also Julie Taylor, *Racial Segregation in California Prisons*, 37 LOY. L.A. L. REV. 139, 150 (2003) (footnotes omitted):

> While exceptions do exist, prison gangs are usually formed based on race. In general, Hispanic gang members join the Mexican Mafia or Nuestra Familia, while black gang members tend to join the Black Guerilla Family or smaller factions of the Bloods or Crips. White gang members join the Aryan Brotherhood. There are no known Asian prison gangs.

[184] Linda S. Beres & Thomas D. Griffith, *Gangs, Schools, and Stereotypes*, 37 LOY. L.A. L. REV. 935, 962 (2004).

[185] *See* Taylor, *supra* note 184, at 150 (asserting that gangs such as Aryan Brotherhood, the Black Guerilla Family, the Mexican Mafia, and Nuestra Familia "are responsible for the steady increase in violence in California prisons").

[186] *Compare* Mary E. Pelz, *Gangs*, *in* ENCYCLOPEDIA OF AMERICAN PRISONS, *supra* note 16, at 213 (stating that gang members are five times more involved in violence than unaffiliated inmates), *with* Gerald G. Gaes et al., *The Influence of Gang Affiliation on Violence and Prison Misconduct*, 82 PRISON J. 359, 359-60 (2002) (finding few studies on gang violence).

[187] Gaes et al., *supra* note 186, at 374.

[188] Richard P. Seiter, *Winning a Battle of Wills: Correctional Administrators and Prison Gangs*, 5 CORRECTIONS MGMT. Q. iv, iv (2001); *see also* Wilkinson v. Austin, 125 S. Ct. 2384, 2396 (2005) ("Clandestine, organized, fueled by race-based hostility, and committed to fear and violence as a means of disciplining their own members and their rivals, gangs seek nothing less than to control prison life and to extend their power outside prison walls.").

> involved, their will to further the correctional mission . . . cannot waive. They must be forever diligent in their efforts; otherwise the gangs will win and prisons will not be safe for staff or inmates.[189]

Prison officials have responded to gangs by segregating their supposed ringleaders in Supermax prisons[190] on the assumption that a regime of solitude and sensory deprivation reduces violence throughout a state prison system by incapacitating "the worst of the worst" and deterring inmates eager to follow in their violent footsteps. However, a study of Supermax prisons in several states found no decrease in system-wide institutional violence after their construction.[191]

For California prison officials the "facts" did not seem to matter when segregating the likes of Garrison Johnson became common sense. Racialized knowledge had created the stereotype—a black male with a long history of imprisonment, who invariably becomes a gangbanger—and Garrison Johnson fit the bill close enough.[192]

The CDC's open consideration of race signified another, quite different stereotype—the overt, "old" racism practiced under Jim Crow.[193] In Part III, the Article examines the response of the Supreme Court to the

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[189] Seiter, *supra* note 188, at iv.

[190] *See* Scott N. Tachiki, *Indeterminate Sentences in Supermax Prisons Based upon Alleged Gang Affiliations: A Reexamination of Procedural Protection and a Proposal for Greater Procedural Requirements*, 83 CAL. L. REV. 1115, 1117 (1995) (observing that "many states have adopted policies that segregate 'known' prison gang members to highly restrictive 'supermax' prisons").

[191] *See* Chad S. Briggs et al., *The Effect of Super Maximum Security Prisons on Aggregate Levels of Institutional Violence*, 41 CRIMINOLOGY 1341, 1367 (2003) (finding that the opening of Supermax prisons in Minnesota, Illinois, Arizona, and Utah did not decrease institutional violence in the aggregate in any of their respective prison systems).

[192] The Ninth Circuit did not assert that Garrison Johnson belonged to a gang; rather, he failed to refute the common sense conclusion that violence would rise in the absence of racial segregation. *See* Johnson v. California, 321 F.3d 791, 805 (9th Cir. 2003), *rev'd*, 543 U.S. 499 (2005).

[193] *See, e.g.*, Timothy Davis, *Racism in Athletics: Subtle But Persistent*, 21 U. ARK. LITTLE ROCK L. REV. 881, 883 (1999) (describing "'old-fashioned' racism as being "expressed directly and openly"); Richard Delgato, *Rodrigo's Tenth Chronicle: Merit and Affirmative Action*, 83 GEO. L.J. 1711, 1719 (1994) ("The old kind is overt and takes the form of laws and social practices that expressly treat blacks and others of color worse than whites. This type of racism might be typified by whites-only drinking fountains, or university admissions practices that excluded blacks entirely until about 1965."); Edward Patrick Boyle, Note, *It's Not Easy Bein' Green: The Psychology of Racism, Environmental Discrimination, and the Argument for Modernizing Equal Protection Analysis*, 46 VAND. L. REV. 937, 944 n.29 (1993) (describing "old" racism as "that [which] manifests itself by public expression of racial hatred, doctrines of racial inferiority, and support for segregation").

CDC's common sense fears of racial conflict and its "separate but equal" solution.

III. THE *JOHNSON* CASE AND THE SUPREME COURT: A "TAME" *BROWN V. BOARD OF EDUCATION*

A. A SYNOPSIS

Johnson represents one of the ironic cases in the history of prisoners' rights litigation. The CDC, which had been created during Earl Warren's tenure as Governor of California,[194] had awakened the ghost of Homer Plessy by instituting a "separate but equal" race-based housing scheme.[195] The circuit court reputed to be the most liberal in the United States[196] subsequently found no violation of the Equal Protection Clause[197] based upon its reading of *Turner v. Safley*,[198] a decision that had drawn the ire of the Court's "liberal" wing.[199] Nonetheless, the Rehnquist Court, whose Chief Justice had found merit in *Plessy* during his clerkship with the High Court,[200] refused to accommodate the common sense security concerns of prison officials.[201]

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[194] *See* David Halley, *Richard A. McGee, 1897-1983*, *in* ENCYCLOPEDIA OF AMERICAN PRISONS, *supra* note 16, at 315, 316 (recounting Warren's creation of the CDC, followed shortly by his appointment of Richard McGee as head of state corrections, who professionalized the state prison system).

[195] *See Johnson*, 321 F.3d at 794 (describing the segregation process).

[196] *See supra* note 1 (discussing the court's liberal reputation).

[197] *See Johnson*, 321 F.3d at 802.

[198] 482 U.S. 78, 89 (1987).

[199] Justices Marshall, Brennan, and Blackmun joined Justice Stevens's dissent in *Turner v. Safley*. Stevens feared that wardens could invariably "produce[] . . . [some] plausible security concern" to justify any hardship visited on inmates. *Id.* at 101 (Stevens, J., dissenting).

[200] *See* Strossen, *supra* note 75, at 438 n.47 (1997) (recounting discovery of the Rehnquist's memorandum supporting a "continued endorsement of the old doctrine of separate but equal"). Note that Chief Justice Rehnquist did not participate in the *Johnson* ruling.

[201] *Compare* Johnson v. California, 543 U.S. 499, 509 (2005) ("In the prison context, the government's power is at an apex, we think that searching judicial review of racial classifications is necessary to guard against invidious discrimination."), *with, e.g.*, Lewis v. Casey, 518 U.S. 343, 361 (1996) ("[The] principle of deference has special force with regard to that issue, since the inmates in lockdown include 'the most dangerous and violent prisoners in the Arizona prison system,' and other inmates presenting special disciplinary and security concerns.") (citation omitted); Sandin v. Conner, 515 U.S. 472, 482 (1995) ("[F]ederal courts ought to afford appropriate deference and flexibility to state officials trying to manage a volatile environment."); Hudson v. McMillan, 503 U.S. 1, 6 (1992) ("'[P]rison administrators . . . should be accorded wide-ranging deference in the adoption

1. Reviving Strict Scrutiny

In rejecting application of *Turner*'s reasonableness standard test, the Court suspended its long-standing precept that the very nature of imprisonment requires a highly constrictive interpretation of constitutional rights.[202] For this Court, the most stringent equal protection test—strict scrutiny—applies to "*all* racial classifications," including the CDC's.[203] Moreover, the Court's use of metaphor presented strict scrutiny as a "deep structure" test wholly at odds with common sense adjudication.[204] While common sense presupposes the validity of racialized knowledge, the *Johnson* Court mandated "'*searching* judicial inquiry into the justification for such race-based measures.'"[205] In contrast to the passive "naturalness" of common sense, Justice O'Connor's majority opinion called for nothing short of "*smok[ing] out* illegitimate uses of race . . . ."[206]

Prison officials argued that by "'equally' segrega[ting]" blacks and whites they evaded the reach of the Equal Protection Clause of the Fourteenth Amendment.[207] "Indeed," responded Justice O'Connor, "we

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and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.'" (quoting Bell v. Wolfish, 441 U.S. 520, 547 (1979))); *Turner*, 482 U.S. at 89 ("[A] standard [of deference] is necessary if 'prison administrators . . . , and not the courts, [are] to make the difficult judgments concerning institutional operations.'" (quoting Jones v. North Carolina Prisoners' Labor Union, 433 U.S. 119, 128 (1977))); Block v. Rutherford, 468 U.S. 576, 589 (1984) ("'[P]rison administrators are [to be] accorded wide-ranging deference . . . .'" (quoting *Wolfish*, 441 U.S. at 547)).

[202] *See, e.g.*, *Sandin*, 515 U.S. at 485 ("[L]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." (quoting Price v. Johnston, 334 U.S. 266, 285 (1948))); Hewitt v. Helms, 459 U.S. 460, 467 (1983); *Wolfish*, 441 U.S. at 546 (stating that "essential goals that may require limitation or retraction of the retained constitutional rights of both convicted prisoners and pretrial detainees"); Bounds v. Smith, 430 U.S. 817, 840 (1977) ("Our decisions have recognized on more than one occasion that lawful imprisonment properly results in a 'retraction [of rights] justified by the considerations underlying our penal system.'" (quoting *Price*, 334 U.S. at 285)); Wolff v. McDonnell, 418 U.S. 539, 556 (1974) ("In sum, there must be mutual accommodation between institutional needs and objectives and the provisions of the Constitution that are of general application.").

[203] *See Johnson*, 543 U.S. at 500 (emphasis added).

[204] *See* Bernard J. Hibbits, *Making Sense of Metaphors: Visuality, Aurality, and the Reconfiguration of American Legal Discourse*, 16 CARDOZO L. REV. 229, 235 (1994) ("Some scholars . . . suggest that metaphors are fundamental tools of thought and reasoning—so much a part of the deep structure of our mentality.").

[205] *Johnson*, 543 U.S. at 506 (quoting Richmond v. J.A. Croson, Co., 488 U.S. 469, 493 (1989) (plurality opinion)) (emphasis added).

[206] *Id.* (quoting *Richmond*, 488 U.S. at 493) (emphasis added).

[207] *Id.*

rejected the notion that separate can ever be equal—or 'neutral'—50 years ago in *Brown v. Board of Education* and we refuse to resurrect it today."[208]

Nor would the Court accept prison officials' argument that possible racial violence required an exception to strict scrutiny of racial classifications.[209] Whereas "common-sense" fears of racial violence had carried the day for prison officials before the Ninth Circuit,[210] the Court discounted their forecast of racial strife. It did so largely because an empirically-based study contradicted the common sense prediction that integrating Texas prison cells would result in levels of violence without equal in segregated cells.[211] Moreover, Justice O'Connor asserted that the racial segregation of inmates may increase racial violence by "'[stigmatizing] individuals by reason of their membership in a racial group and [inciting] racial hostility.'"[212]

While finding the segregated housing the product of "an express racial classification" and thus "immediately suspect,[213] the Court stopped short of deeming it unconstitutional. As in *Lee v. Washington*, the *Johnson* Court could tolerate "separate but equal" and other "uses of race" for a short while when "those uses of race . . . are narrowly tailored to address" the

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[208] *Id.*

[209] *Id.* at 507-08.

[210] *See* Johnson v. California, 321 F.3d 791, 802 (9th Cir. 2003), *rev'd*, 543 U.S. 499 (2005) ("Given the admittedly high racial tensions and violence already existing within the CDC, there is clearly a common-sense connection between the use of race as the predominant factor in assigning cell mates for 60 days until it is clear how the inmate will adjust to his new environment and reducing racial violence and maintaining a safer environment."). Prison officials' appeal to deference had previously carried the day time and time again in the Supreme Court. *See, e.g.*, Lewis v. Casey, 518 U.S. 343, 361 (1996) ("[The] principle of deference has special force . . . ."); Sandin v. Conner, 515 U.S. 472, 482 (1995) (invoking deference in limiting when procedural safeguards arise in disciplinary hearings); Hudson v. McMillan, 503 U.S. 1, 6 (1992) (invoking deference in limiting cruel and unusual punishment safeguards); Turner v. Safley, 482 U.S. 78, 89 (1987) (invoking deference in limiting free speech); Block v. Rutherford, 468 U.S. 576, 589 (1984) (invoking deference in limiting search and seizure safeguards); Hewitt v. Helms, 459 U.S. 460, 472 (1983) (invoking deference in limiting procedural safeguards in administrative segregation decisions).

[211] *See Johnson*, 543 U.S. at 507-08 ("finding that 'over [ten years] the rate of violence between inmates segregated by race in double cells surpassed the rate among those racially integrated.'" (quoting Trulson & Marquart, *supra* note 67, at 774)). This albeit modest but highly effective use of social science research reminds one of *Brown*'s controversial use of social science findings on the psychological effects of segregation on African Americans in its footnote 11. *See* Brown v. Bd. of Educ., 347 U.S. 483, 495 n.11 (1954).

[212] *Johnson*, 543 U.S. at 507 (quoting Shaw v. Reno, 509 U.S. 630, 643 (1993)).

[213] *Id.* at 509 (quoting *Shaw*, 509 U.S. at 642).

"necessities of prison security and discipline."[214] The Court thus remanded to the district court for further findings.[215]

2. *Redefining the Reach of* Turner v. Safley

Prior to *Johnson*, some lower courts had embraced the *Turner* test as the unitary standard for challenges to prison regulations.[216] Justice O'Connor reversed this trend by delimiting *Turner*'s reach "*only* to rights that are 'inconsistent with proper incarceration.'"[217] "Only," however, seemingly meant all rights but two: the Eighth Amendment ban on cruel and unusual punishment[218] and the Fourteenth Amendment prohibition of racial discrimination.[219] Regarding the latter, Justice O'Connor posited that "[i]t is not a right that need necessarily be compromised for the sake of

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[214] *Id.* at 512 (quoting Lee v. Washington, 390 U.S. 333, 334 (1968)).

[215] *See id.* at 515.

[216] *See, e.g.*, Doe v. Delie, 257 F.3d 309, 316 (3d Cir. 2001) (applying *Turner* to a search and seizure claim); Tillman v. Lebanon County Corr. Facility, 221 F.3d 410, 419 (3d Cir. 2000) (applying *Turner* to a cruel and unusual punishment claim); Gates v. Rowland, 39 F.3d 1439, 1447 (9th Cir. 1994) (ruling that *Turner* permits prison staff to limit statutorily created rights); Klinger v. Dep't of Corr., 31 F.3d 727, 732 (8th Cir. 1994) (applying *Turner* to an equal protection claim).

[217] *Johnson*, 543 U.S. at 500 (quoting Overton v. Bazzetta, 539 U.S. 126, 131 (2003)) (emphasis added). The editors of the *Harvard Law Review* properly found this distinction to be less than clear:

> Although prisoner suits pushing on the new boundaries of *Turner* will surely come, the Court has done little to assure that they will be resolved in a predictable fashion. The key question that *Johnson* passes over, and which underlies the doctrinal confusion it will create, is why prisoners lose full constitutional protection at all . . . .
>
> The *Johnson* Court took a decisive step away from the deference-to-administrators rationale. The Court can no longer persuasively justify the watering down of prisoners' rights on the basis of the judiciary's lack of institutional competence when its new threshold test requires lower courts to decide what constitutes "proper incarceration" or "proper prison administration." In the place of the older normative accounts of why prisoners must sacrifice their rights, the *Johnson* Court offered the conclusory statement that "certain privileges and rights must necessarily be limited in the prison context." But it is hard to know what is necessary about the prison context.

The Supreme Court, 2004 Term Leading Cases: Application to Incarcerated Persons—Inmate Racial Segregation, 119 HARV. L. REV. 228, 236-37 (2006) (footnotes omitted).

[218] *Johnson*, 543 U.S. at 511 (explaining that "the integrity of the criminal justice system depends on full compliance with the Eighth Amendment"); *see also* Worthen v. Hull, 2005 WL 1950250, at *4 (E.D. Okla. July 29, 2005) (saying "but the Supreme Court has 'not used *Turner* to evaluate Eighth Amendment claims of cruel and unusual punishment in prison.' Rather than apply the *Turner* standard, the Court 'judge[s] violations of [the Eighth] Amendment under the 'deliberate indifference' standard . . . .'" (quoting *Johnson*, 543 U.S. at 511) (internal citations omitted)).

[219] *See Johnson*, 543 U.S. at 511.

proper prison administration."[220] Elsewhere, her majority opinion indicated that racial discrimination—in or out of prison—did not resemble other constitutional injuries given its "pernicious" nature[221] and incompatibility with "public respect for our system of justice."[222]

B. COMMON SENSE AFTER *JOHNSON*

In mandating strict scrutiny of an express racial classification, the *Johnson* Court dramatically altered the evidentiary burden. Whereas the Ninth Circuit placed a "heavy burden" on inmates to rebut "common-sense,"[223] the Supreme Court made the parties change places. Under the strict scrutiny test, prison officials must demonstrate that "temporary" racial segregation promotes "a compelling state interest" and does so using a "narrowly tailored" approach.[224]

But here is the rub: Gerald Gunther's much-quoted assertion that strict scrutiny is "'strict' in theory and fatal in fact"[225] just isn't so in penal matters. Take the post-*Johnson* decision, *Parker v. Kramer.*[226] "[C]lear[] racial tensions" had gripped the prison yard of the California state prison at Tuolumne.[227] Prison staff had responded by closing the yard.[228] Plaintiffs' amended complaint stated in relevant part that a prison officer violated their right to equal protection when he separately moved racially distinct groups of black and white inmates to a fenced-in area after an alarm sounded elsewhere in the prison.[229] In approving the defendants' motion for dismissal, the district court described the situation as an "immediate potential threat of violence"[230] that merited the brief racial segregation of certain inmates.[231] The court reasoned as follows:

> Prison security is without question a compelling government interest and defendant's actions were narrowly tailored to further that interest. [I]f defendant . . . separated the inmates as plaintiff describes in his complaint, it was a necessary and temporary

[220] *Id.* at 510.

[221] *Id.* at 511 (quoting Rose v. Mitchell, 443 U.S. 545, 555 (1979)) (internal quotation marks omitted).

[222] *Id.*

[223] Johnson v. California, 321 F.3d 791, 798, 801 (9th Cir. 2003), *rev'd*, 543 U.S. 499 (2005).

[224] *Johnson*, 543 U.S. at 515.

[225] Gunther, *supra* note 19, at 8.

[226] No. CVF-025117AWIDLBP, 2005 WL 2089802 (E.D. Cal. Aug. 29, 2005).

[227] *Id.* at *6.

[228] *Id.* at *3.

[229] *Id.* at *5.

[230] *Id.* at *6.

[231] *Id.*

response to a potential threat of race related violence and therefore warranted even under the strict scrutiny analysis required by Johnson v. California.[232]

Moreover, most racial segregation in prison falls under the "de facto" rubric. Even prior to the Court's decision in *Johnson*, few states employed express racial classification systems. A mere four percent of wardens had official policies forbidding racial integration in housing inmates.[233] Only forty percent of wardens monitored racial balance.[234] Of the sixty-five percent having official housing policies, one-in-four explicitly aimed for "racial balance,"[235]—a term that typically denotes a proportionate number of whites and people of color in a particular housing unit, which allows ample opportunity for self-segregation.[236]

Although ninety percent of the inmate population lives in shared cells,[237] only thirty percent of multiple-occupancy cells are racially integrated.[238] For example, prior to his confinement in a reception center, Garrison Johnson for some sixteen years always "selected" an African American cellmate.[239] The experience of Garrison Johnson is not atypical; inmates often can "choose" cellmates under official or de facto "freedom-of-choice" policies.[240] The outcome is stark but not surprising: there occurs

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[232] *Id.* (citations omitted).

[233] Martha L. Henderson et al., *Race, Rights, and Order in Prison: A National Survey of the Wardens on Racial Integration of Prison Cells*, 80 PRISON J. 295, 302 tbl.3 (2000).

[234] *Id.* at 303 tbl.4.

[235] *Id.* at 302 tbl.3.

[236] *Cf. id.* at 306-07:

> In those institutions where policies do exist, whether written or not, a contradiction exists between what wardens perceive to be the most desirable policy from the standpoint of safety and security and what the wardens state they actually do in their prisons. More than half of the wardens state that assigning inmates to housing on a race-neutral basis, monitoring the degree of racial balance regularly, and changing inmates' assignments to promote balance is preferred. These same wardens, however, do not monitor the racial composition of cells occupied by more than one inmate (62% state they do not monitor). Many who do monitor are unlikely to make changes in assignments to achieve greater balance. Moreover, those who do make changes do so only some of the time or in rare circumstances.

[237] *See id.* at 304-05.

[238] *See id.* at 305 (finding that seventy percent of the inmates sharing a cell have a cellmate of the same race).

[239] Johnson v. California, 543 U.S. 499, 550 (2005) (Thomas, J., dissenting).

[240] *See, e.g.*, Brief for the Nat'l Ass'n of Black Law Enforcement Officers, Inc. as Amicus Curiae Supporting Respondents at 17-18, Johnson v. California, 543 U.S. 499 (2005) (No. 03-636), 2004 WL 1790882 (describing the "permanent policy" for housing inmates after the end of the "reception" period); Craig Hemmens, *No Shades of Grey: The Legal Implications of Voluntary Racial Segregation in Prison*, 4 CORRECTIONS MGMT. Q. 20, 24 (2000) (stating that "many facilities allow inmates to choose their cell partner").

"almost total segregation of races" when inmates select their cellmates.[241] A likely culprit, common sense racism, can be easily located in anecdotal accounts of prison life.[242]

Wardens appear to have little resolve to buck common sense racism and forbid "freedom-of-choice" in selecting cellmates. Surely some prison workers "acquiesce to inmate demands" for segregated housing.[243] Although the majority of wardens do not believe that racial integration increases violence[244] and view "race-neutral" housing assignments as "the most desirable from the standpoint of safety and security,"[245] what they "actually do" is leave things as they are—unless judicially mandated to do otherwise.[246] Moreover, one veteran commentator contends that when wardens do "voluntarily" seek racial balance, their motivation has more to do with avoiding the appearance of bias than pursuing racial justice.[247] "Common sense" would 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.[248]

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[241] Hemmens, *supra* note 240, at 24.

[242] *See supra* note 41 (citing various accounts of de facto segregation); *see also, e.g.*, CARCERAL, *supra* note 35, at 137 (stating that "prisons still remain racial hate factories"); HASSINE ET AL., *supra* note 34, at 71 ("Everyone in the prison system was forced to play the bias game . . . ."); SILBERMAN, *supra* note 154, at 195 (describing prison life as a "cauldron of hate and violence"); *cf.* John P. May, *Introduction*, *in* BUILDING VIOLENCE: HOW AMERICA'S RUSH TO INCARCERATE CREATES MORE VIOLENCE xv, xvi (John P. May ed., 2000) (describing prisons as "toxic environments").

[243] Hemmens, *supra* note 240, at 21.

[244] *See* Henderson et al., *supra* note 233, at 304 tbl.5 (indicating that thirty percent of the wardens responded affirmatively to the following statement: "[The racial integration of individual cells] is likely to increase the level of violence in an institution;" whereas 15.7% responded that "[i]t is likely to decrease the level of violence in an institution;" and 54.3% responded that "[i]t would not have an effect, one way or the other, on the level of violence in an institution").

[245] *Id.* (responding to what "would be most desirable," 60.3% indicated race-neutral housing and would change existing housing to achieve it; 24.4% also viewed race-neutral housing as most desirable but would do nothing to achieve racial balance; 13.7% would have "racial balance in cell blocks but allow inmates to choose cells near others of their own race and to not cell with somebody of another race"; and 1.5% would segregate inmates by race into "separate cell blocks or wings").

[246] *Id.* at 307; *see also* Carroll, *supra* note 26, at 377 (stating that "administrative pressure [for racial balance] is eroded by inmate preferences for self-segregation").

[247] *See* SILBERMAN, *supra* note 154, at 50 (stating that efforts at racial balance are undertaken to avoid the appearance of bias).

[248] *See, e.g.*, ALAN ELSNER, GATES OF INJUSTICE: THE CRISIS IN AMERICAN'S PRISONS 53-54 (2004) (delineating instances of racial bias by prison staff); WILLIAM L. SELKE, PRISONS IN CRISIS 71 (1993) (stating that "racism has always been a part of prison regimes," and

In *Green v. County School Board*,[249] the Supreme Court addressed a "freedom-of-choice" approach to reassigning students in a historically segregated, dual system of public education. Not a single student crossed the "color line."[250] Speaking for the Court, Justice Brennan invalidated "freedom-of-choice" because it perpetuated a dual school system.[251]

But commencing with its decision in *Washington v. Davis*,[252] the Court has required the showing of a racially discriminatory purpose when addressing facially-neutral policies,[253] and a racially disparate impact or the anticipation of such impact does not satisfy this test.[254] The Supreme Court in *Arlington Heights v. Metropolitan Housing Development Corp.*[255] subsequently ruled that the discriminatory intent could be established by 1) "a clear pattern" of discriminatory effects "unexplainable on grounds other than race";[256] 2) "the historical background";[257] 3) "the specific sequence of events leading up to the challenged decision";[258] or 4) "the legislative or administrative history."[259]

Commentators have characterized the aggrieved party's burden as "almost insurmountable,"[260] requiring proof "that officials were 'out to get'

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prison life reflects "daily living in the outside world"); SILBERMAN, *supra* note 154, at 196 (observing that the prison "reproduces the social structure of the larger society" and thus "there is a long history of racial conflict" in prison).

[249] 391 U.S. 430 (1968).

[250] *Id.* at 433.

[251] *Id.* at 441-42.

[252] 426 U.S. 229 (1976).

[253] *See id.* at 239 ("A purpose to discriminate must be present which may be proven by systematic exclusion of eligible jurymen of the proscribed race or by unequal application of the law to such an extent as to show intentional discrimination." (quoting Akins v. Texas, 325 U.S. 398, 403-04 (1945))); *see also* Tolbert v. McGrath, No. C 04-3039 SI(PR), 2005 WL 3310065, at *6 (N.D. Cal., Dec. 7, 2005) ("The inmate making an equal protection claim must demonstrate discriminatory intent or purpose by the defendants.").

[254] *See* Pers. Adm'r v. Feeney, 442 U.S. 256, 279 (1979) (ruling that "'[d]iscriminatory purpose' . . . . implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group") (footnote and citations omitted); *see also* Hernandez v. New York, 500 U.S. 352, 362 (1991) (declaring that "the impact of a classification does not alone show its purpose").

[255] 429 U.S. 252 (1977).

[256] *Id.* at 266.

[257] *Id.* at 267.

[258] *Id.*

[259] *Id.* at 268.

[260] Damon J. Keith, *What Happens to a Dream Deferred: An Assessment of Civil Rights Law Twenty Years After the 1963 March on Washington*, 19 HARV. C.R.-C.L. L. REV. 469, 476 (1984). The Supreme Court agreed that the test demanded a great deal. *See, e.g.*,

a person or group on account of race."[261] For instance, in the post-*Johnson* case *McClain v. Rogers*,[262] the court refused to cast as racially discriminatory a ban on religious practices advocating white supremacy.[263] Instead, the court characterized the defendants' actions as "premised on the need to maintain prison security, . . . [which] under *Turner* would be deemed a neutral basis for classification."[264] Similarly, the Pennsylvania Commonwealth Court concluded that regulating "Afro" hairstyles was "neutral as to race" because members of "any race" could sport them.[265]

In "fail[ing] as a comprehensive account of discrimination,"[266] the discriminatory intent test "tames" *Johnson* as a counterpose to common sense racism. Resting on "a widely-shared, taken-for-granted set of ideas [about race] within a culture,"[267] common sense racism does not typically manifest itself as purposive. Because of the transparency phenomenon, white prison workers do not think of their actions as "race-specific."[268]

Thornburgh v. Gingles, 478 U.S. 30, 44 (1986) (characterizing the discriminatory intent test as "inordinately difficult" to satisfy) (internal quotations omitted).

[261] Randall L. Kennedy, McCleskey v. Kemp*: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1405 (1988). *See* Alexander v. Louisiana, 405 U.S. 625, 631-32 (1972) ("Once a prima facie case of invidious discrimination is established, the burden of proof shifts to the State to rebut the presumption of unconstitutional action by showing that permissible racially neutral selection criteria and procedures have produced the monochromatic result.").

[262] 155 F. App'x. 918 (7th Cir. 2005).

[263] *Id.* at 920.

[264] *Id.*

[265] Meggett v. Pa. Dep't of Corr., 892 A.2d 872, 887-88 (Pa. Commw. Ct. 2006). *But cf.* Flournoy v. Schomig, 152 F. App'x. 535, 538 (7th Cir. 2005) (ruling that denying a black inmate "privileges" accorded whites gave rise to the presumption of racial discrimination).

[266] Strauss, *supra* note 17, at 937-38. As Strauss wrote, the discriminatory intent requirement ended "the possibility that *Brown* would stand for a principle that mandated relatively far-reaching changes in society." *Id.* at 954. *See also* Marguerite A. Driessen, *Toward a More Realistic Standard for Proving Discriminatory Intent,* 12 TEMP. POL. & CIV. RTS. L. REV. 19, 20 (2002) (asserting the "current impotence" of equal protection doctrine); *cf.* Bennett, *supra* note 104, at 1011 (concluding that "a conscious subjective motivation requirement does not capture any apparent ideal of equal protection").

[267] HANEY LÓPEZ, *supra* note 71, at 128.

[268] Flagg, *supra* note 119, at 976. Lawrence's observation below is applicable to common sense racism:

> Traditional notions of intent do not reflect the fact that decisions about racial matters are influenced in large part by factors that can be characterized as neither intentional—in the sense that certain outcomes are self-consciously sought—nor unintentional—in the sense that the outcomes are random, fortuitous, and uninfluenced by the decisionmaker's beliefs, desires, and wishes.

Lawrence, *supra* note 133, at 322; *cf.* Martha Chamallas, *Deepening the Legal Understanding of Bias: On Devaluation and Biased Prototypes,* 74 S. CAL. L. REV. 747, 752

Similarly, Ian Haney López describes common sense racism as containing "racial ideas" that "remain in the background"[269] and thus beyond the reach of the discriminatory intent test.

Unless the Court modifies the discriminatory intent test, common sense racism as practiced by inmates and prison staff will continue to paint a subtle yet, for inmates, easily demarcated color line in multiple-occupancy cells. Although this color line may not carry the same "badge of inferiority" worn by the black school children of Topeka, Kansas,[270] segregation in prison reinforces pejorative racial stereotypes—one being, "black prisoners are inherently too violent to be housed with white prisoners, . . . [which] is but a contemporary version on the theme of blacks as savages."[271]

After *Johnson*, which test applies when aggrieved inmates cannot attribute disparate treatment to express racial classifications or discriminatory intent? Justice O'Connor's majority opinion implies that *Turner*'s lax reasonableness standard constitutes the default test.[272] Subsequent case law agrees.[273] The district court in *Tolbert v. McGrath*[274] explained as follows:

(2001) (observing that a "common complaint" of many commentators "is that current legal doctrines are inadequate to handle contemporary manifestations of bias against . . . disfavored social groups"); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1164 (1995) (stating that "courts have so far failed to develop doctrinal models capable of addressing . . . subtle or unconscious race and national origin discrimination").

[269] HANEY LÓPEZ, *supra* note 71, at 119.

[270] One of the leading penal commentators, James Jacobs, wrote in 1982:

> The situation in today's prisons is different [than the Jim Crow era]. Blacks are frequently the majority, not the minority, and administrative methods for controlling race conflict do not bespeak contempt for either blacks or whites. While the insult to blacks intended by the South's racist system was clear to anyone, black or white, the meaning of certain racially conscious administrative practices in today's prisons is hardly to be understood in the same way.

JACOBS, *supra* note 25, at 87.

[271] Samuel Walker, *The Limits of Segregation in Prisons: A Reply to Jacobs*, 21 CRIM. L. BULL. 485, 491 (1985); *see also* Risdon N. Slate et al., *Racial Segregation as a Correctional Management Tool: Beyond* Lee v. Washington, 3 CORRECTIONS MGMT. Q. 66, 74 (1999) (asserting that segregation by race among prisoners strengthens negative stereotypes).

[272] *See* Johnson v. California, 543 U.S. 499, 509-11 (2005) (delineating the reach of *Turner*). Should *Turner* not apply, little would change because the Court in *Washington v. Davis* applied rational basis review when a discriminatory purpose cannot be shown. *See* 426 U.S. 229, 250-52 (1976).

[273] *See, e.g.*, McClain v. Rogers, 155 F. App'x. 918, 920 (7th Cir. 2005) (characterizing the plaintiff's claim as one based on religious discrimination rather than race); Meggett v. Pa. Dep't of Corr., 892 A.2d 872, 887-88 (Pa. Commw. Ct. 2006) (applying the *Turner* test to a prison regulation about "Afro" haircuts, which the court deemed to be race-neutral). *But*

> For distinctions drawn among prisoners other than those based on race, strict scrutiny is inappropriate to test the infringement of prisoners' constitutional rights. Where a prison regulation (other than a race-based one) impinges on inmates' constitutional rights, the regulation or practice is valid if it is reasonably related to legitimate penological interests.[275]

Moreover, some courts, including the highly-regarded District of Columbia Circuit, have employed "factless," common sense scrutiny in addressing the central component of the *Turner* standard—whether "[t]he logical connection between the regulation and the asserted goal is so remote as to render the policy arbitrary or irrational."[276] To follow their lead is to risk dancing with common sense racism when adjudicating uses of stigma-rich, racialized prison space.

IV. HOMER PLESSY AND GARRISON JOHNSON: EQUAL PROTECTION AND EQUAL CONCERN

Unlike Garrison Johnson, Homer Plessy expressly sought empathy from each Supreme Court Justice: "[If judges were African American and lived under Jim Crow,] [w]hat humiliation, what rage would . . . fill the judicial mind . . . ?"[277] The *Plessy* Court chose not to respond; according Homer Plessy empathy would have given him a social standing incompatible with the common sense of the period.[278] Not even Justice

cf. Glisson v. Sangamon County Sheriff's Dep't, 408 F. Supp. 2d 609, 625 (C.D. Ill. 2006) (citing *Johnson* for the proposition that "if an individual is a member of a protected class, any policy that discriminates against him or her must be reviewed under the strict scrutiny test").

[274] No. C 04-3039 SI, 2005 WL 3310065, at *6 (N.D. Cal., Dec. 7, 2005).

[275] *See id.* ("In short, a race discrimination claim is analyzed under a strict scrutiny standard and a religious discrimination claim analyzed under the less restrictive *Turner* standard") (citations omitted).

[276] Kimberlin v. Dep't of Justice, 318 F.3d 228, 233 (D.C. Cir. 2001) (quoting Turner v. Safley, 482 U.S. 78, 89-90 (1987)); *see also, e.g.*, Frost v. Symington, 197 F.3d 348, 357 (9th Cir. 1999) (stating that the government must show a "common-sense" connection between challenged prison regulations and penal objectives per the first-prong of the *Turner* standard); Ametal v. Reno, 156 F.3d 192, 199 (D.C. Cir. 1998) ("In that case, the [*Turner*] Court scoured the record for evidence of a rational link between the asserted security interests and the marriage ban because common sense does not suggest any.").

[277] Brief for the Plaintiff In Error at *36, Plessy v. Ferguson, 163 U.S. 537 (1896) (No. 210), 1893 WL 10660.

[278] *See, e.g.*, Robert Moats Miller, *The Attitudes of American Protestantism Toward the Negro, 1919-1939*, *in* THE NEGRO IN DEPRESSION AND WAR 105, 106 (Bernard Sternsher ed., 1969) ("A New England Minister suggested to his congregation that they invite the members of a neighboring Negro church to a church, whereupon the ladies of the flock served notice that they would not attend . . . .").

Harlan's storied dissent demonstrates acceptance of Homer Plessy as the social equal of white people.[279]

In *Brown*, Earl Warren honored Homer Plessy's empathic request. In *Brown*, he speaks of feeling, of human pain, and of moral evil. The recognition of human experience and pain—of feeling—is obvious: "To separate [school children] from others of a similar age and qualifications solely because of their race generates feeling of inferiority as to their status in the community and may affect their hearts and minds in a way unlikely ever to be undone."[280]

What led Warren to rise above the common sense of the era and strike down Jim Crow? The pragmatic former prosecutor and governor would not have been out-of-character had he appealed in *Brown* to common sense—as advocates of Jim Crow would likely have urged. President Eisenhower had after all nominated then-Governor Warren because he "seemed to reflect high ideals and a great deal of common sense."[281]

I would like to think that Warren's former black driver played no small part in the Chief Justice's capacity to rise above common sense racism. He apparently told the Chief Justice of the indignities suffered at the hands of Jim Crow.[282] Perhaps Warren then recognized that empathy shares little with common sense. Behind the qualities Clifford Geertz attributed to common sense—"[n]aturalness, practicalness, thinness, immethodologicalness, and accessibleness"[283]—resides their byproduct, stereotyping. By contrast, empathy counters stereotypes because it requires that we put ourselves in the shoes of the "other." Achieving this objective, observed Lynne Henderson, involves several dimensions—"historical, experiential, emotional, and cognitive," which makes the inmate of color more intelligible.[284] Empathy can also flush out "background ideas of

[279] *Cf.* Plessy v. Ferguson, 163 U.S. 537, 561 (1896) (Harlan, J., dissenting) (stating that "social equality no more exists between the races when traveling in a passenger coach . . . than when members of the same race . . . stand or sit with each other in a political assembly").

[280] Lynne N. Henderson, *Legality and Sympathy*, 85 MICH. L. REV. 1574, 1594 (1987) (quoting Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954)) (footnote omitted).

[281] KLUGER, *supra* note 5, at 663.

[282] *See* KENNETH KARTS, BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION 18-19 (1989) (recounting Warren's conversation).

[283] GEERTZ, *supra* note 18, at 85 (internal quotation marks omitted).

[284] Henderson, *supra* note 280, at 1581 (footnote omitted). Empathy, observed Lynne Henderson, is not incompatible with knowledge or reason:

> [E]mpathy is a form of understanding, a phenomenon that encompasses affect as well as cognition in determining meanings; it is a rich source of knowledge and approaches to legal problems—which are, ultimately, human problems. Properly understood, empathy is not a "weird" or "mystical" phenomenon, nor is it "intuition." Rather, it is a way of knowing that can

race."[285] A white jurist can thus disrupt the transparency phenomenon by making otherwise invisible race norms visible, which in turn illuminates the privileges of whiteness.

> explode received knowledge of legal problems and structures that reveals moral problems previously sublimated by pretensions to reductionist rationality . . . .

Id. at 1576 (footnote omitted); *see also* Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361, 380 (1996) (describing empathy as a value-free capacity); Michael J. Swygert & Katherine Earle Yanes, *A Unified Theory of Justice: The Integration of Fairness Into Efficiency*, 73 WASH. L. REV. 249, 308 (1998) ("[E]mpathy can be conceptualized not as an emotion, but as a rational mental capacity for understanding another person's situation.") (footnote omitted); Benjamin Zipurksy, DeShaney *and the Jurisprudence of Compassion*, 65 N.Y.U. L. REV. 1101, 1135 (1998) (describing empathy as "the power to understand the social environment").

[285] Teresa Bruce, *The Empathy Principle*, 6 L. & SEXUALITY 109, 112 (1996):

> In order for jurists to use empathy to guide their interpretation . . . they must both understand and identify with a given litigant's position. They must appreciate the external factors influencing her behavior, such as her race and class, and they must additionally appreciate the more subtle, internal factors, such as her emotions, feelings, desires, and needs. Empathy, in short, requires a people-centered approach. It requires a jurist to cast aside her provincialism and to stand in someone else's shoes.

See also Rachel D. Godsil, *Expressivism, Empathy and Equality*, 36 U. MICH. J.L. REFORM 247, 286 (2003) ("Only a standard expressly requiring the judge to engage in empathy may help to overcome unconscious racism, particularly when unconscious racism stands as a roadblock to that empathy.").

By no means do I assert that empathy will bring common sense racism to a halt. As O'Grady observed:

> Empathy in judging is not predictive of outcome—it is part of a process, but it does not carry the day . . . . [B]ut . . . the incorporation of empathy in judicial decisionmaking will provide a judge with new understandings and enhanced knowledge of context with which to access a case.

Catherine Gage O'Grady, *Empathy and Perspective in Judging: The Honorable William C. Canby, Jr.*, 33 ARIZ. ST. L.J. 4, 10-11 (2001) (footnotes omitted); *but see* Kenji Yoshino, *Suspect Symbols: The Literary Argument for Heightened Scrutiny for Gays*, 96 COLUM. L. REV. 1753, 1765 (1996) ("And there's the rub: how can a judge see a blindness she shares?").

Empathy may well be a universal capacity of the human species. Arguably it aids in the survival of the species by virtue of its capacity to build socially interdependent communities. Empathetic individuals are more likely to aid others in distress as well as build communal bonds. Individuals within these communities possess survival advantages over those lacking access to mutual-aid networks. *See, e.g.*, Richard Delgato, *Rodrigo's Eleventh Chronicle: Empathy and False Empathy*, 84 CAL. L. REV. 61, 79 (1996) (identifying "bonding" as the main function of empathy). Culture, however, can diminish or enhance one's capacity for empathy. Here lies the stain of racism on the civil culture of the United States. Because of the legacy of slavery and Jim Crow, whites are inclined to confuse social habits with underlying human traits. Withholding active empathy likely originated in the social construction of whiteness, withstood *Brown*, and continues to afflict whites in the North and South.

Justice Clarence Thomas' dissent in *Johnson* invites speculation that he withheld active empathy from inmate Garrison Johnson. His embrace of "due deference" is so complete—

Chief Justice Warren, unlike the *Plessy* Court, may have also understood that equal protection under the Fourteenth Amendment obligates judges to reach across the social conventions about race relations and exercise "equal" empathy for African Americans.[286] No doubt he would have been familiar with *Carolene Product's* footnote four[287] and its grant of "special solicitude"—an empathetic phrase in itself—for "discrete and insular groups,"[288] which the Court would later characterize as "suspect" classes.[289] These groups cannot rely on the majoritarian branches for protection because of "empathy failure—the group's inability to make its claims sympathetic to potential bargaining partners."[290] Consequently, they cannot overcome what John Hart Ely characterized as the "cooperation-blocking prejudice."[291]

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he insisted that "the Constitution's demands" must be "accommodat[ed] . . . to those of the prison administration"—that it leaves no role for empathy. Johnson v. California, 543 U.S. 499, 531 (2005) (Thomas, J., dissenting); *see also* Eric L. Muller, *Where, but for the Grace of God, Goes He? The Search for Empathy in the Criminal Jurisprudence of Clarence Thomas*, 15 CONST. COMMENT. 225, 227-30 (1998) (arguing that Justice Thomas' capacity for empathy is "[u]ndeveloped" in that he can only empathize with people who share "his fate" rather than that of the "outsider"); *cf.* Michael DeHaven Newsom, *Clarence Thomas, Victim? Perhaps, and Victimizer? Yes—A Study in Social and Racial Alienation From African-Americans*, 48 ST. LOUIS U. L.J. 327, 328 (2004) (arguing that "Clarence Thomas is deeply alienated from most African-Americans, and his alienation largely operates to repudiate, disavow, and otherwise insult African-Americans").

[286] *See* Deborah L. Brake, *When Equality Leaves Everyone Worse Off: The Problem of Leveling Down in Equality Law*, 46 WM. & MARY L. REV. 513, 563 (1998) (contending that the Equal Protection Clause is more than equal treatment, it is about equal concern, which "should include an obligation to act with equal empathy for our shared humanity").

[287] United States v. Carolene Prods., 304 U.S. 144, 152-53 n.4 (1938); *see also supra* note 106 (discussing the historical importance of footnote four).

[288] *Carolene Prods*, 304 U.S. at 152-53 n.4.

[289] *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973) (defining a suspect class as "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to a position of political powerlessness as to command extraordinary protection from the majoritarian political process"). *But see* Robert C. Farrell, *Legislative Purpose and Equal Protection's Rationality Review*, 37 VILL. L. REV. 1, 56 (1992) (stating that "the Supreme Court has never explained how to decide which form of review is appropriate in a particular case"); Douglas R. Widin, Note, *Suspect Classifications: A Suspect Analysis*, 87 DICK. L. REV. 407, 427-28 (1982) (contending that "[t]he first striking deficiency of suspect classifications analysis is the lack of cogent definition of 'suspect class'") (footnote omitted).

[290] Yoshino, *supra* note 285, at 1764-65.

[291] *See* Ely, *supra* note 104, at 160. In many respects, inmates at large constitute a "discrete" group lacking empathy. *See, e.g.*, CHRISTOPHER E. SMITH, COURTS, POLITICS, AND THE JUDICIAL PROCESS 288 (1993) ("Incarcerated criminal offenders constitute a despised minority without political power to influence the policies of legislative and executive officials."); Erwin Chemerinsky, *The Constitution in Authoritarian Institutions*, 32 SUFFOLK

While Warren exemplifies empathic rectitude, he did not articulate an operational role for empathy in the multi-tiered model of equal protection that emerged from his tenure as Chief Justice. Several have been advanced.[292] Jerry Kang's can be recommended for its clarity and economy.[293] He proposes examining the challenged government practice from "multiple perspectives," which initially requires that "the judge must place himself figuratively in the perspective of each party to the litigation and interpret the social meaning of the practice from that perspective."[294] Subsequently, "the judge must use the empathic insights generated at the first step to scrutinize the various social meanings and test them for blind spots, insensitivities, and oversensitivities."[295] The next step involves "weighing the competing perspective" to determine if it "convey[s] a message of stigma."[296] Lastly, if the government practice conveys "a strongly stigmatic message," the judge employs "strict scrutiny" to

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U. L. REV. 441, 449-60 (1999) ("Those in the military, in prisons, and in schools are classic examples of discrete and insular minorities, who have little political power."); Julie M. Riewe, Note, *The Least Among Us: Unconstitutional Changes In Prisoner Litigation Under the Prison Litigation Reform Act of 1995*, 47 DUKE L.J. 117, 143 (1997) ("While not a suspect class as traditionally defined, prisoners nonetheless comprise a politically vulnerable and underrepresented group that must rely on the courts for protection . . . ."). Federal courts have uniformly and repeatedly rejected prisoners' bid for protection as a suspect group. *See, e.g.*, Zehner v. Trigg, 133 F.3d 459, 463 (7th Cir. 1997) (finding that "the idea [that inmates constitute a suspect class] is completely unsupported"); Wilson v. Giesen, 956 F.2d 738, 744 (7th Cir. 1992) ("But prisoners are not a suspect class."); Pryor v. Brennan, 914 F.2d 921, 923 (7th Cir. 1990) ("Prisoners do not constitute a suspect class."); Moss v. Clark, 886 F.2d 686, 690 (4th Cir. 1989) ("Prisoners are not a suspect class.").

[292] *See, e.g.*, ROBIN WEST, CARING FOR JUSTICE 79-87 (1997) (arguing for an empathic approach to judging); Godsil, *supra* note 285, at 286 (arguing that "empathy may help [judges] to overcome unconscious racism"); Henderson, *supra* note 280, at 1575 (arguing that "[t]he avoidance of emotion, affect, and experiential understanding reflects an impoverished view of reason and understanding—one that focuses on cognition in its most reductionist sense"); Jerry Kang, *Negative Action Against Asian Americans: The Internal Instability of Dworkin's Defense of Affirmative Action*, 31 HARV. C.R.-C.L. L. REV. 1, 27 (1996) (contending that "the judge must use the empathic insights . . . to scrutinize the various social meanings and test them for blindspots, insensitivities, and oversensitivities"). *But see, e.g.*, RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 412 (1990) (contending the empathic judging would render judicial decisionmaking unpredictable); Cynthia V. Ward, *A Kinder, Gentler Liberalism? Visions of Empathy in Feminist and Communitarian Literature*, 61 U. CHI. L. REV. 929 (finding empathic judging untenable). I agree with Susan Bandes's contention that excluding empathy for "outsider" groups, such as blacks and inmates of all races, buttresses dominant narratives. *See* Bandes, *supra* note 284, at 364-65 (responding to Posner's criticism of reliance on empathy in judging).

[293] Kang, *supra* note 292.

[294] *Id.* at 26.

[295] *Id.*

[296] *Id.*

determine if the practice promotes a compelling state interest in the manner least restrictive of the disadvantaged party's constitutional interests.[297] But if the challenged government practice conveys a "mildly stigmatic message," the court employs intermediate scrutiny and thereby inquires whether the practice is substantially related to an important government interest.[298] One employs the rational basis test in the absence of a stigma message.[299]

Building on Professor Kang's empathy-based test, while remaining mindful of the several ways of satisfying the Court's discriminatory intent test, I propose a hybrid of the two. My aim is to create from racially identified space a "middle ground" for judges who recognize the pernicious impact of common sense racism but are unwilling to abandon the discriminatory intent test. Because equal protection embraces equal empathy, prison workers' expected competencies should include empathy and the insights it provides. The proposed test presumes that prison officials exercise empathy for inmates of color and thus overcome the transparency phenomenon, which obscures common sense racism from their consciousness. Given the stigma-rich environment created by racialized space, with the prison being among the premier "acreage," any housing scheme other than one of forced integration would lead to the presumption that prison staff acted with discriminatory purpose. The burden would then shift to the prison staff to demonstrate lack of intent.

Sadly, my proposed test or the unlikely repudiation of the discriminatory intent test will not result in substantial integration of prison cells. There are simply not enough white, non-Hispanic male prisoners, who now comprise a minority of inmates. At the close of 2004, white inmates comprised thirty-four percent of all federal and state male prisoners serving sentences of longer than one year.[300]

V. CONCLUSION

A. TRADING PLACES

If a namesake of Homer Plessy could trade places with inmate Garrison Johnson what would he say to us? Like *the* Homer Plessy, he might ask the Justices to put themselves in his shoes. If the Justices

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[297] *Id.* at 30.

[298] *Id.*

[299] *Id.*

[300] HARRISON & BECK, *supra* note 155, at 8. African Americans accounted for forty-one percent of the prisoners while Hispanics comprised nineteen percent. *See id.*

honored his request, they would vicariously experience the dominant expression of common sense racism—the seeming indifference of the white population to the mass incarceration of undereducated young black men.[301]

A hypothetical namesake of Homer Plessy could be among the large segment of young, inner city African American men relocated to one of the many prisons that perpetuate the "separate but equal" precept of *Plessy v. Ferguson.* This prison functions as a "peculiar institution" by excluding large numbers of black offenders from the mainstream economic, political, and social life of the nation. Loic Wacquant labels inmate Homer Plessy's institutional residence a "judicial ghetto":

> [T]he ghetto is a manner of "social prison" while the prison functions as a "judicial ghetto." Both are entrusted with enclosing a stigmatized population so as to neutralize the material and/or symbolic threat that it poses for the broader society from which it has been extruded.[302]

Wacquant finds a "deep kinship" between ghettoes and prisons in that they share the same elements: (1) a stigmatized population that (2) is constrained or coerced, and (3) experiences territorial confinement, wherein the inhabitants develop "distinctive institutions, culture, and a sullied identity."[303] Moreover, ghettoes and prisons share much of the same

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[301] Some commentators attributed the racial disparity in the prison to an inability to empathize with the plight of a race other than your own. While the following observations address the war on drugs, one of the major reasons for the disparity in rates of imprisonment of blacks and whites, they are emblematic of a lack of empathy for African Americans in general and especially young black men. *See* David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283, 1308 (1995) (footnotes omitted):

> The federal crack penalties provide a paradigmatic case of unconscious racism. While these penalties may reflect some degree of affirmative antipathy toward blacks, the evidence of that is at best suggestive and anecdotal. What the legislative history of the Anti-Drug Abuse Act and its predecessors provide a good deal more reason to suspect is that, regardless of the objectives Congress was pursuing, it would have shown more restraint in fashioning the crack penalties, or more interest in amending them in ensuing years, if the penalties did not apply almost exclusively to blacks. In the words of one defense attorney, "Maybe I'm cynical, but I think that if you saw a lot of young white males getting five-and-10-year minimums for dealing powder cocaine, you'd have a lot more reaction."

See Bruce Western et al., *The Labor Market: Consequences of Incarceration*, 47 CRIME & DELINQ. 410, 414 (2001) ("[A] clear majority of Black high school dropouts are likely to have been to prison at some time."); *see also* Anthony Gillmer, Note, United States v. Clary*: Equal Protection and the Crack Statute*, 45 AM. U. L. REV. 497, 501-03 (1995) (asserting that the federal crack statute represents unconscious racism); *cf.* MICHAEL TONRY, MALIGN NEGLECT 123 (1964) ("It is hard to imagine any legitimate rationale for the decision by the drug war's designers to adopt policies that were unlikely to achieve their ostensible goals and that were foreordained to affect disadvantaged black Americans disproportionately.").

[302] Loic Wacquant, *The New 'Peculiar Institution': On the Prison as Surrogate Ghetto*, 4 THEORETICAL CRIMINOLOGY 377, 378 (2000).

[303] *Id.* at 382-83.

demography and thus possess a symbiotic relationship. Certain inner city neighborhoods are home to a disproportionate share of the prison population. For instance, twenty percent of the inmates sentenced in Ohio's Cuyahoga County came from three percent of the county's census block groups as of July 1, 2001.[304] A 2001 report of Maryland's prison population revealed a comparable portrait, with fifty-six percent of those released from its state's prisons having previously resided in fifteen percent of the Baltimore area's neighborhoods.[305]

For undereducated, youthful black males, imprisonment represents a "common life event" and thus functions as one of several, well-ordered

[304] James P. Lynch & William J. Sabol, *Prisoner Reentry in Perspective*, 3 CRIME POL'Y REPT., Sept. 2001, at 1, 16, *available at* http://www.urban.org/UploadedPDF/410213_reentry.PDF.

[305] JEREMY TRAVIS ET AL., URBAN INST., JUSTICE POLICY CTR., PRISON TO HOME: THE DIMENSIONS AND CONSEQUENCES OF PRISONER REENTRY 48 (2001), *available at* http://www.urban.org/UploadedPDF/from_prison_to_home.pdf.

stages in their "life course."[306] It shapes their trajectory in life via stigmatization;[307] socio-economic marginalization;[308] and civil disabilities such as disenfranchisement,[309] denial of public housing,[310] and exclusion

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[306] Becky Pettit & Bruce Western, *Mass Imprisonment and the Life Course: Race and Class Inequality in U.S. Incarceration*, 69 AM. SOC. REV. 151, 154 (2004); *see also* Austin, *supra* note 148, at *2 tbl.2:

Table 1

Life Chances of Being Imprisoned in the United States (1974-2001).

	1974	1991	2001
Total	1.9%	5.2%	6.6%
Males			
White	3.6%	9.1%	11.3%
Black	13.4%	29.4%	32.2%
Hispanic	4.0%	16.3%	17.2%
Females			
Total	0.3%	1.1%	1.8%
White	0.2%	0.5%	0.9%
Black	1.1%	3.6%	5.6%
Hispanic	0.4%	1.5%	2.2%

[307] *See, e.g.*, John Hagan & Ronit Dinovitzer, *Collateral Consequences of Imprisonment for Children, Communities, and Prisoners*, *in* PRISONS 121, 126-28 (Michael Tonry & Joan Petersilia eds., 1999) (observing "the stigma of imprisonment"); Marc Mauer, *Thinking About Prison and Its Impact on the Twenty-First Century*, 2 OHIO ST. J. CRIM. L. 607, 609 (2005) (writing of "the stigma of imprisonment").

[308] *See, e.g.*, Bruce Western & Becky Pettit, *Incarceration and Racial Inequality in Men's Employment*, 54 INDUS. & LAB. REL. REV. 3, 12-13 (2000) ("We have found that employment patterns cannot be understood without reference to the growth of incarceration .... It seems likely that status attainment, school-to-work transitions, and family structure all are influenced, perhaps even routinely, by the penal system in the current period of high incarceration.").

[309] *See, e.g.*, George P. Fletcher, *Disenfranchisement as Punishment: Reflections on the Racial Uses of Infamia*, 46 UCLA L. REV. 1895, 1898-1900 (1999) (noting that only four states do not disenfranchise felons and that fourteen percent of black men are disenfranchised); *cf.* Aman McLeod et al., *The Locked Ballot Box: The Impact of State Criminal Disenfranchisement Laws on African American Voting Behavior and Implications for Reform*, 11 VA. J. SOC. POL'Y & L. 66, 93 (2003) (concluding that disenfranchisement statutes disproportionably suppress voting by non-disenfranchised blacks).

[310] *See, e.g.*, Nora V. Demleitner, *Collateral Damage: No Re-entry for Drug Offenders*, 47 VILL. L. REV. 1027, 1036 (2002) (stating that "[f]ederal housing policies allow for the exclusion of drug offenders from federally subsidized or funded housing") (footnote omitted); Anthony C. Thompson, *Navigating the Hidden Obstacles to Ex-Offender Reentry*, 45 B.C. L. REV. 255, 278 (2004) ("In 1988 ... Congress ... through an amendment to the public housing statute adopt[ed] [a] one-strike eviction policy from federal public housing. The intent of the amendment was to prohibit admission to applicants and to evict or terminate leases of residents who engaged in certain types of criminal activity.").

from certain professions.[311] Moreover, the harm extends to the "other prisoners"—family members and loved ones; several studies suggest that the absence of large numbers of young black men adversely impacts marriage formation,[312] child-rearing,[313] and participation in communities.[314]

B. A CLOSING LAMENT

I doubt that Homer Plessy would be charitable in his assessment of the prevailing common sense of his era. He surely did not invoke common sense in his challenge to Jim Crow laws.[315] By then the prevailing common sense contained race-based presuppositions that buttressed the Jim Crow laws.[316] Plessy's imprisoned namesake could add that pejorative maxims

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[311] *See, e.g.*, Leroy D. Clark, *A Civil Rights Task, Removing Barriers to Employment of Ex-Convicts*, 38 U.S.F. L. REV. 193, 195 (2004) ("The laws of every state, some federal statutes, and innumerable municipal ordinances expressly include a felony conviction as a disqualifying factor with regard to the majority of regulated occupation.") (footnotes omitted); Margaret E. Finzen, *Systems of Incarceration: The Collateral Consequences of Oppression and their Effects on Black Communities*, 12 GEO. J. ON POVERTY L. & POL'Y 299, 307-08 (2005) (documenting that "various occupational and licensing restrictions throughout the states further restrict a convicted felon's opportunity to obtain employment").

[312] *See* Donald Braman, *Families and Incarceration*, *in* INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS INCARCERATION 117, 126-27 (Marc Mauer & Meda Chesney-Lind eds., 2002) (observing that "marriage and coparenting are far less common and single female-headed households are far more common in areas where incarceration rates are high").

[313] *See* Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1284 (2004) ("Mass incarceration deprives thousands of children of important economic and social support from their fathers. Separation from imprisoned parents has serious psychological consequences for children, including depression, anxiety, feelings of rejection, shame, anger, and guilt, and problems in school.") (footnotes omitted).

[314] *See* James P. Lynch et al., *Crime, Coercion, and Community: The Effects of Arrest and Incarceration Policies on Informal Social Control in Neighborhoods, Executive Summary* 14 (2002), *available at* http://www.ncjrs.gov/pdffiles1/nij/grants/195172.pdf ("Increases in arrest or incarceration are associated with lower levels of participation in voluntary organization and lower levels of attachment to communities. This type of participation in communities is viewed as essential for maintaining organized and viable communities.").

[315] *See* Plessy v. Ferguson, 163 U.S. 537 (1896); Brief for the Plaintiff in Error, *supra* note 285.

[316] *See* Siegel, *supra* note 70, at 1129 (stating that the *Plessy* "decision conformed with 'common sense' intuitions about the meaning of equality"). Grace Elizabeth Hale writes that "[b]y the early twentieth century, whites were constructing modern racial identity" on a "mass cultural" level. HALE, *supra* note 41, at 8. She further observes that segregation created a "new a cultural foundation for the very 'natural' race differences white southerners had hoped to create." *Id.* at 9.

about race can be heard ad nauseam in contemporary prisons.[317] Moreover, in his experience, prisoners often appeal to common sense in justifying the de facto color line that racial groups enforce and prison staff tolerate.[318] After *Johnson v. California*, as before, race matters most.[319]

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[317] The author, who is the "voice" of Plessy's imprisoned namesake, has studied, visited, and written about prisons for some thirty years. *See* Jonathan Simon, *The "Society of Captives" in the Era of Hyper-Incarceration*, 4 THEORETICAL CRIMINOLOGY 285, 286 (2000) (describing James Robertson as a "veteran [] observer of imprisonment").

[318] *See id.* (highlighting the author's familiarity with prison life).

[319] *See supra* notes 34-47 and accompanying text (discussing the impact of race on contemporary prison life); *cf.* HASSINE ET AL., *supra* note 34, at 71 (observing that "skin color" constitutes the only basis for group identity among prisoners). *But see* Miriam Jordan, *California Prisons Uneasily Prepare to Desegregate Prisons*, WALL ST. J., Mar. 21, 2006, at B1, *available at* http://online.wsj.com/public/article/SB114290971697503763-c_Bc66XQDv_Y3oGhmny49FBuPHc_20070321.html?mod=tff_main_tff_top:

> California is creating a desegregation program using Texas as a model. It involves educating prison officers and prisoners and a screening process to weed out inmates whose criminal record or prison history would make them a bad risk for a multiracial cell. One California facility is testing a behavior-modification program that would deny privileges to inmates who undermine the program.
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> At least some prisoners are prepared to give co-existing a try. "California has let inmates dictate how they should live" for too long, says Franklin Porter, a 45-year-old black inmate. "If they're integrating in other states, it can work here."