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Getting Real About Race and Prisoner Rights

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Michael B. Mushlin and Naomi Roslyn Galtz

Abstract

This Article explores the connection between the dramatic increases in the incarceration of non-whites and the parallel decline in the legal protections for prisoners over the same period. Using the social sciences, the Article suggests that racial tensions play a role in the decisions made by both guards and prison administrators. Further, the authors argue that the communities of these non-white prisoners are the least well equipped to advocate for their well-being. Ultimately, the Article concludes that the law is not currently equipped to confront the possibility of dealing with race-based tensions and structural inequities that are present in the prison system. The authors call for the courts to reassert their role in protecting discrete and insular minorities that lack access to the political power necessary to assert their rights. The Article concludes by making five specific suggestions for reform.

KEYWORDS: prisoner rights, race, social science

GETTING REAL ABOUT RACE AND PRISONER RIGHTS

*Michael B. Mushlin & Naomi Roslyn Galtz**

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Introduction

This Article explores the nexus of two stories central to contemporary American jurisprudence and—for tens of millions of citizens—central to the American experience: the rise of the "carceral state" through steep increases in the incarceration of non-whites, and the decline, over the very same period, in legal protections for prisoners. The Article suggests that these two stories cannot be considered in isolation from one another. Nearly everything we know about race from the social sciences suggests that, in the highly pressured context of prison life, racial tensions will play a role in the decisions that guards and administrators make concerning prisoner welfare. Social geography tells us concretely that the communities from which non-white prisoners are drawn are the ones least able to advocate for prisoner well-being. And the sociol-

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ogy of citizenship reveals that citizenship itself has always been deeply "raced" in America, making it doubly challenging for a largely non-white prison population to be seen as worthy of humane treatment. Yet the law is not currently equipped to acknowledge or confront the possibility that mistreatment of prisoners is systemically bound to race-based tensions and structural inequities. This is a critical gap that cannot, we argue, be remedied until the courts adopt a more realistic understanding of the workings of race in the corrections world.

A. Two Stories that Must Be Read Together

This Article arises at the intersection of two major American stories; the first is the rise of the "carceral state" and its disproportionate toll on low-income communities of color. Currently, one in every hundred Americans[1] (more than one in every fifty Americans aged twenty to forty[2]) is behind bars, making America by far the most heavily jailed nation in the developed world.[3] The numbers are so striking that many in the prison research community no longer speak of "rising incarceration rates" but rather discuss the rise of the carceral state[4]—a state in which incarceration is a dominant fact of economic policy and social life.[5] The daily effects of the carceral state, meanwhile, are felt disproportionately by low-

1. THE PEW CTR. ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA 2008 5 (2008) [hereinafter THE PEW CTR.], *available at* http://www.pewcenteronthestates.org/uploadedFiles/8015PCTS_Prison08_FINAL_2-1-1_FORWEB.pdf.

2. Marie Gottschalk, *Dismantling the Carceral State: The Future of Penal Policy Reform*, 84 TEX. L. REV. 1693, 1694 (2006) (citing Michael Tonry, *Symbol, Substance, and Severity in Western Penal Policies*, 3 PUNISHMENT & SOC'Y 517, 518 (2001)).

3. For a sampling of articles that describe the United States as having the highest incarceration rate in the developed world, see Robert Batey, *The Costs of Judicial Restraint: Forgone Opportunities to Limit America's Imprisonment Binge*, 33 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 29, 29 (2007); Gottschalk, *supra* note 2, at 1694; Alice Ristroph, *Criminal Law: Desert, Democracy, and Sentencing Reform*, 96 J. CRIM. L. & CRIMINOLOGY 1293, 1307 (2006).

4. *See, e.g.*, Gottschalk, *supra* note 2, at 1695.

5. Two provisos are in order here. First, we do not engage the critique of the "carceral state." For the purposes of this project, we simply take it as a given that historically unprecedented numbers of Americans are in jail or prison. Second, and more importantly, we do not engage the question of whether the demographic skew to blacks and Latinos in the prison system is itself a product of racial bias. Assuming, for argument's sake, that the incarcerated population is a "fair" representation of the criminal population, the same basic question arises: what are the implications for prisoner rights when disproportionate numbers of non-whites/non-Anglos are incarcerated while judicial safeguards for prisoner treatment decline?

income communities of color.[6] One in nine black men between the ages of twenty and thirty-four is currently behind bars;[7] at present rates, one in three African American children born today can expect to enter the prison system at some point during his or her life.[8] These statistics have enormous implications for urban black communities, affecting "family life, adolescent development, labor markets, family stability, intergenerational transfer of wealth, voting patterns, and civic participation."[9]

The second story—one that mainstream jurisprudence treats as wholly separate from the first—concerns the waning of prisoner rights. The 1970s witnessed vigorous efforts by civil rights lawyers at prison reform, resulting in significantly improved conditions at many jails and prisons. But prisoner rights have been in steady decline over the last twenty-five years, and the legal gains of the 1970s have been eclipsed by the rise of a judicial discourse in which prisoners figure as a collective "management problem." The current scope of deference to prison administrators and workers is breathtaking; prisoner protections have become almost wholly dependent on the claimed needs, capacities, and budgets of local guards and prison officials (though these almost never need be demonstrated).[10] Although today's prisons rarely resemble the dungeons of the past, they are characterized by extreme over-

6. In this piece we concentrate on incarceration rates for African Americans, hence the discussion of "race" rather than "race and ethnicity." But Latino communities have also disproportionately been impacted by skyrocketing incarceration rates, as compared to white, Anglo communities. *See, e.g.*, U.S. DEP'T OF JUSTICE, PREVALENCE OF IMPRISONMENT IN THE U.S. POPULATION, 1974-2001, at 1 (2003), *available at* http://www.ojp.usdoj.gov/bjs/pub/ascii/piusp01.txt ("The rate of ever having gone to prison among adult black males (16.6%) was over twice as high as among adult Hispanic males (7.7%) and over 6 times as high as among adult white males (2.6%).").

7. THE PEW CTR., *supra* note 1, at 6.

8. Jeremy Travis, President, John Jay Coll. of Criminal Justice, New York City Bar Asssociation 2008 Orison S. Marden Lecture: Race, Crime and Justice: A Fresh Look at Old Questions 3 (Mar. 19, 2008), *available at* http://www.jjay.cuny.edu/extra/speeches/racecrime_justice.pdf.

9. *Id.*

10. *See, e.g.*, 1 MICHAEL B. MUSHLIN, RIGHTS OF PRISONERS § 1:7 (3d ed., rev. Oct. 2008), visit www.westlaw.com, search database "RGTSPRISON" (noting the Supreme Court's "passion for deference" in this area); Eva S. Nilsen, *Decency, Dignity, and Desert: Restoring Ideals of Humane Punishment to Constitutional Discourse,* 41 U.C. DAVIS L. REV. 111, 144-45 (2007) (discussing the difficulty posed by modern prisoner rights jurisprudence and concluding that Eighth Amendment claims are "extremely difficult to litigate because the Court has narrowed the basis for Eighth Amendment claims using *Estelle*'s standard of deliberate indifference, making the prisoner's burden nearly impossible"). Nilson further notes that:

> Even inhumane prison conditions may be beyond the reach of the Eighth Amendment unless it can be shown that the prison officials intentionally

crowding, shrinking educational and rehabilitative programs, and the pervasive threat of violence.[11] We are far from the promise of the 1970s.

Despite the historical intersection between sharply rising incarceration rates for non-whites and the contraction of prisoner rights, very little work has been done to suggest why, or how, race matters for the law that governs the treatment of prisoners. There is, to be sure, an extensive literature focusing on racial disparities in arrests and sentencing.[12] There is also a rich, emerging literature tracking the effects of high incarceration rates on low-income communities of color.[13] But there is little sustained work that describes the implications for prisoner rights law of America's disproportionate incarceration of African Americans and Latino/as.

This Article represents an initial attempt to remedy the gap and demonstrate why and how race matters for the jurisprudence of prisoner rights.[14] Part I offers an encapsulated historical account of the rise and decline in protections available to prisoners. In particular, it describes how a series of sharply divided Supreme Court decisions, in tandem with the Prison Litigation Reform Act of

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> failed to remedy them after notice. Thus, the official's state of mind may be more important to the Court's analysis than the nature of the punishment.

Id. S*ee also The Supreme Court, 2005 Term: Leading Cases*, 120 HARV. L. REV. 125, 263 (2006) (noting the Supreme Court's "steady retreat" in protecting inmates' rights).

11. *See* JOHN J. GIBBONS & NICHOLAS DE B. KATZENBACH, COMM'N ON SAFETY & ABUSE IN AM. PRISONS, CONFRONTING CONFINEMENT (2006), http://www.prisoncommission.org/pdfs/confronting_confinement.pdf (documenting overcrowding, decline in prison rehabilitative programs, and increased violence in American prisons); *see also* Francis A. Allen, *The Decline of the Rehabilitative Ideal in American Criminal Justice*, 27 CLEV. ST. L. REV. 147, 148 (1978) (noting that prison programs have declined); Carla I. Barrett, *Does the Prison Rape Elimination Act Adequately Address the Problems Posed by Prison Overcrowding? If Not, What Will?*, 39 NEW ENG. L. REV. 391, 392 (2005).

12. *See, e.g.*, THE SENTENCING PROJECT, REDUCING RACIAL DISPARITIES IN THE CRIMINAL JUSTICE SYSTEM: A MANUAL FOR PRACTITIONERS AND POLICYMAKERS 3 (2000), *available at* http://www.sentencingproject.org/Admin/Documents/publications/rd_reducingrdmanual.pdf (describing racial disparities in other aspects of the criminal justice system in America); Travis, *supra* note 8, at 3 (citing relevant studies).

13. *See, e.g.*, TODD CLEAR, IMPRISONING COMMUNITIES (2007); Margaret E. Finzen, *Systems of Oppression: The Collateral Consequences of Incarceration and Their Effects on Black Communities*, 12 GEO. J. ON POVERTY L. & POL'Y 299 (2005); Travis, *supra* note 8, at 3-10.

14. This is the first piece to emerge from an ongoing project. In further work, we propose to engage more fully with the Equal Protection corpus, develop the citizenship implications of the historical intersection described here, and provide a more detailed picture of the extensively racialized nature of prison life and treatment within prisons.

1995[15] ("PLRA"), have acted radically to depress prisoner access to the courts, thereby undoing some of the most significant judicial gains of the 1970s.

Part II focuses on the judicial treatment of race in the prison setting. Under current prisoner rights law, courts will closely scrutinize the racial implications of prison policies and conditions only where prison officials have explicitly based policies on racial considerations or where plaintiffs can demonstrate an overt intent to discriminate. In this respect, prison decisions merely follow general Equal Protection jurisprudence without reference to the unique setting in which prisoner rights litigation arises.

As Part III suggests, however, the basic Equal Protection standards are misguided when applied to prison contexts. Marshaling evidence from the social sciences, Part III describes two fundamental ways that the courts must "get real" about race or risk complicity in a legal system that allows and fosters systemic, racialized forms of abuse. First, a compelling body of research from psychology and neuroscience indicates that, at a subconscious or "implicit" level, decision-making may be deeply biased, even where there is no overt attempt to discriminate. Although courts cannot remedy implicit bias, they can insist on heightened forms of process and oversight to ensure that, in the uniquely pressured, power-laden, and racialized context of prisons, biased decisions do not reign unchecked.

Second, social geography demonstrates that prison populations are disproportionately drawn from low-income communities of color that are, in several respects, poorly positioned to advocate for the rights of the incarcerated. Such communities are, moreover, reciprocally weakened by the processes of dislocation and re-absorption that attend mass incarceration in substandard prisons. This should alert us to a significant risk that declines in prisoner protections have been possible precisely because prisoners are drawn disproportionately from communities that lack the resources to provide vigorous oversight and advocacy. In response, we urge the federal courts to reverse their sweeping extension of deference to prison administrators and re-assert their critical role as a bulwark against the erosion of rights for populations detached from traditional levers of power.

15. The Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321 (codifed as amended in scattered sections of 11 U.S.C., 18 U.S.C., 28 U.S.C., & 42 U.S.C.). Despite its name, PLRA was in fact signed into law in 1996.

I. The Rise and Decline of Prisoner Rights

A. The Rise of Prisoner Rights

Until the civil rights era of the 1960s and 1970s, prisoners had no articulable rights to humane conditions of confinement or access to formal justice. Initially the courts viewed prisoners as "slaves of the state"[16] and so refused to hear their complaints. Later under the "hands off doctrine" (which persisted well into the latter half of the twentieth century) courts deemed themselves powerless to enforce prisoners' claims because of concerns over separation of powers, federalism, prison security, and judicial competence.[17]

The late 1960s and early 1970s witnessed dramatic new developments. Spurred by the civil rights movement, a series of well-publicized prison riots, and increased public concern for prisoner welfare, lower courts began to take cognizance of prisoners' claims.[18] In 1974, the Supreme Court endorsed this emerging trend, ruling in *Wolff v. MacDonnell* that "[t]here is no iron curtain drawn between the Constitution and the prisons of this country."[19] The *Wolff* decision, aided by the influx of lawyers to the field of civil rights enforcement, unleashed litigation[20] that helped, among other things, to improve prison medical care, remedy horrendous overcrowding, and increase professionalism in prison administration.[21]

The period of openness to prisoner litigants was short-lived, however. Since 1980, prisoners' access to the courts has steadily contracted as a result of two developments. First, a series of Supreme Court decisions has radically enlarged the scope of deference accorded to prison administrators and proscribed the conditions under which poor treatment of prisoners—even objectively brutal treatment—can be considered justiciable. Second, the

16. *See* Ruffin v. Commonwealth, 62 Va. (21 Gratt.) 790, 796 (1871).

17. *See* Mushlin, *supra* note 10, § 1.3.

18. *See id*.

19. 418 U.S. 539, 555-56 (1974).

20. This litigation led to the evolution of a new branch of law. *See* Mushlin, *supra* note 10, § 1:4 (describing the importance of the entry of civil rights lawyers to the field of prisoner rights).

21. *See* Malcolm M. Feeley & Van Swearingen, *The Prison Conditions Cases and the Bureaucratization of American Corrections: Influences, Impacts and Implications*, 24 Pace L. Rev. 433, 442-43 (2004); Vincent M. Nathan, *Have the Courts Made a Difference in the Quality of Prison Conditions? What Have We Accomplished to Date?*, 24 Pace L. Rev. 419, 420 (2004) ("Judicial intervention over the past three decades has had an enormously positive impact on the operation of correctional institutions in the United States, and on the condition in which prisoners live and staff work.").

Prison Litigation Reform Act of 1995[22] ("PLRA") has erected a host of new statutory barriers between any would-be prisoner plaintiff and the courts. Each of these developments is described briefly below.

B. The Decline of Prisoner Rights

1. *The United States Supreme Court Retreats*

Through a series of sharply divided decisions over the last two decades, the Supreme Court has forcefully limited the conditions under which courts will recognize the violation of a prisoner's rights. In *Turner v. Safley*, the Court held that even fundamental rights can be abridged in a prison setting, as long as the deprivation is reasonably related to some governmental objective.[23] Utilizing this test, the Court has had little difficulty upholding restrictions that, in the free world, undeniably would amount to constitutional violations. For example, the Court has held under *Turner* that inmates can be medicated against their will,[24] their publications censored,[25] and family visits suspended for years at a stretch.[26]

A substantial line of rulings, moreover, specifically limits prisoners' recourse to the Eighth Amendment's ban on cruel and unusual punishment. *Whitley v. Albers* established that, absent maliciousness, prison officials may use excessive force to subdue a prisoner during a disturbance without running afoul of the Constitution.[27] Indeed, under *Albers*, virtually any use of force by guards during a prison disturbance may be sanctioned as long as the violence "could plausibly have been thought necessary."[28]

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22. The Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321, 1321-66 (codified as amended in scattered sections of 11 U.S.C., 18 U.S.C., 28 U.S.C., & 42 U.S.C.). As noted *supra*, note 15, the PLRA was actually signed into law in 1996.

23. 482 U.S. 78, 89 (1987).

24. *See* Washington v. Harper, 494 U.S. 210, 227 (1990).

25. *See* Thornburgh v. Abbott, 490 U.S. 401, 404 (1989).

26. *See* Overton v. Bazzetta, 539 U.S. 126, 137 (2003).

27. 475 U.S. 312, 320 (1986). Albers was shot in the knee as guards sought to quell a cellblock uprising; he sustained serious permanent injury. *Id.* at 316-17.

28. *Id.* at 321 (emphasis added). In this regard Justice O'Connor quoted the 1981 precedent *Rhodes v. Chapman* for the proposition that "a prison's internal security is . . . a matter normally left to the discretion of prison administrators." *Id.* at 321. The Court might reasonably have concluded that heightened scrutiny would be useful in the case of uprisings, where guards might well be tempted to take out their frustrations. Instead, quite the opposite, the Court concluded that deference to administrators should be even greater than usual in such cases. *Id.*

In *Wilson v. Seiter*, the Court extended the logic of *Albers* to the condition of confinement issues.[29] Under the five-to-four *Wilson* ruling, an inmate cannot make out a viable Eighth Amendment claim merely by proving that conditions of confinement are—objectively speaking—unremittingly harsh and brutal.[30] In addition to demonstrating objectively inhumane conditions, a plaintiff must prove that corrections officers were "deliberately indifferent" to the suffering caused by the condition[31] or that the officers were "wanton" in their conduct.[32] The Court was, moreover, explicit that the definition of wantonness "depends upon the constraints facing the official."[33] *Wilson*, in effect, reduced the cruel and unusual standard to a function of administrators' intentions and capabilities; brutal conditions can be excused, no matter how far below basic levels of human decency they fall.

Finally, in *Sandin v. Conner*, a closely divided Court found no due process violation where an inmate was subjected to near-solitary confinement for two months for an alleged disciplinary infraction—even though the prison had not afforded him even a rudimentary hearing to determine if he had actually broken any regulations.[34] The Court in *Sandin* explained that only restrictions that "impose[ ] atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life" constitute deprivations of liberty which trigger due process protections.[35] Under *Sandin*, severe restrictions on an inmate's living arrangements, including transfers to isolation for periods of up to a year, have been held to fall outside the protection of the Fourteenth Amendment and thus may be imposed without any opportunity for the inmate to challenge the basis for the punishment.[36] These and similar

29. 501 U.S. 294, 298 (1991).

30. *See id.*

31. *Id.* at 297-98.

32. *Id.* As the concurrence notes, however, it is difficult to apply intent standards to institutional conditions that stretch over long periods of time:

> Inhumane prison conditions often are the result of cumulative actions and inactions by numerous officials inside and outside a prison, sometimes over a long period of time. In those circumstances, it is far from clear whose intent should be examined . . . . In truth, intent simply is not very meaningful when considering a challenge to an institution, such as a prison system.

Id. at 310 (White, J., concurring).

33. *Id.* at 303.

34. 515 U.S. 472 (1995).

35. *Id.* at 484.

36. *See* MUSHLIN, *supra* note 10, § 10.5.

cases reflect a general hostility toward prisoners' claims to fundamental constitutional legal protection.[37]

2. *The United States Congress Retrenches*

The United States Congress further weakened prisoners' access to the courts by enacting the PLRA. The PLRA, which was passed by a voice vote and signed into law by President Clinton, erected a number of barriers between inmates and the judiciary, with the express purpose of reducing prison litigation. To begin with, the PLRA bars any claim that does not involve a physical injury.[38] A "three strikes" provision prevents indigent prisoners from proceeding in forma pauperis if they have sued and lost three times,[39] effectively turning such prisoners into walking "rights-free zones." Since passage of the PLRA, an inmate must exhaust all available remedies under the prison's internal grievance system—regardless of the system's procedural complexity—before bringing suit.[40] (If the inmate blunders by, for example, missing a short grievance deadline set by prison officials, the case is lost, no matter how meritorious.[41]) Other provisions restrict the scope of consent decrees,[42] limit the relief available in prison overcrowding cases,[43] and reduce the amount of attorneys' fees that may be recovered when prisoner plaintiffs prevail.[44]

Prisoner plaintiffs have challenged major provisions of the PLRA, including the limits on consent decrees and exhaustion requirements. But save for one favorable interpretation at the margins, the Supreme Court has rejected all attempts to constrain the effects of the PLRA.[45]

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37. *See id.*

38. *See* 42 U.S.C. § 1997e(e) (2006).

39. *See* 28 U.S.C. § 1915(g) (2006).

40. *See* 42 U.S.C. § 1997e(a) (2006).

41. *See, e.g.*, Whitener v. Buss, No. 07-1490, 2008 WL 681814, at *1 (7th Cir. Mar. 13, 2008) (dismissing claim of prisoner who missed a forty-eight-hour grievance deadline because he needed the relevant officers' names and it took a week to get them, and he did not ask for waiver of the time limit); Wall v. Holt, No. 1:CV-06-0194, 2007 WL 89000, at *3-4 (M.D. Pa. Jan. 9, 2007) (holding that a grievence was not timely because the grievance appeal arrived a few days after the twenty-day deadline at the Bureau of Prisons even though it was mailed within the time period permitted).

42. 18 U.S.C. § 3626(c)(1) (2006).

43. *See id.* § 3626(a)(3)(A)(i)-(ii) (2006); *id.* § 3626(a)(3)(C).

44. 42 U.S.C. § 1997e(d) (2006).

45. *See, e.g.*, Woodford v. Ngo, 548 U.S. 81 (2006) (finding that administrative remedies must be exhausted despite short deadline for filing); Porter v. Nussle, 534 U.S. 516 (2002) (finding exhaustion required both for cases involving assault and those involving living conditions); Miller v. French, 530 U.S. 327 (2000) (upholding

C. Impact of Current Prisoner Rights Law

Given the retrenchment recounted above, it is fair to say that today's prison law does little to protect inmates from all but the worst abuses.[46] Not surprisingly, as the federal courts and Congress continue to limit prisoner rights, conditions in American prisons steadily deteriorate. After a year-long investigation into the nation's prison system, the Commission on Safety and Abuse in America's Prisons concluded that American prisoners face an extremely high incidence of disease and illness and that most prisons lack adequate health care services. "Violence remains a serious problem in America's prisons and jails."[47] A majority of prisons, according to the study, are plagued by overcrowding.[48] Tens of thousands of prisoners are locked in isolation cells for twenty-three hours per day.[49] As prison populations have grown, moreover, prison programs such as Pell Grants for higher education (which have been shown to correlate with reduced recidivism[50]) have decreased and, in some cases, disappeared entirely.[51]

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constitutionality of the PLRA's automatic stay provision); Booth v. Churner, 532 U.S. 731 (2001) (finding exhaustion required even where a grievance process does not authorize the relief sought). *But see* Jones v. Bock, 549 U.S. 199 (2007) (holding that exhaustion is an affirmative defense and that there is no total exhaustion requirement).

46. *See* Margo Schlanger, *Civil Rights Injunctions over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. L. Rev. 550, 582-84 (2006) (noting the significant reduction in the volume of court-ordered regulation due to the shift in correctional injunctive practice).

47. Gibbons & Katzenbach, *supra* note 11, at 11.

48. *See id.* at 27.

49. *Id.* at 52-53 ("On June 30, 2000, when the federal Bureau of Justice Statistics last collected data from state and federal prisons, approximately 80,000 people were reported to be confined in segregation units. That is just a fraction of the state and federal prisoners who spend weeks or months in expensive, high-security control units over the course of a year, and it does not capture everyone incarcerated in supermax prisons.").

50. *See* Eric D. Blumenson & Eva S. Nilsen, *How to Construct an Underclass, or How the War on Drugs Became a War on Education*, 6 J. Gender, Race & Just. 61, 75-83 (2002).

51. *See id.* at 74 (describing the elimination of Pell Grants for prisoners); *see also* Gibbons & Katzenbach, *supra* note 11, at 27 ("While the prison population grew astronomically, funding for education, vocational training, and rehabilitative programming did not keep pace."); James B. Stedman, Congressional Research Report: Federal Pell Grant Program of the Higher Education Act: Background and Reauthorization 25 (2003), *available at* http://digital.library.unt.edu/govdocs/crs/permalink/meta-crs-8432:1 (describing cuts in the Pell Grant program); Bruce Western, Punishment and Inequality in America 175 (2006) (comparing the number of correctional and educational staff in American prisons over time and finding that, while the prison population tripled from 1979 to 1995, prison educational staff stayed the same, resulting in an over 60% cut in educational

It is difficult to ignore that, over the very same years that prisoner rights have contracted and prison conditions have regressed, prison populations have grown dramatically more black and brown. Yet under existing case law, it would be virtually impossible to challenge the racial implications of poor treatment of prisoners in, for example, one of the many rural prisons where virtually all-white administrators and staff oversee virtually all non-white prison populations. In order to understand why such a challenge would be impossible, we turn now to a closer examination of race's role in current prisoner rights case law.

II. Race and Ethnicity Under Current Prison Law

Under existing prisoner rights law, it is extremely difficult to advance a claim concerning racially-motivated mistreatment. Courts will apply strict scrutiny only when prison officials make decisions based on explicit racial considerations—something officials rarely do. The Supreme Court affirmed this principle in *Johnson v. California*,[52] where it held that the California Department of Corrections' ("CDC") explicit reliance on race as a factor in its housing assignment protocol should trigger strict scrutiny review.[53] Abandoning *Turner*'s looser "rational relationship" test[54] (which the Ninth Circuit had applied), the Court declared that California's policy of racial segregation must further a compelling governmental interest and be narrowly tailored to that interest.[55]

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staff per inmate); Sam Dillon & Tamar Lewin, *Pell Grants Said to Face a Shortfall of $6 Billion*, N.Y. Times, Sept. 17, 2008, at A21; Greg Winter, *Tens of Thousands Will Lose College Aid, Report Says*, N.Y. Times, July 18, 2003, at A13 (stating that the government's new formula in determining financial aid "will reduce the nation's largest grant program [the Pell Grant program] by $270 million and bar 84,000 college students from receiving any award at all").

52. 543 U.S. 499 (2005).

53. The Court had sent similar signals in *Lee v. Washington*, 390 U.S. 333 (1968), where it affirmed the unconstitutionality of state statutes that required completely segregated prisons and jails. *Id.* at 334. Although some courts have interpreted *Lee* to invoke a strict scrutiny analysis, there is no discussion of strict scrutiny in the short per curiam opinion.

54. *Johnson*, 543 U.S. at 509. California justified its practice of segregating newly admitted inmates by race on security grounds, and it asked the Court to review this practice under the less rigorous "rational relationship" test of *Turner v. Safley*.

55. In a dissent joined by Justice Scalia, Justice Thomas argued that the courts should apply the *Turner* standard even in cases of explicit racial classification. He emphasized the need to defer to the judgment of corrections officials who are more knowledgeable about security risks and experienced with the prison setting. *Johnson*, 543 U.S. at 529. "[E]xperienced prison administrators, and not judges, are in the best position to supervise the daily operations of prisons across this country." *Id.*; *see also supra* note 29. Note, however, that strict scrutiny is not always "fatal in fact" in cases

The *Johnson* Court made its disdain for racial discrimination clear, but the real legacy of *Johnson* was to impede rather than ease plaintiffs' access to the courts. Absent a showing that administrators have expressly relied on race as a factor in formulating policy, courts will refuse to delve into the racial implications of prison practices.

Moreover, following general Equal Protection jurisprudence,[56] a prisoner plaintiff cannot prevail in a discrimination claim unless he can demonstrate that the discrimination was intentional. For example, in *Johnson v. Quander*, plaintiffs challenged federal DNA testing laws for federal prisoners as racially discriminatory because the laws disproportionately impacted blacks, who are incarcerated at higher rates than whites.[57] The court held that a successful Equal Protection claim requires more than a showing of disproportionate impact; plaintiffs also had to show that lawmakers enacted the DNA testing law, which was facially neutral, with discriminatory intent.[58] Similarly, in *Franklin v. District of Columbia*,[59] the plaintiff claimed there was a disparity between programs for English-speaking inmates and those for Hispanic inmates with limited language ability (Low English Proficiency or "LEP" inmates). Even though the LEP programs were demonstrably less extensive than those for English speakers, the court rejected the claim be-

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involving prison security. The Ninth Circuit, in an unpublished opinion, held that it was permissible for officials at California's Pelican Bay prison to target Hispanic inmates for tighter security controls. The overtly racial classification was justified, the Ninth Circuit reasoned, by safety needs during a period of intense, racially-driven unrest at the prison. The court accepted defendants' evidence to the effect that "Hispanics were, as a group, more likely to be violent than other groups and thus more worthy of closer scrutiny." *Ramirez v. Reagan*, No. 95-15048, 1996 WL 166203, at *5 (9th Cir. Apr. 9, 1996).

56. *See, e.g.*, Washington v. Davis, 426 U.S. 229, 239-48 (1976); *see also* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 318 (1987); David A. Strauss, *Discriminatory Intent and the Taming of* Brown, 56 U. CHI. L. REV. 935 (1989).

57. 370 F. Supp. 2d 79 (D.D.C. 2005), *aff'd*, 440 F.3d 489 (D.C. Cir. 2006).

58. *See id.*; *see also* Johnson v. Governor of Florida, 405 F.3d 1214 (11th Cir. 2005) (affirming summary judgment for defendant in a claim that Florida's statutes barring felons from voting violated both the Fourteenth Amendment Equal Protection Clause and section 2 of the Voting Rights Act, 42 U.S.C. § 1973). In *Johnson*, the plaintiff claimed that the racist origins of Florida's 1868 disenfranchising laws rendered them unconstitutional, even after they were reenacted in 1968. *See* 405 F.3d at 1217. The Court rejected the Fourteenth Amendment claim on two bases: (1) the reenacted laws narrowed the class of disenfranchised individuals, thereby removing any discriminatory taint; and (2) there was no allegation of racial discrimination at the time of the reenactment. *See id.* at 1224-27.

59. 960 F. Supp. 394 (D.D.C. 1997).

cause the plaintiff failed to show that the disparity resulted from the defendant's conscious discrimination.[60]

In 1992, prison guards placed a mentally ill inmate, who had soiled himself, in a 125 degree bath and scrubbed him with wire brushes until the flesh began to pull away from his legs in long strips.[61] The prisoner, Vaughn Dortch, was African American; his jailers vowed to keep at the bath "until his skin turned white."[62] The Dortch incident was an uncommonly barbaric one. But the tenor and intensity of racial antagonism is familiar to anyone who studies—or has worked or lived in—America's prisons.[63] Yet under prevailing judicial norms, prisoners lack a mechanism to seek redress where they find that racial antagonism systemically pervades the treatment they receive or guides funding or policy decisions.

Similar arguments could be made regarding judicial reluctance to interfere with policies in schools or the workplace (for example, inequitable funding schemes for schools, name-based racial profiling in employment, etc.) that disadvantage non-whites yet manage to fly beneath the Equal Protection radar. We do not engage these important issues. We simply note that prison is not "school" or the "workplace." The prison, rather, is an armored, "total institution"[64] run exclusively by the state, whose *raison d'être* is to assert control over inmates' bodies and behaviors. The prison is an opaque container, separating inmates from outside sources of

60. *See id*. at 427-28.

61. SASHA ABRAMSKY, ILL-EQUIPPED: U.S. PRISONS AND OFFENDERS WITH MENTAL ILLNESS 85 (2003); Angela Davis & Cassandra Shaylor, *A Question of Control*, S.F. CHRON., Apr. 9, 2000, at SC-1, *available at* http://www.sfgate.com/cgi-bin/article.cgi?file=/Chronicle/archive/2000/04/09/SC30299.DTL; *see also* Boiled Prisoner Wins Case, http://sonic.net/~doretk/ArchiveARCHIVE/Prison/PRIS.TOPICS/Boiled PrisonerWinsCase.html (last visited Dec. 16, 2008).

62. ABRAMSKY, *supra* note 61, at 85.

63. *See, e.g.*, HUMAN RIGHTS WATCH, NO ESCAPE: MALE RAPE IN U.S. PRISONS ch. 2 (2001), *available at* http://www.hrw.org/reports/2001/prison/report2.html (describing the intense atmosphere of racial hostility that pervades U.S. prison life); Loïc Wacquant, *Deadly Symbiosis*, Rethinking Race and Imprisonment in Twenty-First-Century America, BOSTON REV., Apr/May 2002, *available at* http://bostonreview.net/BR27.2/wacquant.html (describing the critical role of racial and ethnic alliances in prison life; observing that cleavages between guards and prisoners as categories have been replaced by a series of vertical alliances among prisoners/guards of various races).

64. ERVING GOFFMAN, ASYLUMS: ESSAYS ON THE SOCIAL SITUATION OF MENTAL PATIENTS AND OTHER INMATES 14-28 (1961).

power, witnessing, and oversight.[65] It is an overwhelmingly stressful environment for guards, the ones most directly involved with prisoners' fates.[66] And it is an institution that is already fiercely and intrinsically raced, given the demographics of incarceration and prison siting, the inflow of gang members, and the spread of racist or racially charged ideologies within prison systems.

A basic and bitter irony emerges from a review of recent case law at the intersection of race and prisoner rights: American courts have been ready and willing to "crack down" on racial segregation in prison housing[67]—an infrequent practice that may have demonstrable benefits[68]; yet simultaneously, by endorsing the PLRA and deepening judicial deference to prison administrators, the courts have significantly curtailed civil rights protections available to a population of two million, mainly non-white individuals currently incarcerated in the United States. As a net result, non-whites typically cannot be housed separately from whites in American prisons today. But they *can* be subjected to egregiously bad treatment[69]

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65. *See, e.g.*, GIBBONS & KATZENBACH, *supra* note 11, at 77-78 (pointing out that prisons are closed institutions and that oversight of them is "underdeveloped and uneven").

66. *See, e.g.*, TED CONOVER, NEWJACK GUARDING SING SING 80-83 (2000) (describing vividly the stress that prison guards experience).

67. *See* MUSHLIN, *supra* note 10, § 4.4. In this Article, I observed that:

> In the 1968 case of *Lee v Washington,* the Supreme Court dealt with whether it was constitutional for a state to maintain an explicit policy of racially segregating its prisons . . . . The state maintained that segregation was needed to prevent racial violence from flaring up in its prisons. The Court's opinion in the case consisted of a short, three-sentence paragraph summarily affirming the district court's order that de jure prison segregation was unconstitutional. [The decision was subsequently reinforced by] a majority of the Supreme Court in dictum in *Cruz v. Beto* . . . .
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> . . . .
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> Lower courts implementing this mandate have [likewise] struck down segregation . . . that came about because prison officials permitted inmates free choice as to where they would be housed. . . . In *Jones v. Diamond,* a jail permitted inmates to choose which of the two "bullpens" they would be placed in. When the cells became racially segregated, the defendants claimed that this was only the result of the "free choices" of the inmates. . . . And in *Johnson v. State of California* the Ninth Circuit made clear that a policy of racial discrimination of housing assignments, if proven, would not be tolerated. Thus, prisons are under *a mandate to create the "maximum feasible integration*" within prison walls.

Id. (citations omitted, emphasis added); *see also supra* notes 53-65 and accompanying text.

68. In many of the cases prison authorities were apparently attempting, in part, to defuse violence by allowing for racially separate housing. *See* MUSHLIN, *supra* note 10, § 4.4.

69. *See* s*upra* notes 24-37 and accompanying text.

within prisons that often feature primarily white administrators and guards[70] with no judicial checks on the relationship between systemic racism and prison conditions. Rectifying this situation means, first and foremost, getting real about how race matters in the prison system.

III. How Race Matters: Lessons from the Social Sciences

A. Subconscious Racism

Research from the social sciences suggests that racial discrimination transpires at a subconscious level.[71] In the prison context, this raises troubling questions concerning jailors' treatment of prison-

70. Loïc Wacquant, *Deadly Symbiosis: When Ghetto and Prison Meet and Mesh*, 3 Punishment & Soc'y 95, 115 (2001), *available at* http://pun.sagepub.com/cgi/reprint/3/1/95. Wacquant notes that:

> [A]t century's end, the convicts of New York City, Philadelphia, Baltimore, Cleveland, Detroit, and Chicago, who are overwhelmingly African American, serve their sentences in establishments staffed by officers who are overwhelmingly white. In Illinois, for instance, two-thirds of the state's 41,000 inmates are blacks who live under the watch of an 8,400-member uniformed force that is 84% white. In Michigan and Pennsylvania, 55% of prisoners are black but only 13% and 8% of guards, respectively, come from the Afro-American community. In Maryland, the correctional staff is 90% white and monitors an inmate population that is 80% black. With the proliferation of detention facilities in rural areas, the economic stability and social welfare of lower-class whites from the declining hinterland has come to hinge, perversely, on the continued socioeconomic marginality and penal restraint of ever-larger numbers of lower-class blacks from the urban core.

Id.

71. Here we offer a critical proviso. In this Article we focus on a body of psychological research that suggests racist stereotypes help to structure our perceptions and thus influence decision-making even when we do not mean to be racist. We focus on the clinical body of work because we believe courts should find it hard to ignore: results are consistent, often repeated, and appear to have a good basis in neuroscience. However, there is a danger in concentrating on psychological research only and not attending to the larger cultural and ideological formations that structure and support racial perceptions. As Charles Lawrence (a seminal scholar of Critical Race Theory who is largely responsible for introducing the notion of implicit bias to the law) has noted:

> [I] fear that cognitive psychology's focus on the workings of the individual mind may cause us to think of racism as a private concern, as if our private implicit biases do not implicate collective responsibility for racial subordination and the continued vitality of the ideology and material structures of white supremacy. In its most extreme manifestation, this view of implicit bias, as evidence only of private, individual beliefs, is expressed as a right to be racist.

Charles Lawrence III, *Unconscious Racism Revisited: Reflections on the Impact and Origins of "The Id, The Ego, and Equal Protection"*, 40 Conn. L. Rev. 931, 942 (2008).

ers, the ability of non-white inmates to air grievances, and the courts' ability to detect decisions perniciously influenced by race.

The recent wave of research documenting the subconscious operations of race emerged in the 1990s.[72] For decades, social psychologists plumbing the relationship between attitudes and behavior found it difficult to demonstrate how, how often, or under what circumstances expressed attitudes actually predict behavior.[73] In a 1990 article, Anthony Greenwald suggested that social psychologists had been looking for connections between attitude and behavior in all the wrong places. Researchers typically sought explicit, direct connections, yet a review of existing work suggested that attitudes most clearly emerge to shape behavior when subjects are focusing on something other than attitudes.[74]

This is the basic insight behind the development of the Implicit Association Test ("IAT") by Mahzarin Banaji, Anthony Greenwald, and Brian Nosek. The IAT—which now comprises a battery of assessment tools concerning race, gender, age, religion, and other social categories—has become a potent force in the scholarship of bias, spawning over two hundred studies in some of the most respected research institutions across the United States and abroad.[75] The IAT provides dramatic evidence that individuals

72. This was not the first wave of social science research to concentrate on subconscious or implicit sources of racial stereotyping and discrimination. *See, e.g.*, Lawrence, *supra* note 71, at n.76.

73. *See, e.g.*, Anthony G. Greenwald, *What Cognitive Representations Underlie Social Attitudes?*, 28 BULL. OF THE PSYCHONOMIC SOC'Y 254, 254-56 (1990).

74. *See id.* at 255. So, for instance, in one experiment, study participants were asked to review essays and rank them. *See id.* at 256. Each essay was presented in a folder containing a photo of the "author." Unbeknownst to the participants, the researchers systematically varied the pairing of essays and photos. One set of folders contained the photo of a typically attractive woman; a second set, a typically unattractive woman; control folders contained no photos at all. In one variation of the experiment, "attractive" authors scored nearly twice as high as "unattractive" ones on the basis of identical essays (5.2 versus 2.7 on a scale of 1 to 9). *Id.* For Greenwald's purposes, what makes this study important is that the study participants were not *thinking* about gender or attractiveness; they were concentrating on reading and scoring essays. Greenwald describes, moreover, a host of studies like this, in which attitudes emerge as strong determinants of outcome precisely when participants are not attending to them.

75. Shankar Vedantam, *See No Bias*, WASH. POST, Jan. 23, 2005, at W12, *available at* http://www.washingtonpost.com/wp-dyn/articles/A27067-2005Jan21.html. The IAT has evolved into something of a cottage industry. *See* Brian A. Nosek et al., *Harvesting Implicit Group Attitudes and Beliefs from a Demonstration Web Site*, 6 GROUP DYNAMICS: THEORY, RES. & PRAC. 101 (2002); *see also generally* IAT Corp., Project Implicit, https://implicit.harvard.edu/implicit/demo/ (last visited Dec. 16, 2008) (allowing visitors to take brief IATs, receive feedback, and have their results compiled into an ongoing web poll).

find it hard to control implicit associations between, for example, "white" and "good."[76]

The IAT asks test-takers to complete pairings in a rapid manner, with little time to think. For instance, test-takers are asked to determine whether drawings of faces and photos of famous places belong with the grouping "Asian American face or foreign place" or "European American face or U.S. place." They are then asked to repeat the exercise with the groupings reversed ("Asian American face or U.S. place" versus "European American face or foreign place").[77] Reasoning that "[t]he more closely associated the two concepts are, the easier it is to respond to them as a single unit,"[78] IAT researchers use the relative speeds and success rates with which individuals complete sorting tasks to measure "implicit bias," a form of bias that may operate most strongly when individuals are operating quickly and instinctively or are concentrating on something other than the relevant category (age, race, gender, etc.).

IAT studies have consistently "demonstrated a strong and automatic positive evaluation of white Americans and a relatively negative evaluation of African Americans."[79] Across tens of thousands of tests, "88 percent of white people [demonstrated] a pro-white or anti-black implicit bias . . . and more than two-thirds of non-Arab, non-Muslim volunteers displayed implicit biases against Arab Muslims."[80] Nor are non-whites immune to implicit racial bias: "some 48 percent of blacks showed a pro-white or anti-black bias [and] 36 percent of Arab Muslims showed an anti-Muslim bias."[81] Implicit bias, moreover, appears hard to control. At least one follow up

76. *See* Vedantam, *supra* note 75.

77. To minimize the influence of order on selection, test administrators vary the order in which test takers encounter the categorization tasks. *See* IAT Corp., *supra* note 75.

78. *See* Online Psychology Laboratory: Implicit Association Test (Race), http://opl.apa.org/Experiments/About/AboutIATRace.aspx (last visited Dec. 16, 2008).

79. Nilanjana Dasgupta et al., *Automatic Preference for White Americans: Eliminating the Familiarity Explanation*, 36 J. EXPERIMENTAL SOC. PSYCHOL. 316 (2000); *see also* Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945, 955-56 (2006); Anthony G. Greenwald et al., *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. PERSONALITY & SOC. PSYCHOL. 1464 (1998).

80. Vedantam, *supra* note 75. Large majorities of test-takers similarly showed preferences for Christians over Jews and for rich people over poor.

81. *Id.*

study found that participants were unable to suppress the tendency to appear pro-white on the black/white IAT.[82]

Increasingly, research suggests that implicit racial bias informs an individual's ongoing flow of perceptions and judgments, including perceptions of danger and anger. For instance, as one of a series of studies, Joshua Correll asked white participants to "play a primitive video game in which they had to make split-second "shoot/no-shoot" decisions based on whether the figure on the screen was holding a gun."[83] Correll found that most subjects "were more trigger-happy when presented with an image of a black man."[84] Similarly, according to studies by Kurt Hugenberg and Galen V. Bodenhausen, when presented with a series of racially ambiguous faces, individuals who rank high in implicit bias as measured by the IAT are much more likely to categorize angry or menacing faces as black.[85]

Neuroscience appears to ratify these findings. In one study, Mahzarin Banaji (who helped create the IAT) worked with neuroscientist Elizabeth Phelps to explore how the IAT correlates to

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82. *See* Do-Yeong Kim, *Voluntary Controllability of the Implicit Association Test (IAT)*, 66 Soc. Psychol. Q. 83 (2003). Additionally, recent research tends to disaffirm the "familiarity explanation," the idea that test subjects pair "white" and "good" more quickly merely because they are more *familiar* with Caucasian faces. *See* Dasgupta et al., *supra* note 79.

83. Drake Bennett, *Black Man vs. White Woman*, Boston Globe, Feb. 17, 2008, at D1, *available at* http://www.boston.com/bostonglobe/ideas/articles/2008/02/17/black_man_vs_white_woman/.

84. *Id*. But note that Correll contends that "these biases can be sharply reduced, and in some cases even erased. When participants, for example, are shown images of well-liked black public figures before taking the IAT, their anti-black biases disappear." *Id*.

85. *See* Kurt Hugenberg & Galen V. Bodenhausen, *Ambiguity in Social Categorization: The Role of Prejudice and Facial Affect in Race Categorization*, 15 Psychol. Sci. 342, 342-44 (2004). There seemed to be little difference in categorizations of happy faces. *Id*. at 345. For citations to similar work, see Vedantam, *supra* note 75, who reported that:

> A study in Germany by psychologist Arnd Florack found that volunteers whose results suggested more bias against Turks—an immigrant group—were more likely to find a Turkish suspect guilty when asked to make a judgment about criminality in an ambiguous situation. In another study by psychologist Robert W. Livingston at the University of Wisconsin . . . volunteers were given details of a crime in which a Milwaukee woman had been assaulted, suffered a concussion and required several stitches. In this case . . . some volunteers were told the perpetrator had been proven to be David Edmonds from Canada. Others were told the guilty perpetrator was Juan Luis Martinez from Mexico. Volunteers were asked what length of sentence was appropriate for the crime: bias scores against Hispanics on the implicit tests tended to predict a longer sentence for the Mexican.

Id.

brain activity.[86] Sophisticated, rapid functional magnetic resonance imaging ("fMRI") revealed that the IAT (but not express attitudes) was a good predictor of the amount of activity in the amygdala (popularly referred to as the "fear center" of the brain) when white test subjects were shown pictures of black faces.[87] "Black," that is to say, appears to be highly correlated with both "dangerous" and "angry" at an implicit level,[88] and "[i]f stereotypes color something as basic as face perception, then the downstream consequences may be considerable. . . . Perceived hostility will at best promote avoidance—or worse, may foster reciprocation."[89]

The robust findings on subconscious systems of racial bias have obvious implications for prisons, where guards must make split-second determinations concerning threats, in an atmosphere structured around the need to dominate.[90] Prison medical workers similarly must make rapid decisions concerning which prisoners truly need care and who might be "scheming" or "faking," all in a pressured and typically under-resourced situation. Post facto it could be impossible to disentangle the role of implicit bias (or even explicit bias) in decisions concerning punishment, health care, mental health care, etc., but in a prison setting such decisions can have life or death consequences. The problem is only compounded by the fact that differences in norms and communication styles can make it difficult to press grievances cross-culturally.[91] Hence, race

86. *See generally* Elizabeth A. Phelps et al., *Performance on Indirect Measures of Race Evaluation Predicts Amygdala Activation*, 12 J. COGNITIVE NEUROSCIENCE 729 (2000), *available at* http://faculty.psy.ohio-state.edu/cunningham/pdf/phelps.jocn.2000.pdf.

87. *See id.* at 734.

88. *See, e.g.*, Hugenberg & Bodenhausen, *supra* note 85, at 343-45; Vedantam, *supra* note 75.

89. *Subconscious Bias Skews Perceptions*, NW. NEWS, Mar. 2, 2004, http://www.northwestern.edu/univ-relations/media_relations/releases/2004_03/bias.html.

90. *See, e.g.*, Philip G. Zimbardo et al., *The Psychology of Imprisonment: Privation, Power and Pathology*, *in* DOING UNTO OTHERS: EXPLORATIONS IN SOCIAL BEHAVIOR 61-73 (Z. Rubin ed. 1974); Philip G. Zimbardo, *Pathology of Imprisonment*, 6 SOC'Y 4 (1972); *see also* Lorna G. Rhodes, *Supermax as a Technology of Imprisonment*, 74 SOC. RES. 547, 553-57 (2007).

91. A long-standing body of research indicates that blacks and whites have substantially different styles of interaction; in school settings, for instance, there is research indicating that different interactional styles, coupled with differing expectations of treatment and fairness, can make it difficult for black parents to advance their concerns with the same ease as white parents. *See, e.g.*, Audrey Devine-Eller, Rethinking Bourdieu on Race: A Critical Review of Cultural Capital and Habitus in the Sociology of Education Qualitative Literature 5-6 (May 2, 2005) (unpublished manuscript, on file with author at http://www.eden.rutgers.edu/~auderey/

likely is implicated even in the incomplete forms of due process and prison oversight/witnessing (e.g., letters and complaints from family) that do exist.

Courts cannot, of course, seek to control the minds of guards and prison administrators. But they can ensure that heightened forms of oversight, monitoring, and internal due process are used to reign in the influence of bias, even where bias cannot be proved. Unfortunately, as discussed in Parts II and III above, the courts have moved in the opposite direction, offering ever greater deference to prison officials and accepting minimal forms of internal due process.

B. Race, Class, and Geography

A number of studies have explored the links among class, neighborhood, and incarceration rates, but few address these links in the context of prisoner rights. The fact that sending communities are overwhelmingly low-income, poor, and disproportionately enmeshed with the criminal justice system means that communities with the largest stake in the prison system are poorly positioned to advocate for prisoner rights. Employing Geographical Information Systems ("GIS"), researcher Eric Cadora demonstrated this point in a powerfully simple way: Cadora used mapping software to plot the home addresses of incarcerated individuals from Brooklyn, New York, using color coding to indicate varying concentrations of residents in prison.[92] Deep red on the Cadora map indicates so-called "million dollar" blocks—blocks for which the annual costs of incarceration amount to $1,000,000 or more—with progressively lighter shades indicating less entanglement with the prison system.[93] Cadora published this map alongside one that shows concentrations of African American residents.[94] The two maps fit like hand in glove: concentrations of incarcerated individuals follow the contours of concentrations of African American residents with acrobatic finesse, looping in and out of the poorest neighborhoods of Brooklyn.

The Cadora maps help to crystallize a basic insight that social researchers and advocates have been trying to tell us for over a

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papers.htm, follow "Rethinking Bourdieu" hyperlink). As far as the authors of this Article are aware, no parallel research has been conducted in a prison setting.

92. *See, e.g.*, *Gothamist: Where Do Prisoners Come from?*, http://gothamist.com/2005/11/27/where_do_prison.php (last visited Dec. 16, 2008).

93. *Id.* At current rates, it takes approximately thirty incarcerated individuals to form a million dollar block.

94. *Id.*

decade: whatever the precise mix of reasons—and the reasons are manifold—low-income communities of color have been utterly, disproportionately impacted by skyrocketing incarceration rates.[95] There is no longer any basis to doubt the existence of a well developed circuit between prisons and low-income communities of color.

An important clarification is in order here: we by no means contend that courts are responsible for "balancing out" the composition of sending communities, or that individuals are less culpable for law breaking because they are from impoverished communities. Rather, this Article merely highlights two points: (1) the concentration of blacks in low-income communities is an integral part of the American story of race and cannot be dismissed as the product of "mere" market choices,[96] and (2) the circuit between prisons and low-income communities of color is in many senses a closed one.

Although race and class are often viewed as separate variables, much empirical evidence—particularly research incorporating a spatial dimension—reveals deep interrelationships between class and race. William Julius Wilson, for instance, has documented how racial inequalities gave rise to spatially-bound forms of class subordination;[97] how the "suburbanization of work" (driven by racist ideologies and policies) stranded working-class blacks in inner city ghettoes,[98] halting upward mobility for African Americans just as

95. *See id*; *see also supra* notes 57-61 and accompanying text (describing Equal Protection cases).

96. In the traditional Equal Protection discourse, the geographic concentration of racial and ethnic minorities is the product of sheer market forces and therefore somehow beyond justiciable issues of racial equity. *See, e.g.*, Austin Indep. Sch. Dist. v. United States, 429 U.S. 990, 994 (1976) ("Economic pressures and voluntary preferences are the primary determinants of residential patterns."). In this discourse, moreover, race and class are conceptualized as cleanly separable variables.

97. *See* WILLIAM JULIUS WILSON, WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR 3-50 (1996) [hereinafter WILSON, WHEN WORK DISAPPEARS]; WILLIAM JULIUS WILSON, THE DECLINING SIGNIFICANCE OF RACE: BLACKS AND CHANGING AMERICAN INSTITUTIONS 42-121 (2d ed. 1980). The authors acknowledge the storm of controversy that attended Wilson's claim of a "declining" significance to race "as opposed to" class. Here we merely draw on Wilson's work to illustrate that racial, class, and spatial formations are tightly enmeshed in American life.

98. Researcher Bruce Katz similarly notes:

> In 1970, only 25% of the nation's offices were located in suburbs. More recent numbers indicate that over 60% are now located in the suburbs. Many city residents have not been able to follow this migration of jobs. The lack of transportation choices in metropolitan areas limits options for those without cars and it prevents central city residents from accessing jobs located in the suburbs.

BRUCE KATZ & KATHERINE ALLEN, HELP WANTED: CONNECTING INNER-CITY JOB SEEKERS WITH SUBURBAN JOBS 32 (1999), *available at* http://www.brookings.edu/

civil rights protections were being enacted;[99] and how continuing racial tensions and prejudices work to maintain racial segregation by neighborhood.[100] As sociologist Loïc Wacquant reports, the concentration of black urban poverty has only increased in recent years (at least in Chicago, where he used both statistical and ethnographic methods to investigate the historically black inner-city community of Bronzeville):

> [I]n Chicago the proportion of all poor blacks residing in extreme-poverty areas (i.e., census tracts containing more than 40 per cent of persons living in households below the official poverty line) shot up from 24 per cent to 47 per cent between 1970 and 1980. By this date, fully 38 per cent of all poor African Americans in the country's ten largest cities lived in extreme-poverty tracts, compared to 22 per cent a decade earlier and only 6 per cent among poor non Hispanic whites.[101]

As Wacquant documents, the growing spatial concentration of extreme poverty has produced an "unprecedented mesh of obstacles"[102] for urban blacks, including lack of proximity to jobs, deficient housing, and under-resourced schools."[103] Wacquant describes these obstacles in order to elucidate a "closed opportunity structure"[104] that helps to explain entry to crime. Far more to the point for our purposes is how such obstacles close communities off from sources of political influence and advocacy. Low-income communities of color are terra incognita for much of middle-class America—they are even the subject of ethnography, as venturesome scholars attempt to map this part of America for the "mainstream."[105]

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press/review/fall99/bkatz.pdf. Moreover, new jobs created in the city are often geared to the "new class" of creative workers—jobs for which low-income urban citizens are typically not well prepared. *Id.*

99. WILSON, WHEN WORK DISAPPEARS, *supra* note 97, at 3-50.

100. *See generally* WILLIAM JULIUS WILSON & RICHARD P. TAUB, THERE GOES THE NEIGHBORHOOD: RACIAL, ETHNIC, AND CLASS TENSIONS IN FOUR CHICAGO NEIGHBORHOODS AND THEIR MEANING FOR AMERICA (2007) (documenting, largely through ethnographic and qualitative approaches, the resistance of neighborhoods to changing ethnic compositions and the ways that positive forces of community stability can hamper mobility and integration).

101. LOÏC WACQUANT, URBAN OUTCASTS: A COMPARATIVE SOCIOLOGY OF ADVANCED MARGINALITY 94 (2007).

102. *Id.*

103. *Id.* at 94-95.

104. *Id.*

105. Wacquant's work, *supra* note 101, is one example; another is SUDHIR ALLADI VENKATESH, OFF THE BOOKS: THE UNDERGROUND ECONOMY OF THE URBAN POOR (2006). Xavier University actually offers a sort of "study abroad" program to Over-

As a result of the spatial concentration of black urban poverty, ghetto residents, even those with stable jobs who are upwardly aspiring, often become dependent upon economic circuits outside the mainstream, in community-based shadow economies,[106] marking the further distancing of inner-city African American populations from mainstream sources of power and influence. Indeed, the pocketing up of African American poverty has allowed it to be cordoned off from the daily experience not only of whites, but of middle-class and elite black Americans—as reflected, for instance, in the "confessions" of Henry Louis Gates, Jr., concerning his feelings of extreme estrangement from black inner-city teens,[107] or the recent critiques of poor blacks by Bill Cosby, Jr.[108] The point for our discussion is not whether the opprobrium is useful or righteous, but rather the fact that it exists at all, marking distance from an important source of support and advocacy (the African American middle class).

The distance is only exacerbated, of course, by the prison system itself, which removes populations of inner-city non-whites from sight in a way that rationalizes the removal. As Eduardo Bonillo-Silva has noted:

> [B]ecause the enforcement of the racial order from the 1960's onward has been institutionalized, individual whites can express a detachment from the racialized way in which social control agencies operate in the United States. Because these agencies are legally charged with maintaining order in society, their actions are deemed neutral and necessary.[109]

Meanwhile, communities that are already short on resources, and removed from mainstream sources of power, are further undermined politically and economically by the prison system and related civil disabilities, including the loss of census credits (and

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the-Rhine, the community that was the site of the 2001 riots. *See* Newsletter, Urban Academic Service Learning Semester (Oct. 4, 2007) , http://www.xavier.edu/service_learning/newsletters/Urban%20Service%20Learning%20Newsletter1.pdf ("Unlike the international programs, we have the distinction of not only residing in the United States, but importantly, within the city of our university.").

106. VENKATESH, *supra* note 105, at 1-90.

107. *Frontline: The Two Nations of Black America* (PBS television broadcast Feb. 10, 1998) (transcript on file with author), *available at* http://www.pbs.org/wgbh/pages/frontline/shows/race/etc/script.html.

108. Manny Fernandez, *Cosby Defends Criticism of Black Community*, WASH. POST, Sept. 9, 2004, at B3, *available at* http://www.washingtonpost.com/wp-dyn/articles/A6615-2004Sep8.html.

109. EDUARDO BONILLA-SILVA, WHITE SUPREMACY AND RACISM IN THE POST-CIVIL RIGHTS ERA 111 (2001).

attendant funding) for inmate populations which are ascribed to the communities where prisons sit. Specific impacts include:

1. Increased risk of disease in communities (demonstrably attributable to the social instability caused by incarceration, coupled with poor prison health care and the prevalence of STDs in prisons);[110]
2. Diminishment of earning capacity (high incarceration of low educational attainment populations, coupled with withdrawal of educational options for prisoners, all compounded by extreme social reluctance to hire black ex-convicts);[111]
3. Destabilization of families as prisoners are relocated far from home communities with no rights of appeal;[112]
4. Civil disabilities, including lack of access to some government social services for families that merely reside with an ex-convict;[113] and
5. Removal of populations for census purposes, as prisoners are counted as being "in residence" in the communities to which they are sent; this affects everything from congressional apportionments to government grants for urban renewal.[114]

The circuit between prison and ghetto[115] is so well cordoned off from public view that the magnitude of the problem does not seem to touch mainstream America, making it possible for one in every fifty Americans aged twenty to forty to be in prison, without pro-

110. James C. Thomas & Elizabeth Torrone, *Incarceration as Forced Migration: Effects on Selected Community Health Outcomes*, 96 AM. J. PUB. HEALTH 1762, 1762-65 (2006) (estimating the effect of incarceration on teenage pregnancies and sexually transmitted infections and finding that population disruptions owing to incarceration demonstrably lower community health outcomes).

111. DEVAH PAGER ET AL., RACE AT WORK: A FIELD EXPERIMENT OF DISCRIMINATION IN LOW-WAGE LABOR MARKETS 40 (2008), *available at* http://www.law.virginia.edu/pdf/workshops/0708/pager.pdf.

112. *See, e.g.*, CLEAR, *supra* note 13, at 95-96 ("[A] long and rich literature shows that removal of a parent from the home has, on the average, negative consequences for the partner and the children who remain.").

113. Finzen, *supra* note 13, at 309-17.

114. *See, e.g.*, Taren Stinebrickner-Kauffman, *The Prison Effect on Political Landscape*, CHRISTIAN SCI. MONITOR, May 17, 2004, *available at* http://www.csmonitor.com/2004/0517/p09s02-coop.html.

115. Scholars such as Loïc Wacquant (as well as many activists) view prison as an outright form of racial control. "We will indeed see . . . that the massive and rapidly growing over-representation of African Americans at all levels of the penal system expresses the new role that the latter has assumed in the panoply of instruments of racial domination since the ghetto uprisings of the 1960s." Loïc Wacquant, *The Great Penal Leap Backward: Incarceration in America from Nixon to Clinton*, *in* THE NEW PUNITIVENESS: CURRENT TRENDS, THEORIES, PERSPECTIVES 7 (John Pratt et al. eds., 2005), *available at* http://sociology.berkeley.edu/faculty/wacquant/wacquant_pdf/GREATPENALLEAPcor.pdf.

voking a sense of national crisis. This leads to the very real and frightening possibility that prisoner rights have eroded, not merely concurrent with the rise of incarceration of non-whites, but because of it.

CONCLUSION: RETHINKING PRISON LAW

The time has come for the law to acknowledge the racial implications of the prison system. Our courts, in particular, must cease to comply with a system extensively racialized in ways that jeopardize the fates of individuals and the democratic validity of the U.S. penal system. This requires reassertion of the courts' basic role in protecting discrete and insular minorities that lack access to the normal levers of political power.[116] As one commentator put it: "The judicial obligation to enforce the rights of the politically powerless is at the heart of the American political system."[117] Expressed differently, federal judicial intervention is appropriate when important constitutional rights are implicated, when the institution itself has proven resistant to change through more traditional legislative or executive means, and where the change requested is "critical to the quality of American life."[118] The case for the exercise of judicial discretion to ensure protection of pris-

116. The term "discrete and insular minorities" was first used by Chief Justice Stone in his famous footnote four of *United States v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938), to describe those groups that most require judicial protection in order to access their constitutional rights. *See also* JOHN H. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 73-179 (1980); Robert M. Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L.J. 1287 (1982). The essential point of footnote four is that courts should protect from unduly or discriminatorily burdensome state action groups that lack viable political power. The underlying rationale for this theory can be summarized as follows: since a democratic system of government assumes the participation of the citizenry, it is only logical to take the necessary steps to make sure that the citizenry can indeed participate. Thus, if it is determined that a certain group (*i.e.*, a "discrete and insular minority") cannot adequately participate in the political process, then it is up to courts to make sure that the democratic "majority" does not take advantage of them. For a compelling argument that ex-offenders constitute a discrete and insular minority, see generally Ben Geiger, *The Case for Treating Ex-Offenders as a Suspect Class,* 94 CAL. L. REV. 1191 (2006). *See also generally* Dan T. Coenen, *Symposium Article: The Future of Footnote Four*, 41 GA. L. REV. 797 (2007); Felix Gilman, *The Famous Footnote Four: A History of the* Carolene Products *Footnote*, 46 S. TEX. L. REV. 163 (2004); Sharona Hoffman, *Corrective Justice and Title I of the ADA*, 52 AM. U. L. REV. 1213 (2003); Lewis F. Powell, Jr., Carolene Products *Revisited*, 82 COLUM. L. REV. 1087 (1982).

117. *See* ELY, *supra* note 116, at 135-36; *see also* Luther M. Swygert, *In Defense of Judicial Activism*, 16 VAL. U. L. REV. 439, 443 (1982).

118. Donald Zeigler, *Federal Court Reform of State Criminal Justice Systems: A Reassessment of the* Younger *Doctrine from a Modern Perspective*, 19 U.C. DAVIS L. REV. 31, 39 (1985) (citing cases).

oners is compelling under any of these formulations. Specifically, we advocate the following reforms:

1. Use the Eighth Amendment to protect against conditions and practices that fall below civilized standards of decency, regardless of the state of mind of the defendant prison official;
2. Overrule the extreme deference standard of *Turner v. Safley* so that defendant officials must meaningfully justify prison restrictions and conditions that impinge on fundamental rights;
3. Provide meaningful and independent prison oversight;
4. Amend the PLRA to eliminate excessive restrictions on inmate access to the courts imposed by that law; and
5. Convene a national commission to (a) examine the negative impacts of imprisonment and prison conditions on "sending" communities, and (b) recommend steps to ameliorate those impacts.[119]

119. We are grateful to Margaret Winters for this suggestion.