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Racial Classifications and Inmate Housing Assignments

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Introduction

There was a time when a good number of states had pervasive racial segregation in prisons and jails, along with such segregation in schools, hospitals, and public accommodations of all kinds. Changes in both the law and social attitudes have put those days behind us, and mandate that race and ethnicity not be a basis for unequal treatment of persons, including persons in custody in correctional facilities.

At the same time, it would be hard to argue that racial issues have disappeared, or that tensions between racial groups in prisons are not important factors weighing on the minds of prison and jail management in carrying out necessary tasks, including maintaining order and security and protecting both prisoners and staff members against violence.

Gangs in prison settings have clearly grown over time, and it is also clear that most of them are organized along racial or ethnic lines (with white and African-American gangs organized along racial lines, and Hispanic gangs often based on national origin). Rivalry and conflict between such racial gangs have led to many incidents of violence, both one-on-one and in the context of larger prison disturbances in which dozens or even hundreds of persons have been injured and some have been killed.

It is not surprising, then, that the question of the use of race as a factor in making housing assignments in prison has been an active issue in some facilities in recent years. While some state prison systems, such as that of Texas, successfully carried out the end of more pervasive racial segregation, prisoners elsewhere, including California, contended that they were confronting prison policies which routinely resulted in the making of cell assignments, particularly for those new to a facility, on the basis of race. The articulated rationale for such actions was a desire to avoid racial violence.

The U.S. Supreme Court and a number of lower courts have addressed the issue of the use of race as a factor in making inmate housing assignments. This article briefly examines what they have said. At the conclusion of the article, a number of resources and references relevant to the topic are listed.

When May Race Be Used as a Factor in Inmate Housing Assignments?

In the era when the courts were busy striking down the legality of racial segregation and discrimination in a wide variety of contexts, and Congress was busy passing civil rights legislation to enforce equal legal rights for racial minorities, the U.S. Supreme Court turned its attention to segregation in prisons in Lee v. Washington, #75, 390 U.S. 333 (1968) (per curiam).

In that case, in a brief opinion, the Court upheld lower court rulings that Alabama's statutes requiring segregation of the races in prisons and jails were unconstitutional, in violation of the Fourteenth Amendment, which guarantees equal protection of the laws regardless of race. In an important concurrence, Justices Black, Harlan, and Stewart stated that:

> "In joining the opinion of the Court, we wish to make explicit something that is left to be gathered only by implication from the Court's opinion. This is 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. We are unwilling to assume that state or local prison authorities might mistakenly regard such an explicit pronouncement as evincing any dilution of this Court's firm commitment to the Fourteenth Amendment's prohibition of racial discrimination."

Years later, the issue again came to the Court, with questions of both racial segregation and prison security and order involved.

A federal appeals court initially held that a California prison policy under which race was taken into account when double-cell assignments are made in a reception center where new prisoners are confined for their first 60 days while awaiting full classification was not a violation of equal protection but rather was justified under Turner v. Safley, #85-1384, 482 U.S. 78 (1987) because it was "rationally related" to a legitimate penological goal of reducing the possibility of racial violence among inmates.

Indeed, the court stated that this possibility might be sufficiently great that the prison officials might be engaging in deliberate indifference to a substantial risk of serious harm in violation of the Eighth Amendment if they failed to take the racial factor into account. The federal appeals court upheld summary judgment for the defendant prison officials in a

lawsuit filed by a prisoner challenging what he argued was unconstitutional racial discrimination in initial cell assignments. Johnson v. California, #01-56436, 321 F.3d 791, rehearing denied, (9th Cir. 2003).

The U.S. Supreme Court granted review, and in Johnson v. California, #03-636, 543 US. 499 (2005), ruled that prisons cannot segregate prisoners by race even temporarily, except under "extraordinary" circumstances where there is a compelling interest in doing so.

It ruled that an alleged California Department of Corrections (CDC) unwritten policy of racially segregating prisoners in double cells in reception centers for up to 60 days every time they enter a new correctional facility could only be justified if it satisfied the requirements of "strict scrutiny," i.e., served a compelling governmental interest and was "narrowly tailored" towards doing so. The policy was allegedly aimed at helping to reduce racially-related gang violence.

With the exception of those double cells in the reception areas, the rest of the state prison facilities, including dining areas, yards, and cells, were fully integrated, and after the initial 60-day period, prisoners were usually allowed to choose their own cellmates unless there are specific security reasons for denying them.

The policy was challenged by a California African-American inmate who has been incarcerated since 1987, and who, each time he was transferred to a new facility, was double-celled with another African-American inmate.

The majority of the U.S. Supreme Court noted that racial classifications imposed by government must be analyzed by a reviewing court under "strict scrutiny," in which the government has the burden of proving that the classifications are "are narrowly tailored measures that further compelling governmental interests." Prior case law, the majority noted, has insisted on the application of such strict scrutiny "in every context," even for so-called "benign" racial classifications, such as race-conscious university admissions policies, race-based preferences in government contracts, and race-based districting intended to improve minority representation.

> "The reasons for strict scrutiny are familiar. Racial classifications raise special fears that they are motivated by an invidious purpose. Thus, we have admonished time and again that, 'absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining . . . what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics.' We therefore apply strict scrutiny to all racial classifications to 'smoke out' illegitimate uses of race by assuring that [government] is pursuing a goal important enough to warrant use of a highly suspect tool."

The Court's majority rejected the Department's argument that its policy should be exempt from this "categorical rule" because it is "neutral," neither benefiting nor

burdening one group or individual more than any other group or individual. In other words, the majority said in characterizing this argument, strict scrutiny should not be applied because all prisoners are "equally" segregated.

The majority pointed to its prior case law concerning segregated education as already having rejected the notion that "separate can ever be equal -- or 'neutral.'" Additionally, it explicitly stated that the Court had previously applied a "heightened standard of review" in Lee v. Washington, #75, 390 U.S. 333 (1968) (per curiam), striking down Alabama's policy of segregation in its prisons, which the prior brief opinion in Lee did not spell out.

Racial classifications, the majority reasoned, can stigmatize individuals by reason of their membership in a racial group, and also threaten to "incite racial hostility." The decision argued that by insisting that inmates, upon arrival, only be housed with other prisoners of the same race, prison officials could possibly "breed further hostility among prisoners and reinforce racial and ethnic divisions."

> "By perpetuating the notion that race matters most, racial segregation of inmates 'may exacerbate the very patterns of [violence that it is] said to counteract.'"

The decision cited Trulson & Marquart, "The Caged Melting Pot: Toward an Understanding of the Consequences of Desegregation in Prisons," 36 Law & Soc. Rev. 743, 774 (2002) (a study of prison desegregation, finding that "over [10 years] the rate of violence between inmates segregated by race in double cells surpassed the rate among those racially integrated.").

The Court's majority noted that "virtually all" other states and the federal government manage their prison systems without reliance on racial segregation, and that federal regulations governing the Federal Bureau of Prisons (BOP) expressly prohibit it, citing 28 C.F.R. Sec. 551.90.

Because the CDC's policy is an "express racial classification," the decision continued, it is "immediately suspect," so the court below erred in failing to apply strict scrutiny to it, and to require the CDC to demonstrate that its policy is "narrowly tailored to serve a compelling state interest." The majority rejected the argument that the more "deferential standard" of review stated in Turner v. Safley, #85-1384, 482 U.S. 78 (1987) should be applied because the segregation policy in question only applies in a prison context.

That lesser standard, upholding restrictions on rights that bear a reasonable relationship to legitimate penological interests, the Court stated, has never been applied to racial classifications, and has been applied only to rights that are "inconsistent with proper incarceration."

> "The right not to be discriminated against based on one's race is not susceptible to the logic of Turner. It is not a right that need necessarily be compromised for the sake of proper prison administration. On the contrary, compliance with the

> Fourteenth Amendment's ban on racial discrimination is not only consistent with proper prison administration, but also bolsters the legitimacy of the entire criminal justice system. Race discrimination is 'especially pernicious in the administration of justice.' And public respect for our system of justice is undermined when the system discriminates based on race."

Only extreme circumstances, such as a social emergency rising to the level of imminent danger to life or limb, such as a prison race riot, the majority implied, requiring temporary segregation of inmates could justify an exception to the principal that the Constitution is "color-blind, and neither knows nor tolerates classes among citizens."

Prison administrators, the Court stated, will have to demonstrate that any race-based policies are narrowly tailored to address a compelling interest in prison safety. On remand, the CDC would have the burden of showing that its policy fits those requirements. "Prisons are dangerous places, and the special circumstances they present may justify racial classifications in some contexts. Such circumstances can be considered in applying strict scrutiny, which is designed to take relevant differences into account."

The majority emphasized that it had not decided whether the policy in question violated the equal protection guarantees of the constitution, but only that strict scrutiny is the proper standard of review to be applied.

A strong dissent by Justice Stevens argued that, going further than the Court's majority, the CDC policy should be declared, on the basis of the existing record, to violate the equal protection clause of the Fourteenth Amendment, and that the CDC had "utterly failed" to justify it under either the strict scrutiny analysis or the more deferential reasonable relationship standard set forth in Turner.

> "The CDC's segregation policy is based on a conclusive presumption that housing inmates of different races together creates an unacceptable risk of racial violence. Under the policy's logic, an inmate's race is a proxy for gang membership, and gang membership is a proxy for violence. The CDC, however, has offered scant empirical evidence or expert opinion to justify this use of race under even a minimal level of constitutional scrutiny."

Another strong dissent, by Justices Thomas and Scalia, argued that "time and again, even when faced with constitutional rights no less 'fundamental' than the right to be free from state-sponsored racial discrimination, we have deferred to the reasonable judgments of officials experienced in running this Nation's prisons. There is good reason for such deference in this case, in light of the presence of some of the most violent prison gangs in America--all of them organized along racial lines" in California prisons.

> "In that atmosphere, California racially segregates a portion of its inmates, in a part of its prisons, for brief periods of up to 60 days, until the State can arrange permanent housing. The majority is concerned with sparing inmates the indignity

and stigma of racial discrimination. California is concerned with their safety and saving their lives. I respectfully dissent."

Subsequently, California has acted to move towards ending such routine use of race in initial cell assignments.

In a number of subsequent decisions, other courts have indicated that, given the proper "extraordinary" circumstances referred to in both Lee and Johnson, the use of race as a factor in making housing assignments may be justified in response to specific instances or imminent threats of violence.

In Fischer v. Captain Ellegood, #06-15167, 238 Fed. Appx. 428, 2007 U.S. App. Lexis 13552 (Unpub. 11th Cir.), for instance, a federal appeals court rejected claims by a jail inmate that "racial discrimination, segregation, and cruel and unusual punishment" accompanied a five-day lock down of the facility. Evidence indicated that any racial segregation was ordered because of an inmate's complaint of a fear of racial violence, and there was no evidence refuting that motivation for the segregation. Further, there was also evidence that the racial segregation ended immediately after it was determined that a threat of racial violence was no longer present. Allegations concerning overcrowding, sleeping, and shower conditions during the lock-down, including a denial of sheets and showers, were also insufficient to show a constitutional violation.

Similarly, in Mayweathers v. Hickman, #05cv0713, 2008 U.S. Dist. Lexis 85154 (S.D. Ca.), the court found that the use of race as a factor in assigning cellmates on the basis of concern about gang and racial violence was supported by legitimate safety and security interests. The plaintiff prisoner failed to show that prison employees should have known that their use of race in this manner was unlawful under international treaties or the equal protection clause of the Fourteenth Amendment.

In the absence of such specific security justifications, however, courts will strike down the use of race classifications to make housing assignments. See Brand v. Motley, #06-6362, 526 F.3d 921 (6th Cir. 2008), which held that a black prisoner asserted an arguable race discrimination claim when he was denied a request to be reunited with his previous white cellmate after being released from segregated confinement. The trial court was found to have acted erroneously in dismissing this claim when the prisoner claimed, and prison officials admitted, that race was a factor in the denial of the prisoner's request.

Some older cases of possible interest in this area include:

- Palmer v. Marion County, #02-2267, 327 F.3d 588 (7th Cir. 2003), in which a prisoner assaulted by gang members, and attacked yet again when he was moved to a new housing assignment after identifying his assailants, did not show that jail officials were responsible for the second assault. He failed to provide

evidence of his claim that the jail had policies of segregating prisoners by race, and putting predominantly black prisoners in "gladiator cell blocks" in which staff members failed to intervene when fighting erupted.

- Williamson v. Campbell, #02-5104, 44 Fed. Appx. 693 (Unpub. 6th Cir. 2002), finding that a black prison inmate's equal protection claim, arguing that his rights were violated when he was not returned to an area of the prison after completion of an investigation into an escape attempt, while white prisoners were returned there, was frivolous. The plaintiff prisoner himself admitted that he "did not want to be returned" there after the investigation was completed.

- Woods v. Edwards, 51 F.3d 577 (5th Cir. 1995), concluding that an African-American prisoner's general assertion that he was subjected to racial discrimination when kept in extended lockdown was insufficient when he presented no evidence of racial motive; prison officials showed that treatment of him was based on serious nature of his offenses.

- Arney v. Thornburgh, 817 F.Supp. 83 (D. Kan. 1993), stating that prisoners failed to show racial discrimination in assignment of inmates to various housing units, since the racial composition of the units in question was consistent with that of overall inmate population.

- Sockwell v. Phelps, 20 F.3d 187 (5th Cir. 1994), in which former Louisiana correctional officials were found liable for $4,000 in punitive damages for a general policy of racially segregating two-man cells at a state penitentiary.

Resources and References

The following are a few useful resources and references related to the topic of this article.

Resources:

- 28 C.F.R. Sec. 551.90. Federal regulation prohibiting racial discrimination in federal prisons, including in housing.

- Federal Bureau of Prisons Program Statement 1040.04 concerning providing equal opportunity to prisoners on the basis of race, including in housing, and citing various applicable standards. (1999).

- Brief of the U.S. government as amicus curiae in the U.S. Supreme Court case of Johnson v. California, supporting the petitioner Johnson (2004).

Related AELE Monthly Law Journal Article:

- Civil Liability for Prisoner Assault by Inmates, 2007 (5) AELE Mo. L.J. 301.

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- "Calif. Struggles to Desegregate Its Prison Inmates," by Don Thompson, Associated Press, August 22, 2009.

- "Chino prison rioting spurs call for changes," by John Asbury, The Press-Enterprise, Aug. 9, 2009.

- "The Implication of Prisoners' Rights Jurisprudence on Racial Segregation in Prisons: The Normative Approach Gives Way to an Empirical Analysis in Selecting a Standard of Review," Note by Lloyd Jeglikowski**,** Rutgers Race and the Law Review, Vol. 9, No. 1 (2007).

- Trammell, Rebecca. "Racial Segregation and Violence in Men's and Women's Prisons." Paper presented at the annual meeting of the American Society of Criminology, Atlanta Marriott Marquis, Atlanta, Georgia, Nov 13, 2007 (Abstract).

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- Chad Trulson & James W. Marquart, "The Caged Melting Pot: Toward an Understanding of the Consequences of Desegregation in Prisons," 36 Law & Soc. Rev. 743, 774 (2002).

- Martha L. Henderson et al, "Race, Rights, and Order in Prison: A National Survey of Wardens on the Racial Integration of Prison Cells," 80 Prison J. 295 (2000) . [Abstract available on-line, full text may be purchased].

- Craig Hemmens, "No Shades of Grey: The Legal Implications of Voluntary Racial Segregation in Prison," Corrections Management Quarterly Volume:4 Issue:1, pgs. 20-27 (2000) (Abstract).

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