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JAMES W. NICKEL

THE LIBERTY DIMENSION OF HISTORIC AND  
CONTEMPORARY SEGREGATION

Rereading *Plessy v. Ferguson*<sup>1</sup> invites reflection on historic and ongoing racial segregation in the United States. This essay pursues an enriched understanding of what was – and is – wrong with racial segregation by developing a diagnosis of segregation as an infringement of basic liberties. Justice Harlan’s dissent in *Plessy* criticized the requirement of segregation that blacks and whites sit in separate train cars in exactly these terms: “The fundamental objection . . . to the statute is that it interferes with the personal freedom of citizens.”<sup>2</sup>

A more standard diagnosis of what was – and is – wrong with segregation is in terms of equality, and uses concepts such as the denial of equal opportunity, economic exploitation, and the imposition of an inferior social and political status. My purpose in focusing on the liberty dimension of segregation is to supplement rather than undermine diagnoses that emphasize the inequality dimension of segregation. But a diagnosis of segregation in terms of liberty has the advantage of avoiding anachronism since it appeals to values that were already widespread in 19th century America. It is also possible that it will grip people who don’t find compelling a diagnosis in terms of economic inequality.

We should be careful, however, not to exaggerate the difference between liberty-oriented and equality-oriented critiques of segregation, because the former also appeals to an ideal of equality, namely equality of basic liberties. One criticism of segregation – which seems to be the one that Justice Harlan was making – is that it infringed the liberties of both blacks and whites to associate as they pleased. But another criticism, which partially explains why segre-

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<sup>1</sup> 163 U.S. 537 (1896).

<sup>2</sup> 163 U.S. 537 at 557 (1896). A few pages later Harlan said that blacks rightly objected to “the proposition that citizens of the white and black races can be adjudged criminals because they sit, or claim the right to sit, in the same public coach on a public highway” (p. 561).

gation wronged blacks far more than whites, is that segregation was a system of deeply unequal liberties.

The first section offers a description and analysis of racial segregation as it existed around the turn of the century in the United States. The second section develops in some detail the diagnosis of segregation as a violation of basic liberties, attending to both its legally and socially enforced components. The final section considers the extent to which the same diagnosis applies to contemporary racial segregation. Throughout I pay attention to what sort of conception of liberty is being employed.

### I. HISTORIC SEGREGATION IN THE UNITED STATES

In the 1870s many whites who had been comfortable with slavery were far from willing to accept blacks as political equals. But political equality for blacks was what the Thirteenth, Fourteenth, and Fifteenth Amendments prescribed.<sup>3</sup> A central part of such equality was that blacks were to be free to use public places and facilities; to move, live, and work where they wanted; and to vote, participate in politics, and serve in public offices. To have blacks enjoying these liberties on equal terms with whites was unacceptable to many southern whites<sup>4</sup>, and as soon as they were sure they could get away with it they constructed a system – segregation, or “Jim Crow” – that reimposed political inequality by depriving blacks of the vote and by restricting important liberties such as freedom of association, freedom of movement, and free choice of occupation.<sup>5</sup> By the 1890s,

<sup>3</sup> For a history of “Freedom and Repression in the Post-War South.” see Paul Finkleman, “Introduction: The Law of Freedom,” *Chicago-Kent Law Review* 70 (1994): 325–368. See also David A. J. Richards, *Conscience and the Constitution: History, Theory, and Law of the Reconstruction Amendments* (Princeton, N.J.: Princeton University Press, 1993).

<sup>4</sup> This was true of many northern whites as well. Segregation of free blacks in northern cities was common in the early nineteenth century, and hence northern segregation antedated the southern version. See Leon F. Litwack, “Segregation in the Antebellum North,” in Joel Williamson, ed., *The Origins of Segregation* (Boston: D. C. Heath, 1968), pp. 88–95.

<sup>5</sup> See C. Vann Woodward, *The Strange Career of Jim Crow* (Oxford: Oxford University Press, 1966); John Hope Franklin, *From Slavery to Freedom: A History of Negro Americans* (New York: Alfred A. Knopf, third edition, 1967); and Joel Williamson, *After Slavery* (Chapel Hill: University of North Carolina Press, 1965).

when Plessy's unsuccessful challenge to segregated trains was made, many areas of life had been formally divided into different areas for blacks and whites.

Segregation involved both *exclusion* and *separation*. Exclusion of blacks occurred in areas such as voting, political participation, and service in public offices. Substantial numbers of blacks voted during Reconstruction and shortly thereafter. But efforts by the Ku Klux Klan and others to discourage blacks from voting began early on, and by the late 1870s a widespread effort to disfranchise blacks was underway. Means of doing this included complicated registration and voting procedures, poll taxes, literacy tests, and white primaries.<sup>6</sup>

Segregation applied to most areas of life. Areas of separation included churches, schools, neighborhoods, the workplace (although segregation here was limited by the important economic role of black farmers and workers), and public facilities such as trains and busses, hospitals, stores, restaurants, hotels, parks, and beaches.<sup>7</sup> The main places where blacks and whites mixed together were on the streets and roads, in (some) stores, and in (some parts of) the workplace.

To analyze segregation in more detail, we can say that it divided social space into four sectors. First, there were *shared and unsegregated sectors* such as roads and sidewalks. Second, there were *shared but segregated sectors* such as trains and (some) parks. Here the same (or an inferior version of the same) services or facilities were available to blacks as to whites, but there were segregated areas within them. This type of social space was the natural home of the separate but equal doctrine that *Plessy v. Ferguson* sanctified. Third, there were *unshared and segregated areas* such as schools, churches, and potential marriage partners. This area offered blacks indepen-

<sup>6</sup> See Franklin, *From Slavery to Freedom*, pp. 324–343, for a good account of disfranchisement.

<sup>7</sup> Franklin gives a nice summary of this:

Beginning in Tennessee in 1870, Southerners enacted laws against intermarriage of the races in every Southern state. Five years later, Tennessee adopted the first "Jim Crow" law and the rest of the South rapidly fell in line. Negroes and whites were separated on trains, in depots, and on wharves. Toward the end of the century the Negro was banned from white hotels, barber shops, restaurants, and theaters, after the Supreme Court in 1883 outlawed the Civil Rights Acts of 1875. By 1885 most Southern states had laws requiring separate schools.

*From Slavery to Freedom*, p. 342.

dence from whites and the opportunity to develop and run their own institutions. But it also limited blacks to what was available in their own community. And fourth, as we saw earlier, there were areas of *exclusion* such as voting and other forms of political participation. Movie theaters, for example, could fall into any of these sectors depending on how they were arranged. They could be shared and unsegregated if blacks and whites were free to attend the same theaters and could sit wherever they wanted (the arrangement we have today). They could be shared and segregated if blacks and whites used the same movie theater but blacks were restricted to a particular section such as the balcony (the most common arrangement during segregation). Theaters could be unshared and segregated if there were completely separate ones for blacks and whites. Or there could be exclusion if there were no movie theaters that blacks were permitted to attend.

The means whereby segregation was imposed varied by sector. Segregation in areas of government provision or facilitation such as elections, police and legal services, schools, parks, and public transportation was explicitly decreed and enforced by law. Segregation in stores, restaurants, and theaters was sometimes decreed by law, but was also sometimes structured and enforced by the whites who owned and operated the facilities – with backup support from the police if needed. For example, eating establishments usually refused to serve blacks at tables or counters, but were sometimes willing to sell food for consumption outside. Social segregation was often imposed through custom and social pressure – with facilitation from the system of segregated schools and churches, and with backup support from vigilantes and lynch mobs.

In the economic area, segregation and exclusion were often restrained by the economic value of blacks as workers and customers. For example, whites often wished to employ black sharecroppers and laborers, and hence had reasons to tolerate the racial togetherness this required. Initially, sharecropping, manual labor, and domestic service were the main economic options available to blacks. Later, as educational opportunities improved, some African-Americans found jobs as teachers in black schools, as shopkeepers in black neighborhoods, and as doctors for black patients. But segregation served to keep blacks mostly located in certain occupations and parts of the

economy. It did this through the limitation of educational opportunities and discrimination in hiring. Blacks were systematically excluded from positions having authority over whites.

## II. SEGREGATION AS A VIOLATION OF BASIC LIBERTIES

The Civil Rights Movement of the 1960s made extensive use of the rhetoric of freedom. Was this just an attempt to play to favored American values, or were there important ways in which segregation deprived people of liberty? The rhetoric of liberty rightly played an important role in emancipation, when the slaves were literally set free from slavery, but perhaps the 20th century use of this rhetoric is just a carryover from the past that now has little substance.<sup>8</sup> In this section I attempt to show that this is not true; that historic segregation involved substantial violations of basic liberties.<sup>9</sup>

Keeping apart two groups that live in the same territory and under the same government usually requires the use of social and legal norms that tell people quite clearly where they can and can't live, where they can and can't go to school, where they can and can't work, and with whom they can and can't associate. This is particularly true if one of the groups doesn't want to be segregated, or so thoroughly segregated. Segregation's standing barriers to action in key areas of liberty were often reinforced through dramatic events such as arrests, beatings, murders, and lynchings, and hence deprivations of liberty had a saliency that structural inequalities often lacked. Because of this, it is not surprising that a familiar complaint against segregation was that it made African-Americans unfree.

### A. A Negative Conception of Liberty

The claim that historic segregation violated basic liberties will be most robust and have the widest appeal if it does not depend on an

<sup>8</sup> See Robert William Fogel, *Without Consent or Contract: The Rise and Fall of American Slavery* (New York: W. W. Norton, 1989), pp. 393–400 for a concise account of what was wrong with slavery. The first point in his moral indictment is that “slavery permitted one group of people to exercise unrestrained personal domination over another group of people” (p. 394).

<sup>9</sup> For legal and historical essays exploring this theme, see the symposium on “The Law of Freedom” in the *Chicago-Kent Law Review* 70 (1994): 325–800.

exotic or contentious conception of liberty. Accordingly, the conception of liberty that I will use in discussing segregation will be standard and largely “negative.”<sup>10</sup> It takes liberties to consist in the absence of impediments to action in specific areas. The areas of liberty that I will focus on are ones that are widely recognized as important or “basic.”<sup>11</sup> Unfreedom in some area, on this view, is having one’s choice and action in that area blocked by external barriers such as social or legal prohibitions, discrimination, and threats of harm or violence.<sup>12</sup> On this view of freedom, not having enough money to buy a trip to China is not a source of unfreedom, but being unable to buy such a trip because travel to China is legally forbidden or because one is black and travel agents refuse to sell tickets to blacks *is* a restriction of one’s freedom. On the negative view, freedom is concerned with some but not all of the things that limit a person’s power, opportunities, and actual abilities to act in certain ways.

There are, however, some “positive” elements in the conception of liberty that I will use. One is a claim against government to protect one’s basic liberties. Another element that might be considered “positive” is found in the fact that I will take freedom of politi-

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<sup>10</sup> On the contrast between negative and positive conceptions of liberty see Isaiah Berlin, *Two Concepts of Liberty* (Oxford: Oxford University Press, 1958); and Gerald MacCallum, “Negative and Positive Freedom,” *Philosophical Review* 76 (1965): 312–334.

<sup>11</sup> John Rawls takes respect for basic liberties to be the first requirement of social justice. See John Rawls, *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1971), and *Political Liberalism* (New York: Columbia University Press, 1993). See also James W. Nickel, “Rethinking Rawls’s Theory of Liberty and Rights,” *Chicago-Kent Law Review* 69 (1994): 763–785.

<sup>12</sup> In analyzing the liberty dimensions of historic and contemporary racial segregation I will focus on legal and social barriers to action and choice that are external and imposed by others. An alternative approach might emphasize internal barriers to action such as hopelessness, an inability to imagine feasible alternative actions and ways of living, dependency on welfare with a consequent lack of confidence in one’s ability to cope with the world of work, and aversion to facing possible discrimination and rejection. One might argue that many inner-city blacks suffer from these sorts of internal barriers to action as a result of racism, segregation, and discrimination, and that the unfreedom of many black Americans and its connection with segregation cannot be understood or combatted without taking these sorts of internal barriers into account. For a discussion of this sort of conception of liberty, see Nancy J. Hirschman, “Toward a Feminist Theory of Freedom,” *Political Theory* 24 (1996): 46–67.

cal participation to imply a duty of governments to offer citizens opportunities to vote in regular and meaningful elections.

It might be objected here that to give an adequate analysis of historic and contemporary segregation we need a stronger, more positive conception of liberty that equates unfreedom with powerlessness. When riots and violent confrontations with police occur in largely-black urban areas, as they recently did (November 1996) in St. Petersburg, Florida, community leaders who attempt to diagnose the causes of the violence often report that many black residents feel powerless. They feel trapped in a bad situation and unable to do much to escape it. Perhaps they are not literally powerless in the sense of being unable to do anything, but their effective abilities to act in important areas such as education, housing, and business are substantially lower than those of most whites. And these lower-than-average abilities to act are at least partially due to historic segregation and ongoing discrimination. Here one might follow Amartya Sen in defining equal freedom as equal functionings and capabilities.<sup>13</sup> But I will not take this approach for two reasons. One is that, as noted above, my argument will be of more general interest if it doesn't depend on a strong and controversial conception of freedom. The other is that this conception of freedom collapses the distinction between two valuable ideals: equality of basic liberties and equality of opportunity. I endorse both of these ideals, and will illustrate below some of the ways that they are linked, but I think that they are interestingly different and are better left separate so that they can make their distinctive contributions.

### *B. Unequal Liberties*

As I suggested in the introduction, a society could be criticized on liberty grounds if no one enjoys basic liberties, or if some people enjoy them while others don't. The latter criticism appeals to an ideal of *equal* basic liberties. My treatment of historic segregation will make both kinds of criticisms. It will say that segregation made everyone – that is, both blacks *and* whites – less free in important areas such as association. It will also criticize segregation for being a system of unequal liberties, for giving whites freedom in areas

<sup>13</sup> Amartya Sen, "Freedom Of Choice: Concept and Content," *European Economic Review* 32 (1988): 269–294.



where blacks were restrained. A liberty to do something is unequal if one group is free to do that thing and another isn't, or if one group has a much larger liberty in that area than the other.

Most people today who espouse liberty as a political ideal are in favor of equal basic liberties, i.e. liberties that all citizens enjoy in roughly the same measure or degree. But this was not true in 19th century America. Many whites valued liberty, but were not in favor of giving it fully to blacks. They favored, and ultimately imposed, a system of unequal freedom.

Real liberty is a matter of the genuine absence of certain barriers, not merely of laws saying that those barriers should be absent. And two persons or groups enjoy equal liberty when they both enjoy the actual absence of certain impediments to action, not merely the same prescriptions of liberty. Partisans of liberty promote legal prescriptions of liberty as a means to real liberty, but as with other means these legal prescriptions sometimes get confused with their end. So if the law proclaims equal liberty for whites and blacks, but only whites enjoy the freedom and have it protected by government, this is still unequal liberty. And if the law prohibits sexual relations between blacks and whites, but punishes blacks but rarely whites when interracial liaisons occur, this is also unequal liberty (or if you prefer, unequal *unfreedom*).

### *C. Segregation generally*

If we look at segregation as a whole, it substantially infringed freedom of association; freedom of movement and residence; free choice of occupation and other economic liberties; and liberties to vote and participate politically. It also created a scheme of unequal liberties in most of these areas. Although these liberties all receive constitutional recognition in the United States today, my arguments are not intended as arguments in constitutional law. They are rather arguments in political philosophy, or in the theory of human rights.<sup>14</sup>

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<sup>14</sup> All of the basic liberties discussed here are declared to be universal human rights in contemporary human rights documents. For example, the *International Covenant on Civil and Political Rights* (1966) treats freedom of association in article 22; freedom of movement and residence in article 12; free choice of occupation in article 8; and liberties to vote and participate politically in article 25. For an attempt to develop a philosophy of human rights, see James W. Nickel, *Making Sense of Human Rights* (Berkeley: University of California Press, 1987).

### 1. *Freedom of association*

Association with others takes many forms including friendship, love and sexual intimacy, family ties, the relations of neighbors and fellow citizens, religious affiliations, and all sorts of social, political, and commercial alliances.<sup>15</sup> People's interest in freedom of association is the interest in not having substantial barriers to entering, refraining from entering, and withdrawing from such relations.

Historic segregation severely limited the freedom of blacks and whites to associate across racial lines. It placed substantial social and legal barriers in the way of those who would form interracial friendships, love affairs, families, churches, schools, or community organizations. To prevent the formation of such relations it kept blacks and whites apart, putting them in separate neighborhoods, schools, churches, and occupational areas. When such associations formed in spite of these measures, they were subject to legal prohibition, as with interracial marriages, and to severe social sanctions including violence.

Keeping blacks from associating with whites was a key purpose of segregation. But segregation also limited the liberty of whites to associate with blacks. Most whites didn't want to associate with blacks, except perhaps on a business basis in some areas, but the relevance of this to liberties is small for two reasons. First, large populations are seldom uniform in their desires. Some whites did want to associate with African-Americans for purposes such as friendship, family relations,<sup>16</sup> religious evangelism, economic profit, and sexual relations. Second, liberties can be valuable even though only a few people desire to make use of them. For example, the liberty to leave one's historic place and take up residence elsewhere is valuable even when most people prefer to and actually do stay

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<sup>15</sup> On freedom of association see Kenneth Karst, "Paths to Belonging: The Constitution and Cultural Identity," *North Carolina Law Review* 64 (1986): 303–377; and Aviam Soifer, "'Toward a Generalized Notion of the Right to Form or Join an Association': An Essay for Tom Emerson," *Case Western Reserve Law Review* 38 (1988): 641–670.

<sup>16</sup> Recall *Loving v. Virginia*. 388 U.S. 1 (1967) (ruling unconstitutional Virginia's prohibition of interracial marriage). See also the account of interracial marriages in Mississippi in 1870–85 in Vernon Lane Wharton, "Jim Crow Laws and Miscegenation," in Joel Williamson, ed., *The Origins of Segregation* (Boston: D.C. Heath, 1968): 14–20, at p. 19.

put. In my opinion, segregation significantly infringed the freedom of association of both blacks and whites.

But segregation also created a system of unequal liberties in the area of association. Whites were far less likely to be punished, legally or socially, for associating with blacks than blacks were for associating with whites.

The denial of associative liberties had real costs to blacks because whites controlled most of the assets they needed in order to make educational and economic progress. By being blocked from free access to whites, blacks were thereby blocked from access to many of the assets that whites controlled. Thus, unequal liberties contributed greatly to unequal opportunities.

A possible objection to the analysis presented here is that a condemnation of segregation in terms of freedom of association doesn't take seriously enough the liberty to dissociate – which is surely an important part of freedom of association.<sup>17</sup> What about the liberty interests of those whites who didn't want to associate with blacks, and who didn't want their children to have opportunities to associate with blacks? It is clear that freedom of association leaves one free to refuse to be friends with, talk to, or remain located close to persons one finds distasteful for whatever reason. But it is an entirely different matter when one group uses the power of law and threats of social violence to keep another entire group away from it and its children. Freedom of association doesn't give a dominant group the right to confine an entire group in a separate social realm.

## 2. *Freedom of movement*

A person who is imprisoned or even under house arrest suffers greatly reduced abilities to act in a multitude of areas. Freedom of movement is the liberty to go – and stop – where one pleases within the limits of respect for the liberty and rights of others. The American system of apartheid, unlike the South African one, did not use internal passports and roadside checkpoints to monitor whether blacks were in, or traveling to, areas for which they had residence

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<sup>17</sup> On dissociation see Pamela J. Smith, "We are Not Sisters: African-American Women and the Freedom to Associate and Dissociate," *Tulane Law Review* 66 (1992): 1467–1515; and Robert W. McGee, "The Right to Not Associate: The Case for an Absolute Freedom of Negative Association," *UWLA Law Review* 23 (1992): 123–148.

permits. Segregation in the U.S. nevertheless substantially infringed freedom of movement because it prevented blacks from going – and stopping – where they pleased without fear of harassment, violence, or arrest. Segregation was a system of unequal liberties of movement. Blacks were expected to stay out of white areas unless they had white-authorized business in them, and some white towns forbade blacks to stay after sundown.

Further, the Jim Crow system inhibited the ability of blacks to travel by excluding them from the only available hotels and restaurants along public railroads and highways. Plessy presents us with a skewed picture of historic segregation since blacks were on the same train, albeit in separate cars. As long as blacks were on the same trains, they had the same opportunities for travel as whites – assuming they could afford the tickets. But in many areas there were completely separate systems of services, and the fact that blacks were almost always poorer and in some areas fewer than whites meant that the services available to them were sometimes very limited. Hotels, for example, didn't usually have separate areas within the same hotel for whites and blacks. The social space for hotels was not shared and segregated, as with trains, but was rather unshared and segregated. In cities with lots of blacks there were rooming houses and hotels for blacks, but along highways and in cities with few blacks, places to stay were often severely limited. In general, if people are restricted to the services and opportunities offered by their own communities, smaller and poorer groups will often face severely restricted options. This is one of the many links between the denial of basic liberties and the denial of equal opportunity.

### *3. Free choice of residence*

Residence is closely related to movement; it is the liberty to choose a new place as one's temporary or permanent home, along with the liberty to resolutely stay in one's native place if one wishes. As we just saw, during segregation blacks were unwelcome in many areas, especially if they showed any inclination to stay. African-Americans were expected to reside in their own neighborhoods, and if they moved it had to be from one black area to another. Discrimination in access to housing was – and continues to be – a major barrier to free choice of residence by blacks. Eventually, many blacks did succeed in moving to the north, midwest, and west. But when they arrived

housing discrimination usually restricted them to particular areas of town.

Segregation didn't much limit the liberty of whites to enter and stop in black areas, or to reside where they wished. The restrictions imposed on blacks' freedoms of movement and residence created a scheme of unequal liberties.

#### *4. Free choice of occupation and other economic liberties*

My main concern here is the freedom to choose and pursue an occupation, employment, or business. Related liberties include the freedom to hold and transfer property on equal terms with other citizens, and the freedom to pursue and enter into economic arrangements and enterprises on equal terms with other citizens. Under slavery occupational choice for blacks was almost totally absent. Slaves did whatever sort of labor was ordered by their masters, and they couldn't leave their jobs or try to find new ones. Emancipation gave blacks the liberty to choose their jobs or line of work, but their options were greatly limited by poverty, lack of education, and the fact that only a few areas of work were open to them. Initially, blacks were restricted to sharecropping, manual labor, and domestic service. Later, with industrialization, blacks had access to jobs in steel mills and factories, but were frequently restricted to certain job categories. As with discrimination in housing, job discrimination followed blacks as they moved north and west. Segregation violated free choice of occupation because it confined blacks to certain sorts of jobs through discrimination in education and hiring. It also restricted economic opportunities by limiting where blacks could go and stay, and by limiting associational opportunities that could lead to employment or business. Segregation limited the economic liberties of whites since it prevented them from employing blacks in occupational areas that were reserved for whites – and sometimes these restrictions had significant economic costs. But the main criticism here is in terms of unequal liberties. Segregation severely restricted free choice of occupation for blacks, while imposing no such restrictions on whites.

In this section and the previous one, I have assumed that people can be made unfree by discrimination. But is this plausible? If blacks are legally free to seek any job, for example, but are subject to job discrimination from a significant percentage of employers, does this

infringe their liberty to free choice of occupation? I think the answer is affirmative. When the members of a group face discrimination in hiring today, they typically don't face a uniform or monolithic policy. Some employers will evaluate their qualifications fairly and not discriminate; others will discriminate a little in the sense that they hold people from the group to a stricter standard of qualification; yet others will discriminate a lot but might be willing to hire people from the group in exceptional cases; and still others may be unwilling to hire people from the group under any circumstances. Because of this, discrimination isn't always an insuperable barrier to getting a job. Sometimes one can get around it by being very qualified, or by having the right connections, or through ingenuity. However, discrimination is still an impediment to liberty. But don't barriers have to be insuperable to be impediments to liberty? I don't think so. A legal prohibition of doing something backed by a substantial fine or penalty if one is caught and convicted is a paradigm of a barrier to liberty. Yet legal prohibitions are usually far from insuperable barriers to doing what is prohibited.

### 5. *Political liberties*

These include freedoms to vote in fair and meaningful elections, to petition government, to serve in public office, to engage in political speech, protest, organization, and assembly, and to register complaints of violations of law and use state and federal courts.<sup>18</sup> In most Southern states African-Americans were excluded from voting and other forms of political participation from roughly 1890 to 1965. Disfranchisement of blacks allowed whites to avoid living under the "rule" of blacks, and helped stabilize the Jim Crow system by preventing blacks from using their votes to protest segregation and inequality. Other rights of political participation were violated as well. In the South it was very dangerous for blacks to make political speeches, to assemble and protest, and to organize politically.<sup>19</sup>

Political liberties are the clearest example of how segregation created a system of unequal liberties. After 1990, whites had a monopoly

<sup>18</sup> See Christopher Waldrep, "Black Access to Law in Reconstruction: The Case of Warren County, Mississippi," *Chicago-Kent Law Review* 70 (1994): 583–624.

<sup>19</sup> See *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958) (rejecting as unconstitutional Alabama's demand for the membership lists of the state chapter of the NAACP).

on political power, and blacks had extremely limited political liberties. To use the analysis of social space presented in the first section, political activity was not even a shared but segregated area with different systems of political participation for blacks and whites.<sup>20</sup> Until the final decades of southern segregation, political activity was simply an area from which blacks were excluded.

#### *D. Plessy v. Ferguson*

Plessy's challenge was to just one small part of the Jim Crow system. He said that he shouldn't be subject to criminal penalties for refusing to sit in the black section of the train. The Louisiana statute requiring segregation on trains imposed a fine or imprisonment for sitting in the wrong section. It also penalized railway officials if they failed to administer the racial division. It is clear that this statute limited liberties; it used criminal penalties to require blacks and whites to sit in designated cars and to prohibit them from sitting together. But were the liberties sufficiently important ones, and was the restriction of those liberties sufficiently large?

It is clear that important liberties were restricted by segregation on trains. Freedom of association was limited by a scheme that required blacks and whites to stay apart while traveling on trains. Freedom of movement was limited by the fact that blacks who wished to travel by train had to submit to a humiliating system of segregated cars. And important economic liberties were limited by the fact that blacks could not work with, work for, or sell things to whites on trains because they could not enter the cars reserved for whites.

It might be argued, however, that the restrictions that train segregation imposed on these liberties were not very large, and hence that train segregation by itself can't be viewed as a significant infringement of basic liberties. Suppose that for safety reasons train passengers were required to sit in single-person "capsules" that would protect them in case of a train crash. This requirement would greatly restrict associational and economic opportunities on trains, but people would still have ample opportunities for association elsewhere, and thus we would probably conclude that this safety

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<sup>20</sup> The South African system of apartheid used shared but segregated systems of political participation by having a separate legislative branch for "coloreds."

requirement does not restrict associational opportunities to a significant degree.

One answer to this objection is that in evaluating small restrictions on liberty we should attend to their purposes. The purpose of a small restriction on liberty is relevant not only to seeing if there is a justification for the restriction, but also to understanding its meaning. A restriction on association intended to promote train safety may be less objectionable on liberty grounds than a restriction on association intended to restrict association between two groups. One of the main purposes of segregation was to restrict association between blacks and whites, and it did this in a multitude of areas.<sup>21</sup> Segregation kept blacks separate from whites in most spheres of life, and the beliefs of whites about blacks that made them demand such separation were profoundly insulting to blacks.<sup>22</sup> Another response is that blacks didn't have ample opportunities elsewhere for association with whites. Segregation greatly reduced associational opportunities between blacks and whites. It initiated the still ongoing social isolation of blacks.

#### *E. An objection*

Does the liberty diagnosis of segregation give an adequate explanation of how Jim Crow was mainly an injustice to blacks? An adequate diagnosis of what was wrong with segregation needs to explain its asymmetrical character: how it deeply wronged African-Americans while hurting whites to a much smaller degree. Yet under a liberty-oriented diagnosis, we see that many of the barriers imposed by segregation limited the liberties of both blacks *and* whites. Hence it seems doubtful that a liberty-oriented diagnosis of what was wrong with segregation yields an adequate account of the

<sup>21</sup> For a good discussion of the purposes that segregation served for both blacks and whites, see Joel Williamson, *After Slavery*, pp. 275–279.

<sup>22</sup> One of the most outrageous passages in the majority opinion in *Plessy* denies this:

We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.

163 U.S. 537 (1896), at p. 551.



asymmetrical character of segregation. Perhaps only a diagnosis in terms of inequality can do that.

There are a number of good responses available to this objection. First, the asymmetrical character of the injustices perpetuated by segregation can be at least partially accounted for by emphasizing that segregation was a system of *unequal* basic liberties. Of the five areas of liberty discussed above, in four of them the main complaint against segregation was that it created a system of unequal liberties (movement, residence, occupation, and political participation). Second, these unequal liberties resulted in inequality of opportunity. The same barriers that created unequal liberties also created unequal opportunities for movement, education, and employment. Although equal opportunity is not the same ideal, in my opinion, as the ideal of equal liberty, the two ideals do work in tandem to explain how segregation wronged African-Americans. Finally, the message sent by the imposition of a system of segregation and unequal basic liberties was deeply insulting to blacks and flattering to whites. Segregation was based on the belief that blacks, in contrast to whites, had negative characteristics that made them unworthy of equal basic liberties. As John Rawls has emphasized, denial of equal basic liberties to a person or group is deeply insulting and especially harmful to self-respect.<sup>23</sup> Segregation's unequal liberties were wrong not just in the greater restrictions they imposed on blacks, but also in the deep insult that they conveyed. As Joel Williamson put it:

Separation also facilitated the subordination of the inferior race by constantly reminding the Negro that he lived in a world in which the white man was dominant, and in which the non-white was steadfastly denied access to the higher caste. Further, the impression of Negro inferiority would be constantly re-enforced by relegating the baser element, whenever possible, to the use of inferior facilities.<sup>24</sup>

<sup>23</sup> Rawls is worth quoting on this point:

[S]elf-respect is most effectively encouraged and supported by the two principles of justice, . . . precisely because of the insistence on the equal basic liberties and the priority assigned them . . . The importance of self-respect is that it provides a secure sense of our own value, a firm conviction that our determinate conception of the good is worth carrying out. Without self-respect nothing may seem worth doing, and if some things have value for us, we may lack the will to pursue them.

"The Basic Liberties and Their Priority," *Political Liberalism*, p. 318.

<sup>24</sup> Joel Williamson, *After Slavery*, p. 276.

## III. CONTEMPORARY SEGREGATION AND LIBERTY

The United States is still in a segregated country three decades after the demise of legally authorized segregation. Separation between blacks and whites continues to be substantial in housing, where at least half of African-Americans still live in largely-black neighborhoods;<sup>25</sup> in schools, where housing segregation causes many African-American children to attend largely-black schools; in churches, where integration is extremely limited; and in social networks, where association between blacks and whites outside of the workplace is still limited.

Ongoing segregation is perpetuated by many factors. First, there is what we might call inertia, the adherence of both blacks and whites to patterns of living that were established during the Jim Crow era. In some cases we might describe this as loyalty, as when African-Americans continue to value and support their historic churches and colleges. But in many areas inertia is just a matter of people doing what they and their families have always done – and in the case of most whites that means keeping separate from blacks. Second, ongoing segregation is promoted by the on-average lower levels of income of blacks than whites, which make it harder for black families to move to new neighborhoods and to put their children in integrated private schools. Third, segregation is perpetuated by ongoing discrimination, especially in housing<sup>26</sup> and

<sup>25</sup> See Douglas S. Massey and Nancy A. Denton, *American Apartheid: Segregation and the Making of the Underclass* (Philadelphia: University of Pennsylvania Press, 1993).

<sup>26</sup> See Alex M. Johnson, Jr., “How Race and Poverty Intersect to Prevent Integration: Destabilizing Race as a Vehicle to Integrate Neighborhoods,” *University of Pennsylvania Law Review* **143** (1995): 1595–1658. Johnson suggests four causes of residential segregation: (1) “racism no doubt continues to exist and to cause whites to resist living with or around Blacks in integrated neighborhoods” (p. 1609); (2) “the outward flight of whites to suburbia . . . is clearly a factor in maintaining residential segregation patterns in an era in which overt racism has diminished and lost favor” (p. 1611); (3) “the existence of government and private lender policies that discriminate against Blacks in the residential housing market in such a way as to restrict Blacks’ choice of housing locales” (p. 1611); and (4) “poverty” (p. 1614). See also Michael H. Schill and Susan M. Wachter, “The Spatial Bias of Federal Housing Law and Policy: Concentrated Poverty in Urban America,” *University of Pennsylvania Law Review* **143** (1995): 1285–1342.

employment.<sup>27</sup> Although such discrimination is illegal, there is no doubt whatever that it continues at a substantial level. In housing, African-Americans face discrimination when they try to rent as well as when they try to buy. Realtors often don't take blacks to see housing that is for rent or sale in white areas, and landlords often refuse to rent to blacks. In some all-white neighborhoods, blacks still face hostility and even violence from their new neighbors when they move in. A fourth factor follows from the third. Experiencing discrimination and hostility is extremely unpleasant, and a psychological aversion to facing it yet again surely causes many blacks to remain within largely-black neighborhoods and institutions.

Segregation is still supported by restrictions on basic liberties. Legally-authorized segregation and discrimination are gone, so there are no longer legal barriers to free association, movement, residence, or choice of employment. But there are still social strong barriers in these areas. These include ongoing discrimination in housing and employment, and violence against blacks who attempt to integrate white neighborhoods. Ongoing segregation has components that continue to infringe the basic liberties of African-Americans. Today's segregation is often described as "de facto" rather than "de jure," but this is misleading if it is taken to mean that segregation is no longer actively supported by the discrimination. And the active maintenance of barriers in housing and employment still delivers the insulting message that whites believe that African-Americans are unworthy of association with them and their children.

#### IV. CONCLUSION

Even if we stick with a largely negative conception of liberty, as I have in my analysis, we find that both historic and contemporary segregation involve significant infringements of equal basic liberties. The ideal of equal basic liberties supports a powerful indictment of

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<sup>27</sup> On employment discrimination and stereotypes see Joleen Kirschenman and Kathryn M. Neckerman, " 'We'd Love to Hire Them, but . . .': The Meaning of Race for Employers," in Christopher Jencks and Paul E. Peterson, eds. *The Urban Underclass* (1991), Washington, D.C.: Brookings Institution, 1991, pp. 203–232.

both historic and contemporary segregation. When applied to racial segregation in the United States, the rhetoric of liberty has real substance.

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