

## RESOLUTION 06-04-2017 (REVISED)

### DIGEST

Prisons and Civil Rights: Prevention of Disparate Treatment Based on a Protected Class  
Amends Penal Code section 2600 to prevent disparate treatment of prisoners based solely on one's status as a member of a protected class.

### RESOLUTIONS COMMITTEE ANALYSIS

#### History:

No similar resolutions found.

#### Reasons:

This resolution amends Penal Code section 2600 to prevent disparate treatment of prisoners based solely on one's status as a member of a protected class. This resolution should be approved in principle because racial and ethnic classifications of prisoners should be subject to strict scrutiny.

Penal Code section 2600 provides that people in custody in state prisons and county jails pursuant to realignment may be "deprived of such rights, and only such rights, as is reasonably related to legitimate penological interests." (Pen. Code, § 2600, subd. (a).) Government Code section 11135 provides that the state may not discriminate on the basis of "sex, race, color, religion, ancestry, national origin, ethnic group identification . . . or sexual orientation. . ." (Gov. Code, § 11135, subd. (a).) However, California's Department of Corrections and Rehabilitation (CDCR) has a longstanding practice of segregating inmates and imposing discipline on the basis of race or ethnicity, without considering whether a particular inmate is violent, broke prison rules, etc. The CDCR claims the segregation is necessary because of gangs and interracial violence but it does not independently evaluate each prisoner's contribution to the problem causing the segregation or discipline, claiming it is too labor intensive and expensive to do so.

In 2013 the Court of Appeal determined that the CDCR's practice of segregating inmates or imposing discipline, loss of privileges, etc., solely on the basis of race, ethnicity, and national origin because of an inmate's perceived affiliation with a racial group violates the United States and California Constitution. (In re Morales (2013) 212 Cal.App.4th 1410, 1427.) The Court of Appeal held that if the CDCR wants to classify prisoners on the basis of race, the classifications and restrictions must survive strict scrutiny, i.e. they must narrowly tailor the classifications and restrictions and articulate a compelling government interest for doing so. (Id. at 1424.) This resolution codifies the holding in the court decision and ensures that prisoners' civil rights will be honored.

The Resolutions Committee initially recommended disapproval of this resolution. The full Conference voted to approve.

### TEXT OF RESOLUTION

**RESOLVED** that the Conference of California Bar Associations recommends that legislation be

sponsored to amend Penal Code section 2600 to read as follows:

1 § 2600

2 (a) A person sentenced to imprisonment in a state prison or to imprisonment pursuant to  
3 subdivision (h) of Section 1170 may during that period of confinement be deprived of such  
4 rights, and only such rights, as is reasonably related to legitimate penological interests.

5 (b) Nothing in this section shall be construed to overturn the decision in *Thor v. Superior*  
6 Court, 5 Cal. 4th 725.

7 (c) A person sentenced to imprisonment in a state prison or pursuant to subdivision (h) of  
8 Section 1170 shall not be deprived of any rights solely on any of the protected bases under  
9 Government Code section 11135.

(Proposed new language underlined; language to be deleted stricken)

**PROPONENT:** Bay Area Lawyers for Individual Freedom

### **STATEMENT OF REASONS**

The Problem: Penal Code section 2600 allows those imprisoned to be denied certain rights if they are “reasonably related to legitimate penological interests” applying the *Turner v. Safley* rational basis standard of review to determine which rights prisoners may be denied. There is no exception provided in the penal code for protected civil rights, which require a higher level of scrutiny than the one applied in *Turner* and the California Penal Code.

In men’s prisons across California, colored signs hang above cell doors: blue for black inmates, white for white, red, green or pink for Hispanic, etc. On any given day, the color of a sign could mean the difference between a prisoner exercising or being confined to their cell. When prisoners attack guards or other inmates, California allows its corrections officers to restrict all prisoners of that same race or ethnicity to prevent further violence. California is the only state known to use race-based lockdowns. State and federal courts have ruled against the practice multiple times. Managing inmates on the basis of ethnicity is counterproductive, and instead increases hostilities among prisoners (*In re Morales*, 212 Cal.App.4th 1410 (2013)).

California prisoners also continue to be discriminated against solely based on their “sex”, “gender identity”, “gender expression” and “sexual orientation”. Lesbian, gay, bisexual, transgender and intersex individuals continue to be placed in isolated units and in solitary confinement solely based on their sexual orientation, gender expression and gender identity, where they are often denied opportunities to work and program. Transgender prisoners in California are housed in facilities for men or women solely based on their genitalia, which places them at extreme risk of sexual assault, particularly transgender women housed in facilities with men. Furthermore, transgender people are forced to undergo strip searches by law enforcement of a different gender, which too often leads to sexual harassment and assault.

California’s penal systems use of protected classifications to discriminate against prisoners has devastating and dangerous consequences. These practices make prisons more dangerous, strip people of their Constitutional rights without due process and run counter to the penological

purposes claimed to support them.

The Solution: This resolution would make it clear that prisons can no longer solely use protected bases to discriminate and ensures California and federal civil rights nondiscrimination laws extend to our penal institutions. In *Johnson v. California et al.*, the U.S. Supreme Court held a heightened level of scrutiny applies under the Fourteenth Amendment Equal Protection Clause when discriminating against prisoners. The Court rejected the State's arguments that the standard set forth in *Turner* applied to a protected class. Even the Court in *Turner* acknowledged the difference between the standard of review when it came to Constitutional protections. "Prison walls do not form a barrier separating prison inmates from the protections of the Constitution." "[P]risoners retain the constitutional right to petition the government for the redress of grievances [citation]; they are protected against invidious racial discrimination by the Equal Protection Clause of the Fourteenth Amendment [citation]; and they enjoy the protections of due process."

#### **IMPACT STATEMENT**

The resolution does not affect any other law, statute or rule other than those expressly identified.

#### **CURRENT OR PRIOR RELATED LEGISLATION**

None known

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**RESPONSIBLE FLOOR DELEGATE:** Jennifer Orthwein

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### **COUNTERARGUMENTS AND STATE BAR SECTION COMMENTS**

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#### **BAR ASSOCIATION OF NORTHERN SAN DIEGO COUNTY**

We have concerns as to the germaneness of this resolution. In our view, the internal management of prisons should be left to the professionals. There are legitimate reasons for the policies of which the proponent complains, including prevention of riots, suppression of security threat groups, and inmate safety.