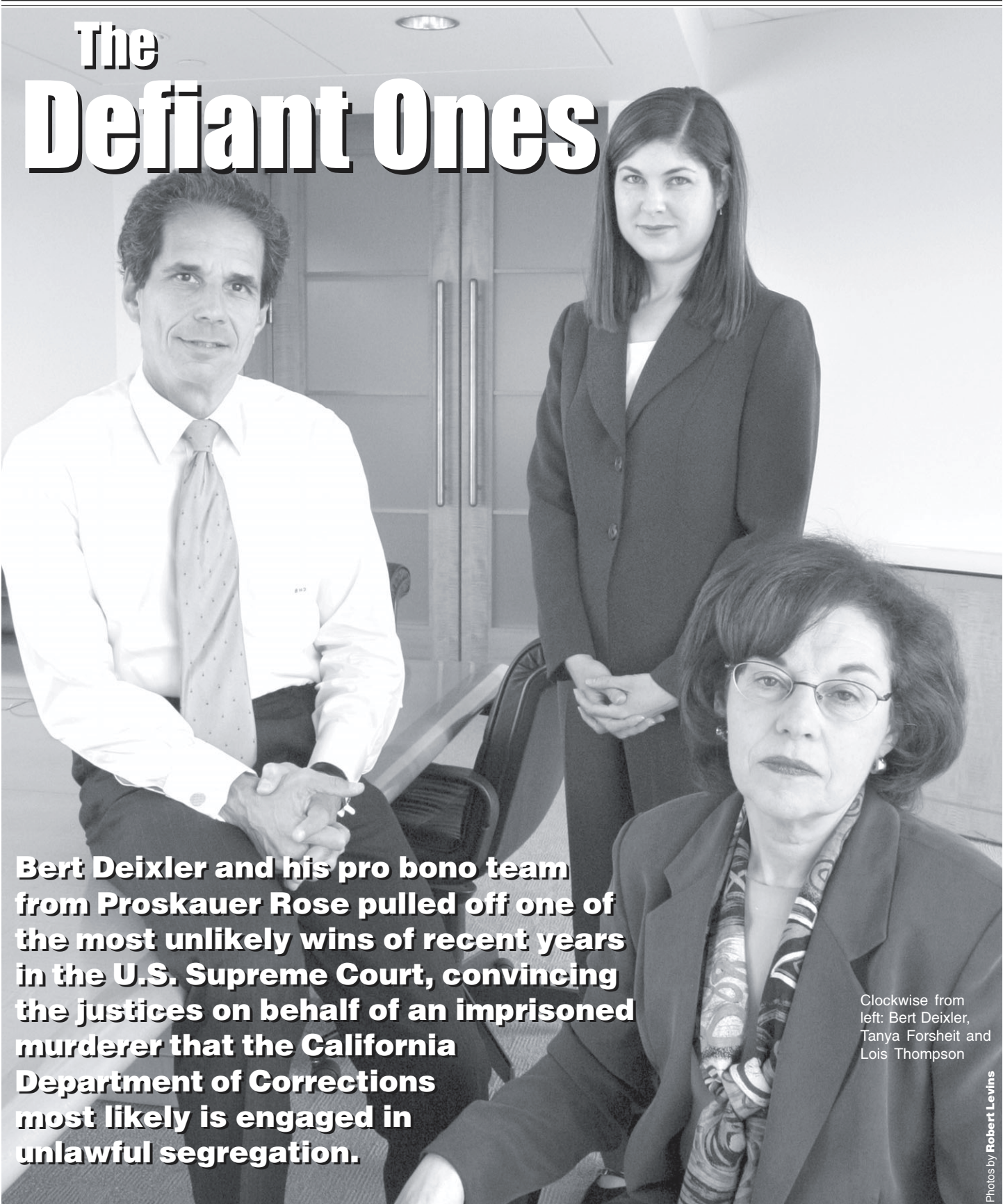


EXTRA

Trials, transactions
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Supplement to the Los Angeles Daily Journal
and San Francisco Daily Journal

The Defiant Ones



Bert Deixler and his pro bono team from Proskauer Rose pulled off one of the most unlikely wins of recent years in the U.S. Supreme Court, convincing the justices on behalf of an imprisoned murderer that the California Department of Corrections most likely is engaged in unlawful segregation.

Clockwise from
left: Bert Deixler,
Tanya Forsheit and
Lois Thompson

Johnson v. California

For the California Department of Corrections to continue to segregate prisoners by race, it will need to convince a federal court of a compelling state interest in doing so. It also will need to beat veteran litigator Bert Deixler and a first-rate pro bono team from Proskauer Rose.

By Adrianna Khoo

The last thing Bert Deixler wants is to be singled out as the hero who integrated California's prison system.

He'd rather see the credit go to the Proskauer Rose team who pro bono took on the cause of an African-American inmate who complained that racial segregation is alive and well behind the bars of the state's 32 prisons.

The group took on Garrison S. Johnson as their client for a very simple reason.

"It's what attorneys are supposed to do. Here we are at this enormous, successful firm, and we're asked by a federal judge to take on a meritorious case," Deixler, the Los Angeles-based lead attorney, says.

In the seven years before Deixler was appointed, Johnson endured repeated segregation, but no one would listen to his complaint. Convicted of murder and other crimes, he was sent to Folsom State Prison in 1987, then transferred six times.

Each time, he was celled solely with blacks, despite an overall prison population that is today 37 percent Hispanic, 29 percent white, 29 percent black and 6 percent defined "other."

"Inmates are housed in a two-man cell based on their ethnicity, which provokes racial tension and riots among different

ethnic groups within California's prison systems," Johnson says in his first handwritten complaint to the Central District Court Jan. 12, 1995.

"It is alleged that due to the racial segregation by the Department of Corrections in its prison facilities, plaintiff is afraid for his life. ... That he may be hurt or knifed and even killed if the [director] is allowed to continue letting his subordinates practice racial segregation," he wrote.

For five years, Johnson battled the system alone, claiming the policy violated his equal-protection rights. The state Department of Corrections defended its unwritten policy of segregating male inmates by race in what are called "inmate reception centers" whenever they are transferred to a new prison.

The department says the state has the nation's highest population of prison gang members. A 2002 study by the Criminal Justice Institute agrees. Department officials claim segregation keeps inmates from attacking one another.

"Where they came from and race are the two driving factors behind gang activity," state Youth and Adult Correctional Agency spokesman JP Tremblay says. "Officers have a responsibility to house inmates in a safe way.

"For example," Tremblay says, "we wouldn't necessarily take a black inmate and house him with a white inmate who has all the characterizations of a skinhead until you know for sure that he is not a gang member."

A federal judge dismissed Johnson's pro se suit for failure to state a claim, which was reversed by the 9th U.S. Circuit Court of Appeals. The court reinstated his suit and remanded it to U.S. District Judge Terry J. Hatter who appointed Deixler to represent Johnson.

The lawyer assembled a nationwide team including partner Lois Thompson and associate Tanya Forsheit in Los Angeles, associate Lee Crawford of Washington, D.C., and partner Charles Sims in New York.

Deixler saw the segregation policy as a naive attempt to judge a book by its cover.

"Can you look at a person's skin color and say, 'Aha, this person presents a prospect for violence?' That's the California standard," Deixler says. "The government is acting on something we know is an improper basis for making judgments, unconstitutional and obviously terribly charged in light of the history of the country."

Hatter dismissed the suit, finding that the government had qualified immunity. That

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decision was upheld by the 9th Circuit, which agreed that the constitutionality of the state's segregation policy should be judged under a deferential standard.

On Feb. 23, the U.S. Supreme Court rendered its decision, overturning by a vote of 5-3 the 9th Circuit's holding. (The chief justice did not participate.)

In *Johnson v. California*, 2005 DJDAR 2118 (U.S. Sct. Feb. 23, 2005), the high court found that the segregation policy treads a fine line between security and equality and that, when the two conflict without more, security must yield. And the court affirmed that any use of racial segregation is automatically suspect.

"When government officials are permitted to use race as a proxy for gang membership and violence without demonstrating a compelling government interest and proving that their means are narrowly tailored, society as a whole suffers," Justice Sandra Day O'Connor wrote for the majority.

The court ordered the Corrections Department to prove the segregation policy is necessary to serve a compelling state interest under the strict-scrutiny test.

Not a bad result for a group of attorneys arguing their first case at the nation's highest court.

"It's the first time and probably the last," Deixler says of his high-court appearance. "It was just thrilling. There's nothing more exciting than for a lawyer to argue a civil rights case before a United States Supreme Court."

Deixler's client, meanwhile, sits in Corcoran State Prison near Fresno, where he will be eligible for parole in 2013.

Johnson, 40, had bouts with authorities throughout his life, landing him in juvenile facilities until, at 22, he received a life sentence for murder, robbery and assault with a deadly weapon.

He was sent to Folsom State Prison where, he wrote in his original complaint, he began to "suffer a great deal of mental and psychological duress due to racial segregation and discrimination."

Though the Supreme Court did not rule on the constitutionality of the segregation policy, experts say the strict-scrutiny finding will make it very difficult for the Corrections Department to prevail.

The test requires the department to prove that racial segregation is narrowly tailored only to achieve prison safety and that no other method will keep the prison operating securely.

"There is a time when segregation



Photos by Robert Levins

"The government is acting on something we know is an improper basis for making judgments, unconstitutional and obviously terrible charged in light of the history of the country," says Bert Deixler of Proskauer Rose, of his fight to end racial segregation in California's 32 state prisons.

benefits prison race riots or the behavior of particular inmates, but routine segregation doesn't meet strict scrutiny," says Erwin Chemerinsky, a Duke University law professor and constitutional rights expert.

Although it is studying its options, the state Department of Corrections claims it's a different world behind prison walls — one that begs for a different set of rules. In his dissent, Justice Clarence Thomas agreed.

"The Constitution has always demanded less behind prison walls," Thomas wrote.

Celling inmates according to race during what's called the "reception period" is not an attempt to discriminate against one group or another, Tremblay explains, but just one of many safety precautions factored into housing situations.

The reception period is an information-gathering period that lasts 60 days, during which new inmates are evaluated for health, education, gang affiliation, criminal history, escape history and other facts. During that time, they are housed with inmates of their own race.

Nathan Barankin, spokesman for the state attorney general, referred questions to the state Department of Corrections.

State Senior Assistant Attorney General Frances Grunder argued the case at the high court.

"California was ground zero for prison gangs, and it is the state where major gangs

originated. That was the theme of our arguments in the lower courts," Bruce Slavin, general counsel for the Youth and Adult Correctional Agency says of the segregation policy.

After the reception period, prisoners can live in racially mixed dormitories and single or double cells of various security levels, according to Tremblay.

But, if an inmate proves well-behaved and needs less security or proves to be more violent to others and needs maximum security, he may be transferred to a more appropriate prison.

Each time an inmate is transferred, the reception process with its segregation policy is repeated.

The segregation approach has been around for at least 29 years in the state, though nobody knows exactly when or why it started, Deixler says.

Making the odds even more unlikely that the Corrections Department can pass the strict-scrutiny test is the fact that California is the only state now known to segregate by race, according to National Major Gang Task Force Executive Director Edward Cohn.

Headquartered in Indianapolis, the task force networks with law enforcement to collect information and train officers about gangs nationwide.

"Other states have not found the need to have this automatic policy," Forsheit says. "They may use race as a factor in housing inmates, but it is not the determinative factor."

California prison administrators say they have relied on their experiences and best judgment to house inmates. The Department of Corrections did not have to provide data to the courts to justify its past practices and does not keep racial violence records, according to Slavin.

"If the case moves forward just on the injunctive relief, we'll have to consider what evidence is out there," he says. "Certainly, we'll look at whether we even believe we can meet that standard. We've not had to answer to that before. We'll examine the facts and dig a little deeper."

Deixler says it is "shocking" that the state doesn't keep records of racial violence in an environment with such allegedly incredible racial tensions.

"The absence of scholarship is amazing in the perfect environment to study racial violence," he says. "We've asked for records in discovery, and if someone has them, they're certainly not talking about it."

The complaints of racial segregation are just the tip of the iceberg when it comes to prison mismanagement, according to Don Specter, executive director of the Prison Law Office, a San Rafael nonprofit that represents prisoners in civil rights cases against the state.

"The lawsuit is just another symptom of a prison system which is not being managed properly and has huge problems: everything from racial segregation, disability discrimination, excessive use of force, inadequate medical care," Specter says of a barrage of pending lawsuits. "The system just is not functioning as it should."

U.S. District Judge Thelton Henderson in San Francisco even threatened last year to take over the troubled prison system.

And, Specter forecasts, there is no way the Department of Corrections will be able legally to use race as the most important or sole determinative factor in housing.

"If you're [in prison], your constitutional rights don't matter much, but that's not to say that you shouldn't have to meet a very high standard that there's a reason to use racial stereotypes to segregate people, especially if other states have proven they don't need segregation to run safe prisons," Specter says.

Texas, which like California has 160,000 inmates, began racially integrating its prison system in 1977 after a black inmate, Allen Lamar, alleged that the Texas Department of Criminal Justice-institutional division violated his civil rights by operating permanently segregated housing facilities. *Lamar v. Coffield*, 72-H-1393 (S.D. Tex. 1977).

Texas successfully completed its integration process in 1991, according to Chad Trulson, an assistant professor of criminal justice at the University of North



'The instances in which a policy has survived strict scrutiny are virtually nil.'

— Lee Crawford
Proskauer Rose

Texas. The state no longer temporarily or permanently segregates inmates.

Trulson's study of violent incidents between prisoners from 1991 to 1999, "The Caged Melting Pot: Toward an Understanding of the Consequences of Desegregation in Prisons," shows that prison violence did not increase after Texas cells were integrated.

In 10 years, Texas officials documented 40,000 fights; of those, only 1,691 were determined to be racially motivated, and only 333 of those were among integrated cell partners.

"Equal status in cells must be promoted," Trulson says his study shows. "We must match inmates on rational objective criteria such as criminal sophistication, aggressive or passive tendencies, etc. as best as possible without regard to race."

Today, 3,078 inmates in California are affiliated with prison-gang activity, according to state Department of Corrections spokeswoman Terry Thornton.

Of those inmates, 803 are known gang members, 900 "associates" are known to have participated in gang activity of some kind, 325 are considered inactive members and 1,050 are known as "gang dropouts."

"We have a particularly different set of problems," Slavin says of the state's

segregation policy.

He adds that the Corrections Department is not opposed to moving toward using alternate methods to determine housing.

Prison administrators are looking into linking county jails' databases with state prison databases so that information on an inmate's criminal, escape or gang history could be accessed at any facility, according to Tremblay.

"We have standards, but with 58 counties, we have some inconsistencies," he says. "We are trying to see if there's a way we can set up a pilot project where we can see that reception process done at the county level so we could avoid redundancy."

Under court order, Texas corrections officials kept records of its integration process.

California, on the other hand, has not done any specific studies on prison violence. But state prison administrators say they have observed racial self-segregation in the prison yards.

Correctional Officer Brian Parriott of Wasco State Prison says that the prisoners, not prison officials, create their own "prison politics" and racial boundaries.

"My experience with the Department of Corrections as a whole is that, by placing different races together, there have been problems," Parriott says. "In an inmate's view, if I'm a white inmate placed in a black inmate's cell, other whites will be saying you cannot be housed with that individual."

Even between Hispanics of different gangs, Parriott says, "if they see one another, they are ordered to immediately fight."

Celling inmates by race leaves it to inmates to either request a cellmate of another race or let the state choose an inmate of the same race for their protection, according to Parriott.

"Do we want people telling us who we have to live with? Most of the time, we get a request, 'I only want to be housed with these types of gang members or this race.'"

State Sen. Gloria Romero, D-Los Angeles, says she doesn't buy arguments of prisons being overrun by gangs as any moral justification for segregation.

Romero held a senate hearing in February to determine whether prisons unlawfully segregate. She may introduce legislation to prohibit the practice.

"We are out of sync with 49 other states. I believe it's a morally wrong and constitutionally unsound policy," Romero says. "If we have moved to integrate our schools, our cities and the rest of society, we should be able to integrate our prisons."

Utah has the highest percentage of street and prison gang members combined in its system, at 23.2 percent, according to the Criminal Justice Institute's 2002 study.

But it never uses racial segregation to

house prisoners, Utah Department of Corrections spokesman Jack Ford says.

Though California had the highest total number of street and prison gang members in its prisons, with 9,546, that amounts to just 6.3 percent of the total inmate population.

Utah's street and prison gang members total 1,597, of which 337 inmates were identified as active prison gang members and 1,260 showed signs of active street gang membership. Seventeen states tallied a higher percentage of gang members than California in their inmate populations.

"When you're the only ones, you start to wonder," Deixler says of California's segregation policy.

Ford says Utah prisons use "classification segregation" rather than "racial segregation." Inmates are classified by their potential threat level to each other as assessed by their crime and intake evaluations through the Adult Inmate Management System, according to Ford.

"A weak inmate," such as a child molester, will likely be preyed upon by others and is classified as a "sigma," Ford says. "Omegas" are those likely to stick up for themselves but who won't prey on others. And "kappas," which make up 75 percent of the prison, are the most aggressive, who will "take advantage of an old man, saying, 'You're going to shine my shoes or get the living shit kicked out of you,'" Ford says.

Utah prison officials identify gang members among new inmates by looking them up in a national gang database, observing tattoos or accepting the inmates' statements of membership. Gang members are immediately separated into a different housing structure, with the "ringleaders" placed in maximum security.

"They [take recreation time] alone. We never have two out at a time. We only let them out one hour every other day," Ford says.

While Ford admits that Utah's approach creates de facto segregation to some extent, he says it's the trade-off for maintaining prison safety.

"We're smart enough not to aggravate the situation," Ford says. "And remember, it's probably only 20-to-25 percent of the population. With everyone else, we put whites and blacks together."

New inmates who are not identified as gang members are simply mixed in with everyone else. They remain in a mixed population unless prison administrators observe them associating only with gang members, orchestrating racial fights or carving new tattoos on themselves, which officers check for every week.

In California, it isn't difficult to point out a gang member, who wears his affiliation as a symbol of pride, Deixler says.

"Experts and longtime prison officials can tell from a distance if someone is in a gang just from the way they wear their hair, the color of their clothes, whether they sign a form with a red pen or a blue pen, who their friends are, who their associates are, who their crime partner was, what the nature of the crime was," Deixler says. "You don't have to be Dick Tracy to figure this out."

Los Angeles Police Department spokeswoman Kathy Simpson, an 18-year veteran police officer in the South Los Angeles area, says her work in the field convinced her of the need for segregation.

Prisoners self-segregate in recreation yards, cafeterias and housing just like street gang members self-segregate by race and territory outside of prison to steer away from enemies or lean on their group's protection, according to Simpson.

"Let's say if you were trying to go from one area to another. I've had gang members literally cry in my back seat, begging me, 'Please don't take me over there,' because if you did, there would be bloodshed," Simpson says of her personal experience, though she does not speak on behalf of the state prison or Police Department. "And they will tell you when they go to prison what gang they are from because they don't want to be mixed up in the wrong place."

"Ten times out of 10, they will thank you," she says.

"Gangs are all about territory and about dealing drugs and bank robberies in their territory," Simpson says. "Segregation is a bad word. It's about being able to function."

Specter says that, despite such rationales, any use of segregation won't stand up in court.

"Gang is a label that means you're a high-risk prisoner. There's no question that officials have the right to classify inmates based on risk," he says. "Whether they can classify them on the label of race is a different story. For example, not all Mexicans are members of prison gangs and need to be segregated."

In rejecting Johnson's case, U.S. District Judge Kim McLane Wardlaw and later the 9th U.S. Circuit Court of Appeals accepted prison officials' best judgment on how to maintain prison safety.

Specifically, they cited the 1987 U.S. Supreme Court decision in *Turner v. Safley*, 482 U.S. 78 (1987), which prohibited correspondence between immediate family members who were inmates at different institutions and marriage between inmates in order to maintain prison safety.

"Applying *Turner*, the courts held that Johnson had the burden of refuting the 'common sense connection' between the policy and prison violence though this was a 'close case,'" Justice Sandra Day O'Connor wrote of the 9th Circuit's 2000 decision.

But Deixler said that such prohibitions,

aimed at preventing correspondence on how to break out of prison or to preventing disputes over extramarital affairs between prisoners, were a far different matter than the segregation policy.

The Supreme Court agreed with Deixler, rejecting *Turner's* application.

"The Court has never applied the *Turner* standard, which asks whether a regulation that burdens prisoners' fundamental rights is 'reasonably related' to 'legitimate penological interests,'" O'Connor wrote.

"The right not to be discriminated against based on one's race is not susceptible to *Turner's* logic," she wrote, "because it is not a right that need necessarily be compromised for the sake of proper prison administration."

Gang leaders in Utah's prison system can earn their way into a transitional medium-security unit, where they are able to get an hour of recreation time every day with other inmates. The medium-security gang facility houses 144 people in cells among four wards.

"We have a positive-behavior rewards system. When one person acts up, the whole section loses visiting privileges that week," no matter who fights or whether that fight is related to race or any other matter, according to Ford.

Cohn has seen similar programs work in other states.

"If they fight or steal or whatever they do, you can hold them accountable on an individual basis, and desegregation absolutely can work," Cohn, a former Indiana Department of Corrections commissioner, says.

But neither Cohn nor Ford criticizes California's methods, taking into consideration that California prison staff have to deal with the largest total inmate population in the world: 162,000, compared to Utah's 6,000.

"Numbers dictate sometimes," Cohn says.

But California's prison system may be able to take a page from the Los Angeles County jails, which, like Utah's prisons, house inmates using criminal databases and evaluations during a 24-hour intake process, according to Los Angeles County jails chief Chuck Jackson.

Los Angeles County's nine jails do not use racial segregation to house people.

Jackson says the county keeps a daily track of a racial breakdown of the jail population and attempts to balance the races in housing situations to reflect those demographics. On March 11, for example, Los Angeles County jails housed 17,299 prisoners: 34 percent of those were black; 45 percent were Hispanic; 17 percent were white; Filipino, Chinese, Japanese and Pacific Islanders comprised less than 1 percent; the rest were "other," according to county jail data.

"For example, if the north county jail has 28 percent African-Americans, we try to make it so that each dorm has 28 percent African-Americans," when placing new people, Jackson says. "You don't want one group to gain a stronghold over another."

The Department of Corrections says it's reviewing Johnson's case.

The Supreme Court is expected to issue its official ruling within the coming weeks and send the case back to the 9th Circuit, according to Forsheit.

The 9th Circuit will decide the timeline for further proceedings and whether it will evaluate Johnson's case with strict scrutiny or leave that evaluation to a district court.

The state Department of Corrections has no deadline to decide whether it will take its case forward at this time, Forsheit says. If it does decide to move forward, the 9th Circuit will determine when the proceedings will occur, at which time the strict-scrutiny test will be applied, according to Deixler.

The state attorney general is responsible for defending the Department of Corrections.

Crawford is confident the state will have to change its housing approach.

"The instances in which a policy has survived strict scrutiny are virtually nil," she says.

In fact, only two cases concerning race have survived the strict-scrutiny test.

In *Korematsu v. U.S.*, 322 U.S. 214 (1944), the Supreme Court held that sending Japanese-Americans to internment camps was lawful because it was in the interest of national security during war times.

"*Korematsu* was unbelievably criticized but has never been overturned. It was one of the great shames of American history," Deixler says. "God knows [how] the notion that the nation was at war ... made the Supreme Court say that it was OK to take American citizens and put them in concentration camps. But judges are not going to rely on it."

The only other case to survive the strict

scrutiny test was *Grutter v. Bollinger*, 539 U.S. 306 (2003), in which the Supreme Court ruled against plaintiffs who opposed the University of Michigan law school's affirmative action admissions process.

The Supreme Court ruled that affirmative action was permissible in the law school because it was narrowly tailored to that department but that it could not apply to the university's general population.

"The prison policy is so broad and is over such a long period of time that it cannot survive the strict-scrutiny test that it's narrowly tailored to serve a compelling state interest," Crawford says.

Crawford says she's not disappointed that the Supreme Court remanded the case rather than ruling segregation unconstitutional on the spot.

"I'm pleasantly surprised because implicit in their legal conclusion is that it's unconstitutional," she says, pointing to the history of cases that failed the strict-scrutiny test. "By reaching the legal question of whether *Turner* or strict scrutiny should be applied, they went for a more-expansive conclusion."

As the junior associate on the case, Crawford, 36, feels lucky to have been involved in a Supreme Court case so early in her career.

"It's like the Super Bowl in many ways, just to have the most important audience you could ever have," Crawford says. "Whether you win or lose, what you do affects the application of the law, and the ramifications of that are huge. I'm completely spoiled to have this opportunity so early in my career."

The case has also taught her the value of pro bono involvement — one of the reasons Deixler was appointed.

"Bert had a long history of picking up pro bono cases, and he was invited to sign onto this case," Crawford says. "By that point, Bert had practiced with private firms, with the U.S. attorney's office, been before lots of district court judges, and so there was familiarity with him there."

Deixler, who has been involved in public-interest work for 29 years, including his

membership on the Federal Civil Rights Panel of the Central District of California, his leadership on the Los Angeles Legal Aid Foundation's board of governors and his work as counsel to various Los Angeles police and ethics commissions, remains modest about his involvement in the case.

"[I] happened to be on a civil rights panel, and the judge must have gotten down to [my] name on the list," he says.

To date, Proskauer Rose has spent \$1 million in billing hours, deposition transcripts, document requests and other expenses since taking charge of the case, Deixler says.

He says those numbers will rise if the case continues, but he cannot predict how much the next phase of the case will cost.

Proskauer Rose managing partner Martin Zohn says taking on Johnson's case was an easy choice for his firm, which has been committed to pro bono work since 1875.

Proskauer Rose attorneys donated 30,000 hours to pro bono work in 2004, with 70 percent of the firm's lawyers averaging 50 hours each.

"What makes the news is the landmark case, and it's great, but the real story is that it was a case that Bert and Tanya and the others kept at until they produced a result for the client," Zohn, an executive board member of Public Counsel says. "What we as a firm are most proud of is that they are doing the same thing for so many other clients that nobody will hear about and the press will never pick up the story."

The Proskauer team remains confident that the long battle for Johnson will pay off.

Deixler relies on the lessons of history to support his confidence that claiming segregation is necessary to maintain safety anywhere cannot survive.

"That was the argument that was made to the Supreme Court when Alabama presented its segregated prison system, when Louisiana didn't want to integrate its parks, when North Carolina didn't want blacks at the same lunch counters as whites, when there was a separate bussing system," he says. "That part of America does not exist anymore."