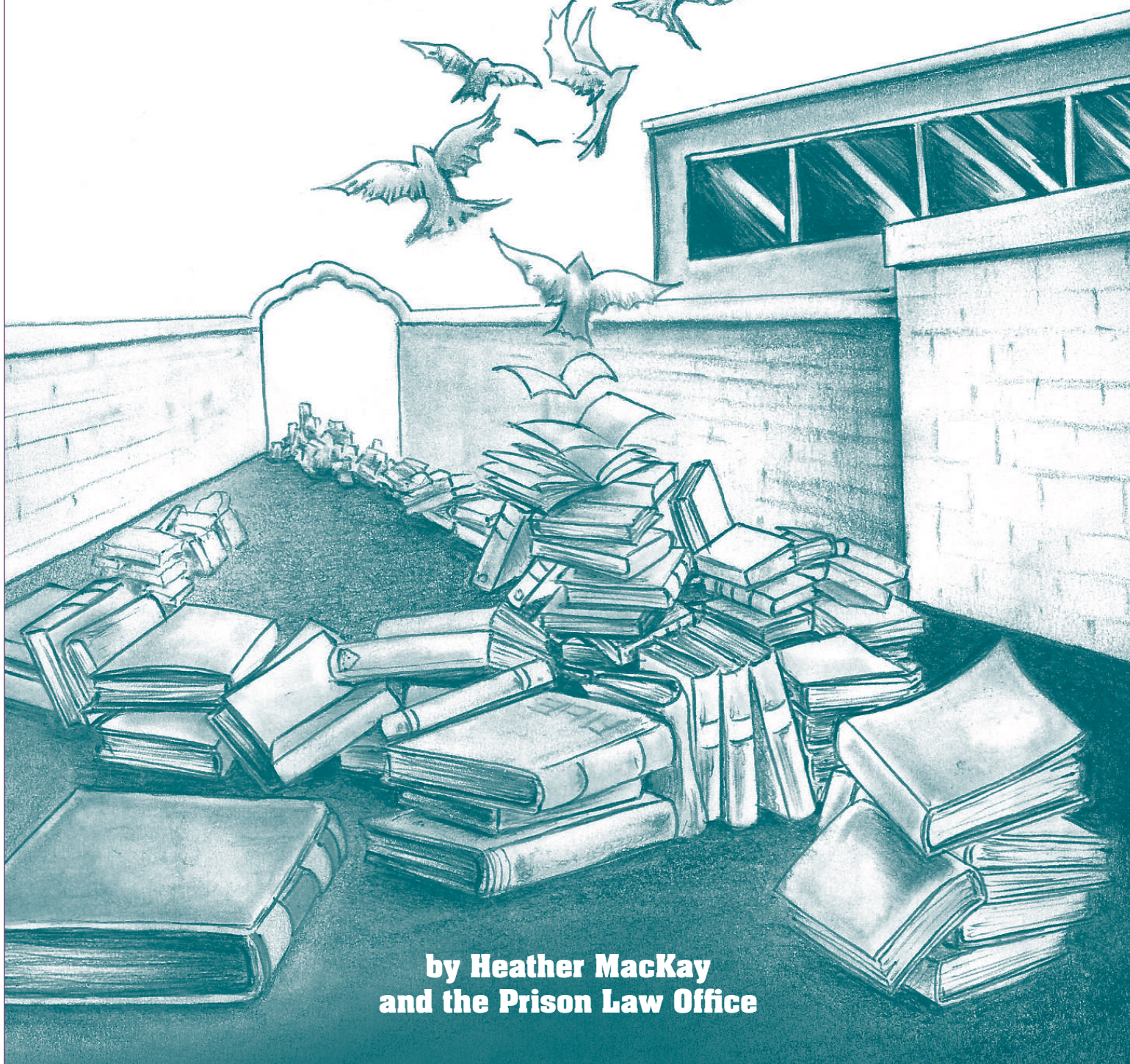


# **The California Prison and Parole Law Handbook**



**by Heather MacKay  
and the Prison Law Office**

# **THE CALIFORNIA PRISON & PAROLE LAW HANDBOOK**

**BY HEATHER MACKAY  
&  
THE PRISON LAW OFFICE**

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Content Editor: Ritika Aggarwal

Production & Style Editor: Brandy Iglesias

Cover Art: Justus Evans

Cover Design: Tara Eglin

Assistance with Chapter 9: Kony Kim, former Staff Attorney at UnCommon Law, a non-profit that represents people at Board of Parole Hearings proceedings, challenges unjust parole policies and decisions, and provides training and information to people serving life terms and their advocates.

Assistance with Chapter 11: Anne Mania, former Staff Attorney at the Prison Law Office and Rosen, Bien, Galvan and Grunfeld, where she worked on ensuring due process for people undergoing parole violation processes.

Assistance with Chapter 13: Theo Cuison, Deputy Director and Clinical Supervisor in the Immigration Unit of the East Bay Community Law Center (EBCLC), a clinic of U.C. Berkeley School of Law.



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## **YOUR RESPONSIBILITY WHEN USING THIS HANDBOOK**

When we wrote *The California Prison and Parole Law Handbook*, we did our best to provide useful and accurate information because we know that people in prison and on parole often have difficulty obtaining legal information and we cannot provide specific advice to everyone who requests it. However, the laws are complex change frequently, and can be subject to differing interpretations. Although we hope to publish periodic supplements updating the materials in the Handbook, we do not always have the resources to make changes to this material every time the law changes. If you use the Handbook, it is your responsibility to make sure that the law has not changed and is applicable to your situation. Most of the materials you need should be available in a prison law library or in a public county law library.

# CHAPTER 3

## CRUEL AND UNUSUAL CONDITIONS, USE OF EXCESSIVE FORCE, AND PROTECTION FROM PHYSICAL AND SEXUAL ABUSE

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- 3.1 Introduction
- 3.2 The Prohibition on Cruel and Unusual Punishment
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- 3.5 Use of Excessive Force by Prison Staff – Constitutional Rights
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### 3.1 Introduction

This chapter discusses laws that protect people in prison from inhumane conditions and physical or mental harm by prison staff or other people in prison. Chapter 6 includes additional information about the right to humane conditions of confinement in segregated housing and Chapter 7 discusses the rights to adequate health care.

### 3.2 The Prohibition on Cruel and Unusual Punishment

People in prison have a right under the Eighth Amendment to the U.S. Constitution to be free from cruel and unusual punishment. This means that people must not be subjected to “wanton and unnecessary infliction of pain” or punishment that is “grossly disproportionate” to the severity of their crimes.<sup>1</sup> Whether a particular prison condition or action by prison officials is cruel and unusual punishment must be measured by “evolving standards of decency” and “today’s ‘broad and idealistic concepts of dignity, civilized standards, humanity, and decency.’”<sup>2</sup> Courts can consider the opinions of experts; however, what the general public would think about a condition may be more important than expert opinion.<sup>3</sup> Note that unlike some other federal constitutional rights (such as those discussed

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<sup>1</sup> *Rhodes v. Chapman* (1981) 452 U.S. 337, 347 [101 S.Ct. 2392; 69 L.Ed.2d 59]. Note that people held in jails pretrial have broader rights under the U.S. Constitution’s Fourteenth Amendment Due Process Clause not to be subjected to jail conditions that amount to “punishment.” *Bell v. Wolfish* (1979) 441 U.S. 520, 535-537 [99 S.Ct. 1861; 60 L.Ed.2d 447]; *Pierce v. County of Orange* (9th Cir. 2008) 526 F.3d 1190, 1205.

<sup>2</sup> *Rhodes v. Chapman* (1981) 452 U.S. 337, 346 [101 S.Ct. 2392; 69 L.Ed.2d 59]; *Hutto v. Finney* (1978) 437 U.S. 678, 685 [98 S.Ct. 2565; 57 L.Ed.2d 522].

<sup>3</sup> *Hoptowit v. Ray* (9th Cir. 1982) 682 F.2d 1237; see also *Keenan v. Hall* (9th Cir. 1996) 83 F.3d 1083 (discussing numerous conditions that can raise Eighth Amendment concerns).

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in Chapter 2), the right to be free from cruel and unusual punishment is absolute and is never balanced against security or other administrative concerns.<sup>4</sup>

The California Constitution also prohibits cruel or unusual punishment.<sup>5</sup> So do state statutes prohibiting punishment that is cruel, corporal, or unusual, or that is not “authorized by the Director of Corrections.”<sup>6</sup>

Inhumane prison conditions, abuse by prison staff, or neglect in failing to protect a person from harm may violate state tort laws, even if they do not rise to the level of unconstitutional cruel and unusual punishment.<sup>7</sup>

Also, prison staff who abuse people in prison can be charged with committing crimes such as assault, battery, or rape.

### 3.3 Inhumane Prison Conditions

The Eighth Amendment does not require that prisons be “comfortable” or “provide every amenity that one might find desirable.”<sup>8</sup> “To the extent that conditions are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society.”<sup>9</sup> However, conditions violate the Eighth Amendment if they deprive a person of “the minimal civilized measures of life’s necessities.”<sup>10</sup> These “basic human needs” are “adequate food, clothing, shelter, sanitation, medical care and personal safety.”<sup>11</sup> A condition may violate the Eighth Amendment even if it has not yet caused any significant injury to a person, so long as there is a “sufficiently imminent danger.”<sup>12</sup> Also, the length of the deprivation can be a factor in whether or not the Eighth Amendment is violated: “A filthy, overcrowded cell and a diet of ‘grue’ might be tolerable for a few days and intolerably cruel for weeks or months.”<sup>13</sup>

In addition to showing that the deprivation of basic needs is sufficiently serious, a person must prove that prison officials or staff acted with “deliberate indifference” to those needs.<sup>14</sup> Deliberate indifference means that the staff subjectively knew of and disregarded the problem. Deliberate

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<sup>4</sup> *Rhodes v. Chapman* (1981) 452 U.S. 337, 348, n. 13 [101 S.Ct. 2392; 69 L.Ed.2d 59].

<sup>5</sup> California Constitution, Article I, § 17.

<sup>6</sup> Penal Code §§ 2650-2652.

<sup>7</sup> See, e.g., *Giraldo v. California Dept. of Corrections and Rehabilitation* (2008) 168 Cal.App.4th 231, 245-253 [85 Cal.Rptr.3d 371] (challenging policies that put people who are transgender at risk of sexual assault on claims of negligence and intentional infliction of emotional distress). (See Chapter 18 for more information about state tort lawsuits).

<sup>8</sup> *Hoptowit v. Ray* (9th Cir. 1982) 682 F.2d 1237, 1246.

<sup>9</sup> *Rhodes v. Chapman* (1981) 452 U.S. 337, 347 [101 S.Ct. 2392; 69 L.Ed.2d 59].

<sup>10</sup> *Rhodes v. Chapman* (1981) 452 U.S. 337, 347 [101 S.Ct. 2392; 69 L.Ed.2d 59].

<sup>11</sup> *Hoptowit v. Ray* (9th Cir. 1982) 682 F.2d 1237, 1246; *Wright v. Rusben* (9th Cir. 1981) 642 F.2d 1129, 1132-1133.

<sup>12</sup> *Helling v. McKinney* (1993) 509 U.S. 25, 33 [113 S.Ct. 2475; 125 L.Ed.2d 22] (exposing person in prison to second-hand cigarette smoke could potentially violate 8th Amendment); see also *Wallis v. Baldwin* (9th Cir. 1995) 70 F.3d 1074, 1077 (exposing people in prison to asbestos posed serious risk to health and safety).

<sup>13</sup> *Hutto v. Finney* (1978) 437 U.S. 678, 685 [98 S.Ct. 2565; 57 L.Ed.2d 522].

<sup>14</sup> *Wilson v. Seiter* (1991) 501 U.S. 294, 302 [111 S.Ct. 2321; 115 L.Ed.2d 271].

indifference may be shown by evidence that either the staff had actual notice of the problem or that the problem was so obvious that the staff must have been aware of it.<sup>15</sup> An excellent way for people to put staff on notice of an unconstitutional deprivation is by filing administrative appeals; moreover, completing an administrative appeals process is usually necessary before filing a lawsuit (see §§ 1.2-1.6).

In one case, the federal Ninth Circuit Court of Appeals applied a heightened state of mind standard – inquiring whether prison official “acted maliciously and sadistically for the very purpose of causing harm” -- to uphold very severe restrictions imposed on a particular person who was in a disciplinary segregation unit as a special sanction designed to alter his extremely dangerous conduct. However, the court distinguished this extreme situation from ordinary “prison conditions cases.”<sup>16</sup>

Different state of mind standards also apply in emergency situations; these are discussed in the sections on lockdowns and modified programs (§ 3.4) and use of force (§§ 3.5-3.6).

People in California prisons have long relied on the Eighth Amendment to challenge inhumane conditions in all types of housing -- general population, segregation, and “strip” or control cells. Courts have many times found conditions to be cruel and unusual, and in other cases prison officials have agreed to stipulated injunctions or consent decrees requiring improvements in conditions. Some of the Eighth Amendment violations have consisted of unsanitary conditions or lack of hygiene facilities, unsafe conditions, insufficient lighting or constant lighting, insufficient heating or plumbing, and excessive noise.<sup>17</sup> Some cases have addressed lack of access to water or

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<sup>15</sup> *Farmer v. Brennan* (1994) 511 U.S. 825, 842-843 [114 S.Ct. 1970; 128 L.Ed.2d 811].

<sup>16</sup> *LeMaire v. Maass* (9th Cir. 1993) 12 F.3d 1444, 1451-1543.

<sup>17</sup> *Gates v. Deukmejian* (E.D. Cal. 1989) No. S-87-1636 (requiring disciplinary cells be modified so people could flush toilets and control lights); *Toussaint v. McCarthy* (N.D. Cal. 1984) 597 F.Supp. 1388, affirmed in part and reversed in part (9th Cir. 1986) 801 F.2d 1080 (insufficient lighting, heating, plumbing, sanitation, and fire safety, and excessive noise); *Paris v. McCarthy* (E.D. Cal.) No. S-84-1699, Consent Decree (requiring minimally adequate kitchen sanitation, heating and lighting); *Jordan v. Fitzharris* (N.D. Cal. 1966) 257 F.Supp. 674 (confinement for 11 days in small “strip cell” with no light and no furnishings except toilet, which was not cleaned regularly and contained no means for the person to clean himself); see also *Hutto v. Finney* (1979) 437 U.S. 678 [98 S.Ct. 2565; 57 L.Ed.2d 522] (Eighth Amendment violations in Arkansas isolation cells included confining people for indeterminate periods of time with no furniture other than toilet and source of water, with nighttime use of communal mattresses likely to spread contagious disease); *Grenning v. Miller-Stout* (9th Cir. 2014) 739 F.3d 1235 (triable issue as to whether Eighth Amendment violated by exposing a person in a Washington prison to constant lighting for 13 days); *Keenan v. Hall* (9th Cir. 1996) 83 F.3d 1083, 1090-1091 (triable issues as to whether Oregon prison conditions including excessive noise, constant lighting, and poor ventilation, heating, and sanitation violated Eighth Amendment); *Hoptowit v. Ray* (9th Cir. 1982) 682 F.2d 1237, 1259 (remanding for further proceedings regarding Washington prison conditions including lack of light and substandard hearing, plumbing, sanitation, and fire safety). But see *Anderson v. County of Kern* (9th Cir. 1995) 45 F.3d 1310 (county jail’s short-term use of strip cell did not violate Eighth Amendment); *Dennis v. Thurman* (C.D. Cal. 1997) 959 F.Supp. 1253, 1261-1262 (no Eighth Amendment violation in turning off water for 36 hours); *Dobner v. McCarthy* (C.D. Cal. 1985) 635 F.Supp. 408, 430 (poor sanitation, food, clothing, and safety did not violate Eighth Amendment).

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food.<sup>18</sup> Others examined lack of opportunity to exercise.<sup>19</sup> In addition, in a ground-breaking case, a federal court held that it was cruel and unusual punishment to house people with mentally illness or developmentally disabilities in the Pelican Bay SHU, a “supermax” segregation unit with extremely limited visual, environmental and social stimulation.<sup>20</sup>

Overcrowding does not in itself violate the Eighth Amendment,<sup>21</sup> but the effects of overcrowding in straining institutional resources beyond their limits may result in specific conditions that are unsafe and inhumane.<sup>22</sup> Also, the combined effects of deprivations may have a cumulative effect that violates the Eighth Amendment even though each individual aspect of the conditions would not do so alone.<sup>23</sup>

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<sup>18</sup> *Foster v. Runnels* (9th Cir. 2009) 554 F.3d 807, 812-815 (triable question whether depriving person of 16 meals over a 23-day period due to refusal to uncover cell window was cruel and unusual punishment); see also *Hutto v. Finney* (1979) 437 U.S. 678, 681-683 [98 S.Ct. 2565; 57 L.Ed.2d 522] (Eighth Amendment violations in Arkansas punitive isolation cells included feeding people only a gruel of fewer than 1,000 calories a day); *Keenan v. Hall* (9th Cir. 1996) 83 F.3d 1083, 1090-1091 (triable issues as to whether spoiled food and foul water in Oregon prison violated Eighth Amendment).

<sup>19</sup> *Allen v. Sakai* (9th Cir. 1994) 48 F.3d 1082, 1087 (opportunity for only 45 minutes a week of outdoor exercise violated the Eighth Amendment); *Toussaint v. Yockey* (9th Cir. 1984) 722 F.2d 1490 and *Toussaint v. McCarthy* (N.D. Cal. 1984) 597 F.Supp. 1388, 1412 (requiring that people held in segregation be offered a minimum amount of outdoor exercise); *Spain v. Procinier* (9th Cir. 1979) 600 F.2d 189, 199 (outdoor exercise required when people otherwise confined in small cells almost 24 hours per day); see also *Hearns v. Terhune* (9th Cir. 2005) 413 F.3d 1036, 1042-1043 (triable issue as to whether lack of access to water in 100 degree temperatures precluded exercise yard use); *Lopez v. Smith* (9th Cir. 2000) 203 F.3d 1122, 1133 (triable issue as to whether denial of outdoor exercise for six weeks violated Eighth Amendment); *Thomas v. Ponder* (9th Cir. 2010) 611 F.3d 1144 (triable issue as to whether complete deprivation of outdoor exercise for over 13 months violated Eighth Amendment); *Hebbe v. Pliler* (9th Cir. 2010) 627 F.3d 338 (triable issue as to whether forcing people to choose between using the law library or exercising outdoors during an 8-month lockdown violated Eighth Amendment); *Keenan v. Hall* (9th Cir. 1996) 83 F.3d 1083, 1090-1091 (triable issues as to whether lack of outdoor exercise for person in Oregon prison violated Eighth Amendment); but see *May v. Baldwin* (9th Cir. 1997) 109 F.3d 557, 565-566 (temporary denial of exercise - 21 days - with no adverse medical effects did not amount to Eighth Amendment violation); *Norwood v. Vance* (9th Cir. 2010) 591 F.3d 1062 (no Eighth Amendment violation in denying person exercise for four periods, each lasting between 2 and 4½ months and totaling 12½ months, during 18 month lockdown); *Hurd v. Garcia* (S.D. Cal. 2006) 454 F.Supp.2d 1032, 1041-1045 (deprivation of outdoor exercise during 5-month lockdown did not violate Eighth Amendment).

<sup>20</sup> *Madrid v. Gomez* (N.D. Cal. 1995) 889 F.Supp. 1146, 1128-1130, 1265-1267. Other cases barring or limiting placement of people with mentally illness in “supermax” prisons include *Ruiz v. Johnson* (S.D. Tex. 1999) 37 F.Supp.2d 855, 907-915; also *Jones’El v. Berge* (W.D. Wis. 2001) 164 F.Supp.2d 1096, and *Scarver v. Litxcher* (W.D. Wis. 2005) 371 F.Supp. 2d 986.

<sup>21</sup> *Rhodes v. Chapman* (1981) 452 U.S. 337, 348-349 [101 S.Ct. 2392; 69 L.Ed.2d 59]; see also *Hoptovit v. Ray* (9th Cir. 1982) 682 F.2d 1237, 1249; *Dobner v. McCarthy* (C.D. Cal. 1985) 635 F.Supp. 408, 428.

<sup>22</sup> *Brown v. Plata* (2011) 563 U.S. 493 [131 S.Ct. 1910; 179 L.Ed.2d 969] (upholding findings that overcrowding was a primary reason why California’s prisons failed to provide adequate medical and mental health care).

<sup>23</sup> *Wilson v. Seiter* (1991) 501 U.S. 294, 304 [111 S.Ct. 2321; 115 L.Ed.2d 271] (for example, a low cell temperature at night combined with a failure to issue blankets); but see *Hoptovit v. Ray* (9th Cir. 1982) 682 F.2d 1237, 1256-1257 (conditions can be considered together, but violate the Eighth Amendment only if they act together to exacerbate a particular deprivation).

Inadequate medical or mental health care can also violate the Eighth Amendment.<sup>24</sup> The standards and cases concerning inadequate medical and mental health care are discussed in detail in Chapter 7.

The U.S. Constitution's Due Process clause is not violated by prison officials' negligence or lack of due care in regards to prison conditions.<sup>25</sup>

### 3.4 Inhumane Prison Conditions – Lockdowns and Modified Programs

The CDCR description of a “lockdown” is a period during which prison officials suspend all movement, activity and programming. A CDCR “modified program” is a suspension or restriction of programs, activities and/or movement that affects only some programs or some people.<sup>26</sup> Lockdowns at CDCR facilities have sometimes lasted for very long periods of time.<sup>27</sup> Also, the CDCR once tried to impose lockdowns in an attempt to cut operating costs during a budget crisis; the policy was quickly retracted due to public criticism.<sup>28</sup>

Prison conditions during lockdowns can give rise to Eighth Amendment concerns of cruel and unusual punishment. However, courts generally give prison officials “reasonable leeway” in handling safety emergencies.<sup>29</sup> Temporary measures that otherwise might violate the Eighth Amendment may be found lawful when imposed during a “genuine emergency” and then lifted when prison officials regain order and control.<sup>30</sup> Generally, the more basic the particular need, the shorter the time it can be withheld, if at all.<sup>31</sup> As with other prison conditions, the Eighth Amendment is not violated unless prison officials act with deliberate indifference in depriving a person of basic life necessities during a lockdown; however, actions taken in the heat of the initial emergency may be upheld so long as the prison officials do not act wantonly and sadistically for the very purpose of causing harm.<sup>32</sup>

The CDCR regulations set general limits on the use of lockdowns and modified programs. Lockdowns should be “rare occasions, generally following very serious threats to institutional security and the safety of staff and inmates,” and “modified programming will last no longer than necessary to

<sup>24</sup> *Estelle v. Gamble* (1976) 429 U.S. 97, 103 [97 S.Ct. 285; 50 L.Ed.2d 251].

<sup>25</sup> *Davidson v. Cannon* (1986) 474 U.S. 344, 374-348 [106 S.Ct. 668; 88 L.Ed.2d 677].

<sup>26</sup> 15 CCR § 3000.

<sup>27</sup> For example, Latinos at Folsom State Prison were locked down for over 20 months in 2002-2003 following a gang riot, prompting a review by the U.S. Justice Department. *California Latino Gang Members Locked Down Over 20 Months: Narrow U.S. Attorney Criminal Review Finds “No Abuses”*, Prison Legal News (Feb. 2005).

<sup>28</sup> Fausset, *Lancaster State Prison Backs Off Lockdown*, Los Angeles Times (June 6, 2003), p. B4.

<sup>29</sup> *Hoptowit v. Ray* (9th Cir. 1982) 682 F.2d 1237, 1259.

<sup>30</sup> *Hayward v. Procutier* (9th Cir. 1980) 629 F.2d 599, 603 see also *Norwood v. Vance* (9th Cir. 2010) 591 F.3d 1062 (conditions during lockdowns to protect people and restore order during a series of attacks did not violate the Eighth Amendment); *Hurd v. Garcia* (S.D. Cal. 2006) 454 F.Supp.2d 1032, 1041-1045.

<sup>31</sup> *Hoptowit v. Ray* (9th Cir. 1982) 682 F.2d 1237, 1259.

<sup>32</sup> *Johnson v. Lewis* (9th Cir. 2000) 217 F.3d 726, 733-734 (prison officials' actions restraining movement during riots upheld unless they were “malicious and sadistic,” but conditions after people are secured judged by the “deliberate indifference” standard).



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restore institutional safety and security or to investigate the triggering event.”<sup>33</sup> The CDCR Secretary or a designee must approve any prolonged lockdown or modified program.<sup>34</sup> The CDCR regulations refer to some of the specific activities that can be suspended or restricted under a lockdown or modified program.<sup>35</sup> The CDCR has agreed to provide outdoor activity to people who are in a modified program or lockdown for longer than fourteen days.<sup>36</sup>

Lockdowns and modified programs directed at particular racial or ethnic groups can raise concerns about unlawful racial discrimination. Further discussion of this issue is in § 2.27.

### 3.5 Use of Excessive Force by Prison Staff – Constitutional Rights

Under the Eighth Amendment to the U.S. Constitution, use of excessive force against a person in prison may amount to cruel and unusual punishment. In deciding whether the use of force was unconstitutional, courts consider both the degree of force used and the mental state of the officer or staff person who applied the force.

For the first factor, the amount of force must be more than “*de minimis*” or minor; a simple push or shove that causes no injury almost certainly is not unconstitutional.<sup>37</sup> Also, verbal harassment does not violate the Constitution.<sup>38</sup> A person does not necessarily have to suffer a serious injury to show that the use of force was excessive, but the extent of injury can be relevant in determining the amount of force that was applied.<sup>39</sup>

For the second factor, a person must show that the prison officials “acted maliciously and sadistically for the purpose of causing harm,” and not in a good-faith effort to maintain or restore order.<sup>40</sup> The deliberate indifference standard that applies to most other types of Eighth Amendment claims applies to use of force claims only when prison officials are being sued for permitting a pattern

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<sup>33</sup> 15 CCR § 3000.

<sup>34</sup> 15 CCR § 3383(c)

<sup>35</sup> See, e.g., 15 CCR §§ 3123(d) (limits on law library access), 3134(c)(4) (timelines for delivery of packages), 3250.4 (termination of publication written by incarcerated people), 3269.1(g) (temporary suspension of integrated housing), 3274(c) (restrictions on movement), 3482(a)(13)(B) (restriction of joint venture programming).

<sup>36</sup> *Mitchell v. Cate* (E.D. Cal. Oct. 20, 2014) No. 08-CIV-1196, Stipulated Settlement.

<sup>37</sup> *Hudson v. McMillan* (1992) 503 U.S. 1, 9-10 [112 S.Ct. 995; 117 L.Ed.2d 156]. Examples of cases raising viable excessive force claims include *Wilkins v. Gaddy* (2010) 559 U.S. 34 [130 S.Ct. 1175; 175 L.Ed.2d 995] (slamming to floor, punching, kicking); *Manly v. Rowley* (9th Cir. 2017) 847 F.3d 705 (punching kicking, and carrying by shackles during cell extraction); *Furnace v. Sullivan* (9th Cir. 2013) 705 F.3d 1021 (prolonged pepper spraying); *Watts v. McKinney* (9th Cir. 2005) 394 F.3d 710, 712 (kicking in genitals); *Robins v. Meecham* (9th Cir. 1995) 60 F.3d 1436, 1440 (shooting with bird shot); *Felix v. McCarthy* (9th Cir. 1991) 939 F.2d 699, 701-702 (throwing person into wall multiple times); *Gaut v. Sunn* (9th Cir. 1987) 810 F.2d 923, 924-925 (beating, kicking, choking, and throwing against wall); *Spain v. Procnier* (9th Cir. 1979) 600 F.2d 189, 193-196 (tear gas in cell extractions).

<sup>38</sup> *Oltarzewski v. Ruggiero* (9th Cir. 1987) 830 F.2d 136, 139.

<sup>39</sup> *Wilkins v. Gaddy* (2010) 559 U.S. 34, 36-37 [130 S.Ct. 1175; 175 L.Ed.2d 995]; *Hudson v. McMillan* (1992) 503 U.S. 1, 9 [112 S.Ct. 995; 117 L.Ed.2d 156].

<sup>40</sup> *Whitley v. Albers* (1986) 475 U.S. 312, 320-321 [106 S.Ct. 1078; 89 L.Ed.2d 251].

of excessive force through their policies or by failing to establish adequate training and procedures.<sup>41</sup> Force that is applied recklessly or negligently does not violate the Constitution.<sup>42</sup>

Excessive force may also violate a person's Fourteenth Amendment substantive due process right "to be secure in one's person." The Fourteenth Amendment analysis considers both objective and subjective factors -- the need for the application of force, the relationship between the need and the amount of force that was used, the extent of injury inflicted, and whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.<sup>43</sup>

### 3.6 Use of Excessive Force by Prison Staff – CDCR Rules

The CDCR has developed statewide policies and staff training programs on the use of force and restraining devices.<sup>44</sup> The rules describe the circumstances in which people may be placed in physical restraints and set limits on what type of restraints may be used.<sup>45</sup> The regulations define reasonable force, unnecessary force, and excessive force, and describe the force options authorized in various situations.<sup>46</sup> The DOM includes specific policies regarding immediate use of force, including in response to in-cell assaults, and controlled uses of force, including extractions (involuntary removal of a person from an area)<sup>47</sup> The DOM also sets policies on the use of less lethal weapons, chemical agents, and deadly force.<sup>48</sup>

The policies direct staff to consider a person's mental health status, medical concerns, and ability to understand and comply with orders when determining the best course of action for resolving a situation.<sup>49</sup> More specifically, before undertaking a "controlled use of force," there must be a "cool down" period during which mental health staff (and possibly custody staff as well) try to persuade the person to voluntarily exit the area. During the cool down period, licensed nursing staff must review a person's health records to determine whether the person has disabilities and/or mental health issues

<sup>41</sup> *Madrid v. Gomez* (N.D. Cal. 1995) 889 F.Supp. 1146, 1247-1255 (allowing pattern of use of excessive force violated Eighth Amendment); *Coleman v. Wilson* (E.D. Cal. 1995) 912 F.Supp. 1282, 1322-1323 (policy allowing use of tasers and 37 mm guns on people with mentally illness in non-emergency circumstances violated Eighth Amendment); see also *Coleman v. Brown* (E.D. Cal. 2014) 28 F.Supp.3d 1068 (policies and processes for use of pepper spray and baton on people with mental illness still insufficient to remedy Eighth Amendment violation); *Jeffers v. Gomez* (9th Cir. 2001) 267 F.3d 895, 913 (CDCR use of force policies and training did not violate Eighth Amendment).

<sup>42</sup> *Jeffers v. Gomez* (9th Cir. 2001) 267 F.3d 895, 912 (officers trying to stop a stabbing during a large melee fired bullet that inadvertently struck person who was being stabbed).

<sup>43</sup> *McRorie v. Shimoda* (9th Cir. 1986) 795 F.2d 780, 785; see also *Kingsley v. Hendrickson* (2015) \_\_ U.S. \_\_ [135 S.Ct. 2466; 192 L.Ed.2d 416] (discussing the legal standard for excessive force claims by person being held pretrial, who need show only that the force purposefully or knowingly used against him was objectively unreasonable).

<sup>44</sup> 15 CCR §§ 3268-3268.3; 15 CCR § 3278; DOM §§ 51020.1-51020.24.

<sup>45</sup> 15 CCR § 3268.2; DOM § 51020.6 (restraints); DOM § 51020.15 (spit hoods or masks).

<sup>46</sup> 15 CCR § 3268; DOM § 51020.5; DOM §§ 51020.7-51020.7.10.

<sup>47</sup> DOM § 51020.11 (immediate use of force); DOM §§ 51020.11.1-51020.11.3 (immediate use of force in cells and responses to in-cell assaults); DOM §§ 51020.12-51020.12.1-51020.5 (controlled uses of force, including extractions).

<sup>48</sup> DOM §§ 51020.7-51020.7.1 (deadly force); DOM §§ 51020.14-51020.14.2 (less lethal weapons); DOM §§ 51020.15.1-51020.15.6 (chemical agents); DOM §§ 51020.12-51020.12.1-51020.5 (controlled uses of force, including extractions).

<sup>49</sup> DOM § 51020.5.

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such that the use of chemical agents or physical force would pose a particular risk to the person. Nursing staff must then be physically present during any ensuing controlled use of force.<sup>50</sup> Also, the use of chemical agents such as pepper spray inside mental health units is prohibited in controlled use of force situations unless authorized on a case-by-case basis by the warden.<sup>51</sup>

In addition, the rules establish procedures for reporting and reviewing incidents involving the use of force.<sup>52</sup> Staff must write a report every time force is used and supervisors must review every use of force to make sure the rules were followed.<sup>53</sup> All controlled uses of force must be videotaped; also a video recording of the person must be made following any use of force resulting in serious bodily injury or great bodily injury.<sup>54</sup> If a person claims that unnecessary or excessive force was used, staff must conduct a videotaped interview with the person within 48 hours of the injury or allegation.<sup>55</sup>

California law requires the independent Office of the Inspector General (OIG) to monitor and report on the CDCR's investigations regarding complaints about staff misconduct and use of force.<sup>56</sup>

### 3.7 Violence or Abuse by Other People in Prison

A person in prison has a right under the Eighth Amendment to the U.S. Constitution to protection from threats of violence and assault by other people in prison. Prison staff violate the Eighth Amendment when they are deliberately indifferent to a substantial risk that a person will be seriously harmed by other people in prison.<sup>57</sup> Thus, cases alleging that prison officials failed to provide protection from assault by other people in prison hinge on what evidence exists that the prison

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<sup>50</sup> DOM § 51020.12.

<sup>51</sup> DOM § 51020.15.3

<sup>52</sup> 15 CCR § 3268(a) (defining who is responsible for authorizing and reviewing use of force); 15 CCR § 3268.1 (force used in institutions); 15 CCR § 3268.3 (force used in the outside community); DOM §§ 51020.17-51020.21.

<sup>53</sup> 15 CCR § 3268.1.

<sup>54</sup> 15 CCR § 3268.1(d)(1).

<sup>55</sup> 15 CCR § 3268.1(d)(2).

<sup>56</sup> Penal Code § 6133.

<sup>57</sup> *Farmer v. Brennan* (1994) 511 U.S. 825, 833-834, 839-840, 844-845 [114 S.Ct. 1970; 128 L.Ed.2d 811]; see also *Berg v. Kincheloe* (9th Cir. 1986) 794 F.2d 457, 459-462; *Leer v. Murphy* (9th Cir. 1988) 844 F.2d 628, 633.

officials were subjectively aware of the danger of serious harm and failed to take reasonable preventative action.<sup>58</sup>

A higher-ranking prison official can have “supervisory liability” if the official was either personally involved in the failure to protect, or there is “a sufficient causal connection” between the supervisor's wrongful conduct and the constitutional violation. A causal connection can be established by showing the official set in motion a series of acts by others or knowingly refused to terminate a series of acts by others, which the supervisor knew or reasonably should have known would cause a constitutional injury.<sup>59</sup>

The U.S. Constitution’s Fourteenth Amendment right to Due Process does not protect people in prison from negligence or mere lack of due care in failing to protect from assault by another person in prison.<sup>60</sup>

Even if a failure to protect does not rise to the level of a constitutional violation, a person may be able to sue prison staff under state tort law for negligently failing to protect them from violence by other people in prison (see Chapter 18).<sup>61</sup>

### 3.8 Sexual Abuse by Prison Staff or Other People in Prison – Constitutional Rights

Under the Eighth Amendment to the U.S. Constitution, people have a right to not be sexually abused by prison staff; rape, other types of sexual touching, verbal harassment, or lewd gestures might all qualify as unconstitutional sexual abuse.<sup>62</sup> A court will presume that the person did not consent to sexual contact with staff, unless the state can show the conduct was not coercive. If there is no apparent legitimate penological purpose for the conduct, a court will also presume that the staffperson acted with an unconstitutional malicious and sadistic intent; however, the constitution is not violated if the staffperson was carrying out a legitimate penological purpose such as a justifiable pat-down or

<sup>58</sup> See, e.g., *Cortez v. Skol* (9th Cir. 2015) 776 F.3d 1046, 1050-1052 (triable Eighth Amendment claim where person in protective custody suffered severe brain damage from attack while being escorted through a passage with hostile people, accompanied by only one corrections officer, who then failed to physically intervene in the attack; *Hearns v. Terhune* (9th Cir. 2005) 413 F.3d 1036, 1040-1042 (person who was attacked by other people in prison after a long escalation of violence known to and facilitated by prison staff adequately stated an Eighth Amendment claim); *Robinson v. Prunty* (9th Cir. 2001) 249 F.3d 862, 866-867 (person presented triable Eighth Amendment claim of a “gladiator-like scenario” in which officers made jokes about potential fights on racially integrated exercise yards and delayed in intervening in fights); compare with *Labatad v. Corrections Corp. of America* (9th Cir. 2013) 714 F.3d 1155 (no Eighth Amendment violation in housing person in a cell with a member of rival gang, where the people had been in general population together for an extended period with no record of problems); *Hurd v. Garcia* (S.D. Cal. 2006) 454 F.Supp.2d 1032, 1045-1048 (decision to transfer person did not violate Eighth Amendment because based on prison staff’s knowledge at the time, transfer did not pose a substantial risk of serious harm).

<sup>59</sup> *Starr v. Baca* (9th Cir. 2011) 652 F.3d 1202, 1207-1208.

<sup>60</sup> *Davidson v. Cannon* (1986) 474 U.S. 344, 347-348 [106 S.Ct. 668; 88 L.Ed.2d 677]; see also *Castro v. County of Los Angeles* (9th Cir. 2016) 833 F.3d 1060 (discussing the Fourteenth Amendment standard that applies to the protection of people held pretrial).

<sup>61</sup> *Giraldo v. California Dept. of Corrections and Rehabilitation* (2008) 168 Cal.App.4th 231, 250-252 [85 Cal.Rptr.3d 371] (case alleging that person who is transgender (male-to-female) suffered sexual assaults).

<sup>62</sup> *Schwenk v. Hartford* (9th Cir. 2000) 204 F.3d 1187, 1197-1198 (sexual harassment, demands for sexual acts, and attempted sodomy by officer); *Wood v. Beauclair* (9th Cir. 2012) 692 F.3d 1041, 1046-1051 (touching of genitalia, and other examples of unconstitutional harassment).

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strip search. To violate the constitution, the conduct must be so offensive to human dignity as to cause “sufficiently serious” physical or psychological harm.<sup>63</sup>

Prison search and monitoring policies that are not justified by legitimate prison needs may be sexually abusive in violation of the U.S. Constitution’s Fourth Amendment right to privacy and/or the Eighth Amendment right to be free from cruel and unusual punishment. For example, people have a constitutional privacy right to be free from unrestricted exposure to the view of guards of the opposite sex.<sup>64</sup> Also, a prison policy requiring male guards to conduct random, non-emergency clothed body searches that included kneading and rubbing the genitals and breasts of people in women’s prisons was found to be cruel and unusual punishment.<sup>65</sup> However, routine pat-down searches by guards of the opposite sex and infrequent casual observation of nude people by guards of the opposite sex do not violate privacy rights.<sup>66</sup>

As discussed in § 3.7, the Eighth Amendment also imposes duties upon prison staff to protect people in prison from other people in prison; this includes protection from sexual abuse.<sup>67</sup>

### 3.9 Sexual Abuse by Prison Staff or Other People in Prison – Statutory Rights and CDCR Rules

The federal Prison Rape Elimination Act (PREA) of 2003<sup>68</sup> required the U.S. Department of Justice to issue national standards to eliminate sexual abuse in detention facilities. The standards state that it is the responsibility of corrections agencies to protect people from sexual abuse and require those agencies to have certain policies and procedures.<sup>69</sup> State and local detention agencies like the CDCR risk losing some of their federal funding if they do not comply with the standards.<sup>70</sup> California also has its own Sexual Abuse in Detention Elimination Act (SADEA), which requires the CDCR to have procedures to protect people from sexual abuse and to respond to reports of sexual abuse.<sup>71</sup>

The CDCR regulations prohibit staff “sexual misconduct.” Sexual misconduct includes offering benefits in exchange for sexual favors, making threats for refusal to engage in sexual behavior, engaging in sexual acts or contact, invasion of privacy beyond what is reasonably necessary to maintain

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<sup>63</sup> *Wood v. Beauclair* (9th Cir. 2012) 692 F.3d 1041, 1046-1051 (sexual harassment, demands for sexual acts, and attempted sodomy by officer were sufficiently serious to support constitutional claim); compare with *Watson v. Carter* (9th Cir. 2012) 668 F.3d 1108, 1114 (no Eighth Amendment violation where officer entered cell while person in men’s prison on toilet and rubbed briefly against person’s thigh); *Austin v. Terhune* (9th Cir. 2004) 367 F.3d 1167, 1172 (no Eighth Amendment violation where officer in control booth displayed genitals to a person in men’s prison and made a sexual comment).

<sup>64</sup> *Bowling v. Enomoto* (N.D. Cal. 1981) 514 F.Supp. 201, 204; see also *Lay v. Porker* (C.D. Cal. 2004) 371 F.Supp.2d 1159, 1164.

<sup>65</sup> *Jordan v. Gardner* (9th Cir. 1993) 986 F.2d 1521, 1527.

<sup>66</sup> *Grummett v. Rushen* (9th Cir. 1985) 779 F.2d 491, 492; *Somers v. Thurman* (9th Cir. 1997) 109 F.3d 614, 624.

<sup>67</sup> *Farmer v. Brennan* (1994) 511 U.S. 825, 828 [114 S.Ct. 1970; 128 L.Ed.2d 811]; *Berg v. Kincheloe* (9th Cir. 1986) 794 F.2d 457, 459.

<sup>68</sup> 42 U.S.C. § 15601 et seq.

<sup>69</sup> 28 C.F.R. § 115.5 et seq.

<sup>70</sup> 42 U.S.C. § 15607(c).

<sup>71</sup> Penal Code § 2635 et seq.



safety and security, or making disrespectful, overly familiar, or sexually threatening comments. Staff cannot claim that the person in prison consented to the sexual behavior.<sup>72</sup> (CDCR policies regarding cross-gender searches and visual privacy during showering, changing clothes or using the toilet are discussed in § 2.36.)

The CDCR has a “zero-tolerance” Prison Rape Elimination Policy for sexual violence, staff sexual misconduct and sexual harassment and procedures for the prevention, detection, response, investigation, and tracking of sexual assaults and staff sexual misconduct.<sup>73</sup> The policy includes training staff and educating people in prison about sexual abuse prevention, reporting, and treatment.<sup>74</sup>

A person may choose to keep their identity confidential when reporting sexual abuse.<sup>75</sup> Prison staff are supposed to intervene when a person appears to be the target of sexual harassment.<sup>76</sup> Any staff who have information about sexual abuse must report it immediately and confidentially and refer the victim to medical/mental health staff for evaluation.<sup>77</sup> The requirements for providing victims of sexual assault with appropriate medical and mental health care are described in more detail in Chapter 7. Prison staff are also supposed to provide a victim of sexual abuse with contact information for outside rape crisis services and victim advocacy organizations.<sup>78</sup>

Prison officials must investigate any report that a person has been sexually abused and document the findings in writing.<sup>79</sup> There are procedures for medical staff to conduct forensic sex assault examinations (“SART exams” or “rape kits”) of the victim and alleged assault to gather evidence.<sup>80</sup> The victim has the right to have a support person, such as a friend, family member, or advocate, present at the examination unless that would cause a problem such as delay or a security risk.<sup>81</sup> In cases of rape, unlawful intercourse with a minor, sodomy, or forcible acts of sexual penetration, the victim also has a right to have victim support advocates at the investigatory interview, unless this would cause a problem such as posing a security risk.<sup>82</sup> When the investigation is completed, the victim of sexual abuse should be told whether the investigators found the abuse allegation to be substantiated and whether some type of action has been taken against the abuser.<sup>83</sup> If an investigation

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<sup>72</sup> 15 CCR § 3401.5(a).

<sup>73</sup> DOM § 54040.1 et seq.

<sup>74</sup> DOM § 54040.4.

<sup>75</sup> Penal Code § 293(a); 15 CCR § 3401.5(d); DOM § 54040.8.1.

<sup>76</sup> Penal Code § 2636(b).

<sup>77</sup> 15 CCR § 3401.5(c); DOM § 54040.7.

<sup>78</sup> DOM § 54040.18. One resource is Just Detention International (JDI), a health and human rights organization that provides advice, support and information for people in prison who are facing sexual abuse or who are survivors of sexual abuse. JDI’s website at [www.justdetention.org](http://www.justdetention.org) has lists of counseling, government and legal resources for survivors of prison sexual abuse. People may contact JDI at the following address: Just Detention International, 3325 Wilshire Blvd., Ste. 340, Los Angeles, CA 90010. JDI’s telephone number is (213) 384-1400, fax number is (213) 384-1411, and email is [info@justdetention.org](mailto:info@justdetention.org).

<sup>79</sup> Penal Code § 2639; DOM §§ 54040.7.1-54040.8.1; DOM §§ 54040.12-54040.12.2.

<sup>80</sup> DOM §§ 54040.6-54040.7; DOM § 54040.9; DOM § 54040.11; DOM §§ 54040.12.1-54040.12.2.

<sup>81</sup> DOM § 54040.8.2.

<sup>82</sup> Penal Code § 264.2; Penal Code § 679.04; DOM § 54040.8.2.

<sup>83</sup> DOM 54040.12.5.

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confirms that a staffperson sexually abused a person in prison, the staffperson must be fired. Criminal sexual abuse by staff must also be reported to law enforcement authorities for possible prosecution.<sup>84</sup> If an investigation confirms that a person has sexually abused another person in prison, the abuser can be charged with a prison disciplinary violation and/or referred to law enforcement for criminal prosecution.<sup>85</sup>

### 3.10 Addressing Prison Health and Safety Problems

People in prison who have suffered or believe they are likely to suffer any type of harm due to unsafe prison conditions or abuse by prison staff or other people in prison should take immediate action to protect their health and safety. People should immediately report safety problems or incidents of abuse to a staffperson and provide as many details as possible, such as specific times, dates, places, and descriptions of the events. A person should also seek any necessary health care. A person can also ask family, friends, or an advocate to contact the prison officials about the situation.

A person who is in danger from staff or other people in prison may want to try to get a change in housing for the purpose of protection. Placement in administrative segregation is a short-term solution (see § 6.3). Longer-term housing possibilities include placement on single cell status (see § 4.19), transfer to another facility (see § 4.15), a Sensitive Needs Yard (SNY) or non-Designated Program Facility (PF) or a Restricted Custody General Population Unit (RCGP) (see § 4.28) or Protective Housing Unit (PHU) (see § 6.12).

If prison officials do not properly respond to complaints about unsafe conditions, staff misconduct, or threats or violence by other people in prison, a person should file an administrative appeal using a CDCR 602 form. If prison staff do not provide an appropriate forensic medical examination or satisfactory medical or mental health care after an injury, or if the claim is about misconduct by health care staff, the person should file a CDCR 602-HC. If a safety or medical issue needs urgent attention, the person should ask for emergency processing by writing “emergency appeal” at the top of the administrative appeal form and explaining why quick action is needed. More information on administrative appeals can be found in Chapter 1. Note that a person will usually have to complete a CDCR administrative appeal process before filing any type of lawsuit (see §§ 1.2-1.6).

There are also other administrative offices that can assist people with conditions or abuse problems, investigate abuse, or review the mishandling of investigations. (See §§ 1.39-1.45).

People can file court actions to force prison officials to do something or stop doing something (called “injunctive relief”) to protect their health and safety. The main two types of actions that people in prison can use to seek injunctive relief are a state petition for writ of habeas corpus or a federal civil rights (§ 1983) lawsuit. People can also file lawsuits to try to get money damages for harm suffered due to past or on-going harm or injury. The two main types of actions that people can use to get

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<sup>84</sup> Penal Code § 2639(e); 15 CCR § 3401.5(b). Rape and other forced or coerced sexual assaults are crimes under California law. See, e.g., Penal Code § 261; Penal Code § 286; Penal Code § 288a; Penal Code § 289. The criminal laws apply regardless of whether the person who commits the assault is a person in prison or prison employee. Moreover, an incarcerated person cannot lawfully consent to sex with a prison employee, so a prison employee who engages in sexual activity with a person in prison can be convicted of a crime, even if the activity was consensual. Penal Code § 289.6; 15 CCR § 3401.5(a).

<sup>85</sup> DOM § 54040.15; see also 15 CCR § 3323(b)(5) (disciplinary violation for sexual abuse); 15 CCR § 3323(h)(11) (disciplinary violation for sexual abuse).

money damages are a federal civil rights (§ 1983) action or a state tort lawsuit. State habeas corpus is discussed in Chapter 15, federal civil rights lawsuits are discussed in Chapter 17, and state tort lawsuits are discussed in Chapter 18. § 19.27 summarizes the various types of legal actions, what they can be used for, and their procedural requirements