

# U.C.L.A. Law Review

## Challenging Gladiator Fights in the CDCR

Kevin McCarthy

### ABSTRACT

The California Department of Corrections and Rehabilitation (CDCR) has a long history of placing people in long-term isolation in response to suspected or confirmed gang membership or affiliation. Despite being forced to stop the practice of indefinite solitary confinement, CDCR continued other arguably unconstitutional practices in response to gang activity. At Pleasant Valley State Prison, the prison officials first implemented gladiator fights, in which they cleared the yard and encouraged members of opposing gangs to fight. In response, the author and others organized mass filing of appeals, an outside protest, and a letterwriting campaign before filing a lawsuit. There has not yet been a final decision on the lawsuit, but it is clearly morally wrong for CDCR to violate people's rights by subjecting them to assault and deny them rehabilitation opportunities.

### AUTHOR

After serving a seventeen-year sentence, Kevin McCarthy paroled in July of 2020 and began the fall 2020 semester at University of California, Berkeley (UC Berkeley) as a legal studies major and the Incarcerated Scholars Program coordinator for Underground Scholars Initiative. Since arriving at UC Berkeley, he co-created a pre-law mentorship program between Underground Scholars Initiative students and Berkeley Law students. He was also accepted into the 2021–2022 Haas Scholars cohort to research the experiences and outcomes of people who were given a gang sentencing enhancement under California Penal Code section 186.22. McCarthy looks forward to beginning law school in the fall of 2023. He can be reached at [kevinmccarthy@berkeley.edu](mailto:kevinmccarthy@berkeley.edu).



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The California Department of Corrections and Rehabilitation (CDCR) has a long history of placing people in long-term isolation in response to suspected or confirmed gang membership or affiliation. Despite being forced to stop the practice of indefinite solitary confinement, CDCR continued other arguably unconstitutional practices in response to gang activity. At Pleasant Valley State Prison, the prison officials first implemented gladiator fights, in which they cleared the yard and encouraged members of opposing gangs to fight. In response, the author and others organized mass filing of appeals, an outside protest, and a letterwriting campaign before filing a lawsuit. There has not yet been a final decision on the lawsuit, but it is clearly morally wrong for CDCR to violate people’s rights by subjecting them to assault and deny them rehabilitation opportunities.

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## INTRODUCTION

I began studying and practicing law while I was in solitary confinement at Pelican Bay State Prison Security Housing Unit (SHU). I was placed there, indefinitely, in 2006 based on my alleged association with prison gang affiliates. Before 2015, any associations with alleged prison gang affiliates were deemed prison gang activity, even if the associations were simply friendships and did not include criminal gang activity.<sup>1,2</sup> Under California Department of Corrections and Rehabilitation (CDCR) policy, prison gang activity warranted indefinite placement in solitary confinement.<sup>3</sup> The administrative regulations governing solitary confinement placement, solitary confinement conditions, and prison gang classification were vague and overbroad, and prison administrators routinely manipulated these regulations to incarcerated individuals' disadvantage.<sup>4</sup>

Learning the law and filing legal petitions on behalf of other incarcerated men provided me with a means of channeling my frustration over the grave injustices that I regularly witnessed. The Pelican Bay SHU was designed to break the spirits of men and force them to provide incriminating information about their peers.<sup>5</sup> Filing legal petitions was a means of defiance and resistance. It gave me a sense of empowerment. I experienced some

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1. The California Department of Corrections and Rehabilitation (CDCR) used the gang validation label to place incarcerated people who they felt threatened by in solitary confinement. This often included jailhouse lawyers, organizers, and nonconformists.
  2. See *Court Finds Systemic Constitutional Violations By California Department of Corrections*, CTR. FOR CONST. RTS. (Jan. 28, 2019), <https://ccrjustice.org/home/press-center/press-releases/court-finds-systemic-constitutional-violations-california> [<https://perma.cc/6MGN-DEHA>]; Jean Casella & James Ridgeway, *Voices From Solitary: Gang "Validation" and Permanent Isolation in California Prisons*, SOLITARY WATCH (Aug. 7, 2010), <https://solitarywatch.org/2010/08/07/voices-from-solitary-gang-validation-and-permanent-isolation-in-california-prisons> [<https://perma.cc/68DS-A52D>]; Danny Murillo, Opinion, *Pelican Bay: Ending Long-Term Solitary Confinement and Racist Policies in California Prisons*, TRUTHOUT (Aug. 28, 2013), <https://truthout.org/articles/pelican-bay-ending-long-term-solitary-confinement-and-racist-policies-in-california-prisons> [<https://perma.cc/AX8E-94QF>].
  3. See *Ashker v. Governor of California*, CTR. FOR CONST. RTS. (Dec. 11, 2020), <https://ccrjustice.org/home/what-we-do/our-cases/ashker-v-brown> [<https://perma.cc/5DH8-7SUF>].
  4. See, e.g., Shane Bauer, *Solitary in Iran Nearly Broke Me. Then I Went Inside America's Prisons.*, MOTHER JONES (Dec. 2012), <https://www.motherjones.com/politics/2012/10/solitary-confinement-shane-bauer> [<https://perma.cc/2GP3-SQKH>].
  5. Pelican Bay prison officials pressure people housed in the Secure Housing Unit (SHU) to "debrief"—that is, provide incriminating information about other incarcerated people—in order to be released from solitary confinement. See Casella & Ridgeway, *supra* note 2.

forms of retaliation from prison personnel at Pelican Bay after I started filing administrative appeals and habeas petitions, but nothing like the extreme retaliation I experienced in the following years at Pleasant Valley State Prison.

Through a series of hunger strikes, activism, and a class-action lawsuit, we succeeded in forcing CDCR to change their gang classification policy and end the practice of indefinite solitary confinement.<sup>6</sup> This victory became official in 2015 through a settlement agreement.<sup>7</sup> In addition to the hunger strikes, we were supported by our allies who were engaged in grassroots advocacy. These efforts, in conjunction with the hunger strikes, gained significant media attention and led to two legislative hearings.<sup>8</sup> I do believe that this had an impact on the federal district court's decisions. Although the law is intended to be above politics, I do believe that it is influenced by politics. The dual approach of utilizing the law (legal petitions) and other methods outside of the law (public awareness and grassroots advocacy) would serve us again in the years to come.

### **I. EIGHTH AMENDMENT VIOLATIONS AT PLEASANT VALLEY STATE PRISON**

I scored some individual legal victories through habeas corpus petitions and administrative appeals, which helped me and others. My greatest and proudest legal accomplishment would come once I was at Pleasant Valley State Prison. While I was housed at Pleasant Valley, I filed a habeas corpus petition to request an injunction against CDCR's decision to conduct what we termed "gladiator fights" among warring gang rivals, and reinstate a bifurcated program that kept rivals separated while allowing them equal access to prison programs, such as rehabilitative programs, family visits, and access to the recreation yard.<sup>9</sup> The events that led to these gladiator fights occurred in the latter part of 2018,<sup>10</sup> when a prison gang war began

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6. See Sam Stanton, *State Agrees to Deal to Move Nearly 2,000 Inmates From Solitary Confinement*, SACRAMENTO BEE (Sept. 1, 2015), <https://www.sacbee.com/news/local/article33279369.html> [<https://perma.cc/FE4H-PKU4>].

7. See *Summary of Settlement Terms in Ashker v. Brown (Governor of California)*, PRISONER HUNGER STRIKE SOLIDARITY (Sept. 1, 2015), <https://prisonerhungerstrikesolidarity.wordpress.com/education/resources/summary-of-settlement-terms-in-ashker-v-brown-governor-of-california> [<https://perma.cc/B7LR-HJXM>].

8. See Stanton, *supra* note 6.

9. Petition for Writ of Habeas Corpus, *McCarthy v. Frauenheim*, No. 19CRWR684722 (Cal. Super. Ct. Feb. 21, 2019).

10. *Id.* exs. A–C.

between two factions, the Fresno Bulldogs gang and a group composed of Hispanics from Southern California, whites, and Mexican Nationals.<sup>11</sup> The first riot occurred on September 28, at California State Prison–Corcoran.<sup>12</sup> That fall, many riots, meaning largescale incidents of violence often involving weapons, between the Fresno Bulldogs and their rivals occurred at Avenal State Prison, California Training Facility–Soledad, California State Prison–Corcoran, and Pleasant Valley State Prison. Instead of keeping the groups apart, CDCR dangerously continued to integrate them.<sup>13</sup> Surprisingly, nobody was killed, but many of the men suffered serious and permanent bodily injuries.<sup>14</sup> During the period between the riots, CDCR placed the men on lockdown,<sup>15</sup> which results in the suspension of privileges, such as rehabilitative programs, visitations, phone access, and recreation yard access.<sup>16</sup>

On January 5, 2019, Pleasant Valley officials implemented a “bifurcated program.”<sup>17</sup> Under the bifurcated program, the Bulldogs and their rivals alternated lockdown days.<sup>18</sup> One day the Bulldogs would be on lockdown while the other groups were off of lockdown, then the following day the groups would switch.<sup>19</sup> A few weeks later, on February 12, CDCR ordered Pleasant Valley officials to end the bifurcated program and conduct two gladiator fights within one week.<sup>20</sup> While we referred to these events as gladiator fights, CDCR used much more misleading terms, such as “peace talks,” “methods used to end the violence,” and “integration incrementals.”<sup>21</sup> Prison administrators conducted these fights by clearing out the exercise yard and then releasing a few members of the opposing factions into the yard, without restraints, and allowing them to fight. Guards would stand by and watch until the fighting began, then would use pepper spray and shoot

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11. *Id.* ex. C. These are the labels assigned and recognized by the California Department of Corrections and Rehabilitation (CDCR), and not necessarily how members of these groups identify as far as race, ethnicity, or nationality.

12. *Id.* ex. A.

13. See Don Thompson, *APNewsBreak: California Halts Prison Gang Peacemaking Effort*, WANE 15 (Sept. 24, 2019), <https://www.wane.com/news/apnewsbreak-california-halts-prison-gang-peacemaking-effort> [<https://perma.cc/CQ4C-VKJY>].

14. *See id.*

15. Petition for Writ of Habeas Corpus, *supra* note 9, at 3–4.

16. *Id.* at 3.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* at 4.

21. *Id.* exs. D–F; Informal Response at 2, *McCarthy*, No. 19CRWR684722 (Cal. Super. Ct. Apr. 2, 2019); see also Thompson, *supra* note 13.

projectiles until the fighting ended.<sup>22</sup> A gladiator fight was conducted on February 14, 2019 between two Southern Hispanics and two Fresno Bulldogs.<sup>23</sup> The facility was subsequently placed on lockdown.<sup>24</sup>

It would have been prudent of CDCR officials to maintain the bifurcated program indefinitely. Enabling people to fight does not serve any penological, societal, or governmental interest. CDCR observed and expressly acknowledged that there was an ongoing war,<sup>25</sup> but instead of separating the groups, CDCR chose to continue bringing the opposing sides together to allow them to fight.<sup>26</sup> I placed prison administrators on notice of this illegal practice through an administrative appeal.<sup>27</sup>

On February 21, 2019, I filed a petition for writ of habeas corpus in Fresno County Superior Court.<sup>28</sup> I alleged that the continued integration of the opposing factions failed to protect individuals of those groups from assault, in violation of our Eighth Amendment rights.<sup>29</sup>

### A. Governing Law

Multiple bodies of law govern prisoner safety. Under the Eighth Amendment, prison officials must take reasonable measures to protect prisoners from assault by other inmates.<sup>30</sup> Prison officials' "deliberate indifference" to a substantial risk of serious harm to an inmate violates the Eighth Amendment.<sup>31</sup> In order to establish deliberate indifference, an incarcerated person must show that prison officials failed to respond reasonably to a known and substantial risk of serious harm.<sup>32</sup> In Eighth Amendment cases, this means that the incarcerated person must show that prison personnel "[knew] of and disregard[ed] an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference."<sup>33</sup> If there is evidence that a risk was

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22. See Informal Response, *supra* note 21, at 2.

23. Petition for Writ of Habeas Corpus, *supra* note 9, ex. F.

24. *Id.*

25. See *id.* exs. A, D.

26. *Id.* at 4.

27. CDCR 602 Inmate/Parolee Appeal, log no. PVSP-19-00408.

28. Petition for Writ of Habeas Corpus, *supra* note 9.

29. *Id.* at 5–6.

30. See *Farmer v. Brennan*, 511 U.S. 825, 833 (1994).

31. *Id.*

32. See *id.* at 834–47.

33. *Id.* at 837.



obvious, a factfinder may conclude that prison officials had actual knowledge of it.<sup>34</sup>

Further, under California law, it is “unlawful to use in the reformatories, institutions, jails, state hospitals or any other state, county, or city institution any cruel, corporal or unusual punishment or to inflict any treatment or allow any lack of care whatever which would injure or impair the health of the prisoner, inmate, or person confined.”<sup>35</sup> Moreover, administrative regulations require that “[e]very employee, regardless of his or her assignment, is responsible for the safe custody of the inmate confined in the institutions of the department.”<sup>36</sup>

## II. PRISON OFFICIALS RETALIATE AGAINST INCARCERATED INDIVIDUALS WHO USE THE LAW TO PROTECT THEMSELVES FROM VIOLENCE

In addition to my habeas petition, my cellmate and I organized over six hundred Southern Hispanics to simultaneously file administrative appeals on multiple occasions. Prison administrators are unaccustomed to this practice. It places a tremendous strain on the prison’s resources and it is extremely time-consuming for prison personnel to process and respond to that quantity of appeals. We filed them on issues related to the gladiator fights. For example, because of an unresolved war between the Northern Hispanics and the Fresno Bulldogs, CDCR keeps both groups separated. So, we appealed CDCR’s refusal to keep the Bulldogs separated from the Southern Hispanics, whites, and Mexican Nationals while keeping them separated from the Northern Hispanics. Each time we organized the mass filing of appeals, the guards would tear apart our cell. They would disguise it by searching other cells in our building, but they were focused on sending a message to us.

Recognizing what we learned about public awareness in conjunction with court filings from our experience at Pelican Bay, we went to work on creating awareness and pressure. My cellmate’s wife organized a protest in front of the prison on Saturday, March 16, 2019.<sup>37</sup> Early Monday morning,

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34. *Id.* at 842–43.

35. CAL. PENAL CODE § 673 (West 2020).

36. CAL. CODE REGS. tit. 15, § 3271 (2021).

37. See Mary Blyth Jones, *Protestors Call for Change*, COALINGA PRESS (Mar. 20, 2019), <https://coalingapress.org/2019/03/20/protesters-call-for-change> [<https://perma.cc/UEY4-LD8Z>].

on March 18, the guards ransacked our cell. And again, to disguise that they were targeting us, they also searched other cells in our building.

We also organized letterwriting campaigns. We passed around a letter that I had written to Governor Gavin Newsom and members of the Assembly and Senate's Public Safety Committees for other Southern Hispanics and Mexican Nationals to use as a template for their own letters. We also encouraged other Southern Hispanics and Mexican Nationals to have their families ask their local assembly members and senators to intervene. We contacted newspapers, legal advocacy groups, and the Office of Inspector General.

Rather than participate in the gladiator fights and perpetuate the violence, all Southern Hispanics and Mexican Nationals refused CDCR's attempt to conduct a gladiator fight on April 30, 2019. The whites, however, made peace with the Fresno Bulldogs, and CDCR and Pleasant Valley officials responded by removing the Fresno Bulldogs and whites from lockdown while keeping us on lockdown. We were told that if we wanted to be off of lockdown and regain access to rehabilitative programs, we had to go through "integration incrementals" with the Bulldogs. Although we refused to participate in the gladiator fights, there were still physical assaults and stabbings between the Fresno Bulldogs and Southern Hispanics.<sup>38</sup> These incidents would occur when the guards would open the cells of affiliates of one group while the other was outside of their cells.<sup>39</sup> Whether it was inadvertent or intentional, their actions failed to protect the incarcerated men. We continued to file administrative appeals regarding these incidents.

On May 10, 2019, the Fresno County Superior Court issued an order to show cause on my Eighth Amendment claim that prison officials had failed, and continued to fail, to protect prisoners from assault. Within the order, the court directed CDCR to address: (1) whether prison officials at Pleasant Valley State Prison were organizing fights among rival gang members, and (2) what measures had been taken at Pleasant Valley State Prison in response to the gang violence.<sup>40</sup> The order to show cause prompted a visit from the deputy attorney general to Pleasant Valley to inquire about the fights. Meanwhile, we continued forward with our letter writing and public

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38. Motion for Preliminary Injunction, *McCarthy v. Frauenheim*, No. 19CRW684722 (Cal. Super. Ct. Feb. 18, 2020); *see also* CDCR 602 Inmate/Parolee Appeal, log no. PVSP-C-19-01090.

39. Motion for Preliminary Injunction, *supra* note 38; CDCR 602 Inmate/Parolee Appeal, *supra* note 38.

40. Order to Show Cause, *McCarthy*, No. 19CRWR684722 (Cal. Super. Ct. May 10, 2019).

awareness campaign. The pressure became too much for prison officials. On July 10, 2019, they had a guard plant a weapon in our cell and say that it was ours.<sup>41</sup> I had anticipated further retaliation from prison administrators, but not something so criminal. I was devastated. At that point, I had already been accepted into UC Berkeley and had less than a year remaining on my sentence. A Rules Violation Report (RVR) for a weapon gets referred to the local district attorney for possible felony prosecution.<sup>42</sup> Moreover, a guilty finding on the administrative rules violation results in a loss of 365 days worth of early release credit.

My cellmate and I were taken to solitary confinement. A week later, on July 17, 2019, ten Southern Hispanics were released to the recreation yard, where over eighty Fresno Bulldogs were waiting.<sup>43</sup> The Southern Hispanics were attacked by the Fresno Bulldogs,<sup>44</sup> though fortunately there were roughly eighty white incarcerated people who intervened on behalf of the Southern Hispanics.<sup>45</sup> A massive riot followed,<sup>46</sup> requiring two victims to be air-lifted to the hospital. A week later, on July 31, my cellmate and I were released from solitary confinement. Prison administrators conducted a gladiator fight between three Fresno Bulldogs and three Southern Hispanics that same day,<sup>47</sup> and another one week later, on August 7, between two members of each group.<sup>48</sup>

The next month, a few notable events had a significant impact. First, on September 6, 2019, the court denied a motion made by the attorney general to vacate the order to show cause.<sup>49</sup> Second, the Associated Press published an article about the gladiator fights<sup>50</sup> in which CDCR announced that it had

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41. See Rules Violation Report, log no. 6875337 (dismissed Jan. 8, 2020).

42. See CAL. CODE REGS. tit. 15, §§ 3312(a)(3), 3316(a)-(b) (2020).

43. Return to Order to Show Cause ex. 1, *McCarthy*, No. 19CRWR684722 (Cal. Super. Ct. Sept. 13, 2019).

44. *Id.*

45. *Id.*

46. See *id.*; Cresencio Rodriguez-Delgado, *Two Riots Involving More Than 200 Prisoners Break Out at Coalinga Prison, State Confirms*, FRESNO BEE (July 18, 2019), <https://www.fresnobee.com/news/local/crime/article232856067.html> [<https://perma.cc/Y989-H8QP>].

47. Motion for Preliminary Injunction, *supra* note 38.

48. *Id.*

49. Order Denying Motion to Vacate Order to Show Cause, *McCarthy*, No. 19CRWR684722 (Cal. Super. Ct. Sept. 6, 2019).

50. Don Thompson, *California Halts Prison Gang Peacemaking Effort*, AP (Sept. 24, 2019), <https://www.wane.com/news/apnewsbreak-california-halts-prison-gang-peacemaking-effort> [<https://perma.cc/2NRU-KEJ2>].

decided to temporarily halt the “peace talks” (their characterization of the gladiator fights).<sup>51</sup>

Prison personnel at Pleasant Valley were very upset about these developments. They did not like all of the negative attention that the prison was receiving. One of the guards suggested that if I were to withdraw my habeas petition, his superiors would withdraw the RVR for the weapon. For practical and ethical reasons, I did not take prison administrators up on their offer. I was, however, concerned about future retaliation, and I did not have any means of protecting myself from it. I was correct to be concerned: The retaliation continued but took on a different form. A guard told me that they had information that I was in danger from other Southern Hispanics. He suggested that I request placement on a “sensitive needs yard” (protective custody), and if I did, they would drop the RVR for the weapon. I recognized this as another ploy to pressure me to withdraw the petition and rejected it outright. If I were in protective custody, the habeas petition would become moot because I would no longer be confined under the conditions which gave rise to my legal claim.

On November 22, 2019, the Fresno County Superior Court ordered an evidentiary hearing for my habeas petition.<sup>52</sup> Following that development, CDCR implemented the same bifurcated program that they had terminated months earlier at all institutions where the Southern Hispanics and Bulldogs were housed in the same facility. Unfortunately, there was a catch: The bifurcated program would end in March, and at that point, CDCR would order prison officials to attempt to integrate the Bulldogs and Southern Hispanics. The bifurcated program only lasted a few weeks. As a Southern Hispanic was returning to his cell, a guard opened the cell of two Bulldogs. The two Bulldogs ran out of their cell and attacked the Southern Hispanic. The entire Bulldog faction was placed on lockdown, while the other factions continued to have access to normal prison activities. That was shortlived because of COVID-19. COVID-19 resulted in a semi-lockdown, but CDCR has not conducted any gladiator fights since August 7, 2019.

I was required to be present at a status hearing for the habeas petition in the Fresno County Superior Court on January 10, 2020. Two days before I was taken to court, the RVR for the planted weapon was dismissed. Before it was dismissed, one of the guards told me that he and other prison

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51. *Id.*

52. Order Setting Evidentiary Hearing, *McCarthy*, No. 19CRWR684722 (Cal. Super. Ct. Nov. 22, 2019).

personnel didn't like their names coming up in court. I paroled on July 24, 2020, and began classes at UC Berkeley on August 26, 2020. I attended the evidentiary hearing on September 29, 2020 and testified about the facts of the case. We currently await a ruling from the court.

### III. CDCR'S LEGAL JUSTIFICATION FOR THE GLADIATOR FIGHTS

CDCR's justification for continuing integration attempts between the rival groups—despite their knowledge that the groups will fight—is difficult to understand. Initially, CDCR relied on California Penal Code Section 2600 as justification for the gladiator fights, and included language from the Supreme Court's decision in *Bell v. Wolfish*<sup>53</sup>: “Prison administrators . . . should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.”<sup>54</sup> It is unclear how CDCR would arrive at the conclusion that integrating warring parties would “preserve internal order” and “maintain institutional security.” Moreover, CDCR completely failed to grasp that Section 2600 does not give them free license to allow incarcerated individuals to be assaulted.

CDCR also argued in their informal response that maintaining a bifurcated program would be in violation of *Brown v. Board of Education*<sup>55</sup> because they cannot provide separate but equal access to prison programs.<sup>56</sup> But CDCR fundamentally misinterprets *Brown's* holding. Separating the Fresno Bulldogs from the Southern Hispanics would not be raced-based because both groups are classified as Hispanic. Additionally, segregation of the two would be based on gang factors, not on race factors. Even assuming that *Brown* applied in this scenario, prison regulations may impinge on inmates' constitutional rights as long as the regulation is “reasonably related” to legitimate penological interests.<sup>57</sup> What could be a more important penological interest than protecting prisoners from assault? CDCR routinely cites *Turner* as grounds for denying inmates certain rights; they could certainly cite *Turner* if they believed that the bifurcated program ran afoul of *Brown*.

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53. 441 U.S. 520 (1979).

54. *Id.* at 547.

55. 347 U.S. 483 (1954).

56. Defendant's Informal Reply, *supra* note 21.

57. *Turner v. Safley*, 482 U.S. 78, 89 (1987).

In CDCR's response to the order to show cause, they changed their legal justification for continuing the gladiator fights: They argued that the *Mitchell v. Cate* settlement agreement<sup>58</sup> requires them to continuously attempt to integrate opposing factions. Under the *Mitchell* settlement agreement, CDCR may not implement race-based lockdowns.<sup>59</sup> Again, CDCR misinterpreted and misapplied the law. Protecting prisoners from assault does not give rise to a race-based lockdown issue, nor does operating a bifurcated program based on gang factors. Additionally, CDCR completely fails to understand that the *Mitchell* settlement agreement neither overturned *Farmer v. Brennan*, nor repealed California Penal Code Section 673. Regardless of how CDCR constructs the meaning of a "race-based lockdown," "allowing the beating . . . of one prisoner by another serves no 'legitimate penological objectiv[e],' anymore than it squares with 'evolving standards of decency.'"<sup>60</sup> Not only does CDCR have a difficult time interpreting a single ruling, but they have even greater difficulty harmonizing multiple laws. Sadly, they have chosen to ignore the fact that they must "take reasonable measures to guarantee the safety of the inmates" and "are not free to let the state of nature take its course."<sup>61</sup>

If CDCR believed that the bifurcated program conflicted with the terms of the *Mitchell* settlement, they could easily house the Bulldogs in a facility where the Bulldogs do not have any gang rivals. CDCR operates thirty-four prisons with numerous facilities, or subprisons which are physically separate clusters of buildings in which residents only interact with people housed inside that facility, within each prison.<sup>62</sup> There are housing options available that would prevent the assaults; a lot can be inferred by CDCR's reluctance to do so. Gladiator fights between Southern Hispanics and Bulldogs date back to 2006.<sup>63</sup>

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58. Stipulated Settlement, *Mitchell v. Cate*, No. 2:08-CV-01196-TLN-EFB (E.D. Cal. May 30, 2008).

59. *Id.* at 4.

60. *Farmer v. Brennan*, 511 U.S. 825, 833 (1994) (alteration in original) (first quoting *Hudson v. Palmer*, 468 U.S. 517, 548 (1984), then quoting *Estelle v. Gamble*, 429 U.S. 97, 102 (1976)).

61. *Id.* at 832–33.

62. GABRIEL PETEK, LEGIS. ANALYST'S OFF., THE 2020–21 BUDGET: EFFECTIVELY MANAGING STATE PRISON INFRASTRUCTURE 3 (2020), <https://lao.ca.gov/reports/2020/4186/prison-infrastructure-022820.pdf> [<http://perma.cc/5ETL-WRZY>].

63. See John Kavanaugh, *Anatomy of a Failed Prison Yard Integration*, 24 PEACEKEEPER (2007).

#### IV. CDCR'S SYSTEMIC FAILURE TO PROTECT PRISONERS FROM ASSAULT

The gladiator fights between the Bulldogs and Southern Hispanics are part of CDCR's larger, systemic failure to protect incarcerated people from assault. In the 1990s, guards conducted gladiator fights among multiple gangs at California State Prison–Corcoran.<sup>64</sup> The guards summoned female guards and secretaries to watch, bet on the outcomes of the fights, and shot the incarcerated people when they failed to heed the guards' orders to stop fighting.<sup>65</sup> Over an eight-year period, seven incarcerated people were shot dead and fifty were wounded.<sup>66</sup>

In 2018, CDCR began integrating general population inmates with sensitive needs inmates.<sup>67</sup> Sensitive needs inmates are those with safety concerns (who should be in protective custody), such as those who were state witnesses and testified against their co-defendants, gang dropouts, those who were discovered to be informants for prison officials, former law enforcement, and people convicted of child molestation or rape.<sup>68</sup> CDCR reasoned that inmates should learn to get along with one another and forced the general population and sensitive needs inmates together.<sup>69</sup> CDCR labeled places where these integrations were occurring as Non-Designated Programming Facilities (NDPF).<sup>70</sup> Incarcerated people who refuse placement in an NDPF are disciplined and often transferred to higher security prisons.<sup>71</sup> Out of the fifty-one incidents of general population–

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64. Tim Cornwell, *Staged Fights, Betting Guards, Gunfire and Death for the Gladiators*, INDEPENDENT (Aug. 21, 1996), <https://www.independent.co.uk/news/world/staged-fights-betting-guards-gunfire-and-death-for-the-gladiators-1310849.html> [<https://perma.cc/K5PB-BU6F>].

65. *Id.*; see also Stories Written By a Current Prisoner, *California Prison "Gladiator Days at Corcoran,"* YOUTUBE (Oct. 23, 2020), [https://www.youtube.com/watch?v=X\\_8Ap-fviow](https://www.youtube.com/watch?v=X_8Ap-fviow) [<https://perma.cc/ULH8-NNDV>].

66. Cornwell, *supra* note 64.

67. See *Non-Designated Programming Facilities (NDPF)*, PRISONER ADVOCACY NETWORK, <https://www.prisoneradvocacynetwork.org/non-designated-programming-facilities.html> [<https://perma.cc/2WN3-T9PR>]; Ruthie Montalvo, *The Mayhem of "Merged Yards,"* SILICON VALLEY DE-BUG (Apr. 11, 2019), <https://www.siliconvalleydebug.org/stories/the-mayhem-of-merged-yards> [<https://perma.cc/HS7Z-LUJD>].

68. See *Non-Designated Programming Facilities (NDPF)*, *supra* note 67.

69. See Tyler Pratt, *Inmate Riots and Injuries Reported in the Wake of New State Prison Program*, KCBX NEWS (Dec. 26, 2018), <https://www.kcbx.org/post/inmate-riots-and-injuries-reported-wake-new-state-prison-program#stream/0> [<https://perma.cc/EM23-TGRZ>].

70. *Non-Designated Programming Facilities (NDPF)*, *supra* note 67.

71. See *id.* ("When people refuse these unsafe and potentially deadly housing assignments, they are disciplined and often transferred to higher security prisons where they lose

special needs integration that the Office of Inspector General tracked, 64 percent resulted in violence.<sup>72</sup>

### A. Necessary Changes

It is deeply concerning that the California Governor's Office, Senate and Assembly's Public Safety Committees, and the Office of Inspector General are aware of the Southern Hispanic–Bulldog gladiator fights—and the NDPF violence—but have done nothing to intervene. It is also concerning that the Attorney General's office, the agency that represents CDCR on habeas petitions, has not informed them that they are in violation of the law. CDCR has a legal department that is designed to advise them on legal matters—either they are incompetent or CDCR simply ignores their advice.

In my experience, CDCR usually only does the right thing once the court has forced them to. Regardless of who the secretary is, CDCR has a deeply embedded punitive culture that treats rehabilitation as a privilege—earned only when incarcerated people jump through hoops and humiliate themselves—rather than a public safety obligation that they must fulfill. CDCR neglects to recognize that many of its incarcerated people have already suffered a lifetime of domestic trauma and street trauma, which the gladiator fights only exacerbate. The trauma that the gladiator fights create—coupled with the lack of rehabilitative programs because of lockdowns—only ensures that incarcerated people return to their communities unimproved and further traumatized. From both public safety and moral standpoints, it is unacceptable to subject incarcerated human beings to assault and deny them rehabilitation. CDCR must devise housing arrangements that provide access to educational and rehabilitative opportunities, regardless of one's custody level or gang affiliation. CDCR must treat safety and rehabilitation as nonnegotiable priorities. The legislature must enact legislation that expressly states that incarcerated people have a statutory right to rehabilitation so that CDCR cannot hold rehabilitation hostage if those in their custody do not submit to their cruel and unusual treatment.

In my experience, courts are reluctant to strike down prison policies and afford an unreasonable level of deference to the decisions of prison

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access to time outside of the cell, and programs and work that entitle them to time credits.”).

72. *Id.*



administrators.<sup>73</sup> Given CDCR's history of blatantly disregarding federal, state, and administrative law, courts must have greater authority to intervene. Incarcerated individuals and the state of California cannot continue to give CDCR so much unchecked authority. The legislature must enact legislation that gives the courts greater ability to intervene.

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73. *See, e.g.*, *Procunier v. Martinez*, 416 U.S. 396, 405 (1974) (“Courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform.”), *abrogated on other grounds by* *Thornburgh v. Abbott*, 490 U.S. 401 (1989); *Turner v. Safley*, 482 U.S. 78, 90 (1987) (“[C]ourts should be particularly conscious of the ‘measure of judicial deference owed to corrections officials . . . in gauging the validity of [a prison] regulation.’” (quoting *Pell v. Procunier*, 417 U.S. 817, 827 (1974))).