A Guide to Prison Litigation in the Eighth Circuit

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INTRODUCTION

The American Civil Liberties Union (ACLU) of Nebraska works to protect the rights guaranteed by the U.S. Constitution, including those that affect inmates such as the Eighth Amendment ban on cruel and unusual punishment. Perhaps because there are few other practical ways for inmates to challenge the conditions under which they live, we receive hundreds of complaints from inmates every year. As the prison population in Nebraska has increased and the number of available services has decreased, the number of complaints has skyrocketed. If the current pace continues, we will receive twice as many complaints in 2014 as we received in 2013.

We carefully evaluate every complaint we receive in order to decide if it alleges a constitutional violation that we are able to pursue. The solution to many prison problems is not found in the Constitution; there simply is not a constitutional right to many of the things that inmates want. Other complaints raise legitimate issues but are not cost effective to pursue. It is an unfortunate reality that litigation is expensive and the ACLU of Nebraska must pick its battles carefully. There are some, however, that raise issues that we take very seriously. As the number of complaints has risen, so too has the potential for litigation.

This report describes the constitutional standards that apply to prison litigation. Regardless of the constitutional standard or the issue, it is important to always remember that courts are reluctant to get involved in managing a state's prisons. The issues raised in prison litigation are complicated and not easily solved by judicial decree. Running a prison system requires expertise that courts simply do not have, and since most prisons are run by the states, principles of federalism provide federal courts with good reason to defer to local authorities.[1]

However, when constitutional rights are at stake, federal courts will reluctantly take action.[2] When they do so, it is almost always by using one of four basic tests. The first and most important is the deliberate indifference test used for potential violations of the Eighth Amendment's ban on cruel and unusual punishment. The deliberate indifference test asks whether prison officials were deliberately indifferent to serious harm or the risk of serious harm. The deliberate indifference test has grown in popularity within the court system and often is referred to in prison cases outside the punishment context.

Second in importance is the deferential *Turner* test, which is used when considering the constitutional rights of inmates *other* than the right to be free of cruel and unusual punishment. The *Turner* test asks simply whether a given restriction on inmate rights is reasonably related to a legitimate penological objective. First Amendment rights such as free speech and the free exercise of religion are considered under this test.

Third in importance is due process under the Fifth and Fourteenth Amendments. Procedural due process prevents the state from doing certain things to inmates without following certain processes. Where an inmate is transferred to segregation or denied parole, the question often becomes whether or not the state followed the correct procedures before making such a decision.

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[1] *Procunier v. Martinez*, 416 U.S. 416, 404-405 (1974) (recognizing that courts are poorly equipped to decide prison issues is no more than a "healthy sense of realism").

[2] *Id.* at 405-406 (when prison regulation violates Constitution courts will "discharge their duty").

Substantive due process is another aspect of the Due Process Clause that comes up in cases involving pretrial detainees or residents in mental health facilities. Because those who are held by the state but not convicted of a crime may not be punished at all, the Eighth Amendment does not apply. Instead, courts consider whether a prison regulation or the actions of prison officials have violated a fundamental right in a way that "shocks the conscience." The Eighth Amendment cannot be totally ignored, however, because courts often equate "cruel and unusual" with "shocks the conscience."

This article will discuss the four basic tests in some detail before moving on to consider how these tests have been applied in specific circumstances within the Eighth Circuit. First we will look at what we are calling "primary causes of action." By this we mean occurrences that directly violate the Constitution, such as denying inmates adequate medical care. Next we will consider "secondary causes of action," which are conditions that do not directly violate the Constitution, but may lead to a primary cause of action. For example, a lockdown does not violate the Constitution directly, but can result in inadequate medical care (which does violate the Constitution). A brief look at several common issues that do not violate the Constitution will complete our survey. The conclusion offers suggestions on the future of prison law and is followed by suggestions for further reading.

BASIC TESTS

The Eighth Amendment: Deliberate Indifference

The Eighth Amendment reads, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[3] The Eighth Amendment has been incorporated and applies to the states through the Fourteenth Amendment.[4] It is the ban on cruel and unusual punishments that concerns us here.

While the Eighth Amendment may have originally prohibited only actual torture, in the modern world it encompasses "broad and idealistic concepts of dignity, civilized standards, humanity and decency."[5] This broad conception bars not only punishments that are incompatible with the "evolving standards of decency that mark the progress of a maturing society" but also those that involve the unnecessary and wanton infliction of pain or are grossly disproportionate to the severity of the crime [6] This expansive understanding bans conditions of confinement that result in harm serious enough to amount to torture or in pain that serves no penological purpose.[7]

The Eighth Amendment's flexibility, however, does not mean that courts are free to apply their own judgment. Instead courts look for objective factors "derived from history, the action of state legislatures, and the sentencing by juries" to the maximum possible extent.[8] The opinions of experts can inform a court's opinion but do not themselves establish Eighth Amendment standards.[9]

Assuming that the harm in question does not comport with modern standards of decency, a court will look next to the state of mind of the prison officials being accused of violating the Eighth Amendment. Harm that is intentionally inflicted or that results from "deliberate indifference" violates the Eighth Amendment.[10]

Deliberate indifference covers the ground between negligent acts on the part of prison officials, which never violate the Eighth Amendment, and acts deliberately intended to cause harm, which always violate the Eighth Amendment. Negligence and medical malpractice do not become constitutional violations "merely because the victim is a prisoner."[11] On the other hand, acts or omissions taken "for the very purpose of causing harm" always violate the Eighth Amendment.[12]

Deliberate indifference is similar to criminal negligence in that it requires disregarding an excessive risk that the actor is *actually* aware

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[3] U.S. Const. amend VIII.

[4] *Robinson v. California*, 370 U.S. 660, 667 (1962).

[5] *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (quoting *Jackson v. Bishop*, 404 F.2d 571, 579 (8th Cir. 1968)) (recent cases have proscribed more than "physically barbarous punishments"). For older cases, see *Wilkerson v. Utah*, 99 U.S. 130, 136 (1879) (Eighth Amendment bans torture and the like); *In re Kemmler*, 136 U.S. 436, 447 (1890) ("punishments are cruel when they involve torture"). For more recent cases, see *Hudson v. McMillian*, 503 U.S. 1, 8 (1992) (Eighth Amendment has "few absolute limitations"); *Gregg v. Georgia*, 428 U.S. 153, 171 (1976) (Eighth Amendment not limited to torture but expands as public opinion becomes "enlightened"); *Trop v. Dulles*, 356 U.S. 86, 100-101 (1958) (Eighth Amendment "must draw its meaning from the evolving standards of decency"); *Weems v. United* States, 217 U.S. 349, 372-373 (1910) (Eighth Amendment originally banned torture but is not so limited today).

[6] *Estelle*, 429 U.S. at 102-103 (citing *Trop v. Dulles*, 356 U.S. 86, 101 (1958); *Gregg v. Georgia*, 428 U.S. 153, 173 (1976)).

[7] *Estelle*, 429 U.S. at 103 (citing *Gregg*, 428 U.S. at 182-183).

[8] *Rhodes v. Chapman*, 452 U.S. 337, 346-347 (1981); *Estelle*, 429 U.S. at 104.

[9] *Smith v. Norris*, 877 F. Supp. 1296, 1305 (E.D. Ark. 1995) ("the opinions of experts do not establish constitutional standards . . . but . . . can assist a court").

[10] *Estelle*, 429 U.S. at 104-105 (internal citations omitted); *Farmer v. Brennan*, 511 U.S. 825, 834 (1994).

[11] *Estelle*, 429 U.S. at 106. See also *White v. Farrier*, 849 F.2d 322, 325 (8th Cir. 1988) (mere negligence not Eighth Amendment violation).

[12] *Farmer*, 511 U.S. at 835.

of.[13] In the words of the court:

> [A] prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards 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 . . . The Eighth Amendment does not outlaw cruel and unusual "conditions"; it outlaws cruel and unusual "punishments."[14]

Showing that a prison official actually knew of a risk of serious harm requires an inquiry into the official's state of mind in order to determine what he or she knew at the time of the alleged Eighth Amendment violation.[15] While this might seem like an impossible task, an official's knowledge can be proved in "the usual ways, including inference from circumstantial evidence."[16] A fact finder could conclude that a prison official knew about a substantial risk from the very fact that the risk was obvious.[17] As an example, if an inmate could show that

> [A] substantial risk of inmate attacks was "longstanding, pervasive, well-documented, or expressly noted by prison officials in the past, and the circumstances suggest that the defendant-official being sued had been exposed to information concerning the risk and thus 'must have known' about it, then such evidence could be sufficient to permit a trier of fact to find that the defendant-official had actual knowledge of the risk.[18]

Allowing proof of knowledge from circumstantial evidence loosens the (theoretically) strict knowledge requirement and makes proof in such a case more like proof of recklessness in the civil context.[19] However, a prison official can always show that, despite the obviousness of the risk, he or she was not *actually* aware of the risk.[20]

In addition to defending themselves by proving a lack of knowledge, prison officials can also avoid liability by showing that they acted reasonably under the circumstances. If an official acted appropriately in the face of a known risk of harm, that official is not guilty of an Eighth Amendment violation even if the harm in question did in fact befall the inmate.[21] The reasonableness requirement also means that the level of care required under the deliberate indifference standard can vary with the situation. For example, less care is required when prison officials are faced with an emergency such as a prison riot.[22]

An inmate facing a risk of harm does not have to wait for the harm to actually occur before filing suit. It is enough if the inmate is facing a serious risk of harm that officials are aware of and doing nothing about.[23] It is also unnecessary to prove that the risk was unique to the prisoner in question; a general but serious risk is sufficient.[24] In either case, proof that an inmate has notified officials of the risk he or she is facing is helpful in proving such an

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[13] *Id*. at 836-837, 839-840 (referring to Prosser & Keeton, *Restatement (Second) of Torts* § 34, 213-214 (1965); R. Perkins & R. Boyce, *Criminal Law*, 850-851 (3d. ed. 1982)).

[14] *Id*. at 837-838.

[15] *Id*. at 838-839.

[16] *Id*. at 842.

[17] *Id*. at 842.

[18] *Id*. at 842-843.

[19] *Id*. at 842. See also *Tokar v. Armontrout*, 97 F.3d 1078, 1083 (8th Cir. 1996).

[20] *Farmer*, 511 U.S. at 844.

[21] *Id*. at 844-845.

[22] *Whitley v. Albers*, 475 U.S. 312, 321-322 (1986).

[23] *Farmer*, 511 U.S. at 846-847.

[24] *Id*. at 843-844.

allegation.[25]

From all of this it seems clear that there are two main issues a plaintiff will face when trying to prove deliberate indifference. First, a plaintiff must show that officials actually knew of the risk of harm in question. In most cases this will probably take the form of showing that the risk was either well known or was totally obvious. Second, a plaintiff must show that prison officials' reaction to this risk was unreasonable. Conversely, a defendant in a deliberate indifference case will try to show that he or she did not actually know of the risk of harm and/or that he or she acted reasonably under the circumstances.

The deliberate indifference standard comes up time and time again in prison litigation. This holds true in the Eighth Circuit the same as everywhere else, and often is the main issue in conditions of confinement cases.[26]

Other Constitutional Rights: The Turner Test

Inmates retain all rights that are completely consistent with incarceration, but lose others to the degree such rights are inconsistent with incarceration.[27] For example, the right not to be discriminated against on the basis of race is fully compatible with incarceration and prison discrimination cases are considered under strict scrutiny like any other discrimination case.[28] Where a right is not totally compatible with incarceration courts will usually defer to prison authorities when considering the rights of inmates.[29]

The "*Turner* test" is a deferential standard designed to balance the rights of inmates with the needs of the prison system when considering prison regulations that curtail rights that are only compatible with incarceration to a limited degree.[30] Examples of rights that must be limited in the prison context and thus are subject to the *Turner* test include free speech, the free exercise of religion, and free association.[31] The *Turner* test applies to both facial and as-applied challenges equally.[32]

This test, which is reminiscent of rational basis review, asks whether a prison rule that infringes on a fundamental right is "reasonably related to legitimate penological objectives."[33] Examples of such legitimate objectives include security, deterrence and rehabilitation.[34] A claimed security concern must be real rather than imagined or speculative.[35]

If the prison regulation addresses a legitimate, non-speculative concern, four factors are used to decide if the regulation is permissible. First, there must be a "valid, rational connection"

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[25] *Id*. at 848.

[26] For examples showing the wide range of cases deliberate indifference is applied to, see *Croom v. Latham*, 2002 U.S. Dist. LEXIS 28968, **5-6 (E.D. Ark. Mar. 11, 2002) (prison overcrowding); *Hott v. Hennepin County*, 260 F.3d 901, 905 (8th Cir. 2001) (pretrial detainee's suicide); *Smith v. Copeland*, 87 F.3d 265, 267-269 (8th Cir. 1996) (unsanitary conditions); *Whitnack v. Douglas County*, 16 F.3d 954, 957 (8th Cir. 1994) (unsanitary conditions).

[27] *Turner v. Safley*, 482 U.S. 78, 95 (1987) (citing *Pell v. Procunier*, 417 U.S. 817, 822 (1974) (lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights); *Beard v. Banks*, 548 U.S. 521, 528 (Constitution permits greater restriction of rights in prison than elsewhere); *Overton v. Bazzetta*, 539 U.S. 126, 131 (2003) (many of the rights enjoyed by other citizens are lost by the prisoner).

[28] *Johnson v. California*, 543 U.S. 499, 512-513 (2005).

[29] *Turner*, 482 U.S. at 84-85, 94-95.

[30] See *Johnson v. California*, 543 U.S. at 510 (*Turner* only applies to rights that must be limited by incarceration); *Shaw v. Murphy*, 532 U.S. 223, 229 (2001) (*Turner* test is a "unitary, deferential standard").

[31] See *Overton v. Bazzetta*, 539 U.S. at 131 (freedom of association is one of the rights least compatible with incarceration); *Shaw v. Murphy*, 532 U.S. 223, 230 (2001) (*Turner* test used for free speech); *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 352-353 (1987) (applying *Turner* to free exercise claim); *Jones v. N. C. Prisoners' Labor Union, Inc.*, 433 U.S. 119, 134-136 (1977) (incarceration necessarily limits First Amendment right of association); *Price v. Johnston*, 334 U.S. 266, 285 (1948) (prisoners lose the right to personally argue their own appeals).

[32] *Bahrampour v. Lampert*, 356 F.3d 969, 975 (9th Cir. 2004).

[33] *Turner*, 482 U.S. at 87, 89 (citing *Procunier v. Martinez*, 416 U.S. 396, 412-413 (1974)); *California First Amendment Coalition v. Woodford*, 299 F.3d 868, 881 (9th Cir. 2002) (If prison can show a legitimate interest it then only needs to show "plausible" evidence that the policy in question will further that interest).

[34] *Turner*, 482 U.S. at 97-98. See also *Pell v. Procunier*, 417 U.S. 817, 822-823 (1974) (deterrence, protection of society, rehabilitation, and internal security are legitimate penological interests); *California First Amendment Coalition v. Woodford*, 299 F.3d 868, 880 (9th Cir. 2002) (security and staff safety are legitimate penological concerns).

[35] *California First Amendment Coalition*, 299 F.3d at 882.

between the regulation and the governmental interest used to justify it. Second, a court must consider whether alternative means of exercising the right remain open to the inmates. Third, a court must weigh the impact accommodation of the right will have on guards and other inmates. Finally the presence or absence of ready alternatives to the regulation can affect its status.[36]

As suggested by the fourth factor, the availability of "obvious, easy" alternatives to the regulation in question can demonstrate that the regulation is not necessary in order to achieve the prison's objectives.[37] If an inmate can provide an alternative to the challenged regulation that will protect his or her rights at a de minimis cost to the prison's interests it may be evidence of an exaggerated response on the part of the prison.[38]

Although there only needs to be a "common sense" connection between the policy and the stated interest, a connection that is extremely tenuous or speculative may not satisfy the *Turner* test.[39]

Under *Turner* and its progeny, a court will consider most cases not involving the Eighth Amendment under a deferential "reasonably related to a legitimate penological interest" standard. As discussed above, Eighth Amendment claims are governed by the deliberate indifference standard.

Substantive Due Process

When looking at conditions of confinement the first question a court will ask is whether the individual in question has been convicted of a crime and is therefore being confined as punishment. In such cases the Eighth Amendment, with its ban on cruel and unusual punishments, governs. In all other cases, however, the Fourteenth Amendment and substantive due process sets the constitutional standard.[40] This simple division is complicated, however, by the tendency of courts to look to the Eighth Amendment when applying the Fourteenth.

Substantive due process governs cases in which the individual in question has not been convicted of a crime because such a person cannot (theoretically) be "punished" at all.[41] The Fourteenth Amendment prevents the states from depriving any person of "life, liberty or property without due process of law."[42] Due process has been held to cover more than simply procedural fairness.[43] The aspect of the Due Process Clause that goes beyond procedure to bar certain government actions "regardless of the fairness of the procedures used to implement them" is known as substantive due process.[44]

Substantive due process has served as something of a catchall for rights not specifically mentioned in the Constitution. As such, it cannot be applied to rights that are explicitly covered elsewhere.[45] For example, if

[36] *Turner*, 482 U.S. at 89-91.

[37] *Id*. at 97-98.

[38] *Bahrampour v. Lampert*, 356 F.3d at 976 (citing *Turner*, 482 U.S. at 90-91).

[39] *California First Amendment Coalition*, 299 F.3d at 881-882 (9th Cir. 2002).

[40] *Bell v. Wolfish*, 441 U.S. 520, 535-536 (1979) ("detainee may not be punished prior to an adjudication of guilt").

[41] *Youngberg v. Romeo*, 457 U.S. 307, 315 (1982) (applying due process to involuntarily committed to mental institution). See also *Ingraham v. Wright*, 430 U.S. 651, 669-671 (1977) ("punishment" only occurs after a criminal conviction and thus Eighth Amendment inapplicable to school children); *Bell v. Wolfish*, 441 U.S. at 537 n. 16 (1979) (due process rather than Eighth Amendment applies to pretrial detainees because such detainees may not be punished at all); *Riggins v. Nevada*, 504 U.S. 127, 134-135 (1992) (forcing antipsychotic medication on detainee governed by Fourteenth Amendment); *County of Sacramento v. Lewis*, 523 U.S. 833, 844-850 (1998) (applying substantive due process rather than Eighth or Fourth Amendments to fleeing suspect accidentally struck by police vehicle); *United States v. Neal*, 679 F.3d 737, 740 (8th Cir. 2012) (due process limits the government's power to deprive plaintiff of personal liberty); *Revels v. Sanders*, 519 F.3d 734, 740 (8th Cir. 2008) (commitment is a significant deprivation of liberty that requires due process); *Heidemann v. Rother*, 84 F.3d 1021, 1028 (8th Cir. 1996) (freedom from bodily restraint at the "core" of the due process clause).

[42] US Const. amend. XIV, § 1.

[43] *County of Sacramento*, 523 U.S. at 840.

[44] *Id*. (citing *Daniels v. Williams*, 474 U.S. 327, 331 (1986)).

[45] *Graham v. Connor*, 490 U.S. 386, 395 (1989).

a court were to find that a pretrial detainee or other individual held by the state but not yet convicted of a crime had been "seized" it would ignore substantive due process and use the Fourth Amendment rules governing seizures instead.[46]

At its heart, the Due Process Clause protects the individual from arbitrary government action.[47] This holds true regardless of whether procedural or substantive due process is at issue.[48] While the issue is always the arbitrary use of government power against the individual, the test used to determine what is "fatally arbitrary" differs depending on whether it is the legislative or executive branch that is involved.[49] Because the vast majority of cases involve arbitrary executive action rather than legislative action, we will focus on abusive behavior by government officials rather than abusive laws passed by the legislature.

Only the most extreme executive actions can be "arbitrary in the constitutional sense."[50] The traditional test for determining whether such an extreme abuse of power occurred is the "shocks the conscience" test.[51] The test was first used in 1952 to overturn the conviction of a drug dealer where the evidence was obtained by forcibly pumping the dealer's stomach.[52] Since *Rochin* there have been far more cases holding that government conduct *did not* shock the conscience than holding that it *did*.[53]

Whether or not a government action shocks the conscience is often unclear, but there are a few things that are certain. First, due process does not guarantee a constitutional remedy for every government created harm.[54] Second, negligence on the part of government officials is never enough to shock the conscience.[55] Finally, conduct deliberately intended to cause some unjustifiable harm will generally shock the conscience.[56]

Things get murky, however, when dealing with actions that are more culpable than negligence but are not intentional. Conduct involving recklessness or gross negligence may indeed be actionable, but it is a matter of "close calls."[57] Although these are tough questions for a court to decide, there is at least one guidepost that courts have relied on: the Eighth Amendment.

The Eighth Amendment prohibits cruel and unusual punishment and applies to prisoners convicted of a crime. As mentioned earlier, it does not apply to individuals who are not being punished for a crime. However, the due process rights of pretrial detainees and others held by the government but not convicted of a crime are *at least as great as* those due a convicted prisoner under the Eighth Amendment.[58] Thus a government official will have engaged in conscience-shocking behavior not only by causing intentional harm, but also by acting with deliberate indifference to an individual's serious medical or other needs.[59] Thus while the Eighth Amendment does not form the standard for cases involving pretrial detainees or residents in a mental health facility it is by no means irrelevant. See the other sections of this writing

[46] See *Albright v. Oliver*, 510 U.S. 266, 274-275 (1994) (plurality opinion) (seizure covered by Fourth Amendment not substantive due process).

[47] *County of Sacramento*, 523 U.S. at 845; *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974).

[48] *County of Sacramento*, 523 U.S. at 845-846.

[49] *Id*. at 846.

[50] *Id*. (quoting *Collins v. Harker Heights*, 503 U.S. 115, 129 (1992)).

[51] *Id*.

[52] *Rochin v. California*, 342 U.S. 165, 172 (1952).

[53] See *County of Sacramento*, 523 U.S. at 854 (killing motorcyclist during high speed police chase did not shock the conscience); *Collins*, 503 U.S. at 128 (1992) (failure to properly train employee that caused his death did not shock the conscience); *United States v. Salerno*, 481 U.S. 739, 750-751 (1987) (holding pretrial arrestee without bail did not shock the conscience); *Whitley v. Albers*, 475 U.S. 312, 327 (1986) (shooting inmate during prison riot did not shock the conscience and was not brutal); *Breithaupt v. Abram*, 352 U.S. 432, 435 (1957) (drawing blood from unconscious detainee did not shock conscience because it was not "brutal" or "offensive").

[54] *County of Sacramento*, 523 U.S. at 848.

[55] *Id*. at 848-849.

[56] *Id*. at 849.

[57] *Id*.

[58] *Id*. at 849-850 (citing *Bell v. Wolfish*, 441 U.S. at 535 n. 16).

[59] *Id*. at 850.

for the Eighth Amendment standard on a variety of issues.

Procedural Due Process

The Due Process Clause of the Fourteenth Amendment prohibits the states from depriving any person of "life, liberty, or property, without due process of law."[60] If an interest in life, liberty or property is not at stake, the U.S. Constitution does not require that any particular process be followed.[61] In the prison context the issue is usually whether or not there is a liberty interest at stake. Such an interest can either be implicit in the Constitution itself or can be created by a state law or policy.[62]

One of the liberty interests implicit in the Due Process Clause is the right to serve a sentence that is no longer than what a court imposed.[63] Conversely, there is no implicit liberty interest is being let out of prison early, and thus no special process is required unless an interest has been created by state law.[64]

One way that a state law or policy can create a liberty interest is by subjecting inmates to hardships that are "atypical and significant . . . in relation to the ordinary incidents of prison life."[65] For example, a thirty-day sentence to segregation is not sufficiently different than the normal incidents of prison life to create a liberty interest in remaining free of such a punishment. On the other hand, an assignment of indefinite length to a supermax unit in which the inmate will have almost no contact with other human beings *is* different enough to create a liberty interest.[66]

If there is indeed a liberty interest, three factors are considered when deciding what process must be followed before depriving the inmate of his or her liberty. First, a court will weigh the interest that will be affected by the state action. Second, the risk of an erroneous deprivation of this interest and the probable value of any additional or substitute procedures must be weighed. Finally, the government's interest must be taken into account, including the fiscal and administrative burdens that any additional procedures might entail.[67] This differs from other areas of law, in which cost is not considered relevant in assessing the constitutionality of government action.

Because the process that the state must provide stems from a three-factor balancing test, it can vary depending on the details of each situation.[68] Generally, however, more safeguards must be followed when taking away liberty than when granting liberty. Parole revocation or the cancellation of good time credits based on specific offenses requires a formal, adversarial hearing.[69] "Informal, nonadversary" procedures can be used in cases such as consideration of inmates for parole and the transfer of inmates in and out of segregation.[70]

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[60] U.S. Const. amend XIV § 1.

[61] *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005).

[62] *Id*.

[63] *United States v. Johnson*, 703 F.3d 464, 470 (8th Cir. 2013) (no deprivation of liberty at stake unless the proceedings could increase the range of punishment).

[64] *Id*. at 469-470 (inmate had no liberty interest in having his sentence reduced retroactively).

[65] *Sandin v. Connor*, 515 U.S. 472, 483-484 (1995). See also *Wilkinson*, 545 U.S. at 223 (affirming *Sandin*).

[66] *Wilkinson*, 545 U.S. at 223-224.

[67] *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

[68] *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) ("due process is flexible and calls for such procedural protections as the particular situation demands").

[69] *Wilkinson*, 545 U.S. at 228. See also *Morrissey*, 408 U.S. at 482 (parolee has relied on government's promise not to revoke parole unless certain conditions are met).

[70] *Greenholtz v. Inmates of Neb. Penal & Correctional Complex*, 442 U.S. 1 (1979) (parole requires opportunity to be heard and notice of adverse decision); *Hewitt v. Helms*, 459 U.S. 460, 476 (1982) (inmate must be given notice of charges and opportunity to be heard before being sent to segregation).

PRIMARY CAUSES OF ACTION

The following issues faced by inmates, which this writing calls "primary causes of action," can directly violate the U.S. Constitution. These stand in contrast to what this writing calls "secondary causes of action," which will only raise an Eighth Amendment or other constitutional issue within the Eighth Circuit if they result in one or more of the primary causes of action. For example, a lockdown does not violate the Constitution standing alone. If a lockdown leads to inadequate healthcare, however, it may violate the Eighth Amendment's ban on cruel and unusual punishment. What follows is a short description of those primary causes of action that the ACLU of Nebraska has received the most complaints about since the start of 2013 and the appropriate legal standards that would be applied by a court.

Physical and Mental Health Care

Healthcare for inmates will violate the Eighth Amendment unless it meets certain minimum standards. Under *Estelle v. Gamble*, prison healthcare falls below this standard if prison officials exhibit "deliberate indifference" to an inmate's "serious medical needs."[71] The standard is the same for mental, physical and dental care.[72]

A prison official exhibits deliberate indifference if he or she "knows of and disregards an excessive risk to inmate health or safety."[73] Prison officials may violate the Eighth Amendment not only where they know of a serious medical need but refuse to provide care, but also where they delay needed care for non-medical reasons.[74] A delay as short as three weeks has been found to violate the Eighth Amendment.[75]

Medical care may not be denied or delayed out of monetary or other non-medical concerns.[76] A lack of resources or manpower may not be used to justify violations of the Eighth Amendment under any circumstances.[77] "Grossly incompetent" care can amount to deliberate indifference, as can a decision to provide sick inmates with an easier and less effective course of treatment.[78] On the other

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[71] *Estelle v. Gamble*, 429 U.S. 97, 103 (1976).

[72] For mental health see *Bell v. Stigers*, 937 F.2d 1340 (8th Cir. 1991) (medical needs include mental health); *Olson v. Bloomberg*, 339 F.3d 730, 735 (8th Cir. 2003) (analyzing failure to provide mental heath care under deliberate indifference standard); *Fleming v. Neb. Dep't of Corr. Servs.*, 2006 U.S. Dist. LEXIS 76256, at *44 (D. Neb. Oct. 18, 2006) (conditions that are injurious to mental health can form Eighth Amendment claim); *Wellman v. Faulkner*, 715 F.2d 269, 272 (7th Cir. 1982) (treatment of mental disorders of disturbed inmates is a serious medical need); *Ramos v. Lamm*, 639 F.2d 559, 574 (10th Cir. 1980) (cert denied at *Ramos v. Lamm*, 450 U.S. 1041 (1981)) (Eighth Amendment covers physical ills, dental care and psychological or psychiatric care). For dental care see *Hartsfield v. Colburn*, 491 F.3d 394, 397 (8th Cir 2007) (applying Eighth Amendment to dental care); *Boyd v. Knox*, 47 F.3d 966, 969 (8th Cir. 1995) (same); *Patterson v. Pearson*, 19 F.3d 439, 400 (8th Cir. 1994) (same); *Fields v. Gander*, 734 F.2d 1313, 1315 (8th Cir. 1984) (untreated dental problem could support Eighth Amendment claim).

[73] *Farmer v. Brennan*, 511 U.S. 825, 837 (1994).

[74] *Estelle*, 429 U.S. at 97, 104-105.

[75] *Fincher v. Singleton*, 2013 U.S. Dist. LEXIS 42599, at **13-14 (8th Cir. Mar. 26, 2013) (Eighth Circuit has consistently held that three week delay for obviously sick inmate was too long); *Boyd v. Knox*, 47 F.3d 966, 969 (8th Cir 1996) (three week delay in dental care could be cruel and unusual); *Patterson v. Pearson*, 19 F.3d 439, 440 (8th Cir. 1994) (officials who delayed three weeks in treating swollen jaw not entitled to summary judgment); *Fields v. Gander*, 734 F.2d 1313, 1313-1315 (8th Cir. 1984) (three week delay in dental visit sufficiently serious to state Eighth Amendment claim). But see *Johnson v. Hamilton*, 452 F.3d 967, 973 (8th Cir. 2006) (one month delay in x-raying broken finger not deliberate indifference).

[76] *Hawkins v. Glover*, 2013 U.S. Dist. LEXIS 95576, at *23 (W.D. Ark. June 20, 2013) (delay caused by prison's unwillingness to pay for procedure); *Fincher v. Singleton*, 2013 U.S. Dist. LEXIS 42599, at *14 (W.D. Ark. Mar. 26, 2013) (treatment delayed because of inmate's inability to pay); *Hartsfield v. Colburn*, 371 F.3d 454, 457-458 (8th Cir. 2004) (treatment delayed because of inmate's behavioral problems); *Cody v. Hillard*, 599 F. Supp. 1025, 1041 (1984) (medical specialist's judgment overruled because recommended treatment too expensive).

[77] *Campbell v. Cauthron*, 623 F.2d 503, 508 (8th Cir. 1980); *Gonzales v. Moreno*, 1989 U.S. Dist. LEXIS 17244 at *33 (D. Neb. Nov. 1, 1989).

[78] *Burke v. N.D. Dep't. of Corr. & Rehab.*, 294 F.3d 1043, 1044 (citing *Smith v. Jenkins*, 919 F.2d 90, 93 (8th Cir. 1990)) (grossly incompetent or inadequate care can constitute deliberate indifference); *Warren v. Fanning*, 950 F.2d 1370, 1373 (8th Cir. 1991).

hand, an inmate is not entitled to the treatment of his or her choice, and a prisoner's "mere difference of opinion over matters of expert medical judgment or a course of treatment fails to rise to the level of a constitutional violation."[79] Negligent care or care that amounts to medical malpractice does not violate the Eighth Amendment.[80]

A medical need is sufficiently serious if a physician has diagnosed it as requiring treatment or if it would be obvious to a layperson that it requires medical attention.[81] If the need is obvious to a layperson, it does not need to be verified by medical evidence.[82] A medical condition does not need to be an emergency or life-threatening in order to be sufficiently serious.[83] In the Eighth Circuit most conditions that require surgery and many that do not have been held to be sufficiently serious.[84] An inmate's own self-diagnosis is not sufficient to prove that he or she has a serious medical problem.[85]

The harm from a lack of physical or mental health care does not need to have actually occurred in order for an inmate to bring suit under the Eighth Amendment. It is enough if the inmate alleges a sufficiently grave potential harm.[86] If there are problems shown with the overall system of healthcare in a prison, it does not matter how many inmates were actually affected by the defective system.[87]

Inmates retain a constitutionally protected liberty interest in refusing unwanted medical treatment under the Due Process Clause.[88] This interest is subject to the *Turner* test, and thus a prison may infringe upon this interest if doing so is reasonably related to a legitimate penological interest.[89] As an

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[79] *Hawkins*, 2013 U.S. Dist. LEXIS 95576, at *13 (quoting *Nelson v. Shuffman*, 603 F.3d 439, 449 (8th Cir. 2010)); *Taylor v. Bowers*, 966 F.2d 417, 421 (8th Cir. 1992) (Eighth Circuit has "repeatedly" said that mere difference of opinion not constitutional violation); *Martin v. Sargent*, 780 F.2d 1334, 1339 (8th Cir. 1985) (disagreement over medical treatment is not a constitutional violation); *Massey v. Hutto*, 545 F.2d 45, 46 (8th Cir. 1976) (disagreement over proper treatment of precancerous lesions not Eighth Amendment violation); *Jones v. Lockhart*, 484 F.2d 1192, 1193 (8th Cir. 1973) (differences over matters of medical judgment not § 1983 violation); *Cates v. Ciccone*, 422 F.2d 926, 928 (8th Cir. 1970) (prisoner cannot be the judge of what medical treatment is necessary or proper); *Ayers v. Ciccone*, 300 F. Supp. 568, 573 (W.D. Mo. 1968) (course of treatment authorized by competent medical authorities was not constitutional violation even though inmate would have preferred different treatment)

[80] *Burks v. Teasdale*, 492 F. Supp. 650, 655 (W.D. Mo. 1980) (citing *Estelle v. Gamble*, 529 U.S. at 105-106 (1976).

[81] *Moore v. Jackson*, 123 F.3d 1082, 1086 (8th Cir. 1997) (per curiam); *Johnson v. Busby*, 953. F.2d 349, 351 (8th Cir. 1991); *Brewer v. Blackwell*, 836 F. Supp. 631, 639 (S.D. Iowa 1993); *Coleman v. Rieck*, 2000 U.S. Dist. LEXIS 21695, at *8 (D. Neb. Sept. 5, 2000).

[82] *Bowling v. Holder*, 2013 U.S. Dist. LEXIS 35550, at *41 (E.D. Mo. Mar. 13, 2013).

[83] *Ellis v. Butler*, 890 F.2d 1001, 1003 n. 1 (8th Cir. 1989) (painfully swollen knee possibly serious enough to invoke Eighth Amendment).

[84] For cases requiring surgery, see *Hawkins*, 2013 U.S. Dist. LEXIS 95576, at **2-4 (broken wrist); *Johnson v. Lockhart*, 941 F.2d 705, 706 (8th Cir. 1991) (hernia); *Warren v. Fanning*, 950 F.2d 1370, 1373 (8th Cir. 1991) (infected toenails); *Dace v. Solem*, 858 F.2d 385, 387-388 (8th Cir. 1988) (nasal condition); *Taylor v. Bowers*, 966 F.2d 417, 421 (8th Cir. 1986) (ruptured appendix). For cases not requiring surgery, see *Fields v. Gander*, 734 F.2d 1313, 1314 (8th Cir. 1984) (tooth infection); *Mullen v. Smith*, 738 F.2d 317, 318 (8th Cir. 1984) (back and head injuries); *Houston v. Dwyer*, 2008 U.S. Dist. LEXIS 69413, at *21 (E.D. Mo. Sept. 15, 2008) (Hepatitis C). The Eighth Circuit has also found psychological disorders to be serious medical needs. See *White v. Farrier*, 849 F.2d 322, 324 (8th Cir. 1988) (transsexualism); *Young v. Armontrout*, 795 F.2d 55, 56 (8th Cir. 1986) (unspecified psychiatric needs). For instances where a court did not find a sufficiently serious medical need, see *Strohfus v. Bowers*, 2014 U.S. Dist. LEXIS 100746, at **13-14 (D.S.D. July 24, 2014) (one-week delay in providing medication for ear infection); *Wagner v. City of St. Louis Dep't of Pub.* Safety, 2014 U.S. Dist. LEXIS 96467, at **24-25 (E.D. Mo. July 16, 2014) (eye strain caused by old eyeglass prescription); *Caldwell v. Palmer*, 2014 U.S. Dist. LEXIS 77920, at **14-15 (N.D. Iowa June 9, 2014) (hemorrhoid); *Fourte v. Faulkner County*, 746 F.3d 384, 389-390 (8th Cir. 2014) (high blood pressure readings); *Crowley v. Hedgepeth*, 109 F.3d 500, 502 (8th Cir. 1997) (refusal to provide sunglasses for light sensitivity); *Aswegan v. Henry*, 49 F.3d 461, 464-465 (8th Cir. 1995) (asthmatic placed in shower stall during shakedown); *Kayser v. Caspari*, 16 F.3d 280, 281 (8th Cir. 1994) (inmate's self-diagnosis of kidney stones); *Hagen v. Tate*, 1994 U.S. App. LEXIS 7130 at *2 (8th Cir. April 13, 1994) (smoke inhalation).

[85] *Morgan v. Rabun*, 128 F.3d 694, 698 (8th Cir. 1997) (inmate's claim that medication made him go crazy and lose control); *Kayser v. Caspari*, 16 F.3d 280, 281 (8th Cir. 1994) (self-diagnosis of kidney stones).

[86] *Brewer v. Blackwell*, 836 F. Supp. 631, 640 (S.D. Iowa 1993); *Nelson v. Corr. Med. Servs.*, 583 F.3d 522, 529 (8th Cir. 2009) (shackling female inmate to bed during delivery of child presented unjustifiable risk of harm).

[87] *Finney v. Arkansas Bd. of Corr.*, 505 F.2d 194, 203 (8th Cir. 1974) (finding Eighth Amendment violation without reference to number of prisoners affected); *Cody v. Hillard*, 599 F. Supp. 1025, 1055 (D.S.D. 1984) (deliberate indifference established by showing systemic deficiencies in staffing, facilities, equipment or procedures).

[88] *Pitre v. Cain*, 131 S. Ct. 8, 8 (2010) (citing *Cruzan v. Dir. Mo. Dep't of Health*, 497 U.S. 261, 278 (1990)).

[89] *Id*. at 9 (citing *Washington v. Harper*, 494 U.S. 210 (1990); *Turner v. Safley*, 482 U.S. 78, 89 (1987)).

example, prison officials may force a dangerous mentally ill inmate to take antipsychotic medication whether or not the inmate agrees with the treatment.[90] An inmate may not be punished in a way that poses a substantial risk of serious harm for refusing to take offered medication.[91]

Housing Inmates with Mental Illness

Although there is no clear Eighth Circuit precedent, other circuits have found that housing inmates with mental illness in segregation violates the Eighth Amendment.[92] Courts that have ruled on the issue have found that the "touchstone" in the area is inmate health; while an inmate may be punished, the state may not do so in a "manner that threatens the physical *and mental health* of prisoners."[93] To punish an inmate in a way that creates new or exacerbates existing mental health problems offends the modern conception of basic humanity demanded by the Eighth Amendment.[94]

While any inmate placed in segregation is probably traumatized to some degree, we must remember that for an Eighth Amendment violation there must be a serious harm. A minor impact such as mild anxiety suffered by an otherwise healthy inmate is not enough to create a constitutional problem. On the other hand, the Ninth Circuit has ruled that when housing inmates with existing mental illnesses such as "borderline personality disorders, brain damage or mental retardation, impulse ridden personalities, or a history of psychiatric problems or chronic depression . . . [segregation] is the mental equivalent of putting an asthmatic in a place with little air to breathe."[95] Even the risk of harm for such persons is too much; inmates are not required to "endure the horrific suffering of a serious mental illness . . . before obtaining relief."[96] Within the Ninth Circuit, using segregation as a substitute for mental health care "clearly" rises to the level of deliberate indifference to the serious mental health needs of inmates and amounts to cruel and unusual punishment.[97]

The Ninth Circuit's ruling is backed up by an increasing amount of evidence. According to the 2006 Bureau of Justice and Statistics Report, 56% of state inmates, 45% of federal inmates, and 64% of jail inmates experience symptoms of mental illness.[98] Furthermore, "8 to 19 percent of prisoners have psychiatric disorders that result in significant functional disabilities, and another 15 to 20 percent require some form of psychiatric intervention during their incarceration."[99]

Studies suggest that mentally ill inmates are less able to negotiate the prison environment, have more rule infractions, and therefore spend more time in

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[90] *Id.* (citing *Washington v. Harper*, 494 U.S. at 227).

[91] *Id*. at 9-10 (inmate who refused HIV medication forced to do hard labor).

[92] Although some of the cases mentioned in this section refer to "supermax" facilities, the definition of such facilities would seem to include many segregation units within the Eighth Circuit. See *Austin v. Wilkinson*, 189 F. Supp. 2d 719, 723 (N.D. Ohio 2002) (equating "supermax" with "segregation"); Deborah Golden, *The Federal Bureau of Prisons: Willfully Ignorant or Consciously Unlawful?*, 18 MICH. J. RACE & L. 275, 275-276 (Spring 2013) (providing federal definition of "supermax"); David C. Fathi, *Anatomy of the Modern Prisoners' Rights Suit: The Common Law of Supermax Litigation*, 24 PACE L. REV. 675, 676 (Spring 2004) (equating supermax with "security housing unit," "special management unit," "intensive management unit," and "control unit").

[93] *Madrid v. Gomez*, 889 F. Supp. 1146, 1260 (N.D. Cal. 1995) (citing *Young v. Quinlan*, 960 F.2d 351, 364 (3d Cir. 1992) (emphasis added by *Madrid* court).

[94] *Id*. at 1261; *Jones 'El v. Berge*, 164 F. Supp. 2d 1096, 1123-1124, 1126 (W.D. Wis. 2001) (quoting *Madrid*, 889 F. Supp. at 1265-1266) (granting preliminary injunction removing mentally ill inmates from supermax facility because it was "shocking and indecent").

[95] *Madrid*, 889 F. Supp. at 1265.

[96] *Id*. See also *Ruiz v. Johnson*, 37 F. Supp. 2d 855, 915 (S.D. Tex. 1999) (housing of mentally ill inmates in segregation "perverse and unconscionable"); *Gates v. Cook*, 376 F.3d 323, 342-343 (5th Cir. 2004) (upholding order to house inmates with serious mental illness separately); *Inmates of Occoquan v. Barry*, 717 F. Supp. 854, 868 (D.D.C. 1989) (mentally ill must be housed in separate facility or hospital).

[97] *Casey v. Lewis*, 834 F. Supp. 1477, 1549 (D. Ariz. 1993).

[98] Dori James & Lauren Glaze, *Mental Health Problems of Prison and Jail Inmates*, BUREAU JUST. STAT. (Sept. 2006), http://www.ojp.usdoj.gov/bjs/abstract/mhppji.htm (accessed August 6, 2014).

[99] Jeffrey Metzner, *Class action litigation in correctional psychiatry*, 30 J. AM. ACAD. PSYCHIATRY & L. 19 –29 (2002).

segregation.[100] Once in segregation, symptoms of mental illness may prompt further infractions that can insure the inmate remains in segregation.[101]

Most research agrees that isolation and segregation-like environments are harmful to inmates and are likely to cause serious health problems.[102] The psychological effects of isolation include anxiety, depression, anger, cognitive disturbances, perceptual distortions, obsessive thoughts, paranoia, and psychosis.[103] The psychological effects are especially significant for inmates with serious mental illness who experience psychotic symptoms and/or functional impairments.[104] Additionally, segregation increases the risk of suicide for inmates, especially the mentally ill inmates.[105] After reviewing over two decades of studies on the effects of segregation, Craig (2003) noted:

> There is not a single published study of solitary or supermax-like confinement in which nonvoluntary confinement lasting for longer than 10 days, where participants were unable to terminate their isolation at will that failed to result in negative psychological effects. The damaging effects ranged in severity and included such clinically significant symptoms as hypertension, uncontrollable anger, hallucinations, emotional breakdowns, chronic depression, and suicidal thoughts and behavior.[106]

It is important to note that the effects of segregation vary depending on several factors; duration, characteristics of confinement, and characteristics of the inmate can all affect the impact of segregation.[107]

In light of the substantial research confirming the harmful effects of segregation, the American Psychological Association recently took the position that "prolonged segregation of adult inmates with serious mental illness, with rare exception, should be avoided due the potential for harm to such inmates."[108]

An inmate with mental illness attempting to challenge his or her placement in segregation must show that he or she was subjected to either a serious harm or the risk of serious harm by being placed in segregation, and that prison officials were

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[100] Donald Morgan, Al Edwards, & Larry Faulkner, *The adaptation to prison by individuals with schizophrenia.* 21.4 J. AM. ACAD. PSYCHIATRY & L. ONLINE 427-433 (1993); David Lovell & Ron Jemelka, *When inmates misbehave: The costs of discipline*, 76.2 PRISON J. 165-179 (1996) ("Inmates with serious mental illness committed infractions at three times the rate of non-seriously mentally ill counterparts").

[101] Sasha Abramsky & Jamie Fellner, *Ill-equipped: US prisons and offenders with mental illness*. HUM. RTS. WATCH, 2003; Jamie Fellner, *Corrections Quandary: Mental Illness and Prison Rules*, 41 HARV. CR-CLL REV. 391 (2006).

[102] Peter Scharff Smith, *The effects of solitary confinement on prison inmates: A brief history and review of the literature*, 34.1 CRIME & JUST. 441-528 (2006); Stanley Brodsky & Forrest Scogin, *Inmates in protective custody: First data on emotional effects*, FORENSIC REP. (1988); Stuart Grassian, *Psychopathological effects of solitary confinement*, 140.11 AM. J. PSYCHIATRY 1450-1454 (1983); Jesenia Pizarro & Vanja MK Stenius, *Supermax prisons: Their rise, current practices, and effect on inmates*, 84.2 PRISON J. 248-264 (2004); Thomas Hafemeister & Jeff George, *The Ninth Circle of Hell: An Eighth Amendment Analysis of Imposing Prolonged Supermax Solitary Confinement on Inmates with a Mental Illness*, (2012).

[103] Peter Scharff Smith, *The effects of solitary confinement on prison inmates: A brief history and review of the literature*, 34.1 CRIME AND JUST. 441-528 (2006); Stanley Brodsky & Forrest Scogin, *Inmates in protective custody: First data on emotional effects*, Forensic Rep. (1988); Holly A. Miller, *Reexamining psychological distress in the current conditions of segregation*, 1.1 J. CORRECTIONAL HEALTH CARE 39-53 (1994).

[104] Jeffrey Metzner & Jamie Fellner, *Solitary Confinement and Mental Illness in US Prisons: A Challenge for Medical Ethics*, 38.1 J. AM. ACAD. PSYCHIATRY & L. ONLINE 104-108 (2010) (Stress, decreased social contacts, and lack of structured days can exacerbate the symptoms of mental illness); Sasha Abramsky & Jamie Fellner, *Ill-equipped: US prisons and offenders with mental illness*. HUM. RTS. WATCH, 2003.

[105] See note 4.

[106] Craig Haney, *Mental Health Issues in Long-Term Solitary and 'Supermax' Confinement*, 30:1 CRIME AND DELINQ., 124-156 (2003).

[107] Peter Scharff Smith, *The effects of solitary confinement on prison inmates: A brief history and review of the literature*, 34.1 Crime and Just. 441-528 (2006); James Bonta & Paul Gendreau, *Reexamining the cruel and unusual punishment of prison life*, 14.4 LAW AND HUM. BEHAV. 347 (1990); Stuart Grassian, *Psychopathological effects of solitary confinement*, 140.11 AM. J. PSYCHIATRY 1450-1454 (1983).

[108] Am. Psychol. Ass'n, Position Statement on Segregation of Prisoners with Mental Illness, (Dec. 2012).

deliberately indifferent to that harm or risk of harm. One hurdle that must be faced in such cases is the need for expert testimony on the effects of segregation on the mental health of the inmate in question; it is not enough for the inmate to claim that segregation created or exacerbated a mental illness.[109]

In addition to showing a connection between segregation and mental decline, some courts hold that a successful plaintiff must also demonstrate that there was a viable alternative to segregation available to prison officials. As the Seventh Circuit has said, the "treatment of a mentally ill prisoner who happens also to have murdered two other inmates is much more complicated than the treatment of a harmless lunatic."[110] Prison officials have a duty not only to protect the health of the mentally ill, but also to provide a safe environment for staff and other inmates.[111] Where officials have no other option but to place a mentally ill inmate in segregation in order to protect others, a court will defer to the expertise of prison officials.[112]

For example, a prison placed a dangerous delusional schizophrenic in solitary confinement on limited property. The isolation and silence prevented him from quieting the voices in his head, while the high heat in the cell interacted badly with his medication. He was never able to behave well enough to earn more social time or a television because his mental illness caused him to act out. The court found that it was a "fair inference" that the conditions exacerbated his mental illness and caused him "severe" mental and physical suffering.[113] Unfortunately, plaintiff was unable to show that prison officials had, given his propensity for violence toward himself and others, any alternative but to place him in an isolated room with almost no property.[114]

Other circuit courts instead follow the more traditional view that a lack of resources cannot be used to justify placing mentally ill inmates in unconstitutionally harsh conditions. For example, a New York prison routinely mixed inmates with and without mental illness together in segregation. Those with mental illness suffered from a lack of mental health care and exacerbation of their symptoms, while those without mental illness had to endure the "filth, noisome odors, deafening noise and the sight and sound of prisoners engaging in such psychotic behavior as attempted suicide, self-mutilation and hallucination."[115] Although proper facilities for inmates with mental illness were more expensive and not available at every prison, the court rejected the idea that such concerns could justify violating the Eighth Amendment.[116]

The Eighth Circuit has not held that placing inmates with mental illness in segregation violates the Eighth Amendment. One cannot help but wonder, however, if this may change at some point in the future. As we have seen, the Ninth Circuit has already recognizing the medical science showing how harmful solitary confinement can be, especially for the mentally ill. It does not seem impossible

[109] *Matz v. Vandenbrook*, 2013 U.S. Dist. LEXIS 116930, at *22 (W.D. Wis. August 19, 2013) (granting summary judgment to prison because inmate produced no evidence other than his own testimony that segregation worsened his mental illness). See also *Ruiz v. Johnson*, 37 F. Supp. 2d 855, 911-913 (S.D. Tex. 1999) (discussing expert findings regarding mental illness and segregation); *Jones 'El*, 164 F. Supp. at 1102-1105 (citing expert findings about harmful effects of confinement at supermax facility on the mentally ill).

[110] *Scarver v. Litscher*, 434 F.3d 972, 976 (7th Cir. 2006) (upholding summary judgment where mentally ill inmate failed to show any alternative to segregation); *Anderson v. County of Kern*, 45 F.3d 1310, 1314 (9th Cir. 1995) (short-term housing of violent inmates in "safety cells" acceptable even if those inmates were mentally ill).

[111] *Matz*, 2013 U.S. Dist. LEXIS 116930, at *26.

[112] *Id*. at *25.

[113] *Scarver*, 434 F.3d at 974-975.

[114] *Id*. at 976-977.

[115] *Langley v. Coughlin*, 715 F. Supp. 522, 531, 540 (S.D.N.Y. 1989).

[116] *Id.* at 254. See also *Ruiz*, 37 F. Supp. at 913-915 (finding housing of mentally ill inmates in segregation "deplorable and outrageous" without even referencing alternatives); *Jones 'El*, 164 F. Supp. 2d at 1125 (analyzing housing of mentally ill inmates in supermax without reference to available alternatives).

that at some point the overwhelming evidence being gathered on the effects of solitary will convince the Eighth Circuit that solitary confinement is an atypical and significant hardship and thus implicates the Due Process Clause.

Restraints

While some issues, such as medical care, seem to come up primarily in prison settings, the improper use of restraints emerges in both the prison and hospital context. We therefore will consider restraints under both the Eighth and Fourteenth Amendments.

For persons convicted of a crime the Eighth Amendment's ban on cruel and unusual punishments governs the use of restraints. The deliberate indifference test applies to the use of restraints, and thus whether or not a prison official deliberately ignored a serious risk to an inmate's health will usually be the main issue in contention. Extreme situations, such as punishing inmates by handcuffing them to "hitching posts" and leaving them in the sun without water or shackling pregnant inmates to the hospital bed during delivery are "obvious" enough violations of the Eighth Amendment that a court will not require proof of what a prison official did or did not know.[117]

The reason for placing the inmate in restraints, the time spent in restraints, and the severity of the restraints are used to determine if an Eighth Amendment violation has occurred.[118] Courts are more apt to find a violation where restraints are used to maintain everyday order and discipline than when they are used in emergency situations.[119] Where there is time for consideration, prison officials are expected to consider the risk of harm to an inmate before applying restraints.[120] A prison must have a policy in place governing the use of restraints rather than relying on the discretion of individual officials.[121]

Safety

Inmate safety is one of the core issues in conditions of confinement cases and is frequently described as a basic human need.[122] Being violently assaulted in prison is "not one of the penalties that criminal offenders pay for their offenses against society."[123] Prison officials have a duty to protect inmates from violence committed by other inmates.[124] Prison safety cases are sometimes referred to as "failure to protect" cases.

The Eighth Amendment and the deliberate indifference test govern safety issues.[125] This test requires a plaintiff to show two things in order to prevail. First, the plaintiff must show that the harm or risk of harm is sufficiently serious.[126] Second, the plaintiff must show that prison officials knew

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[117] *Hope v. Pelzer*, 536 U.S. 730, 738 (2002) (citing *Trop v. Dulles*, 356 U.S. 86, 100 (1958)) (hitching posts); *Nelson v. Corr. Med. Servs.*, 583 F.3d 522, 524-527 (8th Cir. 2009) (en banc) (pregnant inmates). See also *Gates v. Collier*, 501 F.2d 1291, 1306 (5th Cir. 1974) (handcuffing inmates to cell bars for long periods of time violated the "precepts of civilization which we profess to possess").

[118] *Linn v. Mason*, 2012 U.S. Dist. LEXIS 166997, at **6-7 (E.D. Ark. Oct. 29, 2012) (four hour duration, stress position, and inmate's threat to harm himself considered relevant to Eighth Amendment issue).

[119] *Hope*, 536 U.S. at 736, 745-746 (cuffing inmate to hitching post for longer than necessary to restore order violated Eighth Amendment). See also *Whitley v. Albers*, 474 U.S. 312, 320 (1986) (Eighth Amendment requirements loosen in emergency situation such as prison riot).

[120] *Nelson v. Corr. Med. Servs.*, 583 F.3d 522, 530 (8th Cir. 2009) (en banc) (prison officials failed to consider risk to pregnant inmate before shackling to delivery bed).

[121] *Burks v. Teasdale*, 492 F. Supp. 650, 679-680 (W.D. Mo. 1980) (prison's lack of policy governing restraints was "disturbing" and violated Constitution)

[122] *Cody v. Hillard*, 830 F.2d 912, 913-914 (8th Cir. 1987).

[123] *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981).

[124] *Farmer v. Brennan*, 511 U.S. 825, 833 (1994); *Wilson v. Seiter*, 501 U.S. 294, 303 (1991) (protection from other inmates is condition of confinement).

[125] *Farmer*, 511 U.S. at 828 (internal citation omitted) ("deliberate indifference to a substantial risk of serious harm to an inmate violates the Eighth Amendment").

[126] For examples of harms or risks that have been declared sufficiently serious, see *Walton v. Dawson*, 752 F.3d 1109, 18-19 (8th Cir. 2014) (failure to lock cell doors at night); *Blackmon v. Lombardi*, 527 Fed. Appx. 583, 584-585 (8th Cir. 2013) (per curiam) (unpublished) (nothing done about dangerous prison employee); *Jensen v. Clark*, 94 F.3d 1191, 1198 (8th Cir. 1996) (assigning cellmates without checking for compatibility); *Smith v. Norris*, 877 F. Supp. 1296 (E.D. Ark. 1995) (knife wound); *Riley v. Olk-Long*, 282 F.3d 592 (8th Cir. 2002) (rape by guard).

about the harm or risk of harm and disregarded or were indifferent to that risk.[127] A plaintiff does not need to show that prison officials "specifically knew about or anticipated the precise source of the harm."[128]

The risk of harm that inmates pose to each other can be either general or specific. For example, an overcrowded sleeping barracks in which violent incidents frequently occur can present a sufficiently serious risk of harm to invoke the Eighth Amendment, even though the risk is not specific to any particular inmate.[129] Similarly, assigning cellmates in a manner that does not take into account compatibility can violate the Eighth Amendment's ban on cruel and unusual punishment if it leads to increased violence between cellmates.[130] This is true even if overcrowding in the prison prevents a more thorough compatibility check from being employed.[131] Officials must put in place adequate security to maintain a reasonably safe environment even in the face of "surprise attacks" and other hazards that cannot be specifically anticipated in advance.[132]

A serious risk can also be specific, as when there is known bad blood between two inmates, an inmate is known to be particularly dangerous, or where a particular guard has known violent tendencies.[133] For example, where an inmate is known to have sexually assaulted other inmates in the past, that inmate presents a specific risk that officials must protect other inmates from.[134]

On the other hand, general threats between inmates are common and are not enough to create a serious risk of harm.[135] Nor is general knowledge that an inmate is "disruptive" enough to impute knowledge that an inmate poses a risk to others.[136] If an inmate does not tell prison officials that he or she is in danger from a violent cellmate or some other source, courts are reluctant to hold officials responsible for failing to discover the dangerous condition.[137]

Assuming that there is a serious risk of harm, prison officials may be charged with knowledge of this risk in several ways. A record filled with grievances or other inmate complaints concerning violence may be enough to show that prison officials were aware of a safety problem.[138] The existence of expert reports discussing the problem may be enough to show that officials were aware of the problem.[139] Knowledge may be inferred directly from the circumstances where they are "very obvious and blatant" and indicate that officials knew of the risk.[140] A report from an inmate may also be enough, even if it provides officials with short notice of the safety problem.[141]

Prison officials who are aware of a serious risk must

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[127] *Farmer*, 511 U.S at 834-837; *Krein v. Norris*, 309 F.3d 487, 489 (8th Cir. 2002).

[128] *Nelson v. Shuffman*, 603 F.3d 439, 447 (8th Cir. 2010) (quoting *Krein v. Norris*, 309 F.3d 487, 491 (8th Cir. 2002)).

[129] *Farmer*, 511 U.S. at 843 (knowledge of specific danger irrelevant where inmate rape was "common and uncontrolled"); *Norris*, 877 F. Supp. at 1312-1314 (affirmed in relevant parts by *Smith v. Arkansas Dep't of Corr.*, 103 F.3d 637 (8th Cir. 1996)) (overcrowded barracks in which at least eight violent incidents per year occurred).

[130] *Jensen v. Clarke*, 94 F.3d 1191, 1194-1196 (8th Cir. 1996) (Random cell assignments at the Nebraska State Penitentiary that led to violence between inmates violated Constitution).

[131] *Id*. at 1195.

[132] *Krein*, 309 F.3d at 491-492 (declining to grant summary judgment where plaintiff alleged inadequate security and surprise attack).

[133] *Hall v. Phillips*, 2005 U.S. Dist. LEXIS 40844, at *34 (W.D. Ark. Nov. 22, 2005) (bad blood between two inmates); *Riley v. Olk-Long*, 282 F.3d 592, 596 (8th Cir. 2002) (guard with known violent tendencies).

[134] *Nelson v. Shuffman*, 603 F.3d at 447-448.

[135] *Hall*, 2005 U.S. Dist. LEXIS 40844, at *33.

[136] *Id*. at *33; *Perkins v. Grimes*, 161 F.3d 1127, 1130 (8th Cir. 1998) (officials knew that inmate was disruptive but not that he was "violent sexual aggressor").

[137] *Perkins*, 161 F.3d at 1130 (prison officials had no notice that cellmate was violent rapist because inmate did not tell them prior to being raped).

[138] *Norris*, 877 F. Supp. at 1300.

[139] *Id*.

[140] *Riley*, 282 F.3d at 595 (citing *Spruce v. Sargent*, 149 F.3d 783, 786 (8th Cir. 1998)) (risk was obvious where prison rape was committed by guard with history of sexual violence known to prison officials).

[141] *Hall*, 2005 U.S. Dist. LEXIS 40844, at *34 (twenty minute notice of impending violence was enough given the known history between inmates).

take action. It is not enough to rely on sporadic patrols of overcrowded barracks or to ignore known hostility between two inmates.[142] Assuming that action is in fact taken, it must be a reasonable response to the severity of the potential harm.[143] Officials cannot rely on union contracts to excuse a failure to take appropriate action when faced with a dangerous or violent guard.[144]

Excessive Force

When prison officials are accused of using excessive force against disruptive inmates, courts do not use the deliberate indifference test. Instead, courts consider whether the force was used was an "unnecessary and wanton infliction of pain."[145] This in turn is determined by whether "force was applied in a good faith effort to maintain and restore discipline or maliciously and sadistically for the very purpose of causing harm."[146]

The factors used in making this determination are the need for force, the correlation between the need and the amount of force used, and the extent of the injury inflicted on the inmate.[147] Prison officials may not use force against inmates out of anger or frustration, or use more force than necessary to restore order.[148] As with other areas of prison administration, courts show deference to prison officials.[149]

Unlike deliberate indifference, the unnecessary and wanton test does not require the inmate to have suffered a serious harm. If a prison official maliciously uses force to cause harm the Eighth Amendment is violated whether or not a significant injury results.[150] The inmate must, however, have suffered more than a *de minimis* injury.[151] Despite the exclusion of truly minor injuries, "[a]n inmate who is gratuitously beaten by guards does not lose his ability to pursue an excessive force claim merely because he has the good fortune to escape without serious injury."[152]

Use of force against inmates has been upheld in a wide range of circumstances, from shooting an inmate with a shotgun during a prison riot to pepper spraying an inmate who refused to leave a shower cell.[153] Other than cases involving truly minor injuries, the real issue is always twofold: whether the force was used for a proper reason such as restoring order, and whether it was used in the proper amount. For example, an inmate placed in a chokehold and dragged by several officers back to his cell when he refused to return on his own was not subjected to excessive force.[154]

Because "maintain[ing] or restor[ing] discipline" is a legitimate reason to use force, even inmates who are locked in their cells can have force used against them if they disobey orders.[155] When the

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[142] *Norris*, 877 F. Supp. at 1300 (sporadic patrols continued to be used despite knowledge of dangerous situation); *Hall*, 2005 U.S. Dist. LEXIS 40844, at **33-34 (officials did nothing in face of known hostility between inmates).

[143] *Riley*, 282 F.3d at 597.

[144] *Id*.

[145] *Whitley v. Albers*, 475 U.S. 312, 319 (1985). See also *Hudson v. McMillian*, 503 U.S. 1, 6 (1992) (noting that deliberate indifference applies to issues such as medical care that ordinarily do not involve competing security concerns).

[146] *Whitley*, 474 U.S. at 320 (quoting *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d. Cir. 1973)).

[147] *Id*. (citing *Johnson*, 481 F.2d at 1033).

[148] *Johnson v. Blaukat*, 453 F.3d 1108, 1113 (8th Cir. 2006).

[149] *Whitley*, 474 U.S. at 321-322 (citing *Rhodes v. Chapman*, 452 U.S. 337, 349 n. 14 (1981). See also *Hudson*, 503 U.S. at 6 (noting that use of force situations often involve the need to act quickly and decisively).

[150] *Hudson*, 503 U.S. at 4, 9 (loosened teeth, minor bruises and facial swelling). See also *Wilkins v. Gaddy*, 559 U.S. 34, 35 (2010) (bruised heel, lower back pain, migraine headaches); *Williams v. Jackson*, 600 F.3d 1007, 1010 (8th Cir. 2010) (red skin, swollen eyes, blurred vision); *Anderson v. Lambordia*, 2014 U.S. Dist. LEXIS 46713, at *7 (E.D. Mo. Apr. 4, 2014) (abrasions and headache); *Winters v. Baker*, 2013 U.S. Dist. LEXIS 148208, at *2 (D. Neb. Oct. 15, 2013) (moderate elbow damage). For an example of a *de minimis* injury, see *Jackson v. Buckman*, 2014 U.S. App. LEXIS 12127, at **15-16 (8th Cir. June 27, 2014) ("karate" blow to nose that left no bruise or cut).

[151] *Whitley*, 475 U.S. at 327 (quoting *Estelle v. Gamble*, 429 U.S. 97, 106 (1976)). See also *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973) ("not every push or shove . . . violates a prisoner's rights").

[152] *Wilkins v. Gaddy*, 559 U.S. 34, 38 (2010).

[153] *Whitley*, 475 U.S. at 326 (shotgun); *Burns v. Eaton*, 752 F.3d 1136, at **8-9 (8th Cir. 2014) (pepper spray). But see below for emerging legal standard barring use of pepper spray against inmates with mental illness.

[154] *Duren v. Watson*, 2014 U.S. Dist. LEXIS 42024, at *16 (W.D. Ark. Mar. 28, 2014).

[155] *Burns*, 752 F.3d at *7; *Winters v. Baker*, 2013 U.S. Dist. LEXIS 148208, at

disturbance or refusal to comply ceases, however, so too does the need to use force. For example, an inmate initially refused to "cuff up" but relented and submitted to cuffing before force had been applied. When it was applied *afterwards*, a court noted that there had been no need for force.[156]

Pepper spray is usually considered a minor amount of force and its use can be justified by relatively minor infractions.[157] It has occasionally even been found to be so *de minimis* that it will not support an Eighth Amendment claim at all.[158] However, if pepper spray is used in great quantities, without warning, or the inmate is not allowed to wash up afterwards, courts have held that an Eighth Amendment issue is present.[159] Pepper spray may not be used on a compliant inmate or one who is merely questioning a guard's orders.[160]

As in the case of housing inmates with mental illness in segregation, the Eighth Circuit has not ruled on the propriety of using pepper spray or other chemical agents on the mentally ill. Other circuits, however, have recognized such use as an infliction of cruel and unusual punishment because mentally ill inmates who bang, scream or otherwise act out lack the capacity to conform their behavior to the standards expected of them. When they are sprayed with chemicals for actions that they cannot control, the result is an infliction of pain with no penological justification.[161]

Noise

Noise levels can become cruel and unusual in three different ways. First, noise can prevent sleep. Second, noise levels can be high enough to result in hearing loss. Third, noise can violate the Constitution where the noise stems from the screaming or other activities of mentally ill inmates and is experienced by mentally sound inmates.

Many penal institutions follow the American Correctional Association (ACA) standard and limit the noise level in the inmate occupied areas of a prison to 70 decibels.[162] Although the ACA standards have only limited constitutional significance, there is enough case law and medical science to say that 70 decibels is something of a magic number. If the regular noise level in an institution is above 70 decibels it is serious enough to raise an Eighth Amendment issue.[163]

Inmates should be kept in an environment "reasonably free of excessive noise."[164]

A noise level violates the Eighth Amendment if it is high enough to create an intolerable environment. A consistently high noise level is more likely to be

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*7 (D. Neb. Oct. 15, 2013) (inmate was pepper sprayed and his arm was twisted when he extended his arm through cell hatch into hallway).

[156] *Walker v. Bowersox*, 526 F.3d 1186, 1188 (8th Cir. 2008). See also *Santiago v. Blair*, 707 F.3d 984, 990 (8th Cir. 2013) (remanding to determine if inmate had stopped resisting before force was applied); *Lambordia*, 2014 U.S. Dist. LEXIS 46713, at *7 (previously argumentative inmate was cooperative before guard slammed him against restraint cage).

[157] *Burns*, 752 F.3d at *9 (use of pepper spray to force inmate to "cuff up" not greatly excessive); *Jones v. Shields*, 207 F.3d 491, 496 (8th Cir. 2000) (inmate sprayed for angrily refusing order).

[158] *Shields*, 207 F.3d at 495 (pepper spray *de minimis* where effects lasted only 45 minutes). But see *Foulk v. Charrier*, 262 F.3d 687, 701(8th Cir. 2001) (pepper spray not *de minimis* despite leaving no compensable injuries).

[159] *Walker*, 526 F.3d at 1189 (pepper spray fired in "super soaker" quantities against inmate locked in cell who not allowed to wash up for three days).

[160] *Treats v. Morgan*, 308 F.3d 868, 872 (8th Cir. 2002); *Foulk v. Charrier*, 262 F.3d 687, 701-702 (inmate who argued with guards tricked into coming to door and then pepper sprayed in face by guards); *Johnson v. Blaukat*, 453 F.3d 1108, 1113 (8th Cir. 2006) (inmate choked and pepper sprayed while trying to comply with orders).

[161] For example, see *Coleman v. Brown*, 2014 U.S. Dist. LEXIS 50878, at *41 (E.D. Cal. Apr. 10, 2014) (use of chemical agents on schizophrenic, bipolar, psychotic, etc. inmates is "horrific" where inmates' behavior caused by mental illness and use of gas caused psychiatric harm); *Thomas v. McNeil*, 2009 U.S. Dist. LEXIS 1208, at **91-115 (M.D. Fla. Jan. 9, 2009) (non-spontaneous use of tear gas on mentally ill inmates acting out constitutes deliberate indifference on part of prison officials).

[162] For example, see Nebraska's noise regulation: 81 Neb. Admin. Code, ch. 15, § 006.03, available at http://www.ncc.ne.gov/pdf/jail_standards/jail_rules_and_reg/CHAPTR15.pdf.

[163] *Rhem v. Malcolm*, 371 F. Supp. 594, 607-608 (S.D.N.Y. 1974) (generally accepted safe decibel level is 65-70).

[164] *Keenan v. Hall*, 83 F.3d 1083, 1090 (9th Cir. 1996) (citing *Toussaint v. McCarthy*, 597 F. Supp. 1388, 1397 (N.D. Cal. 1984)).

found intolerable than one that is intermittent.[165]

Inmates must, however, show that they have suffered harm as a result of the noise. A total inability to sleep, hearing loss, or the development of psychological or physiological problem due to noise is sufficient.[166] Difficulty sleeping or being forced to wear earplugs is not serious enough to raise a constitutional issue.[167]

Because prisons are often made almost entirely out of concrete and steel, fixing a noise problem can be difficult and expensive for a prison. Despite these obstacles, a lack of funding cannot justify such a "gross tax on [inmates'] mental health."[168]

The sound of other inmates "screaming, wailing, crying, singing and yelling" all the time can be particularly intolerable.[169] When this noise is created by inmates with mental illness it may violate the Eighth Amendment regardless of the decibel level. Such inmates are often housed in segregation units, presumably to separate and control them. Segregation units are not, however, populated exclusively by the mentally ill. Where inmates in segregation without mental illness are forced to listen to the constant "scream[ing] and holler[ing]" of their mentally ill neighbors, a court will have "no problem" finding that such conditions violate contemporary standards of decency.[170] The "sleep deprivation and anxiety which [such] behavior causes certainly results in a deprivation of basic necessities which rises to the level of a constitutional violation."[171]

Within the Eighth Circuit the horrific *Goff v. Harper* is worth discussing in some detail.[172] George Goff was sentenced to a lengthy stint in segregation at the Iowa State Penitentiary. Part of the segregation unit was known as the "bug range," and it housed most of the inmates with serious mental health problems.[173] Evidence showed that the bug range was "dominated by maddening waves of noise."[174] Some of this came from inmates who "yelled at the top of their lungs for no apparent purpose," while other noise came from inmates known as "bangers," who banged things on their cell bars or walls, including their own heads.[175]

Inmates testified that they would try to reverse their normal sleep schedule, since the middle of the night was sometimes the only time it was quiet enough to concentrate.[176] Others tried to fashion crude earplugs out of toilet paper.[177] One inmate testified, "I can't sleep at night because the 'bugs' bang and people scream all night. Nothing is ever done about it."[178] Although it belabors the point, I include the testimony of Inmate 111 because he vividly painted a picture of just how awful a stint in segregation at the Iowa State Penitentiary was for those sane enough to notice:

> Inmate 101 bangs constantly and defecates in the shower. Inmate 103 is a banger. Inmate 104 bangs and screams and hollers that it is OK to rape children. Inmate 105 is explosive at

[165] *Rhem*, 371 F. Supp. at 607- 608.

[166] *Walton v. Dawson*, 752 F.3d 1109, 19 (8th Cir. 2014) (quoting *Walker v. Schult*, 717 F.3d 119, 126 (2d Cir. 2013) ("sleep is critical to human existence")); *Obama v. Burl*, 477 Fed. Appx. 409, 411 (8th Cir. 2012) (per curiam) (unpublished) (constant lighting causing inability to sleep, headaches and emotional distress); *Aikens v. Lash*, 371 F. Supp. 482, 493 (N.D. Ind. 1974) (noise created by inmates yelling caused "tension, anxiety, and distress" to both prisoners and staff).

[167] *Hutchings v. Corum*, 501 F. Supp. 1276, 1282-1293 (W.D. Mo. 1980) (inability to sleep or development of psychological problems); *Rhem*, 371 F. Supp. at 608-609 (hearing loss; cited with approval in *Hutchings*).

[168] *Rhem* at 609.

[169] *Keenan* at 1088-1090. See also *Aikens*, 371 F. Supp. at 493 (inmates yelling to each other).

[170] *Bracewell v. Lobmiller*, 938 F. Supp. 1571, 1574 (M.D. Ala. 1996).

[171] *Id*. at 1579.

[172] *Goff v.* Harper, 1997 U.S. Dist. LEXIS 24186 (S.D. Iowa June 5, 1997).

[173] *Id*. at **52-53.

[174] *Id*. at *52.

[175] *Id*. at **52-53.

[176] *Id*. at *53.

[177] *Id*.

[178] *Id*. at *55.

> times. Inmate 107 is the worst of all the bangers. Inmate 109 cuts himself and paints himself with his own blood. Inmate 112 hears voices, sees demons and screams. Inmate 113 bangs and screams. Inmate 114 believes the guards are trying to poison his food. Inmate 115 believes he has a woman in his cell. He has also cussed all day for every day of the last seven years. Inmate 116 sings all day. Inmate 118 does not shower. Inmate 119 frequently urinates in his cell; he is also a banger. Inmate 120 has totally lost his mind, is a banger and hollers all the time. Inmate 121 must be forced to take a shower, rips his clothing to pieces, and believes Jesus Christ is going to set him free. Inmate 122 screams and hollers about what the white inmates are planning to do. Inmate 123 strips down in his cell, masturbates and "goes crazy." Inmate 124 is a banger and a screamer. Inmate 125 is absolutely silent. Inmate 126 is a banger and a screamer and throws his feces all over. Inmate 127 believes the National Guard is coming to the Penitentiary.[179]

The *Goff* court held that mixing mentally ill and mentally stable inmates together was enough to constitute a serious deprivation of life's necessities.[180] Because these conditions had existed for over a decade, there was no doubt that prison officials had been deliberately indifferent.[181]

Noise can rise to a level recognized as problematic under the Eighth Amendment where the noise results in hearing loss, mental health problems or where the noise stems from the screaming of inmates with mental illness and is experienced by mentally sound inmates.

Ventilation

The Constitution does not guarantee comfortable prisons, nor does it guarantee ideally ventilated prisons. Nonetheless, it is possible for ventilation to violate the Eighth Amendment standing alone or in combination with other conditions of confinement.[182] Both the severity and the duration of a prisoner's exposure to inadequate ventilation are relevant for Eighth Amendment purposes. A condition that would not ordinarily amount to cruel and unusual punishment can do so if the condition persists over a long period of time.[183]

The Eighth Circuit Court has not clearly laid out an Eighth Amendment standard for airflow or ventilation. If the Eighth Circuit were to follow courts in other circuits, however, a ventilation system that keeps the relative humidity low enough to prohibit mold growth and is operating within its design parameters does not violate the Eighth Amendment.[184]

Although the Eighth Circuit has not set out any

[179] *Id*. at **56-57.

[180] *Id*. at *148.

[181] *Id*. at **150-151.

[182] *Gillespie v. Crawford*, 833 F.2d 47, 50 (5th Cir. 1987) (inadequate ventilation severe enough to cause inmates to contract tuberculosis was enough for Eighth Amendment claim.); *Wallace v. Hamrick*, 229 Fed. Appx. 827, 832 (11th Cir. 2007)(unpublished) (plaintiff did not need to wait for a harm to occur in order to have an injury sufficient to support claim of constitutional violation where he alleged that he had "no ventilation."); *Murphy v. Wheaton*, 381 F. Supp. 1252, 1261 (N.D. Ill. 1974) (inmates made valid Eighth Amendment complaint where they alleged that those in segregation were "forced to inhale smoke fumes, while ventilation was deliberately shut off.").

[183] *Chandler v. Crosby*, 375 F.3d 1278, 1295 (11th Cir. 2006) (severity and duration considered relevant for ventilation case); *Green v. Mowery*, 212 Fed. Appx. 918, 920 (11th Cir. 2006)(unpublished) (Eighth Amendment applies to a prisoner's claim of inadequate cooling and ventilation, and court must consider both the severity and the duration of the prisoner's exposure to excessive conditions).

[184] *Chandler*, 375 F.3d at 1298.

clear standards, there are cases in which inadequate ventilation was held to violate the Constitution. For example, an Eighth Circuit court held that inadequate ventilation was enough to violate the Eighth Amendment when witnesses from both sides testified about how stale and "human" smelling the air in a county jail was.[185] This was due both to the inadequate window units used to cool the cells and the fact that the windows had been welded shut.[186]

Ventilation is often considered along with other conditions of confinement under a totality of the circumstances analysis. In such cases, a court will ask whether ventilation that is bad but not bad enough to violate the Constitution has combined with some other undesirable aspect of prison life to produce an Eighth Amendment violation. For example, ventilation is sometimes lumped together with inadequate heating or cooling. A prison that exposes inmates to extremes of temperature along with inadequate ventilation may violate the Eighth Amendment by exposing inmates to "threatened and actual health hazards."[187] Overcrowding can combine with poor ventilation in a similar manner.[188]

Because inmates often cite airflow standards promulgated by the American Correctional Association and others, it is recommended that this section be read in conjunction with the section covering expert opinions below.

Religion

The religious rights of inmates are protected in two ways. First, the Frist Amendment holds that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[189] Both the Establishment Clause and the Free Exercise Clause have been held to apply to the states (and to prisons run by the states) through the Fourteenth Amendment.[190] Religious rights under the First Amendment are judged using the deferential *Turner* test.[191]

Second, a federal law known as the Religious Land Use and Institutionalized Persons Act (RLUIPA) adds more stringent protections for the religious exercise of inmates. Under RLUIPA, restrictions on religious practice are judged under strict scrutiny. This section will consider religious rights under the First Amendment first before turning to RLUIPA.

Inmates do not completely forfeit their religious rights when they enter the prison system.[192] Religious rights, guaranteed by the First Amendment, are necessarily limited during incarceration in two ways. First, any religious practice that conflicts with the "fact" of incarceration is obviously restricted or lost entirely during incarceration.[193] For example, a prison does not have to allow an inmate to go on a religious pilgrimage because this would conflict with the "fact" of his or her incarceration.

Second, any religious rights are subjected to the *Turner* test and balanced against "valid penological objectives" such as the deterrence of crime,

[185] *Hutchings v. Corum*, 501 F. Supp. 1276, 1293 (W.D. Mo. 1980).

[186] *Id*. at 1282.

[187] *Chapman v. Simon*, 2006 U.S. Dist. LEXIS 5522, at **10-11 (E.D. Mo. 2006).

[188] *James v. Goord*, 190 F.R.D. 103, 107-109 (S.D.N.Y. 1999) (prisoners alleged sufficient Eighth Amendment violations to survive motion to dismiss by claiming that double bunking combined with poor ventilation amounted to cruel and unusual punishment).

[189] U.S. Const. amend. I.

[190] *Murdock v. Pennsylvania*, 319 U.S. 105, 108 (1943) (Fourteenth Amendment makes First Amendment applicable to the states); *Everson v. Bd. of Educ.*, 330 U.S. 1, 8 (1947) (First Amendment applicable to states).

[191] For example, see *Love v. Reed*, 216 F.3d 682, 690 (8th Cir. 2000) (applying *Turner* to religious diet); *Avery v. Ferguson*, 2010 U.S. Dist. LEXIS 101864 (W.D. Ark. 2010) (analyzing dietary complaint under First Amendment).

[192] *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 348 (1987); *Pell v. Procunier*, 417 U.S. 817, 822 (prisoner retains those First Amendment rights not inconsistent with his status as prisoner or legitimate penological objectives).

[193] *O'Lone*, 482 U.S. at 348; *Pell*, 417 U.S. at 822-823.

rehabilitation of inmates, and prison security.[194] A restriction on religious practice that is reasonably related to a legitimate penological objective will be upheld in court. As an example, a prison may prohibit Pagan or Heathen inmates from possessing ritual weapons such as daggers and spears because of the prison's legitimate interest in safety.[195]

Inmates must be given a reasonable opportunity to practice their faiths. Whether or not an opportunity is reasonable takes into account all the aspects of an inmate's faith. For example, denying Muslim inmates the ability to participate in a weekly service activity known as Jumu'ah is not a complete denial of one religious activity but rather a partial denial of overall Muslim religious practice.[196] The state must give the same opportunity to minority religions that it gives to "conventional" religious practice.[197]

Sometimes the problem with religion in prison stems from an official refusal to recognize a particular belief system as a religion at all. Courts are generally reluctant to decide what counts as a "real" religion and treat religious claims with "great solicitude lest these vital freedoms be extinguished."[198] A variety of tests have been used in order to make such a decision.

Some courts have defined religion as obedience to the dictates of conscience without distinguishing between conscience and God.[199] This does not mean that every possible belief or opinion counts as religious; "personal predilection[s]" and social or political philosophies are not considered religious but are instead unprotected "convictions."[200]

Religion has also been defined by the questions it answers.[201] Under this view, a religion is anything that provides answers to life's ultimate questions. Other courts have defined religion as not only a sincere belief in God, but also any beliefs that occupy a "place in the life of its possessor parallel to that filled by the orthodox belief in God."[202] The U.S. Supreme Court has actually ruled that any moral or ethical belief is religious if held with the strength of a traditional religious conviction, although it appears to have retreated from this position more recently.[203]

None of these definitions demand that a belief system feature a god in order to count as real religions. In fact, courts have explicitly found Buddhism, Taoism, Ethical Culture and Secular Humanism to be religions and therefore entitled to First Amendment protection.[204]

Courts have also rejected the argument that prison officials need the power to weed out fake or sham belief systems in order to run the prison.[205] Within the Eighth Circuit this principle has been applied to the Black Hebrew Israelites, who claim to be the true Israelites and argue that present day Jews are imposters.[206] Prison officials considered them more

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[194] *O'Lone*, 482 U.S. at 349; *Pell*, 417 U.S. at 822-823; *Turner v. Safley*, 482 U.S. 78, 89-91 (1987).

[195] For example, see *Rust v. Clarke*, 883 F. Supp. 1293, 1301 (D. Neb. 1995) (wooden Viking sword); *Manley v. Daniels*, 2012 U.S. Dist. LEXIS 161622, at **11-13 (N.D. Ind. Nov. 2, 2012) (realistic looking ritual dagger made of cardboard).

[196] *O'Lone*, 482 U.S. at 351-352.

[197] *Cruz v. Beto*, 405 U.S. 319, 322 (1972) (Buddhist not allowed same access to chapel as Christians); *Sisney v. Reisch*, 674 F.3d 839, 845 (8th Cir. 2012) (Jewish inmate refused daily access to religious tent called a "succah"); *Thomas v. Gunter*, 32 F.3d 1258, 1261 (1994) (Native American denied daily access to sweat lodge for prayer while Christians allowed daily access to equivalent).

[198] *Remmers v. Brewer*, 361 F. Supp. 537, 539-540 (S.D. Iowa 1973) (upheld by *Remmers v. Brewer*, 494 F.2d 1277 (8th Cir. 1974) (per curiam)). See also *Goff v. Graves*, 362 F.3d 543, 547 (8th Cir. 2004) (recognizing the Church of the New Song as a real religion even though this required suspending disbelief).

[199] *United States v. Kauten*, 133 F.2d 703, 707-708 (2d Cir. 1943).

[200] *Id*.

[201] *United States v. Ballard*, 322 U.S. 78 (1944); *Hernandez v. Comm'r*, 490 U.S. 680, 693 (1989) (IRS cannot reject claims on the grounds that they are "inherently irreligious.").

[202] *United States v. Seeger*, 380 U.S. 163, 166 (1961) (accepting that the writings of Plato, Aristotle and Spinoza could count as religious).

[203] *Welsh v. United States*, 398 U.S. 333, 335, 339 (1970). But see *Frazee v. Illinois Department of Employment Security*, 489 U.S. 829, 833 (1989) (purely secular views cannot count as religious).

[204] *Torcaso v. Watkins*, 367 U.S. 488-489, 495 n. 11 (1961).

[205] *Remmers v. Brewer*, 361 F. Supp. at 541-542 (citing *Engel v. Vitale*, 370 U.S. 421 (1962)) (such an idea strikes "directly . . . at the core of the . . . Establishment Clause").

[206] *Walker v. Maschner*, 2000 U.S. Dist. LEXIS 21528, at *3 (S.D. Iowa May

of a gang than a religion and refused to grant them kosher meals. In the legal action that followed, a court held that religious beliefs did not need to be "acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment Protection."[207] While a purely secular belief or personal preference could not count as religious, a belief that was religious in nature was not unprotected merely because it was also secular.[208] A prison may not deny a religion recognition simply because officials find the group's beliefs repugnant.[209] On the other hand, the religion clauses of the First Amendment do not protect "so-called religions that tend to mock established institutions and are obviously shams and absurdities and whose members are patently devoid of religious sincerity."[210]

We will now turn from the First Amendment and the deferential *Turner* test to the more plaintiff-friendly RLUIPA. Although it only covers claims involving religion, RLUIPA can be very effective if the facts allow its application.[211] An inmate claiming that his or her free exercise of religion has been violated may be more successful filing an RLUIPA claim than a generic § 1983 claim and facing the *Turner* test.

Because RLUIPA is designed to prohibit "substantial burdens on religious exercise, without regard to discriminatory intent," the state faces a much higher burden under RLUIPA than it would under the *Turner* test.[212] The heart of RLUIPA is 42 U.S.C. § 2000cc(a), which bars the government from imposing a substantial burden on the religious exercise of institutionalized persons such as inmates unless such restriction is in furtherance of a compelling governmental interest and there is no

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31, 2000).

[207] *Id*. at *29 (quoting *Thomas v. Review Bd. of Indiana Employment Sec. Div*., 450 U.S. 707, 713 (1981).

[208] *Id*. at *29 (citing *Yoder*, 406 U.S. at 216). See also *Teterud v. Burns*, 522 F.2d 357 (8th Cir. 1975) (long hair for Native Americans could be both expression of cultural pride and religious exercise).

[209] *Wiggins v. Sargent*, 753 F.2d 663, 666 (8th Cir. 1985) (white supremacist Church of Jesus Christ Christian). See also *Ochs v. Thalacker*, 90 F.3d 293, 296 (8th Cir. 1996) (declining to dismiss Church of Jesus Christ Christian claim "out of hand" as religion).

[210] *Wiggins*, 753 F.2d at 666.

[211] The most important sections of RLUIPA are reproduced below:

42 USCS § 2000cc-1

(a) General rule. No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution . . . even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person--

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(b) Scope of application. This section applies in any case in which--

(1) the substantial burden is imposed in a program or activity that receives Federal financial assistance; or

(2) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes.

42 USCS § 2000cc-2

(a) Cause of action. A person may assert a violation of this Act as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

(b) Burden of persuasion. If a plaintiff produces prima facie evidence to support a claim alleging a violation of the Free Exercise Clause . . . the government shall bear the burden of persuasion on any element of the claim, except that the plaintiff shall bear the burden of persuasion on whether the law (including a regulation) or government practice that is challenged by the claim substantially burdens the plaintiff's exercise of religion.

. . .

(e) Prisoners. Nothing in this Act shall be construed to amend or repeal the Prison Litigation Reform Act of 1995 (including provisions of law amended by that Act).

42 USCS § 2000cc-3

(c) . . . this Act may require a government to incur expenses in its own operations to avoid imposing a substantial burden on religious exercise.

. . .

(g) Broad construction. This Act shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this Act and the Constitution.

42 USCS § 2000cc-5. Definitions

In this Act . . .

(7) Religious exercise.

(A) In general. The term "religious exercise" includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.

[212] See *Greene v. Solano County Jail*, 513 F.3d 982, 986 (9th Cir. 2008) (RLUIPA is much stricter than the "deferential" *Turner* test); *Van Wyhe v. Reisch*, 581 F.3d 639, 654 (8th Cir. 2009) (RLUIPA bans substantial burdens on religion without regard to intent).

less restrictive means of furthering that interest.[213]

The threshold inquiry in an RLUIPA claim is whether plaintiffs can show that their ability to exercise their religion has been substantially burdened.[214] This is, with one exception discussed below, the same substantial burden test as used in free exercise cases.[215] A common formulation of the test is that in order for a substantial burden to exist, a government policy or action "must significantly inhibit or constrain [religious] conduct or [religious] expression . . . must meaningfully curtail a person's ability to express adherence to his or her faith; or must deny a person reasonable opportunities to engage in those activities that are fundamental to a person's religion."[216]

The only difference between substantial burden in the two contexts is the following: in the free exercise context the substantial burden must inhibit a "central tenet" of the plaintiff's faith or constrain activities that are "fundamental" to the plaintiff's faith.[217] Under RLUIPA, however, "any exercise of religion, whether or not compelled by, or central to, a system of religious belief" is protected.[218] RLUIPA thus protects a much wider swath of religious activity than would be covered under the generic free exercise test. The only clear limitation to this powerful right is that an inmate cannot meet this threshold with a "single, vague and unsupported statement."[219] Setting aside such an extreme situation RLUIPA will be construed as broadly as possible in order to protect religious exercise to the maximum extent possible.[220]

While RLUIPA takes a broad view of what constitutes a substantial burden, there are two important caveats. Several cases have held that simply making the practice of religion more expensive is not a substantial burden.[221] As an example, a Muslim prisoner forced to purchase halal meals from the commissary because the prison would not provide them most days was not substantially burdened because he offered no evidence that the added cost would be a burden.[222] A court will not automatically equate increased cost to the inmate with a substantial burden on the inmate's practice; an inmate must demonstrate an actual burden in order to succeed.

The second caveat lies in the fact that a court will not find a burden where there is a denial of one item but an equivalent is available. For example, an inmate whose expensive gold cross was taken from him was not burdened in his religious practice when he failed to show how a less expensive cross would

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[213] *Patel v. United States Bureau of Prisons*, 515 F.3d 807, 813 (8th Cir. 2008) (citing *Cutter v. Wilkinson*, 544 U.S. 709, 714 (2005). See also *Gladson v. Iowa Dep't of Corr.*, 551 F.3d 825, 833 (8th Cir. 2009) (*Turner* test is used for First Amendment claims and strict scrutiny for RLUIPA claims).

[214] *Native American Council of Tribes v. Weber*, 897 F. Supp. 2d 828, 844-845 (D.S.D. 2012). See also *Brown v. Schuetzle*, 368 F. Supp. 2d 1009, 1022-1023 (D.N.D. 2005) (failure to provide pipe keeper for sweat lodge ceremonies not substantial burden).

[215] *Patel*, 515 F.3d at 813; *Weir v. Nix*, 114 F.3d 817, 820 (8th Cir. 1997).

[216] *Van Wyhe v. Reisch*, 581 F.3d 639, 656 (8th Cir. 2009) (internal quotation and citation omitted). See also *Holt v. Hobbs*, 2012 U.S. Dist. LEXIS 40942, *18 (E.D. Ark. Jan. 27, 2012) (other than the significance of religious belief, substantial burden test is the same under Free Exercise Clause and RLUIPA).

[217] *Patel*, 515 F.3d at 813.

[218] *Cutter*, 544 U.S. at 715 (quoting § 2000cc-5(7)(A)).

[219] *Native American Council of Tribes*, 897 F. Supp. 2d at 845 (citing *Cutter*, 544 U.S. at 725). See also *Van Wyhe*, 581 F.3d at 656 (plaintiff's own conclusory statement not enough to show substantial burden).

[220] *Native American Council of Tribes*, 897 F. Supp. 2d at 845 (accepting tobacco as part of Native American religion without much proof).

[221] See *Braunfeld v. Braun*, 366 U.S. 599, 605 (1961) (plurality opinion) (a law that makes the practice of religion more expensive is not substantial burden under Free Exercise Clause); *Donovan v. Tony & Susan Alamo Found*., 722 F.2d 397, 403 (8th Cir. 1983) (otherwise constitutional law does not violate Free Exercise Clause because result is financial harm); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 n. 11 (11th Cir. 2004) (harsh economic realities do not constitute substantial burden under RLUIPA); *Goodall by Goodall v. Stafford County. Sch. Bd.*, 60 F.3d 168, 172 (economic burden alone not substantial burden under RFRA); *Briley v. Cole*, 2011 U.S. Dist. LEXIS 86383, at **7-8 (E.D. Ark. July 8, 2011) (religious vegetarian forced to supplement diet at cantina not substantially burdened under RLUIPA); *Patel*, 515 F.3d at 813-814 (requiring religious vegetarian to purchase commissary meals not substantial burden).

[222] *Patel*, 515 F.3d at 814. See also *Toler v. Leopold*, 2008 U.S. Dist. LEXIS 27121, at **8-10 (E.D. Mo. Apr. 3, 2008) (substantial burden shown where inmate was able to demonstrate that he was indigent and unable to purchase kosher items from canteen).

not be adequate.[223] As with our first caveat, an inmate must demonstrate how his or her religious practice is actually burdened by the challenged official action or policy.

Once a plaintiff has shown that his or her religious belief has been substantially burdened, the state must justify the imposition of such a burden by demonstrating a compelling interest in restricting the activity in question. Combined with the least restrictive means prong this is essentially strict scrutiny.[224]

The compelling interest standard, although strong, does not "elevate accommodation of religious observances over an institution's need to maintain order and safety" and courts will remain mindful of and deferential to the safety concerns of prison officials. [225]

On the other hand, the state may not burden religious rights simply out of a desire to "enforce a general policy."[226] Similarly ineffective as justifications are generic pronouncements about the need to maintain order and security, "mere speculation, exaggerated fears [and] post-hoc rationalizations."[227] The unwillingness of courts to accept post-hoc reasons for restricting religious liberty can be particularly important; in justifying any policy the state must rely on the reasons it had when the restriction was put in place, not any that emerge (or are created) later.[228]

Least restrictive means forms the second half of RLUIPA's strict scrutiny test. In order to pass the least restrictive means test, defendants must show that they seriously considered alternatives before implementing the chosen policy.[229] Defendants need not "refute every conceivable option in order to satisfy the least restrictive means prong," but they must offer some evidence that they considered alternatives.[230] As with the compelling interest prong, a court will only consider what the prison did at the time the restriction was put in place, not alternatives that were considered later.[231]

Least restrictive means is a tough burden for the state, but it is not impossible.[232] A prison that carefully weighs the alternatives and genuinely tries to find the policy that least affects religious liberty will pass the test. Prisons that do not consider things carefully beforehand will have problems.

Unlike claims for constitutional violations filed under § 1983, RLUIPA does not create an action for money damages.[233] Because immunity from private suits is a fundamental aspect of sovereignty a state may only waive such immunity if it does so "unequivocally" by a "clear declaration."[234] RLUIPA only applies to those states that take money from the federal government for their prison systems, which are then considered to have voluntarily consented to RLUIPA's authorization of "appropriate relief."[235] However, the phrase "appropriate relief" has not been considered the "unequivocal expression of state consent" required to constitute a voluntary waiver of sovereign

[223] *Sanchez v. Earls*, 534 Fed. Appx. 577, 578 (8th Cir. 2013).

[224] *Murphy v. Mo. Dep't of Corr.*, 372 F.3d 979, 987 (8th Cir. 2004); *Holt*, 2012 U.S. Dist. LEXIS 40942, at *18; *Gladson v. Iowa Dep't of Corr.*, 551 F.3d at 833.

[225] *Native American Council of Tribes*, 897 F. Supp. 2d at 849 (citing *Fegans v. Norris*, 537 F.3d 897, 902 (8th Cir. 2008). See also *Cutter*, 544 U.S. at 725 n. 13 ("prison security is a compelling state interest, and deference is due to institutional officials' expertise in this area").

[226] *Native American Council of Tribes*, 897 F. Supp. 2d at 849.

[227] *Id*. (citing *Alvarez v. Hill*, 518 F.3d 1152, 1156 (9th Cir. 2008); *Fowler v. Crawford*, 534 F.3d 931, 939 (8th Cir. 2008)). See also *El-Tabech v. Clarke*, 2007 U.S. Dist. LEXIS 52018, at **7-8 (D. Neb. July 17, 2007) (prison officials unable to show how providing kosher diet would increase costs or impact safety).

[228] *Native American Council of Tribes*, 897 F. Supp. 2d at 849-851.

[229] *Id*. at 851.

[230] *Id*. at 852 (citing *Fowler*, 534 F.3d at 940) (reading policies of prisons in other states does not count as having seriously considered alternatives).

[231] *Id*. at 852-853.

[232] *Holt*, 2012 U.S. Dist. LEXIS 40942, at *20 (finding limitation on beard length was least restrictive means to maintain security)

[233] *Sossamon v. Texas*, 131 S. Ct. 1651, 1655 (2011).

[234] *Id*. at 1657-1658 (internal citations omitted).

[235] *Id*. at 1658-1659.

immunity.[236]

Food

Food complaints generally arise in two different ways. First, inmates may complain about the basic nutritional or sanitary quality of the food. Second, an inmate may complain that his or her religious dietary needs are not being accommodated. For complaints about religious diets, see the section above on religion.

Claims involving food are quite straightforward: in order to violate the Eighth Amendment, prison food must be nutritionally inadequate or unsanitary. There is no Eighth Amendment violation if the food is merely unappetizing or "not prepared to an inmate's taste."[237] Similarly, it does not violate the Eighth Amendment if the food is cold or served at odd hours.[238]

The food must negatively affect the health of inmates (or risk affecting the health of inmates) in order to violate the Eighth Amendment.[239] While a complete denial of food will violate the Eighth Amendment if it goes on long enough, a relatively minor denial of proper nutrition is not serious enough to raise an Eighth Amendment question.[240]

A sanitation problem can also violate the Eighth Amendment.[241] Like nutrition, sanitation problems must be fairly severe in order to amount to cruel and unusual punishment. For example, prison meals that occasionally contain foreign objects such as plastic or a human tooth have not been found to be seriously unsanitary.[242]

Jones v. Helder nicely demonstrates the sort of complaint that sufficiently raises an Eighth Amendment complaint over nutrition in prison.[243] Plaintiff Jones was incarcerated at the Washington County Detention Center (WCDC) in Arkansas when he filed an Eighth Amendment complaint over the food.[244] The complaint alleged that, while the menu was nutritionally adequate in theory, in practice inmates were not being fed a healthy diet. As an example, Jones claimed that while the menu called for a serving size of ten ounces, inmates were actually being given six ounces of food.[245] Jones also claimed that fruit and protein – while on the menu – frequently did not actually appear in inmates' meals.[246]

The court acknowledged that the Eighth Amendment did not require prisons to provide inmates with food prepared to their tastes.[247] It was only where food was inadequate to maintain health that the Eighth Amendment came into play.[248] Jones had, by raising questions of portion size and provision of fruit and protein, properly made an

[236] *Id*. at 1659.

[237] *Jones v. Helder*, 2011 U.S. Dist. LEXIS 34776, at *15 (W.D. Ark. Mar. 8, 2011). See also *Burgin v. Nix*, 899 F.2d 733, 734-735 (inmate had no right to one nutritionally adequate meal over another).

[238] *Johnson v. Mulcahy*, 2007 U.S. Dist. LEXIS 64044, at **8-9 (E.D. Mo. Aug. 29, 2007) (difference between hot and cold meals not serious enough to raise Eighth Amendment issue).

[239] *Avery v. Ferguson*, 2010 U.S. Dist. LEXIS 101864, at *29 (W.D. Ark. Sept. 3, 2010). See also *Burgin v. Nix*, 899 F.2d 733, 734-735 (8th Cir. 1990) (no constitutional right to preferred type of meal as long as nutritionally adequate); *Wishon v. Gammon*, 978 F.2d 446, 449 (8th Cir. 1992) (inmate has a right to nutritionally adequate food but no more); *Montano v. Bell*, 2008 U.S. Dist. LEXIS 38447, at **6-7 (E.D. Mo. May 12, 2008) (to violate the Eighth Amendment, prison food must be nutritionally inadequate or prepared in a manner that presents an immediate danger); *Helder*, 2011 U.S. Dist. LEXIS 34776, at *15 (Eighth Amendment only violated where food is inadequate to maintain good health).

[240] *Mulcahy*, 2007 U.S. Dist. LEXIS 64044, at **8-9 (nutritionally questionable sack lunches served over three day period not sufficiently serious).

[241] *Cody v. Hillard*, 599 F. Supp. 1025, at **1030-1031 (D.S.D. May 31, 1984) (reversed on other grounds by *Cody v. Hillard*, 830 F.2d 912 (8th Cir. 1987) (mouse infestation, inadequate refrigerator and freezer space, food stored beneath leaking waste pipes, and improper kitchen procedures such as a failure to wear hairnets enough to raise Eighth Amendment).

[242] *Avery*, 2010 U.S. Dist. LEXIS 101864, at **27-28.

[243] *Helder*, 2011 U.S. Dist. LEXIS 34776 (W.D. Ark. 2011).

[244] *Id*. at *2.

[245] *Id*. at *3.

[246] *Id*. at **3-4.

[247] *Id*. at *14.

[248] *Id*. at *14.

Eighth Amendment argument over prison food.[249]

From the preceding it should be clear that an Eighth Amendment claim over prison food is fairly simple and must involve large deviations from nutritional or sanitary norms. Occasional or intermittent problems with food are unlikely to raise constitutional concerns.

Law Libraries

The quality or availability of prison law libraries is a common complaint among inmates. Unfortunately for the would-be plaintiff, suits over law libraries are complicated and unlikely to meet with success.

The right of prisoners to access the courts requires the provision of law libraries or "alternative sources of legal knowledge."[250] In general this means that states must provide either attorneys to help inmates with legal documents, or with libraries and other tools to they can prepare their own.[251] The form of access a state chooses to provide is constitutionally irrelevant as long inmates are given "meaningful access" to the courts.[252] While inmates must be given the "limited" ability to present their grievances to the courts, they do not need to be given the ability to conduct general legal research.[253]

Inmates must show an actual injury in order to establish standing.[254] This means that in order to make a valid claim an inmate must not only show that the prison library (or other form of access) was inadequate but also that this inadequacy prevented him or her from pursuing an "actionable" legal claim or otherwise accessing the courts.[255] The actual injury requirement is the main issue in most cases, which often fail to even reach the issue of the adequacy of the prison library or equivalent offering.

The requirement that a claim be "actionable" or that an inmate suffered "actual" harm has several important consequences. The first is that an inmate must show that a law library was inadequate and that that this inadequacy prevented him or her from accessing the courts in some way. Second, in order for the inmate to have suffered an "actual" injury, he or she also must show that the claim that he or she would have brought but for the lack of library materials might have won. As Justice Scalia put it, "[d]epriving someone of an arguable (though not yet established) claim inflicts actual injury because it deprives him of something of value -- arguable claims are settled, bought, and sold. Depriving someone of a frivolous claim, on the other hand, deprives him of nothing at all, except perhaps the punishment of Federal Rule of Civil Procedure 11 sanctions."[256]

Because the state must provide access it is not enough to provide an illiterate inmate, or one who does not speak English, with access to an excellent prison library because it would do the inmate no good.[257] It is left to the state to determine *how* to provide access to the courts for such inmates, but all inmates must be provided with the capability of

[249] *Id*. at **15-16.

[250] *Bounds v. Smith*, 430 U.S. 817, 817 (1977) (reaffirming *Younger v. Gilmore*, 404 U.S. 15 (1971)). See also *Myers v. Hundley*, 101 F.3d 543, 544 (8th Cir. 1996) (inmates have right to access the courts and prisons must provide opportunity to do so).

[251] *Bounds*, 430 U.S. at 828, 831.

[252] *Id*. at 831-835. See also *Kane v. Garcia Espita*, 546 U.S. 9, 10 (2005) (per curiam) (access to law libraries is not a right); *Lewis v. Casey*, 518 U.S. 343 (1996) (no right to law libraries only right to access the courts).

[253] *Lewis v. Casey*, 518 U.S. at 360; *Schrier v. Halford*, 60 F.3d 1309, 1312 (8th Cir. 1995) (states may not erect unreasonable barriers to prevent inmates from pursuing civil matters or postconviction relief, but do not need to provide assistance in these matters).

[254] *Lewis v. Casey*, 518 U.S. at 349-350.

[255] *Id*. at 351, 356.

[256] *Id*. at 353 n. 3. See also *Christopher v. Harbury*, 536 U.S. 403, 414-423 (2002) (denial of access claim in CIA cover-up case failed to state nonfrivolous claim); *In re Tyler*, 839 F.2d 1290, 1292 (8th Cir. 1988) (no constitutional right to file frivolous action).

[257] *Lewis v. Casey*, 518 U.S. at 356-357.

bringing actionable claims before the court.[258]

Just as there is no specific right to have a law library, there is no right to have inmate law clerks or for inmates to receive legal advice from one another. Insofar as any such right exists, it is only as one part of the general right to access the courts.[259] The free speech right to offer legal advice or to hear legal advice is limited by the *Turner* test, and thus inmates can be barred from helping each other with legal work as long as such a ban is "reasonably related to legitimate and neutral government objectives."[260]

There are many examples of how the actual injury requirement has caused plaintiffs to lose cases within the Eighth Circuit. An inmate who missed court deadlines because his requests to use legal research computers were "simply denied" had his case dismissed because the court had granted him extensions.[261] An inmate who was unable to file a habeas petition lost his case because the court felt that his claim was frivolous and thus he would have lost anyway.[262] There is no actual injury if an inmate is unable to file a claim that is barred by the statute of limitations and thus cannot possibly be successful.[263] Even an inmate who claimed that, due to his poor education, he was unable to even begin the legal process without help lost his case because he was unable to demonstrate that he had missed any deadlines or was somehow barred from filing his claims.[264]

Since the U.S. Supreme Court has provided clear guidance on the issue of prison libraries and other means by which prisoners might receive legal assistance, it is no surprise that cases in the Eighth Circuit are fairly predictable. There is no right to a prison library or any other form of legal assistance in the abstract. Rather, there is the right of meaningful access to the courts. A prison system may supply this access in any number of ways and is not required to have a library or any other particular form of assistance.

Inmates bringing lack of access suits must be able to show actual injury. As defined by the Supreme Court and applied in the Eighth Circuit, this means that an inmate must be able to show that he or she had a plausible claim that he or she was unable to pursue because of some deficiency in the legal access made available by the state. Showing an actual injury is quite difficult, and lack of access claims are nearly uniformly unsuccessful.

Mail

The rules that govern unprivileged prison mail can be complicated in other parts of the country, and depend on whether the letter or package is outgoing or incoming. Within the Eighth Circuit, however, the rules are fairly simple and involve the deferential *Turner* test. The fundamental inmate mail case is *Procunier v. Martinez*, which was heavily modified by *Thornburgh v. Abbott*, and finally rendered nearly irrelevant within the Eighth Circuit by *Smith v. Delo*.[265] We will consider each of these three cases in order to set out the basic rules.

Because of the important First Amendment rights involved, *Procunier* laid out an exacting test to be used in considering the censorship of inmate mail, which could only be justified if two conditions were

[258] *Id*.

[259] *Shaw v. Murphy*, 532 U.S. 223, 231 (2001). See also *Lewis v. Casey*, 518 U.S. at 350-351.

[260] *Shaw*, 532 U.S. at 228 (citing *Turner*, 482 U.S. at 89). See also *Murphy v. Shaw*, 49 Fed. Appx. 711, 712-713 (2002).

[261] *Beaulieu v. Ludeman*, 690 F.3d 1017, 1021, 1046-1047 (8th Cir. 2012).

[262] *White v. Kautzky*, 494 F.3d 677, 680-681 (8th Cir. 2007).

[263] *Id*.

[264] *Brenden v. Walter*, 2008 U.S. Dist. LEXIS 10880, at **13-14 (D.S.D. Feb. 12, 2008).

[265] *Procunier v. Martinez*, 416 U.S. 396 (1974); *Thornburgh v. Abbott*, 490 U.S. 401 (1989); *Smith v. Delo*, 995 F.2d 827 (8th Cir. 1993).

met. First, the restriction had to further an important governmental interest, such as security, that was unrelated to the suppression of free speech. In particular, prison officials could not censor correspondence to eliminate critical opinions or untrue statements. Second, the restriction must be no more restrictive than necessary to achieve the important interest described in the first prong.[266] With its talk of "no more restrictive than necessary" and "important interests," the *Procunier* test is quite close to intermediate scrutiny.

The *Procunier* court also demanded that a prison censoring inmate mail follow two "minimum procedural safeguards."[267] First, an inmate must be notified of the rejection of a letter written by or addressed to him or her.[268] Second, an inmate must be allowed a reasonable opportunity to protest the decision, with the complaint being heard by someone other than the individual who made the initial rejection.[269] Later Eighth Circuit decisions have held that the *Procunier* safeguards apply to packages and anything else sent through the mail.[270]

Over the course of the next fifteen years cases such as *Turner v. Safley* held that inmate rights should be considered under something more akin to rational basis review as opposed to *Procunier's* intermediate scrutiny. The *Thornburgh* court acknowledged both this tension and the fact that *Procunier* had dealt with outgoing mail, which was less threatening to prison security than incoming mail.[271] With these two points in mind the court explicitly limited *Procunier* to outgoing mail and held that the *Turner* test should be used when considering incoming mail.[272]

This basic division remains in place to this day in many circuits; restrictions on incoming mail are judged under the deferential *Turner* test, while those affecting outgoing mail are judged under the stricter *Procunier*. The Eighth Circuit, however, has joined a minority of circuits in holding that *Thornburgh* really applied the deferential *Turner* test to *all* inmate mail, thus eliminating the distinction between incoming and outgoing mail.[273]

While intermediate scrutiny of censorship of inmate mail may be a thing of the past in the Eighth Circuit, *Procunier's* procedural safeguards remain in place and thus an inmate whose mail is censored must still be given notice and an opportunity to contest the censorship.[274] Bans on unsolicited bulk mail have been upheld under the *Turner* test, even when inmates are not even notified of the existence of the confiscated material.[275]

Prison officials do not violate the Constitution if they read an inmate's non-privileged mail outside his or her presence.[276] Legal mail, on the other hand, must be opened in the inmate's presence.[277]

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[266] *Procunier*, 416 U.S. at 413-414.

[267] *Id*.

[268] *Id*. at 418.

[269] *Id*.

[270] *Bonner v. Outlaw*, 552 F.3d 673, 676-677 (8th Cir. 2009).

[271] *Thornburgh v. Abbott*, 490 U.S. 401, 409-410, 412-413 (referring to *Turner v. Safley*, 482 U.S. 78 (1987)).

[272] *Id*. at 413-414. See also *Hughbanks v. Dooley*, 2012 U.S. Dist. LEXIS 12479, at *35-36 (D.S.D. Feb. 2, 2012) (noting that under *Thornburgh* the *Turner* test was now used for incoming mail).

[273] *Smith v. Delo*, 995 F.2d 827, 829 (8th Cir. 1993) (rejecting idea that *Thornburgh* only applied to incoming mail); *Thongvanh v. Thalacker*, 17 F.3d 256, 259 (8th Cir. 1994) (reiterating that only *Turner* is to be used).

[274] *Bonner v. Outlaw*, 552 F.3d 673, 676-677 (8th Cir. 2009) (applying *Procunier* safeguards to incoming mail).

[275] *Hughbanks*, 2012 U.S. Dist. LEXIS 12479, at **25-40.

[276] *Wolff v. McDonnell*, 418 U.S. 539, 576 (1974) ("freedom from censorship is not equivalent to freedom from inspection"); *Stockdale v. Dwyer*, 2007 U.S. Dist. LEXIS 75819, at *16 (E.D. Mo. Oct. 11, 2007); *Delo*, 995 F.2d at 830 (prison could screen mail for escape plans, contraband, threats and evidence of illegal activity); *Gassler v. Wood*, 14 F.3d 406, 408-409 (8th Cir. 1994) (making photocopies of inmate's correspondence did not violate Constitution).

[277] *Wolff*, 418 U.S. at 577 (1974); *Moore v. Rowley*, 126 Fed. Appx. 759, 760 (8th Cir. 2005) (prison could inspect bankruptcy petition before it left prison); *Cody v. Weber*, 256 F.3d 764, 768 (8th Cir. 2001) (mail from attorney to client must be opened in inmate's presence); *Thongvanh v. Thalacker*, 17 F.3d 256, 258-259 (8th Cir. 1994) (prison official's duty to maintain security does not include opening legal mail); *McMaster v. Pung*, 984 F.2d 948, 953 (8th Cir. 1993) (prison entitled to open legal mail in inmate's presence); *Jensen v. Klecker*, 648 F.2d 1179, 1182 (8th Cir. 1981) (mail to from an inmate's attorney, and identified as such, may not be opened except in the presence of the inmate).

An "isolated, inadvertent" instance in which an inmate's legal mail is opened outside his or her presence is not enough to state a constitutional claim.[278] Mail from involuntarily committed residents of a state mental hospital is given the same protection as that given inmates.[279]

In order to qualify as legal mail, a letter or package must "be specially marked as originating from an attorney, with his name and address being given."[280] In addition, the mail must be marked "privileged" or something similar.[281] An outgoing letter, properly marked at privileged, must *actually contain* legal mail in order to be entitled to special protection.[282]

Lawsuits over inmate mail fall under the same "access to the courts" logic discussed in the section on law libraries (see above), which means that an inmate challenging the opening of his or her legal mail must show an "actual injury."[283] This requires showing that the inmate had a viable legal claim that, but for the prison's interference with his or her legal mail, would have been successful. [284]

Indigent inmates must be provided with paper and pen to write legal documents, notarial services, and stamps.[285] The state does not, however, need to provide unlimited amounts of these items, and may limit the amounts provided as long as the limitation is reasonably related to a legitimate penological interest.[286]

[278] *Beaulieu v. Ludeman*, 690 F.3d 1017, 1037 (8th Cir. 2012); *Stockdale*, 2007 U.S. Dist. LEXIS 75819, at *19 (citing *Gardner v. Howard*, 109 F.3d 427, 431 (8th Cir. 1997).

[279] *Beaulieu*, 690 F.3d at 1035-1037.

[280] *Wolff*, 418 U.S. at 576; *Jensen v. Klecker*, 648 F.2d 1179, 1182-1183 (8th Cir. (1981) (incoming mail must be marked as legal and must be addressed to specific inmate).

[281] *Harrod v. Halford*, 773 F.2d 234, 235-236 (8th Cir. 1985) (mail clearly from lawyer but not marked "privileged" did not have to be opened in inmate's presence).

[282] *Stockdale*, 2007 U.S. Dist. LEXIS 75819, at **21-24 (letter marked as legal that contained letter to reporter not privileged)

[283] *Beaulieu*, 690 F.3d at 1037; *Cody v. Weber*, 256 F.3d 764, 768 (8th Cir. 2001) (allegation that prison gained advantage in litigation by opening inmate's mail enough to allege actual injury); *Cooper v. Delo*, 997 F.2d 376, 377 (8th Cir. 1993) (inmate must present evidence that his legal claim was prejudiced by problem with mail); *McMaster*, 984 F.2d at 953 (inmate must show actual injury or prejudice as a result of prison interfering with mail).

[284] *Cody*, 256 F.3d at 769-770 (bare allegation that claim would have been successful but for interference with mail not enough to avoid summary judgment).

[285] *Bounds v. Smith*, 430 U.S. 817, 824-825 (1977).

[286] *Blaise v. Fenn*, 48 F.3d 337, 339 (citing *Turner*, 482 U.S. at 89) (upholding prison policy that forced inmates to budget money for stamps).

SECONDARY CAUSES OF ACTION

The following issues faced by inmates, which this writing calls "secondary causes of action," do not directly violate the U.S. Constitution. These stand in contrast to what this writing calls "primary causes of action," which can be direct violations of the Eighth Amendment or another right guaranteed by the Constitution. A secondary cause of action will only raise a constitutional issue within the Eighth Circuit if it results in one or more of the primary causes of action. For example, a lockdown does not violate the Constitution standing alone. If a lockdown leads to inadequate healthcare, however, it may violate the Eighth Amendment's ban on cruel and unusual punishment. What follows is a short description of those secondary causes of action that the ACLU of Nebraska receives the most complaints about.

Segregation and Solitary Confinement

Many of the cases in this area combine Eighth Amendment claims concerning the conditions in segregation with Fourteenth Amendment procedural due process claims concerning the procedure followed in placing an inmate in segregation. It is unlikely, however, that a court in the Eighth Circuit will find a protected liberty interest in remaining out of segregation, and therefore a due process claim concerning the way in which an inmate was placed in segregation is not likely to succeed.

The Due Process Clause does not protect an inmate from every condition of confinement that has a negative effect on him or her; it is only those that result in the loss of a protected interest.[287] In the case of segregation, it is only if transfer to segregation represents an "atypical and significant hardship" that the deprivation will rise to the level of a protected liberty interest.[288] Courts have "routinely" held that placement in segregation is not atypical and significant.[289] It is only when an inmate is placed in segregation for an indefinite or extended period that segregation can rise to the level of a protected liberty interest.[290]

Once in segregation, however, inmates must not be kept under conditions that threaten their physical or mental health. The usual Eighth Amendment requirements apply in these cases, and thus an inmate must demonstrate an objectively severe medical need and deliberate indifference on the part of prison officials.[291] If placement in segregation leads to a denial of

[287] *Haggins v. MN Comm'r of Corr*., 2012 U.S. Dist. LEXIS 39029, at **18-19 (D. Minn. Feb. 14, 2012) (citing *Sandin v. Conner*, 515 U.S. 472, 484-487 (1995).

[288] *Haggins v. MN Comm'r of Corr*., 2011 U.S. Dist. LEXIS 115117, 10 (D. Min. 2011). See also *Phillips v. Norris*, 320 F.3d 844, 847 (8th Cir. 2003) (denial of visitation, exercise and religious visits during thirty-seven days in segregation not enough to create liberty interest); *Rahman X v. Morgan*, 300 F.3d 970, 973-974 (8th Cir. 2002) (twenty-six months in segregation not atypical and significant); (*Freitas v. Ault*, 109 F.3d 1335, 1338 (8th Cir. 1997) (no constitutionally protected interest in being in less restrictive environment); *Kennedy v. Blankenship*, 100 F.3d 640, 642 n. 2, 643 (8th Cir. 1996) (punitive isolation not atypical and significant deprivation); *Wilson v. Harper*, 949 F. Supp. 714, 723 (S.D. Iowa 1996) (11 months in segregation not enough to create liberty interest); *Harper v. Showers*, 174 F.3d 716, 719 (5th Cir. 1999) (inmates have no property or liberty interest in custodial classifications). But see *Wilkinson v. Austin*, 545 U.S. 209 (2005) ("supermax" facility different enough that liberty interest was created).

[289] *Haggins*, 2012 U.S. Dist. LEXIS 39029, at *19 (quoting *Portley-El v. Brill*, 288 F.3d 1063, 1065 (8th Cir. 2002); *Phillips*, 320 F.3d at 847.

[290] *Haggins*, 2011 U.S. Dist. LEXIS 115117 at *12. See *Wilkinson v. Austin*, 545 U.S. at 217-225 (placement in "supermax" prison for indefinite term was atypical and significant); *Williams v. Norris*, 277 Fed. Appx. 647, 648-649 (8th Cir. 2008) (12 years in segregation was atypical and significant hardship); *Herron v. Wright*, 1997 U.S. App. LEXIS 12709, at *6 (8th Cir. June 3, 1997) (length of confinement cannot be ignored); *Herron v. Schriro*, 11 Fed. Appx. 659, 661-662 (8th Cir. 2011) (more than 13 years in segregation was atypical and significant). But see *El-Tabech v. Clarke*, 2007 U.S. Dist. LEXIS 36719, at *19 (D. Neb. May 18, 2007) (six years of segregation with no definite ending point not atypical and significant); *Hess v. Clarke*, 2005 U.S. Dist. LEXIS 45198, at **5-7 (D. Neb. Mar. 25, 2005) (more than eleven years on IM status not enough to create liberty interest); *Herron v. Schriro*, 11 Fed. Appx. 659, 662 (8th Cir. 2001) (no "sufficiently serious" deprivation where plaintiff spent fourteen years in segregation).

[291] *Haggins*, 2012 U.S. Dist. LEXIS 39029, at *30.

mental health care, medical care, or some other basic need of which prison officials are aware, an Eighth Amendment violation has occurred.[292] Putting a mentally ill inmate in segregation because of his illness does not automatically violate the Eighth Amendment in the Eighth Circuit, but may in other circuits.[293] For more information on mental illness and segregation, see the section on housing inmates with mental illness above.

A denial of exercise that does not result in harm to the inmate, or minor indignities such as a lack of toilet paper while in segregation, have not been found serious enough to raise an Eighth Amendment question.[294]

Solitary confinement is generally a losing issue within the Eighth Circuit. It is not cruel and unusual in and of itself, nor is there a liberty interest that will support a due process claim. However, as mentioned above, this may be changing in light of the mass of evidence showing the harmful effects of solitary confinement.

Lockdowns

The term "lockdown" generally refers to the short-term confinement of inmates to their cells, usually in response to an emergency such as a riot. A lockdown by itself is not unconstitutional but can result in something such as a lack of exercise that does violate the Constitution.[295] While cases are sometimes described as being "about the lockdown," they are really about some other issue.

Lockdowns within the Eighth Circuit have resulted in inadequate exercise and reduced supplies of food and clean clothing.[296] Inmates are entitled to "reasonably adequate sanitation, personal hygiene, and laundry privileges, particularly over a lengthy course of time," but not every "deviation from ideal conditions" violates the Constitution."[297] Lockdowns that deprive inmates of the proper amount of exercise, clothing, sanitation, and food for up to fifteen days have been held to be too short to violate the Eighth Amendment.[298]

The Eighth Amendment is not the only way to challenge a lockdown. In other circuits RLUIPA has been applied to lockdowns that resulted in a lack of religious exercise.[299] In contrast to the lengthy times required in order to violate the Eighth Amendment, both ten-day and rolling one-day lockdowns have been held to substantially burden religious practice.[300]

Those courts that have considered lockdowns under RLUIPA have not considered even one-day lockdowns to be "temporary and intermittent bans on group worship."[301] Rather than being treated as partial ban on worship, a one-day lockdown is treated as a complete ban that happens to have lasted one day. Even such a short lockdown (if it in fact prevents religious

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[292] *Id*. at 34-35 n. 8.

[293] *Id*. See also *Duwenhoegger v. King*, 2013 U.S. Dist. LEXIS 25255, *29 (D. Minn. Jan. 28, 2013) (demotion to segregation, even without cause, is not atypical and significant hardship); *Kelly v. Brewer*, 378 F. Supp. 447, 452 (S.D. Iowa 1974) ("solitary confinement in itself does not constitute cruel and unusual punishment"); *Courtney v. Bishop*, 409 F.2d 1185, 1187 (8th Cir. 1969) (solitary confinement not unconstitutional per se).

[294] *Thompson v. Stovall*, 2013 U.S. Dist. LEXIS 17948 (W.D. Ark. 2013).

[295] See *Noble v. Adams*, 646 F.3d 1138, 1141-1142 (9th Cir. 2011) (lockdown considered as possible Eighth Amendment violation because it resulted in a lack of exercise for inmates); *Norwood v. Vance*, 591 F.3d 1062, 1065 (9th Cir. 2010) (lockdown resulting in lack of exercise).

[296] *Rust v. Grammer*, 858 F.2d 411, 412 (8th Cir. 1988).

[297] *Coleman v. Newton*, 2008 U.S. Dist. LEXIS 42340, at **5-6 (D. Neb. May 29, 2008) (citing *Howard v. Adkison*, 887 F.2d 134, 137 (8th Cir. 1989)); *Osolinski v. Kane*, 92 F.3d 934, 938 (9th Cir. 1996)).

[298] See *Rust*, 858 F.2d 411, 412 (8th Cir. 1988) (nine day denial of proper diet and exercise not long enough to violate Eighth Amendment); *Coleman*, 2008 U.S. Dist. LEXIS 42340, at *1 (fifteen day lockdown, including Christmas and New Year's Day, that resulted in inadequate sanitation and hygiene not long enough); *Johnson v. Mulcahy*, 2007 U.S. Dist. LEXIS 64044, at **8-9 (E.D. Mo. Aug. 29, 2006) (three-day lockdown resulting in only cold food not denial of minimum civilized measure of life's necessities).

[299] *Rogers v. Giurbino*, 2013 U.S. Dist. LEXIS 26293, at **1-2 (S.D. Cal. Feb. 26, 2013) (RLUIPA applied to ten day and rolling one-day lockdowns); see also *Epps v. Grannis*, 2013 U.S. Dist. LEXIS 91507, at *7 (S.D. Cal. June 27, 2013) (RLUIPA claim over lockdown considered but mooted because lockdown ended).

[300] *Giurbino*, 2013 U.S. Dist. LEXIS 26293, at **16-19.

[301] *Id*. at *18.

worship while in effect) can substantially burden the free exercise of religion.[302] If the Eighth Circuit were to accept this logic RLUIPA could be a viable way to challenge a lockdown.

If a plaintiff challenging a lockdown using RLUIPA is able to show a substantial burden on his or her religious practice, the state must then demonstrate that the lockdown was the least restrictive means to meet a compelling state interest. Safety and security are compelling interests.[303] A lack of resources can also be used in this context to justify a lockdown because an inability to adequately monitor and manage inmates "indisputably raises institutional safety and security concerns"[304] Note however that insufficient resources cannot be used to justify a violation of the Eighth Amendment such as lack of adequate mental or physical healthcare.

The least restrictive means test requires the prison officials to show that they actually considered and rejected less restrictive measures before adopting the challenged practices.[305] Prison officials may not "justify restrictions on religious exercise by simply citing the need to maintain order and security in a prison."[306] For example, a lockdown was upheld under RLUIPA where prison officials had considered other options but had concluded that a complete lockdown would be the fastest way to finish a search for weapons and would result in the least disruption to prisoner's religious activities.[307]

Lockdowns will be upheld in the Eighth Circuit unless they result in harm that is serious enough to amount to cruel and unusual punishment. RLUIPA, on the other hand, is an untried alternative that may be more effective than traditional Eighth Amendment claims.

Overcrowding

Like lockdowns, overcrowding is not generally an Eighth Amendment violation standing alone but can be the cause of constitutional violations. Regardless of the severity of the constitutional problems caused by overcrowding, courts are very reluctant to order population reductions as a solution.[308] In addition, the Prison Litigation Reform Act (PLRA) places high procedural barriers that must be overcome before any population reduction can be ordered.[309] Despite these hurdles, the U.S. Supreme Court recently upheld a court-ordered reduction in California's prison population.[310]

While the California litigation primarily involved physical and mental healthcare, overcrowding has led to cases involving inmate safety, mental anguish and exercise within the Eighth Circuit. [311]

The reason an inmate is placed in a small cell is relevant to determining if his or her rights have been violated. For example, a court is less likely to find a constitutional violation where an inmate was placed in a small observation cell for his own safety.[312]

Although overcrowding is not usually an independent constitutional violation, there are quasi-exceptions within the Eighth Circuit.

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[302] *Id.* at **17-18.

[303] *Id*. at **23-25 (lockdown to search for missing scissors met compelling interest in security).

[304] *Id*. at **26-27.

[305] *Id*. (citing *Warsoldier*, 418 F.3d at 999).

[306] *Id*. at *29 (citing *Greene*, 513 F.3d at 988-989).

[307] *Id*. at *32.

[308] See *Brown v. Plata*, 131 S. Ct. 1910, 1946 (2011) (upholding court-ordered reduction in California's prison population); *Coleman v. Wilson*, 912 F. Supp. 1282 (E.D. Cal. 1995) (inadequate mental health care caused by overcrowding); *Plata v. Schwarzenegger*, 603 F.3d 1088, 1091-1093 (9th Cir. 2010) (discussing *Plata v. Brown* and inadequate physical health care caused by overcrowding).

[309] 18 U.S.C. § 3626. See also *Brown v. Plata*, 131 S. Ct. at 1922.

[310] *Brown v. Plata*, 131 S. Ct. at 1947.

[311] *Jensen v. Clarke*, 94 F.3d 1191, 1194 (8th Cir. 1996) (overcrowding leading to violence between cell mates); *Croom v. Latham*, 2002 U.S. Dist. LEXIS 28968, at **4-5 (E.D. Ark. Mar. 11, 2002) (mental anguish); *Hall v. Dalton*, 34 F.3d 648, 649-650 (8th Cir. 1994) (exercise).

[312] *Ferguson v. Cape Girardeau County*, 88 F.3d 647, 650 (8th Cir. 1996) (inmate held to monitor medical condition).

While there are no cases that consider square footage case in complete isolation from any other conditions of confinement, there are a few in which square footage calculations predominate. From these it seems that below fourteen square feet per inmate will be highly suspect, and above thirty square feet will be presumed constitutional.[313] Cases involving pretrial detainees seem to employ the same lower limit of fourteen square feet per inmate.[314]

The number of hours per day and the length of an inmate's stay in the cell in question can also play a role in determining if cramped conditions are unconstitutional. Where inmates are confined to their cells most of the day a court will be more concerned with how much space each inmate has.[315] Similarly, inmates who live in the same cell for long periods need more space.[316]

The overwhelming number of overcrowding cases reject the idea that a square footage claim can exist divorced from any other conditions of confinement. Even in cases where square footage is discussed, it is almost always in combination with other factors such as the amount of time inmates spend in their cells, the length of stay, and the amount of exercise inmates receive. Regardless of the square footage an inmate has, overcrowding that leads to other problems, such as a lack of physical or mental healthcare, violates the Constitution.

On the other hand, some cases clearly emphasize raw square footage even though they mention other factors. If nothing else, the numbers fourteen and thirty seem to create presumptions in the Eighth Circuit. If there are more than thirty square feet per inmate a court will be skeptical of an overcrowding claim without aggravating circumstances such as a total lack of exercise. If there is less than fourteen square feet per inmate courts may find an Eighth or Fourteenth Amendment violation without much else.

Exercise

A lack of exercise in prison is generally not held to be a violation of the Eighth Amendment standing alone. Instead, exercise in prison is similar to overcrowding and lockdowns in that it can amount to cruel and unusual punishment if inmates suffer one of the commonly accepted Eighth Amendment violations as a result of lack of exercise. Factors a court will consider include the opportunity to be out of the cell, the availability of recreation within the cell, the size of the cell and the duration of the confinement.[317]

Even in extreme situations, such as where inmates have only eighteen square feet of space per inmate and as a "practical matter" can do little else but sit or lie on their bunks a court will look to whether or not there were deleterious effects before ruling that a lack of exercise is unconstitutional.[318] Despite this limitation on

[313] *Campbell v. Cauthron*, 623 F.2d 503, 506 (8th Cir. 1980) ("[w]e have no trouble concluding that such crowded conditions [fourteen square feet per inmate] constitute cruel and unusual punishment for those convicted inmates who are kept in their cramped cells for all but a few hours each week."); *Croom*, 2002 U.S. Dist. LEXIS 28968, at *7 (fourteen square feet per inmate is the lower limit); *Burks v. Teasdale*, 603 F.2d 59, 61 (8th Cir. 1979) (unconstitutional to hold two inmates in forty-seven square foot cells and three inmates in sixty-seven square foot cells), *Johnson v. Levine*, 588 F.2d 1378, 1380 (4th Cir. 1978) (unconstitutional to hold two inmates in fifty square foot cells for ten to fifteen hours per day); *Johnson v. Levine*, 450 F. Supp. 648, 655-656 (D. Md. 1978) (unconstitutional to hold inmates in dormitory with fifty-five square feet per inmate); *Jensen*, 94 F.3d at 1194-1196 (37 square feet per inmate not per say unconstitutional); *Ferguson*, 88 F.3d at 650 (thirty square feet constitutional under totality of circumstances).

[314] See *Hall v. Dalton*, 34 F.3d 648, 649-650 (8th Cir. 1994) (pretrial detainee held for forty days in fourteen square foot cell without exercise).

[315] See *Campbell*, 623 F.2d at 506-507 (contrasting inmates locked in cells twenty-four hours per day as opposed to only at night in the earlier *Bell v. Wolfish*, 441 U.S. 542 (1979)); *Hall*, 34 F.3d at 649-650 (thirty days in cramped cell with occasional time outside cell constitutional).

[316] *Campbell*, 623 F.2d at 507 (ordering that inmates held for more than one week be given extra space); *Hall*, 34 F.3d at 649-650 (pretrial detainee's rights violated when held for forty days in small cell); *Ferguson*, 88 F.3d at 650 (short stay of three weeks relevant to determining if small cell constitutional).

[317] *Wishon v. Gammon*, 978 F.2d 446, 449 (8th Cir. 1992) (45 minutes per week not unconstitutional because inmate had other opportunities to be out of cell and move about); *Ruiz v. Estelle*, 679 F.2d 1115, 1152 (5th Cir. 1982) (one hour exercise per day not cruel and unusual).

[318] *Campbell v. Cauthron*, 623 F.2d 503, 506 (8th Cir. 1980).

the reach of the Eighth Amendment as applied to exercise, where there is "enforced idleness" that leads to detrimental physical effects, there is an Eighth Amendment violation.[319]

Pretrial detainees, not having been convicted of a crime, may not be punished and are protected by due process and the Fourteenth Amendment rather than the Eighth Amendment. Because these due process rights are at least as extensive as those retained by convicted prisoners under the Eighth Amendment, many of the exercise cases involving both convicted criminals and pretrial detainees simply analyze the issue under the Eighth Amendment.[320]

In either case, a plaintiff must show some negative effect from the lack of exercise, such as reduced physical or mental health.[321] Within the Eighth Circuit there is something of a rule of thumb in this regard. To prevent the physical deterioration of inmates, "ordinarily" any inmate confined to his cell for more than sixteen hours per day must be given one hour per day outside his cell in order to exercise.[322]

The opportunity to exercise must be more than theoretical. For example, asking twelve pretrial detainees to share one weight machine over the course of one hour per day has been held to not provide a realistic opportunity for exercise.[323] On the other hand, courts have reacted badly to inadequate exercise claims where the inmate in question did not actually use all the available exercise opportunities.[324]

A lack of staff or resources may not be used to justify denying inmates the opportunity to exercise.[325] As courts have said in other contexts, "if states or counties operate detention facilities, they must meet constitutional standards. We cannot permit unconstitutional conditions to exist simply because prison officials cannot or will not spend the necessary money."[326]

Proving the negative effects of a lack of exercise is difficult, and most Eighth Circuit cases deny inmate claims of inadequate opportunities to exercise.[327] It is important to note, however, that most of these cases involve inmates making claims for relatively minor or short-term deprivations. Fifteen days without exercise has been held to be "severe, perhaps even harsh" but not "cruel or barbaric."[328] On the other hand, a three-week denial of the reasonable opportunity to exercise has been held to violate the Fourteenth Amendment.[329]

[319] *Id*. at 507. See also *Andrews v. Gunter*, 1987 U.S. Dist. LEXIS 14565, at *8 (D. Neb. Dec. 28, 1987) (one hour of exercise per day required); *Hutchings v. Corum*, 501 F. Supp. 1276, 1294 (W.D. Mo. 1980); *Wishon v. Gammon*, 978 F.2d at 449 (citing *French v. Owens*, 777 F.2d 1250, 1255 (7th Cir. 1985)) (lack of exercise leading to muscle deterioration violates Eighth Amendment); *Thompson v. Stovall*, 2013 U.S. Dist. LEXIS 17948, at *17 (W.D. Ark. Jan. 18, 2013) (lack of exercise leading to physical effects could violate the Eighth Amendment).

[320] *Campbell*, 623 F.2d at 505.

[321] *Id*. at 506.

[322] *Id*. at 507. See also *Andrews*, 1987 U.S. Dist. LEXIS 14565, at *8 (one hour of exercise per day required by the Eighth Amendment).

[323] *Gonzales v. Moreno*, 1989 U.S. Dist. LEXIS 17244, at *18, *32 (D. Neb. Nov. 1, 1989).

[324] *Wishon v. Gammon*, 978 F.2d 446, 449 (8th Cir. 1992).

[325] *Gonzales*, 1989 U.S. Dist. LEXIS 17244 at *33.

[326] *Id*. (citing *Campbell*, 623 F.2d at 508).

[327] See *Rahman X v. Morgan*, 300 F.3d 970, 972 (8th Cir. 2002) (three hours per week for inmate on death row was sufficient); *Thompson v. Stovall*, 2013 U.S. Dist. LEXIS 17948, at *18 (W.D. Ark. Jan. 18, 2013) (citing *Irving v. Dormire*, 519 F.3d 441, 448 (8th Cir. 2008)) (three months without exercise did not violate Constitution because no ill effects proven).

[328] *Leonard v. Norris*, 797 F.2d 683, 685 (8th Cir. 1986) (inmate held in isolation for fifteen days).

[329] *Gonzales*, 1989 U.S. Dist. LEXIS 17244, at **27-29.

NO CAUSE OF ACTION

Rehabilitation and Programming

There is no right under the Eighth Amendment to rehabilitative programs within the Eighth Circuit, and therefore our discussion of this issue will be brief. It will be recalled that the Eighth Amendment prohibits cruel and unusual punishment. While there has been some debate about exactly what constitutes such punishment, courts have consistently held that "idleness and the lack of vocational, educational and rehabilitative programs are not Eighth Amendment violations. The lack of these programs simply does not amount to the infliction of pain. There is no constitutional right to rehabilitation."[330]

There is however one slender ray of hope for anyone hoping to litigate a lack of rehabilitative opportunities in the Eighth Circuit. If an institution *does* provide such opportunities, it must provide them on an equal basis to inmates who are "similarly situated" unless there is at least a rational basis to distinguish among inmates.[331] An inmate must show that he or she was treated differently because of his or her membership in a protected class such as race, religion or gender.[332]

In the case of prisons and prisoners, prison population size, average length of sentence, security classification, types of crimes, age and "other considerations" all can render inmates dissimilarly situated.[333] For example, women's prisons are often smaller than the men's prisons owing to the smaller population of female inmates. Women generally have lower security classifications, shorter sentences, and have been convicted of less serious crimes than male inmates.[334] Given these facts, an Eighth Circuit court has held that the male and female inmates in Missouri were not similarly situated, making any comparison for equal protection purposes impossible.[335]

It is very especially difficult to show that inmates at two different prisons are similarly situated. In fact, because every prison is so unique, it is a "virtual certainty" that services at each prison will differ, and comparisons are therefore "virtually irrelevant."[336]

If inmates are similarly situated, the level of scrutiny a court will use to examine the disparate treatment depends on the reason for the difference. For example, a policy that provides for different treatment due to race, national origin or religion is considered under strict scrutiny and must be narrowly tailored to further a compelling governmental interest.[337] Different treatment due to gender is considered under intermediate scrutiny and must be substantially related to the achievement of important governmental objectives.[338] Different

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[330] *Andrews v. Gunter*, 1987 U.S. Dist. LEXIS 14565, at *13 (D. Neb. Dec. 28, 1987) (citing *Hoptowit v. Ray*, 682 F.2d 1237, 1254-1255 (9th Cir. 1982). See also *Rhodes v. Chapman*, 452 U.S. 337, 348 (1981) (limited work and delayed educational opportunities do not inflict pain); *Jordan v. Longley*, 2008 U.S. Dist. LEXIS 115937, at *11 (D.S.D. Aug. 28, 2008) (no constitutional right to education or rehabilitation); *Wishon v. Gammon*, 978 F.2d 446, 450 (8th Cir. 1992) (no right to educational or vocational opportunities during incarceration); *Damron v. N.D. Comm'r of Corr*., 299 F. Supp. 2d 970, 981 (D.N.D. 2004) (Eighth Circuit case law "clear" that prisoners have no constitutional right to educational or vocational opportunities); *Craig v. Bretthauer*, 2007 U.S. Dist. LEXIS 55230, at *6 (N.D. Iowa July 27, 2007) (no right to educational or vocational opportunities).

[331] *Craig*, 2007 U.S. Dist. LEXIS 55230, at *6.

[332] *Keevan v. Smith*, 100 F.3d 644, 647-648 (8th Cir. 1996) (gender based discrimination in educational opportunities).

[333] *Craig*, 2007 U.S. Dist. LEXIS 55230, at *6 (age); *Keevan*, 100 F.3d at 648 (other considerations).

[334] *Keevan*, 100 F.3d at 649.

[335] *Id*. at 649-650.

[336] *Id*. at 651.

[337] *Adarand Constructors v. Pena*, 515 U.S. 200, 227 (1995) (strict scrutiny used for all racial classifications).

[338] *United States v. Virginia*, 518 U.S. 515, 532-533 (1996) (gender claims in general get intermediate scrutiny); *Keevan*, 100 F.3d at 650 (gender claim in prison).

treatment due to almost anything else, including age and disability, is subject to rational basis review and must be rationally related to a legitimate purpose.[339]

A facially neutral policy is one that does not mention race, gender, or whatever the classification being challenged is. Such a policy is not held to the standards mentioned in the previous paragraph. If a policy is facially neutral, the plaintiff must show that it has a disproportionately adverse impact on the group in question and was enacted for a discriminatory purpose.[340] If the adverse impact of a facially neutral policy cannot plausibly be explained on a neutral ground such as security or rehabilitation, the impact itself will show that the real purpose behind policy was not discriminatory.[341]

There are an enormous number of cases in the Eighth Circuit holding that there is no constitutional right to rehabilitation, vocational training, or education. The only way in which a court might be interested in such an issue is if there is a claim that programs are being offered on an unequal basis. Where such a claim is made, the courts will look for persons similarly situated being treated differently for an illegitimate purpose such as race. It is very difficult for one group of inmates to show that they are in fact similarly situated to another. It is also very difficult to show that a facially neutral policy was enacted for an impermissible reason. Since most policies are facially neutral, the odds are stacked against an equal protection claim, and there do not appear to be any successful equal protection claims within the Eighth Circuit.

Parole

Unless created by state statute, there is no constitutional right to parole. The Due Process Clause applies when the government deprives an individual of life, liberty or property.[342] What is important is the type of interest at stake, not the "weight" of the interest in question.[343] This means that, in order for due process protections to apply, and individual must have a "legitimate claim of entitlement" to the interest in question.[344] An "abstract need," "desire," or "unilateral expectation" is not enough to create a protected interest.[345]

Parole is a conditional release prior to completion of an individual's full sentence. As such, there is no inherent claim of entitlement to such release and thus no due process protection for parole.[346] The mere possibility of release created by a parole system is not an interest protected by the due process clause.[347] The granting of parole is different than parole revocation. Because revoking parole involves taking away liberty that an individual already has, as opposed to granting liberty that an individual does not have, parole revocations are

[339] *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985) (disability claim treated under rational basis review); *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 312-314 (1976) (age discrimination considered under rational basis); *Craig*, 2007 U.S. Dist. LEXIS 55230, at **7-8 (age related claim and rational basis).

[340] *Keevan*, 100 F.3d at 650 (citing *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 264-266 (1977)); *Marshall v. Kirkland*, 602 F.2d 1282, 1299 (8th Cir. 1979)).

[341] *Keevan*, 100 F.3d at 650 (citing *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 275 (1979)); *Ricketts v. City of Columbia*, 36 F.3d 775, 781 (8th Cir. 1994); *Gomillion v. Lightfoot*, 364 U.S. 339, 347-348 (1960); *Yick Wo v. Hopkins*, 118 U.S. 356, 373-374 (1886); *Craig*, 2007 U.S. Dist. LEXIS 55230, at **7-8 (reducing recidivism is legitimate purpose).

[342] *Greenholtz v. Inmates of Neb. Penal & Correctional Complex*, 442 U.S. 1, 7 (1979).

[343] *Id*. (quoting *Board of Regents v. Roth*, 408 U.S. 564, 570-571 (1972)).

[344] *Swarthout v. Cooke*, 131 S. Ct. 859, 861 (2011) (per curiam) (due process protections only apply if there is a liberty interest); *Greenholtz*, 442 U.S. at 7 (due process only applies if a protected interest has been found); *United States v. Johnson*, 703 F.3d 464, 470 (8th Cir. 2013) (no protected interest unless there was a legitimate expectation that the benefit would come).

[345] *Greenholtz*, 442 U.S. at 7. See also *Adams v. Agniel*, 405 F.3d 643, 645 (8th Cir. 2005) (no liberty interest in possibility of parole).

[346] *Swarthout*, 131 S. Ct. at 862 (no right under Federal Constitution to early release); *Board of Pardons v. Allen*, 482 U.S. 369, 373 (1987) (existence of parole system does not by itself create liberty interest); *Greenholtz*, 442 U.S. at 7 (same); *Jackson v. Nixon*, 747 F.3d 537, 543 (8th Cir. 2014) (Inmates have no constitutional right to early parole).

[347] *Greenholtz*, 442 U.S.. at 9-11.

subject to due process limitations.[348]

A state has no duty to create a parole system at all.[349] Because creation of a parole system is optional, a state that chooses to do so has great freedom in defining the conditions of release or factors to be considered by the parole authority.[350] While the mere existence of a parole program does not create a liberty interest, it is possible for a state statute to create such an interest through the use of mandatory sounding language.[351]

Eligibility for parole is sometimes conditioned on completing one or more programs such as drug treatment. No protected liberty interest is at stake if a prison denies an inmate the opportunity to participate in such a program as long as the denial does not result in the inmate serving more time than his or her original sentence.[352]

Where a specific state statute has created a liberty interest an inmate has two minimal rights guaranteed by the due process clause. First, an inmate has the right to appear before the parole board and be given an opportunity to speak. Second, if the inmate is not granted parole, he or she must be told the reason for the denial.[353] An inmate does not have the right to see the evidence on which the parole board based its decision.[354] Finally, the First Amendment prohibits the state from conditioning parole on participation in a program with religious content.[355]

Regulations and Expert Opinions

Prison regulations, policies and the opinions of experts have very limited relevance when it comes to constitutional law. Simply put, a prison that violates its own policy or regulation does not create § 1983 liability.[356] For example, the failure to respond to a grievance in a timely manner, as specified in a Department of Corrections policy, does not violate the Constitution.[357] This is not to say, however, that a policy or regulation cannot violate the Constitution. For example, if a prison had a policy of opening legal mail outside an inmate's presence, the policy itself might violate an inmate's right to counsel or to access the courts. However, such a problem would be independent of whether or not the prison followed its unconstitutional policy.[358]

On occasion a prison's internal policy may represent a "constitutional minimum," and thus violating the policy will also violate the Constitution. For example, a jail determined that the best way to prevent inmates from sexual assault was to lock all the cell doors at night. The jail had a constitutional duty to protect inmates from sexual assault. When the doors were left unlocked and a detainee was raped, the violation of the door locking policy amounted to

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[348] *Id.* at 9-10 (citing Henry J. Friendly, *Some Kind of Hearing*, 123 U. Pa. L. Rev 1267, 1296 (1975).

[349] Id. at 9; *Swarthout*, 131 S. Ct. at 862.

[350] *Greenholtz*, 442 U.S. at 7-8.

[351] *Swarthout*, 131 S. Ct. at 860-861 (state statute reading "shall set a release date unless" created a liberty interest); *Board of Pardons v. Allen*, 482 U.S. 369, 371, 376 (1987) ("shall" language in parole statute created a liberty interest); *Greenholtz*, 442 U.S. at 12 (accepting that statutory language including words "shall order his release unless" created liberty interest); *Kentucky Dep't of Corrections v. Thompson*, 490 U.S. 454, 460 (1989) (protected liberty interests come from either the Due Process Clause or the laws of the states); *Nolan v. Thompson*, 521 F.3d 983, 989 (8th Cir. 2008) (state may create liberty interest by limiting official discretion or using mandatory terms).

[352] *Pereschini v. Calloway*, 651 F.3d 802, 807-808 (8th Cir. 2011) (removing inmate from drug treatment program needed in order to be eligible for parole did not implicate Due Process Clause). But see *Sandin v. Connor*, 515 U.S. 472, 482 (1995) (criticizing focus on whether statute or regulation used mandatory language when deciding whether state had created a liberty interest).

[353] *Swarthout*, 131 S. Ct. at 862; *Wilkinson v. Austin*, 545 U.S. 209, 226 (2005) (notice of factual basis and opportunity to rebut are among most important due process protections); *Greenholtz*, 442 U.S. at 15-16 (such procedure adequately safeguards against serious risk of error); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 543 (1985) (opportunity to be heard has "obvious value" in avoiding serious error).

[354] *Greenholtz*, 442 U.S. at 15.

[355] *Jackson v. Nixon*, 747 F.3d 537, 543 (8th Cir. 2014) (prison could not condition parole on participation in AA meetings with religious content).

[356] *Maxwell v. Tyler*, 2011 U.S. Dist. LEXIS 146505, at *8 (E.D. Ark. Oct. 27, 2011); *Moore v. Rowley*, 126 Fed. Appx. 759, 760 (8th Cir. 2005); *Gardner v. Howard*, 109 F.3d 427, 430 (8th Cir. 1997); *Falls v. Nesbitt*, 966 F.2d 375, 380 (8th Cir. 1992).

[357] *Maxwell*, 2011 U.S. Dist. LEXIS 146505, at *8.

[358] *Gardner*, 109 F.3d at 430.

a failure to provide the constitutionally mandated minimum level of safety. In such cases, a court will consider the policy violation to be almost synonymous with a constitutional violation, despite the fact that policy violations do not *ipso facto* violate the Constitution.[359]

Whether the conduct of prison officials is harmful enough to raise an Eighth Amendment issue is an "objective or legal determination."[360] Because such a determination is a legal rather than factual one, expert opinions may be "helpful and relevant" but "simply do not establish the constitutional minima."[361] The recommendations of the American Correctional Association, the National Sheriffs' Association and others can be "instructive" but do not establish what the Constitution requires.[362] Even recommendations laid out by the Department of Justice do not establish what the Constitution demands.[363] Professional standards are not constitutional requirements.[364]

Expert opinion or professional standards can be used to establish what prison standards actually are.[365] Such standards can be helpful to a court when determining what practices are required or forbidden by contemporary standards of decency. For instance, medical care in a prison may be so inadequate and diverge so far from professional standards that a court may find that the prison officials responsible for such care were deliberately indifferent.[366] Such opinion does not, however, establish whether or not a constitutional violation has occurred.

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[359] *Walton v. Dawson*, 2014 U.S. App. LEXIS 9304, at **24-25 (8th Cir. May 20, 2014).

[360] *Bledaw v. Simpson*, 1994 U.S. App. LEXIS 9398, at *2 (8th Cir. Feb. 14, 1994); *Hickey v. Reeder*, 12 F.3d 754, 756 (8th Cir. 1993) (citing *Hudson v. McMillian*, 503 U.S. 1, 6-7 (1992)).

[361] *Rhodes v. Chapman*, 452 U.S. 337, 350 n. 13 (1980) (citing *Bell v. Wolfish*, 441 U.S. 520, 543-544 n. 27).

[362] *Bell v. Wolfish*, 441 U.S. at 543-544 n. 27.

[363] *Id*.

[364] *Brown v. Plata*, 131 S. Ct. 1910, 1944 (2011).

[365] *Peters v. Woodbury County*, 979 F. Supp. 901, 921-922 (N.D. Iowa 2013).

[366] *Mace v. Johnson*, 2014 U.S. Dist. LEXIS 16676, at **19-20 (D. Minn. Feb. 11, 2014).

CONCLUSION

Like many areas of constitutional law, prison law starts with a few basic principles and corollaries. The Eighth Amendment, cruel and unusual punishment, and the deliberate indifference test form the most widely used set of standards. We have seen that a successful deliberate indifference claim requires showing that prison officials were aware of a serious harm or risk of serious harm and chose to ignore that harm or risk. This is a higher standard than negligence and is similar to criminal recklessness.

When prison officials violate fundamental rights in a way that does not involve punishment, the *Turner* test comes into play. This deferential test asks whether the limitation on inmate rights is reasonably related to a legitimate penological objective. Safety and security are the two most commonly cited penological objectives and prisons are often successful in defending claims that fall under *Turner*.

The last two basic principles involve due process. Procedural due process requires that officials follow certain procedures, often notice and a hearing, before depriving an inmate of life, liberty or property. Cases involving procedural due process often turn on whether or not the plaintiff had a liberty interest sufficient to invoke due process.

Anyone held by the state who has not been convicted of a crime may not be punished at all, thus negating the possibility of cruel and unusual punishment. Cases involving such persons are considered under substantive due process and the "shocks the conscience" test. The Eighth Amendment and deliberate indifference are often used as the standard for what shocks the conscience.

What makes prison law interesting is how these principles are applied across a wide variety of fact patterns. For example, the Eighth Amendment ban on cruel and unusual punishment and the evolving standard of decency that follows from it have been applied to such disparate subjects as physical and mental health care, inmate-on-inmate violence, noise and ventilation.

In addition to the many ways these basic principles are applied, the flexibility engendered by having only a few sweeping rules has allowed prison law to change over the years. What the public considers cruel changes over time, and eventually finds its way into legislation and other evidence that courts recognize as demonstrating that our sense of decency has evolved. The ever-increasing accumulation of knowledge also plays a role and has expanded what is considered cruel and unusual over time. For example, those courts that have banned the housing of mentally ill inmates in segregation have done so in part because of advancing work in the study of mental illness.

Looking forward it seems possible that these two trends will work together to produce important changes in prison law. As our standard of decency evolves to bring mental illness among the punishments that may not be inflicted on inmates, and as we come to better understand what causes mental illness, what counts as cruel and unusual punishment may expand to encompass inmates in general population as well as those in segregation.

The prison system in Nebraska houses roughly 5,000 inmates and is currently at 157% of its design capacity.[367] Within some individual

[367] Neb. Dep't of Corr. Services, *Monthly Data Sheet* (Sept. 30, 2014), http://www.corrections.state.ne.us/pdf/datasheets/datasheetSep14.pdf.

prisons the numbers are even more ominous; the Lincoln Correction Center, home to many inmates who have mental illness, is over 160% capacity while the larger Omaha Correctional Center is almost 190% capacity. The Nebraska State Penitentiary is at 183% capacity while the Diagnostic and Evaluation Center through which all inmates pass before reaching their final destination is at 300% capacity.[368] These numbers are even worse when one considers that over one hundred and fifty state inmates are now being housed by county jails and are not represented in the official overcrowding total.[369]

Overcrowding and the danger to inmates and staff that it has produced have resulted in a semi-permanent lockdown at many institutions. Overcrowding and lockdowns are not traditionally considered to be direct violations of the Eighth Amendment. At the ACLU of Nebraska we hear from a steady stream of inmates who tell us that living in overcrowded conditions under a lockdown is comparable or worse to being in segregation. These inmates tell us that their mental health is deteriorating as a result of the constant noise and the ever-present threat of violence.

Courts outside the Eighth Circuit have already ruled that housing mentally ill inmates in segregation is cruel and unusual. These courts have also held that housing an inmate in a way that he or she becomes mentally ill is also a violation of the Eighth Amendment. If advancements in knowledge reveal that housing inmates in such conditions inevitably leads to mental health problems, will this transform overcrowding and lockdowns into what I have called primary constitutional violations? Will a future Eighth Circuit court rule that inmates in general population who suffer from overcrowding and lockdowns have direct Eighth Amendment claims?

Another area where innovation seems possible is procedural due process. Many prison due process cases are lost because courts do not see a significant difference between segregation and general population. As we learn more about the effects of segregation it will be harder for courts to maintain that an inmate has no liberty interest in remaining in general population. If the Eighth Circuit were to recognize such an interest, prisons would be constitutionally required to give inmates notice and a real hearing before sending them to segregation. Such a move could transform procedural due process from a relatively minor part of prison law into a common area of litigation.

While speculation about the future direction of prison law is interesting the only law that applies to today's prisons and inmates is the law of the present. Much of this law as it exists within the Eighth Circuit is found in the preceding pages. While not comprehensive, the topics covered in this work represent the most common complaints that the ACLU of Nebraska has received. We hope that this work will be of help to inmates, attorneys, policy makers, and anyone else interested in the laws that govern prison in the Eighth Circuit.

[368] *Id.*
[369] *Id.*

FURTHER READING

This work is hardly the last word on the law governing prisons in the Eighth Circuit. There are many resources available for purchase, and anyone with access to a law library can decide for him or herself what these are worth. This short section will, with one exception, focus instead on materials available online and without charge.

These resources are general and should be of use to anyone with an interest in prisons and the law that governs them. Taken together with this work, they should be enough to give the prospective litigant an understanding of the strengths and weaknesses of his or her case.

If there is one book that anyone considering prison litigation should purchase, it is the *Prisoner's Self-Help Litigation Manual*.[370] At nearly 1,000 pages, it includes everything from detailed descriptions of inmate's rights to sample voire dire questions to ask potential jurors. This is the only work on this list that is not freely available via the Internet.

The *Jailhouse Lawyer's Handbook*, published online by the Center for Constitutional Rights and The National Lawyer's Guild, is available as a free download.[371] This is a wonderful resource for both inmates and lawyers, and includes "how to" instructions that this article lacks. Users should be aware, however, that the *Handbook* is intended for a national audience and does not include much Eighth Circuit case law. Despite this shortcoming (for those in the Eighth Circuit) this is perhaps the single best free resource available online.

The ACLU National Prison Project contains a great number of reports on various aspects of prison law.[372] Perhaps most usefully, the Project also has the complaints and other documents from a number of ACLU prison lawsuits online.[373] These are excellent examples of what sample pleadings look like and should be of use to both attorneys and pro se litigants.

The American Correctional Association (ACA) is a professional group that most prison systems belong to.[374] The prison standards promulgated by the ACA are often cited in case law, although a failure to meet ACA standards is not a per se constitutional violation. The ideals promulgated by the ACA form at least a starting point for what a modern prison system should look like.

The Justice Center at the Council of State Governments (CSG) promotes a data-driven approach to a number of problems facing state governments, including corrections, courts, and law enforcement.[375] The Justice Reinvestment Project looks for ways states can save money on criminal justice and reinvest it in building stronger communities.[376] Many of CSG's reports contain useful data and analysis for policymakers.

Other good sources of data include The Bureau of Justice Statistics (BJS) Corrections Unit and

[370] John Boston & Daniel E. Manville, *Prisoner's Self-Help Litigation Manual* (4th ed., Oxford 2010).

[371] Center for Constitutional Rights, *Jailhouse Lawyer's Handbook* (Rachel Meeropol & Ian Head, eds., 5th ed. 2010), http://jailhouselaw.org (last visited Oct. 21, 2014).

[372] ACLU National Prison Project, https://www.aclu.org/prisoners-rights/aclu-national-prison-project (last visited Oct. 20, 2014).

[373] ACLU Prisoner's Rights Cases, https://www.aclu.org/search?logic=any&type=case&cpi=p49 (last visited Oct. 20, 2014).

[374] American Correctional Association, http://www.aca.org/ACA_Prod_IMIS/ACA_Member/Home/ACA_Member/ Home.aspx (last visited Oct. 20, 2014).

[375] The Council of State Governments Justice Center, http://csgjusticecenter.org (last visited Oct. 20, 2014).

[376] Justice Reinvestment, http://csgjusticecenter.org/jr/ (last visited Oct. 20, 2014).

The Pew Research Center.[377] BJS maintains over 30 data collections, including surveys of prison and jail inmates, prison facilities and staff, and offenders under community corrections. The Pew Center produces statistics on a wide variety of topics in the criminal justice field such as the racial disparity in incarceration and the changing nature of the war on drugs.

Two slightly more activist-minded organizations also produce useful reports. The Prison Policy Initiative works to end mass criminalization and incarceration.[378] As part of their work they produce reports documenting the racial disparity in mass incarceration and the rapid growth of prisons in all fifty states. The Brennan Center for Justice at the New York University School of Law produces similar research under its "Justice for All" program.[379]

[377] Bureau of Justice Statistics Corrections Unit, http://www.bjs.gov/index.cfm?ty=tp&tid=1 (last visited Oct. 21, 2014); Pew Research Center, http://www.pewresearch.org (last visited Oct. 21, 2014).

[378] Prison Policy Initiative, http://www.prisonpolicy.org (last visited Oct. 21, 2014).

[379] Brennan Center for Justice, Justice for All Program, http://www.brennancenter.org/issues/justice-all (last visited Oct. 21, 2014).