THE TIPPING POINT

Have Nebraska's Prisons Crossed into Unconstitutional Territory?

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ACLU

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INTRODUCTION

The line between permissible and impermissible conditions of confinement is blurry and courts have struggled as if looking through a glass darkly. Conditions at Nebraska's overcrowded prisons have been teetering on the edge for some time but may finally have crossed into unconstitutional territory. Taken as a whole, Nebraska's prisons are at 155% capacity, with some being much more overcrowded.[1] For example, the Nebraska State Penitentiary (NSP) is at 183% capacity, the Omaha Correctional Center (OCC) is at 190% capacity, and the Diagnostic and Evaluation Center (DEC) is at an incredible 278% capacity.[2] For comparison, the California prison system that was the subject of successful litigation on the issue of overcrowding was at roughly 200% capacity system-wide.[3]

We have received hundreds of letters describing the effects of the overcrowding, including a petition with as many as 400 signers begging for legal help. We have begun interviewing witnesses at the correctional institutions and conducting legal research. Taken together, our efforts reveal a system in crisis that is unable or unwilling to properly house and care for inmates. Intervention by litigation may already be justifiable.

Legislative and executive efforts, however, may alleviate some of the unlawful conditions and associated litigation opportunities. We are aware of LB 907 and LB 999, now on general file in the Legislature, and consider them to be excellent proposals. We also approve of the legislature's plans to seek expert assistance, presumably to result in further legislation in 2015. Of particular interest to ACLU of Nebraska is "front-end" sentencing reform, which we believe needs to be a significant part of any effective plan to reduce overcrowding. We do not believe that merely building more prisons will fix the defects in our correctional system.

Because effective prison reform depends on the efforts of so many actors and is therefore uncertain, ACLU of Nebraska will continue to prepare to enforce the demands of the Eighth Amendment through the state or federal court system. We consider serious prison reform an urgent matter and are willing to work positively with any and all stakeholders. What we are not willing to do is wait. Although litigation would be a difficult and expensive route for all involved, we may have to force the issue if Nebraska does not have the wisdom to rapidly put in place a comprehensive and long-term solution.

In the following pages and endnotes we will briefly discuss the standards governing prisons in Nebraska and throughout the United States. We will then turn to several specific areas where our preliminary research shows that conditions may violate the Eighth Amendment standards and principles governing prison conditions and thus be ripe for litigation.

Basic Eighth Amendment Standards

Although elusive, the basic principle encapsulated by the Eighth Amendment is "nothing less than the dignity of man."[4] Prisoners must be treated in a manner that comports with society's "evolving standards of decency" and in a way that respects their humanity.[5] In order to accomplish this goal, the Eighth Amendment must be interpreted in a "flexible and dynamic manner."[6]

These same principles apply when looking at prison conditions. Originally the Eighth Amendment may have prohibited only "physically barbarous" conditions, but today it has been extended to cover punishments that unnecessarily and wantonly inflict pain or that are grossly disproportionate to the crime.[7] In addition, conditions that "alone or in combination . . . deprive inmates of the minimal civilized measures of life's necessities" are barred by our contemporary standard of decency.[8]

Prison conditions that, alone or in combination, produce a harm or risk of harm that violates our contemporary standard of decency violate the Eighth Amendment.[9] Inmates are not required to wait until they become sick or otherwise hurt due to unconstitutional prison conditions.[10] With these principles in mind we turn next to some specific areas where Nebraska's prison system may be violating the Eighth Amendment.

Substandard health care within our prison system violates the Eighth Amendment

According to the Supreme Court of the United States, inmate healthcare violates the Eighth Amendment if prison officials exhibit "deliberate indifference" to an inmate's "serious medical needs."[11] The standard is the same for both mental and physical care.[12]

A prison official exhibits deliberate indifference if he or she "knows of and disregards an excessive risk to inmate health or safety.[13] Prison officials may violate the Eighth Amendment by refusing to provide care or by delaying care for as little as three weeks.[14] Medical care may not be denied or delayed out of monetary or other non-medical concerns.[15] A lack of resources or manpower may not be used to justify violations of the Eighth Amendment under any circumstances.[16]

A medical need is serious if it has been diagnosed by a physician as requiring treatment or if it would be obvious to a layperson that it requires medical attention.[17] The Eighth Circuit has found a host of conditions, including psychological disorders, to be sufficiently serious.[18]

Perhaps our most commonly received complaint from inmates involves the lack of physical and mental health care within Nebraska's prison system. Inmates we have interviewed describe a wait for even routine care that often stretches out to three weeks

or longer. Many inmates do not even bother to seek care for less serious problems because they expect to have recovered before receiving any medical care. For at least some percentage of the inmate population the wait can be far longer. Inmates beg to see a doctor for painful and frightening conditions, only to be issued an antacid or an analgesic and told that they already saw the doctor last month, or that an appointment with a specialist has been scheduled for months in the future.

When inmates do receive medical attention the care rarely comes from a doctor and is almost universally described as cursory and inadequate. Many complain that they were diagnosed without ever being seen by medical personnel. While this may not be surprising given the massive overcrowding at NSP and other institutions, it also may violate the Eighth Amendment. Let us not forget that a lack of funds or personnel cannot justify denying inmates proper medical care.

Housing inmates with mental illness in segregation violates the Eighth Amendment

Courts in several circuits have found that housing inmates with mental illness in segregation violates the Eighth Amendment. Those 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."[19]

For inmates with mental illness being placed in segregation can be the "mental equivalent of putting an asthmatic in a place with little air to breathe."[20] 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."[21]

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Estimates from our contacts in the inmate population place the percentage of inmates in general population with mental illness at somewhere between thirty and fifty percent.[22] In segregation this number appears to be far higher, and our information suggests that the mentally ill may comprise a majority of the population in segregation. We also understand that inmates in segregation are not being given any mental health care, with at least one interviewee telling us that he has only been seen once, for a few minutes, by a mental health professional in the eighteen months he has been in segregation. This is unacceptable and we will consider this issue a top priority for litigation.

Exposure to violence at the hands of other inmates violates the Eighth Amendment

Inmate safety is one of the core issues in conditions of confinement cases and is frequently described as a basic human need.[23] Prison officials have a duty to protect inmates from violence committed by other inmates.[24] Being violently assaulted in prison is "not one of the penalties that criminal offenders pay for their offenses against society."[25]

A court within the Eighth Circuit has held that as few as eight reported instances of violence per year in a housing unit or sleeping bay represents a sufficiently serious risk of harm...Inmates tell us that the overcrowded conditions and lockdown promote inmate-on-inmate violence and that there are simply not enough guards to keep everyone safe.

A plaintiff in a prison safety case must show two things in order to prevail: 1) that the harm or risk of harm is sufficiently serious, and 2) that prison officials were deliberately indifferent to this harm or risk of harm.[26]

A court within the Eighth Circuit has held that as few as eight reported instances of violence per year in a housing unit or sleeping bay represents a sufficiently serious risk of harm.[27] The large number of grievances that have been filed on this issue, combined with routine reporting of violence, should be more than enough to convince a court that prison officials are aware of the high level of violence at many Nebraska institutions. Awareness of a serious problem combined with a lack of action amounts to deliberate indifference.[28]

We understand that there are one or two fights per week in each of the sleeping bays at NSP, with relatively few being broken up by guards. While our investigation is ongoing, we have already heard of serious injuries such as unconsciousness, heavy bleeding and a broken jaw. Inmates tell us that the overcrowded conditions and lockdown promote inmate-on-inmate violence and that there are simply not enough guards to keep everyone safe. We have also heard from inmates who have been denied protective custody and suffered serious injuries as a result. Given how crowded segregation reportedly is, the question naturally arises whether inmates are being denied protective custody simply because there is no place to put them other than in general population. This is another area where litigation seems likely to have success.

Lack of exercise opportunities violates the Eighth Amendment

Ordinarily, any inmate confined to his cell for more than sixteen hours per day must be given one hour per day outside his or her cell in order to exercise. Prison officials have the freedom to fill in the details, as long as inmates are provided a "meaningful" opportunity for exercise.[29] Where there is "enforced idleness" that leads to detrimental physical effects, there is an Eighth Amendment violation.[30] A lack of staff or resources may not be used to justify denying inmates the opportunity to exercise.[31]

After health care, lack of exercise is the most common complaint received at ACLU of Nebraska. Inmates are locked in their cells or sleeping bays for the vast majority of the day. Inmates are theoretically allowed one hour of exercise per day, but this is largely illusory. Inmates with jobs have their exercise period taken away, even if they work desk jobs. An inmate working five days per week will thus only receive one hour of exercise on the two days he or she does not work. For those without jobs, the situation is slightly better but still unacceptable. If any other activity conflicts with an inmate's scheduled exercise period, the inmate must choose between exercise and that other activity. For example, if an inmate's worship service fell during the same hour as his or her exercise period, the inmate would have to choose between attending worship services and exercising.

This lack of exercise is taking a toll on inmate health. From the reports we have received, weight gain, elevated triglycerides and other health effects are widespread. Inmates also routinely complain of other symptoms of forced idleness such as restlessness, irritability and difficulty sleeping. Many blame the large number of fights on the stress caused by lack of exercise. This is another area where a lawsuit appears viable.

Excessive noise creates two Eighth Amendment violations

Noise levels can become cruel and unusual if they may result in hearing loss or where the noise stems from the screaming or other activities of inmates with mental illness and is experienced by mentally sound inmates.

Following the ACA standard, Nebraska's standard for noise in the inmate occupied areas of a prison is 70 decibels.[32] Such a limit follows both case law and medical science. A regular noise level above 70 decibels creates an Eighth Amendment issue.[33]

Noise created by inmates with mental illness can be an Eighth Amendment violation regardless of how loud it is. Courts have had "no problem" finding that a sane inmate forced to listen to the screaming or other activities of the mentally ill while in segregation violates contemporary standards of decency.[34]

We have received enough complaints to conclude that both of these are occurring within Nebraska's prison system. Inmates we have interviewed confirm that the noise level throughout NSP is very high and have sent us a noise petition signed by over 450 inmates. We have heard that segregation at both NSP and Tecumseh is very noisy, with much of the sound created by inmates with mental illness. Inmates in segregation describe stuffing paper under their doors or in their ears in an attempt to avoid the screaming, banging and kicking of the mentally ill inmates warehoused nearby. Some have adopted odd sleep patterns, either in an attempt to sleep or in an attempt to be awake during those few hours when the level of noise allows for coherent thought. This is truly a nightmare scenario, there is already Eighth Circuit case law on point, and a court may find that these conditions go beyond contemporary standards of decency.

Inadequate ventilation can violate the Eighth Amendment

ACLU has some evidence that the ventilation at NSP falls far short of ACA standards...Inmates describe mold growth and a persistent smell that varies between "outhouse" and "gym locker."

Inadequate ventilation can become a constitutional issue where a lack of airflow leads to foul odors, stale air or mold growth. It can be combined with other conditions of confinement and considered under a totality of the circumstances analysis, or can be so bad that it becomes cruel and unusual standing alone.[35]

ACLU has some evidence that the ventilation at NSP falls far short of ACA standards. We have received copies of grievances in which prison officials describe the airflow at NSP as being roughly 10% of what the ACA standards require. Inmates describe mold growth and a persistent smell that varies between "outhouse" and "gym locker." We will include ventilation in any lawsuit we file over conditions of confinement.

CONCLUSION

Nebraska's prison system is at 155% capacity as a whole, with some institutions much higher. Overcrowding has led to deteriorating conditions of confinement and the system may have crossed into unconstitutional territory. We have received hundreds of letters describing a an overburdened system that seems incapable of providing the basic necessities our shared conception of decency demands.

Our research has revealed at least six areas where a lawsuit over the appallingly overcrowded conditions within Nebraska's prison system could be successful. Our top priorities for litigation will be mental and physical health care and the housing of inmates with mental illness in segregation. Other areas that may be actionable now or in the near future are inmate safety, a lack of exercise opportunities for inmates, excessive noise and inadequate ventilation.

This list should be considered preliminary. Even at this early stage, however, we may be able to convince a court that the conditions in Nebraska's overcrowded prison system violate the Eighth Amendment. Given the high priority ACLU places on this issue, we will continue our work and may uncover additional litigation opportunities.

Legislative efforts such as LB 907 and LB 999 may alleviate some of these unlawful conditions and the associated risk of litigation. Passage and vigorous implementation of these bills would be a positive step and would lessen the immediate pressure for court-ordered relief. If combined with further efforts in the coming years, particularly sentencing reform, our prisons may yet become an example to be followed rather than a lesson to be learned from. We remain both willing to work with all willing partners and ready to litigate if necessary.

ENDNOTES

1 Nebraska Department of Correctional Services, *Monthly Data Sheet*, http://www.corrections.state.ne.us/pdf/datasheets/datasheetFeb14.pdf (February 28, 2014).

2 *Id*.

3 *Brown v. Plata*, 131 S. Ct. 1910, 1924 (2011).

4 *Campbell v. Cauthron*, 623 F.2d 503, 505 (8th Cir. 1980).

5 *Id*. (citing *Trop v. Dulles*, 356 U.S. 86, 100-101 (1958); *Hutto v. Finney*, 437 U.S. 678, 685 (1978); *Estelle v. Gamble*, 429 U.S. 97, 102 (1976)).

6 *Rhodes v. Chapman*, 452 U.S. 337, 345 (1981) (quoting *Gregg v. Georgia*, 428 U.S. 153, 171 (1976)). See also *Hudson v. McMillian*, 503 U.S. 1, 8 (1992) (Eighth Amendment has "few absolute limitations").

7 *Id*. at 346.

8 *Id*. at 347.

9 *Helling v. McKinney*, 509 U.S. 25, 32-33 (1993).

10 *Id*. See also *Hutto,* 437 U.S. at 682 (inmates crowded together with other inmates suffering from contagious diseases did not need to wait until they became sick to file suit); *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 200 (1989) (Basic human needs protected by Eighth Amendment includes "reasonable safety"); *Youngberg v. Romeo*, 457 U.S. 307, 315-316 (1982) (Holding criminals in unsafe conditions was cruel and unusual punishment); *Gates v. Collier*, 501 F.2d 1291, 1302-1303 (5th Cir. 1974) (inmates entitled to Eighth Amendment relief when they proved threats to personal safety from electrical wiring and deficient firefighting measures); *Ramos v. Lamm*, 639 F.2d 559, 572 (10th Cir. 1980) (inmate did not need to wait until he was assaulted before obtaining relief).

11 *Estelle*, 429 U.S. at 103.

12 *Bell v. Stigers*, 937 F.2d 1340, 1343 (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).

13 *Farmer v. Brennan*, 511 U.S. 825, 837-842 (1994); *Prater v. Dahm*, 89 F.3d 538, 541 (8th Cir. 1996); *Tokar v. Armontrout*, 97 F.3d 1078, 1083 (8th Cir. 1996).

14 *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). See also *Edwards v. Snyder*, 478 F.3d 827, 830-832 (7th Cir. 2007) (two-day delay in treating injured finger).

15 *Hartsfield v. Colburn*, 371 F.3d 454, 457-458 (8th Cir. 2004); *Hawkins v. Glover*, 2013 U.S. Dist. LEXIS 95576 at *23 (W.D. Ark. 2013); *Fincher v. Singleton*, 2013 U.S. Dist. LEXIS 42599 at *14 (W.D. Ark. 2013).

16 *Campbell*, 623 F.2d at 508; *Gonzales v. Moreno*, 1989 U.S. Dist. LEXIS 17244 at *33 (D. Neb. 1989).

17 *Johnson v. Busby*, 953 F.2d 349, 351 (8th Cir. 1991); *Brewer v. Blackwell*, 836 F. Supp. 631, 639 (S.D. Iowa 1993).

18 See *Johnson v. Lockhart*, 941 F.2d 705, 706 (8th Cir. 1991) (hernia); *Warren v. Fanning*, 950 F.2d 1370, 1372 (8th Cir. 1991) (infected toenails); *Dace v. Solem*, 858 F.2d 385, 388 (8th Cir. 1988) (nasal condition); *Taylor v. Bowers*, 966 F.2d 417, 419 (8th Cir. 1986) (ruptured appendix); *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); *Cummings v. Roberts*, 628 F.2d 1065, 1066 (8th Cir. 1980) (back injury); White *v. Farrier*, 849 F.2d 322, 323-324 (8th Cir. 1988) (transsexualism); *Young v. Armontrout*, 795 F.2d 55, 56 (8th Cir. 1986) (unspecified psychiatric needs).

19 *Madrid v. Gomez*, 889 F. Supp. 1146, 1260-1261 (N.D. Cal. 1995) (citing *Young v. Quinlan*, 960 F.2d 351, 364 (3rd Cir. 1992) (emphasis added by *Madrid* court).

20 *Id*. at 1265.

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

22 The numbers reported by inmates are roughly in line with the latest statistics produced by the Department of Justice. See Doris J. James and Lauren E. Glaze, Mental Health Problems of Prison and Jail Inmates (2006), *available at* http://www.bjs.gov/content/pub/pdf/mhppji.pdf.

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

24 *Farmer*, 511 U.S. at 833; *Wilson v. Seiter*, 501 U.S. 294, 303 (1991) (protection from other inmates is condition of confinement).

25 *Rhodes*, 452 U.S. at 347.

26 *Farmer*, 511 U.S. at 834. See also *Smith v. Norris*, 877 F. Supp. 1296 (E.D. Ark. 1995) (affirmed in relevant parts by *Smith v. Arkansas Dep't of Corr.*, 103 F.3d 637 (8th Cir. 1996).

27 *Norris*, 877 F. Supp. at 1306-1307.

28 *Id*.

29 *Campbell*, 623 F.2d at 506. See also *Andrews v. Gunter*, 1987 U.S. Dist. LEXIS 14565 at *8 (D. Neb. 1987) (one hour of exercise per day required); *Hutchings v. Corum*, 501 F. Supp. 1276, 1294 (W.D. Mo. 1980).

30 *Id*.

31 *Gonzales,* 1989 U.S. Dist. LEXIS 17244 at *33.

32 81 Neb. Admin. Code § 15-006.03 (2013)

33 See *Hutchings,* 501 F. Supp. at 1293 (noise level could rise to unconstitutional level); *Rhem v. Malcolm*, 371 F. Supp. 594, 609 (S.D.N.Y. 1974) (70 decibel standard; 83 decibels shown by plaintiff were "intolerable"); *Keenan v. Hall*, 83 F.3d 1083, 1090 (9th Cir. 1996) (modern standard of decency required environment relatively free of noise); *Toussaint v. McCarthy*, 597 F. Supp. 1388, 1397-1410 (N.D. Cal. 1984) (public conception of decency prohibited constant 70 decibel noise level).

34 *Goff v. Harper*, 1997 U.S. Dist. LEXIS 24186 at **131-133 (S.D. Iowa 1997); *Bracewell v. Lobmiller*, 938 F. Supp. 1571, 1578 (M.D. Ala. 1996).

35 *Hutchings,* 501 F. Supp. At 1282-1293 (ventilation that caused "human" smell bad enough to violate Eighth Amendment alone); *Chapman v. Simon*, 2006 U.S. Dist. LEXIS 5522 at **10-11 (E.D. Mo. 2006) (inadequate ventilation and exposure to extremes of temperature considered together); *Chandler v. Crosby*, 379 F.3d 1278, 1294-1295 (11th Cir. 2006) (ventilation should keep humidity low enough to prevent mold growth); *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.); *Keenan v. Hall*, 83 F.3d 1083, 1090 (9th Cir. 1996) (odor of feces and vomit); *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."); *Green v. Mowery*, 212 Fed. Appx. 918, 920 (11th Cir. 2006) (unpublished) (court must consider both the severity and the duration of the prisoner's exposure to excessive conditions); *James v. Goord*, 190 F.R.D. 103, 107-109 (S.D.N.Y. 1999) (double bunking combined with poor ventilation amounted to cruel and unusual punishment).

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