Northwestern PRITZKER SCHOOL OF LAW

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# OPEN ISSUES IN PRISON CASES

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This is a summary of "open" legal issues involving the rights of prisoners that will in some cases merit preservation with an eye toward further review. For many of these issues, I have briefs or complaint language that I will happily share with other attorneys. What follows constitutes general information about the law, not legal advice.

## Rights of pretrial detainees

For the following species of claims brought by pretrial detainees — failure to protect, medical and mental health care, and conditions of confinement — is the proper constitutional standard subjective deliberate indifference, or a more plaintiff-friendly objective standard?

> **Why the issue remains open:** Supreme Court precedent dictates that claims regarding conditions of confinement, failure to protect, and medical and mental health care brought by convicted prisoners are governed by the subjective deliberate indifference standard, which requires the plaintiff to show that a defendant subjectively knew of—and disregarded—a substantial risk of harm. See Farmer v. Brennan, 511 U.S. 825 (1994). The Court has not, however, addressed the standard for claims brought by pretrial detainees. While every circuit has (more or less) applied the same subjective state of mind standard to pretrial detainees, the Supreme Court held in Kingsley v.

Hendrickson, 135 S.Ct. 2466 (2015), that pretrial detainees, who have not been adjudicated guilty of any offense, are entitled to greater protections against excessive force than convicted prisoners, and that a pretrial detainee can make out an excessive force claim based solely on the objective unreasonableness of the force applied.

Although the narrow holding of Kingsley applies only to excessive force claims brought by pretrial detainees, the reasoning of the decision suggests that lower court authority extending subjective standards designed for convicted prisoners to pretrial detainees must be reexamined. The en banc Ninth Circuit recently concluded as much. Castro v. County of Los Angeles, No. 12-56829, 2016 WL 4268955, at *1 (9th Cir. Aug. 15, 2016); see also David M. Shapiro, To Seek A Newer World: Prisoners' Rights at the Frontier, 114 Mich. L. Rev. First Impressions 126 (2016).

**Use of force**

Does the "malicious and sadistic" standard continue to govern excessive force claims brought by convicted prisoners, or is the proper standard an objective one?

**Why the issue remains open:** Whitley v. Albers, 475 U.S. 312 (1986), and Hudson v. McMillian, 503 U.S. 1 (1992), apply the "malicious and sadistic" standard, a subjective state-of-mind test, to convicted prisoners. The majority in Kingsley v. Hendrickson, 135 S.Ct. 2466 (2015), applied an objective standard to pretrial detainees and also indicated a willingness to reconsider the "sadistic and malicious" standard as applied to convicted prisoners: "We acknowledge that our view that an objective standard is appropriate in the context of excessive force claims brought by pretrial detainees pursuant to the Fourteenth Amendment may raise questions about the use of a subjective standard in the context of excessive force claims brought by convicted prisoners. We are not confronted with such a claim, however, so we need not address that issue today." Id. at 2476.

**Speech and Religious Exercise**

What is the standard for censorship of outgoing mail from prisons and jails?

> **Why the issue remains open:** Procunier v. Martinez, 416 U.S. 396, 413 (1974), articulated the following standard for regulations regarding the censorship of prisoner mail: "First, the regulation or practice in question must further an important or substantial governmental interest unrelated to the suppression of expression . . . .Second, the limitation of First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved."
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> In Turner v. Safley, 482 U.S. 78, 89 (1987), however, the Court applied a less exacting standard to the censorship of mail sent to prisoners, holding that such censorship need only be "reasonably related to a legitimate penological interest." Then, in Thornburgh v. Abbott, 490 U.S. 401, 413 (1989), the Court explicitly overruled the Martinez standard as applied to mail sent to a prisoner and instead applied the Turner legitimate penological interest standard. The Court justified applying the Turner standard to incoming correspondence and the Martinez standard to outgoing correspondence by noting the greater "implications of incoming materials" (as opposed to outgoing materials) for "prison security." Id.
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> Thornburgh makes it fairly clear that the more exacting Martinez standard continues to apply to censorship of outgoing mail (and outgoing speech more broadly), and many courts have said as much. E.g., Nasir v. Morgan, 350 F.3d 366, 369 (3d Cir. 2003). Other courts have concluded the deferential "legitimate penological interest" test applies even to outgoing mail. E.g., Samford v. Dretke, 562 F.3d 674, 678–79 (5th Cir. 2009); Smith v. Delo, 995 F.2d 827, 829–30 (8th Cir. 1993). See also John Boston and Daniel E. Manville, Prisoners' Self-Help Litigation Manual 188 & nn. 67-68 (4th ed. 2009).

Is a "substantial burden" on a prisoner's religious exercise a required element of a Free Exercise Clause claim?

**Why the issue remains open:** In O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987), the Supreme Court applied the Turner legitimate penological interest test, which does not include a substantial burden element, to a prisoner's free exercise claim. Nonetheless, federal appellate courts are divided as to whether this additional requirement applies in prisoner free exercise cases. See Ford v. McGinnis, 352 F.3d 582, 592 (2d Cir. 2003) ("[T]he Circuits apparently are split over whether prisoners must show a substantial burden on their religious exercise in order to maintain free exercise claims.").

May a prisoner be punished for filing grievances containing truthful allegations that an official believes to be false?

**Why the issue remains open:** In general, the First Amendment prohibits retaliating against prisoners for making truthful complaints and filing truthful grievances. Toolasprashad v. Bureau of Prisons, 286 F.3d 576 (D.C. Cir. 2002) ("[O]fficials may not retaliate against prisoners for filing grievances that are truthful . . ."); see also Bridges v. Gilbert, 557 F.3d 541, 551 (7th Cir. 2009).

It is less clear whether the First Amendment prohibits punishing a prisoner for submitting a truthful grievance that an official believes to be false. In Procunier v. Martinez, 416 U.S. 396, 415 (1974), the Supreme Court struck down a policy that allowed "censorship of statements that 'unduly complain' or 'magnify grievances,' expression of 'inflammatory political, racial, religious or other views,' and matter deemed 'defamatory' or 'otherwise inappropriate.'" Procunier applied a least restrictive means test to prison speech regulations, but, as discussed in greater detail above, this standard has been largely overruled and replaced by the more deferential "legitimate penological interest" test of Turner v. Safely, 482 U.S. 78 (1987).

In Harris v. Walls, 604 Fed. Appx. 518 (7th Cir. 2015), the court stated that a prisoner's speech—even if true—could be punished because officials "sincerely believed" it to be false. This is a problematic

holding because it would allow prison officials to insulate themselves from liability by claiming a subjective and ultimately erroneous belief that a prisoner's truthful complaint (about, for example, being beaten or raped) was false. Another court has stated that "the important inquiry is whether defendants reasonably believed plaintiff was lying." Czapiewski v. Russell, No. 15-cv-208, 2016 WL 3920503, at *3 (W.D. Wis. July 18, 2016) (emphasis added).

In short, there are several possible tests. Truthful grievances may be protected regardless of whether the defendants think they are truthful. In the alternative, a mere subjective belief that the complaint is false may defeat liability. There is also a middle ground position: A subjective belief that the prisoner is lying defeats liability for retaliation, but only if the subjective belief is also a reasonable one.

Is "some evidence" of a disciplinary violation sufficient to defeat a claim that a prison official charged a prisoner with a disciplinary infraction in retaliation for protected speech?

This question involves the interplay of the law governing two types of claims that a prisoner may bring based on a disciplinary charge: (1) a claim that a charge is so unsupported by evidence that it violates procedural due process, and (2) a claim that a charge violates the First Amendment because a prison official issued the underlying disciplinary ticket in retaliation for speech. As for the first type of claim, the Supreme Court has decided that the minimal showing of "some evidence" is all that due process requires. Superintendent v. Hill, 472 U.S. 445, 447, (1985).

When the claim is of the second species (i.e., the prisoner asserts that an officer "put" a charge on her or him in retaliation protected speech), the circuits are split as to whether "some evidence" to support the prison's finding of a disciplinary violation suffices to defeat the prisoner's First Amendment claim. Moots v. Lombardi, 453 F.3d 1020, 1023 (8th Cir. 2006) (applying "some evidence" standard to retaliation claim); Nifas v. Beard, 374 F. App'x 241, 244 (3d Cir. 2010) (same); Hines v. Gomez, 108 F.3d 265, 269 (9th Cir. 1997) (rejecting

the "some evidence" standard for retaliation claims). See also John Boston and Daniel E. Manville, Prisoners' Self-Help Litigation Manual 218 & n. 321 (4th ed. 2009).

Does the Religious Land Use and Institutionalized Persons Act ("RLUIPA") permit the recovery of compensatory and punitive damages against municipal officials?

**Why the issue remains open:** In Sossamon v. Texas, 563 U.S. 277 (2011), the Supreme Court held that RLUIPA, interpreted in light of state sovereign immunity, does not permit the recovery of monetary damages against states and state officers sued in their official capacities. Municipalities and municipal officers, however, do not enjoy sovereign immunity, except when they are acting as arms of the state. Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 280, (1977).

Some lower courts have uncritically extended the holding in Sossamon to municipalities and municipal officials. E.g., Scott v. Brown, No. 1:11-CV-2514-TWT-JFK, 2012 WL 1080363, at (N.D. Ga. Jan. 31, 2012) ("Plaintiff's RLUIPA based damage claims fail because the only possible Defendant, Sheriff Brown, is not liable for damages in his official capacity (acting for the state) or in his individual capacity."), report and recommendation adopted, No. 1:11-CV-2514-TWT, 2012 WL 1080322 (N.D. Ga. Mar. 30, 2012)

Others have allowed RLUIPA damages suits against such defendants to proceed. E.g., Perfetto v. Plumpton, No. 14-CV-556-PB, 2016 WL 3647852, at *3 (D.N.H. July 1, 2016) ("Defendants principally cite cases in which courts dismissed RLUIPA damages claims on sovereign immunity grounds against state, rather than county, employees. Sovereign immunity does not affect Perfetto's claim here, however, because . . . counties, unlike states, do not enjoy sovereign immunity.") (citations omitted).

Does RLUIPA authorize respondeat superior liability?

**Why the issue remains open:** It is well-settled that suits under 42 U.S.C. § 1983 do not permit respondeat superior liability. Ashcroft v. Iqbal, 556 U.S. 662, 675 (2009). Some courts have applied the same rule to RLUIPA claims, but the statutory rationale for doing so is unclear. A recent federal case from New Hampshire summarizes the disagreement over this issue as follows:

> [W]hat standard governs counties' liability under RLUIPA for the alleged wrongful conduct of their employees? In answering this question, some courts have suggested that counties or municipalities can be held vicariously liable under RLUIPA for their employees' actions. See, e.g., Alderson v. Burnett, No. 1:07-CV-1003, 2008 WL 4185945, at *3 (W.D. Mich. Sept. 8, 2008) (stating that "municipal entities can be held vicariously liable under RLUIPA"); Layman Lessons, Inc. v. City of Millersville, Tenn., 636 F. Supp. 2d 620, 643 (M.D. Tenn. 2008) (same); Agrawal v. Briley, No. 02 C 6807, 2004 WL 1977581 (N.D. Ill. Aug. 25, 2004) ("RLUIPA appears implicitly to authorize respondeat superior liability against municipalities ...."). Other courts disagree, concluding that vicarious liability is unavailable under RLUIPA. These courts reason that, as with Section 1983 claims, a county or municipality cannot be liable for a RLUIPA violation merely because it employs a tortfeasor. See, e.g., Mahone v. Pierce Cty., No. C10-5847 RBL/KLS, 2011 WL 3298898, at *3 (W.D. Wash. May 23, 2011), report and recommendation adopted, No. C10-5847 RBL/KLS, 2011 WL 3298528 (W.D. Wash. Aug. 1, 2011); Greenberg v. Hill, No. 2:07-CV-1076, 2009 WL 890521, at *3 (S.D. Ohio Mar. 31, 2009) ("[T]o establish liability under RLUIPA (and Section 1983), a plaintiff must prove, among other things, the personal involvement of each defendant in the alleged violation"); see also Patel v. Bureau of Prisons, 125 F. Supp. 3d 44, 55 (D.D.C. 2015) (concluding that "pure vicarious liability ... is not

sufficient to state a claim under [the Religious Freedom Restoration Act]").

Perfetto v. Plumpton, No. 14-CV-556-PB, 2016 WL 3647852, at *4 (D.N.H. July 1, 2016).

Does the Religious Freedom Restoration Act ("RFRA") permit the recovery of compensatory and punitive damages against federal officials?

**Why the issue remains open:** RFRA authorizes claims "against a government" for violations of religious rights, with "government" defined to include an "official (or other person acting under color of law) of the United States." 42 U.S.C. §§ 2000bb-1(c) & 2000bb-2(1).[1] Courts are divided as to whether that definition encompasses federal officials sued for damages in their individual capacity. See Patel v. Bureau of Prisons, 125 F. Supp. 3d 44 (D.D.C. 2015) (holding that RFRA authorizes individual-capacity suits against federal officials); Jama v. INS, 343 F.Supp.2d 338, 374 (N.D.J. 2004) (holding "federal officials sued in their individual capacities are not immune from suit"), But see Tanvir v. Lynch, 128 F.Supp.3d 756, 775-81 (S.D.N.Y. Sept. 3, 2015) (holding that the law does not permit damages against officials in their personal capacities under RFRA).

**Prison Litigation Reform Act**

Under the PLRA, may a prisoner sue for compensatory damages for free speech and free exercise violations in the absence of physical injury?

**Why the issue remains open:** A provision of the PLRA, 42 U.S.C. § 1997e(e), provides: "No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for

[1] The Supreme Court struck down RFRA in part in City of Boerne v. Flores, 521 U.S. 507 (1997), holding that Congress had exceeded its limited constitutional authority to enforce the Fourteenth Amendment against state and local governments. Following City of Boerne, RFRA continues to apply to religious claims brought against the federal government by federal prisoners.

mental or emotional injury suffered while in custody without a prior showing of physical injury . . ." Federal courts are deeply divided on whether this "physical injury" limitation for compensatory damages requires a plaintiff who suffers an injury to religious liberty or free speech to make an additional showing of physical injury. Four circuits require physical injury. Allah v. Al-Hafeez, 226 F.3d 247, 250-51; Geiger v. Jowers, 404 F.3d 371, 374-75 (5th Cir. 2005); Royal v. Kautzky, 375 F.3d 720, 723 (8th Cir. 2004); Searles v. Van Bebber, 251 F.3d 869, 876 (10th Cir. 2001) (same result). Four others do not . King v. Zamiara, 788 F.3d 207, 213 (6th Cir. 2015); Rowe v. Shake, 196 F.3d 778, 781-82 (7th Cir. 1999); Canell v. Lightner, 143 F.3d 1210, 1213 (9th Cir. 1998); Toliver v. City of New York, 530 F. App'x 90, 93 n.2 (2d Cir. 2013).

Under the PLRA, may a prisoner sue for punitive damages in the absence of physical injury?

Courts are divided as to whether the physical injury provision of the PLRA, cited above, extends only to claims for compensatory damages, or also to punitive damages. Al-Amin v. Smith, 637 F.3d 1192, 1199 (11th Cir. 2011) (recovery of punitive damages is barred without a showing of physical injury); Royal v. Kautzky, 375 F.3d 720, 723 (8th Cir. 2004) (the physical injury requirement applies only to compensatory damages; punitive damages are not barred).

## Qualified Immunity

Are claims to which qualified immunity might apply subject to a heightened pleading standard?

**Why the issue remains open:** In Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit, 507 U.S. 163 (1993), the Supreme Court rejected the contention that § 1983 claims are subject to a heightened pleading standard. With one exception, every circuit to consider the issue then held that overcoming qualified immunity does not require heightened pleading. The one exception is the Fifth

Circuit. See Schultea v. Wood, 47 F.3d 1427, 1433 (5th Cir. 1995). Under Schultea, Fifth Circuit district courts routinely require litigants to submit additional information to overcome a qualified immunity defense at the pleading stage. In my view, this practice is inconsistent with Leatherman.

**Sexual Abuse and Strip Searches**

Is reasonable suspicion required to strip search an arrestee who has been taken to a jail but not yet arraigned and/or placed in general population?

**Why the issue remains open**: Florence v. Board of Chosen Freeholders, 132 S.Ct. 1510 (2012), holds that an arrestee entering a jail's general population may be strip searched without reasonable suspicion that the arrestee is in possession of contraband. Justice Alito's concurrence, however, suggests both that a strip search without reasonable suspicion may not be justified in cases where the arrestee has not yet been placed into general population, and that placing an arrestee in general population prior to arraignment may violate the Fourth Amendment:

> It is important to note . . . that the Court does not hold that it is always reasonable to conduct a full strip search of an arrestee whose detention has not been reviewed by a judicial officer and who could be held in available facilities apart from the general population. Most of those arrested for minor offenses are not dangerous, and most are released from custody prior to or at the time of their initial appearance before a magistrate. In some cases, the charges are dropped. In others, arrestees are released either on their own recognizance or on minimal bail. In the end, few are sentenced to incarceration. For these persons, admission to the general jail population, with the concomitant humiliation of a strip search, may not be reasonable, particularly if an alternative procedure is feasible."

Id. at 1524 (Alito, J., concurring).

Can "consensual" sex between a prisoner and a correctional officer violate the Eighth Amendment?

**Why the issue remains open**: The Supreme Court has never addressed this issue, and the lower courts are divided. Some federal courts hold that a prisoner's consent to have sex with a correctional officer means that the intercourse does not violate the Eighth Amendment. Graham v. Sherriff of Logan County, 741 F.3d 1118 (10th Cir. 2013); Hall v. Beavin, 1999 WL 1045694 (6th Cir. Nov. 8, 1999); Freitas v. Ault, 109 F.3d 1335, 1339 (8th Cir. 1997); see also Phillips v. Bird, 2003 WL WL 22953175 (D. Mass. 2003); Ashely v. Peery, No. 13-354, 2015 WL 9008501 *4 (M.D. La. 2015).

Other courts acknowledge that the relationship between a guard and a prisoner presents a heightened risk of coercion. At least one court has adopted a per se rule that "vaginal intercourse and/or fellatio between an inmate and a correction officer . . . violates contemporary standards of decency under the Eighth Amendment." Carrigan v. Davis, 70 F. Supp. 2d 448, 454 (D. Del. 1999); Chao v. Ballista, 772 F. Supp. 2d 337, 350 (D. Mass. 2011) ("[T]o the extent that [other] cases hold as a matter of law that voluntary sex between an officer and an inmate can never amount to "pain" or never reach the seriousness required by the Eighth Amendment, I must strongly disagree.").

In the Ninth Circuit, "when a prisoner alleges sexual abuse by a prison guard . . . the prisoner is entitled to a presumption that the conduct was not consensual. The state then may rebut this presumption by showing that the conduct involved no coercive factors." Wood v. Beauclair, 692 F.3d 1041, 1048–49 (9th Cir. 2012).

## ***Monell* liability**

Are private prisons companies and contractors liable for constitutional violations committed by their employees in respondeat superior, or are they liable only if a Monell policy or practice violation occurs?

**Why the issue remains open:** Every circuit to consider the issue has decided that Monell, and not respondeat superior, applies to private jail and prison companies. However, the Supreme Court has not decided the issue, there is no logical basis for it, and Seventh Circuit Judges Posner and Hamilton have stated that such companies should be liable in respondeat superior for the acts of their agents. Shields v. Illinois Dep't of Corr., 746 F.3d 782, 785 (7th Cir. 2014).