THE CUTTING EDGE OF PRISON LITIGATION

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This is a brief article about open questions in prisoners' rights law—that is, legal issues over which the federal courts disagree. These range from issues regarding prisoners' exercise of religion, to interpretation of the Prison Litigation Reform Act, to the law protecting prisoners' physical safety. I hope that this article will be helpful to prisoners' rights lawyers who may consider seeking Supreme Court review of these unresolved questions.

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Introduction

Recent Supreme Court decisions striking down restrictions on prisoners' religious exercise,[1] applying greater scrutiny to the use of force in jails,[2] and questioning the imposition of long-term solitary confinement[3] may mark the beginning of a new day in prisoners' rights jurisprudence. As I have suggested elsewhere, these decisions might presage a long-overdue trend toward greater protection of prisoners' rights.[4]

In light of these developments, there is no time like the present to take stock of open issues in prisoners' rights litigation. For decades, lawyers in this field have worked to keep issues affecting prisoners out of the Supreme Court for fear that the Court would do more harm than good to prisoners' rights. But times may be changing, making it possible to consider not only Supreme Court defense, but offense too.

Given the recent confirmation of Neil Gorsuch as an Associate Justice, some may find it strange that I see in present times a place for an offensive game that presses the high court to expand legal protections

1. Holt v. Hobbs, 135 S. Ct. 853 (2015).
2. Kingsley v. Hendrickson, 135 S. Ct. 2466 (2015).
3. Davis v. Ayala, 135 S. Ct. 2187, 2208 (2015) (Kennedy, J., concurring).
4. David M. Shapiro, *To Seek a Newer World: Prisoners' Rights at the Frontier*, 114 Mich. L. Rev. First Impressions 124 (2016).

for prisoners. Justice Gorsuch, however, is not likely to significantly upset the alignment of votes in prisoners' rights cases. Justice Scalia voted very consistently for the government in prisoners' rights cases.[5] Assuming his successor does the same, it will not change the fact that the court as a whole has been somewhat more receptive to prisoners' claims in its recent jurisprudence.[6]

This article seeks to catalogue important prisoners' rights issues that divide the federal courts. Below, I lay out questions involving prisoners' rights that are the subjects of controversy among the federal courts, and I briefly describe why each question may fairly be described as open.

I. Speech and Religious Exercise

A. *What Is the Standard for Censorship of Outgoing Mail from Prisons and Jails?*

The Court in *Procunier v. Martinez*[7] articulated the following standard for regulations regarding the censorship of prisoners' 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."[8] In *Turner v. Safley*,[9] 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 legitimate penological interests."[10] Then, in *Thornburgh v. Abbott*,[11] the Court explicitly overruled the *Martinez* standard as applied to mail sent to a prisoner and instead applied the *Turner* legitimate penological interest standard.[12] 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."[13]

Abbott makes it fairly clear that the more exacting *Martinez* standard continues to apply to censorship of outgoing mail (and outgoing speech more broadly), and several courts have said as much.[14] Other courts have concluded the deferential "legitimate penological interest" test set forth in *Turner* applies even to outgoing mail.[15] The circuits are

5. *See, e.g.*, *Kingsley*, 135 S. Ct. at 2477 (Scalia, J., dissenting); Brown v. Plata, 563 U.S. 493, 550 (2011) (Scalia, J., dissenting); Lewis v. Casey, 518 U.S. 343 (1996).
6. Shapiro, *supra* note 4.
7. 416 U.S. 396, 413 (1974), *overruled by* Thornburgh v. Abbot, 490 U.S. 401 (1989).
8. *Id.* at 413.
9. 482 U.S. 78 (1987).
10. *Id.* at 89.
11. 490 U.S. 401 (1989).
12. *Id.* at 413.
13. *Id.*
14. *See, e.g.*, Nasir v. Morgan, 350 F.3d 366, 369 (3d Cir. 2003).
15. *See, e.g.*, Samford v. Dretke, 562 F.3d 674, 678–79 (5th Cir. 2009); Smith v. Delo,

split roughly evenly on this question, which is surprising because the Supreme Court's decision in *Abbott* strongly suggests that the *Procunier* standard still applies to outgoing mail.[16]

B. *Is a "Substantial Burden" on a Prisoner's Religious Exercise a Required Element of a Free Exercise Clause Claim?*

In *O'Lone v. Estate of Shabazz*,[17] a case decided eight days after *Turner*, 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. Notably, the *O'Lone* Court adjudicated the religion claim without even mentioning a substantial burden requirement. Nonetheless, federal appellate courts interpreting *O'Lone* are divided as to whether this additional requirement applies in prisoner free exercise cases.[18]

C. *May a Prisoner Be Punished for Filing Grievances Containing Truthful Allegations that an Official Believes to Be False?*

In general, the First Amendment prohibits retaliating against prisoners for making truthful complaints and filing truthful grievances.[19]

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*,[20] 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.'"[21] *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*.[22]

In *Harris v. Walls*,[23] the Seventh Circuit stated that a prisoner's speech—even if true—could be punished because officials "sincerely believed" it to be false.[24] This is a problematic holding because it would allow prison officials to insulate themselves from liability by claiming a

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995 F.2d 827, 829–30 (8th Cir. 1993). *See also* John Boston & Daniel E. Manville, Prisoners' Self-Help Litigation Manual 188 nn.67–68 (4th ed. 2009).

16. *See* Boston & Manville, *supra* note 15, at 188 nn.67 & 69.
17. 482 U.S. 342 (1987).
18. *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.").
19. *See* 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).
20. 416 U.S. 396, 415 (1974), *overruled by* Thornburgh v. Abbott, 490 U.S. 401 (1989).
21. *Id.* at 415.
22. 482 U.S. 78 (1987).
23. 604 Fed. App'x 518 (7th Cir. 2015).
24. *Id.* at *522.

subjective and ultimately erroneous belief that a prisoner's truthful complaint (about, for example, being beaten or raped) was false.

In *Czapiewski v. Russell*[25] a district court proposed a different standard. Under that approach, "the important inquiry is whether defendants *reasonably* believed plaintiff was lying."[26]

In short, there are several possible tests. Truthful grievances may be protected regardless of whether the defendants think they are truthful. That would seem to reflect a logical reading of *Procunier*, where the Supreme Court did not allow prison officials to censor speech that they viewed as "magnify[ing] grievances." In the alternative, a mere subjective belief that the complaint is false may defeat liability, as in *Harris v. Walls*.[27] Finally, there is also the middle ground position taken in *Czapiewski*: A subjective belief that the prisoner is lying defeats liability for retaliation, but only if the subjective belief is also a reasonable one.[28]

D. *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.[29]

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.[30]

Applying this standard to retaliation claims creates risks because "some evidence" requires a very minimal showing from prison officials and rarely allows plaintiffs to prevail. If an officer can escape liability for a retaliatory disciplinary charge by coming forth with "some evidence" that the prisoner broke a rule (even if that evidence is minimal

25. Czapiewski v. Russell, No. 15-cv-208-bbc, 2016 WL 3920503 (W.D. Wis. July 18, 2016).
26. *Id.* at *3 (emphasis added).
27. 604 Fed. App'x 518.
28. *Czapiewski*, 2016 WL 3920503, at *3.
29. Superintendent v. Hill, 472 U.S. 445, 447 (1985).
30. 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* Boston & Manville, *supra* note 15, at 218 n.321.

or contradicted by much more persuasive evidence that the prisoner did not break the rule), it becomes too easy for officers to get away with retaliation.

E. *Does the Religious Land Use and Institutionalized Persons Act (RLUIPA) Permit the Recovery of Compensatory and Punitive Damages Against Municipal Officials?*

In *Sossamon v. Texas*,[31] 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.[32]

Some lower courts have uncritically extended the holding in *Sossamon* to municipalities and municipal officials.[33] Others have allowed RLUIPA damages suits against such defendants to proceed.[34]

F. *Does RLUIPA Authorize Respondeat Superior Liability?*

It is well settled that suits under 42 U.S.C. § 1983 do not permit *respondeat superior* liability.[35] 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. 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.[36]

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31. 563 U.S. 277 (2011).
32. Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 280 (1977).
33. *See e.g.*, Scott v. Brown, No. 1:11-CV-2514-TWT-JFK, 2012 WL 1080363, at *4 (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 by* No. 1:11-CV-2514-TWT, 2012 WL 1080322 (N.D. Ga. Mar. 30, 2012).
34. *See 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).
35. Ashcroft v. Iqbal, 556 U.S. 662, 675 (2009).
36. *Perfetto*, 2016 WL 3647852, at *4 (citations omitted).

In my view, *Agrawal v. Briley*,[37] which recognizes respondeat superior liability under RLUIPA, correctly interprets the statutory text:

> RLUIPA is violated when a "government" "impose[s] a substantial burden on the religious exercise of a person." Only a "government" may be sued under RLUIPA, but RLUIPA defines "government" broadly, as including not only state and local governments, but also their agencies, their officials, and others acting under color of state law . . . In speaking of liable parties as "governments" rather than "persons," RLUIPA appears implicitly to authorize *respondeat superior* liability against municipalities. . . .[38]

G. *Does the Religious Freedom Restoration Act (RFRA) Permit the Recovery of Compensatory and Punitive Damages Against Federal Officials?*

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."[39] Courts are divided as to whether that definition encompasses federal officials sued for damages in their individual capacity.[40]

In my view, the phrase "appropriate relief" in RFRA fairly encompasses monetary damages against federal officials.[41] In *Sossamon v. Texas*, the Supreme Court held that the same language—"appropriate relief"—in RLUIPA did not allow for damages against state governments.[42] *Sossamon*, however, involved considerations unique to the sovereign immunity of states in our federalist system. The same considerations do not apply to federal officials. Thus, "Congress need not waive sovereign immunity to permit an individual-capacity suit against a federal official."[43]

37. No. 02 C 6807, 2004 WL 1977581 (N.D. Ill. Aug. 25, 2004).
38. *Id*. at *14.
39. 42 U.S.C. §§ 2000bb-1(c) & 2000bb-2(1) (2012). 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.
40. *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. U.S. INS, 343 F. Supp. 2d 338, 373 (D.N.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. 2015) (holding that the law does not permit damages against officials in their personal capacities under RFRA).
41. 42 U.S.C. § 2000bb-1(c) (2012).
42. *Id.* § 2000cc-2(a).
43. *Patel*, 125 F. Supp. 3d at 54.

II. Prison Litigation Reform Act

A. *Under the Prison Litigation Reform Act, (PLRA), May a Prisoner Sue for Compensatory Damages for Free Speech and Free Exercise Violations in the Absence of Physical Injury?*

A provision of the PLRA, 42 U.S.C. § 1997(e), provides: "No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury . . . ."

The Second, Sixth, Seventh, and Ninth Circuits hold that the violation of a free exercise or speech right is not a mere emotional injury—it is a separate category of harm, an injury to a fundamental liberty.[44] Therefore, Section 1997e(e) permits a prisoner to bring a First Amendment damages claim without alleging a physical injury.

Four Circuits have reached the opposite conclusion. They reason that an expressive injury is mental or emotional in nature.[45]

In my view, the plain meaning of the term "mental or emotional injury" does not encompass infringements of religious liberty. Indeed, those who fought to establish religious freedom in America would recoil at the notion, adopted by the lower court here, that the violation of religious freedom could be reduced to mere "mental or emotional injury."[46]

B. *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.[47]

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44. *See* King v. Zamiara, 788 F.3d 207, 213 (6th Cir. 2015); Rowe v. Shake, 196 F.3d 778, 781–82 (7th Cir. 1999) ("A prisoner is entitled to judicial relief for a violation of his First Amendment rights aside from any physical, mental, or emotional injury he may have sustained."); Canell v. Lightner, 143 F.3d 1210, 1213 (9th Cir. 1998) ("The deprivation of First Amendment rights entitles a plaintiff to judicial relief wholly aside from any physical injury he can show, or any mental or emotional injury he may have incurred. Therefore, § 1997e(e) does not apply to First Amendment Claims regardless of the form of relief sought."); Toliver v. City of New York, 530 F. App'x 90, 93 (2d Cir. 2013).
45. Allah v. Al-Hafeez, 226 F.3d 247, 250–51 (3d Cir. 2000) (additional showing of physical injury required); Geiger v. Jowers, 404 F.3d 371, 374–75 (5th Cir. 2005) (same result in pro se case); Royal v. Kautzky, 375 F.3d 720, 723 (8th Cir. 2004) (same result over dissent by Judge Heaney); Searles v. Van Bebber, 251 F.3d 869, 876 (10th Cir. 2001) (same result).
46. 42 U.S.C. § 1997e(e) (2013).
47. 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).

III. Post-Kingsley v. Hendrickson Questions

A. *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?*

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.[48] The Court has not, however, addressed the standard for claims brought by *pretrial detainees*.

The Supreme Court held in *Kingsley v. Hendrickson*[49] 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.[50] "[M]ost importantly," Justice Breyer wrote in his majority opinion, "pretrial detainees (unlike convicted prisoners) cannot be punished at all."[51]

Some lower courts have begun to apply the standard derived in *Kingsley* to claims brought by jail detainees outside the context of officer use of force.[52]

B. *Does the "Malicious and Sadistic" Standard Continue to Govern Excessive Force Claims Brought by Convicted Prisoners, or Is the Proper Standard an Objective One?*

Whitley v. Albers[53] and *Hudson v. McMillian*[54] apply the "malicious and sadistic" standard to convicted prisoners' excessive force claims. This standard, which turns on the subjective state of mind of the officer, is extremely difficult for a plaintiff to meet. The question is "whether force

48. *See* Farmer v. Brennan, 511 U.S. 825, 837–48 (1994).
49. 135 S. Ct. 2466 (2015).
50. *E.g.*, Fisher v. Lovejoy, 414 F.3d 659, 661–62 (7th Cir. 2005).
51. 135 S. Ct. at 2475.
52. *See* Castro v. City of Los Angeles, 833 F.3d 1060 (9th Cir. 2016) (en banc) (applying objective standard to claim that jailers failed to protect detainee from beating by cellmate); Darnell v. Pineiro, 849 F.3d 17 (2d Cir. 2017); Abila v. Funk, No. CIV 14–1002 JB/SMV, 2016 WL 7242731, at *42 (D.N.M. Nov. 23, 2016) (applying objective standard to jail suicide case in light of *Kingsley*).
53. 475 U.S. 312 (1986).
54. 503 U.S. 1 (1992).

was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm."[55]

The majority in *Kingsley v. Hendrickson*,[56] however, 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.[57]

IV. Sexual Abuse and Strip Searches

A. *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?*

Florence v. Board of Chosen Freeholders[58] 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.[59]

Lower courts have begun to treat Justice Alito's concurrence as the governing opinion on the ground that he provided the fifth and decisive vote with the reservations above.[60]

55. Whitley v. Albers, 475 U.S. 312, 320–21 (1986) (citing Johnson v. Glick, 481 F.2d 1028, 1033 (2d. Cir 1973)).
56. 135 S. Ct. 2466 (2015).
57. *Id.* at 2476.
58. 132 S. Ct. 1510 (2012).
59. *Id.* at 1524 (Alito, J., concurring).
60. *See* Sanchez v. County of Essex, No. 15-3391 (MCA), 2016 WL 4577008, at *4–5

B. *Can "Consensual" Sex Between a Prisoner and a Correctional Officer Violate the Eighth Amendment?*

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.[61] 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."[62] 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."[63]

V. Conclusion

My goal here has been to present and catalogue open questions, not to offer answers about which, if any, of these questions should be brought before the Supreme Court by advocates for prisoners. I hope that the analysis here will identify what, potentially, is on the table.

(D.N.J. Sept. 1, 2016); Haas v. Burlington County, 955 F. Supp. 2d 334, 341–42 (D.N.J. 2013).

61. Graham v. Sheriff of Logan County, 741 F.3d 1118 (10th Cir. 2013); Hall v. Beavin, No. 98-3803, 1999 WL 1045694 (6th Cir. Nov. 8, 1999); Freitas v. Ault, 109 F.3d 1335, 1339 (8th Cir. 1997); *see also* Ashley v. Perry, No. 13-354, 2015 WL 9008501, at *4 (M.D. La. Dec. 15, 2015); Phillips v. Bird, No. Civ. A. 03–247–KAJ, 2003 WL 22953175 (D. Del. Dec. 1, 2003).
62. Carrigan v. Davis, 70 F. Supp. 2d 448, 454 (D. Del. 1999); *cf.* 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.").
63. Wood v. Beauclair, 692 F.3d 1041, 1048–49 (9th Cir. 2012).