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David M. Shapiro

Northwestern Pritzker School of Law

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TO SEEK A NEWER WORLD: PRISONERS' RIGHTS AT THE FRONTIER

*David M. Shapiro**

Prisoners' rights lawyers have long faced a dismal legal landscape. Yet, 2015 was a remarkable year for prison litigation that could signal a new period for this area of law—the Supreme Court handed down decisions that will reverberate in prison jurisprudence for decades to come. New questions have been asked, new avenues opened. This piece is about what the Court has done recently, and what possibilities it has opened for the future. More broadly, I suggest that the Court may be subjecting prison officials to greater scrutiny and that this shifting judicial landscape reflects an evolving social discourse about prison conditions and mass incarceration. With the United States leading the world in incarcerating its own people,¹ the federal courts' attention to prison conditions is long overdue.

The recent judicial decisions were made all the more surprising by a long and dreary prologue: In prison law, deference has long been the order of the day.² In the 1960s and 1970s, federal judges had begun, for the first time in American history, to scrutinize and manage conditions in prisons and jails,³ but deference soon took hold. Lacking the training and technical competence to run prisons, lower court judges were instructed by the Supreme Court to back off—let the jailers run the jails.⁴ Deference to prison officials' judgment was the dominant note in prison conditions law for at least three decades. In this field, a lawyer had to be naïve to bring a case to

* Clinical Assistant Professor of Law, Northwestern Pritzker School of Law. Evan Bianchi contributed invaluable research assistance to this article, and Steven Lubet improved the piece with insightful comments.

1. DAVID SHAPIRO, ACLU, BANKING ON BONDAGE: PRIVATE PRISONS AND MASS INCARCERATION 5 (2011), https://www.aclu.org/files/assets/bankingonbondage_20111102.pdf [<https://perma.cc/9KGX-5MN4>].

2. See, e.g., *Lewis v. Casey*, 518 U.S. 343 (1996); *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987); *Turner v. Safley*, 482 U.S. 78 (1987); *Bell v. Wolfish*, 441 U.S. 520 (1979); *Pell v. Procunier*, 417 U.S. 817 (1974).

3. See, e.g., *Wolff v. McDonnell*, 418 U.S. 539 (1974) (holding that prisoners who lose good time credits as part of disciplinary actions are entitled to due process protection), *overruled by Thornburgh v. Abbott*, 490 U.S. 401 (1989); *Procunier v. Martinez*, 416 U.S. 396 (1974) (invalidating unjustifiable prisoner-mail censorship regulations); Jack E. Call, *The Supreme Court and Prisoners' Rights*, 59 FED. PROB., Mar. 1995, at 36, 36.

4. See *supra* note 2; see also Call, *supra* note 3, at 38–41.

change the law. The strategy that worked was to litigate the facts and choose cases that exposed truly inhuman conditions. That did not assure victory, but the conventional wisdom was that anything less assured defeat.

In 2015, however, judicial scrutiny intensified while deference at last receded. In *Holt v. Hobbs*, the Supreme Court, all but scoffing at a restriction on a prisoner's religious exercise, handed down a decision that upended a vast body of lower court precedent.⁵ In *Kingsley v. Hendrickson*, the Court lowered the standard for excessive force claims brought by pretrial detainees and signaled that current law may set the bar too high for other claims as well.⁶ In *Davis v. Ayala*, Justice Kennedy devoted a concurrence to the dangers of solitary confinement, an opinion made all the more remarkable by the fact that the underlying case had almost nothing to do with solitary confinement.⁷

These developments suggest there may be vitality in the business of prisoners' rights after all. To be sure, two majority opinions and a concurrence do not make a legal revolution, and deference will always cast its long shadow over the doctrine. Yet the Court's willingness to take a harder look at prisons suggests that judicial deference to prison authorities will become less absolute. At minimum, 2015 created a range of new legal possibilities. It put to rest the notion that the big questions had all been settled. It proved that in the universe of prison law, much remains for the making.

I. RELIGIOUS LIBERTY: A NEW ORDER

Holt v. Hobbs, handed down by the Court on January 20, 2015, revolutionizes the law protecting the religious freedom of prisoners under the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA).⁸ The decision unsettles an abundance of precedent, and lower courts will likely be grappling with *Holt's* aftershocks for years to come.

The pre-*Holt* landscape began with the enactment of RLUIPA in 2000. RLUIPA applies to cases alleging that prison regulations or land use regulations burden religious exercise. Under RLUIPA, a burden on religious exercise is invalid unless it is the least restrictive means of furthering a compelling governmental interest.⁹ The RLUIPA standard is clearly more exacting than the constitutional standard for prisoner religious claims: to defeat a claim arising under the Free Exercise Clause, prison officials need

5. See *Holt v. Hobbs*, 135 S. Ct. 853 (2015).

6. See *Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015).

7. See *Davis v. Ayala*, 135 S. Ct. 2187 (2015).

8. 42 U.S.C. §§ 2000cc to cc-5 (2012).

9. *Id.* § 2000cc-1(a).

only show that a restriction on religious practice was “reasonably related to legitimate penological interests.”¹⁰

In 2005, the Supreme Court upheld RLUIPA in *Cutter v. Wilkinson*, ruling that the statute did not violate the Establishment Clause.¹¹ But this victory for prisoners’ religious rights came at a cost: in dicta, the Court bled the statute of much of its force. While the text of RLUIPA recites the customary language of strict scrutiny, using the terms “compelling interest” and “least restrictive means,” the Court’s unanimous opinion, authored by Justice Ginsburg, suggested that strict scrutiny under RLUIPA was not “real” strict scrutiny. “[P]rison security is a compelling state interest,” the Court wrote, and “deference is due to institutional officials’ expertise in this area.”¹² The opinion concluded that “[l]awmakers supporting RLUIPA . . . anticipated that courts would apply the Act’s standard with ‘due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security and discipline, consistent with consideration of costs and limited resources.’”¹³

Following *Cutter*, it was not entirely clear what this relaxed form of strict scrutiny meant. Since strict scrutiny and deference to the government are in a sense opposites, there was incoherence in the very notion of strict scrutiny with deference. The impact of the decision, however, was massive. Following *Cutter*, lower courts cited dicta from that case involving deference hundreds of times.¹⁴ Applying the *Cutter* standard, courts upheld a vast array of restrictions on core religious practices.¹⁵

The petitioner in *Holt* was a Muslim prisoner in Arkansas, who wished to grow a half-inch beard for religious reasons.¹⁶ He sought an injunction

10. O’Lone v. Estate of Shabazz, 482 U.S. 342, 349 (1987) (quoting Turner v. Safley, 482 U.S. 78, 89 (1987)).

11. Cutter v. Wilkinson, 544 U.S. 709, 713–14 (2005).

12. *Id.* at 725 n.13.

13. *Id.* at 723 (citing remarks of Senator Hatch, 146 CONG. REC. 16,698, 16,700 (2000)).

14. Search Cutter v. Wilkinson, 544 U.S. 709 (2005), in WestlawNext. Follow the “Citing References” hyperlink, narrow the search to “Cases,” and narrow jurisdiction to “Federal Courts of Appeals” and “Federal District Courts.” Then search within results for “deference.” See results list; see e.g., Moussazadeh v. Tex. Dep’t of Criminal Justice, 703 F.3d 781 (5th Cir. 2012); Washington v. Klem, 497 F.3d 272 (3d Cir. 2007); Lovelace v. Lee, 472 F.3d 174 (4th Cir. 2006).

15. See, e.g., Chance v. Tex. Dep’t of Criminal Justice, 730 F.3d 404, 412–17 (5th Cir. 2013) (stating that prison’s schedule of Native American religious services and restrictions on communal pipe-smoking and Native American smudging ritual did not violate RLUIPA); Van Wyhe v. Reisch, 581 F.3d 639, 657 (8th Cir. 2009) (stating that denying additional group religious study time, among other restrictions, did not violate RLUIPA).

16. Holt v. Hobbs, 135 S. Ct. 853, 859 (2015). This is not to suggest that the RLUIPA standard was applied uniformly by all the federal courts of appeals—some circuits took a

protecting him against punishment for growing such a beard.¹⁷ Every lower court judge to consider the case—the magistrate judge, the district court judge, and a unanimous Eighth Circuit panel—believed that prohibiting the beard did not violate RLUIPA.¹⁸ The prison argued that the plaintiff might escape by suddenly changing his appearance (i.e., by shaving the beard) or that he might conceal contraband in his facial hair.¹⁹

In a unanimous opinion by Justice Alito, the Supreme Court rejected these arguments as utterly unconvincing.²⁰ The Court's emphasis on scrutiny, not deference, starkly contrasted with *Cutter*. "RLUIPA does not permit . . . unquestioning deference," Justice Alito wrote.²¹ "Prison officials are experts in running prisons and evaluating the likely effects of altering prison rules, and courts should respect that expertise. But that respect does not justify the abdication of the responsibility, conferred by Congress, to apply RLUIPA's rigorous standard."²² To accept the government's rationale for prohibiting the beard would require, the Court reasoned, "a degree of deference that is tantamount to unquestioning acceptance."²³ Not only did the Court depart from *Cutter*'s deferential analysis—the unanimous opinion did not even *mention* the prior ruling.

Why does *Holt* not even mention *Cutter*? Surely not because *Cutter* was insufficiently relevant—it was the only prior Supreme Court decision interpreting RLUIPA's standard. *Cutter* addressed the same issue that *Holt* did, and in detail. If there had been five or six such decisions, one might allow for the possibility that the Court omitted a particular case for the sake of brevity, or because other cases made the same point. Under the circumstances here, however, the omission of *Cutter* must have been deliberate.

One possibility is that the Court's reticence about *Cutter* is an implicit instruction that the lower courts must reconcile the two rulings. Another is that the Court's silence is damning to *Cutter*, and that the prior decision has been sent to the dustbin of history.

The latter view is more plausible for two reasons. First, the *Cutter* and *Holt* standards are wholly irreconcilable: one calls for deference, while the

harder look than others at the government's rationales. James D. Nelson, *Incarceration, Accommodation, and Strict Scrutiny*, 95 VA. L. REV. 2053, 2068–71 (2009).

17. Complaint at 3–4, *Hobbs*, 135 S. Ct. 853, No. 5:11-cv-00164 (E.D. Ark. June 28, 2011).

18. *Hobbs*, 135 S. Ct. at 861.

19. *Id.* at 863–64.

20. *Id.* at 864–65.

21. *Id.* at 864.

22. *Id.*

23. *Id.*

other eschews it. Second, Justice Sotomayor wrote a concurrence in *Holt* in which she discussed *Cutter* deference at length.²⁴ Cloaked as a statement of agreement with the lead opinion, the concurrence is in fact an attempt to gut the decision and resurrect *Cutter*. “Nothing in the Court’s opinion calls into question our prior holding in *Cutter v. Wilkinson*,” Justice Sotomayor asserted, finding that the Court’s opinion did not preclude deferring to prison officials’ reasoning when that deference is due—that is, when prison officials “offer a plausible explanation for their chosen policy.”²⁵

No other Justice joined the Sotomayor concurrence—all eight of the remaining Justices made a decision to join the lead opinion, which gave *Cutter* a cold shoulder. The point of the concurrence was to preserve *Cutter* deference; eight members of the Court had no interest in that endeavor. This is powerful evidence that *Cutter* is dead.

Perhaps the best argument against the view that *Holt* wholly jettisons *Cutter* is that the opinion does not explicitly reject the earlier ruling. Overruling prior cases by implication is disfavored, and, in the absence of a clear statement, it generally is not for lower courts to decide that higher tribunals have overruled their own precedent.²⁶ But here the argument is less persuasive because *Cutter*’s principal holding was that RLUIPA did not violate the Establishment Clause. *Cutter*’s discussion of the RLUIPA standard was part of the reasoning, but not part of the narrow holding. In other words, *Cutter* remains good law because its holding that RLUIPA is constitutional is intact. In *Holt*, then, because the issue regarded RLUIPA’s standard and not RLUIPA’s constitutionality, there was nothing to overrule. The Court merely ignored its previous, erroneous dictum.

In the months and years ahead, the lower courts will face powerful incentives to ignore the full effect of *Holt*. As noted above, a great panoply of religious claims has been decided under the *Cutter* standard. Under a correct reading of *Holt*, however, none of these decisions are unquestionably good law because all were decided under the wrong legal standard. Faithful implementation of *Holt*, then, demands a period of doctrinal chaos in the lower courts.

Early signs from the lower courts are not encouraging—an effort seems to be underway to deny *Holt* its full effect. Since *Holt*, more than fifty federal

24. *Id.* at 867 (Sotomayor, J., concurring).

25. *Id.*

26. *See, e.g.,* *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989) (“If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.”).

cases have relied upon the *Cutter* dicta regarding deference in adjudicating prisoners' religious freedom claims.²⁷

One troubling example comes from an Eleventh Circuit decision rendered soon after *Holt*. In *Knight v. Thompson*, the Eleventh Circuit affirmed a grant of summary judgment against Native American inmates who challenged the hair-length policy of the Alabama Department of Corrections (ADOC) under RLUIPA.²⁸ The petitioners challenged a policy requiring male inmates to keep their hair off of the neck and ears. They argued that the policy imposed a substantial burden on their Native American religion, which dictated that they wear their hair unshorn.²⁹ *Knight* was decided before *Holt*, but the Supreme Court vacated the original decision and remanded the case for reconsideration in light of the *Holt* decision.³⁰ On remand, the Eleventh Circuit reinstated its original decision, which relied heavily on *Cutter*, and did not modify it to address *Holt*'s RLUIPA standard.³¹

Several lower courts have attempted to reconcile the *Cutter* and *Holt* standards, although often without much independent analysis.³² Such courts have found the two standards coexistent and not contradictory. For example, in *Staples v. N.H. State Prison*, the Court implied that *Cutter* is alive and well when it cited Justice Sotomayor's concurrence and stated that "*Holt* cautions, however, that where a prison provides security-based justifications for its regulation, courts should afford a measure of deference and should not substitute their own judgment for that of the prison."³³ On the other hand, several courts have fully adopted the *Holt* standard without giving authoritative weight to *Cutter*.³⁴ One might speculate that the recent decision

27. Search *Cutter v. Wilkinson*, 544 U.S. 709 (2005), in WestlawNext. Follow the "Citing References" hyperlink, narrow the search to "Cases," narrow jurisdiction to "Federal Courts of Appeals" and "Federal District Courts," and narrow "Date" to "After 1/20/2015." Then search within results for "deference." See results list; see, e.g., *Moussazadeh v. Tex. Dep't of Criminal Justice*, 703 F.3d 781 (5th Cir. 2012); *Washington v. Klem*, 497 F.3d 272 (3d Cir. 2007); *Lovelace v. Lee*, 472 F.3d 174 (4th Cir. 2006).

28. *Knight v. Thompson*, 723 F.3d 1275 (11th Cir. 2013), *vacated*, 135 S. Ct. 1173 (2015), *reinstated in part and suspended in part*, 797 F.3d 934 (11th Cir. 2015).

29. See *id.* at 1276.

30. *Knight v. Thompson*, 135 S. Ct. 1173 (2015).

31. Compare *Knight*, 723 F.3d at 1282–83, with *Knight*, 797 F.3d at 943–44.

32. See, e.g., *Hughes v. Heimgartner*, No. 5:12-CV-3250-JAR, 2015 WL 1292253, at *7 (D. Kan. Mar. 23, 2015); *Wright v. Lassiter*, No. 5:13-CT-3245-D, 2015 WL 3650746, at *4 (E.D.N.C. June 11, 2015), *aff'd in part, vacated in part, remanded*, No. 15–6958, 2016 WL 626377 (4th Cir. 2016).

33. *Staples v. N.H. State Prison*, No. 14-CV-473-LM, 2015 WL 4067139, at *3 (D.N.H. July 2, 2015).

34. See *Cole v. Danberg*, No. 10-088-GMS, 2015 WL 5437083, at *5 (D. Del. Sept. 14, 2015) ("RLUIPA . . . does not permit unquestioning deference."); *Watkins v. Jones*, No.

will free lower court judges who take prisoners' religious claims seriously to side with prisoners more frequently, but that it will not affect the rulings of judges hostile to such claims because the Supreme Court is unlikely to take an active role in policing fidelity to the *Holt* standard.³⁵

II. PRETRIAL DETENTION: A NEW FRONTIER OPENED

No less significant than *Holt v. Hobbs* is the Court's June 22, 2015 decision in *Kingsley v. Hendrickson*, which set the legal standard for use of force against pretrial detainees held in jails.³⁶ Prior to *Kingsley*, the Supreme Court had set a breathtakingly high bar for use of force claims brought by post-conviction prisoners, holding that force in prison does not violate the Eighth Amendment's Cruel and Unusual Punishments Clause unless the force is "malicious[] and sadistic[]." ³⁷ At least two federal appellate courts assumed that the same standard applied to excessive force claims brought by pretrial detainees against jail officials.³⁸ *Kingsley*, however, says otherwise.

The Supreme Court first articulated the malicious and sadistic standard and applied it to post-conviction prisoners in *Whitley v. Albers*, in which a prison officer shot a prisoner in the leg during a riot.³⁹ Adopting a portion of a formulation Judge Friendly coined in an earlier case,⁴⁰ the Court held that where an officer uses force to "resolve a disturbance . . . that indisputably poses significant risks to the safety of inmates and prison staff," the determination of "whether the measure taken inflicted unnecessary and wanton pain and suffering ultimately turns on 'whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.'"⁴¹ Because the standard is only met by malicious and sadistic actions, the test allows an officer to use

4:12CV215-RH/CAS, 2015 WL 5468647, at *13 (N.D. Fla. Aug. 28, 2015), *report and recommendation adopted in part*, No. 4:12CV215-RH/CAS, 2015 WL 5468648 (N.D. Fla. Sept. 15, 2015).

35. Cf. David Shapiro, *Lenient in Theory, Dumb in Fact: Prison, Speech, and Scrutiny*, 84 GEO. WASH. L. REV. (forthcoming 2016) (arguing that the lower courts have given prison authorities far greater deference in speech cases than the Supreme Court intended).

36. *Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015).

37. *Whitley v. Albers*, 475 U.S. 312, 320 (1986); *Hudson v. McMillian*, 503 U.S. 1, 7 (1992).

38. See *Griffin v. Hardrick*, 604 F.3d 949, 954 (6th Cir. 2010); *Bozeman v. Orum*, 422 F.3d 1265, 1271 (11th Cir. 2005), *abrogated by Kingsley*, 135 S. Ct. 2466.

39. *Whitley v. Albers*, 475 U.S. at 316, 320–22.

40. *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973), *overruled by*, *Graham v. Connor*, 490 U.S. 386 (1989).

41. *Whitley*, 475 U.S. at 320–21 (quoting *Johnson*, 481 F.2d at 1033).

force that is unreasonable and excessive, so long as the officer is not motivated by malice or sadism.⁴²

In defending this exacting standard, the Court in *Whitley* appealed to the interest in deferring to decisions made by prison officials, often in dangerous circumstances and in the heat of the moment: “When the ‘ever-present potential for violent confrontation and conflagration,’ ripens into *actual* unrest and conflict, the admonition that ‘a prison’s internal security is peculiarly a matter normally left to the discretion of prison administrators’ carries special weight.”⁴³

While *Whitley* set the standard for use of force against post-conviction prisoners, it did not address whether the same standard applies to jail detainees, who remain innocent until proven guilty. On the one hand, the Court’s characterization of prisons as dangerous places requiring officers to make split-second decisions could be taken to suggest that officers in a jail, who, like their prison counterparts, must make instantaneous decisions about the use of force, should receive the same level of deference and latitude. On the other hand, the Eighth Amendment protects post-conviction prisoners against cruel and unusual punishment, whereas the Due Process Clause protects pretrial detainees against *any* punishment.⁴⁴ Thus, “leveling down” the jail standard to the prison standard would mean that freedom from all punishment for pretrial detainees meant nothing more than freedom from cruel and unusual punishment.

Kingsley involved a detainee in a Wisconsin jail who sought damages for injuries sustained when officers allegedly slammed his head into a concrete bunk and shot him with a Taser.⁴⁵ The judge issued a jury instruction that required the jury to find for the defendants unless it found that the officers acted with a subjectively culpable state of mind—the use of unreasonable force would not suffice.⁴⁶ The jury found for the defendants, and the Seventh Circuit rejected Kingsley’s challenge to the jury instruction.⁴⁷ The Supreme Court granted certiorari.

In a 5–4 decision authored by Justice Breyer (and joined by Justices Kennedy, Ginsburg, Kagan, and Sotomayor), the Court in *Kingsley* held that pretrial detainees in use of force cases enjoy greater constitutional protections than post-conviction prisoners. So long as the use of force is intentional (meaning force was not used accidentally, as when an officer

42. *See id.* at 322.

43. *Id.* at 321–22 (citations omitted) (quoting *Rhodes v. Chapman*, 452 U.S. 337, 349, n.14 (1981) and *Jones v. N.C. Prisoners’ Labor Union, Inc.*, 433 U.S. 119, 132 (1977)).

44. *Bell v. Wolfish*, 441 U.S. 520, 535 n.16 (1979).

45. *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2470 (2015).

46. *Id.* at 2476–77.

47. *Id.* at 2471.

trips and falls on a prisoner) the force is unconstitutional if it is objectively unreasonable.⁴⁸ The pretrial detainee need not show that the officer acted with bad subjective intent at all, much less that the officer's intent was to maliciously and sadistically inflict pain.⁴⁹

If *Kingsley* only affected the standard for use of force claims brought by pretrial detainees, it would be an important case: about 450,000 people are detained before a trial in American jails at any given time.⁵⁰ But *Kingsley* did far more—its logic raises broad questions about standards for other claims brought by incarcerated men and women.

Kingsley suggests that much of the lower court jurisprudence regarding pretrial conditions is wrong because those decisions borrow heavily from Supreme Court precedent regarding post-conviction prisoners. Take, for example, two common categories of cases—medical care claims and claims that staff members failed to adequately protect prisoners from harm by other prisoners. The Supreme Court held in *Estelle v. Gamble* and *Farmer v. Brennan* that the standard for such claims, when brought by post-conviction prisoners, is deliberate indifference.⁵¹ It is not enough that a doctor or officer jeopardized a prisoner's safety by acting in an unreasonable, negligent, or even grossly negligent manner. The prisoner must prove that the doctor or officer subjectively knew of a substantial risk of severe harm to the prisoner, and acted or failed to act despite possessing such knowledge.⁵²

The Federal Reporter is filled with decisions in which lower courts have applied the deliberate indifference standard to medical care and failure-to-protect claims brought by pretrial detainees.⁵³ But all of these decisions may be wrong. When applied to pretrial detainees, the deliberate indifference requirement is at odds with the logic of *Kingsley*, which suggests that due process provides to pretrial detainees greater protections than the Eighth Amendment affords to post-conviction prisoners. *Kingsley* also suggests that pretrial detainees need not show that a jail official acted with a subjectively culpable state of mind—it is enough to show that the official's actions were unreasonable. In short, the logic of *Kingsley* suggests that all conditions

48. *Id.* at 2472–74.

49. *See id.* at 2475–76.

50. *See* Peter Wagner & Bernadette Rabuy, *Mass Incarceration: The Whole Pie 2015*, PRISON POLICY INITIATIVE (Dec. 8, 2015), <http://www.prisonpolicy.org/reports/pie2015.html> [<https://perma.cc/2B2V-P2W6>].

51. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994); *Estelle v. Gamble*, 429 U.S. 97, 106 (1976).

52. *Farmer*, 511 U.S. at 841–42.

53. *See, e.g.*, *Clouthier v. County of Contra Costa*, 591 F.3d 1232, 1241 (9th Cir. 2010); *Caiozzo v. Koreman*, 581 F.3d 63, 70–71 (2d Cir. 2009); *Butera v. Cottey*, 285 F.3d 601, 605 (7th Cir. 2002).

claims brought by jail detainees should be governed by objective standards. Given the tension between the implications of *Kingsley* and a substantial body of court of appeals precedent, there is much for the lower courts to sort out in the years ahead.

Some have begun to do so. In *Castro v. County of Los Angeles*, for example, a pretrial detainee who suffered brain damage in a “sobering cell” as a result of an assault from another arrestee brought a failure-to-protect claim against the county and individual defendants.⁵⁴ The panel majority, over a partial concurrence and partial dissent by Judge Graber,⁵⁵ ruled that *Kingsley* did not affect the standard for failure to protect claims by pretrial detainees.⁵⁶ The court has granted rehearing en banc,⁵⁷ and argument was heard in March.⁵⁸

Although *Kingsley* focuses on the legal distinction between pretrial detainees and post-conviction prisoners, the opinion also suggests that the five-Justice majority is skeptical about applying the malicious and sadistic standard even to prisoners who have already been convicted. “We acknowledge,” Justice Breyer wrote, “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.”⁵⁹ The Court continued: “We are not confronted with such a claim, however, so we need not address that issue today.”⁶⁰ This statement may signal that the Court intends to take up the issue in the near future.

III. SOLITARY CONFINEMENT: A SURPRISING CONCURRENCE

Kingsley and *Holt* are remarkable decisions—but the greatest prison law surprise of 2015 came from Justice Kennedy, who authored a concurrence focused on solitary confinement in *Davis v. Ayala*.⁶¹ No one could have predicted this, because the case itself pertained to jury selection and had virtually nothing to do with solitary confinement.

54. *Castro v. County of Los Angeles*, 797 F.3d 654, 660–61 (9th Cir. 2015), *reh’g granted en banc*, 809 F.3d 536 (9th Cir. 2015).

55. *Castro*, 797 F.3d at 677.

56. *Id.* at 665.

57. *Castro v. County of Los Angeles*, 809 F.3d 536 (9th Cir. 2015).

58. The author is counsel for a group of amici curiae in this litigation.

59. *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2476 (2015).

60. *Id.*

61. *See Davis v. Ayala*, 135 S. Ct. 2187 (2015).

Historically, Supreme Court cases on solitary confinement have been few and far between. In the Gilded Age, the Supreme Court handed down *In re Medley*,⁶² which condemned solitary confinement, at least as it was practiced in the eighteenth and nineteenth centuries. The case dealt with a Colorado man who was sentenced to solitary confinement pending execution.⁶³ The sentencing court imposed solitary confinement pursuant to a statute enacted after the crime occurred—a violation, the Court held, of the Ex Post Facto Clause.⁶⁴ Justice Miller’s opinion did not stop there; he penned powerful dicta regarding the effects of solitary confinement:

The peculiarities of this system were the complete isolation of the prisoner from all human society, and his confinement in a cell of considerable size, so arranged that he had no direct intercourse with or sight of any human being, and no employment or instruction. . . . A considerable number of the prisoners fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane, others still, committed suicide, while those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent service to the community.⁶⁵

The issue of solitary confinement remained dormant in the Supreme Court until 2005, when *Wilkinson v. Austin* was decided.⁶⁶ *Wilkinson* addressed Ohio’s supermax prison, where prisoners spent twenty-three hours a day in single cells and the remaining hour in a small indoor exercise room.⁶⁷ The duration of solitary confinement was indefinite, and prisoners lost their parole eligibility while incarcerated in the supermax.⁶⁸ The Court concluded that prisoners had a liberty interest in avoiding the prison’s harsh conditions, and could not be sent to the supermax without procedural due process.⁶⁹ The Court held that the prison’s procedures, which included a hearing, satisfied procedural due process.

While *Wilkinson* addressed procedural due process, the decision avoided the question strongly hinted at a century earlier in *Medley*: Under what conditions, if any, does solitary confinement violate the Eighth Amendment? The Court noted that the “harsh” conditions of supermax

62. *In re Medley*, 134 U.S. 160 (1890).

63. *Id.* at 161–62.

64. *Id.* at 172.

65. *Id.* at 168.

66. See *Wilkinson v. Austin*, 545 U.S. 209 (2005).

67. *Id.* at 214.

68. *Id.* at 214–15.

69. *Id.* at 224.

confinement “may well be necessary and appropriate in light of the danger that high-risk inmates pose both to prison officials and to other prisoners,” but did not directly address the issue.⁷⁰

The recent case *Davis v. Ayala* was an unlikely forum for a justice to revisit the question of solitary confinement. *Ayala* dealt with a *Batson* challenge to jury selection. The Court held that the error, if any, was harmless.⁷¹ Justice Kennedy agreed, but he also wrote a concurrence about solitary confinement. His hook for doing so was an answer to a question at oral argument, to which a lawyer responded that Ayala had spent the majority of his twenty-five years of incarceration in solitary confinement.⁷²

Quoting a wide range of sources—including: *The Oxford History of the Prison*,⁷³ *The New Yorker*,⁷⁴ the *American Journal of Public Health*,⁷⁵ the *Journal of the American Academy of Psychiatry and Law*,⁷⁶ *In re Medley*,⁷⁷ the *Washington University Journal of Law and Policy*,⁷⁸ Charles Dickens,⁷⁹ and Fyodor Dostoevsky⁸⁰—Justice Kennedy opined that “[y]ears on end of near-total isolation exact a terrible price.”⁸¹ Suggesting that the Court should take up the issue of solitary confinement, Justice Kennedy wrote: “In a case that presented the issue, the judiciary may be required, within its proper jurisdiction and authority, to determine whether workable alternative systems for long-term confinement exist, and, if so, whether a correctional system should be required to adopt them.”⁸²

Justice Thomas responded in a short concurrence, in which he dismissed Justice Kennedy’s analysis as bleeding-heart nonsense.⁸³ Ayala was a murderer, and “the accommodations in which Ayala is housed are a far sight more spacious than those in which his victims . . . now rest.”⁸⁴

70. *Id.*

71. *Davis v. Ayala*, 135 S. Ct. 2187, 2208 (2015).

72. *Id.* (Kennedy, J., concurring).

73. *Id.* at 2209.

74. *Id.* at 2210.

75. *Id.*

76. *Id.*

77. *Id.* at 2209.

78. *Id.* at 2210.

79. *Id.* at 2209.

80. *Id.* at 2210.

81. *Id.*

82. *Id.*

83. *See id.* (Thomas, J., concurring).

84. *Id.*

IV. WHY NOW?

The Supreme Court's recent decisions will surely have important effects on the specific types of cases which they govern. The larger question, though, is whether they auger even more significant changes to come in prison jurisprudence. It would be premature to predict with any confidence that the trend is changing, and yet it is noteworthy that a common theme—skepticism of excessive judicial deference—runs through the three cases. *Holt* rejects “unquestioning deference.”⁸⁵ *Kingsley* jettisons the “malicious and sadistic” standard as overly deferential to jailers and implies that other standards may also be too lenient.⁸⁶

In his *Ayala* concurrence, Justice Kennedy suggested a theory as to why courts may now wish to take a harder look at prisons:

Prisoners are shut away—out of sight, out of mind. It seems fair to suggest that, in decades past, the public may have assumed lawyers and judges were engaged in a careful assessment of correctional policies, while most lawyers and judges assumed these matters were for the policymakers and correctional experts.⁸⁷

This passage intimates that there was an implicit contract between courts and prison officials—courts would stay out of the business of running prisons, and prison officials themselves would ensure the humane management of correctional facilities. Justice Kennedy may be suggesting that the prison authorities have not upheld their end of the deal, and that the time has come for courts to step in.

Justice Kennedy does not hide the fact that a shift in public perception brought both the specific problem of solitary confinement and the broader problem of prison conditions to his attention. Immediately after the passage excerpted above, he writes: “There are indications of a new and growing awareness in the broader public of the subject of corrections and of solitary confinement in particular.”⁸⁸ Throughout the concurrence, he cites scholarly studies and press articles about the effects of solitary confinement.⁸⁹

It is possible, Kennedy suggests, to imagine a future in which a shift in the social and political discourse about prisons would sharpen judicial scrutiny. In the 1980s and 1990s, the political atmosphere was toxic to any efforts to reduce incarceration levels; being painted as soft on crime could

85. *Holt v. Hobbs*, 135 S. Ct. 853, 864 (2015).

86. *See Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2472–73, 2476 (2015).

87. *Davis v. Ayala*, 135 S. Ct. 2187, 2209–10 (Kennedy, J., concurring).

88. *Id.* at 2210.

89. *See id.*

have ended a politician's career.⁹⁰ This was also the era in which an edifice of deference was built into Supreme Court jurisprudence.

Today, numerous states and the federal government have begun to reduce sentences, and the goal of ending mass incarceration enjoys broad bipartisan support.⁹¹ In particular, as Justice Kennedy notes in *Ayala*, solitary confinement, an issue virtually unheard of a decade ago, now receives significant attention: increased discussion in the media, a barrage of lawsuits, changes in state law and policy, even a Senate hearing on the subject.⁹² In January, President Obama announced a series of restrictions on the use of solitary confinement in federal prisons, including a ban on the solitary confinement of juveniles.⁹³

These, in short, are hopeful times in the world of prisoners' rights law. It is possible that little will change. But it is also possible, for the first time in decades, to envision a future in which new political conditions and greater judicial scrutiny refashion the law of prison conditions, at least in some areas. Will the Supreme Court impose limits on solitary confinement? Will it revisit the "malicious and sadistic" standard in excessive force cases brought by convicted prisoners? Will it reconsider the highly deferential standard

90. See, e.g., Sara Sun Beale, *Still Tough on Crime? Prospects for Restorative Justice in the United States*, 2003 UTAH L. REV. 413, 417-18.

91. See 28 U.S.C. § 994(g), (u) (2012); U.S. SENTENCING COMM'N, POLICY PROFILE SENSIBLE SENTENCING REFORM: THE 2014 REDUCTION OF DRUG SENTENCES (2014), http://www.uscc.gov/sites/default/files/pdf/research-and-publications/backgrounders/profile_2014_drug_amendment.pdf [<https://perma.cc/ZA37-ZET6>]; Ram Subramanian & Ruth Delaney, *Playbook for Change? States Reconsider Mandatory Sentences*, 26 FED. SENT'G REP. (February 2014); Carl Hulse & Jennifer Steinhauer, *Sentencing Overhaul Proposed in Senate with Bipartisan Backing*, N.Y. TIMES, (Oct. 1, 2015), http://www.nytimes.com/2015/10/02/us/politics/senate-plan-to-ease-sentencing-laws.html?_r=0 [<https://perma.cc/2VYH-VMJD>]; Marc Mauer & Nazgol Ghandnoosh, *Fewer Prisoners, Less Crime: A Tale of Three States*, THE SENT'G PROJECT (revised July 2014), http://sentencingproject.org/doc/publications/inc_Fewer_Prisoners_Less_Crime.pdf [<https://perma.cc/3DDK-XPBU>].

92. See, e.g., ZACHARY HEIDEN, CHANGE IS POSSIBLE: A CASE STUDY OF SOLITARY CONFINEMENT REFORM IN MAINE, ACLU OF ME. (2013), www.aclumaine.org/sites/default/files/uploads/users/admin/ACLU_solitary_Report_webversion.pdf [<https://perma.cc/ZV4Q-YQZM>]; Ruth Tam, *Senate Leaders Consider Solitary Confinement Reform for Select Prisoners*, PBS: NEWSHOUR (Feb. 26, 2014), <http://www.pbs.org/newshour/rundown/senate-leaders-consider-solitary-confinement-reform-select-prisoners/> [<http://perma.cc/5VSK-Q98W>]; *Summary of Ashker v. Governor of California Settlement Terms*, CTR. CONST. RTS. (2015), <https://ccrjustice.org/sites/default/files/attach/2015/08/2015-09-01-Ashker-settlement-summary.pdf> [<https://perma.cc/TDP3-XCSF>].

93. Juliet Eilperin, *Obama Bans Solitary Confinement for Juveniles in Federal Prisons*, WASH. POST (January 26, 2016), https://www.washingtonpost.com/politics/obama-bans-solitary-confinement-for-juveniles-in-federal-prisons/2016/01/25/056e14b2-c3a2-11e5-9693-933a4d31bcc8_story.html [<https://perma.cc/9PVR-NNJC>].

that currently governs prisoners' free speech claims?⁹⁴ "Come, my friends," Tennyson's Ulysses exhorts the mariners, "'Tis not too late to seek a newer world. . . . To strive, to seek, to find, and not to yield."⁹⁵

94. See David Shapiro, *Lenient in Theory, Dumb in Fact: Prison, Speech, and Scrutiny*, 84 GEO. WASH. L. REV. (forthcoming 2016).

95. ALFRED LORD TENNYSON, *Ulysses*, in *SELECTED POEMS* 50 (Christopher Ricks ed., Penguin Books 2007).