

The Supreme Court is Not Sure if Jail Guards Should or Should Not Torture Innocent Inmates

[Police Brutality, State Corruption](#)

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In the eyes of the law, Michael Kingsley was an innocent man. Although he had been arrested in April of 2010, Kingsley had been convicted of no crime. He was awaiting trial at a small county jail when the guards came to his cell and demanded he remove a sheet of paper covering a light. Kingsley refused, insisting that someone else covered the light. So the officers moved him to a new cell, placed him face down on a cement bunk, and crowded around him, blocking the cell's only camera. Then, later claiming that Kingsley resisted the removal of his handcuffs, the officers shocked him with a stun gun for a full five seconds. They then exited the

cell, leaving Kingsley alone on the cement with his hands still cuffed, writhing in pain.

Kingsley filed a lawsuit against two of the guards, asserting they violated his federal civil rights by using excessive force against him. A jury sided with the guards, and an appeals court affirmed the decision. On Monday, the Supreme Court heard the case of *Kingsley v. Hendrickson* to decide what rights are owed to “pretrial detainees”—that is, people who’ve been arrested but not tried. Technically, the justices took the case to decide a narrow issue of law. But the legal jargon that dominated Monday’s argument barely concealed a broader battle among the justices over [an astonishingly topical topic](#): police brutality and abuse of power.

Unfortunately, as soon as arguments begin, it’s clear that Kingsley’s case turns out to be a mess. The first problem is that nobody seems quite certain where Kingsley’s constitutional right to be free from excessive force *comes from*. If you’re a free person walking the streets, the Fourth Amendment protects you from “unreasonable” police abuse. If you’re a convicted prisoner, the Eighth Amendment protects you from “cruel and unusual punishment.” But what if, like Kingsley, you’re stuck in between—already arrested, still in jail, but not convicted?

Both sides seem to agree that the 14th Amendment’s [due process clause](#) protects these people, which is a problem, because the due process clause doesn’t say very much. Kingsley thinks it gives him the same rights as a free person, meaning he need only prove an officer used *objectively* unreasonable force to win his case. The officers think it gives Kingsley the same rights as a convicted inmate, meaning he must prove his punisher acted with malice, or at least recklessness—both mental states that focus on the officer’s *subjective* intent.

Justice Anthony Kennedy immediately spots a weakness in Kingsley’s argument: Pretrial detainees are often housed in the same prisons as convicts. Do detainees mixed in with the general prison population maintain constitutional rights that convicts don’t?

Well, yeah, responds Kingsley’s lawyer Wendy M. Ward (in so many words). Convicts have been found guilty of a crime; pretrial detainees haven’t. Shouldn’t legally innocent detainees maintain a freedom from punishment that other inmates lose when they’re convicted? A concerned-looking Kennedy then leads Ward into a pointless word game about the difference between “discipline” and “punishment,” from which Justice Sonia Sotomayor saves her. What the court is really looking for,

Sotomayor reminds Ward, is a *standard* for the jury to use to decide when guards inflict unconstitutionally excessive force against a pretrial detainee. Ward thinks any use of force that is “objectively unreasonable” is unconstitutional, while her opponents think a guard must also have a “subjective intent” to harm.

Justice Samuel Alito—who is sleepy all morning and appears to doze off at one point—wonders if this distinction makes any sense in practice.

“It doesn’t seem to me that there are going to be very many cases where the difference between these two standards will result in a different outcome,” he tells Ward. “Am I wrong?”

“I think you are wrong,” Ward responds, but struggles to describe a case, aside from Kingsley’s, where the distinction matters. So Justice Stephen Breyer dreams up one for her. What if one officer tells another that a gun is actually a Taser, and the officer, intending to hit a detainee with a stun gun, accidentally shoots him? Objectively, shooting an inmate with no justification is unreasonable and unconstitutional. Subjectively, *accidentally* shooting a detainee may be excusable.

“I’m rather worried,” Breyer says of his bizarre scenario, “about holding the policeman in this weird case [guilty], where his state of mind is 100 percent innocent.”

Ward, a painfully inept oral advocate who skittishly concedes her most crucial arguments in between long gaps of awkward silence, has no real answer except that holding Breyer’s imaginary (and possibly blind) cop accountable is “more faithful to the Constitution.” She sits down and is replaced by John F. Bash, representing the United States. (The Justice Department decided to weigh in on the case, supporting Kingsley’s standard *and* the verdict against him. This confuses everyone and helps no one.) Bash, with his handsome features and baritone voice, looks like he hopped out of some TV legal procedural—but he can’t seem to lay out a clear distinction, either. He tries to tell the justices that guards can use more force against convicts than detainees, but Sotomayor pushes back.

“I’m not sure why that’s right,” she tells Bash. “What, the Constitution permits you to get a free kick in? If I walk by a prisoner and I want to establish discipline, I can freely kick them any time I want?”

Bash, delightfully burned by an irritated Sotomayor, soon stands down. Paul Clement, [the conservative superlawyer](#), rises to argue on behalf of the guards who hit Kingsley with a stun gun. Clement wants the court to hold that guards must punish detainees “sadistically or maliciously” in order to violate their constitutional rights, and that jolting a prisoner with electricity while he is handcuffed and face-down in a cell is neither. Even worse, he thinks convicted felons and pretrial detainees should receive the exact same rights behind bars. In other words, a legally innocent detainee doesn’t have the reasonable expectation to be free from police abuse that a free person walking the streets does.

Suddenly Justice Elena Kagan jumps into the ring to deliver a sucker punch. Imagine two people are indicted for the same offensive, she tells Clement. One makes bail; the other does not.

“The one who’s out on the street has some kind of encounter with a police officer,” she says, “and he reaches into his pocket to take out something, and the police officer shoots him.” That person will almost certainly have a constitutional case against his shooter. But imagine his peer—indicted for the same crime—is shot for the same reason in prison. Under Clement’s standard, he likely wouldn’t have any constitutional recourse, because he couldn’t prove the officer acted sadistically. “Why,” Kagan asks with her trademark quizzical head-tilt, “should that be so?”

Kagan, who [specializes in tripping up Clement](#), lands her point perfectly, saving the case from musty legal doctrines and placing it in the context of today’s realities. (Her hypothetical [doesn’t sound very hypothetical at all](#).) Kagan and Sotomayor appear to be the only justices aware of the fact that police officers shoot innocent people—and that the last thing their victims need is yet another judicial barricade to block them from pursuing justice.

Clement fires back, declaring that “the fact of incarceration is really a game-changer.” But Sotomayor keeps him in trapped in the corner.

“You’re loading the deck completely,” she tells him. Under his rule, the jury would be told to “give police officers deference,” then be told that “whatever they do” to detainees (short of assaulting them with demonstrably sadistic and malicious intent) is OK.

This final act of tag-teaming puts some urgency back in the arguments, reminding everyone that this case could have very serious—and dire—results for people whose safety is left at the mercy of cops. At the same time the Supreme Court heard Kingsley's case, thousands attended [the funeral of Freddie Gray](#), who was fatally wounded in police custody. As demonstrations [broke out across Baltimore](#) to protest his death, the justices debated whether another man abused in police custody must prove his abuser acted "maliciously" before he can pursue his constitutional rights. The answer to this question should be obvious—yet the court may well decide that innocent people can be treated like convicted criminals if they're too poor to make bail. That unfortunate fact suggests the justices' [recent reckoning with police overreach](#) was nothing more than a fleeting encounter with reality.

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