Current Issues in Constitutional Litigation

SECOND EDITION

2018 SUPPLEMENT

Sarah E. Ricks
RUTGERS SCHOOL OF LAW – CAMDEN

Evelyn M. Tenenbaum
ALBANY LAW SCHOOL

CAROLINA ACADEMIC PRESS
Durham, North Carolina

Carolina Academic Press
700 Kent Street
Durham, North Carolina 27701
Telephone (919) 489-7486
Fax (919) 493-5668
E-mail: cap@cap-press.com
www.cap-press.com

August 2018 Supplement to 2d Edition of Current Issues in Constitutional Litigation: A Context & Practice Casebook

Chapter 2, p. 68, after Fifth Circuit's Model Jury Instruction

The exercise described on p. 65 (Exercise 2-D) actually took place. A panel of distinguished judges and lawyers in the Fifth Circuit reconsidered the Fifth Circuit's pattern jury instructions in light of changes in the legal landscape.

Below is an excerpt from the revised jury instructions. As you read the excerpt below, consider whether the updated Fifth Circuit pattern instructions are consistent with Supreme Court doctrine, and why:

> In deciding whether the force used was excessive, you must give prison officials wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain internal security in the prison. In making this determination, you may consider the following nonexclusive factors: (1) the extent of the injury suffered (2) the need for the application of force; (3) the relationship between the need and the amount of force used; (4) the threat reasonably perceived by the responsible officials; and (5) any efforts made to temper the severity of a forceful response.
>
> In considering the second element—harm—not every malevolent, harmful, or injurious touch by a prison guard gives rise to a claim under federal law. But an inmate like Plaintiff [name] need not show significant injury to establish a constitutional violation. Even a slight use of force, under certain circumstances, may be so repugnant to the conscience of mankind that a claim may exist. The extent of injury an inmate suffers is one factor that may suggest whether the use of the force could reasonably have been thought necessary in the particular situation.

The Fifth Circuit's Model Jury Instructions for civil cases are available on the circuit website, http://www.lb5.uscourts.gov (select Jury Instructions, select Civil). They were prepared by the Committee on Pattern Jury Instructions and published in October 2014. The instructions for Eighth Amendment (Excessive Force) appear as 10.7.

Chapter 2, p. 87, Exercise 2-E, add to bullet points

- Keep in mind that a district court should "liberally" interpret the factual allegations of a *pro se* complaint. *Sauce v. Bauer*, _ U.S. _, 138 S.Ct. 2561, 2561 (2018).

Chapter 6, p. 286, after *Graham* and before Development of Doctrine in the Lower Courts

In 2017, the Supreme Court held that:

> If law enforcement officers make a "seizure" of a person using force that is judged to be reasonable based on a consideration of the circumstances relevant to that determination . . . the officers [may not] be held liable for injuries caused by the seizure on the ground that they committed a separate Fourth Amendment violation that contributed to their need to use force . . . . A different Fourth Amendment violation cannot transform a later, reasonable use of force into an unreasonable seizure.

County of Los Angeles v. Mendez, _ U.S. _, 137 S. Ct. 1539, 1543–44 (2017). The Court therefore rejected the Ninth Circuit's "provocation" rule for having imposed liability in such a situation.

Chapter 6, p. 321, add to the end of Exercise 6-F

Wilson v. Callahan, _U.S. __, 138 S.Ct. 1261 (2018) (denying certiorari on whether the Second Circuit "erred in continuing to require in deadly force shooting cases, that the jury must be instructed regarding the specific legal justifications for the use of deadly force, and that the usual less specific instructions regarding the use of excessive force are not adequate" as in conflict with *Scott's* establishment of reasonableness "as the ultimate and only inquiry")

Chapter 6, p. 326, add to the end of *For further discussion*

In *Manuel v. City of Joliet, Ill.*, _ U.S. _, 137 S. Ct. 911, 920 (2017), the Supreme Court held that the 4th Amendment "governs a claim for unlawful pretrial detention even beyond the start of legal process." *Manuel* is discussed further ruling in Chapter 7.

Chapter 7, p. 335, after *For further discussion note 3*

4. In *Lopez*, the Seventh Circuit recognized a neutral judicial determination of probable cause as dividing 4th Amendment from 14th Amendment protection. But since then, the Supreme Court has held that a defendant seized without probable cause can challenge his pretrial detention under the Fourth Amendment. *Manuel v. City of Joliet*, __U.S. __, 137 S.Ct. 911, 917 (2017). In *Manuel,* the Supreme Court held that the Fourth Amendment protects a person from being seized without probable cause both at the time of arrest and "when legal process itself goes wrong—when, for example, a judge's probable-cause determination is predicated solely on a police officer's false statements. . . Legal process has gone forward, but it has done nothing to satisfy the Fourth Amendment's probable-cause requirement. And for that reason, it cannot extinguish the detainee's Fourth Amendment claim—or somehow, as the Seventh Circuit has held, convert that claim into one founded on the Due Process Clause." *Id.* at 918-19; *id*. at 920, n. 8 ("By contrast . . . once a trial has occurred the Fourth Amendment drops out").

5. Probable cause for the arrest was not contested in *Lopez*. The Supreme Court more recently has cautioned against assessing probable cause for an arrest by "viewing each fact 'in isolation, rather than as a factor in the totality of the circumstances.'" *District of Columbia v. Wesby*, 538 U.S. ___, 138 S.Ct. 577, 588 (2018) (further citation omitted). "The totality-of-the-circumstances test 'precludes this sort of divide-and-conquer analysis.'" *Id.* Finding probable cause for the arrest of partygoers in a vacant house, the Supreme Court reasoned:

> [T]he officers found a group of people who claimed to be having a bachelor party with no bachelor, in a near-empty house, with strippers in the living room and sexual activity in the bedroom, and who fled at the first sign of police. The panel majority identified innocent explanations for most of these circumstances in isolation, but again, this kind of divide-and-conquer approach is improper. . . [H]ere, the totality of the circumstances gave the officers plenty of reasons to doubt the partygoers' protestations of innocence.

Id. at 589.

Chapter 7, p. 341, after *For further discussion*

Questions to guide reading of *Kingsley*

1. For a 14th Amendment excessive force claim, the Supreme Court holds that the officer must intentionally use physical force against the pretrial detainee. Why are accidental uses of force outside the 14th Amendment?

2. What two questions did the Supreme Court leave open in *Kingsley*?

3. How does the Court define "objective reasonableness" and what factors does the Court identify as relevant to the reasonableness of the use of force against pretrial detainees? Why does the Court predict this will be a "workable" standard?

4. Prison officials argued that excessive force claims by pretrial detainees should be judged under a subjective standard, that force was applied "maliciously and sadistically to cause harm." Why did the Supreme Court reject that argument?

Kingsley v. Hendrickson

576 U.S. __, 135 S.Ct. 2466 (2015)

Justice BREYER delivered the opinion of the Court.

. . . The question before us is whether, to prove an excessive force claim, a pretrial detainee must show that the officers were subjectively aware that their use of force was unreasonable, or only that the officers' use of that force was objectively unreasonable. We conclude that the latter standard is the correct one.

. . .

II. A.

We consider a legally requisite state of mind. In a case like this one, there are, in a sense, two separate state-of-mind questions. The first concerns the defendant's state of mind with respect to his physical acts—*i.e.*, his state of mind with respect to the bringing about of certain physical consequences in the world. The second question concerns the defendant's state of mind with respect to whether his use of force was "excessive." Here, as to the first question, there is no dispute. As to the second, whether to interpret the defendant's physical acts in the world as involving force that was "excessive," there is a dispute. We conclude with respect to that question that the relevant standard is objective not subjective. Thus, the defendant's state of mind is not a matter that a plaintiff is required to prove.

Consider the series of physical events that take place in the world—a series of events that might consist, for example, of the swing of a fist that hits a face, a push that leads to a fall, or the shot of a Taser that leads to the stunning of its recipient. No one here denies, and we must assume, that, as to the series of events that have taken place in the world, the defendant must possess a purposeful, a knowing, or possibly a reckless state of mind. That is because, as we have stated, "liability for *negligently* inflicted harm is categorically beneath the threshold of constitutional due process." *County of Sacramento v. Lewis*, 523 U.S. 833, 849 (1998) (emphasis added). *See also Daniels v. Williams*, 474 U.S. 327, 331 (1986) ("Historically, this guarantee of due process has been applied to *deliberate* decisions of government officials to deprive a person of life, liberty, or property"). Thus, if an officer's Taser goes off by accident or if an officer unintentionally trips and falls on a detainee, causing him harm, the pretrial detainee cannot prevail on an excessive force claim. But if the use of force is deliberate—i.e., purposeful or knowing—the pretrial detainee's claim may proceed. In the context of a police pursuit of a suspect the Court noted, though without so holding, that recklessness in some cases might suffice as a standard for imposing liability. *See Lewis*, *supra*, at 849. Whether that standard might suffice for liability in the case of an alleged mistreatment of a pretrial detainee need not be decided here; for the officers do not dispute that they acted purposefully or knowingly with respect to the force they used against Kingsley.

We now consider the question before us here—the defendant's state of mind with respect to the proper interpretation of the force (a series of events in the world) that the defendant deliberately (not accidentally or negligently) used. In deciding whether the force deliberately used is, constitutionally speaking, "excessive," should courts use an objective standard only, or instead a subjective standard that takes into account a defendant's state of mind? It is with respect to this question that we hold that courts must use an objective standard. In short, we agree with . . . the Seventh Circuit's jury instruction committee. . . that a pretrial detainee must show only that the force purposely or knowingly used against him was objectively unreasonable.

. . . [O]bjective reasonableness turns on the "facts and circumstances of each particular case." *Graham v. Connor*, 490 U.S. 386, 396 (1989). A court must make this determination from the perspective of a reasonable officer on the scene, including what the officer knew at the time, not with the 20/20 vision of hindsight. See *ibid*. A court must also account for the "legitimate interests that stem from [the government's] need to manage the facility in which the individual is detained," appropriately deferring to "policies and practices that in th[e] judgment" of jail officials "are needed to preserve internal order and discipline and to maintain institutional security." *Bell v. Wolfish*, 441 U.S. 520, 540, 547 (1979).

Considerations such as the following may bear on the reasonableness or unreasonableness of the force used: the relationship between the need for the use of force and the amount of force used; the extent of the plaintiff's injury; any effort made by the officer to temper or to limit the amount of force; the severity of the security problem at issue; the threat reasonably perceived by the officer; and whether the plaintiff was actively resisting. See, *e.g.*, *Graham*, *supra*, at 396. We do not consider this list to be exclusive. We mention these factors only to illustrate the types of objective circumstances potentially relevant to a determination of excessive force.

B

. . [T]he appropriate standard for a pretrial detainee's excessive force claim is solely an objective one. . . [I]t is consistent with our precedent. We have said that "the Due Process Clause protects a pretrial detainee from the use of excessive force that amounts to punishment." *Graham*, *supra*, at 395, n. 10. . . [T]he *Bell* Court . . . explain[ed] that, in the absence of an expressed intent to punish, a pretrial detainee can nevertheless prevail by showing that the actions are not "rationally related to a legitimate nonpunitive governmental purpose" or that the actions "appear excessive in relation to that purpose." *Id*., at 561. The *Bell* Court applied this latter objective standard to evaluate a variety of prison conditions, including a prison's practice of double-

bunking. In doing so, it did not consider the prison officials' subjective beliefs about the policy. *Id*., at 541–543. Rather, the Court examined objective evidence, such as the size of the rooms and available amenities, before concluding that the conditions were reasonably related to the legitimate purpose of holding detainees for trial and did not appear excessive in relation to that purpose. *Ibid*.

. . .

[E]xperience suggests that an objective standard is workable. It is consistent with the pattern jury instructions used in several Circuits. . . Finally, the use of an objective standard adequately protects an officer who acts in good faith. We recognize that "[r]unning a prison is an inordinately difficult undertaking," . . . and that "safety and order at these institutions requires the expertise of correctional officials, who must have substantial discretion to devise reasonable solutions to the problems they face," *Florence v. Board of Chosen Freeholders of County of Burlington*, 566 U.S. ___, ___ (2012). Officers facing disturbances "are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving." *Graham*, 490 U.S., at 397. For these reasons, we have stressed that a court must judge the reasonableness of the force used from the perspective and with the knowledge of the defendant officer. We have also explained that a court must take account of the legitimate interests in managing a jail, acknowledging as part of the objective reasonableness analysis that deference to policies and practices needed to maintain order and institutional security is appropriate. . . . And we have limited liability for excessive force to situations in which the use of force was the result of an intentional and knowing act (though we leave open the possibility of including a "reckless" act as well). *Ibid*. Additionally, an officer enjoys qualified immunity and is not liable for excessive force unless he has violated a "clearly established" right, such that "it would [have been] clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier v. Katz*, 533 U.S. 194, 202 . . . .

C

Respondents believe that the relevant legal standard should be subjective, *i.e.*, that the plaintiff must prove that the use of force was not "applied in a good-faith effort to maintain or restore discipline" but, rather, was applied "maliciously and sadistically to cause harm." . . . [citing, *e.g.*, *Whitley v. Albers*, 475 U.S. 312 (1986) and *Hudson v. McMillian*, 503 U.S. 1 (1992)].

[*Whitley* and *Hudson*], however, concern excessive force claims brought by convicted prisoners under the Eighth Amendment's Cruel and Unusual Punishment Clause, not claims brought by pretrial detainees under the Fourteenth Amendment's Due Process Clause . . . The language of the two Clauses differs, and . . . most importantly, pretrial detainees (unlike convicted prisoners) cannot be punished at all, much less "maliciously and sadistically." *Ingraham v. Wright*, 430 U.S. 651, 671–672, n. 40 (1977); *Graham, supra*, at 395, n. 10 (1989) . . . . Thus, there is no need here, as there might be in an Eighth Amendment case, to determine when punishment is unconstitutional. *Whitley* and *Hudson* are relevant here only insofar as they address the practical importance of taking into account the legitimate safety-related concerns of those who run jails. And, as explained above, we believe we have done so.

Lewis does not prove respondents' point, either. There, the Court considered a claim that a police officer had violated due process by causing a death during a high-speed automobile chase aimed at apprehending a suspect. We wrote that "[j]ust as a purpose to cause harm is needed for Eighth Amendment liability in a [prison] riot case, so it ought to be needed for due process liability in a pursuit case." 523 U.S., at 854. . . . [T]his statement referred to the defendant's intent to commit the acts in question, not to whether the force intentionally used was "excessive." 523 U.S., at 854, and n. 13.

. . .

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. . . .

Justice SCALIA, with whom THE CHIEF JUSTICE and Justice THOMAS join, dissenting.

The Constitution contains no freestanding prohibition of excessive force. There are, however, four constitutional provisions that we have said forbid the use of excessive force in certain circumstances. The Fourth Amendment prohibits it when it makes a search or seizure "unreasonable." The Eighth Amendment prohibits it when it constitutes "cruel and unusual" punishment. The Fifth and Fourteenth Amendments prohibit it (or, for that matter, any use of force) when it is used to "deprive" someone of "life, liberty, or property, without due process of law."

This is a Fourteenth Amendment case. . . Our cases hold that the intentional infliction of punishment upon a pretrial detainee may violate the Fourteenth Amendment; but the infliction of "objectively unreasonable" force, without more, is not the intentional infliction of punishment.

. . . I disagree . . . that any intentional application of force that is objectively unreasonable in degree is a use of excessive force that "amount[s] to punishment." *Bell*, 441 U.S., at 535 . . . It is illogical, however, automatically to infer punitive intent from the fact that a prison guard used more force against a pretrial detainee than was necessary. That could easily have been the result of a misjudgment about the degree of force required to maintain order or protect other inmates, rather than the product of an intent to punish the detainee for his charged crime (or for any other behavior). An officer's decision regarding how much force to use is made "in haste, under pressure, and frequently without the luxury of a second chance," *Hudson v. McMillian*, 503 U.S. 1, 6, (1992) (internal quotation marks omitted), not after the considered thought that precedes detention-policy determinations like those at issue in *Bell* . . . . That an officer used more force than necessary might be evidence that he acted with intent to punish, but it is no more than that.

. . .

[O]ur Constitution is not the only source of American law. There is an immense body of state statutory and common law under which individuals abused by state officials can seek relief.

Exercise 7-A

The Supreme Court in *Kingsley* resolved a longstanding circuit split over whether custodial officials needed to *subjectively* intend to inflict excessive force in order for a 14th Amendment claim of excessive force to succeed. For decades, while a claim that could show *objectively* excessive force could prevail in some circuits, that same claim would have failed in other circuits because plaintiff could not prove the defendant *subjectively* intended force to be excessive.

- Is there any recourse for plaintiffs whose claims failed because, while they could demonstrate objective excessive force, they failed to prove a higher standard of subjective excessive force, or malicious and sadistic use of force?

- Suppose you represented a plaintiff in a pre-trial excessive force claim that was evaluated and rejected by a jury applying the 11th Circuit Jury Instructions on pp. 338-39. The jury reached its verdict in 2014. The appeal time is long past. Your former client is now on the phone. She heard a news report about the new Supreme Court case and asks you how it can help her. Explain your answer in plain language to your former client.

Exercise 7-B

Review the Pattern Jury Instructions for the 11th Circuit on pp. 338-39. Suppose you have been appointed to a distinguished panel of attorneys in the 11th Circuit. Your committee charge is to revise the pattern jury instructions to be consistent with the Supreme Court's decisions in *Kingsley* and *Wilkins*.

- What language will you propose for district court judges to instruct juries on claims of excessive force against pre-trial detainees?
- Consider how a district court should instruct a jury to consider the correctional officer's state of mind, the injury to plaintiff, and the institutional need to preserve order, among other factors.

For further discussion

1. Can 4th Amendment protections extend into pretrial detention? Yes, said the Supreme Court in a ruling after *Kingsley*. The Supreme Court held that the 4th Amendment "governs a claim for unlawful pretrial detention even beyond the start of legal process." *Manuel v. City of Joliet, Ill.*, _ U.S. _, 137 S. Ct. 911, 920 (2017). Police arrested Manuel without probable cause, based on his possession of pills that tested negative for an illegal substance. At the court proceeding initiating legal process, "[a]ll that the judge had before him were police fabrications about the pills' content." *Id*. at 919. The judge's order holding Manuel for trial therefore did not "expunge Manuel's Fourth Amendment claim because the process he received failed to establish what [the 4th] Amendment makes essential for pretrial detention—probable cause to believe he committed a crime." *Id.* at 919-20. Therefore, both Manuel's pretrial detention and his original arrest could violate his Fourth Amendment rights. *Id.* at 920.

2. Manuel is consistent with *Kingsley*. While *Manuel* held a defendant seized without probable cause can challenge pretrial detention under the 4th Amendment, "*Manuel* does not address the availability of due process challenges after a legal seizure. . . [and] when the detention is legal, a pre-trial detainee subjected to excessive force properly invokes the Fourteenth Amendment." *Jauch v. Choctaw Cty.*, 874 F.3d 425, 429 (5th Cir. 2017)

While *Manuel* concerned a pretrial detainee's challenge to probable cause to detain him, *Kingsley* concerned a lawful pretrial detention. *Kingsley*, 135 S. Ct. at 2470. In *Kingsley*, a lawfully arrested pretrial detainee was awaiting trial when he claimed officers used excessive force in his cell. *Id.* (correctional officers applied a Taser to Kingsley's back while he was handcuffed in a jail cell). As the pretrial detainee in *Kingsley* did not challenge probable cause for his detention, but instead challenged the use of force during a lawful detention, the claim was properly analyzed under 14th Amendment due process.

Chapter 10, p. 489, after *Accrual of a False Arrest Claim and the* Heck v. Humphrey *Bar*

But what event triggers the start of the statute of limitations for a claim that pretrial detention violates probable cause? *Manuel* held a pretrial detainee's challenge to the validity of the probable cause resulting in the detention is governed by the 4th Amendment. *Manuel v. City of Joliet, Ill.*, _ U.S. _, 137 S. Ct. 911, 920 (2017). But in *Manuel*, the Supreme Court declined to reach what accrual rule should govern a § 1983 challenge to post-legal-process pretrial detention. *Id.* at 921.

Plaintiff argued that the Fourth Amendment claim should accrue upon termination of the criminal prosecution in favor of the accused, analogizing the constitutional claim to the tort of malicious prosecution. That accrual date would avoid "conflicting resolutions" in § 1983 litigation and criminal proceedings by "preclud[ing] the possibility of the claimant succeeding in the tort action after having been convicted in the underlying criminal prosecution." *Id.* at 921. In support of that accrual date, the Supreme Court in *Manuel* explicitly noted "all but two of the ten Courts of Appeals that have recognized a Fourth Amendment claim like his have incorporated a 'favorable termination' element and so pegged the statute of limitations to the dismissal of the criminal case. *Id.*

By contrast, defendants argued that the Fourth Amendment claim should accrue on the date of the initiation of legal process, analogizing the constitutional claim to the tort of false arrest. Further, defendants argued, "even if malicious prosecution were the better comparison," a court should reject "that tort's favorable-termination element" because '"the Fourth Amendment is concerned not with the outcome of a prosecution, but with the legality of searches and seizures." *Id*. (summarizing defendants' argument). Finally, defendants argued plaintiff had "forfeited an alternative theory" that "his pretrial detention 'constitute[d] a continuing Fourth Amendment violation,' each day of which triggered the statute of limitations anew. *Id.* (further summarizing defendants' argument).

Chapter 10, p. 461 at the end of note 3

The Supreme Court reversed a state court interpretation of 42 U.S.C. §1988 because it "is a federal statute" and the "Idaho Supreme Court, like any other state or federal court, is bound by this Court's interpretation of federal law." *James v. City of Boise, Idaho*, 577 U.S. _____, 136 S.Ct. 685 (2016) (*per curiam*).

Chapter 10, p. 483, before Attorney's Fees Provision of Prison Litigation Reform Act

For further discussion

The Supreme Court reaffirmed that the Prison Litigation Reform Act requires an inmate to exhaust available administrative remedies before bringing suit to challenge prison conditions, but clarified that the inmate "need not exhaust unavailable ones." *Ross v. Blake*, 578 U.S. ___, 136 S. Ct. 1850, 1850 (2016). "[A]n administrative procedure is unavailable when (despite what regulations or guidance materials may promise) it operates as a simple dead end . . . [*e.g.*] a prison handbook directs inmates to submit their grievances to a particular administrative office—but in practice that office disclaims the capacity to consider those petitions. . . . [Or, an administrative scheme might be unavailable if] some mechanism exists to provide relief, but no ordinary prisoner can discern or navigate it. . . [or] when prison administrators thwart inmates from taking advantage of a grievance process through machination, misrepresentation, or intimidation." *Ross*, 578 U.S. __, 136 S. Ct. at 1858–60.

Chapter 10, p. 487, For Further Discussion, after Note 2

3. Unlike § 1988 attorney's fees, the Prison Litigation Reform Act requires a prevailing prisoner to pay a defined portion of the recovery to satisfy attorney's fees. In *Murphy v. Smith*, __ U.S.

__, 138 S. Ct. 784, 787 (2018), the Court held that "the [district] court (1) *mus*t apply judgment funds toward the fee award (2) with the *purpose* of (3) *fully discharging* the fee award. And to meet *that* duty, a district court must apply as much of the judgment as necessary to satisfy the fee award, without of course exceeding the 25% cap." *Id*. at 787. The statutory phrase "shall be applied," *id.*, required the district court to "apply as much of the judgment as necessary, up to 25%, to satisfy an award of attorney's fees." *Id*. at 790. In so holding, the Supreme Court abrogated rulings from several circuits. While those circuits had recognized 25% as the maximum portion of the award to be applied towards attorney's fees, they had allowed plaintiffs to pay less than 25%. Brief for Petitioner in *Murphy v. Smith*, 2017 WL 4404062 at *12 (Sept. 29, 2017).

Chapter 11, p. 504, at the end of Note 1, *For further discussion*

More recently, the Supreme Court further defined a "clearly established" legal principle:

> The rule must be "settled law," . . . which means it is dictated by "controlling authority" or "a robust 'consensus of cases of persuasive authority,' " . . . It is not enough that the rule is suggested by then-existing precedent. The precedent must be clear enough that every reasonable official would interpret it to establish the particular rule the plaintiff seeks to apply. *See Reichle,* 566 U.S., at 666. Otherwise, the rule is not one that "every reasonable official" would know. *Id.,* at 664 (internal quotation marks omitted).
>
> The "clearly established" standard also requires that the legal principle clearly prohibit the officer's conduct in the particular circumstances before him. This requires a high "degree of specificity." *Mullenix v. Luna,* 577 U.S. ——, ——, 136 S.Ct. 305, 309 (2015) (*per curiam*). . . We have stressed that the "specificity" of the rule is "especially important in the Fourth Amendment context." *Mullenix, supra,* at 308. . . .Thus, we have stressed the need to "identify a case where an officer acting under similar circumstances ... was held to have violated the Fourth Amendment." *White v. Pauly,* 580 U.S. ——, ——, 137 S.Ct. 548, 552 (2017) (*per curiam*); *e.g., Plumhoff* [*v. Rickard*, 572 U.S. __, 134 S.Ct. 2012, 2023 (2014)]. While there does not have to be "a case directly on point," existing precedent must place the lawfulness of the particular arrest "beyond debate." *al–Kidd, supra,* at 741, 131 S.Ct. 2074. Of course, there can be the rare "obvious case," where the unlawfulness of the officer's conduct is sufficiently clear even though existing precedent does not address similar circumstances. *Brosseau v. Haugen,* 543 U.S. 194, 199, 125 S.Ct. 596 (2004) (*per curiam*). But "a body of relevant case law" is usually necessary to " 'clearly establish' the answer" with respect to probable cause. *Ibid.*

District of Columbia v. Wesby, 538 U.S. ___, 138 S.Ct. 577, 589 – 90 (2018); *see White v. Pauly,* 580 U.S. ——, ——, 137 S.Ct. 548, 552 (2017) (*per curiam*) ("[c]learly established federal law does not prohibit a reasonable officer who arrives late to an ongoing police action in circumstances like this from assuming that proper procedures, such as officer identification, have already been followed"). *Mullenix*, *Plumhoff*, and *Brosseau* are excerpted later in this Chapter.

Chapter 11, p. 505, at the end of Note 3, *For further discussion*

See District of Columbia v. Wesby, 538 U.S. __, 138 S.Ct. 577, 591 (2018) ("Even assuming the officers lacked actual probable cause to arrest the partygoers, the officers are entitled to qualified immunity because they 'reasonably but mistakenly conclude[d] that probable cause [wa]s

present'") (further citation omitted).

Chapter 11, p. 529, at the end of Note 3, *For further discussion*

Similarly, the Supreme Court held in 2015 that prison officials were entitled to qualified immunity from the claim that they had violated plaintiff's "right to the proper implementation of adequate suicide prevention protocols" because such a right was not clearly established in 2004. *Taylor v. Barkes*, 575 U.S. ____, 135 S.Ct. 2042 (2015) (*per curiam*). The Court reasoned:

> No decision of this Court establishes a right to the proper implementation of adequate suicide prevention protocols. No decision of this Court even discusses suicide screening or prevention protocols. And "to the extent that a 'robust consensus of cases of persuasive authority'" in the Courts of Appeals "could itself clearly establish the federal right respondent alleges," *City and County of San Francisco v. Sheehan*, 575 U. S. ___, ___ (2015) (slip op., at 16), the weight of that authority at the time of Barkes's death suggested that such a right did not exist. [citing decisions of 6th, 11th, 5th and 4th Circuits].
>
> The Third Circuit nonetheless found this right clearly established by two of its own decisions, both stemming from the same case. Assuming for the sake of argument that a right can be "clearly established" by circuit precedent despite disagreement in the courts of appeals, neither of the Third Circuit decisions relied upon clearly established the right at issue.

Taylor, 135 S.Ct. at 2044-45.

As of 2018, the Supreme Court still has not resolved what sources of authority can sufficiently define a constitutional right in the context of qualified immunity. Recently, the Court found a circuit court's reliance on a single binding precedent – even though it was from the relevant circuit – to be insufficient to "clearly establish" a constitutional right "because it was not 'settled law.'" *District of Columbia v. Wesby*, 538 U.S. __, 138 S.Ct. 577, 591 (2018) (further citation omitted). The Court acknowledged that it has not yet resolved what sources of law render a constitutional right "clearly established":

> We have not yet decided what precedents – other than our own – qualify as controlling authority for purposes of qualified immunity. . . . We express no view on that question here. Relatedly, our citation to and discussion of various lower court precedents should not be construed as agreeing or disagreeing them, or endorsing a particular reading of them.

Id. at 591, n. 8 (internal citations omitted).

Chapter 11, p. 537, before Section C, add to For further discussion

3. Justice Sotomayor sounded an alarm about the trajectory of Supreme Court qualified immunity jurisprudence, in a dissent joined by Justice Ginsberg. Justice Sotomayor wrote:

> "[T]his Court routinely displays an unflinching willingness 'to summarily reverse courts for wrongly denying officers the protection of qualified immunity' but "rarely intervene[s] where courts wrongly afford officers the benefit of qualified immunity in

> these same cases.' [quoting her own earlier dissent] . . . Such a one-sided approach to qualified immunity transforms the doctrine into an absolute shield for law enforcement officers, gutting the deterrent effect of the Fourth Amendment.
>
> The majority today exacerbates that troubling asymmetry. Its decision is not just wrong on the law; it also sends an alarming signal to law enforcement officers and the public. It tells officers that they can shoot first and think later, and it tells the public that palpably unreasonable conduct will go unpunished."

Kisela v. Hughes, _ U.S. _, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting). The next Supreme Court case excerpted, *Mullenix*, is an example of a summary reversal of a circuit court's denial of qualified immunity.

Chapter 11, p. 537, before Section C

Mullenix v. Luna

_ U.S. _, 136 S. Ct. 305 (2015)

PER CURIAM.

[This § 1983 action alleges Trooper Chadrin Mullenix violated the Fourth Amendment by using excessive force against Israel Leija, Jr. Leija led police on an 18–minute chase at speeds between 85 and 110 miles per hour. Leija called police, claiming to have a gun and threatening to shoot at police officers if they did not abandon their pursuit. Police set up tire spikes. Trooper Mullenix drove to an overpass, intending to set up a spike strip, but considered shooting at Leija's car to disable it. Mullenix had not received training in this tactic and had not attempted it before. Mullenix took a shooting position on the overpass, 20 feet above the highway. Respondents allege that Mullenix still could hear his supervisor's response to "stand by" and "see if the spikes work first." From the overpass, Mullenix fired six shots in the dark at a car traveling 85 miles per hour, killing Leija. A second later, the car hit spike strips deployed to stop it.]

We address only the qualified immunity question, not whether there was a Fourth Amendment violation in the first place . . . . "We do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate." *Ashcroft v. al–Kidd,* 563 U.S. 731, 741 (2011). . . ."We have repeatedly told courts ... not to define clearly established law at a high level of generality." *al–Kidd, supra,* at 742. The dispositive question is "whether the violative nature of *particular* conduct is clearly established." *Ibid.* (emphasis added). This inquiry " 'must be undertaken in light of the specific context of the case, not as a broad general proposition.' " *Brosseau v. Haugen,* 543 U.S. 194, 198 (2004) (*per curiam*) . . . .

In this case, the Fifth Circuit held that Mullenix violated the clearly established rule that a police officer may not " 'use deadly force against a fleeing felon who does not pose a sufficient threat of harm to the officer or others.' " 773 F.3d, at 725. . . . In this case, Mullenix confronted a reportedly intoxicated fugitive, set on avoiding capture through high-speed vehicular flight, who twice during his flight had threatened to shoot police officers, and who was moments away from encountering an officer . . . . The relevant inquiry is whether existing precedent placed the conclusion that Mullenix acted unreasonably in these circumstances "beyond debate." *al–Kidd, supra,* at 741. The general principle that deadly force requires a sufficient threat hardly settles this matter. See *Pasco v. Knoblauch,* 566 F.3d 572, 580 (C.A.5 2009) ("[I]t would be unreasonable to

expect a police officer to make the numerous legal conclusions necessary to apply *Garner* to a high-speed car chase ...").

Far from clarifying the issue, excessive force cases involving car chases reveal the hazy legal backdrop against which Mullenix acted. In *Brosseau* itself, the Court held that an officer did not violate clearly established law when she shot a fleeing suspect out of fear that he endangered "other officers on foot who [she] *believed* were in the immediate area," "the occupied vehicles in [his] path," and "any other citizens who *might* be in the area." 543 U.S., at 197. . . . The threat Leija posed was at least as immediate as that presented by a suspect who had just begun to drive off and was headed only in the general direction of officers and bystanders. *Id.,* at 196–197. By the time Mullenix fired, Leija had led police on a 25–mile chase at extremely high speeds, was reportedly intoxicated, had twice threatened to shoot officers, and was racing towards an officer's location.

. . .

The Court has thus never found the use of deadly force in connection with a dangerous car chase to violate the Fourth Amendment, let alone to be a basis for denying qualified immunity. Leija in his flight did not pass as many cars as the drivers in *Scott* [p. 310] or *Plumhoff* [p. 532]; traffic was light on [the highway]. At the same time, the fleeing fugitives in *Scott* and *Plumhoff* had not verbally threatened to kill any officers in their path, nor were they about to come upon such officers. In any event, none of our precedents "squarely governs" the facts here. Given Leija's conduct, we cannot say that only someone "plainly incompetent" or who "knowingly violate[s] the law" would have perceived a sufficient threat and acted as Mullenix did. *Malley,* 475 U.S., at 341.

The dissent focuses on the availability of spike strips as an alternative means of terminating the chase. It argues that even if Leija posed a threat sufficient to justify deadly force in some circumstances, Mullenix nevertheless contravened clearly established law because he did not wait to see if the spike strips would work before taking action. . . . The dissent can cite no case from this Court denying qualified immunity because officers entitled to terminate a high-speed chase selected one dangerous alternative over another.

Even so, the dissent argues, there was no governmental interest that justified acting before Leija's car hit the spikes. Mullenix explained, however, that he feared Leija might attempt to shoot at or run over the officers manning the spike strips. Mullenix also feared that even if Leija hit the spike strips, he might still be able to continue driving in the direction of other officers. . . . Ultimately, whatever can be said of the wisdom of Mullenix's choice, this Court's precedents do not place the conclusion that he acted unreasonably in these circumstances "beyond debate." *al–Kidd,* 563 U.S., at 741.

. . .

Cases decided by the lower courts since *Brosseau* likewise have not clearly established that deadly force is inappropriate in response to conduct like Leija's. The Fifth Circuit here principally relied on its own decision in *Lytle v. Bexar County,* 560 F.3d 404 (2009) [p. 321], denying qualified immunity to a police officer who had fired at a fleeing car and killed one of its passengers. That holding turned on the court's assumption, for purposes of summary judgment, that the car was moving away from the officer and had already traveled some distance at the moment the officer fired. See *id.,* at 409. . . . Without implying that *Lytle* was either correct or incorrect, it suffices to say that *Lytle* does not clearly dictate the conclusion that Mullenix was unjustified in perceiving grave danger and responding accordingly, given that Leija was speeding towards a confrontation with officers he had threatened to kill.

Cases that the Fifth Circuit ignored also suggest that Mullenix's assessment of the threat Leija posed was reasonable. [citing decisions from 11th, 6th Circuits]. Other cases are simply too factually distinct to speak clearly to the specific circumstances here. [*e.g.,* suspects who may have done little more than flee at relatively low speeds]. These cases shed little light on whether the far greater danger of a speeding fugitive threatening to kill police officers waiting in his path could warrant deadly force. . . . [Q]ualified immunity protects actions in the " 'hazy border between excessive and acceptable force.' " *Brosseau, supra,* at 201 (citation omitted). Because the constitutional rule applied by the Fifth Circuit was not " 'beyond debate,' " *Stanton v. Sims,* 571 U.S. ——, ——, 134 S.Ct. 3, 7 (2013) (*per curiam*), we grant Mullenix's petition for certiorari and reverse the Fifth Circuit's determination that Mullenix is not entitled to qualified immunity.

Chapter 12, p. 621, before Practice Pointer

The Supreme Court recently declined to decide the continuing viability of a claim for supervisory liability. In a 2015 *per curiam* decision, the Supreme Court held two supervisory prison officials who had no contact with a suicidal detainee to be entitled to qualified immunity. *Taylor v. Barkes*, 575 U.S. ____, 135 S.Ct. 2042 (2015) (*per curiam*). The Supreme Court based the holding solely on the absence of a clearly defined constitutional right, and expressly declined to reach the question of whether supervisory liability remains a viable Section 1983 theory. *Id.* at 2043-44 (while the circuit court determined plaintiffs "had alleged a cognizable theory of supervisory liability" "we [the Supreme Court] express no view").