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

The Supreme Court will hear oral argument in 2017 in *County of Los Angeles v. Mendez*, Docket No. 16-369. The issues are:

(1) Whether the U.S. Court of Appeals for the 9th Circuit's "provocation" rule should be barred as it conflicts with *Graham v. Connor* regarding the manner in which a claim of excessive force against a police officer should be determined in an action brought under 42 U.S.C. § 1983 for a violation of a plaintiff's Fourth Amendment rights, and has been rejected by other courts of appeals; and (2) whether, in an action brought under Section 1983, an incident giving rise to a reasonable use of force is an intervening, superseding event which breaks the chain of causation from a prior, unlawful entry in violation of the

Fourth Amendment.

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

This book does not address malicious prosecution. The doctrine is on the cusp of change. In October 2016, the Supreme Court heard oral argument on whether an individual's Fourth Amendment right to be free from unreasonable seizure continues beyond legal process so as to allow a malicious prosecution claim based upon the Fourth Amendment. A decision is forthcoming in *Manuel v. City of Joilet*, Docket No. 14-9496.

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 (June 22, 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 and 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.

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

The Supreme Court recently 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 recently 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 11, p. 537, before Section C

Mullenix v. Luna

__ U.S. __, 136 S. Ct. 305 (Nov. 9, 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.

For further discussion

The Supreme Court held 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.

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”).