1-1-2009

Scott v. Harris and the Role of the Jury in Constitutional Litigation

Michael Wells
Marion and W. Colquitt Carter Chair in Tort and Insurance Law *University of Georgia School of Law*, mwells@uga.edu

University of Georgia School of Law
Research Paper Series
Paper No. 2009-09

Scott v. Harris and the Role of the Jury in Constitutional Litigation

Michael L. Wells*

ABSTRACT

Suits brought under 42 U.S.C. § 1983 to recover damages for "excessive force" bear some resemblance to common law tort litigation, since the key issue is whether the force used was "unreasonable." In ordinary negligence law the jury typically decides whether an actor has exercised reasonable care, even when there is no dispute as to the facts. In § 1983 litigation the federal courts are badly split on the allocation of decision making between judge and jury, sometimes even within a particular circuit. The Supreme Court recently faced the judge–jury issue in *Scott v. Harris*, where it ruled that a police officer acts

reasonably when he rams a suspect's car in order to end a high-speed chase. But the Court did not explain why it preferred judicial over jury decision making on the issue, nor did it even identify the choice between judge and jury as an issue requiring attention. This article argues that, whatever the merit of the substantive holding of *Scott*, the Court was right to favor judge over jury in this context. The key difference between constitutional torts and common law torts is that the defendant in a § 1983 suit can win even if he has violated the plaintiff's constitutional rights. This is because the defendant enjoys official immunity from liability for damages so long as the plaintiff's rights were not "clearly established" at the time the defendant acted. Consequently, because juries cannot lay down rules, a regime in which they decide Fourth Amendment reasonableness on a case-by-case basis will systematically thwart plaintiffs' efforts to recover damages. The aims of § 1983—to deter constitutional violations and vindicate constitutional rights—would be better served by a body of law that consists of bright-line rules, which can only be made by judges.

I. INTRODUCTION

Scott v. Harris[1] will be remembered as the case in which the Supreme Court entered the YouTube age by citing a videotape available on YouTube's website of the high-speed police chase that gave rise to the litigation.[2] But the long-run significance of the case lies elsewhere: in the Court's allocation of decision-making responsibilities between judge and jury in suits seeking damages for constitutional violations.

---

* Professor of Law, University of Georgia. The author wishes to thank Bobby Bartlett, Dan Coenen, Tom Eaton, and Jason Solomon for helpful comments on a draft.

1. 550 U.S. 372 (2007); *see* Dan M. Kahan, David A. Hoffman & Donald Braman, *Whose Eyes Are You Going to Believe?* Scott v. Harris *and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 838 (2009) (further discussing *Scott v. Harris*); Karen M. Blum, Scott v. Harris: *Death Knell for Deadly Force Policies and* Garner *Jury Instructions?*, 58 SYRACUSE L. REV. 45, 52–53 (2007) (further discussing *Scott v. Harris*); Leading Cases, *The Supreme Court, 2006 Term*, 121 HARV. L. REV. 185, 214 (2007) (further discussing *Scott v. Harris*).

2. 550 U.S. at 378 n.5. Professor Blum has gathered cases suggesting that "[i]n the wake of *Scott*, other courts are now relying on video evidence to relate what 'really' happened." Blum, *supra* note , at 53 n.47.

Scott held that a police officer committed no Fourth Amendment violation when he rammed Harris's vehicle to end the pursuit, even though Harris was suspected of nothing more serious than a speeding violation.[3] Severely injured when his car left the road, Harris sued under 42 U.S.C. § 1983, claiming that Scott had used excessive force, thereby violating the Fourth Amendment's prohibition of "unreasonable . . . seizure."[4] The district court and an Eleventh Circuit panel had ruled that Harris was entitled to a jury trial on the issue of whether the force used was reasonable.[5] After viewing videos produced by cameras mounted on police cars, the Court ordered that Scott be granted the directed verdict he sought.[6] Only Justice Stevens dissented.[7]

Justice Scalia's majority opinion lacks clarity as to why the directed verdict should have been granted.[8] Some of his reasoning suggests that the result turns on the narrow issue of whether a reasonable jury could have found for Harris in light of the video. According to the Court, Harris's "version of events [was] so utterly discredited by the record that no reasonable jury could have believed him."[9] In other parts of the opinion, however, the Court seems to rely upon a more ambitious rationale—one that assigns the task of applying law to fact in determining Fourth Amendment reasonableness to judge rather than to juries. For example, Justice Scalia declares that "in judging whether Scott's actions were reasonable, *we* must consider" a variety of factors.[10] Although this broader principle better accounts for the outcome,[11] the Court does not articulate or defend it, and the judge–

3. 550 U.S. at 374–76.
4. *Id.* at 374, 386.
5. *Id.* at 375–76.
6. *Id.* at 378–79, 386.
7. *Id.* at 389.
8. *Id.* at 380–81.
9. *Id.* at 380.
10. *Id.* at 383 (emphasis added).
11. Despite the lack of clarity in the opinion, commentators seem to agree that the ruling as to the video was only one step toward the holding. *See* Blum, *supra* note , at 53 ("Once the Court decided that the videotape was incontrovertible evidence that Harris presented a threat to others on the road, the question remained as to whether Scott's use of force to eliminate the threat was objectively reasonable."); Leading Cases, *supra* note , at 218 ("Having determined the appropriate treatment of the contested facts, the Court turned to whether Scott's use of force was objectively reasonable under the Fourth Amendment.") (internal quotation marks omitted).

jury issue remains an open one.

Using *Scott* as a starting point, this article examines the proper roles of judge and jury in § 1983 litigation over claims that police officers have used excessive force in violation of the Fourth Amendment right against unreasonable seizures. This general topic raises two distinct questions, only one of which is discussed in this article. One set of judge–jury issues involves the Seventh Amendment,[12] which seems to require[13] that questions of historical fact—regarding who did what—are for the jury.[14] The harder question, and the one addressed here, is one of judicial policy making. It concerns which decision maker should apply Fourth Amendment norms

12. The Seventh Amendment applies to § 1983 litigation. *See* City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 709 (1999) ("We hold that a § 1983 suit seeking legal relief is an action at law within the meaning of the Seventh Amendment."). The Court also held that "the statute itself does not confer the jury right." *Id.* at 707.

13. *See* Markman v. Westview Instruments, Inc., 517 U.S. 370, 388 (1996) (concluding that matters of "simple historical fact" are for the jury). In *Scott*, the Court took for itself the issue of how Fourth Amendment principles should be applied to the historical facts. *See* 550 U.S. at 381–85 (evaluating the reasonableness of Scott's conduct). One might argue that the Seventh Amendment covers this issue, for *Markman* had recognized the existence of a range of matters that fall "somewhere between a pristine legal standard and a simple historical fact," some of which call for jury trial under the Seventh Amendment. 517 U.S. at 388. But none of the Justices, including Justice Stevens in his dissent, identified a Seventh Amendment issue in *Scott*.

14. It is not altogether clear whether this must be so in all contexts as a matter of constitutional law. It is in any event the settled practice in § 1983 excessive-force litigation. *See, e.g.*, Johnson v. Dist. of Columbia, 528 F.3d 969, 977 (D.C. Cir. 2008) (stating summary judgment was premature because "whether Johnson's prone position was threatening or suggested escape" is a "dispute that can only be resolved by evaluating the conflicting testimony of Johnson and Bruce"); Moore v. Indehar, 514 F.3d 756, 762 (8th Cir. 2008) ("Where questions of historical fact exist, the jury must resolve those questions so that the court may make the ultimate legal determination of whether officers' actions were objectively reasonable in light of clearly established law." (quoting Littrell v. Franklin, 388 F.3d 578, 586 (8th Cir. 2004))); Meadours v. Ermel, 483 F.3d 417, 423 (5th Cir. 2007) (ruling that a trial was required to resolve "several key factual disputes . . . for example, whether Meadours was first shot while charging at Officer Kominek or while he was still atop the doghouse, posing no imminent threat"); Winterrowd v. Nelson, 480 F.3d 1181, 1183 n.3 (9th Cir. 2007) ("A jury will have to resolve the conflicting versions as to what transpired after the stop."); Nimely v. City of New York, 414 F.3d 381, 392 (2d Cir. 2005) ("credibility-weighings" are for the jury); Bell v. Irwin, 321 F.3d 637, 640 (7th Cir. 2003) ("When material facts are in dispute, then the case must go to a jury.").

to the historical facts once those facts are determined.[15] Like the Supreme Court in *Scott*, lower courts seldom give careful attention to this question. Scholars, too, have glossed over the problem. This inattentiveness is both perplexing and disturbing, because the allocation of decisional roles arises frequently in § 1983 cases.

Though the reported opinions often are opaque on this issue, they can be roughly divided into two camps. Some courts seem to follow the common law of torts, assigning the Fourth Amendment reasonableness issue to the jury.[16] Other courts allocate the task of determining "reasonableness" to themselves, at least when the case presents no disputed issues of historical fact.[17] Not one of the opinions,

---

15. *See* HENRY M. HART, JR., & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 350–51 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (giving a classic account of the "three-fold nature of the decisional process," distinguishing between "fact identification," "law declaration," and "law application").

16. *See, e.g.*, Parker v. Gerrish, 547 F.3d 1, 8–11 (1st Cir. 2008) (upholding jury verdict for plaintiff on excessive force); Gill v. Maciejewski, 546 F.3d 557, 562 (8th Cir. 2008) (upholding jury verdict for plaintiff on excessive force); Chelios v. Heavener, 520 F.3d 678, 689 (7th Cir. 2008) (holding that when the facts are viewed in the light most favorable to the plaintiff, "a jury reasonably could find that the force that Sergeant Heavener and the two other officers used in arresting Mr. Chelios was unreasonable"); Curley v. Klem, 499 F.3d 199, 211 (3d Cir. 2007) (holding that question of whether an officer's mistake in firing his weapon was "essentially factual" and for the jury); Jennings v. Jones, 479 F.3d 110, 112 (1st Cir. 2007) (reviewing a jury verdict in favor of the plaintiff on excessive force and reversing the district court's grant of qualified immunity to the defendant); Baker v. City of Hamilton, 471 F.3d 601, 607 (6th Cir. 2006) (finding that on the plaintiff's facts, "a reasonable jury could conclude that Officer Taylor's strike to Baker's head was unjustified and excessive"); Parks v. Pomeroy, 387 F.3d 949, 955–56 (8th Cir. 2004) ("[W]hether Pomeroy used objectively unreasonable force when he fatally shot Parks is a question of fact."); Flores v. City of Palacios, 381 F.3d 391, 399 (5th Cir. 2004) (rejecting summary judgment for the defendant on the ground that issues of fact remained to be determined, and characterizing "whether [the officer] reasonably believed that Flores posed a significant threat" as a question of fact).

17. *See, e.g.*, Ramirez v. Knoulton, 542 F.3d 124, 128 (5th Cir. 2008) ("[T]he ultimate determination of Fourth Amendment objective reasonableness is a question of law." (quoting White v. Balderama, 153 F.3d 237, 241 (5th Cir. 1998))); Davenport v. Causey, 521 F.3d 544, 550–54 (6th Cir. 2008) (examining the evidence and holding that the defendants were entitled to summary judgment because "the facts, even when viewed most favorably to the plaintiffs, do not constitute a constitutional violation"); Moore v. Indehar, 514 F.3d 756, 762 (8th Cir. 2008) (finding questions of historical fact are for the jury, but the court makes the determination of whether the officers' actions were objectively reasonable); Long v. Slaton, 508 F.3d 576, 580–81 (11th Cir.

however, acknowledges that there is an important and highly contestable policy question at stake in these cases. Not one opinion deliberately reasons its way to a principled explanation of why the court

---

2007) ("Accepting the facts as alleged in the complaint as true, we conclude that Deputy Slaton's force was objectively reasonable under the Fourth Amendment."); Bell v. Irwin, 321 F.3d 637, 640 (7th Cir. 2003) ("Permitting the jury freedom to determine for itself whether particular conduct was reasonable within the meaning of the Fourth Amendment would introduce the *ex post* reassessment that *Graham* decried."); Deorle v. Rutherford, 272 F.3d 1272, 1279–85 (9th Cir. 2001) (examining the excessive-force issue in detail and concluding that "the force was excessive compared to the governmental interests at stake").

Sometimes courts take the task for themselves without explicitly acknowledging that they are making a choice between judge and jury. In *Davis v. City of Las Vegas*, the court said that in order to resolve the excessive-force issue for purposes of summary judgment:

> We start . . . by assessing the quantum of force used against Davis. . . .
>
> Next, we must assess the governmental interest that might justify the use of such force . . . .
>
> Second, we assess whether the suspect posed an immediate threat . . . .
>
> Next we consider whether Davis was actively resisting arrest . . . .
>
> Finally, we consider whether Miller could have used other methods . . . .

478 F.3d 1048, 1055–56 (9th Cir. 2007) (internal citations omitted) (emphasis added). The court concluded that the plaintiff's facts "demonstrate that Officer Miller's actions were unreasonable and that Davis's Fourth Amendment rights were violated." *Id.* at 1056; *see also* Estate of Larsen *ex rel.* Sturdivan v. Murr, 511 F.3d 1255, 1260 (10th Cir. 2008) ("*We* assess objective reasonableness . . . ." (emphasis added)).

Other opinions leave it unclear whether reasonableness will be decided by judge or jury. *See* Meadours v. Ermel, 483 F.3d 417, 423 (5th Cir. 2007) (giving somewhat confusing signals as to whether the Fourth Amendment reasonableness issue was for the court or the jury). In *Meadours*, the court stated that in order to resolve that issue, "*we* must balance the amount of force used against the need for force." *Id.* at 423 (emphasis added). But then it said that "[w]e express no opinion about the ultimate reasonableness of the officers' actions. It is for a jury to decide the factual disputes, and at this stage we cannot say the officers are entitled to qualified immunity." *Id.* at 424. It is hard to be certain just where the *Meadours* court means to put the responsibility for deciding reasonableness. For an earlier 5th Circuit case that seems to rest on the implicit premise that the issue is for the court, *see* Ballard v. Burton, 444 F.3d 391, 402–03 (5th Cir. 2006) (taking the plaintiff's historical facts as given, the court addressed and resolved the Fourth Amendment reasonableness issue for the defendant). *Ramirez* does not cite either *Meadours* or *Ballard*, but relies instead on a case decided before either of them. *See* 542 F.3d at 128 (citing *Balderama*, 153 F.3d at 241).

should allocate decision-making responsibility in favor of judge or jury. And not one decision even begins to sketch the arguments that cut against the decision the court has reached. As a result, there appear to be not merely disagreements among circuits but *intra*-circuit conflicts on this question.[18] It is impossible to know for sure, however, because courts typically do not even flag the judge–jury allocation issue or explain why they have resolved that issue one way rather than the other. Nor is it always clear whether a court is squarely ruling on the merits of the excessive force issue or on the reasonableness of a potential jury finding for one party or the other.[19]

My thesis is that in § 1983 litigation, judges should be favored over juries in deciding matters, such as Fourth Amendment reasonableness, that require the application of law to fact.[20] Judges should be favored because the substantive constitutional law in this area should be stated in the form of rules, and only judges can make rules. The core of my argument is that the judge–jury issue cannot be resolved in a vacuum.[21] It must take account of the official immunity doctrine,

---

18. *Compare Flores*, 381 F.3d at 399 (5th Cir.), *Baker*, 471 F.3d at 607 (6th Cir.), *Chelios*, 520 F.3d at 689 (7th Cir.), *and Parks*, 387 F.3d at 955–56 (8th Cir.) *with Ramirez*, 542 F.3d at 124 (5th Cir.), *Davenport*, 521 F.3d at 550–54 (6th Cir.), *Bell*, 321 F.3d at 640 (7th Cir.), *and Moore*, 514 F.3d at 762 (8th Cir.).

19. *See, e.g.*, Davenport v. Causey, 521 F.3d at 546 (noting that the officer, Causey, stopped Davenport for a traffic violation at 7:58:43 A.M.; Davenport disobeyed his commands, and at 7:59:51 A.M., Causey shot and killed Davenport). The Court's holding in favor of the defendant *may* be a ruling of the kind a court might make in ordinary negligence law, that (a) the issue is for the jury, and (b) a jury could not reasonably find for the plaintiff on these facts.

A more plausible reading of the case is that the court addresses the constitutional issue directly and rules that the officers acted reasonably. *See id.* at 552 (stating "*judges* are to look" at various factors) (emphasis added). One cannot be certain of this, however, because the court does not explicitly indicate just what it is doing.

20. The "unreasonable seizure" judge–jury issue is one aspect of a much larger debate. The judge–jury issue comes up across the whole range of topics covered by American law, and its resolution may vary depending on the substantive context in which it arises. *See* Mark P. Gergen, *The Jury's Role in Deciding Normative Issues in the American Common Law*, 68 FORDHAM L. REV. 407, 409 (1999) (discussing the judge–jury issue and its substantive contexts).

21. As Daryl Levinson points out in his critique of "rights essentialism," one cannot think straight about constitutional rights without taking account of remedial considerations: "Rights are dependent on remedies not just for their application to the real world, but for their scope, shape, and very existence." Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 858 (1999).

which protects police officers from liability unless they have violated "clearly established . . . rights of which a reasonable person would have known."[22] The aims of § 1983—vindicating constitutional rights and deterring constitutional violations[23]—are now and will continue to be systematically frustrated by the official immunity doctrine unless courts strive to state substantive constitutional "excessive force" law in the form of black letter rules. For this reason, I argue that the normatively superior reading of *Scott* is the judge-over-jury alternative. Objections to this reading that champions of the jury might advance are, on balance, unavailing.

I defend this thesis in five Parts. Part I examines and rejects the notion that Fourth Amendment values are adequately served by transplanting jury-friendly common law principles into the law of constitutional torts. I argue that the seeming analogy between constitutional torts and common law torts is weak because the differences between the two areas override similarities. Part II discusses the distinctive policy issues raised by the judge–jury question in § 1983 litigation and urges that a heightened need for rule-oriented doctrine in this area favors a decision-making scheme that assigns more authority to judges than to juries. Part III examines the extensive body of lower court opinions in excessive force cases and suggests that modern courts have moved in the direction advocated here, by giving judicially enforceable content to the Fourth Amendment's commands. Part IV considers the impact of *Scott* on the future of this movement. Part V addresses objections to my thesis likely to come from

---

22. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); *see infra* Part III.B.2. This article takes the current law of qualified immunity as a given and argues for stating substantive constitutional law in the form of rules as a means of coping with this obstacle to recovery. Another alternative is to replace *Harlow* with a more rule-oriented approach to immunity. *See* Alan K. Chen, *The Ultimate Standard: Qualified Immunity in the Age of Constitutional Balancing Tests*, 81 IOWA L. REV. 261, 332–33 (1995) ("[*S*]*ome* form of immunity rules would be preferable to the current, unqualified immunity standard").

23. *See, e.g.*, Owen v. City of Independence, 445 U.S. 622, 650–54 (1980) (discussing compensation and deterrence); Carey v. Piphus, 435 U.S. 247, 253–56 (1978) (same). The Court's references to "compensation" are best understood as shorthand for vindication of rights, for the Court's doctrine is not designed to assure that constitutional wrongs will always be compensated. They may nonetheless be adequately vindicated. *See* John C. Jeffries, Jr., *Compensation for Constitutional Torts: Reflections on the Significance of Fault*, 88 MICH. L. REV. 82, 84–96 (1989) (discussing rationales for compensation).

proponents of open-ended constitutional balancing tests that tend to channel decision making to juries.

II. SECTION 1983 AND THE COMMON LAW

Section 1983 authorizes a cause of action against any person who, "under color of" state law, violates the plaintiff's constitutional rights. Harris's § 1983 suit against Scott rested on a well-settled doctrinal framework: (1) An "unreasonable . . . seizure" violates the Fourth Amendment;[24] (2) a "seizure" occurs when there is a "governmental termination of movement through means intentionally applied"[25]; (3) ramming a car to stop it amounts to a "seizure";[26] and (4) a seizure is "unreasonable" when a police officer uses "excessive force" in bringing it about.[27] In this case and others like it, the key issue is whether the force was reasonable or excessive.[28] The principal

24. *See* Graham v. Connor, 490 U.S. 386, 394 (1989) ("Where . . . the excessive force claim arises in the context of an arrest or investigatory stop of a free citizen, it is most properly characterized as one involving the protections of the Fourth Amendment, which guarantees citizens the right 'to be secure in their persons . . . against unreasonable . . . seizures' of the person.")

At some point after the initial arrest, the interaction between the officer and the person seized will be governed by Fourteenth Amendment substantive due process rather than the Fourth Amendment. *See* Orem v. Rephann, 523 F.3d 442, 446 (4th Cir. 2008) (holding when the excessive force occurs after the arrest, while the plaintiff is being transported to jail for booking, the Fourteenth Amendment test applies, and the plaintiff must show that the officer "inflicted unnecessary and wanton pain and suffering" (quoting Taylor v. McDuffie, 155 F.3d 479, 483 (4th Cir. 1998))). The Supreme Court has not yet specified exactly what line should be drawn. My focus in this article is solely on Fourth Amendment claims.

25. Brower v. Inyo County, 489 U.S. 593, 597 (1989) (emphasis omitted).

26. Scott v. Harris, 550 U.S. 372, 381 (2007) (deriving the principle that ramming a car to stop it amounts to a "seizure" from the Court's reasoning in *Brower*, 489 U.S. at 597).

27. *Graham*, 490 U.S. at 394.

28. This article deals primarily with the judge–jury issues that arise in excessive-force cases. Note that an encounter with the police may give rise to other constitutional claims, including: (a) whether an officer at the scene, who fails to intervene to protect the victim from the force, may be held liable, *see, e.g.*, Hadley v. Gutierrez, 526 F.3d 1324, 1330–31 (11th Cir. 2008) (holding officer entitled to qualified immunity because no evidence presented at trial that he could have prevented excessive force); (b) whether the officer had sufficient grounds to justify *any* seizure, even one that does not involve the use of force, *see, e.g.*, Shipman v.

Supreme Court ruling on the topic came in *Graham v. Connor*.[29] Using language reminiscent of common law negligence, the Court held that deciding Fourth Amendment reasonableness "requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight."[30] The *Graham* Court did not say whether the "reasonableness" inquiry was to be made by the judge or the jury.[31]

Hamilton, 520 F.3d 775, 776–77, 781 (7th Cir. 2008) (seeking to serve a summons on a hospital patient, an officer arrested a nurse who, according to the officer, obstructed his work; the court held that on the plaintiff's version of the facts, there was no obstruction and the right not be seized was clearly established, precluding qualified immunity); (c) whether probable cause existed for a search, *see, e.g.*, Graves v. City of Coeur d'Alene, 339 F.3d 828, 844 (9th Cir. 2003) (finding insufficient evidence of probable cause, since only evidence that could be considered was the fact that protestor carried a heavy backpack with bulges in an "indisputably dangerous setting"); (d) assuming probable cause, whether the search itself was reasonable, *see, e.g.*, Arachuleta v. Wagner, 523 F.3d 1278, 1286–87 (10th Cir. 2008) (holding that, in the circumstances, a strip search violated the Fourth Amendment); and finally, (e) when the police injure someone other than a person they were seeking to seize or search, the relevant constitutional doctrine is substantive due process, *see* County of Sacramento v. Lewis, 523 U.S. 833, 853–54 (1998) (holding plaintiff must show that the officer's conduct shocks the conscience).

Of course, an incident may produce multiple claims, and one may succeed while another fails. *See, e.g.*, Holmes v. Vill. of Hoffman Estates, 511 F.3d 673, 687–88 (7th Cir. 2007) (concluding that illegal arrest claim fails but excessive-force claim may succeed).

29. 490 U.S. 386 (1989).

30. *Id.* at 396. In *Scott*, the Court added to this list the "relative culpability" of the officer and the plaintiff. 550 U.S. at 384. Lower courts have also supplemented this list of factors from time to time. *See, e.g.*, Fogarty v. Gallegos, 523 F.3d 1147, 1159–60 (10th Cir. 2008) (determining whether the officer's "'reckless or deliberate conduct' in connection with the arrest contributed to the need to use the force employed" (quoting Jiron v. City of Lakewood, 392 F.3d 410, 415 (10th Cir. 2008))); Davis v. City of Las Vegas, 478 F.3d 1048, 1054 (9th Cir. 2007) ("Courts may also consider 'the availability of alternative methods of capturing or subduing a suspect.'" (quoting Smith v. City of Hemet, 394 F.3d 689, 701 (9th Cir. 2005))); Littrell v. Franklin, 388 F.3d 578, 583 (8th Cir. 2004) (stating "the result of the force" may be a factor (quoting Crumley v. City of St. Paul, 324 F.3d 1003, 1007 (8th Cir. 2003))); Robinson v. Solano County, 218 F.3d 1030, 1036 (9th Cir. 2000) (considering "whether the plaintiff was sober" (quoting *Graham*, 490 U.S. at 1440 n.5)).

31. *See* 490 U.S. at 396 (describing the Fourth Amendment test and stating that "its proper application requires careful attention to the facts and circumstances of each

The common law of torts, however, plainly opts for the jury. In ordinary tort cases, the jury not only finds the facts, but also applies law to fact, evaluating the conduct of the parties under the negligence standard of "reasonable care."[32] Even when the facts are not disputed, the jury ordinarily makes these assessments.[33] Thus, the Restatement assigns to the jury responsibility for resolving factual disputes,[34] and then describes its role in applying law to fact:

> When, in light of all the facts relating to the actor's conduct, reasonable minds can differ as to whether the conduct lacks reasonable care, it is the function of the jury to make that determination.[35]

The court's responsibility in dealing with common law torts is to oversee the jury on both fact finding and application of law to fact, overturning verdicts or granting summary judgment and directed verdicts where a reasonable jury could reach only one conclusion.[36]

A. The Ambiguous Majority Opinion in Scott

Justice Scalia's opinion in *Scott* contains passages on both sides of the judge–jury allocation issue. Some parts of the opinion imply that

---

particular case," without specifying whether the decision-maker should be the judge or the jury). Later, the Court used the passive voice, perhaps in order to avoid the judge–jury issue—"[t]he 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene." *Id.*

32. *See* RESTATEMENT (SECOND) OF TORTS § 285 cmt. g ("If no standard of obligatory conduct has been established . . . the jury must itself define the standard of the reasonable man . . . .").

33. *See* Gergen, *supra* note 20, at 434 & n.121 ("Where there is only normative doubt about what is reasonable conduct, a judge could decide the issue without intruding on the role of the jury as fact-finder. This possibility most clearly arises in a case where the facts are undisputed but breach is contested. In negligence law, the issue of breach goes to the jury in such a case."). The qualifier ("ordinarily") is necessary because "in some cases reasonable minds can reach only one conclusion. . . . Yet most of the time, the rule [on allocation of decision making between judge and jury] calls for a jury decision on the negligence issue." RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 8 cmt. b (Tentative Draft No. 1, 2001).

34. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 8(a) (Tentative Draft No. 1, 2001).

35. *Id.* § 8(b).

36. *Id.* § 8 cmt. b.

the issue is ordinarily for the jury, subject to standard judicial oversight. The Court's opinion takes issue with "the version of the story told by [Harris] and adopted by the Court of Appeals."[37] The chase was recorded on videotape by cameras mounted in the police cars, and "[t]he videotape quite clearly contradict[ed]" Harris's version of the events.[38]

> There we see [Harris's] vehicle racing down narrow, two-lane roads in the dead of night at speeds that are shockingly fast. We see it swerve around more than a dozen other cars, cross the double-yellow line, and force cars traveling in both directions to their respective shoulders to avoid being hit. We see it run multiple red lights and travel for considerable periods of time in the occasional center left-turn-only lane, chased by numerous police cars forced to engage in the same hazardous maneuvers just to keep up. Far from being the cautious and controlled driver the lower court depicts, what we see on the video more closely resembles a Hollywood-style car chase of the most frightening sort, placing police officers and innocent bystanders alike at great risk of serious injury.[39]

The Court pointed out that, in applying the summary judgment rule, the non-movant's perspective should be taken only if there is a "genuine" factual dispute.[40] Here the plaintiff's version was "so utterly discredited by the record that no reasonable jury could have believed him," and the Eleventh Circuit "should not have relied on such visible fiction."[41]

If the reasonableness issue were for the jury, the opinion might have ended there, remanding and giving directions to the district court to instruct the jury that Harris's driving endangered others—a fact which it should bear in mind in evaluating the reasonableness of Scott's actions. Justice Scalia, however, found it necessary for the Court to

37. Scott v. Harris, 550 U.S. 372, 378 (2007).
38. *Id.*
39. *Id.* at 379–80 (citations omitted).
40. *Id.* at 380 (citing FED. R. CIV. P. 56(c)).
41. *Id.* at 380–81.

"slosh our way through the factbound morass of 'reasonableness.'"[42] He went on to examine the substantive content of Fourth Amendment reasonableness and apply that content to the facts of this case.[43] Citing a criminal case in which the reasonableness of a search was determined by courts, he said that the task is to "balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion."[44] In the high-speed chase, excessive-force context, he continued, the specific issue is whether the need to stop the fleeing motorist justifies the use of deadly force.[45] Here, the videotape showed that Harris "posed an actual and imminent threat" to pedestrians, other motorists, and the police.[46] At the same time, "Scott's actions posed a high likelihood of serious injury or death to [Harris]."[47]

Given these competing considerations, the approach of common law torts would be to ask the jury to balance them, subject to judicial control in cases where the jury acts irrationally. But this is not what the Court did in *Scott*. Writing for the Court, Justice Scalia did not take on the role of overseer, asking whether a reasonable jury could find that Scott used excessive force. On the Court's behalf, he carried out the excessive-force balancing calculation from scratch. He resolved the difficulty of weighing one factor against the other by "tak[ing] into account not only the number of lives at risk, but also their relative culpability."[48] Harris's responsibility for the dangerous situation tipped the balance in favor of finding that Scott's force was not excessive.[49] Obliging the police to let Harris go, in the hope that he would slow down, was not an acceptable alternative, for "there would have been no way to convey convincingly to [Harris] that the chase was off," so he "might have been just as likely to respond by continuing to drive recklessly as by slowing down and wiping his brow."[50] Whether one agrees or not with this line of reasoning, it contains nothing to suggest that the reasonableness determination is for a jury in the first instance,

42. *Id.* at 383.
43. *Id.* at 383–84.
44. *Id.* at 383 (quoting United States v. Place, 462 U.S. 696, 703 (1983)).
45. *Id.*
46. *Id.* at 384.
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.* at 385.

subject to the usual highly deferential judicial oversight. It begins from the premise that judges—including Supreme Court Justices—themselves are to make the Fourth Amendment reasonableness assessment.

B. Borrowing Common Law Doctrines

Sooner or later, the Court will be obliged to give the § 1983 judge–jury problem more systematic treatment than it did in *Scott* or *Graham*. Whatever the Court meant to do in those cases, the Justices inevitably will have to decide whether they wish to modify the common law approach in § 1983 cases. The statute contains no provisions on the many remedial issues that come up in suits for damages.[51] As a result, the Supreme Court has undertaken a considerable amount of federal common law making on the tort law aspects of the cause of action, such as causation, immunity, and damages.[52] Along the way, the Court has declared that § 1983 "should be read against the background of tort liability,"[53] and has often characterized § 1983 as creating "a species of tort liability."[54] These elements of the Court's reasoning suggest that it may be appropriate to borrow from the common law in allocating responsibilities between judge and jury. Despite *Scott*, determinations of Fourth Amendment reasonableness might be assigned to the jury by analogy to common law negligence, where the issue of reasonable care is for the jury, even where the facts are not in dispute.[55]

Time and again the Supreme Court has turned to tort law in deciding § 1983 issues, such as the scope of official immunity, cause in

---

51. *See* Michael Wells, *Constitutional Remedies, Section 1983 and the Common Law*, 68 MISS. L.J. 157, 158 (1998) ("The usual source of answers to questions raised by a statutory remedy is the statute itself. But referring to the text of [§ 1983] is unavailing, because it does nothing more than authorize a remedy.").

52. *See* Wells, *supra* note 51, at 158–59 (giving a detailed examination of these issues).

53. Monroe v. Pape, 365 U.S. 167, 187 (1961), *overruled on other grounds by* Monell v. Dept. of Soc. Servs. of City of New York, 436 U.S. 658, 663 (1978); *see* Sheldon Nahmod, *Section 1983 and the "Background" of Tort Liability*, 50 IND. L.J. 5, 7–13 (1974) (discussing the implications of this proposition for the development of constitutional tort doctrine).

54. *E.g.*, City of Monterey, v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 709 (1999); Heck v. Humphrey, 512 U.S. 477, 483 (1994); Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 305 (1986).

55. *See supra* note 33.

fact, proximate cause, damages, and municipal liability.[56] In the Court's opinions on § 1983, there often seems to be a presumption in favor of following the common law.[57] For example, the central common law principle for compensatory damages is that they should make the plaintiff whole for injury due to the wrong.[58] In *Carey v. Piphus*[59] and *Memphis School District v. Stachura*[60] the Court made this common law principle the basic rule for § 1983 suits as well. *Smith v. Wade* takes the common law as the model for punitive damage awards.[61] In similar fashion, *Pierson v. Ray*[62] borrowed from the common law in making § 1983 official immunity doctrine, and *Town of Newton v. Rumery*[63] applied common law principles to enforce a release–dismissal agreement. Common law principles for cause in fact[64] and proximate cause[65] also apply to constitutional torts.

These cases, and the analogical reasoning that undergirds them, furnish grounds for borrowing from the common law, at least presumptively, on the judge–jury allocation issue as well. On its face, the Fourth Amendment's touchstone of "reasonableness" resembles the "reasonable care" standard that dominates common law negligence. In tort law, the issue of whether someone is at fault under this test is ordinarily left to the jury, even where the facts are not at issue.[66]

---

56. *See, e.g.*, Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 285–87 (1997) (cause in fact); Smith v. Wade, 461 U.S. 30, 34 (1983) (damages); Martinez v. California, 444 U.S. 277, 285 (1980) (municipal liability); Pierson v. Ray, 386 U.S. 547, 553–54, 557 (1967) (official immunity).

57. *See* Wells, *supra* note 51, at 158, 160–76 (documenting the point).

58. RESTATEMENT (SECOND OF TORTS) § 903 (stating compensatory damages are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct).

59. 435 U.S. 247, 254–55, 257–58 (1978) (borrowing the compensation principle from common law torts).

60. 477 U.S. 299, 306, 310 (1986) (applying the common law compensation principle to free speech claims).

61. 461 U.S. at 34 (1983) (discussing common law punitive damages doctrine).

62. 386 U.S. 547, 553–54, 557 (1967) (discussing common law official immunity principles); *see also* Owen v. City of Independence, 445 U.S. 622, 638–50 (1980) (discussing common law principles of municipal immunity).

63. 480 U.S. 386, 392 (1987) (borrowing common law contract principles).

64. *See* Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 285–87 (1977) (utilizing the "but for" test for cause in fact, with the burden of proof on the defendant).

65. *See* Martinez v. California, 444 U.S. 277, 285 (1980) (remote consequences).

66. *See supra* note 33.

"Reasoning by analogy is the most familiar form of legal reasoning,"[67] and here the case for borrowing makes use of two analogies. The analogy between common law tort and constitutional tort supports the borrowing reflected in cases on damages, causation, and immunity. Cases like *Carey*, *Pierson*, and *Smith*, thus, bolster the case for borrowing the common law judge–jury framework. If simple borrowing were the norm, Justice Scalia's majority opinion in *Scott* would seem to be an anomaly, as he evidently rejects the common law in favor of judicial decision making on reasonableness.[68]

In fact, however, the Court has not transplanted the common law into § 1983 in wholesale fashion by means of a straightforward analogy. What the Court has actually done in the causation, immunity, and damages cases is to consider the strength of the constitutional tort–common law tort analogy at the retail level, giving it more weight in some contexts than others. In choosing remedial rules, for example, the Court's central premise has been that those rules should further the purposes of constitutional tort law.[69] Those purposes include vindicating constitutional rights and deterring constitutional violations, but doing so with an eye toward both the good and bad incentives that the threat of liability may create.[70] The critical question for the Court in most of the cases has been whether the purposes of § 1983 are well served by borrowing the common law doctrine.[71] If not, the Court

67. Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 741 (1993).

68. 550 U.S. 372, 384 (2007).

69. *See, e.g.*, Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982) (explaining that "the recognition of a qualified immunity defense . . . reflected an attempt to balance competing values: not only the importance of a damages remedy to protect the rights of citizens but also the need to protect officials who are required to exercise their discretion") (citation and internal quotation marks omitted); Robertson v. Wegmann, 436 U.S. 584, 590–91 (1978) (finding no conflict between § 1983's compensation and deterrence policies and a state survivorship rule that, on the facts of this case, abated the cause of action). *See also*, Wells, *supra* note 51, at 190–91 (discussing the Court's approach to causation and damages issues).

70. *See, e.g.*, Owen v. City of Independence, 445 U.S. 622, 650–54 (1980) (discussing compensation and deterrence); Carey v. Piphus, 435 U.S. 247, 253–56 (1978) (same). As noted *supra* in note 23, the Court's references to "compensation" are best understood as shorthand for vindication of rights, for the Court's doctrine is not designed to assure that constitutional wrongs will always be compensated. They may nonetheless be adequately vindicated. *See* Jeffries, *supra* note , at 84–86 (discussing rationales for compensation).

71. *See supra* note 69.

rejects application of that doctrine in favor of rules better suited to § 1983.[72] In other words, the functional considerations bearing on achieving the aims of constitutional tort law take priority over simply borrowing common law rules. Thus, *Carey v. Piphus* held that the common law rules of damages ordinarily apply in § 1983 cases, but the Court took care to qualify its endorsement, by noting that "the interests protected by a particular constitutional right may not also be protected by an analogous branch of the common law [of] torts."[73] In such a case, "the task will be the more difficult one of adapting common-law rules of damages to provide fair compensation for injuries caused by the deprivation of a constitutional right."[74]

The Court's doctrine on official immunity shows how the Court borrows from the common law without automatically importing it into constitutional tort law. The common law background included an immunity defense for officials charged with torts committed while carrying out their duties.[75] Even if they violated the plaintiff's rights and caused damage, they escaped liability on account of this immunity.[76] The main policy behind immunity for government workers is avoiding "overdeterrence" of bold and effective action by officers.[77] The worry is that, absent some protection, government agents will be overly cautious in the way they carry out their jobs—for action can produce harm and lead to liability, while inaction seldom will. In common law torts, the scope of the immunity varies depending on the type of tort, the jurisdiction, the official, and the nature of his duties.[78] In *Pierson v. Ray*, the Court held that official immunity applies to § 1983 cases, relying on the common law doctrine for support.[79] But in the Court's development of the immunity doctrine it has been alert to

72. *See, e.g.*, Martinez v. California, 444 U.S. 277, 284 & n.8 (1980) (rejecting application of a sweeping state law immunity doctrine to § 1983 cases).

73. 435 U.S. 247, 254–58 (1978). *See* Jean C. Love, *Damages: A Remedy for the Violation of Constitutional Rights*, 67 CAL. L. REV. 1242 (1979) (discussing *Carey* and the issues it raises).

74. *Carey*, 435 U.S. at 258.

75. *See* Pierson v. Ray, 386 U.S. 547, 555 (1967) (discussing the common law immunity defense available to police officers).

76. *Id.*

77. *See* Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982) (discussing the "social costs" of allowing suits against officials).

78. *See* DAN B. DOBBS, THE LAW OF TORTS 732–37 (West 2000) (summarizing the official immunity doctrine).

79. 386 U.S. 547, 553–57 (1967).

the need to modify ordinary tort law in order to achieve the aims of constitutional tort. For example, in some situations, the common law rule grants executive officials absolute immunity.[80] Early in the development of constitutional torts the Court rejected this rule, however, because absolute immunity would thwart the vindication and deterrence goals of § 1983.[81]

The Court has also broken with the common law in defining the *content* of official immunity. Some of the *Pierson* defendants were police officers.[82] As to them, the common law rule allowed a defense if the officer acted with "good faith and probable cause," and the Court borrowed this for § 1983 litigation.[83] Over time, the Court became concerned that the "good faith" prong of this test, with its focus on the subjective beliefs of the officer, made it hard to avoid a trial centering on the officer's credibility.[84] The proliferation of trials undermined the goal of avoiding overdeterrence because officers would be deterred merely by the prospect of having to go to trial.[85] As a result, in *Harlow v. Fitzgerald*, the Court abandoned the "good faith" prong, adopting an objective test that focuses on whether the official violated "clearly established . . . constitutional rights of which a reasonable person would have known."[86] In doing so, the Court jettisoned the common law analogue it had adopted in *Pierson* fifteen years earlier.[87]

C. *Jury Trial: The Common Law/Constitutional Tort Analogy*

Carey and *Harlow* demonstrate the general principle that the force of an argument from analogy depends on whether "A and B are

---

80. *See, e.g.*, Barr v. Matteo, 360 U.S. 564, 574 (1959) (holding federal official is absolutely immune from liability for common law defamation).

81. Scheuer v. Rhodes, 416 U.S. 232, 248 (1974) (stating if absolute immunity were available, "§ 1983 would be drained of meaning"); *see also* Wells, *supra* note , at 189–90 (discussing *Barr* and *Scheuer*).

82. 386 U.S. at 549.

83. *Id.* at 557.

84. *See, e.g.*, Harlow v. Fitzgerald, 457 U.S. 800, 816 (1982) (discussing the burdens involved in judicial inquiry into the subjective motivation of government officials).

85. 457 U.S. at 817 ("Judicial inquiry into subjective motivation . . . can be peculiarly disruptive of effective government.").

86. 457 U.S. 800, 818 (1982).

87. *See* Wells, *supra* note 51, at 181–82 (discussing this shift).

'relevantly' similar, and that there are not 'relevant' differences between them."[88] In practice, of course, there will always be both similarities and differences between A and B. With regard to the role of the jury in § 1983 excessive-force cases, the question of whether to borrow from common law negligence comes down to whether, in the excessive-force context, the factors favoring the jury rank higher than competing values.

The leading negligence case on the allocation of decision making between judge and jury, decided at the dawn of modern tort law, is *Sioux City & Pacific Railroad Co. v. Stout*.[89] Then, as now, negligence consisted of lack of "caution such as a man of ordinary prudence would observe,"[90] or "what would be blameworthy in the average man, the man of ordinary intelligence and prudence,"[91]—who was thus termed "the ordinarily prudent normal man."[92] One well-known English case put flesh on the bones of the reasonable person (at least the male version) by describing him as "the man on the Clapham omnibus," and "the man who takes the magazines at home, and in the evening pushes the lawn mower in his shirt sleeves."[93] A jury chosen from the community at large should make this determination, *Stout* ruled, because "twelve men know more of the common affairs of life than does one man," and "they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge."[94] This

---

88. Sunstein, *supra* note , at 745.

89. 84 U.S. 657 (1873).

90. Vaughan v. Menlove, (1837) 132 Eng. Rep. 490, 493 (C.P.) (Tindal, C.J., concurring).

91. O.W. HOLMES, JR., THE COMMON LAW 87 (Mark D. Howe ed., Harvard University Press 1963) (1881).

92. Roberts v. Ring, 173 N.W. 437, 438 (Minn. 1919).

93. Hall v. Brooklands Auto Racing Club, [1933] 1 K.B. 205, 224.

94. 84 U.S. at 664. Professor Gergen stresses the normative implications of assigning the breach of duty issue to the jury:

> That the issue of breach is put to the jury even when facts are free of doubt shows that in negligence law independent value is put on the jury deciding what is reasonable conduct when the normative issue is open to debate. This is where what I call the values of popular judgment come into play. The many celebrations of the jury's role in negligence focus more on the jury's role in deciding normative issues than the jury's role in deciding factual issues.

See Gergen, *supra* note , at 435.

view has held sway ever since and is reiterated in the Third Restatement of Torts.[95]

Since one or another version of "reasonableness" is at the core of both common law negligence and Fourth Amendment excessive-force cases, one may attempt to argue by analogy for jury trial for at least this particular constitutional tort issue.[96] The problem with the argument by analogy is that there is a relevant difference between constitutional torts and common law torts. The rationale for jury decision making advanced in *Stout* and generally endorsed by common law courts is that a group of ordinary citizens will likely have a better feel for what constitutes "ordinary care" than will one judge.[97] But the force of this reasoning is diminished in the Fourth Amendment excessive-force context. It is true that the perspective of the ordinary person influences the content and application of some Fourth Amendment principles, notably in determining whether a person has a reasonable expectation of privacy in a given set of circumstances.[98] Even so, the Fourth Amendment's "reasonableness" test (including in excessive-force cases) is not simply an application of the general tort

95. *See* RESTATEMENT (THIRD) OF TORTS § 8 cmt. b (Tentative Draft No. 1, 2001) ("The jury is assigned the responsibility of rendering such judgments partly because several minds are better than one, and also because of the desirability of taking advantage of the insight and values of the community, as embodied in the jury, rather than relying on the professional knowledge of the judge.").

96. Focusing on negligence law may make the analogical argument for jury decision making in constitutional tort seem stronger than it actually is. Even in the common law, the role of the jury varies from one tort to another. While the jury's authority is considerable in negligence, "[h]istorically, the jury has had little to say on normative issues in administering the torts of battery, assault, trespass, and conversion, [because] these torts take the form of categorical rules that, on their face, ask for no normative judgment at the point of application." Gergen, *supra* note , at 439. Gergen also shows that the jury's role in classical contract law is far more limited than in negligence. *See id.* at 440–61 (stating that because of highly formalized rules, judges generally make normative decisions). He argues that the reason for the difference is that we place more value "on having normative determinations made by people with legal training and the perspective of judges" in contract law. *Id.* at 410.

97. *See Stout*, 84 U.S. at 664 ("It is assumed that twelve men know more of common affairs of life than does one man, that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge.").

98. *See, e.g.*, Georgia v. Randolph, 547 U.S. 103, 111 (2006) ("The constant element in assessing Fourth Amendment reasonableness in the consent cases . . . is the great significance given to widely shared social expectations.")

standard of care.[99] Unlike the common law negligence principle, the Fourth Amendment is not directed toward all members of society, but only toward governments and their officers.[100] The broad aim of common law negligence is to assign liability for personal injury to faulty actors but without any well-defined goal in mind. As Professor Kenneth Abraham has noted, "the law of torts has grown and evolved, state-by-state, without any central, self-conscious authority to make it responsive to a clear set of express goals."[101]

The far more focused aim of Fourth Amendment excessive-force doctrine is to curb the power of officials to search and seize persons and property as they wield the state's monopoly of force.[102] In setting the basic Fourth Amendment excessive-force standard, the Court in *Graham* evidently did not borrow from the common law, rather it drew on earlier Fourth Amendment precedents.[103] Adjudicating

---

99. It is possible that "reasonableness" in tort law ought to be given the same content as "reasonableness" in the Fourth Amendment. But the Supreme Court has never said so, and at least one Circuit disputes the notion that the two are the same. *See* Long v. Slaton, 508 F.3d 576, 580 n.6 (11th Cir. 2007) (stating Fourth Amendment's "reasonableness" standard and the "standard of reasonable care" under tort law are not the same). Given that the Fourth Amendment addresses a comparatively narrow range of cases involving the relations between the state and the individual, while the common law of torts reaches a vast array of interactions, and given the different policy considerations bearing on each, *Long* seems persuasive on this point.

100. Like all provisions of the Bill of Rights and the Fourteenth Amendment, the Fourth Amendment's guarantee reaches only "state action." *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 507 (3d ed. 2006). Only in a few circumstances are private entities deemed to be state actors. *See id.* at 517–39 for a general discussion.

101. KENNETH S. ABRAHAM, THE FORMS AND FUNCTIONS OF TORT LAW 14 (3d ed., Foundation Press 2007). According to some scholars, the explanation, and perhaps justification, for unwillingness to construct a more coherent body of negligence law, lies in reluctance to make definitive choices among competing values and thus creating a preference for leaving those choices to juries on a case-by-case basis. Gergen, *supra* note , at 436 & n.129. To the extent this is true, constitutional tort law differs rather sharply from negligence law. Here the constitutional values enforced in § 1983 litigation have already been reasonably well-defined, in part by the text and original understanding of the document and in part by over two centuries of Supreme Court decisions.

102. *See* Graham v. Connor, 490 U.S. 386, 395 (1989) ("[T]he Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct.").

103. *See id.* at 396 (citing United States v. Place, 462 U.S. 696, 703 (1983)

excessive-force cases does not call for a determination of what a person of ordinary prudence would do or not do. It involves a balancing of competing concerns to ascertain whether the police crossed a constitutional line.[104]

III. JUDGE VS. JURY IN CONSTITUTIONAL TORTS

Identifying differences between constitutional and common law torts undermines the argument by analogy and thereby helps to make the case for limiting the role of the jury in § 1983 cases. This, however, is only one step in the argument. Showing that constitutional torts differ from common law torts does not fully answer the question of whether judges or juries should decide law application issues in constitutional torts. It just allows us to direct our attention to the distinctive features of the constitutional context without being distracted by misleading common law comparisons. This Part of the article discusses two aspects of the constitutional setting that are of distinctive importance. First, if the judge–jury issue is viewed from the perspective of constitutional theory, it cannot be resolved without making a hard choice between competing substantive values. Second, the hard choice at the level of theory is an easier one at the level of practice. From a pragmatic perspective there is a strong case for favoring judges over juries in § 1983 litigation, because otherwise suits for damages cannot effectively serve the goals of constitutional tort law—vindicating constitutional rights and deterring violations.[105] The

---

(holding that a dog sniffing a suitcase is not a "search," so evidence obtained in this way can be admitted in a criminal trial despite Fourth Amendment objections)); Tennessee v. Garner, 471 U.S. 1, 7–10, 12–19 (1985) (relying on Fourth Amendment precedent and rejecting the defendants' suggestion that it adopt the common law rule on the use of deadly force); Bell v. Wolfish, 441 U.S. 520, 535–39 (1979) (considering standards governing when an arrestee may be incarcerated pending trial); Terry v. Ohio, 392 U.S. 1, 19–22 (1968) (where the issue was the validity of an investigatory stop).

104. In *Scott*, the Court stated that "in judging whether Scott's actions were reasonable, we must consider the risk of bodily harm that Scott's actions posed to [Harris] in light of the threat to the public that Scott was trying to eliminate." 550 U.S. 372, 383 (2007). It also took into account the "relative culpability" of Scott and Harris, counting this against Harris since he bore responsibility for the situation. *Id.* at 384.

105. *See, e.g.*, Owen v. City of Independence, 445 U.S. 622, 650–54 (1980)

practical problem, in a nutshell, is that the official immunity doctrine will always stand in the way of liability unless substantive constitutional law is stated in the form of rules, and only judges can make rules.

A. Constitutional Values and Jury Trial in Section 1983 Litigation

Commenting on the American political institutions in the 1830s, Alexis de Tocqueville noted the role of the jury in promoting democratic values: "The institution of the jury . . . places the real direction of society in the hands of the governed."[106] According to Akhil Amar, "[n]o idea was more central to our Bill of Rights—indeed, to America's distinctive regime of government of the people, by the people, and for the people—than the idea of the jury."[107] The democratic value of jury decision making has direct relevance to § 1983 litigation. Catherine Struve suggests that "a jury finding of liability in a civil rights case serves as a more effective pronouncement than a judge's disposition would, because it can be seen as embodying the judgment of representatives of the community."[108] Professor Amar maintains that, for the framers of the Bill of Rights, in "both civil and criminal proceedings, the key role of the jury was to protect ordinary individuals against governmental overreaching."[109] In addition, serving on a jury would educate citizens, "instill[ing] republican legal and political virtues,"[110] and would permit "ordinary Citizens [to]

(discussing compensation and deterrence); Carey v. Piphus, 435 U.S. 247, 253–56 (1978) (same). As noted *supra* in note 23, the Court's references to "compensation" are best understood as shorthand for vindication of rights, for the Court's doctrine is not designed to assure that constitutional wrongs will always be compensated. They still may be adequately vindicated. *See* Jeffries, *supra* note , at 84–86 (discussing rationales for compensation).

106. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 260 (Harvey C. Mansfield & Delba Winthrop eds. & trans., University of Chicago Press 2000).

107. Akhil Reed Amar, *Reinventing Juries: Ten Suggested Reforms*, 28 U.C. DAVIS L. REV. 1169, 1169 (1995).

108. Catherine T. Struve, *Constitutional Decision Rules for Juries*, 37 COLUM. HUM. RTS. L. REV. 659, 706–07 (2006).

109. Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1183 (1991).

110. *Id.* at 1186.

participate in the application of national law."[111] The jury system "summed up—indeed embodied—the ideals of populism, federalism, and civic virtue that were the essence of the original Bill of Rights."[112]

Professor Amar's proposed revival of the jury is directly relevant to the role of juries in excessive-force cases. He asserts that, in our early history, "the preferred vehicle for litigating the Fourth Amendment was a tort suit brought by a citizen and tried before a Seventh Amendment jury of fellow citizens."[113] He would "revive this grand tradition" by giving juries a predominant (though not wholly defined) role in "assessing the mixed fact and law question of Fourth Amendment reasonableness."[114] Amar, however, does not appear to make a *constitutional* argument that either the Fourth or the Seventh Amendment requires jury trial; at least, he never flatly asserts that proposition.[115] As I understand his thesis, it draws on the tradition of judicial policy making in § 1983 litigation over issues like immunity, causation, and damages. Jury trial should be favored in these cases, in his view, because the jury's essential role is one of checking governmental oppression.[116] Accordingly, Fourth Amendment values would be better served by allocating these issues to juries.[117] Justice Stevens's dissent in *Scott* makes a similar argument. Some of his language vaguely suggests a constitutional objection to the Court's resolution of the case: Justice Stevens speaks of the plaintiff's "right" to a jury trial,[118] and maintains that "[w]hether a person's actions have risen to a level warranting deadly force is a question of fact best reserved for a jury."[119] But he never claims that the "right" is a constitutional right and never so much as mentions the Seventh

111. *Id.* at 1187.

112. *Id.* at 1190.

113. Amar, *supra* note , at 1171.

114. *Id.* at 1191–92.

115. *Id.* at 1192; *see* Markman v. Westview Instruments, Inc., 517 U.S. 370, 388 (1996) (rejecting a strictly historical methodology in interpreting the Seventh Amendment: "functional considerations" bear on whether judges or juries are better suited to resolve a particular issue); *see also* Paul F. Kirgis, *The Right to a Jury Decision on Questions of Fact Under the Seventh Amendment*, 64 OHIO ST. L. J. 1125, 1128–29 (2003) (discussing recent cases and suggesting that such an argument would likely fail in any event).

116. Amar, *supra* note , at 1191.

117. *Id.* at 1191–92.

118. Scott v. Harris, 550 U.S. 372, 390 (2007) (Stevens, J., dissenting).

119. *Id.* at 395.

Amendment.

By contrast, the Court in *Scott* seems to take it for granted that judges are authorized to make Fourth Amendment reasonableness determinations.[120] Like the *Scott* majority, many lower courts adjudicate Fourth Amendment reasonableness issues, rather than allocate them to the jury,[121] without justifying the choice of judges over jurors or even acknowledging that they are making a choice. In *Bell v. Irwin*, Judge Easterbrook did address the issue.[122] Turning down the plaintiff's argument for a jury determination of Fourth Amendment reasonableness, he said:

> [T]he Constitution is not a form of tort law. It creates legal rules. Permitting the jury to determine for itself whether particular conduct was reasonable within the meaning of the fourth amendment would introduce the *ex post* reassessment that *Graham* decried. Under the Constitution, the right question is how things appeared to objectively reasonable officers at the time of the events, *not* how they appear in the courtroom to a cross-section of the civilian community.[123]

This anti-hindsight argument is unconvincing because it rests on a faulty premise as to the role of the jury in tort law. In ordinary negligence cases the jury is specifically instructed to ask what a reasonable person in the actor's position would have done and is cautioned against hindsight.[124] In the common law, as in Fourth Amendment cases, the right question is "how things appeared to objectively reasonable [actors] at the time of the events."[125]

---

120. *See id.* at 381 (majority opinion) (Justice Scalia stating that Justice Stevens incorrectly concludes that "reasonableness" is a question of fact, when it is "purely" a question of law).

121. *See* cases cited *supra* note for illustrative cases.

122. 321 F.3d 637, 690 (7th Cir. 2003).

123. *Id.* at 640.

124. *See* RESTATEMENT OF TORTS (THIRD), *supra* note 34, § 3 cmt. g ("To establish the actor's negligence, it is not enough that there be a likelihood of harm; the likelihood must be foreseeable to the actor at the time of conduct."); *id.* reporter's note, at 65 ("Many opinions . . . emphasize that in considering negligence it is foresight rather than 'hindsight' that should be relied on.").

125. Bell v. Irwin, 321 F.3d 637, 640 (7th Cir. 2003).

Judge Easterbrook's failure to come up with a good answer to the case for the jury does not mean that none exist. Perhaps what he means to say is that juries cannot be expected to avoid hindsight in any kind of case,[126] no matter how they are instructed; that excessive liability has especially bad consequences for effective police work; and that the value of effective police work overrides the values served by jury rulings on Fourth Amendment reasonableness. Before accepting the Stevens–Amar–Blum–Struve thesis, courts should consider that possible objection. Other potential disadvantages to jury evaluations of excessive-force claims also deserve attention. Arguments that may be advanced in favor of the judge include:

- Judges deal with Fourth Amendment issues every day in both criminal and civil contexts. Simply on account of their expertise, they may be better suited to resolve them than juries.

- The general argument for summary judgment as a means of efficiently adjudicating disputes[127] supports judicial resolution of Fourth Amendment issues.

- Studies suggest that the amount juries award in damages depends partly on whether they think defendants have plenty of money.[128] As a result, plaintiffs may fare badly in cases where the only

126. Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 U. CHI. L. REV. 571, 572–74 (1998) (discussing "hindsight bias"). Note, however, that the psychological literature on which Professor Rachlinski relies does not distinguish between judges and juries. *See id.* at 595 (lumping judges and juries together). Absent a showing that judges are less prone to hindsight bias than juries, it does not seem possible to argue for allocating "reasonableness" rulings to judges rather than to juries solely on the basis of hindsight bias.

127. *See* Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986) (stating that the purpose of summary judgment is to avoid "unwarranted consumption of public and private resources" due to unnecessary trials).

128. *See* James K. Hammitt, Stephen J. Carroll & Daniel A. Relles, *Tort Standards and Jury Decisions*, 14 J. LEGAL STUD. 751, 754–56 (1985) ("Compared with individual defendants, our model predicts that corporate defendants pay 34 percent larger awards, after controlling for plaintiffs' injuries and type of case.").

defendant is a police officer; conversely, juries may unfairly impose liability on municipal defendants or even on officers if they believe that insurance is available.

- Another concern in § 1983 litigation is that juries may tend to favor some plaintiffs over others, depending on whether a given plaintiff is a person with whom jurors can identify or sympathize. Some plaintiffs in excessive-force cases are middle-class citizens who have had an unpleasant experience with the police,[129] while others are mentally ill, petty criminals, or worse.[130] There is a risk that jury determinations of reasonableness would systematically favor the first class of plaintiffs over the second.

B. The Case for Rules in Constitutional Tort Law

If the answer to the judge–jury question depended solely on an assessment of the constitutional values served by jury versus judicial decision making, the Stevens–Amar–Blum–Struve position may well prevail in spite of these countervailing considerations. Some constitutional values would benefit from assigning Fourth Amendment reasonableness and other law application questions to the jury, while others may call for allocating law application to judges. There may be an interpretive principle, such as the intent of the framers, that enables us to choose between them. Alternatively, resolving the issue may require that the Court simply decide which set of competing values it

129. *See, e.g.*, Zivojinovich v. Barner, 525 F.3d 1059, 1062–63 (11th Cir. 2008) (plaintiffs had become drunk and disorderly at a hotel party); Davenport v. Causey, 521 F.3d 544, 546–47 (6th Cir. 2008) (traffic stop); Winterrowd v. Nelson, 480 F.3d 1181, 1182–83 (9th Cir. 2007) (traffic stop).

130. *See, e.g.*, Dorsey v. Barber, 517 F.3d 389, 391–93 (6th Cir. 2008) (plaintiffs had been suspected of auto theft); Freeman v. Gore, 483 F.3d 404, 408–09 (5th Cir. 2007) (altercation occurred when deputies attempted to serve a felony arrest warrant); Ballard v. Burton, 444 F.3d 391, 394 (5th Cir. 2006) (plaintiff was a psychologically disturbed man who drove through town "stopping occasionally to fire his gun in the air").

finds more attractive.

But it is neither necessary nor desirable to address the judge–jury problem at such a high level of abstraction. In the real world of constitutional litigation, there are good reasons for favoring judge over jury. Focusing on the *form* in which constitutional law should be stated, the core of the argument is that rules should be favored over multifactored tests in § 1983 damages cases generally and in excessive-force cases in particular. On that premise, judges should be favored over juries because only judges can make rules. Stating excessive-force law in the form of rules would oblige courts to single out a few determinative features of a fact pattern rather than employ standards that turn on case-by-case evaluation of many factors. Broadly speaking, the issue is whether the benefits of rules are worth their significant costs, which mainly result from the necessarily arbitrary lines they draw. I attempt to show that we would be better off bearing the costs of arbitrary lines because there is no realistic alternative. While the focus here is on excessive force, the general argument applies to other constitutional rights that are typically litigated in suits for damages.

The building blocks of this argument are two distinctive features of § 1983 litigation: (a) that the § 1983 goals of vindicating constitutional rights and deterring constitutional violations cannot be achieved absent liability for damages and (b) that the "official immunity" doctrine blocks liability for damages unless the law is "clearly established." These aspects of § 1983 litigation require that the law be stated, insofar as possible, in the form of rules. A corollary of this reasoning is that the Court's principal excessive-force case, *Graham v. Connor*,[131] should be reconsidered. The Court held in *Graham* that the "proper application" of the Fourth Amendment in this context "requires careful attention to the facts and circumstances of each particular case."[132] The question is "whether the totality of the circumstances justifie[s] a particular sort of . . . seizure."[133] A regime of rules would necessarily topple *Graham*, for it would suppress rather than encourage "careful attention to the facts and circumstances of each particular case."[134]

131. 490 U.S. 386 (1989).
132. *Id.* at 396.
133. *Id.* (quoting Tennessee v. Garner, 471 U.S. 1, 8–9 (1985)).
134. *Id.*

1. Form and Substance in Constitutional Torts

Graham's focus on case-by-case adjudication reflects a choice—an unwise choice, in my view—as to how legal norms should be formulated for excessive-force cases. Broadly speaking, the question here is whether the law should be stated in the form of standards that require careful attention to the specifics of the case at hand, or in the form of rules that pick out a few salient factors, excluding other features of a given case.[135] For example, the pre-*Graham* decision in *Tennessee v. Garner* sets forth a rule that "[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force."[136] A court does not consider *all* the circumstances bearing on the use of deadly force, but *only* whether "the officer has probable cause to believe that the suspect poses a threat of serious physical harm."[137]

The rules–versus–standards issue differs slightly from the judge–jury problem, as standards may be applied by either the judge or the jury. Nonetheless, the two are closely related. Since juries cannot make rules, choosing rules over standards necessarily entails a greater role for judges. By adopting a regime in which the particulars of the case at hand would drive the outcome, *Graham* implicitly opted for a

---

135. *See* Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 510, 536–37 (1988) (drawing this distinction).

136. 471 U.S. 1, 11 (1985); *see* Blum, *supra* note , at 57–58 (discussing the impact of this rule on law enforcement practices). One of the advantages of rules, illustrated by police department adoption of *Garner*'s test, is that those subject to them can easily "internalize" them. *See* FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 121–28 (1991) (discussing the internalization of rules).

137. Two cases in which the officer shot a suspect illustrate the narrow focus of the inquiry. *Compare* Carr v. Deeds, 453 F.3d 593, 601 (4th Cir. 2006) (finding no constitutional violation where the victim "refused [the officer's] command to place his hands in view, jumped from the vehicle, fired at least two rounds from his handgun, and fled into the woods"), *with* Sample v. Bailey, 409 F.3d 689, 697 (6th Cir. 2005) (finding constitutional violation where, according to plaintiff, victim's "hand was at all times visible and . . . never entered into his jacket pocket").

One of the benefits of rules is that they provide the actors to whom they are directed with the information they need to comply with legal norms. In this regard, Blum, *supra* note , at 57–58, discusses law enforcement agencies' responses to *Garner*.

regime of flexible standards over undertaking to articulate rules of general application; *Graham* "nearly always requires a jury to sift through disputed factual contentions, and to draw inferences therefrom."[138] The Court did not identify rules versus standards as an issue in *Graham*, much less explain why it rejected a rules-based approach. Perhaps the common law analogy influenced its ruling, since reasonableness determinations in negligence law generally depend on the circumstances of particular cases. In any event, no Justice dissented on this issue in *Graham*.

Though § 1983 excessive-force cases come to the federal courts with regularity, *Graham*'s lack of attention to the rules–versus–standards question has had the effect of burying that issue. The underpinnings of *Graham*'s preference of standards over rules have received little scrutiny from the Court, lower courts, or in academic literature. It is time to make a start toward remedying that lack of attention. As in any other area where a choice must be made between rules and standards, there are values on either side. My view is that in the § 1983 excessive-force context, a compelling case can be made for rules over standards.

Constitutional rights would be worth little without effective remedies for their breach. Violations of constitutional rights occur in a wide range of circumstances, so that enforcing them requires a variety of remedies. A criminal defendant challenging the validity of the statute under which he is prosecuted can assert his constitutional rights by raising the unconstitutionality of the statute as a defense. The exclusionary rule may be an effective remedy for some Fourth Amendment violations, but as a practical matter it can be raised only in cases where the prosecution seeks to use illegally collected evidence.[139] Ongoing violations and threatened future ones can be effectively remedied by injunctive or other prospective relief that directs officials to comply with constitutional norms. Some kinds of constitutional

138. Sallenger v. Oakes, 473 F.3d 731, 742 (7th Cir. 2007) (quoting Abdullahi v. City of Madison, 423 F.3d 763, 773 (7th Cir. 2005)). This is an unavoidable consequence of stating the legal norm in general terms, as the Court did in *Graham*. *See* Hart & Sacks, *supra* note , at 351 ("[T]he more imprecise the general formulation [of law], the more uncontrolled the judgment [of the law applier] will be.")

139. As Justice Harlan observed, for the victim of an illegal search who is not prosecuted, "it is damages or nothing." Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 410 (1971) (Harlan, J., concurring in the judgment).

wrongs, however, cannot be remedied by any of those means. In excessive-force cases, for example, the Fourth Amendment violation cannot be raised as a defense.[140] The § 1983 plaintiff may or may not also be a criminal defendant. Even if he is, the constitutional violation will probably be irrelevant to the criminal case, and would not be remedied by a successful defense to the criminal prosecution. Prospective relief is unavailing because it is only available to a litigant who can show a likelihood of future injury, and victims of excessive force in a past encounter with the police can rarely meet that requirement.[141] For these many litigants, the only useful remedy is a suit for damages.

2. The Impact of Qualified Immunity on the Goals of Section 1983

The official immunity doctrine stands as a significant impediment to obtaining damages in § 1983 suits. Police officers are ordinarily entitled to qualified immunity, which means that they are shielded from suits for damages unless their conduct violates "clearly established statutory or constitutional rights of which a reasonable person would have known."[142] The aim is to give the officer "fair notice" of what the constitution forbids.[143] There is considerable tension between *Graham*'s case-by-case approach to the excessive-force merits and the "clearly established law" principle. When the resolution of the substantive constitutional issue depends on the facts and circumstances of each particular case, some of the facts are likely to favor one side and some the other, so that the officer can show that the prior cases send mixed signals and do not provide fair notice. Under

---

140. The point here is simply that the officer's use of excessive force in making an arrest is not a defense to any crime for which the person arrested may be charged. If the arrestee's constitutional rights are violated in the course of the arrest, the only means available to him for vindicating those rights may be a suit for damages.

141. *See* City of Los Angeles v. Lyons, 461 U.S. 95, 102 (1983) (requiring the plaintiff show that he will likely be the victim of a similar violation in the future). This point is discussed in somewhat greater detail in Part V.B *infra*.

142. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

143. Hope v. Pelzer, 536 U.S. 730, 742 (2002); *see generally* Amanda K. Eaton, Note, *Optical Illusions: The Hazy Contours of the Clearly Established Law and the Effects of* Hope v. Pelzer *on the Qualified Immunity Doctrine*, 38 GA. L. REV. 661 (2004) (discussing, in detail, *Hope* and its implications).

this regime, he will often have grounds for official immunity. Only when the officer's conduct is especially egregious will it be possible to overcome the immunity doctrine.[144]

Brosseau v. Haugen[145] illustrates the difficulty plaintiffs face when official immunity is litigated under a doctrinal regime like that of *Graham*. Brosseau, a police officer, shot Haugen as he attempted to evade arrest by driving away.[146] Haugen brought a § 1983 suit for damages, charging that the use of a gun was excessive force.[147] Without reaching the merits, the Court held that Brosseau was entitled to immunity.[148] *Graham* and *Garner*, which "are cast at a high level of generality," did not suffice to provide fair notice.[149] According to the Court, the law must be clearly established in a more "particularized" sense, such that "a reasonable official would understand that what he is doing violates [the] right."[150] The Court implied, without explicitly holding, that in nonobvious cases courts must resort to "a body of relevant case law" to answer the "clearly established law" issue.[151] In any event, it proceeded to examine the "handful of cases" featuring circumstances most closely resembling the encounter between Brosseau and Haugen.[152] There were three cases in which the officer faced the

144. Such cases do come up from time to time. In *Reese v. Herbert*, 527 F.3d 1253, 1272–74 (11th Cir. 2008), officers responded to a domestic violence complaint at an apartment complex and made an arrest. According to Reese, the owner and caretaker of the apartments, he then asked officers to move their cars so that other tenants could get to their apartments. *Id.* at 1257–58. He was arrested, choked, thrown to the ground, pepper-sprayed and otherwise abused. *Id.* at 1272–73. Ruling on the officers' summary judgment motion, the court first held that, under the plaintiff's version of the incident, the officers had no probable cause to arrest the plaintiff, who merely asked officers to move their cars, and hence had no authority to use any force. *Id.* at 1271–73. Denying qualified immunity despite the absence of a similar prior case, the court said "[n]o particularized, preexisting case law was needed to inform [the officers] that an officer is not entitled to qualified immunity where his conduct goes 'so far beyond the hazy border between excessive and acceptable force that [he knows that he is] violating the Constitution.'" *Id.* at 1274 (quoting Priester v. City of Riviera Beach, 208 F.3d 919, 926–27 (11th Cir. 2000)).

145. 543 U.S. 194 (2004) (per curiam).

146. *Id.* at 194.

147. *Id.* at 194–95.

148. *Id.* at 195.

149. *Id.* at 199.

150. *Id.* at 198–99 (quoting Saucier v. Katz, 533 U.S. 194, 201–02 (2001)).

151. *Id.* at 199.

152. *Id.* at 200.

question "whether to shoot a disturbed felon, set on avoiding capture through vehicular flight, when persons in the immediate area are at risk from that flight."[153] None of them were on all fours with *Brosseau*. In two of the three no Fourth Amendment violation was found. The Court observed that "[t]hese three cases taken together undoubtedly show that this area is one in which the result depends very much on the facts of each case," and ruled that they "by no means 'clearly establish' that Brosseau's conduct violated the Fourth Amendment."[154]

Combining *Graham*'s "facts and circumstances" test with *Brosseau*'s "particularized" qualified immunity doctrine produces devastating results for the constitutional values that are at stake in excessive-force cases. Even if the plaintiff has a good case on the merits, damages will rarely, if ever, be available on account of official immunity.[155] The *Graham/Brosseau* doctrine illustrates the need for the Court to be attentive to the relation between form and substance in constitutional tort law. In formulating the constitutional doctrine giving rise to § 1983 damages suits, a central concern must be to strive for

---

153. *Id.*

154. *Id.* at 206. One of the two prior cases finding no Fourth Amendment violation was *Cole v. Bone*, where "an 18-wheel tractor-trailer sped through a toll booth and engaged the police in a high-speed pursuit in excess of 90 miles per hour on a high-traffic interstate during the holiday season." *Brosseau*, 543 U.S. at 206 n.4 (discussing 993 F.2d 1328, 1330–31 (8th Cir. 1993)) (Stevens, J., dissenting). The other was *Smith v. Freland*, in which "the suspect led a police officer on a high-speed chase, reaching speeds in excess of 90 miles per hour." *Brosseau*, 543 U.S. at 206 n.4 (discussing 954 F.2d 343, 344 (6th Cir. 1992)) (Stevens, J., dissenting). When the officer cornered the suspect, "the driver repeatedly swerved directly toward the police car. Only after the suspect smashed directly into an unoccupied police car and began to flee again, did the officer finally shoot the driver." *Id.* In view of the framework established in *Hope* and the differences between *Cole* and *Smith*, on the one hand, and *Brosseau* on the other, one is inclined to sympathize with Justice Stevens's view that *Cole* and *Smith* are, at best, "inapposite." *Id.* at 205.

155. *See, e.g.*, Dorsey v. Barber, 517 F.3d 389, 399, 401–02 (6th Cir. 2008). Following *Graham*'s "facts and circumstances" approach, the court engaged in a detailed analysis of the reasonableness of a police officer's action "when he ordered the [plaintiffs] to the ground at gunpoint and held them there despite their unsuspicious, nonthreatening behavior." *Id.* at 401–02. After agreeing with the district judge that "the level of force used by [the officer] was at least arguably excessive," the court went on to uphold the officer's qualified immunity claim, reasoning that "[t]he contours of the right to freedom from the use of excessive force were not so clearly established in a particularized sense that a reasonable officer would have known that such conduct was unlawful." *Id.* at 402.

black-letter rules that clearly state the law and in this way diminish the role of official immunity. The problem with jury decision making on Fourth Amendment excessive-force claims is not that juries make bad decisions. It is that a large role for the jury in evaluating conduct in cases about Fourth Amendment reasonableness is incompatible with the overriding need for rule-based decision making in § 1983 litigation.[156]

III. RULES VS. STANDARDS IN THE LOWER FEDERAL COURTS

A. Judge Posner's Folly

Some lower courts do not fully appreciate the implications of *Brosseau* and seem oblivious to the need to develop rules in response to that case. Consider Judge Posner's opinion in *Richman v. Sheahan*.[157] Jack Richman's mother had received a traffic ticket and wanted to fight it.[158] The mother and her son had spent several hours waiting in an Illinois state courtroom for her case to be called, but at 4:00 P.M. the judge told them he was continuing the case until the next day.[159] The Richmans were upset, argued, and upon being told to leave, refused to do so.[160] Eventually, the judge held Jack Richman in contempt and ordered two deputy sheriffs to arrest him.[161] The difficulty was that

156. *See, e.g.*, Parks v. Pomeroy, 387 F.3d 949, 955–58 (8th Cir. 2004). After ruling that "the issue of whether Pomeroy used objectively unreasonable force when he fatally shot Parks is a question of fact" for the jury, the court went on to find qualified immunity, because the excessive-force issue could be argued either way. *Id.* at 955–56. Thus, "even if we assume that Pomeroy could see Parks's left hand on the floor at the moment of the shooting, it cannot be disputed that Gottstein's gun was nevertheless just inches from Parks's hand." *Id.* at 957–58.

Sometimes courts, albeit inadvertently, acknowledge their failure to formulate Fourth Amendment norms in a sufficiently rule-like way. *See* Evans v. City of Zebulon, 351 F.3d 485, 495 (11th Cir. 2003) ("[T]he general legal principles stated in [earlier cases] do not apply with such obvious clarity to the facts of this case that no reasonable officer could have believed that the manner in which the strip searches . . . were performed was unconstitutional."). The lesson the court should take away from *Evans* is that its directives should be stated with greater clarity in the future.

157. 512 F.3d 876 (7th Cir. 2008).

158. *Id.* at 880.

159. *Id.*

160. *Id.*

161. *Id.*

Jack Richman, 34 years old, and 6 feet two inches tall, weighed 489 pounds:

> [W]hen the two deputies tried to remove Richman forcibly, he clung to the podium and they could not dislodge him. Additional deputies . . . now entered the courtroom and tried to seize Richman. . . .
>
> . . . [T]he struggle . . . continued for a few minutes until the deputies managed to drag him from the podium to the floor, where he lay prone, his face down, but continued to struggle with what was by now a swarm of deputies. They tried to handcuff him and eventually succeeded. By then, several of them were on Richman's back. . . . Richman screamed that he couldn't breathe. Then he fell quiet and the deputies noticed that . . . his skin had turned blue. He was dead.[162]

Richman's mother sued on behalf of his estate, claiming excessive force.[163] Rejecting the officers' motion for summary judgment, Judge Posner reasoned that "[w]hat counts as excessive force in a particular case is . . . relative to circumstances, and two circumstances are critical so far as Jack Richman's Fourth Amendment claim is concerned."[164] One was his extreme, and obvious, obesity, which rendered him "very frail."[165] The other was "the lack of urgency to remove him from the courtroom."[166] For Judge Posner, the combination of these two factors was enough to justify denial of summary judgment not only on the Fourth Amendment issue, but on immunity as well:

> There was no reason to endanger his life in order to remove him with such haste. A reasonable jury could find that the deputies used excessive force. This conclusion, since the legal standard governing excessive-force claims is well-established and clearly

---

162. *Id.*
163. *Id.* at 879.
164. *Id.* at 883.
165. *Id.*
166. *Id.*

> applicable to a situation in which officers suffocate an obviously vulnerable person, scotches the immunity defense.[167]

The problem with this reasoning is that it pays insufficient attention to *Brosseau*'s directive that law must be clearly established in a "particularized" sense, such that "a reasonable official would understand that what he is doing violates [the] right."[168] Judge Posner cites three cases for the proposition that the legal standard is well-established, but none of them addresses a situation like the one in *Richman*.[169] In any event, *Graham* lists "actively resisting arrest" as a factor bearing on reasonableness.[170] In light of all this, the officers who seized Richman may well have to have a well-founded immunity claim despite Judge Posner's holding to the contrary.

B. An Emerging Body of Rules

By contrast, *Hadley v. Gutierrez*[171] shows how rule-making can diminish the role of qualified immunity to the benefit of the vindication and deterrence goals of § 1983. In *Hadley*, an officer had, according to the complaint, "struck [Hadley] in the stomach even though he was not struggling or resisting."[172] Upholding the district court's denial of summary judgment to one of the officers, the court relied on a rule

---

167. *Id.*

168. Brousseau v. Haugen, 543 U.S. 596, 599 (2004).

169. *Richman*, 512 F.3d at 883 (citing Sallenger v. Oakes, 473 F.3d 731, 740–42 (7th Cir. 2007) (the officers may have used force after the plaintiff was handcuffed); Cruz v. City of Laramie, 239 F.3d 1183, 1187–90 (10th Cir. 2001) (officers hog-tied a naked and seriously intoxicated man); Clash v. Beatty, 77 F.3d 1045, 1047–48 (7th Cir. 1996) (the officer may have shoved plaintiff into a police car without provocation, injuring his knee)). As for *Richman*, the officers may actually be right on the merits of the Fourth Amendment issue, as many cases allow officers to use some force against an arrestee who resists. *See, e.g.*, Slusher v. Carson, 540 F.3d 449, 455 (6th Cir. 2008) (holding that a small amount of force was justified because the plaintiff "was, at a minimum, arguing with [the officers] and refusing to return the order"); Mann v. Yarnell, 497 F.3d 822, 826 (8th Cir. 2007) (holding that the officer's use of a canine in a "bite and hold maneuver on [defendant's] leg" was not unreasonable force).

170. Graham v. Conner, 490 U.S. 386, 396 (1989).

171. 526 F.3d 1324 (11th Cir. 2008).

172. *Id.* at 1330.

developed in earlier cases, that "gratuitous use of force when a criminal suspect is not resisting arrest constitutes excessive force."[173] Since this outcome involved the application of a rule, it was "clearly established" that "a handcuffed, non-resisting" arrestee could not be struck.[174] As a result, the officer was not entitled to qualified immunity.[175] Of course, the historical facts as to whether the officer engaged in the wrongful conduct were in dispute and would have to be tried by a jury. Other cases where official immunity was denied because courts had recourse to "clearly established" rules include: *Jones v. Cincinnati*, applying a

---

173. *Id.* The court never calls this proposition a rule, yet it has the attributes of a rule, in that it identifies a few aspects of the situation that will control the outcome, to the exclusion of other arguably relevant factors. *See* Schauer, *supra* note , at 536–37 ("The distinctive feature of rules . . . lies in their ability to be formal, to exclude from consideration in the particular case factors whose exclusion was determined without reference to the particular case at hand."); *see, e.g.*, *Hadley*, 526 F.3d at 1330 (whether the officer believed in good faith that he was in danger); *see also* Davis v. City of Las Vegas, 478 F.3d 1048, 1057 (9th Cir. 2007) (denying immunity because "any reasonable officer in Officer Miller's position would have known . . . that swinging a handcuffed man into a wall head-first multiple times and then punching him in the face while he lay face-down on the ground, and breaking his neck as a result, was unnecessary and excessive").

An earlier case also manifests a reluctance to characterize the "compliant arrestee" norm as a rule, even while giving it rule-like effect. *See* Priester v. City of Riviera Beach, 208 F.3d 919, 923–24 (11th Cir. 2000). That case involved an officer who, according to the plaintiff, ordered a dog to attack him even though he had complied with the officer's order. *Id.* at 923. That court ruled that "[o]n Plaintiff's version of the facts a reasonable jury could conclude that Wheeler used an objectively unreasonable amount of force." *Id.* at 924. The implication of *Priester*'s language is that the jury, assessing all the circumstances, could reasonably find *either for or against* the plaintiff. *See id.* Yet the court goes on to rule that, on the plaintiff's facts, "the law was clearly established . . . that what Defendant Wheeler did violated Plaintiff's constitutional rights." *Id.* at 927. The implication of this holding is that there was a rule in place at the time Wheeler (by hypothesis) ordered the dog to attack, and that the rule prohibited using such force against a compliant arrestee.

174. *Hadley*, 526 F.3d at 1333; *see also* Champion v. Outlook Nashville, Inc., 380 F.3d 893, 901–03 (6th Cir. 2004). On the substantive Fourth Amendment issue the court said "[t]o take the facts in a light most favorable to Plaintiffs is to assume that the Officers lay on top of Champion, a mentally retarded individual who had stopped resisting arrest and posed no flight risk, and sprayed him with pepper spray even after he was immobilized by handcuffs and a hobbling device. The use of such force is not objectively reasonable." *Id.* at 901. On the qualified immunity issue, the court found that it was "clearly established that the Officers' use of pepper spray against Champion after he was handcuffed and hobbled was excessive." *Id.* at 903.

175. *Id.* at 1334.

rule that officers may *not* "strik[e] [the plaintiff] 33 times without giving him a chance to comply with their orders"[176]; *Floyd v. City of Detroit*, applying a rule that "[a]s a matter of law, an unarmed and nondangerous suspect has a constitutional right not to be shot by police officers"[177]; and *York v. City of Las Cruces*, applying a free speech rule that "[a]lthough the word 'bitch' may be offensive to some, any reasonable police officer should have known that he could not arrest Mr. York for loudly saying this word" to no one in particular.[178] Of course, not all rules will favor plaintiffs. *Zivojinovich v. Barner* holds that a small amount of force may be used against someone whose disobedience consists merely of "disobey[ing] a command by members of law enforcement to sit while they executed their lawful duties."[179] Similarly, *Freeman v. Gore* laid down a rule that "minor, incidental injuries that occur in connection with the use of handcuffs to effectuate an arrest do not give rise to a constitutional claim for excessive force."[180]

A crucial feature of these cases is that the opinions do not canvas all the facts and circumstances in the manner invited by the flexible test of *Graham*. Instead, courts hone in on a set of relatively few features that recur from one case to another. Whether or not courts self-consciously set about making rules, the effect of emphasizing the arrestee's noncompliance or the officer's gratuitous use of force is to transform the doctrine from a multifactor test to a body of rules. Moreover, in each of the cases, the plaintiff won the denial of official immunity, which signifies that the rule is already clearly established. The overall impact of the rule making project is to enhance the efficacy of § 1983 litigation in vindicating constitutional rights and deterring

176. 521 F.3d 555, 559 (6th Cir. 2008); *see also* Baker v. City of Hamilton, 471 F.3d 601, 607 (6th Cir. 2006) ("We have held repeatedly that the use of force after a suspect has been incapacitated or neutralized is excessive as a matter of law.").

177. 518 F.3d 398, 407 (6th Cir. 2008); *see also* Clem v. Corbeau, 384 F.3d 543, 554 (4th Cir. 2002) ("Well before 1998 it was clearly established that a police officer could not lawfully shoot a citizen perceived to be unarmed and non-dangerous, neither suspected of any crime nor fleeing a crime scene.").

178. 523 F.3d 1205, 1212 (10th Cir. 2008).

179. 525 F.3d 1059, 1072 (11th Cir. 2008). The court also stated that "using an uncomfortable hold to escort an uncooperative and potentially belligerent suspect is not unreasonable." *Id.* (citing Rodriguez v. Farrell, 280 F.3d 1341, 1345 (11th Cir. 2002)).

180. 483 F.3d 404, 417 (5th Cir. 2007).

violations. My point is not that the rules will, or should, necessarily favor plaintiffs. Plaintiffs will win some and lose some. The value of rules can be appreciated only by comparing the "rules" model of excessive-force law with one that persists in applying a multifactor "totality of the circumstances" test like that of *Graham*. Under the latter approach, plaintiffs are systematically thwarted by official immunity, no matter how strong their cases are on the constitutional merits. Under a rules-oriented doctrine, they still lose (as in *Scott* itself) when the rules are against them. But now plaintiffs succeed in a significant range of cases, as the rules are on their side and they are unimpeded by qualified immunity.

The aims of § 1983 would be furthered to the extent that courts seize every opportunity presented to them to state the law in the form of rules. To take a recent example of a missed opportunity, in *Dorsey v. Barber*, the Sixth Circuit ruled that an officer used excessive force when he "ordered [plaintiffs] to the ground at gunpoint and held them there despite their unsuspicious, nonthreatening behavior."[181] The Court, however, also held that the officer was immune from paying damages because the right was not "clearly established in a particularized sense."[182] In reaching these conclusions, the court followed *Graham*'s "facts and circumstances" test and framed its Fourth Amendment holding as an assessment of the specific facts of this incident.[183] For the sake of avoiding the qualified immunity problem going forward, what the court should have also done is to announce a rule to the effect that an officer violates the Fourth Amendment when he orders a person to the ground at gunpoint and holds him there despite his unsuspicious, non-threatening behavior.[184]

The need for a jury trial on issues of historical fact does not undermine the case for rules. As in any other area of law, the rules can

181. 517 F.3d 389, 401–02 (6th Cir. 2008).

182. *Id.* at 402.

183. *Id.* at 399–400.

184. *See, e.g.*, Cruz v. City of Laramie, 239 F.3d 1183, 1188–90 (10th Cir. 2001). In that case, police officers had hog-tied a severely intoxicated, naked man, binding his wrists and ankles together behind his back with 12 inches or less of separation. *Id.* at 1186. This led to his death. *Id.* The court first announced a rule that, going forward, "officers may not apply this technique when an individual's diminished capacity is apparent." *Id.* at 1188. In the case at hand, however, official immunity was appropriate because the rule had not been clearly established until now. *Id.* at 1189–90.

be molded into instructions so that juries know how the rules would apply to their findings of fact.[185] The case law furnishes many examples of this process. In *Sample v. Bailey,* Bailey, a police officer, shot Sample, an unarmed burglar.[186] He claimed that Sample was reaching into his jacket and might have been grabbing a weapon.[187] Sample acknowledged that he moved his arm but denied that he moved it toward his jacket.[188] While a trial would be necessary in order to resolve the factual dispute, the court made it clear that in the event the jury believed Sample, Bailey would be liable.[189] Prior cases had moved well beyond *Graham*'s "totality of the circumstances" test, by identifying precisely when deadly force would be appropriate.[190] Officers may use deadly force (such as firing a gun) "when the factual situation revealed a perceived serious threat of physical harm to the officer or others in the area from the perspective of a reasonable officer."[191] On Sample's facts, "Sample's mere action of moving his arm to grab the top of the cabinet would not cause a reasonable officer to perceive a serious threat of physical harm to himself or others."[192] Moreover, the rule was clearly established and, in true rule-like fashion,

---

185. *See* Struve, *supra* note (providing a general introduction to crafting jury instructions in constitutional cases). Even though Professor Struve would allocate more decision making to the jury than I believe is wise, her analysis of the problems that arise in translating constitutional doctrine into jury instructions is relevant no matter how broad or narrow the jury's role may be. Another approach is to use the special verdict, FED. R. CIV. P. 59, asking the juries for answers to specific issues of fact so that the judge can then apply the legal rules. *See* Saman v. Robbins, 173 F.3d 1150, 1154–55 (9th Cir. 1999) (upholding a special verdict in an excessive force case); *see generally* Mark S. Brodin, *Accuracy, Efficiency, and Accountability in the Litigation Process—The Case for the Fact Verdict*, 59 U. CIN. L. REV. 15, 19 (1990) (discussing the special verdict practice). Professor Brodin argues for greater use of the special verdict in all areas of litigation: "The special verdict . . . can serve to focus the jurors' attention on the critical fact issues in dispute . . . . At the same time, the device dispenses with the necessity for elaborate instructions on legal doctrine and, consequently, minimizes our dependence on the ability and willingness of lay persons to follow such instructions." *Id.*

186. 409 F.3d 689, 692 (6th Cir. 2005).

187. *Id.*

188. *Id.* at 693–94.

189. *Id.* at 695.

190. *See id.* at 697 (discussing the principles of *Graham* and delineating the "rare instances" an officer may use deadly force).

191. *Id.*

192. *Id.*

was not dependent upon the circumstances of particular cases.[193] If the jury believed Sample, immunity would not be available to Bailey.

IV. *SCOTT* AND RULE-BASED DECISION MAKING

Cases like *Hadley* and *Sample* show how courts can further the aims of § 1983 by laying down rules. One explanation for the reluctance of some lower courts to follow their example may be simple fidelity to *Graham*.[194] It is unclear whether their approach will change after *Scott* because, viewed from the perspective of having to choose between rules and standards, the majority opinion in *Scott* sends mixed signals.[195] Some elements of *Scott* seem to support *Graham*. Justice Scalia explicitly declines[196] to follow *Tennessee v. Garner*, an earlier, pre-*Graham* case in which the Court had announced a rule that a police office may not use deadly force unless the suspect poses a danger to others.[197] Harris attempted to persuade the Court to apply *Garner* to high-speed chases, arguing that his driving did not endanger others and Scott's ramming could not be justified.[198] But that argument was undercut by the eight–Justice majority's reaction to the video. Instead, the Court found *Garner* inapposite, cited *Graham* with approval, and reiterated *Graham*'s directive that in order to decide the excessive-force issue, "we must . . . slosh our way through the factbound morass of 'reasonableness.'"[199]

Up to this point Justice Scalia's opinion seems quite unfriendly to the notion that excessive-force doctrine should be stated in the form of rules. Still, some of the reasoning in *Scott* provides grounds for hope

193. *Id.* at 698–701.

194. *See, e.g.*, Estate of Larsen *ex rel.* Sturdivan v. Murr, 511 F.3d 1255, 1262 (10th Cir. 2008) (drawing an inference that it should "employ no bright line rules" in excessive-force cases).

195. *See supra* Part II.A.

196. Scott v. Harris, 550 U.S. 372, 382–83 (2007).

197. 471 U.S. 1, 11 (1985); *see supra* notes –81 and accompanying text.

198. *Scott*, 550 U.S. at 381–82.

199. *Id.* at 386. By diminishing the authority of *Garner* in deadly force cases, the Court cast substantial doubt on jury instructions aimed at applying the rule announced in that case. *See* Blum, *supra* note , at 70–76 (discussing implications for *Garner* "deadly force" instructions). In this way *Scott* may actually have diminished the degree to which excessive-force law consists of rules, at least until the Court clears up the confusion the opinion seems to have produced.

that the Court may undertake more rule-making, abandoning *Graham*'s directive to examine "the facts and circumstances of each particular case." In its penultimate paragraph, the opinion takes a sharp turn away from *Graham*. Justice Scalia does not explicitly question the *Graham* approach and certainly offers no praise for *Garner*. But, quite abruptly, the vocabulary of rules reappears and this time in a somewhat more favorable light. Sweeping away the contextual features that may bear on Fourth Amendment reasonableness in a given case, Justice Scalia concluded by rejecting Harris's proposed "rule requiring the police to allow fleeing suspects to get away."[200] He chose instead to "lay down a more sensible rule: A police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death."[201]

It is too soon to draw conclusions about just what the Court intends by setting forth this proposition. The reference to a "rule" may be nothing more than a shorthand summary of the discussion of Fourth Amendment reasonableness that immediately preceded it.[202] But Justice Scalia may mean just what he says. The holding may be that, going forward, excessive-force cases seeking damages for high-speed chase cases must *all* be decided for the police officer, at least so long as the chase "threatens the lives of innocent bystanders."[203] In view of the majority's assessment of the video evidence in *Scott*, virtually all high-speed chases in populated areas will satisfy this requirement. Under this reading of the final paragraph, neither judge nor jury would undertake case-by-case reasonableness calculations.

Perhaps some of the Justices feared that this is indeed the significance Justice Scalia and others will give the last paragraph of the opinion in future cases. Though Justices Ginsburg and Breyer joined the Court's opinion, they wrote separately to distance themselves from the notion of adopting a general rule for high-speed chase cases. Justice Ginsburg declined to read the case "as articulating a mechanical *per se* rule," stressed that the inquiry "is situation specific," and identified

200. *Id.* at 385.

201. *Id.* at 386.

202. As one commentator has pointed out, this passage "is internally inconsistent with the factual inquiry and balancing of interests undertaken earlier in the majority's opinion." Leading Cases, *supra* note , at 220.

203. *Scott*, 550 U.S. at 386.

factors—whether lives were at risk and whether a safer alternative was available to the officer—bearing on its resolution.[204] Similarly, Justice Breyer noted "the highly fact-dependent nature of this constitutional determination,"[205] and explicitly "disagree[d] with the Court insofar as it articulates a *per se* rule."[206] These disclaimers may well tell us much about where the majority of the Court is going in this area of law. Six Justices, after all, joined the Scalia opinion without issuing such separate concurrences. The inference is highly plausible that these Justices do prefer the rule-orientedness suggested by the final passages of Justice Scalia's opinion.

V. OBJECTIONS TO RULE-BASED DECISION MAKING IN SECTION 1983 LITIGATION

It is easy to understand why Justices Ginsburg and Breyer would prefer to leave open the constitutional validity of future high-speed pursuits. On a different set of facts—for example, if the chase occurred only in a remote area or at a much lower rate of speed—the officer's actions may seem less reasonable than in *Scott*. One basic objection to stating the law in the form of rules and then applying them rigorously is that laudable goals must be sacrificed. An ineluctable result of picking out a few features of a case and ignoring all the others is that a decision maker simply cannot obtain the optimal result on the merits.[207] But these Justices, and others who recoil at the notion that constitutional law should be reduced to a body of rules, may fairly be accused of seeking an unattainable ideal of perfect justice. Their implicit premise seems to be that the aim of § 1983 litigation is to arrive at the very best answer to the constitutional issue presented in each individual case. When one conceives of § 1983 as a tool for vindicating rights and deterring violations across a range of cases, the quest for constitutional idealism becomes less alluring. The arbitrariness of rules is a cost that

204. *Id.* (Ginsburg, J., concurring).

205. *Id.* at 387.

206. *Id.* at 389 (Breyer, J., concurring); *see also* Kahan et al., *supra* note , at 856–57 & nn.73–79 (discussing the ambiguity of *Scott* on this point).

207. *See* Schauer, *supra* note , at 100 ("[A] system committed to rule-based decision making attains the benefits brought by rules only by relinquishing its aspirations for ideal decision making.").

must be candidly acknowledged, but it also must be accepted.

A second objection centers on minimizing the role played by qualified immunity. Since that doctrine simply does not permit the systematic vindication of constitutional rights and deterrence of violations under a case-by-case approach, one may attempt to find ways around it, thereby avoiding rules and the costs of rule-based adjudication. The problem is that under the current § 1983 regime it is impossible to avoid qualified immunity in most cases seeking damages. Immunity is unavailable only in suits where municipal governments can be held liable, and these may be too few to permit effective vindication and deterrence. In the future this problem of "over-immunity" might be remedied through judicial or legislative action. Until such action is taken, however, the only solution is to state constitutional doctrine in the form of rules that minimize the role of official immunity.

A. The Cost of Rules: Arbitrary Line

In constitutional torts as in any other area, the advantage of "totality of the circumstances" adjudication is that the decision maker can take account of all relevant information.[208] A rule by its nature excludes consideration of some factors that bear on the ideal outcome in each individual case, for the sake of achieving stability and predictability.[209] If the Court in *Scott* indeed made a rule to the effect that officers are never liable for high-speed chases, cases will surely arise in which Justices Ginsburg and Breyer are proven right: The facts seem to call for liability, yet the rule precludes it.[210] In *Abney v. Coe*, a police chase case decided after *Scott*, Abney, a motorcyclist, died in a

---

208. *See* Kahan, et al., *supra* note , at 889–90 & nn.158–61 (discussing the value of case-by-case decision-making); Kathleen Sullivan, *Forward: The Justices of Rules and Standards*, 106 HARV. L. REV. 24, 58–59 (1992) (discussing the advantages of standards over rules).

209. *See* Schauer, *supra* note , at 536–37 ("Rules get in the way. They exclude from consideration factors that a decisionmaker unconstrained by those rules would take into account.").

210. *See* Blum, *supra* note , at 62 (stating that if *Scott* indeed states a rule, that rule "invites irresponsible, if not reckless, behavior on behalf of law enforcement officers"); Leading Cases, *supra* note , at 220–21 (arguing that the *Scott* rule "is flawed, as it ignores several factors relevant to determining the reasonableness of a seizure—most glaringly, the opportunity for police to use alternate and non-life-threatening methods to terminate the pursuit").

collision with a sheriff deputy's car following an eight-mile pursuit.[211] The deputy, Rodney Coe, had "observed [Abney] crossing double yellow lines while passing a vehicle on a curve."[212] Coe tuned on his blue lights and tried to pull Abney over.[213] Abney fled and Coe gave chase.[214] Eventually, under the plaintiff's version of the facts, "Coe intentionally rammed the rear of Abney's motorcycle," resulting in Abney's death.[215] The Fourth Circuit relied on *Scott* in reversing the district court's denial of summary judgment for Coe.[216] Possible distinctions between the two cases were unimportant:

> The fact that, unlike Scott, Abney did not accelerate to 85 miles per hour is not dispositive; indeed, the narrow, winding, two-lane roads in this case all but prohibited such speeds. The fact that Abney was driving during the day and Harris 'in the dead of night' means only that Abney had the opportunity to scare more motorists to death. Similarly, the fact that Abney was driving a motorcycle, rather than a car, does not require a different result since the probability that a motorist will be harmed by a Precision Intervention Technique is high in either circumstance.[217]

It is unclear whether the Fourth Circuit panel treats *Scott* as a rule that decides the winner, but the result in *Abney* is consistent with that reading of the case.[218] By contrast, under a "totality of the circumstances" approach, the reasonableness of the deputy's actions may well turn on whether the vehicle being pursued is a car or a motorcycle and on whether the driver is speeding.[219]

---

211. 493 F.3d 412, 413 (4th Cir. 2007).

212. *Id.* at 414.

213. *Id.*

214. *Id.*

215. *Id.* at 415.

216. *Id.* at 413–14.

217. *Id.* at 418 (citation omitted).

218. *See* Blum, *supra* note , at 63–64 (arguing that *Abney* treats *Scott* as a per se rule).

219. The "arbitrariness" of rules, may, in a given case, work to the disadvantage not only of the plaintiff, as in *Abney*, but of the defendant as well. Lower courts have generally held that an officer violates the Fourth Amendment when he uses force

The issue raised by treating *Scott* as a rule is whether the benefit of a rule is worth the cost of foregoing the "totality of the circumstances" evaluation used in cases like *Abney*.[220] The constitutional tort–common law analogy is relevant to the resolution of this issue, but it is not dispositive. Long ago, the rules–versus–standards issue in negligence law was decided in favor of standards, because it was thought that rules draw arbitrary lines.[221] But a more precise and nuanced way of stating the outcome of that debate would frame it in terms of the relative advantages of the two alternatives.

---

against an arrestee who has been subdued and who is passive. *See, e.g.*, Hadley v. Gutierrez, 526 F.3d 1324, 1330 (11th Cir. 2008) (holding that officer used excessive force when he struck defendant without provocation or resistance). Part of the price of implementing this rule is that an officer who in good faith believes he is in danger from such a person nonetheless will be held liable. *Id.*

In contrast to *Hadley*, an earlier Eleventh Circuit case seems to rule that officers *are* permitted to use force against an arrestee who has become compliant. In *Garrett v. Athens-Clarke County*, 378 F.3d 1274 (11th Cir. 2004), officers had, with much effort, subdued Eric Irby. *Id.* at 1278. They then tied his wrists and ankles together, "causing his body to be bowed." *Id.* Irby died minutes later. *Id.* Rejecting his estate's argument that the force was excessive because the officers "fettered him after he was made compliant," the court said that in the circumstances, the officers were entitled to "restrain Irby in such a way that he could not harm another officer or himself should he decide to stop being compliant, a realistic possibility given his recent words and deeds." *Id.* at 1280–81.

Hadley and *Garrett* can be distinguished on their facts. Irby fought for some time before being subdued, *Garrett*, 378 F.3d at 1277–78, while, according to the plaintiff's facts, Hadley did not, *Hadley*, 526 F.3d at 1327–28. But in a regime of rules, that factual distinction may have to be suppressed. The two cases illustrate the dilemma that courts face when they are asked to state the law in the form of rules. On the one hand, making a blunt rule that force may not be used against compliant suspects would cast doubt on *Garrett*. On the other, attempting to diminish the arbitrariness by allowing the officers to escape liability in the case where they can show reasons to believe they were still in danger sacrifices the clarity that rules provide.

220. *See also* Beshers v. Harrison, 495 F.3d 1260, 1264 (11th Cir. 2007). *Beshers* was another post-*Scott* case raising this cost–benefit issue. It dealt with a high-speed chase of someone suspected of attempting to steal beer, a chase which ended with the patrol car ramming the suspect's car and resulted in the suspect's death. *Id.* at 1262–63. The court, relying on *Scott*, held that there was no Fourth Amendment violation. *Id.* at 1268. For further discussion of *Beshers*, see Blum, *supra* note , at 64–66.

221. *See* Francesco Parisi, *Rules Versus Standards*, *in* THE ENCYCLOPEDIA OF PUBLIC CHOICE 510, 515 (2003) (discussing a history of the rules versus standards issue).

What courts actually concluded is that the costs of rules were too high to justify their benefits.

The most famous example from common law torts concerns the *Goodman/Pokora* episode. In *Baltimore & Ohio Railroad v. Goodman*, a truck collided with a train at a railroad crossing; the plaintiff won a jury verdict, and the railroad appealed, claiming that it should have been granted a directed verdict on account of the plaintiff's fault.[222] The issue for the Supreme Court was whether the driver's failure to stop and get out of the car to look for trains amounted to contributory negligence as a matter of law.[223] With Justice Holmes writing the opinion, the Court ruled that "if a driver cannot be sure otherwise whether a train is dangerously near he must stop and get out of his vehicle."[224] Holmes emphasized that the holding went beyond the facts of the case—though "the question of due care very generally is left to the jury . . . when the standard is clear it should be laid down once and for all by the Courts."[225]

Many first-year law students read *Goodman*, and then they read *Pokora v. Wabash Railway*,[226] where, less than seven years later, the Court abandoned Holmes's approach. That case, too, involved a railway crossing accident.[227] Again, the plaintiff had failed to get out of his truck.[228] On the authority of *Goodman*, the defendant won below.[229] With Justice Cardozo writing the opinion, the Supreme Court reversed.[230] Cardozo reasoned that "[t]o get out of a vehicle and reconnoiter is an uncommon precaution, . . . it is very likely to be futile,

---

222. 275 U.S. 66, 69 (1927).

223. *Id.* at 69–70.

224. *Id.* at 70.

225. *Id.* Many years earlier, Holmes had advanced the notion that the "featureless generality" of the "prudent man" standard "ought to be continually giving place to the specific one, that he was bound to use this or that precaution under these or those circumstances." HOLMES, *supra* note , at 89. For Holmes, this was not just a matter of doctrinal tidiness. His rationale was that "[w]hen a man has to pay damages, he is supposed to have broken the law, and he is further supposed to have known what the law was." *Id.* Accordingly, "any legal standard must, in theory, be capable of being known." *Id.*

226. 292 U.S. 98 (1934).

227. *Id.* at 99.

228. *Id.* at 101.

229. *Id.* at 99.

230. *Id.* at 106.

and sometimes even dangerous."[231] After enumerating the dangers that may arise in one set of circumstances or another, the opinion concluded:

> Illustrations such as these bear witness to the need for caution in framing standards of behavior that amount to rules of law. The need is the more urgent when there is no background of experience out of which the standards have emerged. They are then not the natural flowerings of behavior in its customary forms, but rules artificially developed, and imposed from without.[232]

Because *Goodman* had "been a source of confusion in the federal courts," and "had only wavering support in the courts of the states," the Court effectively abandoned the rule-based approach of the earlier case.[233] The *Goodman/Pokora* episode is widely understood as a cautionary tale about overreaching by judges in negligence law.[234] The Third Restatement of Torts notes that "[b]y and large, . . . American courts have decided that the advantages of allowing courts to decide the negligence issue in cases [where reasonable persons may reach diverse outcomes] do not justify removing the issue from the jury."[235] Echoing Cardozo, the Restatement observes that seemingly similar cases may present "many variables that can best be considered on a case-by-case basis."[236]

As with many other attempted analogies between constitutional and common law torts, this one does not hold up to scrutiny. It may well be that case-by-case adjudication rightly won the day in common law torts, though there are still some dissenters.[237] But it is a mistake to

---

231. *Id.* at 104.

232. *Id.* at 105.

233. *Id.* at 106.

234. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 8, reporter's note c (Tentative Draft No. 1, 2001) ("*Pokora* is correctly interpreted as rebuking Holmes and his approach in *Goodman* and as favoring instead an individualization of assessments of parties' negligence.").

235. *Id.* at cmt. c.

236. *Id.*

237. *See, e.g.*, James A. Henderson, *Expanding the Negligence Concept: Retreat from the Rule of Law*, 51 IND. L.J. 467, 468 (1976) (arguing that "relatively specific rules of decision" are necessary for "the integrity of the judicial process").

transplant that judgment into § 1983 litigation. Because of the special factor of official immunity, the comparison of costs and benefits comes out differently in constitutional torts. Arbitrariness that seems too burdensome in the common law can be tolerated when the alternative is thwarting the basic aims of the cause of action.

A further point regarding the cost of rules should be noted: It is larger or smaller depending on just how broadly the rule is stated. Narrow rules have fewer arbitrariness costs than broader ones, while at the same time they avoid the bad effects of qualified immunity. For example, the putative *Scott* rule need not and should not apply on the facts of *Adams v. Speers*.[238] In this pre-*Scott* case, a high-speed chase ended with both the driver and the officer off the road.[239] The officer then shot the driver without provocation, and the court found a Fourth Amendment violation.[240] *Scott* does not require any reconsideration of that outcome, as there is no difficulty at all in tailoring the high-speed chase rule so as to limit it to the harms done during the chase itself. The general principle illustrated by this example is that the criteria for making constitutional tort law need not include any requirement that rules have any particular breadth. In order to overcome official immunity, all that is needed is that courts state rules. Narrow rules are as good as broad ones for this purpose. Recall *Abney*, which involved the high-speed chase of a motorcyclist.[241] The benefits of rules would be fully achieved by distinguishing that case from *Scott* simply based on the type of vehicle, limiting the (hypothesized) *Scott* rule to cars and trucks, while making a rule forbidding high-speed chases of motorcycles.[242]

B. Exceptions to Official Immunity

The case for rules rests on the problems generated by official immunity for a standards-based body of law. To the extent immunity

238. 473 F.3d 989 (9th Cir. 2007).

239. *Id.* at 991.

240. *Id.* at 992.

241. Abney v. Coe, 493 F.3d 412, 413 (4th Cir. 2007).

242. To take another example, the *Scott* rule could be limited to ramming vehicles of persons who endanger others by extremely fast driving, and not extended, as it was in *Beshers v. Harrison*, 495 F.3d 1260, 1268 (11th Cir. 2007), to someone whose supposed dangerousness is established, in part, by the officer's reasonable belief that he was "driving under the influence of alcohol."

can be avoided, that case is weaker. In two types of § 1983 cases, official immunity will not prevent recovery, and the regime of standards is correspondingly more attractive. But the problem remains because these theories of recovery are rarely available in excessive-force cases.

First, if the plaintiff is able to establish the grounds for *prospective* relief, such as an injunction forbidding the illegal practice, immunity will not be an obstacle. The difficulty here is that in excessive-force cases those requirements are hard to meet. In particular, the plaintiff has to show a likelihood that he will be subjected to illegal force in the future. In *City of Los Angeles v. Lyons*, a police officer stopped the plaintiff for a traffic violation and then, according to the complaint, "without provocation or justification, seized Lyons and applied a chokehold . . . rendering him unconscious and causing damage to his larynx."[243] In his § 1983 suit, Lyons sought not only damages but also an injunction forbidding the practice in the future.[244] The issue before the Supreme Court was whether he had standing to seek injunctive relief, which "depended on whether he was likely to suffer future injury from the use of the chokeholds by police officers."[245] Finding that Lyons had not made a credible allegation to that effect, the Court dismissed the claim for prospective relief.[246] *Lyons* severely limited the availability of injunctions in excessive-force cases, as few plaintiffs will meet the Court's requirements.[247]

Second, local governments may be sued under § 1983, and they

---

243. 461 U.S. 95, 97–98 (1983) (internal quotation marks and citation omitted).

244. *Id.* at 98.

245. *Id.* at 105.

246. *Id.* at 124–25.

247. *See, e.g.*, Wilson v. Morgan, 477 F.3d 326, 342 (6th Cir. 2007) (declining to enjoin the county "from authorizing investigative detentions, [i.e.], detentions based on less than probable cause for 48 to 72 hours" on the ground that "none of the plaintiffs can establish that it is reasonably likely that they will encounter the police again"); Shain v. Ellison, 356 F.3d 211, 215 (2d Cir. 2004) (declining to grant prospective relief because "Shain has not established—or even alleged before this appeal—the likelihood of a future encounter with the Nassau County Police likely to result in a subsequent unconstitutional strip search"). Note that some other types of Fourth Amendment violations may have greater success. *See* City of Houston v. Hill, 482 U.S. 451, 459 n.7 (1987) (finding that "Hill's record of [four] arrests under the ordinance lends compelling support to the threat of future enforcement" sufficient to give Hill standing to challenge the validity of the statute); Kolender v. Lawson, 461 U.S. 352, 355 n.3 (1983) (holding that a person who had been stopped fifteen times under a state law had standing to seek prospective relief).

do not enjoy any immunity whatsoever, even in suits for damages.[248] Here, the problem for the plaintiff is that local governments are not liable for the constitutional torts of their employees on a respondeat superior basis.[249] They are liable only for constitutional violations that result from their "official polices" or "customs."[250] In order to win on the "policy" prong of this test, one must show that (a) the relevant governing body has enacted an unconstitutional rule, (b) a "final policymaker" for the local government made an unconstitutional decision, or (c) bad training and hiring decisions by the local government produced constitutional violations by low level officers.[251] A "custom" is a widespread unconstitutional practice by low level officers that higher-ups ignore.[252] And there is another requirement: "The plaintiff must also demonstrate that, through its *deliberate* conduct, the municipality was the 'moving force' behind the injury alleged."[253] In the excessive-force context, all of the tests are hard to meet, so much so that none can be relied upon for relief. Excessive-force cases typically arise when an officer under stress reacts with what may, in retrospect, be viewed as too much force. There are very few cases involving written policies that authorize excessive force, or policy making officials who direct or approve the use of excessive force,[254] or widespread practices by street-level officers that higher-ups know or should know about.[255] Inadequate training or inadequate screening of

248. Owen v. City of Independence, 445 U.S. 622, 650 (1980) (rejecting qualified immunity for municipalities).

249. Monell v. Dep't of Soc. Servs., 436 U.S. 658, 691 (1978).

250. *Id.* at 694.

251. *See* SHELDON NAHMOD ET AL., CONSTITUTIONAL TORTS 275–331 (2d ed. 2004) (discussing these theories of recovery against municipalities).

252. *See, e.g.*, Baron v. Suffolk County Sheriff's Dep't, 402 F.3d 225, 229 (1st Cir. 2005) (upholding a verdict imposing liability on a municipality for corrections officers' practice of harassing an officer who reported a fellow officer's misconduct).

253. Bd. of Comm'rs of Bryan County v. Brown, 520 U.S. 397, 404 (1997).

254. Such cases do come up from time to time. This may be the rationale behind the rejection of the city's motion for summary judgment in *Cruz v. City of Laramie*, 239 F.3d 1183, 1191 (10th Cir. 2001) (finding that high ranking officials were aware of positional asphyxia attributable to hog-tie restraints). Note, however, that the court seems to treat this as a failure-to-train case. *Id.*

255. The "custom" theory succeeded in *Webster v. City of Houston*, 689 F.2d 1220, 1227 (5th Cir. 1982), *aff'd*, 739 F.2d 993 (5th Cir. 1984) (en banc) (affirming a jury verdict against the city, where the plaintiff established that police officers frequently used "throw down" guns, putting them near unarmed persons who had been shot by police officers, so as to justify the shooting).

new hires are more promising theories, but here too the Court has placed significant hurdles in the way of recovery: in order to win a training case, a plaintiff must show that the training of the officer was so carelessly done as to show "deliberate indifference" to the constitutional rights of persons with whom the officer has contact.[256] Typically, plaintiffs pursue two or more of these theories at once, but in practice it has proven difficult, though not impossible, for the plaintiff to prevail on any of them.[257]

The difficulties of winning on an "inadequate screening" theory are illustrated by *Board of Commissioners of Bryan County v. Brown*.[258] The plaintiff claimed that Reserve Deputy Stacy Burns used excessive force in the course of a traffic stop, and the plaintiff sued the county on the theory that it should not have hired Burns on account of his pre-employment criminal record, which included guilty pleas to misdemeanor charges of assault and battery, resisting arrest, and public drunkenness.[259] The Court held that such a claim could succeed only if the hiring decision "reflects deliberate indifference to the risk that a violation of a particular constitutional . . . right will follow the decision."[260] Thus, "the mere probability that any officer inadequately screened will inflict any constitutional injury" is not sufficient.[261] Liability "must depend on a finding that *this* officer was highly likely to inflict the *particular* injury suffered by the plaintiff."[262]

Professor Amar recognizes that official immunity is a problem for his "strong jury" thesis and proposes to deal with it by lifting the limits on municipal liability and moving toward respondeat superior.[263]

---

256. City of Canton v. Harris, 489 U.S. 378, 388 (1989).

257. *See, e.g.*, Jones v. City of Cincinnati, 521 F.3d 555, 561 (6th Cir. 2008) (upholding the complaint in an excessive-force case); Smith v. Watkins, 159 F.3d 1137, 1138–39 (8th Cir. 1998) (rejecting plaintiff's "municipal liability theories"); Myers v. Oklahoma County Bd. of County Comm'rs, 151 F.3d 1313, 1318–20 (10th Cir. 1998) (rejecting plaintiff's municipal liability theories); Matthews v. Jones, 35 F.3d 1046, 1049–50 (6th Cir. 1994) (rejecting plaintiff's municipal liability theories); Davis v. Mason County, 927 F.2d 1473, 1480–83 (9th Cir. 1991) (upholding jury verdict against the municipality on failure to train and ruling that the city's inadequate training established liability as a matter of law).

258. 520 U.S. 397 (1997).

259. *Id.* at 400–01.

260. *Id.* at 411.

261. *Id.* at 412.

262. *Id.*

263. *See* AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE:

Doing so would require either that the Supreme Court overrule *Monell* or that Congress nullify that case by amending § 1983. This proposal to enhance the strength of the case for the jury by altering the background principles of current law simply sidesteps the issues explored in this article. However strong the case may be for entity liability,[264] there is no escape from the need to address current issues against the background of current law. A pragmatic approach to specific § 1983 issues, including the judge–jury question considered here, is best-served by taking the Court's entrenched doctrine as a starting point. So long as the official immunity principle remains in place, the best way to promote constitutional values through § 1983 suits for damages is to formulate the law as a body of rules, insofar as this is possible. In this regard, it is helpful to distinguish between two dimensions of *Scott*—the substantive choice in favor of law enforcement, and (what seems to be) a decision to embody that choice in the form of a rule. Good arguments can be made against the Court's substantive choice, but there is also a strong case in favor of the Court's decision to make a rule.

VI. CONCLUSION

I have argued against jury discretion, and in favor of rule-based decision making, in § 1983 cases that involve claims of unreasonable force in violation of the Fourth Amendment. The argument is a focused one because it draws heavily on certain features of excessive-force litigation.[265] In this context, an effective damages remedy is essential to

---

FIRST PRINCIPLES 40–41 (1997) (noting that the "shocking remedial gap" caused by official immunity would be best closed by "recogniz[ing] direct liability of the government entity.").

264. There is a large literature on the pros and cons of entity liability, most of it focused on larger issues than the jury trial problem addressed in this article. *Compare* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425 (1987) (advancing arguments for entity liability), *with* John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47, 53–54, 68–81 (1998) (arguing that "a constitutional tort regime based on fault is wise policy"); *see also* JOHN C. JEFFRIES, JR. ET AL., CIVIL RIGHTS ACTIONS: ENFORCING THE CONSTITUTION 210–11 (2d ed. 2007) (citing several articles on the topic).

265. There are virtues to examining constitutional tort issues on a right-by-right basis rather than attempting to come up with principles of general applicability. *See* John C. Jeffries, Jr., *Disaggregating Constitutional Torts*, 110 YALE L.J. 259, 259 (2000). Jeffries argues, convincingly in my view, that

the vindication of constitutional rights because injunctive remedies are rarely available and municipal liability is hard to establish. Qualified immunity looms as an obstacle to recovery of damages unless the law is clearly established. Juries cannot clearly establish the law. Only judges can do that, and then only by making rules.

This article does not take sides in the broad debate over the value of the jury in general tort law. The case against a dominant role for the jury in Fourth Amendment excessive-force litigation is not based on any inherent defect in jury decision making. The problem with juries is that juries cannot make rules, and rules are essential to achieving the goals of § 1983 litigation in excessive-force cases. Even where the standards of conduct are set by judges, as they generally are in public employee speech litigation, rules are preferable to standards on account of qualified immunity.[266]

This is not a blanket preference for rules, nor a general indictment of the jury in § 1983 litigation. In areas where the main enforcement mechanisms are suits for injunctions, there is no qualified immunity defense and the argument for rules may be less compelling.[267] These include—to take three prominent examples—litigation over school segregation; voting rights; and time, manner, and place restrictions on speech. The argument advanced here for rules is not

---

> Treating the availability of damages [for constitutional violations] as a transsubstantive exercise in statutory interpretation [of § 1983] obscures important differences among rights and suppresses clear thinking about remedies. A better strategy would . . . adapt remedies to specific rights. The availability of money damages would then depend on an assessment of their role in enforcing particular rights—and especially on the availability of alternative remedies that make damages more or less needful.

Id.

266. *See* Michael L. Wells, *Section 1983, the First Amendment, and Public Employee Speech: Shaping the Right to Fit the Remedy (and Vice Versa)*, 35 GA. L. REV. 939, 975–79 (2001) (discussing qualified immunity problems in the public employee speech context).

267. While my argument is a narrow one, there are good reasons to favor Supreme Court opinions that give more guidance as to how officials should behave across the whole range of cases the Court decides. *See* Frederick Schauer, *Abandoning the Guidance Function*: Morse v. Frederick, 2007 SUP. CT. REV. 205, 205–07 (arguing that while "the need for Supreme Court guidance of lower courts has increased substantially over the past several decades . . . its willingness to take on these obligations has been heading in the opposite direction"). But one need not endorse Professor Schauer's view in order to accept my thesis.

even directed at the whole body of Fourth Amendment law, but only at those parts of it that are litigated in § 1983 cases. By contrast, many other areas of Fourth Amendment law are adjudicated in suppression hearings or other settings where official immunity is not an issue. The case for rules is weaker in those settings.[268]

Courts and scholars pay a great deal of attention to the substantive choices that must be made in adjudicating constitutional issues, and almost none to the question of form. Yet form and substance are sometimes intertwined, at least in excessive-force cases. The ultimate aim of § 1983 litigation is not to arrive at the perfect post hoc balance of state and individual interests in every single case. It is to vindicate constitutional rights and deter constitutional violations without inhibiting effective government in the process, and to achieve these aims in a systematic way over the long run. So long as *Graham*'s "totality of the circumstances" test governs excessive-force cases, the combination of official immunity and restrictions on governmental liability will systematically thwart the vindication and deterrence aims of constitutional torts. Even when the plaintiff establishes a Fourth Amendment violation, recovery will be hard to come by. Absent modification of the official immunity or governmental liability doctrines, the only realistic solution is to abandon *Graham*, and hence to diminish the role of the jury, in favor of a regime of rules.

---

268. *See* Ronald J. Allen, Joseph L. Hoffman, Debra A. Livingston & William J. Stuntz, COMPREHENSIVE CRIMINAL PROCEDURE 554 (2d ed. 2005) (noting arguments against "bright-line Fourth Amendment rules").

Even in areas where the case for rules is comparatively weak, however, the need for directives that can actually constrain official conduct favors a more, rather than less, rule-like approach. *See* Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 904 (1999) ("Constitutional doctrine, in order to have any useful meaning in governing the primary behavior of government, must be more rule-like than any of the most abstract standards that might be put forward as the basic principle of any given constitutional right.").