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# Constitutional Decision Rules for Juries

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*Abstract*

*Recent scholarship on constitutional decision rules distinguishes courts from other constitutional decision makers, but has not explored distinctions – within the judicial institution – between judges and juries. Correlatively, social science literature on jury comprehension has proposed methods for improving jury instructions, but that literature has not considered in any detail the doctrinal complexities of constitutional law. This Article, drawing upon both fields, presents an agenda for crafting constitutional decision rules specifically for juries. Implementing this agenda will enhance the adjudication of constitutional tort claims, and could also render constitutional doctrine more accessible to non-lawyers.*

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* Professor, University of Pennsylvania Law School. I am deeply indebted to the members of the committee to draft model rules for use in civil cases in the Third Circuit, and to Daniel Capra, my co–reporter on that committee; though this paper does not necessarily reflect their views, I have benefited a great deal from their experience and wisdom. I am grateful to participants in a University of Pennsylvania Law School ad hoc workshop for comments—and especially to Geoffrey Hazard for detailed suggestions—during the initial stages of this project, and to Stephen Burbank, Daniel Capra, Richard Caputo, Dickinson Debevoise, Frank Goodman, Louis Pollak, Kermit Roosevelt and David Rudovsky for comments on a draft. I thank Meg Kammerud, Greg Mercer and Dylan Steinberg for research assistance, and Ronald Day and the staff of the Biddle Law Library for assistance in obtaining sources. Errors, of course, are mine.

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## I. INTRODUCTION

When scholars study constitutional interpretation in the judicial setting,[1] they ordinarily focus on judges; attention to the role of juries is much more rare.[2] The emphasis on judges is understandable. Take, for example, the interpretation of provisions in the Bill of Rights. In most contexts, judicial actors other than juries interpret and apply those provisions. Magistrates decide whether to issue warrants.[3] Trial judges decide whether to exclude

1. That setting, of course, is not the only one in which constitutional interpretation occurs. *See, e.g.*, Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 Harv. L. Rev. 1359 (1997).

2. There are notable exceptions. *See infra* note 29.

3. Magistrates—unlike jurors—are repeat players in the judicial process; but it appears that magistrates serving in state court systems need not always have formal legal training. *See* William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 Va. L. Rev. 881, 889 n.17 (1991) ("Apparently, anyone who works for the court system but who is *not* affiliated with the police department or prosecutor's office can be a magistrate."). Federal magistrate judges, by contrast, invariably do possess legal training. *See* 28 U.S.C. § 631(b)(1) (providing that "[n]o individual may be appointed" to a full-time federal magistrate judge position unless the individual "has been for at least five years a member in good standing of the bar of the highest court of a State, the District of Columbia, the Commonwealth of Puerto Rico, the Territory of Guam, the Commonwealth of the Northern Mariana Islands, or the Virgin Islands of the

evidence.[4] Appellate judges review trial judges' decisions. Federal judges, exercising habeas jurisdiction, review the determinations of trial and appellate judges (albeit under a deferential standard of review).[5]

There are, however, instances in which juries play a key role in the application of the Bill of Rights.[6] A person injured by a government actor's violation of the Constitution may sue for damages under 42 U.S.C. § 1983 (if the defendant is a state actor) or under the *Bivens* doctrine (if the defendant is a federal actor).[7] Such a suit triggers a right to a jury trial,[8] and though the vast majority of such

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United States.").

4. The Supreme Court held in *Jackson v. Denno*, 378 U.S. 368 (1964), that there must be a judicial determination of the voluntariness of a confession before evidence of that confession is submitted to the jury, see *id.* at 388–91. Even if the judge decides not to suppress the evidence, some jurisdictions permit the defendant to argue the question of voluntariness to the jury as well. *See, e.g.*, N.Y.C.P.L. § 710.70 ("Even though the issue of the admissibility of such evidence . . . was determined adversely to the defendant upon motion, the defendant may adduce trial evidence and otherwise contend that the statement was involuntarily made . . . . [T]he court must submit such issue to the jury under instructions to disregard such evidence upon a finding that the statement was involuntarily made.").

5. Rulings in a state criminal trial may also be reviewed by state judges in postconviction collateral proceedings. *See* 1 Randy Hertz & James S. Liebman, Federal Habeas Corpus Practice and Procedure § 3.5a(6), at 190 (4th ed. 2001) ("All States provide some form of postconviction review . . . .").

6. In addition to the civil cause of action upon which I focus in the text, there also exists the possibility of a criminal prosecution for certain federal civil rights violations. *See* 18 U.S.C. § 242.

7. *See* Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 389 (1971) (recognizing an implied right of action for damages arising from Fourth Amendment violation). The Court has placed a number of limitations on the *Bivens* remedy. *See* Erwin Chemerinsky, Federal Jurisdiction § 9.1, at 595–604 (4th ed. 2003) (explaining that "[i]n the last two decades, the Supreme Court has consistently refused to expand, and indeed has substantially limited, the availability of *Bivens* suits").

8. *See* U.S. Const. amend. VII ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . ."). In *City of Monterey v. Del Monte Dunes*, 526 U.S. 687 (1999), the Court held that there was a Seventh Amendment right to a jury determination of the question of liability in a Section 1983 suit seeking damages reflecting just compensation for a regulatory taking. *See id.* at 721. Only Justice Scalia would have held flatly that all Section 1983 claims for damages carry a Seventh Amendment jury right. *See id.* at 723 (Scalia, J., concurring in part and in the judgment). Both the plurality and the dissent were willing to scrutinize specific types of constitutional damages claims brought under Section 1983 to discern whether the particular type of claim triggered a jury right. *See id.* at 711–12

cases are disposed of prior to trial,[9] the remaining cases constitute a significant portion of the federal jury trial docket.[10] In those cases (to take some common examples),[11] the plaintiff may claim that a police

(Kennedy, J., joined by Rehnquist, C.J., and Stevens and Thomas, JJ.) (noting doubts as to whether claim-specific analysis was appropriate but engaging in that analysis anyway); *id.* at 751–52 (Souter, J., joined by O'Connor, Ginsburg and Breyer, JJ., concurring in part and dissenting in part) (rejecting Justice Scalia's proposed approach). None of the Justices, however, questioned the notion that a Section 1983 damages claim that was tort-like in nature and that sought legal relief should carry a right to a jury trial. *See id.* at 709 (majority opinion); *id.* at 751 (concurrence/dissent). The types of claims discussed in this Article—such as excessive force claims—would meet this test.

Although the Seventh Amendment does not bind the states, *see* Gasperini v. Center for Humanities, Inc., 518 U.S. 415, 432 (1996), a Section 1983 damages suit in state court will ordinarily trigger a jury trial right under state constitutional and/or statutory provisions. *See generally* Geoffrey C. Hazard, Jr., et al., Pleading and Procedure: State and Federal 998 (9th ed. 2005) (noting that most state constitutions include a jury trial guarantee for certain civil cases, and discussing state statutory provisions concerning jury trial).

Of course, some Section 1983 claims seek only injunctive relief and do not carry a right to a jury trial. Suits seeking injunctive relief concerning prison conditions are a notable example. But because the Prison Litigation Reform Act was designed to make it more difficult to bring such suits for purposes of institutional reform, damages suits may become relatively more important in prison litigation. *See* Alphonse A. Gerhardstein, *A Practitioner's Guide to Successful Jury Trials on Behalf of Prisoner–Plaintiffs*, 24 Pace L. Rev. 691, 720 (2004) (arguing that "[t]he PLRA is forcing prison reform activists to press for large damage awards as a vehicle to trigger institutional reform").

9. For example, a search of case data provided by the Administrative Office of the U.S. Courts (the "AO Data") reveals that of federal civil rights cases terminated in fiscal year 1999, 95.94 percent terminated prior to trial. (This search, which covered all federal districts and all bases of jurisdiction, included the categories "440 Other Civil Rights" and "550 Prisoner Civil Rights," which are likely to encompass *Bivens* actions and Section 1983 actions other than employment disputes). A similar pattern emerges in other types of cases. For example, running the same search as described above, but in "all" case categories, disclosed that of all federal civil cases terminated in fiscal year 1999, 97.70 percent terminated prior to trial.

10. For instance, a search of the AO Data for cases that terminated in fiscal year 1999 after a completed jury trial showed that 16.68 percent of those cases fell in the category "440 Other Civil Rights" and 8.43 percent of the cases fell in the category "550 Prisoner Civil Rights." This search covered all federal districts and all bases of jurisdiction. If the search is narrowed to cases in which the basis for federal jurisdiction was other than diversity, then the proportions rise to 25.92 percent (for "440 Other Civil Rights") and 13.15 percent (for "550 Prisoner Civil Rights").

11. Though the AO Data do not provide details on types of constitutional claims, empirical studies provide an indication of common types of claims. *See* Margo Schlanger, *Inmate Litigation*, 116 Harv. L. Rev. 1557, 1571 (2003) ("[F]our

officer's use of force violated the Fourth Amendment, or that a prison guard's use of force violated the Eighth; that an arrest transgressed the Fourth Amendment's probable cause requirement; or that the denial of medical care to a prisoner constituted cruel and unusual punishment within the meaning of the Eighth Amendment.

What role should the jury play in resolving these claims? At one extreme, some have suggested that the jury should be the paradigmatic interpreter and enforcer of the Bill of Rights;[12] perhaps, under such a view, one could simply give the jury the text of the relevant Amendment and direct the jury to apply the Amendment to the facts.[13] At the other, some critics of the jury have argued that the court should employ a special verdict form, placing only factual questions before the jury and reserving to the judge the task of applying the law to those facts.[14]

The answer should lie between these poles: the task of applying the Bill of Rights should not be taken from the jury when historical facts are in dispute,[15] but the jury should apply the

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leading topics of correctional conditions litigation in federal court are physical assaults (by correctional staff or by other inmates), inadequate medical care, alleged due process violations relating to disciplinary sanctions, and more general living conditions claims (relating, for example, to nutrition or sanitation)."); Theodore Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 Cornell L. Rev. 482, 550–51 tbls.I & II (1982) (study of case files for all Section 1983 cases filed in the Central District of California in 1975 or 1976; common claims included false arrest, assault, battery, shooting, search, and seizure); Seth F. Kreimer, *Exploring the Dark Matter of Judicial Review: A Constitutional Census of the 1990s*, 5 Wm. & Mary Bill Rts. J. 427, 469 tbl.10, 478 tbl.12, 484 tbl. 17, 498 tbl. 20 (1997) (study of "a one in ten sample of 1994 federal district court opinions available on Lexis, a sample that yielded 667 constitutional claims in 431 cases," *id.* at 451; two of the top four types of damages claims were Eighth Amendment claims and Fourth Amendment false arrest claims).

12. *See infra* note 29.

13. *See, e.g.*, George C. Thomas III & Barry S. Pollack, *Saving Rights from a Remedy: A Societal View of the Fourth Amendment*, 73 B.U. L. Rev. 147, 150, 185 (1993) (arguing that "jury panels [sh]ould replace the judge in deciding the violation issue in pre-trial motions to suppress," and that because simpler instructions are better, "perhaps the judge should do little more than read the Fourth Amendment to the jury").

14. *See, e.g.*, Mark S. Brodin, *Accuracy, Efficiency, and Accountability in the Litigation Process—The Case for the Fact Verdict*, 59 U. Cin. L. Rev. 15, 90–91 (1990).

15. *See infra* text accompanying notes 202–208 for a discussion of whether constitutional reasonableness issues (in excessive force cases, for example) should go to the jury when the historical facts are not in dispute.

relevant provision as it has been interpreted by the courts. To borrow a term recently coined by Mitchell Berman, the jury should implement the relevant constitutional operative proposition, as defined by the Supreme Court and relevant lower courts.[16] Settling that question, however, merely raises another: what decision rules should the jury use to determine whether the defendant violated the relevant operative proposition?

Professor Berman defines decision rules as "rules that direct courts how to decide whether a given operative proposition has been, or will be, complied with."[17] "Courts," however, are not monolithic

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16. Mitchell N. Berman, *Constitutional Decision Rules*, 90 Va. L. Rev. 1, 9 (2004) (defining "constitutional operative propositions" as "constitutional doctrines that represent the judiciary's understanding of the proper meaning of a constitutional power, right, duty, or other sort of provision"). I am grateful to Matt Adler for suggesting to me that the decision rules literature might be relevant to the question of jury instructions.

By "relevant lower courts," I mean the relevant appellate court(s) (for cases tried in federal court, the relevant Court of Appeals) and the trial judge.

17. Berman, *supra* note 16, at 51. Professor Berman offers the following example:

> The Fourteenth Amendment provides that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws." . . . Suppose the federal judiciary interprets the provision to mean that government may not classify individuals in ways not reasonably designed to promote a legitimate state interest. Such, then, is the constitutional operative proposition. But that is not the whole of judge-made constitutional doctrine. A court cannot implement this operative proposition without some sort of procedure (perhaps implicit) for determining whether *to adjudge* the operative proposition satisfied when, as will always be the case, the court lacks unmediated access to the true fact of the matter. It needs, that is to say, a constitutional decision rule.

*Id.* at 9–10. Professor Berman points out that "the decision rule could correspond to the operative proposition" in a number of "different way[s]." *Id.* at 11. For instance,

> the Court might direct, as a decision rule, that courts conclude that the equal protection operative proposition is violated (i.e., that the state has discriminated among individuals in a manner not reasonably designed to promote a legitimate state interest) if persuaded by a preponderance of the evidence either (a) that this is so, or (b) that the challenged action contains a facial racial classification which is not narrowly tailored to promote a compelling governmental interest.

*Id.* For an insightful recent use of the decision rules model to critique constitutional doctrine, see Kermit Roosevelt III, *Constitutional Calcification: How the Law Becomes What the Court Does*, 91 Va. L. Rev. 1649 (2005).

entities.[18] If such rules are written by judges, and are designed primarily for use by judges, the question arises whether those rules are appropriate for use by juries.[19]

I do not contend that juries should use fundamentally different decision rules than judges do.[20] But if the premise is that a jury-applied decision rule should achieve roughly the same effects as the judge-applied decision rule, then a decision rule designed for judges may require modification for the jury's use. Must the language of a controlling Supreme Court decision be read verbatim to the jury, or can the judge translate that language into more colloquial terms? If the Supreme Court decision in question emphasizes the need for deference to the judgment calls made by police officers (or prison officials), should that admonition be included in the jury instructions? If the relevant constitutional principle is standard-like (rather than rule-like), should the judge provide only an abstract statement of the standard, or should she provide illustrations as well? Should she attempt to list some or all of the factors that would bear upon the application of that standard to the facts of the case? More generally, should she discuss the ways in which the constitutional principles relate to the events at issue in the case, or does that overstep the bounds of the judicial role?

In this Article, I contend that the analytical concept of decision rules can help to answer these questions. Using that concept, and drawing upon the social science literature concerning jury instructions[21] and decision-making, I set forth a proposed

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18. Darryl Brown has made this point in the context of his perceptive discussion of decision rules for juries in criminal cases. *See* Darryl K. Brown, *Plain Meaning, Practical Reason, and Culpability: Toward a Theory of Jury Interpretation of Criminal Statutes*, 96 Mich. L. Rev. 1199, 1206 (1998) [hereinafter Plain Meaning] ("Although scholars typically consider judges as the primary audience for these [decision] rules, and prosecutors when they make charging decisions as a secondary audience, criminal juries also are guided by these rules.").

19. *Cf.* Frederick Schauer, *The Occasions of Constitutional Interpretation*, 72 B.U. L. Rev. 729, 730 (1992) (pointing out that "it is mistaken to assume that Supreme Court centered accounts of the principles of constitutional interpretation are necessarily transferable to the interpretive tasks of other officials," *id.*).

20. *Cf.* Berman, *supra* note 16, at 104 (suggesting that "full appreciation of constitutional decision rules" could lead the Court to "permit Congress to substitute its judgment for the Court's on just what the applicable decision rule should be").

21. There exists a rich literature on jury comprehension and instruction drafting. *See, e.g.*, Amiram Elwork et al., Making Jury Instructions

approach for crafting and conveying jury decision rules in constitutional tort cases.

My argument proceeds in four parts. I begin, in Part II, by surveying the types of doctrinal challenges that may arise in constitutional tort litigation. I argue that doctrinal complexity poses a distinct sort of test for juries—one that demands attention to the choice and presentation of jury decision rules. Part III considers specific strategies for crafting such rules. I argue in Part III.A. that jury decision rules should depart from the language of Supreme Court opinions where such departures improve jury comprehension, and in Part III.B. that the judge should sometimes assist the jury by discussing how the relevant constitutional doctrine may apply to the facts of the case. Part IV considers the interaction between trial structure and jury decision rules. In Part IV.A., I argue that reforms of trial procedures can improve the jury's use of appropriate decision rules. Part IV.B. considers the division of functions between jury and judge, giving particular attention to the choice among general verdicts, special verdicts, and general verdicts accompanied by interrogatories. Part IV.B. notes that some judicial decision rules, in particular those governing qualified immunity, need not be imparted to the jury. Part V concludes.

## II. DOCTRINAL COMPLEXITY IN CONSTITUTIONAL TORT TRIALS

A number of scholars—most prominently, Akhil Amar—have argued that the jury served a central function in the original design of the Bill of Rights. Drawing on this history, they suggest that the jury should once again play a key role in remedying Bill of Rights violations. They propose that the Court should abandon the complexity of its current decision rules in favor of simpler rules that the jury could readily apply. That proposal, however, would require a drastic break with existing caselaw. This section briefly surveys that jurisprudence, in order to demonstrate the intricacy of constitutional tort doctrine. It is highly improbable that the Court would wipe clean the doctrinal slate, merely in order to simplify the jury's task.

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Understandable (1982); Robert P. Charrow & Veda R. Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 Colum. L. Rev. 1306, 1323 (1979); Allan Lind & Anthony Partridge, *Suggestions for Improving Juror Understanding of Instructions*, *in* Federal Judicial Center, Pattern Criminal Jury Instructions (1988). Once a decision-maker has settled on a particular jury decision rule, this literature provides valuable advice for expressing that rule in language that the jury is more likely to understand.

Accordingly, any realistic discussion of jury decision rules must recognize that doctrinal complexities are likely to persist.

Though they "sit on the periphery today," Amar asserts, "[j]uries stood at the center of the original Bill of Rights."[22] For example, Amar contends that the Framers of the Fourth Amendment expected "[t]ort law remedies" to provide redress for violations,[23] and suggests that "the Fourth Amendment was designed to privilege the perspective of the civil jury."[24] In the context of Fourth Amendment violations, as elsewhere, "the key role of the jury was to protect ordinary individuals against governmental overreaching."[25] Amar posits, however, that after Reconstruction, judges replaced juries as the optimal interpreters of the Constitution. Where "[t]he original Bill . . . focused centrally on empowering the people collectively against government agents following their own agenda[,] [t]he Fourteenth Amendment . . . focused on protecting minorities against even responsive, representative, majoritarian government."[26] Thus, Amar suggests, the "natural institutional guardian" of the post-Reconstruction Bill of Rights may be "an insulated judiciary rather than the popular jury."[27]

Amar notes that the task of a founding-era jury would have been simplified significantly by the relatively straightforward nature of then-extant doctrine. The "emphasis on juries made all the more sense in a world where few American judges were deeply and distinctively learned in law, where common law was relatively simple rather than intricately regulatory, and where ordinary yeomen were remarkably literate and rights conscious."[28] The landscape has changed dramatically since that time, and the questions facing the constitutional adjudicator are considerably more intricate. Not surprisingly, Amar and others who wish to revive the jury's role vis-à-vis the Bill of Rights also advocate a simplification of constitutional

22. Akhil Amar, The Bill of Rights: Creation and Reconstruction 108–09 (1998).

23. Akhil Amar, The Constitution and Criminal Procedure: First Principles 21 (1997) [hereinafter Criminal Procedure First Principles].

24. *Id.* at 17.

25. Akhil R. Amar, *The Bill of Rights as a Constitution*, 100 Yale L.J. 1131, 1183 (1991) [hereinafter *Constitution*].

26. Akhil R. Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 Yale L.J. 1193, 1260 (1992).

27. Amar, *Constitution*, *supra* note 25, at 1151 (making this argument with respect to the First Amendment).

28. Amar, Creation, *supra* note 22, at 110.

doctrine.[29]

Simplifying the doctrines that govern constitutional tort litigation, however, is more easily suggested than done. The decision rules concerning the relevant constitutional operative proposition may be intricate in themselves.[30] Even if they are not, surrounding liability doctrines may add significant complications.

It is, of course, a basic requirement of Section 1983 that the defendant acted under color of state law.[31] In many cases, this element is undisputed. But where the defendant claims that he was acting as a private individual, and material fact disputes exist on this issue, the jury must decide the question. The issues arising in this context may be as variegated as the facts that can underpin a finding of state action:[32] was there a "sufficiently close nexus between

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29. *See, e.g.*, Amar, Criminal Procedure First Principles, *supra* note 23, at 33 (suggesting that "common-sense reasonableness could straighten out Fourth Amendment thinking and writing"); *id.* at 40–41 (noting problems posed by qualified immunity, and advocating the substitution of governmental entity liability for individual officer liability); Michael Stokes Paulsen, *Captain James T. Kirk and the Enterprise of Constitutional Interpretation: Some Modest Proposals from the Twenty Third Century*, 59 Alb. L. Rev. 671, 691 (1995) (making a "modest" proposal "for restoring The People's role in constitutional interpretation" that includes "eliminat[ing] doctrinal jargon in judicial opinions" and "reinvigorat[ing] the jury as an instrument of popular interpretation of the Constitution"); George C. Thomas III & Barry S. Pollack, *Saving Rights from a Remedy: A Societal View of the Fourth Amendment*, 73 B.U. L. Rev. 147, 150, 185 (1993) (arguing that "jury panels [sh]ould replace the judge in deciding the violation issue in pre-trial motions to suppress," and that because simpler instructions are better, "perhaps the judge should do little more than read the Fourth Amendment to the jury"); *cf.* Ronald J. Bacigal, *Putting the People Back into the Fourth Amendment*, 62 Geo. Wash. L. Rev. 359, 414 (1994) ("The Court's balancing approach to the Fourth Amendment is better suited to a high level of abstraction, rather than refined calculations in individual cases.").

30. I discuss some of those intricacies in Part III, below. Numerous others exist. *See, e.g.*, Daniel J. Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 Colum. L. Rev. 247, 278 n.160 (1988) (noting "the well-deserved reputation of Fourth Amendment doctrine for complexity if not incoherence").

31. A similar requirement exists in *Bivens* actions. *See, e.g.*, Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 389 (1971) (holding that a Fourth Amendment violation "by a federal agent *acting under color of his authority* gives rise to a cause of action for damages" (emphasis added)).

32. *See* Lugar v. Edmondson Oil Co., 457 U.S. 922, 935 n.18 (1982) ("[C]onduct satisfying the state-action requirement of the Fourteenth Amendment satisfies [Section 1983's] requirement of action under color of state law.").

the State" and the defendant's action?[33] Did "the State create[] the legal framework governing the conduct"?[34] Did the government "delegate[] its authority to the private actor,"[35] or "knowingly accept[] the benefits derived from unconstitutional behavior",[36] or "provide[] 'significant encouragement, either overt or covert'"?[37] Did the action "result[] from the State's exercise of 'coercive power'"?[38] Was the defendant "controlled by" the government[39] or "entwined with governmental policies"?[40] Did the defendant "act[] with the help of or in concert with state officials"?[41]

To make the issue more concrete, suppose that the defendant is a police officer who claims that she was off-duty at the time of the relevant events. If she was off duty, that fact will be relevant to the determination of action under color of state law[42]—but the plaintiff may still show such action if the defendant purported to exercise official authority.[43] Conversely, even if the defendant was on duty,

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33. Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974).

34. National Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 192 (1988) (citing North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975)).

35. *Tarkanian*, 488 U.S. at 192 (citing West v. Atkins, 487 U.S. 42 (1988)).

36. *Id.* (citing Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961)).

37. Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n, 531 U.S. 288, 296 (2001) (quoting Blum v. Yaretsky, 457 U.S. 991, 1004 (1982)).

38. *Brentwood*, 531 U.S. at 296 (quoting *Blum*, 457 U.S. at 1004).

39. *Brentwood*, 531 U.S. at 296 (citing Pennsylvania v. Board of Directors of City Trusts of Philadelphia, 353 U.S. 230, 231 (1957) (per curiam)).

40. *Brentwood*, 531 U.S. at 296 (quoting Evans v. Newton, 382 U.S. 296, 299, 301 (1966)).

41. McKeesport Hosp. v. Accreditation Council for Graduate Medical Educ., 24 F.3d 519, 524 (3d Cir. 1994) (citing Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991); Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982); Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970); Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978)).

42. *See, e.g.*, Paul v. Davis, 424 U.S. 693, 717 (1976) (Brennan, J., joined by Marshall, J., and in relevant part by White, J., dissenting) ("[A]n off-duty policeman's discipline of his own children, for example, would not constitute conduct 'under color of' law.").

43. *See, e.g.*, Bonenberger v. Plymouth Tp., 132 F.3d 20, 24 (3d Cir. 1997) ("[O]ff-duty police officers who flash a badge or otherwise purport to exercise official authority generally act under color of law."). Likewise, even if the defendant acted for private reasons, she could be considered to act under color of state law if she used a show of official authority to accomplish her private aims. *See, e.g.*, Basista v. Weir, 340 F.2d 74, 80–81 (3d Cir. 1965) ("Assuming *arguendo* that Scalese's actions were in fact motivated by personal animosity that does not and cannot place him or his acts outside the scope of Section 1983 if he vented his

she still might not have acted under color of state law—if she was acting for "purely private motives" and if her "interaction with the victim [wa]s unconnected with [her] execution of official duties."[44]

One could express the relevant concept in an abstract form: did the defendant "exercise power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law'"?[45] But in our hypothetical case, application of this abstract concept could require attention to numerous concrete factors:[46] were the defendant's acts job-related? Did she identify herself as an officer? Was she wearing police clothing? Did she show a badge? Was she carrying a government-issue weapon or driving a police car? Did she assert her authority as an officer, for example by placing someone under arrest?

Now suppose, instead, that the defendant is a private citizen who—according to the plaintiff—conspired with a government official to violate the plaintiff's federal civil rights.[47] The Supreme Court decisions that recognize this theory of liability do not state in much detail what the plaintiff must show in order to establish such a conspiracy.[48] But assuming that this theory incorporates standard conspiracy doctrine, the plaintiff must show an agreement among some number of people—including the defendant and at least one government official—to do an act that violated the plaintiff's federal

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ill feeling towards Basista . . . under color of a policeman's badge.").

44. *Bonenberger*, 132 F.3d at 24.

45. West v. Atkins, 487 U.S. 42, 49 (1988) (quoting United States v. Classic, 313 U.S. 299, 326 (1941)).

46. *See, e.g.*, Barna v. City of Perth Amboy, 42 F.3d 809, 816 (3d Cir. 1994) ("Manifestations of . . . pretended [official] authority may include flashing a badge, identifying oneself as a police officer, placing an individual under arrest, or intervening in a dispute involving others pursuant to a duty imposed by police department regulations.").

47. "[T]o act 'under color of' state law for § 1983 purposes does not require that the defendant be an officer of the State. It is enough that he is a willful participant in joint action with the State or its agents. Private persons, jointly engaged with state officials in the challenged action, are acting 'under color' of law for purposes of § 1983 actions." Dennis v. Sparks, 449 U.S. 24, 27–28 (1980) (citing Adickes v. S. H. Kress & Co., 398 U.S. 144, 152 (1970); United States v. Price, 383 U.S. 787, 794 (1966)).

48. *See, e.g.*, *Adickes*, 398 U.S. at 152 ("Although this is a lawsuit against a private party, not the State or one of its officials, . . . petitioner will have made out a violation of her Fourteenth Amendment rights and will be entitled to relief under § 1983 if she can prove that a Kress employee, in the course of employment, and a Hattiesburg policeman somehow reached an understanding to deny Miss Adickes service in The Kress store. . .").

civil rights, and must show at least one overt act in furtherance of that agreement.[49]

Even where action under color of state law is undisputed, multi-defendant cases may present intricate questions concerning each defendant's liability. In addition to the individual sued for directly violating the plaintiff's rights, other defendants may be sued on a theory of supervisory liability[50] or for failure to intervene.[51] A municipality may be sued on the theory that a municipal "policy or custom" caused the violation of the plaintiff's rights.[52] Showings of municipal "policy or custom" vary in their complexity: the plaintiff may point to a duly adopted municipal law, or to a statement by a policymaking official, or to a custom so widespread and well-settled that it constitutes the municipality's standard operating procedure, or to inadequate screening, training or supervision by the municipality of its employees.

The first of these municipal liability theories is the most straightforward: the existence of a law authorizing the act in question suffices to establish municipal policy.[53] With respect to the

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49. *See, e.g.*, Hampton v. Hanrahan, 600 F.2d 600, 620–21 (7th Cir. 1979), *rev'd in part on other grounds*, 446 U.S. 754 (1980).

50. A plaintiff can establish supervisory liability by showing that the supervisor knew of the subordinate's conduct and acquiesced in it. *See, e.g.*, Rode v. Dellarciprete, 845 F.2d 1195, 1207 (3d Cir. 1988). A supervisor can also be liable for inaction, at least where the supervisor displayed "deliberate indifference to the consequences of inaction." A.M. *ex rel.* J.M.K. v. Luzerne County Juvenile Det. Ctr., 372 F.3d 572, 586 (3d Cir. 2004) (citing Stoneking v. Bradford Area Sch. Dist., 882 F.2d 720, 725 (3d Cir. 1989)). In some circuits, plaintiffs can establish supervisory liability by meeting an apparently less stringent test, such as "reckless disregard." *See* Hall v. Lombardi, 996 F.2d 954, 961 (8th Cir. 1993).

51. *See, e.g.*, Smith v. Mensinger, 293 F.3d 641, 650 (3d Cir. 2002) ("[A] corrections officer's failure to intervene in a beating can be the basis of liability for an Eighth Amendment violation under § 1983 if the corrections officer had a reasonable opportunity to intervene and simply refused to do so.").

52. Monell v. Department of Soc. Serv. of City of New York, 436 U.S. 658, 694 (1978) ("[I]t is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.").

53. *See* Pembaur v. City of Cincinnati, 475 U.S. 469, 480 (1986) ("No one has ever doubted . . . that a municipality may be liable under § 1983 for a single decision by its properly constituted legislative body—whether or not that body had taken similar action in the past or intended to do so in the future—because even a single decision by such a body unquestionably constitutes an act of official government policy.").

second theory, the judge will determine the identity of the municipal policymakers, but the jury will still have the task of determining whether decisions by those policymakers caused the violation of the plaintiff's rights.[54] As to the third theory, the plaintiff must establish both "that the relevant practice is so widespread as to have the force of law"[55] and that the practice caused the violation. The fourth theory—"liability through inaction"[56]—requires the plaintiff to establish both that the municipality's failure to screen, train or supervise amounted to "deliberate indifference" to the plaintiff's federal rights[57]—a standard the content of which will vary depending on whether the municipal failure concerned training and supervision,[58] or screening during the hiring process[59]—and that the failure caused the violation.

The varying applicability of official immunity may introduce yet another complication. Certain types of officials have absolute immunity from damages claims: prosecutors,[60] judges,[61] legislators[62] and police officer witnesses[63] are prominent examples. But absolute

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54. "[T]he identification of those officials whose decisions represent the official policy of the local governmental unit is itself a legal question to be resolved by the trial judge *before* the case is submitted to the jury." Jett v. Dallas Independent School Dist., 491 U.S. 701, 737 (1989).

> Once those officials who have the power to make official policy on a particular issue have been identified, it is for the jury to determine whether *their* decisions have caused the deprivation of rights at issue by policies which affirmatively command that it occur . . ., or by acquiescence in a longstanding practice or custom which constitutes the "standard operating procedure" of the local governmental entity . . .

*Id.*

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

56. Berg v. County of Allegheny, 219 F.3d 261, 276 (3d Cir. 2000).

57. *Brown*, 520 U.S. at 407 (1997).

58. *See* City of Canton v. Harris, 489 U.S. 378, 390.

59. Where the plaintiff claims "that a single facially lawful hiring decision . . . launch[ed] a series of events that ultimately cause[d] a violation of federal rights . . . , rigorous standards of culpability and causation must be applied to ensure that the municipality is not held liable solely for the actions of its employee." *Brown*, 520 U.S. at 405; *but see id.* at 413 n.1 ("We do not suggest that a plaintiff in an inadequate screening case must show a higher degree of culpability than the 'deliberate indifference' required in *Canton* . . .").

60. *See* Imbler v. Pachtman, 424 U.S. 409 (1976).

61. *See* Pierson v. Ray, 386 U.S. 547, 554 (1967).

62. *See* Tenney v. Brandhove, 341 U.S. 367, 379 (1951) (state legislators); Bogan v. Scott–Harris, 523 U.S. 44, 49 (1998) (local legislators).

63. Briscoe v. LaHue, 460 U.S. 325, 345 (1983).

immunity hinges on the function that the defendant served when taking the act in question. For instance, a prosecutor's absolute immunity covers acts taken in "his role as an advocate for the State,"[64] but not acts taken "[w]hen a prosecutor performs the investigative functions normally performed by a detective or police officer"[65] or when a prosecutor "provid[es] legal advice to the police."[66] Thus, although questions of absolute immunity ordinarily will be determined prior to trial, some defendants may be entitled to absolute immunity as to some but not all of their actions. If evidence concerning the conduct covered by absolute immunity is admitted for some purpose, a limiting instruction may be necessary to explain which parts of the defendant's conduct may be considered for purposes of determining liability.

A government official who is not entitled to absolute immunity will attempt to claim qualified immunity instead.[67] To determine whether such immunity attaches, the court should first ask whether "the officer's conduct violated a constitutional right."[68] If so, then the court should consider "whether the right was clearly established," and in particular, "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted."[69] If these questions can be resolved without confronting any material disputes of historical fact, the court should rule on qualified immunity prior to trial.[70] If such factual issues exist, however, the claim will proceed to trial so that a jury can determine the facts. Should the jury also decide the issue of qualified immunity?

A full discussion of this issue will await Part IV.B.; in the meantime, it will suffice to consider briefly the complexity of the qualified immunity analysis. That analysis requires a determination, not only of the relevant constitutional principle, but also of whether that principle was clearly established at the time of the defendant's

64. Buckley v. Fitzsimmons, 509 U.S. 259, 273 (1993).

65. *Id.*

66. Burns v. Reed, 500 U.S. 478, 496 (1991).

67. *See* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) ("[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.").

68. Saucier v. Katz, 533 U.S. 194, 201 (2001).

69. *Id.* at 201–02.

70. *See* Hunter v. Bryant, 502 U.S. 224, 228 (1991) (per curiam) (qualified immunity questions "ordinarily should be decided by the court long before trial").

act. Further, the question is not only whether the relevant principle then existed in the abstract, but also whether that principle's application to the relevant circumstances would have been clear to a reasonable officer. In the case of principles that themselves are stated in terms of reasonableness, the qualified immunity decision rule is particularly vexing: as commentators have noted, the notion is that even if the defendant's conduct violated the principle—i.e., the conduct was unreasonable—this unreasonableness would not have been clear to a reasonable officer under the circumstances. Reasonably unreasonable?[71]

Admittedly, one could eliminate some of these challenges by simplifying the doctrine. For example, adopting Amar's proposal of government enterprise liability for constitutional torts[72] could obviate the need to sort through theories of vicarious liability and issues of official immunity. But such simplifications are unlikely to occur, and, in any event, a decision rule would still be necessary to determine whether the underlying operative proposition was violated. As the following sections discuss, conveying such decision rules to the jury can be a delicate matter.

## III. TAILORING CONSTITUTIONAL DECISION RULES FOR USE BY THE JURY

In a judge's perception, the tapestry of doctrine within which constitutional operative propositions and decision rules exist will include many strands: the text of the Constitution; interpretations of that text, which might take the form of rules or standards; a myriad of fact patterns to which courts have applied those interpretations in prior cases; and general background knowledge concerning the historical context and development of the Bill of Rights and of private causes of action for violation of those rights. How much of this tapestry should a judge display to the jury that hears a civil rights case? And will the images that a judge perceives in that tapestry be equally visible to jurors? In Part III.A., I argue that it is necessary to identify the decision rules set forth in caselaw and to ask whether those decision rules require translation (and/or alteration) for the jury's benefit. In Part III.B. I ask whether, and how, the court should

71. *See* Anderson v. Creighton, 483 U.S. 635, 643 (1987) (noting the "surface appeal" of plaintiffs' argument that "[i]t is not possible . . . to say that one 'reasonably' acted unreasonably," but rejecting that argument).

72. *See* Amar, Criminal Procedure First Principles, *supra* note 23, at 40–41.

assist the jury in applying the relevant decision rule to the case at hand.

## A. Translating Supreme Court language

There are strong incentives to instruct a jury using the language found in Supreme Court decisions. Adherence to the highest Court's language appears to confer a presumption of correctness on the instructions.[73] Yet that language may not furnish an appropriate decision rule for the jury. In this subpart, I first consider language that is not intended to serve as a decision rule for judges, let alone juries. Next, I consider language that may serve as a judicial decision rule, but that is unsuitable for application by juries.[74] Finally, I consider whether, and how, jury decision rules should incorporate the Supreme Court's admonitions concerning the deference due to government actors (such as police officers and prison officials) whose duties may sometimes require close judgment calls in high-pressure situations.

For their own decisional purposes, judges may not always distinguish decision rules from constitutional operative propositions or from other language in Supreme Court opinions. But the failure to carefully identify the relevant decision rule can have untoward consequences.

Take, for example, the decision rule for qualified immunity.[75]

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73. *See, e.g.*, Mendoza v. Gates, 19 Fed. Appx. 514, 517 (9th Cir. 2001) (unpublished opinion in which majority of panel held that district court did not abuse discretion in giving deadly force instruction because the "instruction closely tracks the language used by the Supreme Court in its decision in *Tennessee v. Garner*"); Floyd v. Laws, 929 F.2d 1390, 1394 (9th Cir. 1991) (rejecting challenge to qualified immunity instruction on the ground that instruction used "language almost identical to that found in" Anderson v. Creighton, 483 U.S. 635 (1987)).

74. *Cf.* Edward J. Devitt, *Ten Practical Suggestions About Federal Jury Instructions*, 38 F.R.D. 75, 76 (1966) (noting that "[a]ppellate court opinions are written for a purpose different from that for which jury instructions are designed").

75. Qualified immunity doctrine might not strictly be seen as a decision rule, since it focuses not on identifying violations of constitutional operative propositions but on determining whether an official should be subject to suit and liability for such a violation. However, I characterize immunity doctrine as a decision rule because the doctrine instructs courts how to determine the effects that follow from a violation of the relevant operative proposition.

Though qualified immunity doctrine by definition is distinct from the underlying constitutional operative proposition, David Rudovsky has argued that because government officials are aware of the existence of immunity, the

As I discussed in Part II,[76] the test for qualified immunity is an objective one to which the officer's subjective motivations are irrelevant.[77] The standard, in other words, is what a reasonable officer would understand the Constitution to require under the circumstances. The Court's famous observation in *Malley v. Briggs* that qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law"[78] is an accurate description of the doctrine's effect: if a defendant acted in circumstances under which a reasonable officer would know the act violated the Constitution, that defendant must be either inept or malevolent. But as a statement of how to determine the existence of qualified immunity, the *Malley* formula is plainly incorrect: if used as a decision rule, it would direct the decision-maker to consider whether the officer knowingly violated the law—precisely the inquiry that the objective test is meant to rule out.[79] That the *Malley* turn of phrase appears in one Circuit's model jury instructions[80] (as well as in instructions given in at least one other Circuit[81]) demonstrates the

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immunity decision rule may become a de facto conduct rule for government officials. *See* David Rudovsky, *Running in Place: The Paradox of Expanding Rights and Restricted Remedies*, 2005 U. Ill. L. Rev. 1199, 1221 (arguing that qualified immunity doctrine "operates . . . to establish a sub–constitutional standard for future government conduct").

76. *See supra* text accompanying notes 67–69.

77. *See* Harlow v. Fitzgerald, 457 U.S. 800, 817–18 (1982).

78. Malley v. Briggs, 475 U.S. 335, 341 (1986).

79. Admittedly, it could be argued that the Court's reasons for adopting an objective test for qualified immunity no longer apply at the time of trial. The Court emphasized in *Harlow v. Fitzgerald* that a subjective standard would lead to intrusive discovery about the official's state of mind, *see* 457 U.S. at 817, and would make it difficult for courts to dismiss cases on qualified immunity grounds prior to trial, see id. at 818. Once a claim has reached trial, these concerns are moot. Thus, one could argue that if the jury finds, at trial, that the defendant actually knew her conduct violated the Constitution, the court could reject the qualified immunity defense without violating the principles underlying *Harlow*. However, it seems unlikely that the Court would approve this approach. *Cf.* Crawford–El v. Britton, 523 U.S. 574, 588 (1998) ("[A] defense of qualified immunity may not be rebutted by evidence that the defendant's conduct was malicious or otherwise improperly motivated.").

80. *See* Fifth Circuit Pattern Jury Instructions (Civil) 10.1 (2004) (instructing jury to consider whether "plaintiff has proved either (1) that the defendant(s) was (were) plainly incompetent or that (2) he (they) knowingly violated the law regarding the plaintiff's constitutional rights").

81. *See* Hudson v. New York City, 271 F.3d 62, 70 n.8 (2d Cir. 2001) ("The district court charged the jury: If 'you find from the preponderance of the evidence that the plaintiff has proved either, one, that the defendants were plainly incompetent or, two, they knowingly or with reckless disregard violated

need for closer attention to the distinction between opinion language that sets decision rules and language that does not.

Even if language in a Supreme Court opinion sets a decision rule for judges, there is the further question whether that language should also form the decision rule for the jury. The Eighth Amendment standard for excessive force claims by convicted prisoners provides an example. In such cases, the Supreme Court has explained that the issue is "whether force was applied in a good faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm."[82] Model instructions typically incorporate this language,[83] and courts have approved its use.[84]

However, as the drafters of model instructions for use in the Eighth Circuit have observed, "[t]he term 'sadistic,' to some people, has sexual connotations."[85] Though it would be useful to have empirical data on the way in which jury-eligible people are likely to interpret the word, it is suggestive that the first definition of "sadism" listed in commonly used modern dictionaries reflects the word's sexual associations, while definitions having to do with cruelty are relegated to second place.[86] Despite this insight, the drafters of the Eighth Circuit model were constrained by Circuit precedent. In a prior case (*Howard v. Barnett*), the Court of Appeals had ordered a new trial because of the district court's failure to include the word "sadistically" in the instructions.[87] Accordingly, the

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the law regarding the plaintiff's constitutional rights, you must find for the plaintiff.' Ellison may well be correct that this instruction was erroneous.").

82. Hudson v. McMillian, 503 U.S. 1, 6–7 (1992).

83. *See, e.g.*, Fifth Circuit Pattern Jury Instructions (Civil) 10.5 (2004); Eighth Circuit Pattern Jury Instructions (Civil) 4.30; Ninth Circuit Pattern Jury Instructions (Civil) 11.9; Eleventh Circuit Pattern Jury Instructions (Civil) 2.3.1; Kevin F. O'Malley et al., Federal Jury Practice & Instructions Civil § 166.23 (5th ed. 2001 & Supp. 2004); Martin A. Schwartz & George C. Pratt, 4 Section 1983 Litigation: Jury Instructions § 11.01.1 (1997 & Supp. 2002).

84. *See, e.g.*, Douglas v. Owens, 50 F.3d 1226, 1232–33 & n.13 (3d Cir. 1995) (approving instruction "under the facts of this case").

85. Eighth Circuit Pattern Jury Instructions (Civil) 4.30 n.5.

86. *See* Webster's New Collegiate Dictionary 1018 (1977) (defining sadism as "1: a sexual perversion in which gratification is obtained by the infliction of physical or mental pain on others (as on a love object) . . . 2 a : delight in cruelty b : excessive cruelty"); The American Heritage College Dictionary 1199 (3d ed. 1993) (defining sadism as "1. *Psychol.* a. Sexual gratification from infliction of pain on others. b. A psychological disorder in which sexual gratification is derived from infliction of pain on others. 2. Delight in cruelty. 3. Extreme cruelty").

87. *See* Eighth Circuit Pattern Jury Instructions (Civil) 4.30 n.5 (citing Howard v. Barnett, 21 F.3d 868 (8th Cir.1994)). In *Howard*, the Court of Appeals

Eight Circuit model includes the word "sadistic" in the instruction, but advises that the term should be defined for the jury.[88]

The outcome in *Howard* could have been justified on other grounds;[89] it is thus particularly unfortunate that the rationale stressed by the Court of Appeals—that "the fact-finder may not conclude that the Eighth Amendment was violated unless it finds that the force was applied 'maliciously and sadistically for the very purpose of causing harm'"[90]—seems to require the incantation of the quoted language. The Eighth Circuit has since approved the approach, taken in the model instructions, of defining the word "sadistic" for the jury.[91] The addition of a definition is helpful, and may suffice to prevent jury confusion. But it would be better still to omit the misleading word, and instead to use other, more straightforward language to convey the relevant concept.[92]

The Eighth Amendment excessive force standard illustrates a related question, as well: in addition to conveying the basic decision rule set by the Supreme Court, should jury instructions also echo the

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relied both on the notion that "'maliciously' and 'sadistically' have different meanings, and the two together establish a higher level of intent than would either alone," and on the assertion that by omitting the word "sadistically," the instruction deviated from the standard "required by the Supreme Court in *Hudson*." *Howard*, 21 F.3d at 872.

88. *See* Eighth Circuit Pattern Jury Instructions (Civil) 4.30 n.5 (advocating use of definition); *id.* § 4.46 (defining "sadistically" as "engaging in 'extreme or excessive cruelty or delighting in cruelty'").

89. *See Howard*, 21 F.3d at 872 (noting "[m]oreover" that the instruction was also "defective because it told the jury that the presence of malicious behavior was merely a factor for the jury to consider, rather than the jury's pivotal inquiry").

90. *Id.* at 872.

91. In Parkus v. Delo, 135 F.3d 1232 (8th Cir. 1998), a different Eighth Circuit panel rejected the appellant's argument that the trial judge had erred by defining "sadistic" for the jury. As the court explained,

> Although district courts are not required to define words that are in the vocabularies of lay persons, the meaning of 'maliciously' and 'sadistically' is critical to a jury's deliberations in this type of case. We cannot say the district court abused its discretion when it used the definition of 'sadistically' we mentioned in *Howard*, 21 F.3d at 872, to help explain the culpable mind–set required by *Hudson*, 503 U.S. at 9.

*Parkus*, 135 F.3d at 1234.

92. For example, the *Howard* court defined "sadistically," in its opinion, as "engaging in extreme or excessive cruelty or . . . delighting in cruelty." *Howard*, 21 F.3d at 872. Such language could be used as a substitute for, rather than a definition of, "sadistically."

tenor of the surrounding language in the relevant opinion? In *Whitley v. Albers*, the Court adopted the "malicious and sadistic" decision rule for use in cases arising from prison riots.[93] In *Hudson v. McMillian*, the Court extended that decision rule to all excessive force claims by convicted prisoners.[94] The Court explained this extension by asserting that "[m]any of the concerns underlying [the] holding in *Whitley* arise whenever guards use force to keep order":[95]

> Whether the prison disturbance is a riot or a lesser disruption, corrections officers must balance the need "to maintain or restore discipline" through force against the risk of injury to inmates. Both situations may require prison officials to act quickly and decisively. Likewise, both implicate the principle that "[p]rison administrators . . . should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security."[96]

Read in context, these words explain the Court's choice of decision rule, but need not be seen as a part of that decision rule. However, some sets of model instructions—apparently intent on incorporating Supreme Court language—include not only the malicious and sadistic standard but also an admonition concerning the need for deference to official judgments.[97] Thus, for example, the Fifth Circuit model instruction warns: "I remind you that you must give prison officials wide ranging deference in the adoption and

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93. *See* Whitley v. Albers, 475 U.S. 312, 320–21 (1986).

94. *See* Hudson v. McMillian, 503 U.S. 1, 6–7 (1986) (holding that *Whitley* standard applies "whenever prison officials stand accused of using excessive physical force in violation of the Cruel and Unusual Punishments Clause").

95. *Id.* at 6.

96. *Id.*. at 6 (quoting *Whitley*, 475 U.S. at 321–22). Later in the opinion, the Court made a similar allusion to the need for deference when explaining why *de minimis* uses of force may not violate the Eighth Amendment: "'Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates a prisoner's constitutional rights.'" *Hudson*, 503 U.S. at 9 (quoting Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973).

97. In addition to the instructions quoted in the text, see also O'Malley et al., *supra* note 83, § 166.23 ("[Y]ou must give prison officials wide ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain internal security in the prison."); Eleventh Circuit Pattern Jury Instructions (Civil) 2.3.1 ("[N]ot every push or shove, even if it later seems unnecessary, will give rise to a constitutional violation; and an officer always has the right, and the duty, to use such reasonable force as is necessary under the circumstances to maintain order and assure compliance with prison regulations.").

execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain internal security in the prison."[98] Likewise, the Ninth Circuit model instruction informs jurors that "you should give deference to prison officials in the adoption and execution of policies and practices that in their judgment are needed to preserve discipline and to maintain internal security in a prison."[99]

In effect, these instructions double-count the need for deference. That need has already been taken into account in the Court's choice of the malicious and sadistic standard (rather than some other standard that would be easier to meet).[100] To add explicit admonitions concerning the need for deference risks tipping the scales yet further in the defendant's favor.[101]

By contrast, the Supreme Court's discussion of the Fourth Amendment standard for excessive force suggests that the Court's chosen decision rule for that standard might incorporate a reference to some notion of deference. In *Graham v. Connor*, the Court held that all excessive force claims arising from arrests, police stops and other such seizures "should be analyzed under the Fourth Amendment and its 'reasonableness' standard."[102] The Court framed the reasonableness analysis as a balancing of the individual's "Fourth Amendment interests" against the government's law enforcement interest.[103] Noting that the analysis must be fact-specific,[104] the Court proceeded:

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98. Fifth Circuit Pattern Jury Instructions (Civil) 10.5.

99. Ninth Circuit Pattern Jury Instructions (Civil) 11.9.

100. For example, Justice Stevens argued in *Hudson* that the Court should instead apply "the less demanding standard of 'unnecessary and wanton infliction of pain.'" *Hudson*, 503 U.S. at 13 (Stevens, J., concurring in part and concurring in the judgment) (quoting Estelle v. Gamble, 429 U.S. 97, 104 (1976)).

101. As the Third Circuit has recognized, the decision rule's distinction between malicious and sadistic uses of force (on one hand) and good faith efforts at discipline (on the other) suffices to convey the notion that prison officials should be given latitude: "If 'force was applied in a *good faith effort* to maintain or restore discipline,' . . . the jury presumably would conclude that although the use of force was excessive, it was still justified given the circumstances." Douglas v. Owens, 50 F.3d 1226, 1233 (3d Cir. 1995).

102. Graham v. Connor, 490 U.S. 386, 395 (1989).

103. *See id.* at 396.

104. *See id.* (stating that "proper application" of the standard "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").

> The "reasonableness" of a particular use of force *must be judged* from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight . . . . "Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers," Johnson v. Glick, 481 F.2d, at 1033, violates the Fourth Amendment. *The calculus* of reasonableness *must embody* allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.[105]

This discussion seems clearly to concern the content of the decision rule, rather than the Court's reasons for selecting it. The reasonableness analysis, under this view, must incorporate the fact that police must sometimes react instantly in high-pressure situations; without that recognition, the analysis could err. One could take issue with the Court's reasoning,[106] but it is difficult to deny that *Graham*'s deference discussion sets a decision rule.

Of course, recognizing the *Graham* language as a decision rule does not demonstrate that it ought to be used verbatim to provide a decision rule *for juries*. Presumably, Chief Justice Rehnquist wrote at least partly with lower court judges in mind. After all, those judges must apply the *Graham* standard when deciding motions to dismiss for failure to state a claim, motions for summary judgment, and motions for judgment as a matter of law. Indeed, in the light of the fact that the vast majority of federal civil rights claims are dismissed prior to trial,[107] it will usually be a judge who employs a decision rule to dispose of the case. Admittedly, in order to dispose of the case without trial, the judge must ask whether any reasonable jury could find for the non-moving party.[108] But this does not mean that the decision rule employed by the judge must be

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105. *Id.* at 396–97 (emphases added) (quoting Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973) (Friendly, J.)).

106. For example, one could argue that municipalities, at any rate, should carefully train officers to respond appropriately in just such situations, and that it is therefore inappropriate to give undue weight to such exigencies when assessing who should bear the cost when things go wrong (at least in the context of assessing municipal liability).

107. *See supra* note 9.

108. *See, e.g.*, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986) ("[S]ummary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.").

worded in the same way as the decision rule for a jury.

To determine whether, and how, to include the *Graham* language in a jury decision rule, it would be useful to know how juries' analysis of the relevant issues would likely compare with judges'. For example, one might want to know whether juries are more or less likely than judges to be affected by hindsight bias,[109] and whether juries are more or less likely than judges to defer to the judgment of police officers. If juries are no more likely than judges to defer to police judgments, then the jury decision rule might employ a good deal of the language used by the *Graham* Court. If, on the other hand, juries are already more predisposed to defer, the jury decision rule might appropriately encapsulate the deference concept simply by saying that "the 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene."[110]

As the foregoing illustrates, isolating decision rules from the surrounding discussion in Supreme Court opinions will not fully determine how the *jury* decision rule should be worded. Should more accessible terms be substituted for those that might be misleading? Should the level of emphasis placed on a concept such as deference to police judgments vary as between judges' and juries' decision rules? Experimental or field studies could help instruction drafters to select among possible jury decision rules. The analytical steps discussed in this Part can identify questions for such studies to address—or, in the absence of such studies, can at least make clearer the assumptions that underlie the current selection of decision rules.

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109. On the question of hindsight bias in judges' decisionmaking, see, e.g., Chris Guthrie et al., *Inside the Judicial Mind*, 86 Cornell L. Rev. 777, 804 (2001) (discussing experimental data); Stuntz, *supra* note 3, at 912–13 (discussing role of hindsight bias in judges' decisions on suppression motions). For a description of experiments the results of which provide evidence of possible hindsight bias in mock jurors, see Casper & Benedict, *The Influence of Outcome Information and Attitudes on Juror Decision Making in Search and Seizure Cases*, *in* Inside the Juror: The Psychology of Juror Decision Making (Reid Hastie ed., 1993).

110. Studies of jurors' and juries' views of the police could also help instruction drafters to determine whether jury decision rules should include an instruction on police officers as witnesses. *See, e.g.*, Michael Avery et al., Police Misconduct: Law and Litigation § 12:8 (providing such an instruction). Similar studies of jurors' views of prisoner plaintiffs and correctional defendants would be useful as well. *Cf.* Gerhardstein, *supra* note 8, at 692 ("Jurors hate prisoners. Most are shocked to learn that prisoners have the right to sue corrections officials and even more shocked to learn that they will be asked to award damages to those prisoners.").

## B. Fitting the decision rules to the case

The prior section discussed the challenges inherent in deriving jury decision rules from Supreme Court opinions. But even assuming the success of that enterprise, no set of jury decision rules can be perfected in the abstract. Though the appeal of model instructions is understandable—following models, like repeating the language of Supreme Court decisions, can in effect lend a patina of correctness to a trial judge's instructions[111]—the authoritativeness of models should not be overestimated. Model instructions can no more determine the content of a good set of jury instructions in a given case than the teacher's manuals that accompany some law school casebooks can provide a script for competent teaching. The model gives a framework and a working draft, but it may require adjustment to fit the case at hand.[112]

In this Part, I discuss several types of tailoring that may be needed. I begin by discussing the challenges posed in crafting a decision rule concerning the "totality of the circumstances." I contend that to instruct on such a decision rule, the court should not merely provide an abstract formulation but should also point out the types of factors that the jury should consider. Next, I stress the need for discernment in selecting an existing decision rule for application in a

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111. *See, e.g.*, Johnson v. Breeden, 280 F.3d 1308, 1313 (11th Cir. 2002) (rejecting defendants' challenges to jury instructions and noting that trial judge "used the Eleventh Circuit pattern jury instruction, substantially verbatim"); Swinton v. Potomac Corp., 270 F.3d 794, 807 (9th Cir. 2001) (rejecting challenge to jury instructions on the ground that the instructions "adequately included [the requisite] elements and mirrored the Ninth Circuit model civil jury instruction for disparate treatment under Title VII, which is analogous for purposes of this analysis"); *see also* Jack B. Weinstein, *The Power and Duty of Federal Judges to Marshall and Comment on the Evidence in Jury Trials and Some Suggestions on Charging Juries*, 118 F.R.D. 161, 162 (1988) ("Judges know that use of dry, generic form charges copied from chargebooks reduces the risk that they will be reversed."); Darryl K. Brown, *Regulating Decision Effects of Legally Sufficient Jury Instructions*, 73 S. Cal. L. Rev. 1105, 1108 (2000) ("For rules on which an instruction has been approved on appeal or by a pattern jury instruction committee, trial judges often will not even hear argument for alternatives.").

112. *See* Devitt, *supra* note 74, at 77 ("Very few pattern instructions are intended to be copied verbatim in every case. They are intended principally as an aid to the preparation of an appropriate instruction in the particular case."); William W. Schwarzer, *Reforming Jury Trials*, 132 F.R.D. 575, 583 (1991) ("Lawyers and judges can greatly aid jury comprehension by drafting instructions in plain English, tailoring them to the facts of the case, avoiding broad generalizations that make their application more difficult, and providing the jury with decision trees or algorithms to follow in their deliberations.").

given case. In some instances, the Supreme Court has adopted a standard-like decision rule, but has then derived a more specific and rule-like formulation for use in certain circumstances; I note that in such cases, the more specific decision rule should be employed when warranted by the evidence. In other instances, a decision rule employed in one type of case may be misleading when used in a related, but materially distinct, type of case. Finally, I consider cases in which the trial court provided the jury with an otherwise unexceptionable decision rule, but failed to tailor that rule to important facets of the case.

The Fourth Amendment standard for excessive force provides some pertinent examples. As I discussed above, this is an objective reasonableness standard of sorts. The analysis proceeds from the viewpoint of a reasonable officer (though that viewpoint should be applied to the facts the defendant reasonably believed to be true at the time)[113]—but the objectivity of the analysis, under the *Graham* formulation, apparently should be colored by a recognition of the challenges of police work under high-pressure conditions.[114] In any event, the key point for present purposes is that the standard is one of all-things-considered reasonableness. It "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."[115] Lower courts have noted other factors that may be relevant, such as "the number of persons with whom the police officers must contend at one time."[116]

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113. *See, e.g.*, Saucier v. Katz, 533 U.S. 194, 205 (2001) ("If an officer reasonably, but mistakenly, believed that a suspect was likely to fight back . . . the officer would be justified in using more force than in fact was needed."); Estate of Smith v. Marasco, 318 F.3d 497, 516–17 (3d Cir. 2003) (analyzing Fourth Amendment excessive force claim based on officers' knowledge or "objectively reasonable belief" concerning relevant facts); Curley v. Klem, 298 F.3d 271, 280 (3d Cir. 2002) (holding that, viewed in light most favorable to plaintiff, evidence established excessive force because "under [plaintiff]'s account of events, it was unreasonable for [defendant] to fire at [plaintiff] based on his unfounded, mistaken conclusion that [plaintiff] was the suspect in question").

114. *See supra* text accompanying notes 102–110. As I discuss in Part III.A., if jurors possess an intuitive sense of those challenges, the decision rule need not contain as great an emphasis on the matter as it would if jurors were likely to be unaware of such challenges.

115. Graham v. Connor, 490 U.S. 386, 396 (1989).

116. Kopec v. Tate, 361 F.3d 772, 777 (3d Cir. 2004).

How should the court direct the jury's "careful attention" to the "circumstances of [the] particular case"? At a minimum, of course, the court must provide the abstract statement of the decision rule. In addition, the court should give examples of factors that may be most relevant to the analysis.[117] Thus, some model instructions include, as examples, the factors identified by the Court in *Graham*.[118] If other factors—not identified in *Graham*—are also relevant, the court should list those too. The listing of factors in a model instruction should be a starting point; working in consultation with counsel, the court should add any other factors warranted by the evidence.[119]

Some might object that it suffices to list the *Graham* factors, and that listing others requires judgment calls that put the judge in the position of commenting on the evidence. The *Graham* Court, of course, made clear that its listing was not exhaustive.[120] More centrally, as the discussion that follows will illustrate, in order to craft appropriate instructions, the court *must* make judgment calls about the legal implications of the evidence in the case.

Take, for example, the choice of decision rules in a case involving the use of deadly force by a police officer. In most Fourth Amendment excessive force cases, as I have noted, the standard-like decision rule directs the jury to balance the individual's Fourth Amendment right to be free of unreasonable seizure against the government's law enforcement interest, using a totality-of-the-circumstances approach. Technically, that balancing also applies in cases where the force used was deadly in nature, but in such cases the Supreme Court has performed the balancing itself, producing a somewhat more rule-like decision rule. Reasoning that "[w]here the suspect poses no immediate threat to the officer and no threat to

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117. *Cf.* John P. Cronan, *Is Any of This Making Sense? Reflecting on Guilty Pleas to Aid Criminal Juror Comprehension*, 39 Am. Crim. L. Rev. 1187, 1252 (2002) (criticizing pattern jury instructions for "present[ing concepts] in an abstract manner").

The court should make clear that the list of factors is not exhaustive. *Cf.* Seventh Circuit Pattern Jury Instructions (Civil) 7.09 cmt. (cautioning that a list of factors "might suggest that others are irrelevant").

118. *See, e.g.*, Ninth Circuit Pattern Jury Instructions (Civil) 11.4; Eleventh Circuit Pattern Jury Instructions (Civil) 2.2.

119. The court should list these factors in the final instructions; if the judge gives preliminary instructions at the outset of the trial, those instructions can simply state the general standard. *See infra* text accompanying notes 167–172.

120. *Graham*, 490 U.S. at 396.

others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so,"[121] the Court held in *Tennessee v. Garner* that deadly force may not be used "to prevent the escape of an apparently unarmed suspected felon . . . . unless it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others."[122] Even if this test is met, the officer must, if feasible, give the suspect a warning before using deadly force.[123]

In cases where the evidence indisputably shows a use of deadly force,[124] the court must draw the jury's decision rule from *Garner* rather than *Graham*.[125] To do otherwise would invite the jury to choose a balance other than that selected by the *Garner* Court.[126] The *Garner/Graham* choice, then, illustrates one of the trial judge's basic tasks: she must assess the evidence and determine whether the Supreme Court (or the relevant Court of Appeals) has prescribed a decision rule for the particular type of dispute involved in the case.

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121. Tennessee v. Garner, 471 U.S. 1, 11 (1985).

122. *Id.* at 3.

123. *See id.* at 11–12.

124. If there are disputes of material fact as to whether or not deadly force was used, then the court should instruct on both the *Garner* and *Graham* tests and explain when each applies.

The *Garner* Court did not specify what types of force, other than shootings, count as deadly force for *Garner's* purposes. *See generally* Michael Avery et al., Police Misconduct: Law and Litigation § 2.22 ("The use of instrumentalities other than firearms may constitute the deployment of deadly force. Police cars have been held to be instruments of deadly force. A majority of the courts that have considered the question and have concluded that police dogs should not be considered an instrument of deadly force.").

125. The *Garner* decision rule requires adjustment for use in cases where the suspect is not trying to escape but nonetheless poses a threat to someone's safety. *See, e.g.*, Seventh Circuit Pattern Jury Instructions (Civil) 7.09 (*Garner* instruction providing that "[a]n officer may use deadly force when a reasonable officer, under the same circumstances, would believe that the suspect's actions placed him or others in the immediate vicinity in imminent danger of death or serious bodily harm").

126. *See, e.g.*, Monroe v. City of Phoenix, 248 F.3d 851, 860 (9th Cir. 2001) (holding that "in a police shooting case such as this, where there was no dispute that deadly force was used, the district court abuses its discretion by not giving a *Garner* deadly force instruction"); *but see* Billingsley v. City of Omaha, 277 F.3d 990, 995 n.2 (8th Cir. 2002) (in case where trial court gave both an excessive force instruction and a deadly force instruction, holding that "[a]lthough the inclusion of both instructions was improper and created confusion, it does not constitute plain error").

When the caselaw provides such a decision rule, the trial judge must make sure to provide it to the jury.

If this exhausted the responsibilities of the trial judge, the task might be relatively straightforward: she must merely make sure to select the appropriate decision rule from among those provided by the higher courts. But some cases may present disputes for which no higher court has yet explicitly provided a decision rule. In those cases, there is no recourse to models, for no model exists; and the unthinking use of a model developed for some other type of case may seriously mislead the jury.

The Eighth Amendment "excessive force" instruction given in *Giron v. Corrections Corporation of America* provides a notable illustration.[127] The plaintiff, claiming that a corrections officer raped her while she was imprisoned in a state correctional facility, brought Eighth Amendment claims against the officer and other defendants.[128] Plaintiff's counsel apparently styled the claim against the officer as one for excessive force; but recognizing the distinctive issues posed by an "excessive force" claim stemming from a rape, plaintiff's counsel requested the following instruction:

> Sexual abuse of a prisoner by a corrections officer has no legitimate purpose, and is simply not part of the penalty that prisoners must pay. If you find that Defendant Torrez forced Plaintiff to have sexual intercourse with him, then you must find that this use of force was excessive and applied maliciously and sadistically for the very purpose of causing harm.[129]

The district court, however, rejected this language, and instead instructed the jury that in order to return a verdict for the plaintiff it must find:

> First: that Defendant Torrez forced Plaintiff to have sexual intercourse with him; and
> Second: that the use of force was applied maliciously and for the very purpose of causing harm; and
> Third: as a direct result, Plaintiff was damaged . . . .[130]

As we saw in Part III.A., a "malicious and sadistic" standard

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127. 191 F.3d 1281 (10th Cir. 1999)

128. *Id.* at 1288. The Eighth Amendment claims were asserted under Section 1983; the plaintiff also asserted claims under state law. *Id.* at 1284.

129. *Id.* at 1288.

130. *Id.* The instructions also included the requirement of action under color of state law. *See id.*

governs prisoners' Eighth Amendment claims for excessive force. Indeed, the Court has stated explicitly that this standard applies "whenever prison officials stand accused of using excessive physical force in violation of the Cruel and Unusual Punishments Clause."[131] But neither *Whitley v. Albers* (in which the Court first adopted the "malicious and sadistic" language)[132] nor *Hudson v. McMillian* (in which the Court extended that language to all excessive force claims)[133] involved a claim of rape.

In a case where the plaintiff claims she was beaten and the defendant admits the use of force but claims it was necessary to maintain order, the Court's "malicious and sadistic" standard can be coherently applied: Assuming the jury finds that the officer used force, the jury must still determine whether the officer's motives were malice and sadism (rather than a "good faith effort" to keep order). But in a case where the plaintiff claims she was raped,[134] it makes no sense to require the plaintiff to prove *both* the rape *and* the defendant's malice and intent to cause harm. Such an instruction defies logic (and basic decency), for it suggests that *some* rapes of inmates by guards *are* constitutionally permitted—that in order to find for the plaintiff the jury must find not only that the rape occurred but also something more. Accordingly, the Court of Appeals found plain error in the instruction and remanded the claim for a new trial.[135]

The problem in *Giron*, then, was the trial judge's failure to recognize that the *Whitley/Hudson* decision rule for excessive force claims simply was unsuitable for adjudicating Ms. Giron's claim. A different issue may arise when the court employs an otherwise appropriate decision rule but fails to explain to the jury how that decision rule might be applied to the case at hand. *Grazier ex rel. White v. City of Philadelphia* illustrates how the need for such

131. Hudson v. McMillian, 503 U.S. 1, 6–7 (1986).

132. *See* Whitley v. Albers, 475 U.S. 312, 320–21 (1986).

133. *See Hudson*, 503 U.S. at 6–7.

134. In *Giron*, the defendant asserted that "consensual" sex occurred. 191 F.3d at 1284; *compare* Heggenmiller v. Edna Mahan Correctional Institution for Women, 128 Fed.Appx. 240, 249 (3d Cir. 2005) (non–precedential opinion) (Fuentes, J., dissenting) ("[E]ven defendants concede that prison inmates cannot legally consent to sex with their prison guards.").

135. *See id.* at 1290 ("Since Ms. Giron had to prove that Mr. Torrez forced her to have sex with him, she should not have faced the additional hurdle of showing that the coercion involved malice under a test primarily designed for a prison guard's use of force to maintain order.").

additional commentary might arise.[136] As described in the appellate opinions in *Grazier*, the facts of the case were these: two rookie police officers, in plain clothes and an unmarked car, stopped a car for a traffic infraction by pulling in front of it at a right angle. The officers claimed they showed badges and said "Police, Don't move"; the driver of the car claimed he had the windows up and the radio on, and thought the two men were carjackers.

> Panicked, [Campbell] threw his car into reverse and backed into another car. He then drove forward either at Hood or in his direction. Hood fired four shots at Campbell's car, three of which struck Campbell. The shot that injured Campbell most severely, the last of the four, arguably was not discharged until after his vehicle was pulling away from the officers.[137]

The trial judge gave the jury a standard *Graham* reasonableness instruction on excessive force,[138] as well as a more specific instruction on deadly force.[139] Thus instructed, the jury returned a verdict for the defendants.[140] On appeal, the plaintiffs contended that "the Court should have instructed the jury that an officer acts unreasonably if his improper conduct creates the

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136. 328 F.3d 120 (3d Cir. 2003).

137. *Id.* at 123.

138. The instruction read in part:

> [Y]ou must determine whether the amount of force used to effect the stop was that which a reasonable officer would have employed in effectuating the stop under similar circumstances. In making this determination, you may take into account the reason for the stop, the severity of the crime or the violation, whether plaintiffs posed an immediate threat to the safety of the defendants or others, and whether the plaintiffs actively resisted or attempted to evade the stop.

*Id.* at 126 n.7.

139. This part of the instruction stated:

> In evaluating the reasonableness of the use of force in this situation, you must ask yourselves the following question: giving due regard to the pressures faced by the police, was it objectionably [sic] reasonable for the officer to believe, in light of the totality of the circumstances, that the subject posed a significant threat of death or serious physical injury to the officer or others, and that deadly force was necessary to prevent the suspect from causing serious physical injury or death.

*Id.* at 130 (Becker, C.J., dissenting in part).

140. *See id.* at 122.

situation making necessary the use of deadly force."[141] A majority of the appellate panel rejected the plaintiffs' argument, finding that they had not requested their desired instruction and that the failure to give it was not plain error.[142]

Then-Chief Judge Becker dissented in relevant part. In his view, the trial judge should have explained that if an "officer's conduct unreasonably creates the need to use deadly force in self-defense, that conduct may render the eventual use of deadly force by the officer unreasonable in violation of the Fourth Amendment, even if the officer reasonably believed that such force was necessary to prevent death or severe bodily injury."[143] In addition, he argued, the trial judge should have marshaled the facts for the jury, pointing out "that the defendants were plain-clothes officers, forbidden by Regulations to make traffic stops, and that the officers were driving an unmarked car (in a high crime neighborhood) which they pulled perpendicularly in front of plaintiffs' car to make a traffic stop, also in violation of department policy."[144] And the judge should have drawn the jury's attention to key fact disputes, such as "whether the officers exited the car with guns drawn and failed to identify themselves," and "whether a reasonable officer in Hood's position would know that he was out of danger when he fired the last shot, which entered the back of Campbell's car and lodged in the base of his brain."[145]

To both the majority and dissent in *Grazier*, this dispute over the decision rule was at its core a disagreement over the proper role of the trial judge. The majority asserted that the dissent's approach would impinge on both counsel and jury: "[E]ngrafting evidence to argument is the home turf of counsel. Laying out a level (even if plain) canvas for counsel to color is the court's model role."[146] Chief Judge Becker responded that, to the contrary, the trial judge has a duty to relate the law to the facts: "The art of instructing the jury is not the rote recitation of controlling legal principles, quoted verbatim from the case law, but the didactic exercise of providing the jury with guidance as to how those principles apply to the evidence presented

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141. *Id.* at 127.
142. *Id.*
143. *Id.* at 129–30 (Becker, C.J., dissenting in part).
144. *Id.* at 131.
145. *Id.* Unrebutted expert testimony indicated that the last shot was fired, through the back windshield into the plaintiff's head, when the plaintiff's car was between 32 and 120 feet from the defendant, heading away.
146. *Id.* at 128.

and how the factual disputes bear on the ultimate outcome."[147]

These contrasting views fit within a long-running debate over judicial comment on the evidence.[148] "Judicial comment" is a broad term; such comment can range from a summary of the evidence (and its connection to relevant law) to observations concerning witness credibility and the weight of the evidence. At least the latter sorts of comment are now outlawed in a majority of states;[149] but federal judges retain a broad discretionary power to comment. Judge Weinstein has argued that judicial comment can "educate the jurors" and "can serve to clarify what may have been distorted by the bias of counsel's arguments."[150] Judge Weinstein observes that "stat[ing] the rules of law in the context of the evidence" is the most common method of judicial summary of the evidence: "The judge may simply state the rules of law in the jury charge, and illuminate them with examples from the evidence presented in the case."[151] Like Chief Judge Becker, Judge Weinstein considers such a summary to be necessary in some cases; "[m]ere abstract statements of general rules from the chargebooks may leave all but the most sophisticated and quick-witted jurors without any effective guidance."[152]

The notion that the judge should provide such comment in appropriate cases reflects a particular view of the relationship between judge and jury. In this model, the trial serves as a sort of seminar on the relevant issues, and the judge plays the role of a teacher—as should the lawyers.[153] Indeed, as the *Grazier* majority

147. *Id.* at 130 (Becker, C.J., dissenting); *cf.* Christopher N. May, *"What Do We Do Now?": Helping Juries Apply the Instructions*, 28 Loy. L.A. L. Rev. 869, 870 (1995) (arguing that "the judge should either weave the evidence into the instructions, or use the threat of doing so to induce counsel to link the evidence to the law in their closing arguments"); William W. Schwarzer, *Communicating with Juries: Problems and Remedies*, 69 Cal. L. Rev. 731, 744 (1981) ("By the time the final instructions are given, the jury will have acquired a context from the evidence. Instructions should therefore . . . incorporat[e] that evidence."); *compare id.* at 751 ("Particular inferences are a matter for argument that can and should be left to counsel.").

148. *See, e.g.*, Edson Sunderland, *The Inefficiency of the American Jury*, 13 Mich. L. Rev. 302, 310 (1914) (advocating judicial comment).

149. *See* Weinstein, *supra* note 111, at 169 ("Currently twenty states still do not permit either summary or comment and seventeen more permit summary only.").

150. *Id.* at 166; *see also* Devitt, *supra* note 74, at 78 (arguing that the trial judge should provide impartial summary and comment on the evidence).

151. Weinstein, *supra* note 111, at 173.

152. *Id.*

153. *See* B. Michael Dann, *"Learning Lessons" and "Speaking Rights":*

observed, a skilled argument by counsel might fill the void left by an overly abstract jury charge. And a charge that ties the law to the facts, pointing out key fact disputes and noting potential applications of the law, might be inaccurate or might unduly sway the jury.[154] But, as the next section discusses, the trial inherently requires the judge to make choices that will affect the way in which the jury frames the questions in the case, and the way in which the jury perceives the connections between the evidence and the relevant law. Recognizing the effect of the trial process upon jury decision-making may not lead us to a failsafe method for crafting optimal jury decision rules. But such recognition can, at least, provide the means of choosing among trial procedures with an eye to the effect on those decision rules.

## IV. THE INTERACTION OF TRIAL PROCEDURES AND JURY DECISION RULES

In recent decades, judges, legal scholars and social scientists have responded to critiques of the jury system by proposing an "active" model of jury decision-making.[155] Though this model may have been designed largely to improve juries' ability to deal with scientific and technical complexity (for example, in cases presenting difficult questions of product safety and causation),[156] the model can also assist judges and juries in handling doctrinal complexities of the sort discussed in Parts II and III.

Advocates of the "active learning" model contend that judges should design the trial so as to facilitate the jury's learning process.[157] Judges might "preinstruct" the jury—summarizing the

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*Creating Educated and Democratic Juries*, 68 Ind. L.J. 1229, 1244 (1993) (discussing "[t]he analogy between the courtroom and the classroom"); Schwarzer, *supra* note 112, at 588 ("a trial is an exercise in education").

154. On the other hand, even if the judge provides no comment on the evidence she might nonetheless betray her views of the case. *See* Douglas G. Smith, *Structural and Functional Aspects of the Jury: Comparative Analysis and Proposals for Reform*, 48 Ala. L. Rev. 441, 541 (1997) ("Social science research seems to support the conclusion that a judge's nonverbal behavior as well as his verbal behavior may influence the jury's verdict.").

155. *See, e.g.*, Douglas G. Smith, *The Historical and Constitutional Contexts of Jury Reform*, 25 Hofstra L. Rev. 377, 382–83 (1996) (summarizing proposals for "reforms that would result in a more active jury").

156. *See, e.g.*, Joe S. Cecil et al., *Citizen Comprehension of Difficult Issues: Lessons from Civil Jury Trials*, 40 Am. U. L. Rev. 727, 756–60 (1991) (reviewing data suggesting that "scientific and technical evidence" pose particular challenges for juries).

157. *See, e.g.*, Brown, *Plain Meaning*, *supra* note 18, at 1233 (advocating

relevant legal principles before the jury hears evidence—as well as instructing the jury after the close of the evidence. They might permit jurors to take notes and submit questions for witnesses, and they might even (though this is particularly controversial) permit the jurors to discuss the case before formal deliberations begin. They might allow the lawyers to provide mini-arguments, at various points during a long trial, to point out the significance of recent or upcoming testimony. They could give the jurors written copies of the instructions (as well as an oral rendition), and they could respond in a substantive way to jurors' questions about the instructions.

Studies of these reforms have, naturally, focused on their effects on the jury's decision-making process; and the evidence so far supports the adoption of many of these innovations. In this section, I will highlight some of the measures that are most likely to impact jury decision rules.

## A. Structuring the presentation and application of decision rules

Part III discussed the obvious point that a decision rule's wording can be centrally important. But the effect of jury decision rules depends as well upon the process by which those decision rules are conveyed, and, indeed, upon a host of choices the judge and lawyers make about the surrounding trial procedures. In the interests of brevity, this section focuses on three of the most important structural influences on jury decision rules: the timing and format of the instructions and the trial judge's response to juror questions about those instructions.

### 1. Preliminary instructions

Though the applicable Civil Rule permits judges to "instruct the jury at any time after trial begins and before the jury is

written copies, preinstruction, and simplification of instructions); Cronan, *supra* note 117, at 1241–44, 1248–51 (advocating written copies, preinstruction, and permission for juror note–taking); Smith, *Historical and Constitutional Contexts*, *supra* note 155, at 457–58 (advocating simplification, less formality, judicial comment, permitting juror questions for witnesses, early juror discussions, and juror note-taking); Mark A. Frankel, *A Trial Judge's Perspective on Providing Tools for Rational Jury Decisionmaking*, 85 Nw. U. L. Rev. 221, 222–23 (1990) (describing his "view of the role of a trial judge as the jurors' ally in their struggle to resolve the difficult disputes submitted to them").

discharged,"[158] judges often wait until after the close of the evidence to instruct the jury on the substantive law.[159] Defenders of the standard practice point out that *post hoc* instructions can be more readily tailored to the evidence actually presented at trial, and that providing substantive instructions at the outset might tip the jury in favor of the plaintiff by triggering a "confirmatory bias." Proponents of preliminary substantive instructions counter that it makes little sense to present evidence to the jury before the jury knows what the plaintiff is required to prove, and that experimental data indicate that preinstruction can improve jury comprehension and application of the instructions to the evidence. On balance, the evidence so far indicates that preinstruction can be useful.[160] Beyond the benefits ordinarily cited by proponents, preinstruction can play a particularly useful role in addressing doctrinal complexity and in developing appropriate decision rules for the jury.

Preliminary instructions on the relevant substantive law can give the jury a framework for processing and recalling trial testimony. Some experimental studies suggest that jurors who receive preliminary instructions are better able to recall relevant facts and more likely to apply relevant legal concepts properly.[161] A

158. Fed. R. Civ. P. 51(b)(3).

159. However, it is standard practice to give the jury some general instructions about trial procedure at the outset of the trial. *See* Dann, *supra* note 153, at 1249 ("In most courtrooms, the pattern or scripted jury instructions given at the outset of the case deal with very elementary legal principles of general application and with various procedural or housekeeping matters. Rarely are they tailored to the individual case.").

160. I discuss the empirical evidence concerning preinstruction (and other jury reforms) in greater detail in *Expertise and the Legal Process*, which will be published as a chapter in a forthcoming book on medical malpractice reforms. *See* Medical Malpractice and the U.S. Healthcare System: New Century, Different Issues (William M. Sage & Rogan Kersh eds., Cambridge Univ. Press, forthcoming May 2006).

161. *See* Lynne ForsterLee et al., *Juror Competence in Civil Trials: Effects of Preinstruction and Evidence Technicality*, 78 J. Applied Psychol. 14, 16–19 (1993); Amiram Elwork et al., *Juridic Decisions: In Ignorance of the Law or in Light of It?*, 1 L. & Hum. Behav. 163, 177 (1977); Saul M. Kassin & Lawrence S. Wrightsman, *On the Requirements of Proof: The Timing of Judicial Instruction and Mock Juror Verdicts*, 37 J. Personality & Social Psychol. 1877, 1885 (1979) (video simulation of a criminal trial; researchers found that "most preinstructed subjects 'presumed innocent,' whereas the others 'presumed guilty'"). Another experimental study of instruction timing found no significant effect on fact recall, comprehension of abstract legal concepts, or preferences as to outcome, but did find that providing substantive instructions "both before and after the evidence" improved mock jurors' ability to apply the law to the facts of the case. Vicki L.

field study of trials in Wisconsin state court found that judges in trials where the jury had received preliminary instructions were significantly "less surprised" by, and "more satisfied" with, the outcome chosen by the jury.[162]

The benefits of preinstruction may be particularly strong in the sorts of civil rights trials discussed here. To the extent that such trials confront the jury with complexity, the complexity will likely be of the doctrinal sort discussed in Parts II and III rather than the complexity that arises from difficult technical or scientific expert testimony. An excessive force case, for example, will frequently involve no particularly challenging scientific testimony, but may require jurors to distinguish among multiple defendants to whom differing theories of liability apply.[163] Some experimental data indicate that preinstruction may help jurors to perceive distinctions among multiple parties[164]—which suggests that preinstruction may

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Smith, *Impact of Pretrial Instruction on Jurors' Information Processing and Decision Making*, 76 J. Applied Psychol. 220, 223–25 (1991). In addition, mock jurors "were significantly more likely to defer their verdict decisions" if they were instructed on the law before they heard the evidence. *Id.* at 225.

162. Larry Heuer & Steven D. Penrod, *Instructing Jurors: A Field Experiment with Written and Preliminary Instructions*, 13 L. & Hum. Behav. 409, 425–26 & tbl.10 (1989). However, answers to multiple-choice questions (about the instructions) administered to jurors after the trial failed to show much, if any, significant benefit from preinstruction. *See id.* at 424–25. Preliminary instructions, when given, always included instructions on burden of proof but did not always include instruction on the substantive law. *See id.* at 416–18; thus, the results of this study do not provide a clear measure of the effects of substantive preinstructions.

163. *See supra* text accompanying notes 50–59 (discussing supervisory, bystander, and municipal liability). Some types of civil rights cases, particularly in the employment discrimination context, may involve expert testimony concerning statistical data. But many civil rights cases—such as those involving claims of excessive force—will center upon less technical questions (e.g., Did the officer use force? Was the force reasonable under the circumstances?). Even if expert testimony is presented on such questions (for example, to establish the trajectory of a bullet or the sequence of events during a shooting), such testimony may be more comprehensible to jurors than the types of epidemiological evidence that may be central in a products liability case.

164. *See* ForsterLee et al., *Juror Competence*, *supra* note 161, at 17–18 (reporting that "[j]urors more clearly differentiated among the plaintiffs [as to damages level] when preinstructed than when postinstructed"); Martin J. Bourgeois et al., *Nominal and Interactive Groups: Effects of Preinstruction and Deliberations on Decisions and Evidence Recall in Complex Trials*, 80 J. Applied Psychol. 58, 60–64 (1995) (mock jurors who were told beforehand that they would be asked to reach a verdict without deliberating with others were significantly more likely to distinguish among plaintiffs with varying injury levels when

help juries to sort through the issues in multi-defendant civil rights trials.

At the same time, the conditions under which preinstruction may produce a pro-plaintiff bias seem less likely to be present in many civil rights cases. In particular, the results of one study "suggest that preinstruction, when presented in a less complex trial, will generally aid systematic processing but when presented in the context of more complex evidence will augment a proplaintiff bias."[165] The study's authors based this conclusion on the facts that the evidence in the mock trial favored the defense and that "[p]reinstruction increased verdicts for the defendant when the evidence was low in technicality, whereas it increased verdicts for the plaintiff when the evidence was high in technicality"—technicality, in this experiment, having to do with the abstruseness of the medical jargon in the expert testimony.[166] Even in trials that do involve challenging medical or scientific issues, there are ways to render those issues more accessible to the jury, as by encouraging expert witnesses to use simpler terms. In any event, civil rights cases are less likely than other types of cases (such as products liability or medical malpractice cases) to involve medical, scientific or probabilistic testimony; thus, the possible downside of preinstruction seems less likely to manifest itself.

Preliminary instructions on the substantive law should not be as detailed and comprehensive as the substantive instructions given after the close of the evidence.[167] Developments during the trial

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preinstructed). In both of these experiments, other factors affected the impact of preinstruction. ForsterLee et al. varied the technical complexity of the evidence in the mock trial, and found that the benefits of preinstruction appeared when the complexity level of the evidence was "moderate" but not when it was "high." ForsterLee et al., *Juror Competence*, *supra*, at 17–18. Bourgeois et al. told some mock jurors they would be deliberating and told others they would reach decisions without discussing the case with others; jurors who knew they would be deliberating did no better at distinguishing among plaintiffs when given preinstructions. *See* Bourgeois et al., *supra*, at 60–64.

165. Bourgeois et al., *supra* note 164, at 65.

166. *Id.* (giving examples of the highly technical version—"A diagnosis of infiltrating ductal carcinoma was made on the basis of the results of an incisional biopsy"—and its less technical counterpart—"Cancer of the breast was diagnosed by surgically removing part of the lesion and analyzing it").

167. When giving the preliminary instructions, the judge should emphasize their provisional nature and should tell the jury that the instructions to be given at the end of the trial will control (to the extent that they differ from those given at the outset). *See* Dann, *supra* note 153, at 1250.

may alter the landscape, perhaps rendering some elements undisputed or disclosing new ways in which the law might apply to the evidence. But certain basic decisions can and should be made at a preliminary charging conference before the trial begins.[168] The trial judge should establish the elements of the claim, and should ascertain whether some of those elements are undisputed.[169] In particular, the court should decide on the basic decision rules applicable to the relevant constitutional violation. (For example, in the *Giron* litigation, it should have been established prior to the start of trial that an inmate who proves a rape by a prison guard need not also separately prove "malice" in order to show an Eighth Amendment violation.[170]) And the judge should distinguish among multiple defendants, noting any differences among the theories of liability pertaining to each.

The preliminary instructions, then, can state the decision rule at a relatively high level of generality. A totality-of-the-circumstances decision rule can be stated in its abstract form (e.g., "the amount of force, if any, which a reasonable officer would have used under similar circumstances"), without providing an illustrative list of potentially relevant circumstances. And a relatively novel way of applying the relevant decision rule need not be flagged in the preliminary instructions. So, for example, the trial judge in *Grazier* could have given a preliminary instruction setting forth the basic decision rule for deadly force cases, without commenting on the potential relevance of conduct by the officers that led up to the use of deadly force.[171] This approach would give the trial judge somewhat more time to consider what might be a novel legal question,[172] and would allow the judge to avoid the issue in the event that evidence presented during trial did not make the issue relevant.

Concededly, providing preliminary instructions will frontload the work that the judge (and counsel) must perform concerning the

168. The court may set a deadline for the submission of proposed instructions that is prior to the close of the evidence, so long as that deadline is set at a "reasonable time." Fed. R. Civ. P. 51(a)(1).

169. The requirement of action under color of state law, for example, often will be undisputed.

170. *See supra* text accompanying notes 127–135.

171. *See supra* text accompanying notes 136– 145.

172. *Cf.* Grazier v. City of Phila., 328 F.3d 120, 127 (3d Cir. 2003) (noting that the Third Circuit had not yet decided whether to adopt the doctrine "that an officer acts unreasonably if his improper conduct creates the situation making necessary the use of deadly force").

instructions. But much of the basic legal work must be done in any event, in order to resolve other questions during trial (for example, concerning evidentiary matters). Drafting preliminary instructions provides an occasion for the court, and counsel, to establish the basic decision rules under which the trial will proceed;[173] and this, in turn, can help the judge to approach with greater analytical clarity the later task of tailoring those decision rules to the evidence actually presented. In the meantime, the preliminary instructions can assist jurors by providing a frame into which to fit the evidence they hear.

### 2. Spoken and written instructions

Judges always deliver their instructions through the spoken word. This is as it should be. Indeed, if one had to choose one medium—spoken or written—for the delivery of instructions, the choice would be obvious. If a decision rule is so full of jargon that one cannot speak it with a straight face, there is something wrong with the decision rule.[174] But one does not have to choose. Spoken instructions can be accompanied by written copies. A jury might be able to hear a simple decision rule and retain the gist; but one of any complexity should be provided in writing as well.

Although three field studies have attempted to measure the effects of written instructions on jury performance,[175] none of those studies would necessarily have detected such effects. Only one of the three studies found significantly better performance by jurors who had been given written copies of the instructions.[176] But it appears that each of the studies employed questionnaires that the jurors filled out after completing their service, at a time when they may well not have had access to a copy of the instructions.[177]

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173. *Cf.* Schwarzer, *supra* note 112, at 578 ("One way judges can promote issue identification and narrowing is by requiring lawyers to submit proposed substantive jury instruction before the pretrial conference.").

174. In an interesting parallel, Joseph Goldstein has observed that the oral statements that Supreme Court Justices deliver from the bench—when announcing decisions—are sometimes much more intelligible than the written opinions that follow. *See* Joseph Goldstein, The Intelligible Constitution (1992).

175. *See* Heuer & Penrod, *supra* note 162; Alan Reifman et al., *Real Jurors' Understanding of the Law in Real Cases*, 16 L. & Hum. Behav. 539 (1992); Geoffrey P. Kramer & Dorean M. Koenig, *Do Jurors Understand Criminal Jury Instructions? Analyzing the Results of the Michigan Juror Comprehension Project*, 23 U. Mich. J. L. Reform 401 (1990).

176. *See* Kramer & Koenig, *supra* note 175, at 428.

177. *See* Heuer & Penrod, *supra* note 162, at 417, 420; Reifman et al.,

The Wisconsin state court field study, though it did not detect clear signs that written instructions result in better jury performance,[178] did demonstrate that judges and lawyers found no downsides to the practice.[179] To the contrary, while judges "d[id] not expect written instructions to make the trial more fair," judges who conducted trials in which written instructions were provided to the jury reported "that the written copy definitely did make the trial more fair."[180]

When a decision rule is laid out in print, various visual techniques can help to delineate relevant concepts. For example, numbered elements can be indented and set off with bullet points; bullet points can also draw attention to the factors in a multi-factor test. Thus, written copies can help convey the concepts in a complex decision rule, and can also serve as a reminder to which jurors can refer during trial and deliberations.

### 3. Questions about the instructions

Consistent with the model of courtroom as classroom,[181] Judge Weinstein suggests that the judge, when reading the charge to the jury, should pause periodically and ask the jurors if they understand the instructions.[182] Many judges may be unwilling to go that far; they may believe that soliciting juror questions is asking for trouble, and that many such questions might be resolved by the jury during deliberations, without interference from the judge. Either way, it is at any rate essential for the judge to respond in a meaningful fashion if the jury does ask questions.[183]

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*supra* note 175, at 545, 551; Kramer & Koenig, *supra* note 175, at 406, 409.

178. *See* Heuer & Penrod, *supra* note 162, at 420–21 (reporting results of tests and questionnaires administered to jurors).

179. *See id.* at 423.

180. *Id.* at 423–24 & tbl.8.

181. *See* Stephen B. Burbank, *The Courtroom as Classroom: Independence, Imagination and Ideology in the Work of Jack Weinstein*, 97 Colum. L. Rev. 1971 (1997).

182. *See* Weinstein, *supra* note 111, at 184; *cf.* Cronan, *supra* note 117, at 1232–33 (proposing a criminal rule of procedure that would require judges to hold a pre-deliberation colloquy with jurors to ensure that they understand key concepts).

183. *See, e.g.*, Peter Meijes Tiersma, *Reforming the Language of Jury Instructions*, 22 Hofstra L. Rev. 37, 40 (1993) (stressing "the need to inform jurors of their right to ask questions about instructions that they do not understand, and to receive an adequate response").

An adequate response may well require more than simply directing the jury's attention to the relevant portion of the instructions. It is true that, if the instructions as drafted meet the standard for legal correctness, the trial judge will not likely be reversed for following this course of action.[184] Indeed, some appellate courts have even gone so far as to warn that trial judges should be wary of straying from the original instructions.[185]

For example, in *Humphrey v. Staszak*, a jury deliberating over a false arrest claim asked the judge "whether it was 'appropriate to find for the Plaintiff if we believe a defendant was responsible for escalating or provoking the situation?'"[186] The trial judge responded by giving the jury an instruction on the state-law defense of entrapment.[187] Unfortunately, such an instruction was inapposite, both because there was no evidence to support the elements of an entrapment defense, and because even if the plaintiff could prove entrapment that would not necessarily establish a lack of probable cause to arrest.[188] Holding that the instruction was prejudicial, the Court of Appeals opined:

> All trial judges are aware of the difficulty questions from a jury can cause after the jury has begun its deliberations. It is often a delicate situation for a trial judge who wishes in good faith, as in this case, to be helpful in answering a jury's question without unfairly affecting the verdict. At times it is better to answer the jury's question simply by telling the jury that the instructions already given are adequate to decide the case.[189]

Although it is apparent that the response given by the trial judge in *Humphrey* was ill-advised, so was the response by the Court of Appeals. The problem with the trial judge's approach was not that

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184. *Cf.* Bethany K. Dumas, *Jury Trials: Lay Jurors, Pattern Jury Instructions, and Comprehension Issues*, 67 Tenn. L. Rev. 701, 704 (2000) (discussing the Supreme Court's holding "in *Weeks v. Angelone*[, 528 U.S. 225 (2000),] . . . that a trial judge who presides over a death penalty case is not obliged to clear up the jury's confusion over a crucial sentencing instruction by doing anything more than pointing to the controlling language of the instructions").

185. *See* Brown, *Decision Effects*, *supra* note 111, at 1109 n.18 (noting that "[s]ome appellate courts affirmatively discourage trial courts from attempting to explain or clarify instructions").

186. 148 F.3d 719, 722 (7th Cir. 1998).

187. *See id.* at 723.

188. *See id.* at 723–24.

189. *Id.* at 724–25.

he departed from the previous instructions. Rather, the difficulty was that he did so by providing an additional instruction that was a poor conceptual fit with the case and that was not warranted by the evidence. It would have been more helpful had the Court of Appeals attempted to provide some guidance on the considerations that should inform a judge's response to juror questions, rather than trying to deter meaningful responses altogether.

Concededly, the Court of Appeals would have had to exercise some creativity in shaping such guidance, because the Civil Rules—possibly reflecting a vision of a passive rather than active jury—do not address the trial court's duties in responding to questions from jurors. Useful analogies are available, however. For example, in *Douglas v. Owens*, the jury—while deliberating over the plaintiff's excessive force claims against four prison guards—"sent a note to the judge asking if they could move Griffith [one of the guards] from question one to question two" on the special verdict form—i.e., "the jurors wished to consider whether Griffith had 'approved the use of force' rather than consider if Griffith had actually himself 'used force.'"[190]

To the Court of Appeals in *Douglas*, the trial court's grant of this request raised a "fundamental concern": that "Griffith was never on notice of any claim that he failed to intervene while others improperly used force" against the plaintiff.[191] In assessing the risk of prejudice to Griffith from this shift in the liability theory, the Court of Appeals chose to view the issue through the lens of Civil Rule 15(b), which governs amendment of the pleadings to conform to the evidence at trial. As the Court of Appeals acknowledged, Rule 15(b) is designed for situations in which a party, rather than the jury, seeks to change the theory of the case.[192] But the general framework set by Rule 15(b) seems appropriate when the change is initiated by the jury, as well. The Rule sets a presumption in favor of changes that will serve "the presentation of the merits," unless "the objecting party . . . satisf[ies] the court that the admission of such evidence would prejudice the party in maintaining the party's action or defense."[193]

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190. 50 F.3d 1226, 1233–34 (3d Cir. 1995).

191. *Id.* at 1234.

192. *Id.* at 1235.

193. Fed. R. Civ. P. 15(b). When a party seeks to alter a matter provided for in the final pretrial order, courts sometimes apply the more stringent standard set by Rule 16, which requires the party seeking the change to show that it is necessary "to prevent manifest injustice." Fed. R. Civ. P. 16(e). As between the two paradigms, Rule 15(b) seems more appropriate for use when the

The Rule also permits the court to "grant a continuance to enable the objecting party to meet" the evidence that comes in under the amended pleading;[194] an analogous strategy will not be as easy to implement when the evidence has closed and the jury has begun deliberations, but if the court accedes to the jury's request the court certainly should provide an opportunity for further argument by counsel, if not for the submission of additional evidence.

The *Douglas* court's suggestion addresses the possibility that a jury's question might prompt a change in the liability theory conveyed by the instructions. More commonly, a jury might simply seek clarification of the existing instructions. In that event, the judge should respond to the substance of the question, and should seek to ensure that the jurors have understood the response. In either type of case, before responding to any questions concerning the instructions, the judge should consult with counsel and should apprise counsel of the response that the judge intends to make.

### B. Allocating decisions between judge and jury

Numerous procedural choices can influence the ways in which jurors receive and apply a decision rule. Among those choices, the type of verdict form is so significant that it merits consideration in a separate section. The trial judge's selection of the form of the verdict—general (with or without interrogatories), or special—divides decision-making authority between jury and judge, and also structures the jury's decision-making process. I argue, in Part IV.B.1., that the best option, at least in complex cases, is a general verdict accompanied by interrogatories; such a verdict form can guide the jury's decision-making and provide insight into its reasoning, without stripping the jury of its normative role in applying the Constitution. In Part IV.B.2., I examine an exception to this principle: where a question of qualified immunity presents an issue of historical fact, the court should pose interrogatories to the jury on the questions of fact but should not put the issue of immunity to the jury.

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jury requests a change; the fact that the jury takes the initiative to seek the change suggests that it may be likely that the merits would be served by the change, and the fact that the jury, not the party, is the one seeking the change indicates that the interest in strictly enforcing the terms of the pretrial order may be somewhat less strong.

194. Fed. R. Civ. P. 15(b).

### 1. A presumption in favor of a general verdict (with interrogatories)

The conceptual distinction among the types of verdict forms is relatively straightforward. "If the jury announces only its ultimate conclusions, it returns an ordinary general verdict; if it makes factual findings in addition to the ultimate legal conclusions, it returns a general verdict with interrogatories."[195] By contrast, "[i]f it returns only factual findings, leaving the court to determine the ultimate legal result, it returns a special verdict."[196]

In federal courts, the trial judge possesses broad discretion to choose among these verdict forms.[197] This discretion is all the more striking because the choice determines whether the jury plays any role in applying the law, or whether its only function is to find the historical facts. Proponents of the special verdict argue that it plays to the jury's strengths while minimizing the impact of its weaknesses:

> The litigation is packaged for the lay jurors into those components they are most familiar and comfortable with: actual facts. The necessity for instructions on legal constructs is completely avoided, thus streamlining the trial and appellate stages and obviating the problems of jury comprehension. Since the jurors must go on record with their fact findings, and the judge for her application of legal principles, accountability of the actors in the litigation process is increased while reviewability of their work is enhanced.[198]

As this article seeks to show, problems of comprehension certainly do arise when juries are asked to apply constitutional decision rules. But, as this article also seeks to suggest, strategies exist to address those problems without removing the constitutional issue from the jury. It would be particularly ironic for a judge to

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195. Zhang v. American Gem Seafoods, Inc., 339 F.3d 1020, 1031 (9th Cir. 2003).

196. *Id.*

197. *See, e.g.*, Bills v. Aseltine, 52 F.3d 596, 605 (6th Cir. 1995) ("Whether a court uses a special or general verdict rests in its discretion, as does the content and form of any interrogatories it chooses to submit."); Floyd v. Laws, 929 F.2d 1390, 1395 (9th Cir. 1991) ("As a general rule, the court has complete discretion over whether to have the jury return a special verdict or a general verdict.").

198. Mark S. Brodin, *Accuracy, Efficiency, and Accountability in the Litigation Process—The Case for the Fact Verdict*, 59 U. Cin. L. Rev. 15, 90–91 (1990).

remove from the jury the application of provisions in the Bill of Rights—a basic set of protections that exist to delineate the individual's relation to the government.

Of course, the very importance of those protections might provide a reason to relegate their application to a judge rather than a jury,[199] and the Court has done so in the context of the exclusionary rules concerning evidence obtained in violation of the Fourth or Fifth Amendments.[200] But the Court removed the exclusionary-rule question from the jury because it doubted the jury's ability to disregard excluded evidence when determining guilt—not necessarily because it doubted the jury's ability to determine the constitutional question itself.[201]

Admittedly, some courts take the view that certain constitutional reasonableness tests—such as the Fourth Amendment test for excessive force—should be determined by the judge when there are no material disputes of historical fact. Such a view, of course, would depart from the treatment of reasonableness in tort law, where many cases go to the jury even in the absence of a dispute of historical fact.[202] A primary rationale for sending such cases to the

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199. *Cf.* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1182 (1989) ("I frankly do not know why we treat some of these questions as matters of fact and others as matters of law—though I imagine that their relative importance to our liberties has much to do with it.").

200. *See* Jackson v. Denno, 378 U.S. 368, 388 (1964) (stating that a judge must rule on the voluntariness of a confession before evidence of that confession is provided to a jury that will determine question of guilt or innocence).

201. *See id.* at 388 ("Will uncertainty about the sufficiency of the other evidence to prove guilt beyond a reasonable doubt actually result in acquittal when the jury knows the defendant has given a truthful confession?"). Indeed, the Court noted that "[w]hether the trial judge, another judge, or another jury, but not the convicting jury, fully resolves the issue of voluntariness is not a matter of concern here. To this extent . . . the States are free to allocate functions between judge and jury as they see fit." *Id.* at 391 n.19. An additional argument could be made that juries may be harsher than judges in their judgments of guilty defendants, and that this may make juries less willing to provide an exclusionary remedy, see, e.g., Carol Steiker, *Second Thoughts About First Principles*, 107 Harv. L. Rev. 820, 844 (1994) (noting that such defendants are "unlikely to win a jury's sympathy"); in this view, it is appropriate to entrust the exclusionary decision to the judge rather than to a jury (even if the jury is a different one from the one that will determine guilt).

202. As Justice Hunt famously explained:

> In some cases . . . the necessary inference from the proof is so certain that it may be ruled as a question of law . . . . So if a coachdriver intentionally drives within a few inches of a precipice, and an accident happens, negligence may be ruled as

jury is that reasonableness is a judgment call—and one that juries are particularly well qualified to make, because of the range of jurors' life experiences.[203]

Judge Easterbrook recently asserted that such a rationale is misplaced in the Fourth Amendment context. Drawing on the Supreme Court's holdings that a trial judge's suppression rulings on reasonable suspicion and probable cause should be reviewed de novo on appeal[204] and that the Fourth Amendment excessive force analysis proceeds from the viewpoint of a reasonable officer under the circumstances,[205] he argued that in such excessive force cases

> 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 . . . . [W]hen material facts (or enough of them to justify the conduct objectively) are undisputed, then there would be nothing for a jury to do *except* second-guess the officers . . . . Judges rather than juries determine what limits the Constitution places on official conduct.[206]

One might well question Judge Easterbrook's contention that

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> a question of law. On the other hand, if he had placed a suitable distance between his coach and the precipice, but by the breaking of a rein or an axle, which could not have been anticipated, an injury occurred, it might be ruled as a question of law that there was no negligence and no liability. But these are extreme cases. The range between them is almost infinite in variety and extent. It is in relation to these intermediate cases that the opposite rule prevails.

Sioux City & P. R. Co. v. Stout, 84 U.S. 657, 663 (1873).

203. Justice Hunt, for example, asserted:

> Twelve men of the average of the community, comprising men of education and men of little education, men of learning and men whose learning consists only in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer; these sit together, consult, apply their separate experience of the affairs of life to the facts proven, and draw a unanimous conclusion. This average judgment thus given it is the great effort of the law to obtain. It is assumed that twelve men know more of the 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.

*Id.* at 664.

204. *See* Ornelas v. U.S., 517 U.S. 690, 700 (1996).

205. *See* Graham v. Connor, 490 U.S. 386, 396 (1989).

206. Bell v. Irwin, 321 F.3d 637, 640–41 (7th Cir. 2003); *see also* Acosta v. Ames Department Stores, Inc., 386 F.3d 5, 8–9 (1st Cir. 2004) (following *Bell* with respect to probable cause issue in false arrest case).

the Fourth Amendment "creates legal rules" and for that reason "is not a form of tort law."[207] A totality-of-the-circumstances test—such as the Fourth Amendment excessive force test—is a standard rather than a rule; and as Justice Scalia has pointed out, judges applying such a standard are engaged in a task similar to that traditionally given to the jury.[208] And one might doubt Judge Easterbrook's view that the objective nature of that excessive force test renders it unsuitable for the jury; after all, the tort standard of due care is also an objective one. In some places at some points in time, juries might well be inferior to judges in their determination of civil rights claims. But in other places and times, juries might be better suited to the task, especially since the jurors' collective experience will almost certainly be broader than that of the judge.

To resolve the question raised by Judge Easterbrook would take us beyond the scope of this Article. It is, in any event, uncontroversial that if there are material disputes of historical fact, a constitutional tort case must go to the jury, and that when it does, the jury can be asked to render a general verdict. Absent empirical data supporting the conclusion that juries are unsuited to the task, other values support the notion that juries should be involved in applying the provisions of the Bill of Rights in civil suits.

As many have noted, jury service educates jurors about the legal process and about the law,[209] and involves them in self-government.[210] Such educative and self-government functions are particularly desirable in the context of basic civil rights norms.[211] It also can be argued that a jury finding of liability in a civil rights case

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207. *Bell*, 321 F.3d at 640.

208. *See* Scalia, *supra* note 199, at 1187 ("[A]ppellate judges [should] bear in mind that when we have finally reached the point where we can do no more than consult the totality of the circumstances, we are acting more as fact-finders than as expositors of the law.").

209. *See, e.g.*, Hayden J. Trubitt, *Patchwork Verdicts, Different-Jurors Verdicts, and American Jury Theory: Whether Verdicts Are Invalidated by Juror Disagreement on Issues*, 36 Okla. L. Rev. 473, 475 (1983) (noting that "the American jury system serves an educative function").

210. *See* Akhil Reed Amar, *Reinventing Juries: Ten Suggested Reforms*, 28 U.C. Davis L. Rev. 1169, 1174 (1995) ("The deepest constitutional function of the jury is to serve the people, not the parties—to serve them by involving them in the administration of justice and the grand project of democratic self-government.").

211. *Cf.* Amar, *Reinventing Juries*, *supra* note 210, at 1192 ("The Constitution comes from the people, and the people should have some role in administering it and saying what it means.").

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.[212] The latter function would be diluted if the judgment of liability were pronounced by the court upon the jury's findings of fact in a special verdict; though the jury would have been involved in the process, it would not have made the ultimate normative judgment that the defendant should be held liable. And the former functions would be eliminated by the use of a special verdict: as its proponents point out, one of the very rationales for the special verdict is that it removes the need for the judge to spend time and effort explaining the law to the jury.[213] This argument might carry weight in the case of, for example, an antitrust claim; most individuals will not feel the weight of the antitrust laws, in any direct way, in their personal lives. But the point is much less persuasive when it comes to civil rights, for these are rights that define each individual's relation to the state and state officials.

Using a general verdict in a civil rights case, then, empowers the jury as a constitutional decision-maker. In a simple case involving only a single defendant and one theory of liability, a general verdict may be all that is needed. But in more complex cases—involving multiple defendants with different liability standards, for example—the Delphic nature of a general verdict may leave doubt as to the reasoning behind the jury's choices.[214] In such cases the addition of special interrogatories can help to ensure that the jury considers carefully the varying issues that pertain to each defendant and claim,[215] and can provide greater insight into the jury's reasoning.

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212. *See, e.g.*, Brown, *Plain Meaning*, *supra* note 18, at 1215 (noting that "juries are groups designed to represent local communities and to bring local norms and 'common sense' to bear on legal judgments").

213. *See* Brodin, *supra* note 198, at 90–91; *see also* Floyd v. Laws, 929 F.2d 1390, 1395 (9th Cir. 1991) (noting that the use of special verdicts "permits the judge to give a minimum of legal instruction to the jurors"). It is not self-evident that the use of special verdicts will always eliminate the need for instruction on the substantive law. Civil Rule 49 requires the judge to "give to the jury such explanation and instruction . . . as may be necessary to enable the jury to make its findings upon each issue." Fed. R. Civ. P. 49(a).

214. In multi-defendant cases, even a general verdict form will not be particularly short. *See* Manual for Complex Litigation (Fourth) § 12.451, at 160 (2004) ("A general verdict form should at least require separate verdicts on each claim and on damages, but be drafted so as to prevent duplicate damage awards.").

215. *Id.* at § 11.633, at 123 ("Special verdict forms or interrogatories . . . may help the jury focus on the issues . . . .").

The relative transparency that special interrogatories provide is not without its downsides. Compared with a general verdict, "interrogatories increase the length and complexity of deliberations and are more likely to produce inconsistencies"[216]—or, at least, more likely to reveal them. Jurors who could reach agreement as to the result, but not as to the details of the narrative underlying the result,[217] may find it more difficult to reach a verdict if they are required to answer special interrogatories. A defendant is entitled to avoid liability unless the jury unanimously finds that the elements of the claim are proven by a preponderance of the evidence.[218] But it is much less clear that the defendant is entitled to jury unanimity on the details of the narrative underpinning that finding.[219] If two possible narratives each could, if true, establish the elements of the claim, and if each of the jurors believes that one of those narratives is more likely true than not true, then it seems reasonable to conclude that the plaintiff has proven his claim and should recover.[220] But if

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216. *Id.* at § 12.451, at 161.

217. For a discussion of the "story model" of juror decision-making, *see, e.g.*, Brown, *Plain Meaning*, *supra* note 18, at 1216–17.

218. *See* Fed. R. Civ. P. 48 ("Unless the parties otherwise stipulate, the verdict shall be unanimous"). I drafted the statement in the text carefully, to preserve an ambiguity that is frequently present in jury instructions: Does the plaintiff have to prove *that each element is more likely true than not true*, or rather *that it is more likely than not that the elements all are true*? Pointing out that the probability of the conjunction of multiple elements will often be smaller than each of those elements' probabilities taken separately, commentators have labeled this issue the "conjunction problem." Saul Levmore, *Conjunction and Aggregation*, 99 Mich. L. Rev. 723, 724 (2001). Scholars have suggested a number of responses to this problem. *See, e.g., id.* at 726 (noting the argument "that issues like negligence and causation are not likely to be perfectly independent of one another"); *id.* at 732 (describing the "story model" of juror decision-making and noting that "the more we imagine the factfinder to be comparing two stories, the less it matters whether the factfinder multiplies probabilities"); *id.* at 756 (arguing that the effects of the jury unanimity requirement may offset the effects of a failure to require the jury to multiply the probabilities of each element).

219. *Cf.* Darryl K. Brown, *Judicial Instructions, Defendant Culpability, and Jury Interpretation of Law*, 21 St. Louis U. Pub. L. Rev. 25, 30 (2002) (noting with respect to criminal prosecutions that the "Supreme Court has left wide leeway, as a matter of constitutional law, for juror disagreement on the particular facts or theories underlying a charge").

220. Hayden Trubitt has termed such verdicts "patchwork verdicts." *See* Trubitt, *supra* note 209, at 511 (arguing that "[p]atchwork verdicts are, in general, valid and proper," but not "where the 'patched' grounds are not part of a sole transaction, do not have a common focus of injury, or do not call for exactly the same remedy"). One commentator advocates requiring juror agreement on the facts underlying civil jury verdicts, on the grounds that such a requirement will

the interrogatories on the verdict form pose detailed inquiries about the underlying facts, those jurors might not be able to reach consensus on the answers.

If the jury deadlocks in such a case, the judge could ask the jurors the basis for their disagreement. If it becomes clear that the disagreement concerns the factual details, but that each juror subscribes to a version of those facts that would support a plaintiff verdict, then perhaps the court (in consultation with counsel) could redraft the interrogatories to provide alternative options for answering the factual questions.[221] The court should then provide any additional instruction necessary to enable the jury to respond to the revised interrogatories.

More generally, the judge should regard the responses to the interrogatories as a continuation of the dialogue between judge and jury. Obviously, if the jury's general verdict and interrogatory responses are consistent, then that dialogue has come to a successful close and the court should enter judgment upon the verdict.[222] If the interrogatory responses are internally consistent but they do not support the general verdict, the court has the authority to enter judgment "in accordance with the answers," or to send the case back to the jury, or to order a new trial.[223] If the interrogatory answers are

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promote careful juror deliberations. *See* Elizabeth A. Larsen, *Specificity and Juror Agreement in Civil Cases*, 69 U. Chi. L. Rev. 379, 396 (2002) ("If specificity is not required, jurors can render verdicts without fully fleshing out the differences among them."). Such a concern might weigh against pointing out to the jury, *ex ante*, that jurors can disagree on the facts and still return a verdict. But if jurors are not told of such a rule, they are unlikely to guess it; and thus a judge's willingness to permit a jury to return a verdict even though jurors are split between two different views of the facts supporting that verdict should not decrease the care with which the jury approaches its task. Moreover, even if jurors are aware of the possibility that they could return a verdict despite such disagreement, the use of special interrogatories concerning the underlying facts should help to promote thorough discussion during the deliberations.

221. *Cf.* Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 2512 ("The court presumably has the power to clarify the text of the interrogatory if it is confident that the result would have a positive effect . . . ."). If the judge chooses this course, she should take care to indicate clearly that the two possible sets of responses are not to be mixed and matched: each juror should choose one or the other, or neither.

222. *See* Fed. R. Civ. P. 49(b) ("When the general verdict and the answers are harmonious, the appropriate judgment upon the verdict and answers shall be entered . . . ."). Unless, of course, the verdict loser makes a post-verdict motion for judgment as a matter of law or a new trial. *See* Fed. R. Civ. P. 50.

223. Fed. R. Civ. P. 49(b).

internally inconsistent (as well as inconsistent with the general verdict), then the court must either return the case to the jury or order a new trial.[224]

Though a full discussion of the considerations implicated by these choices is beyond the scope of this article, the court's response to inconsistency in the jury's answers should take account of the normative arguments in favor of retaining constitutional decision-making authority in the jury. For example, those arguments weigh against the entry of judgment on consistent interrogatory answers notwithstanding a contrary general verdict. Such an inconsistency suggests juror confusion, which in turn indicates a need for the trial judge to engage in a colloquy with the jurors in order to discern the source of that confusion. After that colloquy, the judge could consult with counsel and design further instructions to clarify the jury's task. The court could follow a similar procedure in cases where the interrogatory answers are internally inconsistent. In other words, unless special considerations indicate the need for a new trial the trial judge should see inconsistency in the jury's answers as an opportunity to identify and address juror confusion through colloquy and additional instructions.

### 2. An exception for qualified immunity

The use of interrogatories can guide jurors' analysis in complex cases and can assist the court in identifying and addressing juror confusion. It is to be hoped that, in many instances, the careful crafting of jury decision rules will prevent such confusion from arising. Some tasks, however, are so unlikely to be tractable for a jury that they simply should not be presented for consideration. In particular, qualified immunity issues should not go to the jury; those issues present an exceptional instance in which the use of a special verdict is preferable.[225]

Qualified immunity doctrine was not designed with juries in mind; to the contrary, it was designed specifically to promote the

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224. *See id.*

225. For a discussion of the general issue of jury determinations in cases involving historical fact disputes material to qualified immunity, see Henk J. Brands, Note, *Qualified Immunity and the Allocation of Decision-Making Functions Between Judge and Jury*, 90 Colum. L. Rev. 1045, 1065 (1990) ("[T]he judge must identify the content of 'clearly established law' as he would on a motion for summary judgment and instruct the jury accordingly. In his discretion, he may request either a general or a special verdict.").

resolution of cases by summary judgment prior to trial.[226] As I discussed in Part II,[227] the qualified immunity decision rule asks whether it would have been clear to a reasonable officer under the circumstances that the conduct in question violated the Constitution. Part II noted that this decision rule applies even when the underlying constitutional principle itself includes a reasonableness test. Thus, for example, to determine whether a police officer used excessive force in making an arrest, the jury must ask whether the officer used more force than would a reasonable officer under the circumstances. But under the Supreme Court's teaching, even if this test is met, the defendant can obtain qualified immunity by showing that the violation would not have been clear to a reasonable officer under the circumstances.[228]

A jury asked to decide the qualified immunity question in such a case would be asked, in effect,[229] to decide the following two questions: "First, did the defendant use more force against the plaintiff than a reasonable officer would have used under the same circumstances? Second, if so, then would it have been clear to a reasonable officer under the circumstances that the force defendant used was more than a reasonable officer would have used under the circumstances?"[230]

The Supreme Court has surmounted this conceptual challenge. The difficulty, explains the Court, arises merely from the fortuity that the Fourth Amendment standard has been cast in terms of "reasonableness"; "[h]ad an equally serviceable term, such as

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226. *See* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (stating that the Court's objective standard for qualified immunity "should . . . permit the resolution of many insubstantial claims on summary judgment").

227. *See supra* text accompanying notes 67–70.

228. *See* Anderson v. Creighton, 483 U.S. 635, 641 (1987); Saucier v. Katz, 533 U.S. 194, 201 (2001).

229. I do not suggest that the language quoted in the text would be the best attempt at a jury decision rule on qualified immunity; rather, I use that language to highlight the peculiar nature of the analysis that qualified immunity requires.

230. *See* Stephenson v. Doe, 332 F.3d 68, 80 n.15 (2d Cir. 2003) ("Qualified immunity . . . looks to the reasonableness of an officer's belief that he acted lawfully after the officer is found to have been unreasonable in his conduct. This inherently makes for confusion."); Llaguno v. Mingey, 763 F.2d 1560, 1569 (7th Cir. 1985) (en banc) ("To . . . instruct the jury further that even if the police acted without probable cause they should be exonerated if they reasonably (though erroneously) believed that they were acting reasonably is to confuse the jury and give the defendants two bites at the apple."), *overruled on other grounds by* County of Riverside v. McLaughlin, 500 U.S. 44 (1991).

'undue' . . . been employed," the qualified immunity analysis would not seem so confusing.[231] Or at least, it would be no more confusing in the Fourth Amendment context than it is anywhere else: "[R]egardless of the terminology used, the precise content of most of the Constitution's civil-liberties guarantees rests upon an assessment of what accommodation between governmental need and individual freedom is reasonable"—which means that the "reasonably unreasonable" objection, "if it has any substance, applies to the application of [qualified immunity] generally."[232]

Whether or not this defense of qualified immunity doctrine persuades jurisprudes, it does provide further support for the view that this is not the sort of analysis in which one should ask the jury to engage.[233] Indeed, though at least two circuits have stated to the contrary,[234] and though some model jury instructions include

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231. *Id.* at 643.

232. *Anderson*, 483 U.S. at 643–44.

233. Nor would the qualified immunity analysis be more tractable in cases where the constitutional claim requires a showing of subjective bad intent. It seems incongruous to suggest that a defendant could ever obtain qualified immunity if the plaintiff proves a claim that includes an element such as malice and sadism or subjective deliberate indifference. *See, e.g.*, Johnson v. Breeden, 280 F.3d 1308, 1321–22 (11th Cir. 2002) (where plaintiff proves Eighth Amendment excessive force violation, "the subjective element required to establish it is so extreme that every conceivable set of circumstances in which this constitutional violation occurs is clearly established to be a violation of the Constitution"); Beers–Capitol v. Whetzel, 256 F.3d 120, 143 n.15 (3d Cir. 2001) ("Because deliberate indifference under *Farmer* requires actual knowledge or awareness on the part of the defendant, a defendant cannot have qualified immunity if she was deliberately indifferent."). On the other hand, the Court's reasoning in *Hope v. Pelzer*, 536 U.S. 730 (2002), might provide some ground to argue the contrary. In *Hope*, the Court assumed that the plaintiff's allegations met the Eighth Amendment subjective deliberate indifference standard for conditions-of-confinement claims, see *id.* at 737, and then proceeded to consider whether the defendants were entitled to qualified immunity, see *id.* at 739. Though the Court ultimately held that they were not, it did so on the ground that caselaw, a state regulation and a DOJ report should have made the constitutionality of the conduct unclear, see *id.* at 741–42, not on the ground that qualified immunity is simply incompatible with a finding of subjective deliberate indifference.

If the Court were to hold that qualified immunity could coexist with a finding of subjective bad intent, and if the qualified immunity issue were submitted to the jury, the inherent incongruity of the analysis would be likely to produce jury confusion.

234. *See* McCoy v. Hernandez, 203 F.3d 371, 376 (5th Cir. 2000) (rejecting argument that trial judge erred in submitting qualified immunity issue to jury, and explaining that, "while qualified immunity ordinarily should be decided by

instructions on the subject,[235] a number of circuits have concluded that issues of qualified immunity should not be submitted to the jury.[236] Rather, if the resolution of the qualified immunity defense turns on questions of historical fact, special interrogatories can be put to the jury on those fact issues, and the judge can use the answers to determine the question of immunity.[237]

## V. CONCLUSION

In my effort to sketch an approach to the creation of constitutional decision rules for juries, I have drawn upon two widely disparate sets of scholarship. This Article shares with Professor Berman's work on constitutional decision rules a focus on the relation between those rules and the characteristics of the institutions that apply them. But instead of focusing on the differences between courts and other decision-makers, I have focused on distinctions, within courts, between judge and jury. Likewise, this

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the court long before trial, if the issue is not decided until trial the defense goes to the jury"); Ortega v. O'Connor, 146 F.3d 1149, 1159 (9th Cir. 1998) (holding that "the defendants were entitled to an instruction" on qualified immunity).

235. *See* Fifth Circuit Pattern Jury Instructions (Civil) 10.1; O'Malley et al., *supra* note 83, § 165.23; Leonard Sand et al., Modern Federal Jury Instructions–Civil § 87–86 (2001); Schwartz & Pratt, *supra* note 83, § 17.02.1; *but see* Schwartz & Pratt, *supra* note 83, § 17.02.1 note ("This instruction is appropriate only in those circuits that permit submission of the qualified immunity defense to the jury.").

236. *See, e.g.*, Johnson v. Breeden, 280 F.3d 1308, 1318 (11th Cir. 2002) ("[T]he jury does not apply the law relating to qualified immunity to those historical facts it finds; that is the court's duty"); Willingham v. Crooke, 412 F.3d 553, 560 (4th Cir. 2005) (holding that "the district court should submit factual questions to the jury and reserve for itself the legal question of whether the defendant is entitled to qualified immunity on the facts found by the jury").

237. *See, e.g.*, Stone v. Peacock, 968 F.2d 1163, 1166 (11th Cir. 1992) ("If there are disputed issues of fact concerning qualified immunity that must be resolved by a full trial and which the district court determines that the jury should resolve, special interrogatories would be appropriate."); Stephenson v. Doe, 332 F.3d 68, 81 (2d Cir. 2003) (holding that on remand trial court should submit special interrogatories to jury concerning factual disputes underlying issue of qualified immunity); Rakovich v. Wade, 850 F.2d 1180, 1202 n.15 (7th Cir. 1988) ("In the unusual circumstance where an immunity inquiry remains unresolved at the time the case goes to the jury, the district court may consider the use of special interrogatories to allow the jury to resolve disputed facts . . . .") *overruled on other grounds by* Spiegla v. Hull, 371 F.3d 928, 941–42 (7th Cir 2004); *see also* Acevedo–Garcia v. Monroig, 351 F.3d 547, 563 (1st Cir. 2003 ("[T]he judge is certainly not obliged to submit the ultimate issue [of qualified immunity] to the jury.").

Article shares with the literature on jury reforms a concern with the impact of trial procedures on jury functioning, and a focus on the need for careful drafting of instructions. But instead of focusing on those questions as they may arise in a variety of types of cases, I have examined the ways in which trial process and instruction crafting influence juries' application of the Bill of Rights.

I have not, in this article, attempted to establish in detail who should take up each of the tasks I have suggested. But clearly there is room for work by many actors. The Supreme Court, and the Courts of Appeals, should be more conscious of the fact that many of the decision rules they adopt for the implementation of the Bill of Rights will be applied by juries as well as judges. The authors of opinions from which those decision rules will be derived could indicate more clearly which part of the opinion is intended as a decision rule (rather than, say, a justification for the decision rule or a description of its effects). And opinion authors should try, where possible, to avoid using terms that are likely to confuse a jury. Such efforts would bring benefits outside as well as within the trial context: When constitutional decision rules are crafted with an eye toward their application by juries, the content of those rules should become more accessible to those by whose putative consent the government exists.[238]

This article also has implications for the approach taken by committees or task forces that draft model instructions. The foundational works on drafting jury instructions emphasize the importance of testing instructions on jury-eligible populations for comprehensibility and accuracy. This, indeed, is an ideal approach, though it also can be prohibitively expensive, especially when the instructions to be tested are lengthy and multifarious. Short of a huge empirical research project involving teams of linguists and social scientists, is there any role for more modest efforts by committees composed of lawyers and judges?

This article suggests that there is. As I have argued, some of the greatest challenges in formulating constitutional decision rules arise because of the area's doctrinal complexity. To that extent, efforts by law-trained drafting committees can ~~advance the ball~~

238. *Cf.* Goldstein, *supra* note 174, at 19 ("That the Constitution be intelligible and accessible to We the People of the United States is requisite to a government by consent . . . ."); Smith, *supra* note 154, at 489 ("The fact that jurors are not legal experts . . . puts pressure on the legal system to simplify legal principles . . . .").

significantly. They can, for example, perform the key analytical task of isolating the decision rules from other statements in the relevant opinions. Law-trained drafters will not be able to answer all the relevant questions without help from the social science community. But they can direct empirical researchers to the key questions, and they can strive, in the interim, to make educated guesses about the most appropriate jury decision rules.

Though I list them last here, trial judges are the most important arbiters of those decision rules. Our system accords trial judges great discretion concerning the structure of the trial. And though appellate courts state that they will review the legal sufficiency of the instructions de novo if the issue has been properly preserved, even then the precise wording of the instruction lies within the trial judge's discretion. Compared with standard operating procedure, the techniques proposed here can be demanding and even risky. They do not decrease the chances of reversal on appeal. Indeed, in certain instances—as where the judge provides a substantive response to a jury's question about the instructions, or where a judge provides guidance on the law's possible application to the facts of the case—the methods I advocate may lead in some cases to missteps, including reversible errors. Trial judges who pursue my suggested approach will unavoidably be conscious of its costs—for example, when they do extra work in order to implement it, or when at times they are reversed on appeal because they followed it. But it is to be hoped that they will also experience its benefits, in the form of greater jury understanding and improved jury decision making.