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# An "Objectively Reasonable" Criticism of the Doctrine of Qualified Immunity in Excessive Force Cases Brought Under 42 U.S.C. § 1983

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## I. INTRODUCTION

In *Graham v. Connor*, the United States Supreme Court announced for the first time that "all claims that law enforcement officers have used excessive force . . . in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard."[1] In other words, "the question is whether the officers' actions [were] 'objectively reasonable' in light of the facts and circumstances confronting them."[2] Application of the "objectively reasonable" standard in the context of excessive force cases ought to be rather straightforward; after all, the standard is fundamental to the American legal system. For example, in tort law, juries are routinely asked to place themselves in the shoes of medical doctors, lawyers, and other professionals in an effort to determine what conduct is objectively reasonable under a given set of facts.[3] Likewise, in criminal law, where a defendant raises self-defense in response to a charge of murder or battery, juries must determine whether the force used was objectively reasonable in response to the perceived threat.[4] The inquiry is often fact intensive, and like all questions of fact, should be entrusted to the jury.[5]

As this paper seeks to explain however, in excessive force cases brought under 42 U.S.C. § 1983,[6] the role of juries has been essentially usurped by the doctrine of qualified immunity, such that judges are deciding what is reasonable and enabling law enforcement officers to escape liability through ambiguities in the law. The Supreme Court's

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1. Graham v. Connor, 490 U.S. 386, 395 (1989) (emphasis omitted).

2. *Id.* at 397.

3. *See, e.g.*, Knowlton v. Deseret Med., Inc., 930 F.2d 116, 121-22 (1st Cir. 1991).

4. *See, e.g.*, Palmer v. Hendricks, 592 F.3d 386, 396 (3d Cir. 2010).

5. Randall H. Warner, *All Mixed Up About Mixed Questions*, 7 J. APP. PRAC. & PROCESS 101, 104 (2005).

6. 42 U.S.C. § 1983 (2010) states: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . ."

attempt at harmonizing the doctrine of qualified immunity with its holding in *Graham* has only caused greater confusion, and the only solution appears to be eliminating qualified immunity from excessive force cases altogether.

## II. THE DOCTRINE OF QUALIFIED IMMUNITY

The doctrine of qualified immunity protects government officials from civil damages under 42 U.S.C. § 1983. Its primary purpose is to allow for the dismissal of a lawsuit at the summary judgment stage, such that government officials in the course of performing their discretionary functions are not burdened by the costs of litigation or distracted from their governmental duties.[7] The leading case is *Harlow v. Fitzgerald*, where the Supreme Court formulated the rule that "government officials [are entitled to qualified immunity] insofar as their conduct does not violate clearly established statutory or constitutional rights of which a *reasonable person would have known*."[8] What a "reasonable person would have known" is clearly a question of fact; however, the Supreme Court has turned the entire qualified immunity analysis into a question of law—decided by judges.[9] The Court did this by not focusing on the "reasonable person" aspect of the rule announced in *Harlow*, but rather, on the "clearly established . . . rights" aspect.[10] The Court instructed judges to determine whether there was a clearly established law,[11] at the time the alleged civil rights violation took place, that forbade the official's conduct.[12] If no such law existed, the official would be *presumed* to have acted reasonably since the conduct at issue had not been "previously identified as [being] unlawful."[13] On the other hand, if there was a clearly established law, the official would not be entitled to qualified immunity because "a reasonably competent public official should know the law governing his conduct."[14]

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7. Harlow v. Fitzgerald, 457 U.S. 800, 815–19 (1982).

8. *Id.* at 818 (emphasis added).

9. Mitchell v. Forsyth, 472 U.S. 511, 528 (1985).

10. *See Harlow*, 457 U.S. at 818.

11. *Harlow* intended for qualified immunity to hinge entirely on the existence of clearly established law. *Id.* Yet, it is striking that nowhere in the opinion does the Court define what a clearly established law is. Subsequent cases have held that at a minimum, Supreme Court decisions and decisions from the circuit where the case arose are considered clearly established law. MICHAEL L. WELLS ET AL., CASES AND MATERIALS ON FEDERAL COURTS 61 (2007). The amount of factual similarity needed for a case to be clearly established law is discussed later in this paper. *See infra* part VI.

12. *Harlow*, 457 U.S. at 818.

13. *Id.*

14. *Id.* at 818–19.

## III. EXCESSIVE FLAWS

*Harlow* essentially allowed judges to determine the "objective reasonableness of an official's conduct" solely "by reference to clearly established law."[15] According to the Court, approaching qualified immunity in this manner would allow for many lawsuits to be dismissed on summary judgment, thus avoiding the need for trial.[16] Ironically however, *Harlow* was not decided on summary judgment—the qualified immunity issue was remanded back to the trial court.[17] The Court reasoned, "The trial court . . . is better situated to *make any such further findings* as may be necessary."[18] This exposed a flaw in *Harlow*: If the primary purpose of qualified immunity is to allow for the dismissal of a lawsuit at the summary judgment stage, a single dispute concerning a material issue of fact will preclude summary judgment.[19] For example, imagine a situation where a suspect is shot multiple times by a law enforcement officer during the course of an arrest. In a subsequent civil rights lawsuit, the suspect claims that he submitted to the arrest and did nothing to provoke the officer's attack. The officer however, claims that he feared for his life because the suspect reached for something in his pocket despite being told to put his hands up. In a situation such as this, where a government official is entitled to qualified immunity under one set of facts, but not the other, summary judgment would be precluded until the disputed facts are resolved by a jury.[20] Once a jury is summoned however, the purposes of qualified immunity announced in *Harlow*—to prevent government officials from being burdened by the costs of litigation or distracted from their governmental duties—are largely diminished, if not lost entirely. At this point, the officer would likely need to go through witness testimony and evidence production, which can be costly and time consuming. Moreover, particularly in excessive force cases, another potential problem arises.

If a jury is summoned to resolve disputed facts for the purpose of qualified immunity, the jury will also be asked, in the interest of judicial economy, to resolve facts that go towards the merits of the excessive force claim.[21] That is, whether under *Graham*, the officer's use of force was objectively reasonable. This places the jury in an exceptional

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15. *Id.* at 818.

16. *Id.*

17. *Id.* at 819–20.

18. *Id.* at 820 (emphasis added).

19. *See* FED. R. CIV. P. 56; Katz v. United States, 194 F.3d 962 (9th Cir. 1999), *overruled by* Saucier v. Katz, 533 U.S. 194 (2001) (overruled on other grounds).

20. Kerman v. City of New York, 374 F.3d 93, 109 (2d Cir. 2004).

21. *See* Anderson v. Russell, 247 F.3d 125 (4th Cir. 2001); Willingham v. Loughnan, 261 F.3d 1178 (11th Cir. 2001).

position. On one hand, the jury is resolving facts for the judge to determine whether the force used was objectively reasonable—by reference to clearly established law—under *Harlow*, and on the other hand, the jury is resolving facts for itself to determine whether the force used was objectively reasonable under *Graham* and the Fourth Amendment. The result can be problematic. Recall the example used above where a suspect is shot multiple times during the course of an arrest. Imagine that after the facts are resolved by a jury, the judge determines that there is no clearly established law prohibiting the officer's conduct, and therefore, the officer is presumed to have acted reasonably and is entitled to qualified immunity. Imagine also however, that although there was no clearly established law, the jury found that the officer's use of force was completely unreasonable under *Graham*. In a situation such as this, should the officer be allowed to escape liability because there was no clearly established law, when a jury found that the amount of force used was objectively unreasonable? In other words, "[c]an there be a reasonable use of unreasonable force?"[22]

Apparently so. In fact, the example used above where a suspect is shot multiple times during the course of an arrest is taken from an actual case—*Anderson v. Russell*.[23] In *Anderson*, the suspect was walking around a shopping mall with headphones on and a portable Walkman radio tucked in his back pocket.[24] Another mall patron mistakenly believed the Walkman radio to be a handgun and notified a nearby law enforcement officer.[25] The officer observed the suspect and determined that the hard object in his back pocket (the Walkman radio) resembled the shape of a handgun.[26] Thus, the officer followed the suspect outside, drew his firearm, and instructed the suspect to get on his knees and put his hands up.[27] The suspect complied with the order, but then reached to turn off his Walkman radio whereupon the officer began firing.[28] The suspect suffered permanent injuries to his arm and leg and brought a civil rights lawsuit in the District of Maryland.[29] The facts were heavily disputed, which caused the district court to summon a jury.[30] On the excessive force claim, the jury unanimously found that the officer's use of force was unreasonable under the Fourth Amendment and rendered a

22. Erwin Chemerinsky & Karen M. Blum, *Fourth Amendment Stops, Arrests and Searches in the Context of Qualified Immunity*, 25 TOURO L. REV. 781, 782 (2009).

23. Anderson v. Russell, 247 F.3d 125 (4th Cir. 2001).

24. *Id.* at 127–28.

25. *Id.* at 128.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.* at 128–29.

verdict in favor of the suspect.[31] On the officer's claim for qualified immunity however, the judge held that the officer's use of force complied with his training,[32] and there was no clearly established law prohibiting the officer's conduct.[33] Therefore, the officer was granted qualified immunity and judgment as a matter of law, notwithstanding the jury's verdict.[34]

Allowing a judge's *presumption* of reasonableness—based solely on the presence or absence of clearly established law—to trump a jury's finding of unreasonableness runs counter to the "bedrock principle" that "questions of fact are best determined by a jury."[35] As one commentator/judge explains, "[J]uries are in the best position to discern the truth, having heard testimony first-hand along with all the eye-twitches, sweaty brows, pregnant pauses and other non-verbal cues that accompany it."[36] Cases like *Anderson* seem to ignore this importance—but courts do not have a choice. It used to be that many circuit courts refused to follow *Harlow* in excessive force cases to avoid a result like *Anderson*.[37] For instance, in a landmark case called *Saucier v. Katz*, the Ninth Circuit denied a police officer's claim for qualified immunity based on the premise that the rules announced in *Harlow* and *Graham* both sought to determine the reasonableness of an officer's conduct.[38] If material facts were in dispute, the question of reasonableness should go to the jury.[39] The Ninth Circuit reasoned that "an officer cannot have an objectively reasonable belief that the force used was necessary (entitling the officer to qualified immunity) when no reasonable officer could have believed that the force used was necessary (establishing a Fourth Amendment violation)."[40] As convincing as this sounds, the Supreme Court reversed 9-0.[41]

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31. *Id.* at 128.

32. *Id.* at 129.

33. *See id.* at 129. The absence of clearly established law can only be assumed because otherwise, the officer would not have been entitled to qualified immunity even if the officer had complied with his training. For another case where jury and judge come out opposite, see Willingham v. Loughnan, 261 F.3d 1178 (11th Cir. 2001).

34. *Anderson*, 247 F.3d at 128.

35. Warner, *supra* note 5, at 104.

36. *Id.*

37. Katz v. United States, 194 F.3d 962, 968 (9th Cir. 1999) (listing cases); Dunigan v. Noble, 390 F.3d 486, 491 n.5 (6th Cir. 2004) ("Prior to *Saucier*, a majority of Circuits, including our own, held the question of whether an officer was entitled to qualified immunity from an excessive force claim was identical to the inquiry on the merits of the claim.").

38. Saucier v. Katz, 533 U.S. 194 (2001) (overruling *Katz v. United States*, 194 F.3d at 968 (9th Cir. 1999)).

39. *See Katz*, 194 F.3d at 970 n.5.

40. *Id.* at 969 (9th Cir. 1999).

41. *Saucier*, 533 U.S. 194 (2001) (overruling *Katz* on other grounds).

## IV. HOLDING ON TO QUALIFIED IMMUNITY IN EXCESSIVE FORCE CASES

The Court held that the qualified immunity analysis was "not susceptible of fusion" with the merits of an excessive force claim, and the two should not be "treated as one question, to be decided by the [jury]."[42] It offered two main rationales. First, the Court focused on the purposes of qualified immunity that were originally announced in *Harlow*: "The approach the [Ninth Circuit] adopted—to deny summary judgment any time a material issue of fact remains on the excessive force claim—could undermine the goal of qualified immunity to 'avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment.'"[43] Needless to say, this rationale is unpersuasive and symptomatic of this paper's earlier criticism of *Harlow*. If a material issue of fact remains, summary judgment is necessarily precluded; there would be no effect on the resolution of "insubstantial claims" because insubstantial claims are those where an officer would be entitled to qualified immunity even if all the evidence was viewed in the light most favorable to the plaintiff.[44] There would be no material issues of fact remaining, and thus, the Ninth Circuit's approach would not even apply. Furthermore, if summary judgment is precluded, the "disruption of government" would be substantially the same whether the jury was resolving facts for the purpose of qualified immunity or for the merits of the excessive force claim. The officer would have to go through the same stages of litigation, particularly witness testimony and evidence production. The Court was incorrect to assume that the Ninth Circuit's approach would have any significant impact on the purposes of qualified immunity.

The second rationale offered by the Court focused on the dangers and dynamics of law enforcement. According to the Court, there is a fundamental distinction between the protections afforded to law enforcement officers under *Graham* as compared to under *Harlow*.[45] *Graham* recognized 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."[46] Thus, in a world of "limitless factual

42. *Id.* at 197.

43. *Id.* at 202 (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)).

44. *See Harlow*, 457 U.S. at 816–19.

45. *Saucier*, 533 U.S. at 204.

46. *Id.* at 205 (internal quotations omitted) (quoting Graham v. Connor, 490 U.S. 386, 397 (1989)).

circumstances,"[47] the Court argued that *Graham* is meant to protect officers from reasonable mistakes in *fact*.[48] For instance, if an officer mistakenly believes that a suspect is carrying a gun, and that mistake is reasonable, the officer would be protected under *Graham* for using more force than was actually necessary.[49] *Harlow* on the other hand, is purportedly meant to protect officers from reasonable mistakes in the *law*.[50] The Court explained:

> The qualified immunity inquiry . . . acknowledge[s] that reasonable mistakes can be made as to the legal constraints on particular police conduct. It is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts. An officer might *correctly perceive all of the relevant facts* but have a *mistaken understanding as to whether a particular amount of force is legal* in those circumstances. If the officer's mistake as to what the law requires is reasonable [by reference to clearly established law], however, the officer is entitled to the immunity defense.[51]

In other words, law enforcement officers are given two bites at the apple. If an officer correctly perceives all of the relevant facts, but uses more force than is necessary, the officer escapes liability unless a clearly established law declared that the amount of force used was illegal under those circumstances. This is notwithstanding the fact that *no reasonable officer* would have acted similarly. The tension is obvious. Furthermore, if the plaintiff only needs to show a clearly established law, then theoretically *Graham* and the Fourth Amendment should apply because, even if *Graham* is intended to protect officers from reasonable mistakes in fact, it is *clearly established law* that using more force than is "objectively reasonable in light of the facts and circumstances" is illegal.[52] But the Court rejected this argument, stating that "the right the official is alleged to have violated must have been 'clearly established' in a more *particularized*, and hence more relevant, sense . . . . [It] must be defined at the *appropriate level of specificity* [to be] clearly established."[53]

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47. *Id.* at 205.

48. *Id.* at 204–05.

49. *Id.* at 205.

50. *Id.*

51. *Id.* (emphasis added).

52. *See* Graham v. Connor, 490 U.S. 386, 397 (1989) (internal quotations omitted).

53. *Id.* at 202 (emphasis added) (internal quotations omitted) (quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987) and Wilson v. Layne, 526 U.S. 603, 615 (1999)).

## V. NO SPECIFICITY ON THE "APPROPRIATE LEVEL OF SPECIFICITY"

Apart from the concerns that (1) the Court is affording law enforcement officers too much protection from liability and (2) the Court is splitting hairs to distinguish *Graham's* fact-based protection from *Harlow's* law-based protection,[54] this paper's main criticism of *Saucier* is that the Court offered no clear guidance concerning the "appropriate level of specificity" needed for a law to be clearly established. Subsequent cases have only made it less clear. For instance, in *Hope v. Pelzer*, a prisoner brought a civil rights lawsuit against three prison guards for cruel and unusual punishment under the Eighth Amendment.[55] After getting into a fight with one of the guards, the prisoner was chained to a hitching post at both arms.[56] The guards removed the prisoner's shirt and let him bake under the sun for seven hours.[57] He was given no bathroom breaks, only two drinks of water, and was taunted by the guards throughout the ordeal.[58] The Eleventh Circuit held that although the prisoner's Eighth Amendment rights were clearly violated, the guards were entitled to qualified immunity because the law concerning the use of the hitching post was not clearly established.[59] Although it could be "inferred" from "analogous" case law that the guards' conduct was illegal,[60] the Eleventh Circuit held that the case law needed to have "materially similar" facts in order to be considered clearly established law.[61] In other words, to overcome qualified immunity, the prisoner would have had to cite case law that prohibited a prison guard from chaining a prisoner to a hitching post for seven hours, without a shirt, without bathroom breaks, without water, and while taunting him.[62] This was how many circuit courts interpreted *Saucier*,[63] but the Supreme Court rejected such a narrow approach.[64]

The Court adopted a "fair warning" standard in *Hope*, and held that prior case law did not need to have materially similar facts to serve as the basis for clearly established law.[65] In fact, no factual similarity was

54. For an argument that *Saucier* and its distinction between *Graham* and *Harlow* is really a case about judicial activism, *see* John C. Jeffries, Jr., *What's Wrong with Qualified Immunity*, 62 FLA. L. REV. 851, 861–67 (2010).

55. Hope v. Pelzer, 536 U.S. 730, 733 (2002).

56. *Id.*

57. *Id.*

58. *Id.* at 735.

59. Hope v. Pelzer, 240 F.3d 975, 981 (11th Cir. 2001), *rev'd*, 536 U.S. 730 (2002).

60. *Id.*

61. *Id.* (quoting Suissa v. Fulton County, Ga., 74 F.3d 266, 269–70 (11th Cir. 1996)).

62. *See id.*

63. ERWIN CHEMERINSKY, FEDERAL JURISDICTION 552 (Wolters Kluwer ed., 5th ed. 2007).

64. *Hope*, 536 U.S. 730.

65. *Id.* at 741.

needed at all—"officials can still be on notice that their conduct violates [clearly] established law even in novel factual circumstances."[66] As long as the current "state of the law" gave the officer "fair warning" that the conduct was unlawful, the officer was not entitled to qualified immunity.[67] This holding greatly relaxed the standard that was purportedly announced in *Saucier*, making it "much easier for civil rights plaintiffs" to overcome qualified immunity.[68] Up until the time *Hope* was decided, cases were routinely being dismissed due to the lack of materially similar cases.[69] Though *Hope* was an Eighth Amendment case and not a Fourth Amendment case, one would expect *Hope* to apply fully to excessive force cases; after all, cruel and unusual punishment is not too far removed from the use of excessive force.[70] Interestingly however, in the only excessive force case to be heard since *Hope* where clearly established was at issue, the Court seemed to completely ignore *Hope*.

## VI. A LESS THAN OBVIOUS RETREAT FROM *HOPE*

In *Brosseau v. Haugen*, the Court retreated from *Hope* and granted a law enforcement officer qualified immunity due to the lack of materially similar cases.[71] In *Brosseau*, a suspect ran from law enforcement officers and jumped into his car.[72] He locked the doors and while fumbling for the keys, a police officer drew his gun and ordered him to get out.[73] The officer banged on the driver side window until it shattered, but by then, the suspect had started the car and began driving away.[74] The officer jumped back and shot the suspect in the back.[75] The Ninth Circuit, relying on *Hope*, denied the officer qualified immunity on the grounds that the officer had "fair warning" that using deadly force under the circumstances was unlawful.[76] The Supreme Court however, in a per curiam opinion, reversed 8-1 without even hearing oral argument—the case was decided solely based on the petition and opposition for certiorari.[77] In its opinion, the Court held that the officer was entitled to qualified immunity because the law was not clearly established in the

66. *Id.*
67. *Id.*
68. CHEMERINSKY, *supra* note 63, at 552.
69. *See id.* at 554.
70. *See* Hudson v. McMillian, 503 U.S. 1 (1992).
71. Brosseau v. Haugen, 543 U.S. 194, 201 (2004).
72. *Id.* at 196.
73. *Id.*
74. *Id.*
75. *Id.* at 196–97.
76. Haugen v. Brosseau, 339 F.3d 857, 873–74 (9th Cir. 2003).
77. CHEMERINSKY, *supra* note 63, at 554.

"more 'particularized' sense" under *Saucier*.[78] The Court stressed the lack of a materially similar case, and in a single sentence, distinguished *Hope* on the grounds that *Hope* was "an obvious case" where materially similar cases were not needed because it was obvious that the conduct at issue violated clearly established law.[79] Apparently, the constitutionality of shooting an unarmed suspect in the back while that person is driving away is "far from . . . obvious."[80] Needless to say, *Brosseau's* departure from *Hope* and back towards *Saucier* has caused "great confusion in the lower courts as to whether and when cases on point are needed to overcome qualified immunity.[81]

## VII. AN ALTERNATIVE APPROACH

In light of the confusion after *Saucier*, *Hope*, and *Brosseau*, the Court should consider reformulating the doctrine of qualified immunity, at least in the context of excessive force cases. The Ninth Circuit's approach in *Saucier* was persuasive—recognizing that *Harlow* and *Graham* are substantially the same inquiry and denying qualified immunity in favor of the jury deciding the question of reasonableness. Apparently however, the Supreme Court felt that this approach did not provide law enforcement officers with sufficient protection for reasonable mistakes. One explanation could be that the Court is wary of juries having to apply a constitutional standard on a consistent basis.[82] If that is the case, the following approach could be a reasonable alternative to qualified immunity in excessive force cases.

A better approach might be to eliminate qualified immunity altogether in excessive force cases; but rather than create a whole new test, the Court should remove the question of reasonableness from the jury and allow judges to decide whether the use of force was objectively reasonable. Under this approach, jury interaction would remain much the same, except that after all the facts are resolved, the judge would decide the ultimate constitutional question of reasonableness based on the jury's findings. While this would be a departure from settled practice, it appears to have an adequate basis in the law. For instance, trial court judges already decide the question of reasonableness on motions for summary judgment whenever facts are undisputed or viewed in the light most

78. *Brosseau*, 543 U.S. at 199 (quoting Saucier v. Katz, 533 U.S. 194, 202 (2001)).

79. *Id.* at 199.

80. *See id.*

81. CHEMERINSKY, *supra* note 63, at 555.

82. *See* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1181 82 (1989) (recognizing that the Court sometimes does not trust juries with questions concerning constitutional standards).

favorable to the plaintiff.[83] Moreover, appellate judges routinely decide the question of reasonableness every time an excessive force case goes on appeal.[84] Judges are well-equipped, yet it seems odd that the constitutional question of reasonableness only goes to the judge when facts are not in dispute, but at all other times, is entrusted to the jury. It would perhaps make better sense to have the jury resolve the facts, and have the judge decide the question of reasonableness based on those facts.

There are several benefits to this approach. First, it would eliminate the need for line drawing between *Hope* and *Brosseau*, and courts would not have to worry about clearly established law. Second, the Court could retreat from its "irreducibly murky"[85] distinction between *Graham* and *Harlow*. If applied judiciously, *Graham* alone provides law enforcement officers with adequate protection for reasonable mistakes. Third, even though they would be denied qualified immunity, law enforcement officers would benefit by having judges decide the constitutional question of reasonableness. Judges are in a better position to decide constitutional questions, having been trained in the law and having developed expertise through experience. This approach would also eliminate potential jury bias. While jury bias can cut both ways,[86] consider the case of Jared Massey, a YouTube sensation and public hero after being Tasered by a Utah Highway Patrol officer in 2007.[87] Despite an internal investigation clearing the officer, the state settled for $40,000 rather than risk a jury awarding more.[88] Fourth, the approach would serve the same purposes as qualified immunity by allowing claims to be decided early on summary judgment. If no material issues of fact remain in an excessive force case, instead of looking to see whether there is a clearly established law, the judge would simply decide the case. This would not be an unprecedented expansion of judicial power; as mentioned above, our legal system already allows judges to do this in a variety of circumstances. Lastly, the approach would keep judges honest by holding them to the Fourth Amendment standard. Granted there is still flexibility for judges to decide cases based on their own personal

83. Kerman v. City of New York, 374 F.3d 93, 109 (2d Cir. 2004).

84. *See, e.g.*, Oliver v. Fiorino, 586 F.3d 898 (11th Cir. 2009); Meadours v. Ermel, 483 F.3d 417 (5th Cir. 2007).

85. Jeffries, *supra* note 54, at 862.

86. *See* Alison L. Patton, *The Endless Cycle of Abuse: Why 42 U.S.C. § 1983 is Ineffective in Deterring Police Brutality*, 44 HASTINGS L.J. 753, 764–65 (1993).

87. Linda Thomson, *Utah to Pay $40,000 in Taser Settlement*, DESERET NEWS, March 11, 2008, http://www.deseretnews.com/article/695260666/Utah-to-pay-40000-in-Taser-settlement.html. Man Tased by Bored Utah Cop . . . and Gets $40,000, YOUTUBE, http://www.youtube.com/watch?v=sqbmasNeOmM (last visited Sep. 29, 2011).

88. Thomson, *supra* note 87.

ideologies, but the amount of discretion is far less than what the current doctrine of qualified immunity allows.[89]

## VIII. CONCLUSION

In conclusion, the doctrine of qualified immunity is incompatible with excessive force cases. Both qualified immunity and the Fourth Amendment constitutional standard focus on reasonableness, and the Supreme Court's attempts to distinguish the two have made qualified immunity cases near impossible to predict. Under *Brosseau*, a plaintiff will be hard-pressed to find case law that is materially similar in a world of "limitless factual circumstances."[90] Under *Hope*, law enforcement officers arguably have fair warning of everything. The difficulty is fashioning a rule that balances these two extremes, something the Supreme Court has not been able to do. Asking whether the constitutional violation is "obvious," as suggested in *Brosseau*, is no more helpful than asking whether the constitutional violation is clearly established. The reality that it is possible for law enforcement officers to "reasonably act unreasonably" is evidence that the doctrine of qualified immunity needs to be eliminated from excessive force cases, or the Supreme Court needs to fashion a whole new test.

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89. Jeffries, *supra* note 54, at 862 ("It is plain, of course, that the *Saucier* Court wanted summary judgment.").

90. Saucier v. Katz, 533 U.S. 194, 205 (2001).

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