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Civil Rights - Hammer v. Gross: Pounding Out a New Standard in Excessive Force Actions

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CIVIL RIGHTS

HAMMER V. GROSS: POUNDING OUT A NEW STANDARD IN EXCESSIVE FORCE ACTIONS

I. INTRODUCTION

In *Hammer v. Gross*[1], the Ninth Circuit Court of Appeals held that the proper question for the jury in an action arising under 42 U.S.C. Section 1983[2] alleging excessive force by a police officer, is whether the level of force employed was objectively reasonable in light of the facts and circumstances at the time of the incident.[3] In reaching its decision, the court applied the analysis set out by the United States Supreme Court in *Graham v. Connor*.[4] The *en banc* panel also clarified prior decisions regarding FRCP 51[5], reaffirming that there is no "plain error" exception in civil cases in the Ninth Circuit.[6] The Court also held that under the circumstances, the arresting officer and police chief were entitled to qualified immunity from the Section 1983 claim, but that the City of Newport Beach was not.[7]

II. FACTS

On June 23, 1985, plaintiff Timothy Hammer was arrested by Newport Beach police officer Armando Zatarain, upon probable cause,[8] for driving under the influence of alcohol.[9]

1. 932 F.2d 842 (9th Cir. 1991) (en banc, per Canby, J., Farris, J., and Schroeder, J.; Kozinski, J., and Nelson, J., concurring in part, except to section III of the court's opinion; Reinhardt, J., specially concurring except to section IV of the court's opinion; Beezer, J., Browning, J., Fernandez, J., Goodman, J., Thompson, J., dissenting.).

2. *See infra* note 27 and accompanying text for discussion of Section 1983.

3. Hammer v. Gross, 932 F.2d at 846.

4. 490 U.S. 386 (1989). *See infra* note 37 and accompanying text for full discussion of the *Graham* decision.

5. *See* note 51 and accompanying text for discussion of Rule 51.

6. *Hammer*, 932 F.2d at 848.

7. *Id.* at 850-51. *See infra* section IV, subsection A(4) for a discussion of qualified immunity for Office Zatarain and Chief of Police Gross.

8. Id. at 844. (Hammer failed a series of field sobriety tests administered by Zatarain.).

9. *Id.*

Zatarain told Hammer that he would be required to take a blood, urine or breath test to determine his blood alcohol content as mandated by California Vehicle Code Section 23157.[10] Hammer refused.[11]

Zatarain drove Hammer to a Newport Beach Hospital.[12] There, Zatarain handcuffed Hammer by his right wrist to a hard plastic chair and asked Hammer whether he would submit to a blood test.[13] When Hammer verbally refused, Zatarain told a laboratory technician to withdraw a blood sample despite Hammer's objections.[14] Hammer claimed that Zatarain grabbed his shoulders from behind and pinned him to the chair while the technologist swabbed his forearm with iodine.[15] Hammer jumped when the technologist attempted to insert the needle.[16] As Hammer tried to wrestle away from the needle, Zatarain attempted to immobilize him and the two tumbled sideways to the floor, with Hammer twisting his back as he hit the ground.[17] Zatarain lifted Hammer off the floor and told him that the blood would be extracted "the

10. *Id. See* Cal. Veh. Code Section 23157 (Deering, 1987) which provides in pertinent part:

> Any person who drives a motor vehicle is deemed to have given his or her consent to chemical testing of his or her blood, breath or urine for the purpose of determining the alcoholic content of his or her blood. . . .

11. *Hammer*, 932 F.2d at 844. Hammer later testified that he did so because he felt there was a good possibility that the tests would indicate intoxication. *Id. See* Cal. Veh. Code § 13353 (Deering, 1987) which provides in pertinent part:

> [i]f any person refuses an officer's request to submit to, or fails to complete a chemical test or tests pursuant to § 23157, upon receipt of the officer's sworn statement that the officer had reasonable cause to believe the person had been driving a motor vehicle in violation of § 23152 or 23153 and that the person had refused to submit to, or did not complete, the test or tests after being requested by the officer, the department shall (1) suspend the person's privilege to operate a motor vehicle for 6 months, (2) revoke the person's privilege to operate a motor vehicle for 2 years if the person has been convicted of a separate violation of § 23103 as specified in §§ 23103.5, 23152 or 23153 within 5 years of the date of refusal, or (3) revoke the person's privilege to operate a motor vehicle for 3 years if the person has been convicted of 2 or more separate violations of § 23103 as specified in §§ 23103.5, 23152 or 23153, or any combination thereof, within 5 years of the date of refusal.

12. *Hammer*, 932 F.2d at 844.

13. *Id.*

14. *Id.* Hammer later testified that he refused the blood test because he does not like needles. *Id.*

15. *Id.* Zatarain denied having touched Hammer from the time Hammer was first seated in the emergency room until the technologist completed the blood extraction. *Id.*

16. *Id.*

17. *Id.*

easy way or the hard way."[18] Hammer then agreed to take a breathalyzer test, but Zatarain insisted on the blood test and held Hammer in the chair as the blood was withdrawn.[19]

On September 23, 1985, Hammer filed a Section 1983 action[20] claiming violation of his constitutional rights.[21] Following a three-day trial,[22] a jury awarded Hammer compensatory and punitive damages against Zatarain and Newport Beach Chief of Police Charles Gross, as well as compensatory damages against the City of Newport Beach.[23] On appeal, a three-judge panel of the Ninth Circuit reversed, holding that the trial judge had erred in denying defendants' motions for directed verdict and judgment notwithstanding the verdict.[24] Upon Hammer's petition, the Ninth Circuit ordered a rehearing *en banc*.[25]

III. BACKGROUND

A. STANDARD OF REVIEW FOR A SECTION 1983 ACTION ARISING FROM A CLAIM OF EXCESSIVE FORCE

Section 1983[26] came into existence as Section 1 of the Ku Klux Klan Act of April 20, 1871.[27] It was enacted to provide a

18. *Id.* Zatarain called two other officers into the room, threatening to throw Hammer to the floor and pin him down in order to obtain the blood sample. *Id.*

19. *Id.*

20. *See infra* note 27 and accompanying text for discussion of Section 1983.

21. *Hammer*, 932 F.2d at 843-44.

22. Hammer v. Gross, 884 F.2d 1200 at 1202 (9th Cir. 1989). The defendants had moved for summary judgment, asserting that the individual defendants were entitled to qualified immunity and that because Officer Zatarain was no closer than five feet from Hammer during the blood withdrawal, there was no genuine issue of material fact. The District Court denied the motion. At the close of the trial, the defendants moved for a directed verdict, which was also denied. *Id.*

23. *Id.* The court denied defendants' motion for judgment notwithstanding the verdict. *Id.*

24. *Id.* at 1200-08. The court based its reversal on its finding that the amount of force applied by Zatarain was minimal and did not exceed the amount necessary to effect the lawful seizure of blood alcohol evidence. The court found that Zatarain's conduct was not "unreasonable" within the meaning of the fourth amendment. *Id.* at 1208.

25. Hammer v. Gross, 902 F.2d at 774.

26. 42 U.S.C. § 1983 (1982). Section 1983 provides:

> 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.

27. Monroe v. Pape, 365 U.S. 167, 171 (1961). The *Monroe* opinion discusses R.S. § 1979. The statutory language in R.S. 1979 is identical to the language used in 42

remedy for a citizen whose constitutional rights had been violated by abuses of official power.[28] The provision was enacted with "three main aims."[29] The first of these was to override state legislation which was adverse to the rights or privileges of citizens of the United States.[30] The second purpose was to provide a remedy where state law was inadequate.[31] The legislation was also intended "to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice."[32] This final purpose was largely a reaction to the activities of the Ku Klux Klan and the lawless conditions existing in the South in 1871.[33] Congressional debate over Section 1 of the Ku Klux Klan Act makes clear that one reason for the provision was to create a right enforceable in federal courts. This was necessary because, by reason of "prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges and immunities guaranteed by the fourteenth amendment might be denied by the state agencies."[34] The intent of Section 1983 was not solely to provide compensation to victims of abuses of official power, but also to serve as a deterrent against such future constitutional infringements.[35]

U.S.C. § 1983. Annotation, *Supreme Court's Construction of Civil Rights Act of 1871 (42 USCS § 1983) Providing Private Rights of Action For Violation of Federal Rights*, 43 L.Ed. 2d 833, 839.

28. *Monroe*, 365 U.S. at 172.

29. *Id.* at 173.

30. *Id.* (Citing Cong. Globe, 42d Cong., 1st Sess., App. 268).

31. *Id.* In 1871, when the Ku Klux Klan Act was enacted, many state laws were prejudicial toward blacks. For example, several states would not allow a black man to testify in any case against a white man. *Id.* at 174.

32. *Id.* at 174. The Court stated that it was the "failure of certain States to enforce the laws with an equal hand that furnished the powerful momentum" behind the passage of the Ku Klux Klan Act. *Id.* at 174-75.

33. *Id.* at 176. Senator Osborn of Florida stated to Congress:

> That the State courts in the several States have been unable to enforce the criminal laws of their respective States or to suppress the disorders existing, and in fact that the preservation of life and property in many sections of the country is beyond the power of the State government, is a sufficient reason why Congress should. . . enact the laws necessary for the protection of citizens of the United States. (Cong. Globe, 42d Cong., 1st Sess. 653.)

34. *Id.* at 180.

35. Owen v. City of Independence, 445 U.S. 622, 651 (1980). Plaintiff brought suit under 42 U.S.C. § 1983, alleging violation of his rights to procedural and substantive due process after having been discharged from his position as Chief of Police of defendant City. *Id.* at 626. The City gave no reason for the dismissal, plaintiff having received only a written notice that the dismissal was made pursuant to a provision of the city charter. *Id.* The Eighth Circuit court held that a municipality has no

In *Hammer*, the Ninth Circuit panel applied the analysis developed by the United States Supreme Court in *Graham v. Connor*[36] for determining whether force utilized by a state agent is excessive. The *Graham* Court rejected the fourteenth amendment substantive due process approach established in *Rochin v. California*[37] and rejected prior appellate court rulings which interpreted *Rochin* as requiring a substantive analysis of a law enforcement officer's motives in determining whether excessive force was utilized.[38] The Court set forth a new standard of review for excessive force claims against law enforcement officers under Section 1983.[39] In *Graham*, the Court stated that

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immunity from § 1983 and may not assert the good faith of its agents as a defense to such liabilities. *Id.* at 651.

36. 490 U.S. 386 (1989). Plaintiff Graham, wrongly suspected of wrongdoing in a convenience store, was apprehended by defendant Connor, who ignored his claims of being diabetic. *Id.* at 389. Graham momentarily lost consciousness, was shoved by several officers face first into the hood of the patrol car and thrown head first into the car by four officers. *Id.* The Court held that claims of excessive force by a government official should be analyzed under the fourth amendment's reasonableness standard. *Id.* at 395.

37. 342 U.S. 165 (1952) (Frankfurter, J., plurality opinion.) (Overruled by Graham v. Connor, 490 U.S 386). The *Rochin* Court considered whether the forceful extraction of the contents of a suspect's stomach by order of police officers, in order to obtain evidence against the suspect, violated the fourteenth amendment of the United States Constitution. *Rochin* at 168-74. The Court observed that the due process clause of the fourteenth amendment guarantees respect for those personal immunities which are "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Id* at 169, quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934). The Court set forth the test that conduct which "shocks the conscience" violates the due process guidelines set forth in the fourteenth amendment. *Id.* at 172-74. The Graham Court rejected the *Rochin* analysis in favor of analysis under the fourth amendment and its reasonableness standard. *Graham*, 490 U.S. 386 at 393-95.

38. In Johnson v. Glick, 481 F.2d 1028 (2d Cir. 1973), *cert. denied*, 414 U.S. 1033 (1973), the Second Circuit interpreted the *Rochin* test to mean that the court must consider "the need for the application of force, the relationship between the need and the amount of force that was used, the extent of the injury inflicted and whether force was applied in a good faith effort to maintain or restore discipline or *maliciously and sadistically* for the very purpose of causing harm." *Id.* at 1033 (emphasis added). Two years after the decision, the Ninth Circuit adopted the *Johnson* substantive due process test in Meredith v. State of Arizona 523 F.2d 481 (9th Cir. 1975). In *Meredith*, the court held that an unprovoked assault and battery by a guard upon a state prisoner was a violation of that prisoner's right to due process. *Id.* at 484. The court stated that in light of *Johnson*, conduct under color of state law that can be fairly characterized as "intentional, unjustified, brutal and offensive to human dignity" violates the victim's right to substantive due process. *Id.* The *Johnson* test found more recent Ninth Circuit affirmation in Rutherford v. City of Berkeley 780 F.2d 1444 (9th Cir. 1986).

39. *Graham*, 490 U.S. 386, 393-99. The *Graham* court recognized that the lower federal courts had applied the *Johnson* substantive due process test indiscriminately to all Section 1983 excessive force claims against law enforcement officers, without considering whether the use of force might fall under a more specific constitutional right. *Id.* at 393. The court rejected the view that Section 1983 excessive force claims should be governed by the substantive due process standard. *Id.* at 393-94.

analysis of such a claim should commence by identifying the specific constitutional right allegedly violated by the use of force.[40] The Court rejected the validity of the *Rochin* analysis,[41] and held that all claims alleging the use of excessive force by law enforcement officers during arrest, investigatory stop or other seizure[42] should be analyzed under the fourth amendment[43] and its reasonableness standard, as opposed to the fourteenth amendment substantive due process approach.[44]

The *Graham* Court also considered the level of force which would be considered unreasonable under the fourth amendment standard.[45] This analysis must allow for the fact that law enforcement officers are often forced, in tense and rapidly evolving situations, to make split-second determinations of the amount of force required under the circumstances.[46] The question to be addressed is whether the actions of the officer are objectively reasonable in light of the facts and circumstances, without consideration of the officer's intent or motivation.[47] The Court concluded that the four-part test of *Johnson v. Glick*,[48] which considers whether the officer acted "in good faith" or

40. *Id.* at 394.

41. *Id.* at 395. *See supra* note 37 for discussion of the *Rochin* analysis. The *Graham* court stated that it was making explicit what was implicit in the analysis set forth in Tennessee v. Garner. 471 U.S. 1 (1985)). In *Garner*, a case involving the use of excessive force by the police, the Court held that in order to determine whether a seizure is reasonable, and thus constitutional, the nature and quality of the intrusion on the individual's fourth amendment rights must be balanced against the governmental interests supporting the intrusion. *Id.* at 8.

42. A "seizure," triggering the protection of the Fourth Amendment, occurs when a government official, by means of physical force or show of authority, restrains the liberty of a citizen. *See* Terry v. Ohio, 392 U.S. 1, 19 n. 16 (1968).

43. U.S. Const. amend. IV states:

> The rights of the people to be secure in their person, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

44. *Graham*, 490 U.S. at 395. The Court bases this stance on the fact that the fourth amendment is an explicit constitutional protection from physically intrusive government conduct, as opposed to the more general notion of substantive due process. *Id.*

45. *Id.* at 396.

46. *Id.* at 396-97, *see also Terry*, 392 U.S. at 22. (Holding that the facts of a particular case must be judged against the objective standard of whether the information available to the officer at the moment of the seizure or search would warrant a man of reasonable caution to believe that the action taken was appropriate.)

47. *Graham*, 490 U.S. at 397.

48. *See supra*, note 38, for discussion of the *Johnson* test.

"maliciously and sadistically," has no place in a proper fourth amendment analysis.[49] Such subjective motivations have no bearing on whether a particular seizure is unreasonable under the fourth amendment.[50]

The analysis developed in *Graham* considers only whether the level of force applied by the officer was objectively reasonable in light of circumstances existing at the time of the incident. The analysis is to be applied by the jury, free from all subjective considerations.

B. Enforcement of Federal Rule of Civil Procedure 51 in the Ninth Circuit

Rule 51[51] of the Federal Rules of Civil Procedure was designed to bring possible errors to the attention of the court while there is still time to correct them without the cost, delay and expenditure of judicial resources necessitated by retrials.[52] Circuits other than the Ninth have adopted a "plain error" exception to FRCP Rule 51, similar to the "plain error" exception found in Rule 52(b)[53] of the Federal Rules of Criminal Procedure.[54] Although Rule 30 of the Federal Rules of Criminal Procedure shares a common purpose with Rule 51 of the Federal Rules of Civil Procedure, no statutory "plain error" rule is found with regard to civil litigation.[55] In *Bertrand v. Southern*

49. *Id.*

50. *Id.*

51. Fed. R. Civ. P. 51 provides in pertinent part:

> No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of objection.

52. *See* Bertrand v. Southern Pacific Co., 282 F.2d 569, 572 (9th Cir. 1960), *cert. denied*, 365 U.S. 816 (1961).

53. Fed. R. Crim. P. 52(b) provides:

> Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

Rule 52(b) is applicable in conjunction with and as an exception to Fed. R. Crim. P. 30, which provides in pertinent part:

> No party may assign as error any portion of the charge or omission [in an instruction to the jury] unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which that party objects and the grounds of the objection.

54. *See e.g.*, Nimrod v. Sylvester, 369 F.2d 870 (1st Cir. 1966); Ramsey v. Travelers, 317 F.2d 300 (4th Cir. 1963).

55. *See* Hargrave v. Wellman, 276 F.2d 948, 950 n. 3 (9th Cir. 1960).

Pacific,[56] the court stated that regardless of other circuits' rules, in the Ninth Circuit the plain error rule may not be applied in civil appeals in order to review jury instructions where the ground asserted was not raised at trial.[57]

Most circuits, excluding the Ninth Circuit, have stated in dicta that an appellate court may reverse for plain error in an instruction to which no objection was made.[58] These statements, however, recognize that such power is to be exercised only where necessary to prevent a miscarriage of justice.[59]

The Ninth Circuit stated one possible exception to its strict enforcement of Rule 51 in *Robert's Waikiki U-Drive, Inc v. Budget Rent-A-Car Systems*.[60] There, the court stated that if it is aware of a party's concerns with an instruction and further objection would serve no purpose, the party will not be required to take part in the "pointless formality" of lodging a formal objection.[61]

IV. COURT'S ANALYSIS

A. MAJORITY OPINION

1. *Standard for Analysis of a Section 1983 Claim Arising From Excessive Use of Force*

In determining that the proper question for the jury in an excessive force claim is whether an arresting officer's use of force was objectively reasonable in light of the circumstances existing at the time of the incident,[62] the *Hammer* court commenced its analysis by considering whether the facts of the case were sufficient to sustain the jury verdict for Hammer.[63] The

56. 282 F.2d 569, 572.

57. *Id.*

58. C. Wright & A. Miller, FEDERAL PRACTICE AND PROCEDURE, § 2558, at 672 (1971). *See e.g.* Nimrod v. Sylvester, 369 F.2d 870, 873 (1st Cir. 1966).

59. *Id.*

60. 732 F.2d 1403, 1410 (9th Cir. 1984).

61. *Id.* In Eberle v. City of Anaheim, 901 F.2d 814 (9th Cir. 1990), the Ninth Circuit was presented with an appeal of a Section 1983 case arising out of the use of excessive force. At trial, the district court had instructed the jury that in determining whether excessive force was used, it should consider if the force was applied in good faith or maliciously and sadistically for the purpose of causing harm. *Id.* at 820. On appeal, the Ninth Circuit found that the Johnson v. Glick instruction was plain error, but observed that the force utilized in the case was not excessive, thus avoiding the need to permit a "plain error" exception. *Id.*

62. *Hammer*, 932 F.2d at 846.

63. *Id.* at 846-47.

court observed that under *Schmerber v. California*,[64] it is not a violation of the fourth amendment for police, with probable cause but without a warrant, to extract a blood sample from an individual suspected of driving under the influence of alcohol, who had been arrested and hospitalized, and who had refused to take a breathalyzer test.[65] The Ninth Circuit observed that the *Schmerber* court emphasized the routine nature of the test and the fact that it was performed by a physician in a hospital.[66] Additionally, the *Schmerber* Court took pains to limit its holding to the facts of the case.[67] The Ninth Circuit rejected the defense's argument that the *Schmerber* decision *necessarily* legitimized the use of force to overcome resistance to a procedure which the police are entitled to use.[68] The Court observed that the crucial question was whether a rational jury could conclude that the force used on Hammer was excessive under the circumstances.[69]

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64. 384 U.S. 757 (1966). The plaintiff had been arrested upon probable cause for driving under the influence of alcohol. *Id.* at 758. At a hospital, a physician, on direction of the arresting police officer, withdrew a blood sample from the plaintiff, despite his verbal refusal to such. *Id.* at 759. There is no suggestion in *Schmerber* of any physical resistance by the suspect or use of force by the police. *Hammer* 932 F.2d at 844.

65. *Hammer*, 932 F.2d at 844-845, citing *Schmerber*, 384 U.S. at 771-72.

66. *Id.* at 845. In Breithaupt v. Abram, 352 U.S. 432 (1956), the court permitted the withdrawal of blood from a hospitalized, unconscious subject. The court stated that "there is nothing 'brutal' or 'offensive' in the taking of a sample of blood when done . . . under the protective eye of a physician." *Id.* at 435.

67. *Hammer*, 932 F.2d at 845 (citing *Schmerber*, 384 U.S. at 772). The *Hammer* court observed that the plaintiff did not seek an alternative blood alcohol content test on grounds of fear, concern for health, or religious scruples. *See Schmerber* 384 U.S. at 771.

68. *Hammer*, 932 F.2d at 845. While no force was utilized in *Schmerber*, the defendants in *Hammer* argued that the decision legitimized the use of force to overcome resistance to a procedure which the defendants were entitled to employ. *Id.* They asserted that the *Schmerber* court could not have intended a rule which would give no weight to a suspect's verbal objection, but would give effect to an objection accompanied by physical resistance. *Id.* In support of this argument, the defendants cited a footnote in *Schmerber*:

> We "cannot see that it should make any difference whether one states unequivocally that he objects or resorts to physical violence in protest or is in such condition that he is unable to protest." (Citing Breithaupt v. Abram, 352 U.S. 432 at 441 (Warren, C.J. dissenting)). It would be a different case if the police initiated the violence, refused to respect a reasonable request to undergo a different form of testing, or responded to resistance with inappropriate force. *Schmerber*, 384 U.S. at 760 n. 4.

69. *Hammer*, 932 F.2d at 845. The Court assumed for the purpose of its decision that *Schmerber* does not preclude the use of force to extract a blood sample from a resistant suspect in some situations. *Id.* The defendants contended that the force to which Hammer was subjected was not excessive because, as Hammer admitted, it did not rise to a level that "shocks the conscience," *Id.*, the measure of what constitutes

The test for determining whether the force employed was excessive was stated in *Graham v. Connor*.[70] The *Graham* Court held that claims of excessive force by a government official should be analyzed under the fourth amendment and its reasonableness standard, as opposed to a fourteenth amendment substantive due process approach.[71] Under this test, the trier of fact must ask whether the "officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation."[72] The test balances "'the nature and quality of the intrusion on the individual's fourth amendment interests against the countervailing governmental interests at stake."[73] The reasonableness of the use of force is "judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight."[74]

2. *Application of Graham Analysis*

Although *Graham* had not been decided at the time of Hammer's 1985 arrest, the Ninth Circuit observed that under the test applied in *Reed v. Hoy*,[75] the *Graham* analysis is to be applied retroactively.[76] Ordinarily, the Ninth Circuit will retroactively apply a decision reformulating federal civil law.[77] However, in certain cases, retroactive application of new case law may produce an inequitable result.[78] In *Chevron Oil Co. v. Huson*[79], the Supreme Court set forth an analysis for determining whether new case law should be applied retroactively.[80] Under this analysis, the *Graham* standard

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excessive force formulated in *Rochin*. The measure of excessive force set forth in *Rochin* was overruled by the Supreme Court in *Graham*, 490 U.S. 386.

70. 490 U.S. 386. *See supra* note 36 and accompanying text for discussion of *Graham*.

71. *Id.* at 395. This standard applies whether the officer is making an arrest, investigatory stop or other seizure of a free citizen. *Id.*

72. *Hammer*, 932 F.2d at 846 (citing *Graham*, 490 U.S. at 397).

73. *Id.* (citing *Graham*, 490 U.S. at 396).

74. *Hammer*, 932 F.2d 846 (citing *Graham* 490 U.S. at 396).

75. 909 F.2d 324 (9th Cir. 1989), *cert.* denied, 111 S.Ct. 2887 (1991). The court held that in determining whether a decision should be applied retroactively, a court must consider the three factors set out in Chevron Oil Co. v. Huson, 404 U.S. 97, 106-107 (1971) (*See* note 80 *infra*, for discussion of the *Chevron* analysis.)

76. *Id.* at 327-328.

77. Austin v. City of Bisbee, 855 F.2d 1429, 1432 (9th Cir. 1988), (citing Mineo v. Port Auth. of New York and New Jersey, 779 F.2d 939, 943 (3d Cir. 1986)).

78. *Reed*, 909 F.2d at 327.

79. 404 U.S. 97 (1971).

80. *Id.* Under the *Chevron* analysis, new case law should be applied only prospectively if it (1) establishes a new principal of law, by overruling clear past

was properly applied retroactive to the time of Hammer's arrest.[81]

In light of the *Graham* decision, the question facing the Ninth Circuit became whether a rational jury could find that the defendants' use of force to overcome Hammer's resistance and extract a blood sample was not "objectively reasonable in light of the facts and circumstances confronting them."[82]

While Hammer did forcibly resist the blood test, which he had no right to do, his offense was only a misdemeanor.[83] The plurality stressed that Hammer posed no threat to the officer or to others at the hospital.[84] Perhaps most important, however, is the fact that Hammer, prior to the extraction of blood, agreed to submit to a breathalyzer test.[85] If an alternative test is available and requested by the suspect, a police officer may not arbitrarily refuse to administer such simply because the suspect did not make the decision more promptly or had a change of mind.[86] The defendants argued that Hammer's

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precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed; (2) states a rule whose retrospective operation will retard rather than further its operation, considering the rule's prior history and its purpose and effect; (3) is a decision whose retroactive application could produce substantial inequitable results, and for which a holding of nonretroactivity would avoid injustice or hardship. *Id.* at 106-07.

81. *Hammer*, 932 F.2d at 846. While Graham does overrule past Ninth Circuit precedent, the United States Supreme Court states in that decision that it was "making explicit what was implicit in *Garner's* analysis. . . ." (*Graham*, 490 U.S. at 395). Therefore, the Court did not view its decision in *Graham* as establishing a new principle of law. Reed v. Hoy, 909 F.2d 324, 328 (9th Cir. 1990). Thus, *Graham* may be applied retroactively under the first element of the three-part *Chevron* test. Because *Graham* furthers the essential purpose of the fourth amendment — guaranteeing that citizens are "secure in their persons. . . against unreasonable. . . seizures of the person" (U.S. Const. amend IV) — retroactive application of the decision will further rather than retard the policies announced therein. *Id.* Thus, retroactive application is acceptable under the second of the *Chevron* tests. Additionally, retroactive application of *Graham* will not result in any substantially inequitable results. *Id.* The primary factor to be considered with regard to whether substantial inequities will result, is whether a party has reasonably relied on a law which was later invalidated. *Id.* The *Graham* decision surmounts the effect of the third factor in the *Chevron* test.

82. *Hammer*, 932 F.2d at 846 (citing *Graham*, 490 U.S. at 397).

83. *Id.* at 846.

84. *Id. See Graham*, 490 U.S. at 396 (stating that the proper application of the test of reasonableness under the fourth amendment requires consideration of whether the suspect poses an immediate threat to the safety of the officers and others).

85. *Hammer*, 932 F.2d at 845. In his concurring opinion, Judge Kozinski stated that a decision for Hammer should turn solely on this fact. *Id.* at 851.

86. *Id.* at 852. Judge Kozinski points out that the defense offered no evidence that Hammer's consent came too late due to the ineffectiveness or unavailability of an alternative test. *Id.*

consent to the breathalyzer test was not given in good faith and was an attempt to create further delay.[87] While recognizing that this was possible, the Ninth Circuit held that the jury could have concluded that Hammer's consent was sincere, rendering any further use of force unreasonable.[88] Upon considering these factors, and the fact that "the integrity of an individual's person is a cherished value of our society,"[89] the Ninth Circuit panel held that the question of reasonableness of force by the defendants, under the circumstances of the case, was a proper question for the jury.[90]

3. *FRCP Rule 51 in the Ninth Circuit*

Despite the *Hammer* court's holding that the issue of reasonableness of force was a proper question for the jury, the defendants argued that the jury verdict should not stand because the jury was led to believe that force could never be properly utilized to extract a blood sample.[91] The jury was instructed to apply the due process test of unreasonable force which was set out in *Johnson v. Glick*[92] and subsequently rejected by *Graham*.[93] The "malicious and sadistic" element of the *Johnson* analysis puts in question the subjective motives of an officer which, according to *Graham*, does not bear upon whether a particular seizure is unreasonable under the Fourth Amendment.[94] The Ninth Circuit panel agreed that this factor could have led the *Hammer* jury to find that force had been applied with an improper intent, rendering the use of force impermissible.[95]

The court maintained, however, that despite the improper jury instruction, the defendants failed to object to the

87. *Id.* at 846. The *Schmerber* Court noted that the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body eliminates it from the system. *Schmerber*, 384 U.S. at 770.

88. *Hammer*, 932 F.2d at 846.

89. *Id.*, (*citing Schmerber*, 384 U.S. at 772.)

90. *Id.* At trial, the Judge denied defendants' motions for a directed verdict and for judgment notwithstanding the verdict. *Hammer*, 884 F.2d 1200 at 1202. On first appeal, the Ninth Circuit held that because Hammer failed to establish that he had been deprived of any fourth amendment right, the trial judge had erred in denying the defendants' motions. *Id.* at 1202-1208.

91. *Id.* at 846-47.

92. 481 F.2d 1028 (2d Cir. 1973). *See supra* note 38 for discussion of the *Johnson* test.

93. Graham v. Connor, 490 U.S. 386, 397.

94. *Id.*

95. *Hammer*, 932 F.2d at 847.

instruction and did not make known any concern with the lower court's due process excessive force instruction.[96] Thus, they were in no position to complain about it.[97] The Ninth Circuit, as the strictest enforcer of Rule 51,[98] has declared that there is no plain error exception for civil cases in the circuit.[99] In *Hammer*, the court again maintained its standing as a firm enforcer of Rule 51, stating that its position has spared it the "burden of having to review afterthought claims of errors in the instructions" which counsel sought to pursue under the auspices of plain error.[100] In his concurring opinion, Judge Reinhardt urged the court to relax its approach to the enforcement of Rule 51, and "join other circuits in adopting a more flexible and reasonable approach."[101]

4. *Qualified Immunity for Zatarain and Gross*

With regard to Hammer's claims against Chief of Police Gross and the City of Newport Beach, the defendants contended that even if officer Zatarain were found to have used excessive force, there was no evidence that Gross or the City sanctioned such as a policy.[102] Chief Gross testified that during his tenure, he was responsible for establishing the policies of the Newport Beach Police Department.[103] When a suspect refused all three blood alcohol content tests, the City's policy was that blood could be forcibly extracted, so long as the force did not "shock the conscience."[104] The decision of whether to utilize force in order to obtain a blood sample was left to the officers' discretion.[105] From Gross' testimony and the corroborating testimony of a witness[106] who had previously been

96. *Id.*

97. *Id.*

98. See C. Wright & A. Miller, FEDERAL PRACTICE AND PROCEDURE, § 2558, at 674 (1971):

> The Ninth Circuit stands alone in reading Civil Rule 51 literally and denying that there is any power to reverse for plain error in an unobjected-to instruction in a civil case.

99. *Hammer*, 932 F.2d at 847.

100. *Id.* at 848 (quoting C. Wright & A. Miller, FEDERAL PRACTICE AND PROCEDURE, Section 2558 at 674-75).

101. *Id.* at 851 (Reinhardt, J., concurring).

102. *Id.* at 849.

103. *Id.*

104. *Id.*, *see also Rochin*, 342 U.S. at 172.

105. *Hammer*, 932 F.2d at 850.

106. Witness Bohunis testified that several months prior to the Hammer arrest, he had been apprehended by Officer Zatarain and, after being unable to complete a

apprehended by Officer Zatarain, the court concluded that the jury could have reasonably found that Chief Gross had established a policy which permitted the use of force over and above a level reasonable under the circumstances.[107]

Defendants Zatarain and Gross argued that they were entitled to qualified immunity from personal liability as a matter of law.[108] The defendants would be immune from liability if reasonable officers in their position, in light of clearly established law, could have reasonably believed that their actions were lawful.[109] The panel in *Hammer* conceded that the standard of review under *Graham*, as applied to this case, can result in a jury finding that force is excessive, although it did not rise to a level that shocks the conscience.[110] However, at the time of Hammer's arrest, *Graham* had not yet been decided. The Ninth Circuit ruled in *Hammer* that because a reasonable officer would not have anticipated the *Graham* ruling, officers Zatarain and Gross were immune from personal liability for their actions.[111] Despite the fact that the force which Zatarain applied and Gross authorized was unreasonable, it was well below the level that shocks the conscience.[112] Citing *Owen v. City of Independence*,[113] in which the United States Supreme Court ruled that a municipality may not assert the good faith of its officers as a defense to Section 1983 liability, the *Hammer* court refused to extend the granting of immunity to the City of Newport Beach.[114]

In light of the Ninth Circuit's holdings in *Hammer*, and the fact that the City of Newport Beach was not entitled to

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breathalyzer test, was subjected to a blood extraction over his resistance by the substantial forcible efforts of seven officers. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* At the time of Hammer's arrest both *Breithaupt*, 352 U.S. 432, and *Schmerber*, 384 U.S. 757, had been decided. *Breithaupt* permitted the withdrawal of blood when the hospitalized subject was unconscious. *Breithaupt* at 436-39. That decision adopted the rule of *Rochin*; force that "shocks the conscience" violates substantive due process. *Id.* (Hammer concedes that the *Rochin* standard was not violated by Zatarain and Gross. *Hammer*, 932 F.2d at 850). *See* note 64 and accompanying text for discussion of *Schmerber*.

110. *Hammer*, 932 F.2d at 850.

111. *Id.*

112. *Id.*

113. 445 U.S. 622 (1980). The Court observed that the knowledge that a municipality will be held liable for all of its injurious conduct should create an incentive for officials who have doubts regarding the lawfulness of their actions to minimize the likelihood of infringements on the constitutional rights of citizens. *Id.* at 651-52.

114. *Hammer*, 932 F.2d at 850.

immunity, the court vacated the decision of the three-judge panel of the Ninth Circuit, and reinstated the jury verdict against the City of Newport Beach for compensatory damages of $2,500.[115]

B. DISSENT

In his dissent, Judge Fernandez, joined by Judges Browning, Goodwin, Bezer and Thompson, noted that under the authority of *Schmerber*, the extraction of blood can be carried out without a warrant in order to preserve transient evidence.[116] Fernandez emphasized that under *Graham*, police are permitted to use some physical force in order to extract a blood sample.[117] The dissent contended that in light of that element of *Graham*, the fourth amendment did not prohibit Officer Zatarain from exerting force in order to obtain the blood sample.[118] Pointing to the fact that Officer Zatarain did not initiate the physical contact and used no more physical force than minimally necessary to obtain the blood sample, the dissenting Judges concluded that there was no evidence from which a jury could reasonably conclude that Officer Zatarain employed excessive force in gaining the sample.[119]

V. CRITIQUE

A. JURY APPLICATION OF THE *GRAHAM* ANALYSIS

The test adopted by the *Hammer* court to determine whether force used in a seizure is reasonable under the fourth amendment is one of objective reasonableness under the circumstances.[120] However, given the nature of the analysis set out in *Graham*[121] and applied by the Ninth Circuit in *Hammer*, the fourth amendment analysis in excessive force cases is subject to improper application resulting from jury subjectivity.[122] A

115. *Id.* The case was remanded to the three-judge panel for consideration of the issue of attorney's fees, raised by Hammer.

116. *Id.* at 854 (citing *Schmerber*, 384 U.S. at 770).

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* at 845-46 (citing *Graham*, 490 U.S. at 399).

121. *See supra*, notes 36-44 and accompanying text for full discussion of the *Graham* analysis.

122. In Hustler Magazine v. Falwell, 485 U.S. 46 (1988), the Court recognized that a jury's consideration of whether a defendant's conduct was outrageous had an

possible consequence is that in the hands of a jury, the analysis applied in *Hammer* may not differ greatly in result from the fourteenth amendment analysis rejected by *Graham*.

Because the "objectively reasonable in light of the circumstances" analysis cannot be applied mechanically,[123] it is entirely foreseeable that a jury may hold that behavior is unreasonable if, in viewing the circumstances facing an officer at the time of the incident in question, the behavior shocks the consciences of individual jurors.[124] The problem is one of objectivity: if an individual juror is shocked by the nature of the intrusion, that juror may be guided by that shock rather than the objectivity required by *Graham*. As the *Hammer* court points out, to apply the "shocks the conscience" standard is to employ a shorthand version of a due process test which is no longer applicable in analyzing the propriety of force utilized in effecting a search.[125]

In order to allow a jury to apply the *Graham* test as intended by the Court, jurors should be informed of the *Rochin* test and that it has been overruled by the United States Supreme Court. The jurors should be admonished to look beyond the fact that certain behavior may be shocking to their individual consciences — a task, in and of itself difficult for jurors to perform — and proceed with the fourth amendment analysis as set forth in *Graham*. By giving detailed instructions and educating the jury about the overruled *Rochin* analysis, the court will not only guide the jury to the appropriate test to apply, but will also explicitly warn the jurors to avoid the pitfall of unknowingly applying *Rochin's* overruled due process test.

A question which remains regarding a jury's possible misapplication of the *Graham* analysis is whether such will necessarily result in unjust verdicts. While a jury may apply *Graham's* objective analysis incorrectly, being influenced by subjective factors, the result will not necessarily be unjust. It is probable that a decision based upon jurors having

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inherent subjectiveness about it. *Id.* at 55. A jury might impose liability on the basis of the jurors' tastes or views. *Id.* A similar concern may arise in the consideration of an excessive force case where jurors may be unable apply a test in an objective manner due to their individual sympathies and emotions.

123. Bell v. Wolfish, 441 U.S. 520, 559 (1979).

124. *See supra* note 37 for a discussion of the "shocks the conscience" test as set forth in *Rochin*, 342 U.S. 165.

125. *Hammer*, 932 F.2d at 845.

unwittingly applied a "shocks the conscience" test will be equitable. However, because the Ninth Circuit has adopted the *Graham* analysis, the courts must give a jury detailed instructions in order to insure that the test is properly applied.

The *Graham* analysis requires a balancing of the nature and quality of the intrusion of the individual's fourth amendment interests against the governmental interests at stake.[126] Because the reasonableness aspect of the fourth amendment is not capable of mechanical application,[127] the test of reasonableness requires prudent attention to the circumstances of a particular case.[128] This includes the severity of the crime, whether the suspect poses an immediate threat to the officer or others, and whether the suspect is actively resisting or evading arrest.[129]

The factors which a jury must consider in order to reach a decision under the *Hammer* analysis give rise to the issue of how a jury of lay people can judge what amount of force is reasonable for an officer under particular circumstances. A suspect element of the analysis is whether the jury is in a position to doubt what the officer believed was reasonable under the circumstances at the time of the search or seizure. The jury is to judge this from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.[130] The question which arises from this aspect of the analysis is whether it is possible for lay people to put themselves in the shoes of a reasonable officer who has undergone extensive police training and lives with the prospect of violent encounters on a daily basis.

B. CONSIDERATION OF POLICE REPORTS

Another factor to be considered in light of the *Hammer* decision is whether the standard of "objective reasonableness in light of the circumstances" will affect how an officer writes his report of an incident, which may be introduced as evidence.[131] Police reports may be demonstrably reliable evidence

126. *Hammer*, 932 F.2d at 846 (citing *Graham*, 490 U.S. at 396); *see also* Camara v. Municipal Court, 387 U.S. 523, 536-37 (1967); United States v. Place, 462 U.S. 696, 703 (1983).

127. *Graham*, 490 U.S. at 396 (citing Bell v. Wolfish, 441 U.S. at 559).

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

129. *Hammer*, 932 F.2d at 846 (citing *Graham*, 490 U.S. at 396).

130. *Id.* (citing *Graham*, 490 U.S. at 396).

131. Although the Federal Rules of Evidence explicitly exclude police reports from the public records exception of the hearsay rule, (Fed. R. Evid. 803 (8)(B)), where the

that an arrest was made, but they are significantly less reliable evidence of whether the allegations they contain of criminal conduct are true.[132] An officer who is aware of the *Hammer* standard may employ language in his report, such as "under the circumstances at the time, I believed that the force used was reasonable." Alternatively, an officer may attempt to sanitize or lie in his report. A jury, having no first-hand knowledge of the circumstances, should be warned against placing blind faith in an officer's report in determining whether that officer's use of force was unreasonable under the fourth amendment. Without such an admonition, consideration of the defendant officer's report in an excessive force trial poses a potential hinderance to an equitable result. If such reports are admitted, the jury should be instructed as to the potential problems such documents may hazard.

C. THE FOURTH AMENDMENT AND THE SEVERITY OF THE CRIME AT ISSUE

In its analysis, the *Hammer* court adopted an element of the *Graham* test which requires the jury to consider the severity of the crime at issue.[133] The court stressed that Hammer's offense was only a misdemeanor.[134] This raises the question of whether the court is suggesting that an individual suspected of a felony is entitled to less protection by the fourth amendment than an individual suspected of a misdemeanor. The fourth amendment makes no such distinction and in no way indicates that its rule should be applied differently according to varying degrees of the offense in question.[135] Although it initially appears that a jury instructed in this element of the *Hammer* analysis may be led to apply the fourth amendment in a manner never clearly indicated by the Framers, case law indicates otherwise.[136] Court application of the fourth

officer is unavailable to testify, the report should be admitted as the best available evidence. (Notes of Committee on the Judiciary, Senate Report No. 93-1277.)

132. United States v. Bell, 785 F.2d 640, 644 (8th Cir. 1986). "[C]ongress exhibited similar doubts about the reliability of [police] reports when it specifically excluded them from the public records exception to the hearsay rule in criminal cases." *Id.*

133. *Hammer*, 932 F.2d at 846.

134. *Id.*

135. *See supra* note 43 for the text of U.S. Const. amend. IV.

136. *See e.g.*, Hood v. City of Chicago, 927 F.2d 312 (7th Cir. 1991) (Stating that holding a suspected felon pending fingerprint clearance is justifiable because the risk of flight or danger to the public is greater with a person charged with a felony that one charged with a misdemeanor.)

amendment indicates that the severity of the crime at issue should be considered by jurors as an element of a reasonableness analysis under the fourth amendment.

D. REASONABLENESS IN CONSIDERATION OF TRANSIENT EVIDENCE

The *Hammer* analysis leaves it in the hands of the jury to determine what level of force, applied in order to obtain a blood sample from an individual suspected of driving under the influence of alcohol, is reasonable in light of the transient nature of the evidence.[137] The dissent points out that police are entitled to apply some physical force in order to extract a blood sample from such a suspect.[138] However, Hammer did consent to a breathalyzer test after refusing the extraction of a blood sample.[139] The question arises whether, due to the transient nature of the evidence required to determine blood alcohol content, there should be a point at which an individual suspected of driving under the influence of alcohol should no longer be permitted to change his mind with regard to which test he will take. The majority held that Hammer's consent to take a breathalyzer test could be found by the jury to have been given in good faith.[140] Such a determination by the jury may tend to be based more on speculation than any knowledge of what the suspect had in mind at the time. However, a good faith determination, considering the totality of the circumstances at the time, is the best approach to this problem. An individual arrested on suspicion of driving under the influence must submit to an extremely intrusive blood alcohol content test, or face an automatic suspension of his driver's license.[141] Considering the intrusive nature of these procedures, it is not at all unlikely that a suspect will have some difficulty choosing a test and experience a change of mind with regard to that decision. A solution to the problems that such indecision creates is for the courts to adopt a presumption of good faith in situations where suspects display such indecisiveness. The burden of

137. *Hammer*, 932 F.2d at 846.

138. *Id.* at 854 (citing *Graham* at 396-97). *But see* Welsh v. Wisconsin, 466 U.S. 740 (1984), observing that a warrantless home arrest made in order to gain evidence of the plaintiff's blood alcohol content was violative of the fourth amendment despite the exigent circumstance of the transient nature of the evidence. *Id.* at 754.

139. *Hammer*, 932 F.2d at 844.

140. *Id.* at 846.

141. *See supra*, notes 10 and 11 for the pertinent California Vehicle Code provisions.

overcoming that presumption would be on the arresting officers, who would have to demonstrate bad faith by a preponderance of evidence.

E. RULE 51 IN THE NINTH CIRCUIT

The Ninth Circuit stands alone in reading Fed. R. Civ. P. 51 literally and allowing no plain error exception to the rule.[142] In his concurring opinion, Judge Reinhardt states that he would be inclined to take a more flexible approach to its enforcement of Rule 51.[143] In *Nimrod v. Sylvester*,[144] the First Circuit stated its practice of holding the option to notice plain error of its own volition.[145] The *Nimrod* court observed that the plain error rule should be "applied sparingly and only in exceptional cases or under peculiar circumstances to prevent a clear miscarriage of justice."[146]

Uniform application should exist for the Federal Rules of Civil Procedure.[147] But the Ninth Circuit has remained the lone opponent among the district courts to a plain error exception to Rule 51.[148] Where gross inequities would otherwise result, the Ninth Circuit should take advantage of future opportunities to create uniform application of the plain error exception. It should abandon its reputation as the strictest enforcer of Rule 51 and take the more moderate approach hinted at in *Reed* and *Eberle*.[149] While in doing so the court will

142. *See supra*, notes 98-100 and accompanying text for discussion of the Ninth Circuit's position on a plain error exception in civil actions.

143. *Hammer*, 932 F.2d at 851. Judge Reinhardt points to the Ninth Circuit decisions in *Reed*, 909 F.2d 324, and *Eberle*, 901 F.2d 814. In *Reed*, the court found upon review that the trial court had committed a plain error in its jury instructions. *Reed* at 330. Counsel, however, had objected to the instruction, and the court avoided making a plain error exception. Id. *at n. 4. See supra* n. 61 and accompanying text for discussion of *Eberle*.

144. 369 F.2d 870.

145. *Id.* at 873.

146. *Id.*

147. "One of the shaping purposes of the Federal Rules is to bring about uniformity in the federal courts by getting away from local rules. This is especially true of matters which relate to the administration of legal proceedings." Lumbermen's Mutual Casualty Co. v. Wright, 322 F.2d 759, 764 (5th Cir. 1963).

148. *See supra*, note 98.

149. *See also*, Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981), in which dissenting Judge Brennan states that the absence of a plain error "provision in the Civil Rules suggests that review of unchallenged jury instructions is intended to be more restrictive that under the Criminal Rules," *Id.* at 276-77 n. 7, suggesting that perhaps a restrictive plain error exception should apply in civil cases.

take on the burden of reviewing afterthought claims of error,[150] it need not lose its strict reputation with regard to Rule 51. The Ninth Circuit should join the other circuits in conservatively granting plain error exceptions. If there is to be a uniform plain error exception to Rule 51, it should be "confined to the exceptional case where the error has seriously affected the fairness, integrity, or public reputation of judicial proceedings."[151]

VI. CONCLUSION

In *Hammer v. Gross*,[152] the Ninth Circuit held that Section 1983 claims of excessive force by a police officer are to be analyzed under the fourth amendment and its reasonableness standard. Under this standard, set forth by the United States Supreme Court in *Graham v. Connor*,[153] the jurors must determine whether the application of force was objectively reasonable in light of the facts and circumstances facing the officer at the time.[154]

In order to insure that the jury applies the *Hammer* standard effectively, the judge presiding over an excessive force case should carefully instruct the jurors, not only to be certain that they fully understand the analysis, but also to guide them away from inadvertently applying the test of *Rochin v. California*[155] which *Graham* rejected. The jury should also be admonished that police reports which are admitted as evidence are not a source of indisputable fact. In addition, the Ninth Circuit should take a more lenient approach to its denial of a plain error exception to Rule 51, allowing exceptions in instances in which to do otherwise would result in gross miscarriages of justice.

While the *Hammer* standard is the best path to equitable outcomes in Section 1983 claims of excessive force, it is by no means an unwavering route to just results. The analysis is such that proper application will follow only from courts' painstaking attention to clear and informative jury instructions.

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150. C. Wright & A. Miller, FEDERAL PRACTICE AND PROCEDURE, Section 2558, at 674-75.

151. *Id.* at 675. *See also Nimrod*, 369 F.2d at 873, stating that "Only the most palpable of errors will be noticed on appeal when no objection was made in the district court."

152. 932 F.2d 842 (9th Cir. 1991).

153. 490 U.S. 386 (1989).

154. *Id.* at 486.

155. 342 U.S. 165 (1952).

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