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Irene M. Baker

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COMMENTS

WILSON v. SPAIN: WILL PRETRIAL DETAINES ESCAPE THE CONSTITUTIONAL “TWILIGHT ZONE”?

IRENE M. BAKER†

INTRODUCTION

42 U.S.C. § 1983 provides a civil remedy to individuals who are deprived of constitutional rights through the use of excessive force by law enforcement officials. In examining an excessive force claim brought under § 1983, the Supreme Court dictates the analysis begin “by identifying the specific constitutional right allegedly infringed by the challenged application of force.” Courts examining claims of excessive force by law enforcement officials have found, depending upon the particular circumstances, the Fourth Amendment, the Eighth

† J.D. Candidate, June 2002, St. John’s University School of Law.

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.

Id.

2 Graham v. Connor, 490 U.S. 386, 394 (1989). In Graham, the Supreme Court established a claim of excessive force during “the course of an arrest... or other seizure” of an individual is governed by the Fourth Amendment. See id. at 395.

3 See, e.g., Tennessee v. Garner, 471 U.S. 1, 8 (1995) (analyzing the use of deadly force to effectuate an arrest under the Fourth Amendment reasonableness
Amendment,\textsuperscript{4} or the Due Process Clause of the Fourteenth Amendment\textsuperscript{5} to be implicated. There exists confusion among the federal courts regarding the proper constitutional standard to be applied to claims of excessive force under § 1983 following the initial arrest and extending through conviction and incarceration.\textsuperscript{6} While the Supreme Court has held that the

\begin{itemize}
\item The Eighth Amendment provides: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. CONST. amend. VIII. While the Eighth Amendment provides protection from excessive force, it is usually applied to individuals who have been convicted. See Ingraham v. Wright, 430 U.S. 651, 664, 671 n.40 (1977) (stating the Cruel and Unusual Punishments Clause of the Eighth Amendment was designed to protect those convicted of crimes, and consequently “only [applies] after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions”); see also Whitley v. Albers, 475 U.S. 312, 318 (1986) (finding the Eighth Amendment Cruel and Unusual Punishments Clause applicable only after conviction); City of Revere v. Mass. Gen. Hosp., 463 U.S. 239, 244 (1983) (applying the Eighth Amendment only after there has been a formal adjudication of guilt).

\item The Fourteenth Amendment provides, in pertinent part, the State shall not “deprive any person of life, liberty, or property, without due process of law ....” U.S. CONST. amend. XIV, §1. See Rochin v. California, 342 U.S. 165 (1952) (applying the Fourteenth Amendment to a claim of excessive force and establishing the “shocks the conscience” standard of review under the Due Process Clause); Wilkins v. May, 872 F.2d 190 (7th Cir. 1989) (applying the Fourteenth Amendment substantive due process standard to claims of excessive force); Johnson v. Glick, 481 F.2d 1028 (2d Cir. 1973) (applying the Fourteenth Amendment to claim of excessive force and establishing five part test for review).

\item The Supreme Court has not ruled on the issue and the question remains open in several federal courts of appeal. See, e.g., Holmes v. City of Massillon, 78 F.3d 1041, 1049 n.6 (6th Cir. 1996) (stating the law is unclear as to “whether a pretrial detainee can bring a Fourth Amendment excessive force claim or even as to when an arrestee clearly becomes a pretrial detainee”); Hammer v. Gross, 932 F.2d 842, 845 n.1 (9th Cir. 1991) (stating that “it may be questioned whether the Fourth Amendment still controls when the seizure or arrest ripens into detention”); United States v. Cobb, 905 F.2d 784, 788 n.7 (4th Cir. 1990) (“The Supreme Court left unresolved in Graham whether and to what extent the protections of the Fourth Amendment may extend to pretrial detainees.”); Wisniewski v. Kennard, 901 F.2d 1276, 1277 (5th Cir. 1990) (failing to reach the issue of “whether liability should be measured ... by the standards of the [F]ourth [A]mendment or substantive due
Fourth Amendment governs claims of excessive force during "the
course of an arrest . . . or other seizure" of a person,\footnote{Graham, 490 U.S. at 395.} the Court
expressly refused to rule on how to analyze a claim of excessive
force "beyond the point at which arrest ends and pretrial
detention begins."\footnote{Id. at 395 n.10. In a footnote, the Court indicated it was not resolving the
question of whether a pretrial detainee could bring an excessive force claim under
the Fourth Amendment. See id.} Circuit courts are left to determine the
appropriate constitutional standard to be applied to an
individual following arrest, but prior to conviction.\footnote{Following Graham, there is a split of authority as to whether liability for
excessive force should be measured by the standards of the Fourth Amendment or
substantive due process. Some circuits hold a pretrial detainee's excessive force
claim is analyzed as a violation of substantive due process under the Fourteenth
Amendment. See Riley v. Dorton, 115 F.3d 1159, 1161–64 (4th Cir. 1997) (en banc)
(finding plaintiff's claim of excessive force while awaiting booking was properly
analyzed under the Fourteenth Amendment); Cottrell v. Caldwell, 85 F.3d 1480,
1490 (11th Cir. 1996) (finding "[c]laims involving the mistreatment of arrestees or
pretrial detainees in custody are governed by the Fourteenth Amendment's Due
Process Clause"); Brothers v. Klevenhagen, 28 F.3d 452, 457 (5th Cir. 1994) ("Once
an individual has been arrested and is placed into custody, and surely after the
arresting officer has transferred the individual to a jail cell, the individual becomes
a pretrial detainee, protected against excessive force by the Due Process Clause.");
Valencia v. Wiggins, 981 F.2d 1440, 1443–45 (5th Cir. 1993) (stating substantive
due process applies after that act of arrest); Wilkins v. May, 872 F.2d 190, 194 (7th
Cir. 1989) (stating that "if ever there were a strong case for 'substantive due
process,' it would be a case in which a person who had been arrested but not
charged or convicted was brutalized while in custody"); Justice v. Dennis, 834 F.2d
380, 383 (4th Cir. 1987) (utilizing the Fourteenth Amendment standard of whether
the force used "shocks the conscience" in determining whether the force used
against a pretrial detainee was excessive).
Other circuit courts have held it is the Fourth Amendment's "objective
reasonableness" standard that is to be applied to excessive force claims by pretrial
detainees. See Pierce v. Multnomah County, 76 F.3d 1032 (9th Cir. 1996) (finding
the Fourth Amendment's "objectively reasonable" standard applies to the evaluation
of an excessive force claim in the context of a custodial arrest); Powell v. Gardner,
891 F.2d 1039, 1044 (2d Cir. 1989) (holding the Fourth Amendment standard
applies to the period of time when the person arrested is arraigned or formally
charged, and remains in the custody of the arresting officer); McDowell v. Rogers,
663 F.2d 1302 (6th Cir. 1988) (finding the Fourth Amendment applies to claims of
excessive force while an individual is in the custody of arresting officers); Robins v.
Harum, 773 F.2d 1004 (9th Cir. 1985) (applying the Fourth Amendment standard to
an excessive force claim arising out of events occurring en route to the police
station).} Recently in \textit{Wilson v. Spain},\footnote{209 F.3d 713 (8th Cir. 2000).} the Eighth Circuit Court of Appeals held the
Fourth Amendment's protection against unreasonable search and seizure provides the appropriate standard of review for a pretrial detainee's claim of excess force by law enforcement officials.11

Officer David Spain arrested Robert Wilson for public intoxication, and another officer, Stanley Cain, escorted Wilson to the local jail.12 Both Spain and Cain helped book Wilson, who was uncooperative and hostile.13 Wilson was permitted to call his brother to request a ride home, but when his brother arrived, the officers decided to keep Wilson in custody.14 Officer Spain placed Wilson against the wall and frisked him, but Wilson resisted and attempted to elbow the officer.15 Wilson was wrestled to the floor, then handcuffed, and placed in a holding cell.16 While in the cell, Wilson began yelling and pounding on the inside of the door of the cell.17 Officer Spain unlocked the door, pushed the door open forcefully, thereby knocking Wilson unconscious.18 Wilson was taken to a hospital shortly thereafter.19

Wilson sued Spain under § 1983, alleging Officer Spain used excessive force against him in violation of his constitutional rights under the Fourth and Fourteenth Amendments.20 The district court assumed there is a constitutional right to be free from excessive force while detained by law enforcement officials.21 Finding no genuine issue of material fact as to whether Officer Spain should have known that his actions violated Wilson's right to be free from excessive force, the district court granted summary judgment for the defendants.22

11 See id. at 716.
12 See id. at 714.
13 See id.
14 See id.
15 See id.
16 See id.
17 See id.
18 See id.
19 See id.
20 In addition to suing Officer Spain in his individual capacity, Wilson also named Mike Jones, the former Chief of Police of Rogers, Arkansas as an additional defendant in his individual and official capacity. Wilson also brought a claim under Arkansas state law. See id.
21 See id. at 715.
22 The district court had also granted summary judgment for the defendants on the merits, with respect to Wilson's federal claims against Spain in his official capacity and against Jones in both his individual and official capacities. See id. at
On appeal, Judge Bowman of the Eighth Circuit Court of Appeals stated that while there is no question about a pretrial detainee’s right to be free from excessive force, “there is some ongoing uncertainty about which constitutional text is the source of that right.” The court only briefly discussed the confusion among the circuits regarding the appropriate standard of review for claims of excessive force against pretrial detainees. Without reconciling the split among the circuits, the court cited earlier decisions in which the Eighth Circuit had applied Fourth Amendment standards to excessive force claims under § 1983 by pretrial detainees. The court, in applying the Fourth Amendment to claims of excessive force, relied on case law that focused on an extension of the reasonableness standard of the Fourth Amendment protection against unreasonable search and seizure beyond the actual act of arrest. The court determined the Fourth Amendment standard strikes the most appropriate balance between the rights of the pretrial detainee and the governmental interest in maintaining order.

Utilizing the “objective reasonableness” standard of the Fourth Amendment, the court found the officer was entitled to summary judgment on the basis of qualified immunity and on the merits of the claim because his actions were objectively reasonable. The court stated, “[T]he ‘reasonableness’ of a

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23 Id. at 716.
24 See id.
25 See id; see also Moore v. Novak, 146 F.3d 531 (8th Cir. 1998) (applying the Fourth Amendment reasonableness standard to claims of excessive force by law enforcement officials during the booking process); Mayard v. Hopwood, 105 F.3d 1226 (8th Cir. 1997) (applying Fourth Amendment standards not only to the act of arrest, but also to force used against an individual restrained in the back of a police car).
26 In Moore, the eighth circuit applied Fourth Amendment standards when law enforcement officers at a jail used force against a violent and disruptive arrestee during the booking process. See Moore, 146 F.3d at 535. Similarly, in Mayard, the court applied Fourth Amendment standards to the use of force against an arrestee who was restrained in the back of a police car. See Mayard, 105 F.3d at 1228.
27 Wilson, 209 F.3d at 716. The previous case law that applies the Fourth Amendment beyond the instant of the initial seizure did not provide extensive analysis on the difference between an arrestee and a pretrial detainee and instead assumed that the arrest continued beyond the actual arrest. See Moore, 146 F.3d at 535–36; Mayard, 105 F.3d at 1228.
28 The court stated, “The ‘reasonableness’ of a particular use of force must be
particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the [benefit] of hindsight.” Finding that officers are often called upon to make split-second decisions, the court was asked to determine whether Officer Spain’s use of force to quiet a prisoner who had been “very difficult to manage” was lawful. The court found that while Officer Spain might have known that if he pushed the door open quickly, it might make contact with Wilson, a reasonable jury could not find the manner in which the door was opened objectively unreasonable.

While the court determined it is the Fourth Amendment standard that strikes the most appropriate balance between the rights of the pretrial detainee and the governmental interest in maintaining order, none of the existing case law and analysis clearly fits the situation of the pretrial detainees. The Supreme Court must make clear that while substantive due process under the Fourteenth Amendment may play a role in deciding excessive force cases, for most citizens, the reasonableness standard of the Fourth Amendment, informed by existing human rights norms, provides the primary source of constitutional protection from excessive force.

Part I of this Comment outlines claims of excessive force by law enforcement officials under 42 U.S.C. § 1983. Part II of this Comment tracks the development of the constitutional standards applying the Fourteenth Amendment Due Process Clause and the Fourth Amendment’s protection against unreasonable search and seizure to excessive force claims in the course of an arrest, culminating with a discussion of the Supreme Court’s decision in

judged from the perspective of a reasonable officer on the scene....” Wilson, 209 F.3d at 716. (citing Graham v. Connor, 490 U.S. 386, 396 (1989)). “Officer Spain testified that he needed to re-enter the cell to quiet Wilson and to ensure that Wilson was not injuring himself.” Id. at 717. The court reasoned that “while Spain might have known that the door could make contact with Wilson, a reasonable jury could not conclude” that the officer’s actions were “objectively unreasonable in the circumstances.” Id.

29 Id. at 716.
30 See id. at 716–17.
31 Id. at 717.
32 See id.
33 See id. at 716.
34 See R. Wilson Freyermuth, Comment, Rethinking Excessive Force, 1987 DUKE L.J. 692, 693 (advocating for the application of the Fourth Amendment reasonableness standard to claims of excessive force during the course of an arrest).
Part III of this Comment asserts there exists a continuum of constitutional rights applicable to all individuals, regardless of their status as arrestees, pretrial detainees, or convicted inmates, arguing there can be no logical distinction between arrestees and pretrial detainees and asserting a single constitutional standard applies to claims of excessive force. Part III also examines the traditional arguments for and against extending the Fourth Amendment protection against unreasonable search and seizure beyond the initial arrest. Part IV of this Comment submits that while both the Fourth and Fourteenth Amendments protect an individual’s bodily integrity against the use of unreasonable force, it is the less burdensome Fourth Amendment “reasonableness” standard that must control claims of excessive force by law enforcement officials against pretrial detainees. Part V of this Comment provides a brief discussion of excessive force by law enforcement officials in the context of existing international human rights treaties and asserts that there are certain fundamental human rights under all conditions—from arrest, through and including incarceration.

I. EXCESSIVE FORCE CLAIMS UNDER § 1983

Law enforcement plays a vital role in contemporary American society and police officers possess incredible powers. Law enforcement officials are permitted only a small margin of error in judgment in situations that impose a high degree of physical and mental stress. In addition to enforcing the law, pursuing violators, and providing security for the public, police officers shoulder the principal “responsibility for protecting people’s fundamental civil rights to life, liberty, and property.” Law enforcement’s “general responsibility to

36 See Matthew V. Hess, Comment, Good Cop-Bad Cop: Reassessing the Legal Remedies for Police Misconduct, 1993 Utah L. Rev 149 (outlining existing legal remedies for police misconduct and suggesting alternatives).
preserve the peace and enforce the law carries with it the [qualified] power to arrest and to use force.”

Careful scrutiny of these actions is necessary, as police officers exercise this power with wide discretion, minimal supervision, and without opportunity for reflection in stressful and often dangerous circumstances.

Events over the last decade have subjected law enforcement officers across the nation to intense scrutiny and raised serious questions regarding the extent of the qualified privilege granted to law enforcement officers. The war on crime and drugs has prompted, what some commentators have called, a “win-at-all-costs approach” to law enforcement, where the rights of the individual are second to the pursuit and capture of alleged criminals. Some commentators have even asserted that police abuses have been “unofficially tolerated as the price we pay for maintaining law and order.” Such tolerance is unacceptable. There must be a distinction made between the force necessary to maintain order and enforce the law and the use of excessive force that violates an individual’s constitutional and fundamental human rights.

42 U.S.C. § 1983 provides a statutory remedy for state action resulting in the deprivation of civil rights. “Enacted as
part of the Civil Rights Act of 1871, [§] 1983 was designed to provide a remedy for the widespread civil rights violations that characterized the Reconstruction period in the [post-Civil War] South."46 "Originally called the Ku Klux Klan Act of 1871, [§] 1983 was designed to provide a measure of federal control over state officials who showed reluctance to enforce state laws protecting newly freed slaves and union sympathizers."47 The statute established a federal cause of action, providing a neutral federal forum for plaintiffs seeking relief against state officials who deprived them of their civil rights.48 Though the statute stems from Reconstruction era civil rights legislation, it became commonly used for claims of excessive force following the landmark case of Monell v. Department of Social Services of the City of New York,49 which assigned liability to local governments for constitutional violations resulting from policies or customs.50

42 U.S.C. § 1983 has become the primary vehicle for vindicating civil rights deprivations committed through the use of excessive force by law enforcement officials.51 In order to seek the remedial relief provided by § 1983, a plaintiff must allege a deprivation of rights or privileges secured by the Constitution or the laws of the United States.52 In examining claims of excessive

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46 Who is Guarding the Guardians?, supra note 37, at 130.

1983 actions are intended to fulfill at least two basic purposes in the police abuse context. First, such actions are designed to compensate victims of police abuse, usually through an award of compensatory damages. Second, such actions are intended to make police officers and departments accountable to [certain] constitutionally required standards of conduct.

50 See id. at 694-95.
51 See Avery, supra note 41, § 2:14, at 2-23; see also Davidson v. O'Lone, 752 F.2d 817, 827 (3d Cir. 1987) (stating § 1983 functions as the "primary vehicle to provide redress for unconstitutional action by state employees that violates the [Constitution]").
force by law enforcement officials, courts have applied the Fourth Amendment, the Eighth Amendment, or the Due Process Clause of the Fourteenth Amendment, depending upon the particular circumstances.53

There is no generic standard for the review of excessive force claims brought under § 1983.54 The Supreme Court has clearly rejected the idea that there is a general "right" to be free from excessive force grounded in "basic principles of § 1983 jurisdiction."55 "[§] 1983 does not confer substantive rights but merely provides a means to vindicate rights conferred by the Constitution or the laws of the United States."56 In examining an excessive force claim brought under § 1983, the Supreme Court dictates the "analysis begins by identifying the specific constitutional right allegedly infringed by the challenged application of force."57 It is the constitutional right infringed upon that determines the standard under which the court must analyze the § 1983 claim.58 Determining the proper

privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured . . ." Id. (emphasis added); see also Baker v. McCollan, 443 U.S. 137, 140 (1979) ("The first inquiry in any § 1983 suit . . . is whether the plaintiff has been deprived of a right 'secured by the Constitution and laws.'").

See supra notes 3–5.

53 See Graham v. Connor, 490 U.S. 387, 393 (1989) (rejecting the "notion that all excessive force claims brought under § 1983 are governed by a single generic standard"); Whitley v. Albers, 475 U.S. 312, 318–26 (1986) (analyzing a claim of excessive force used to subdue convicted prisoner under the Eight Amendment standard); Tennessee v. Garner, 471 U.S. 1, 7–22 (1985) (analyzing claim of excessive force used to effect arrest under the Fourth Amendment standard); Baker, 443 U.S. at 144 n.3 (stating § 1983 "is not itself a source of substantive rights," but merely provides "a method for vindicating federal rights elsewhere conferred").

54 See supra notes 3–5.

55 See Graham, 490 U.S. at 393 ("There are . . . certain basic principles in [§] 1983 jurisprudence as it relates to claims of excessive force that are beyond question[,] [w]hether the factual circumstances involve an arrestee, a pretrial detainee, or a prisoner") (quoting Justice v. Dennis, 834 F.2d 380, 382 (4th Cir. 1987)).

56 Wilson v. Spain, 209 F.3d 713, 715 (6th Cir. 2000); see also Graham, 490 U.S. at 393–94; Johnson v. Glick, 481 F.2d 1028, 1034 (2d Cir. 1973) (Moore, J., dissenting) ("It is by now axiomatic that, in order to recover damages in an action under 42 U.S.C. § 1983, a claimant must show a deprivation of rights protected by the Constitution.") (citing Rosenberg v. Martin, 478 F.2d 520, 522 (2d Cir. 1973)).

57 Graham, 490 U.S. at 394. In Graham, the Supreme Court established that a claim of excessive force during the course of an arrest or other seizure of an individual is governed by the Fourth Amendment. See id. at 395.

58 See Reginald R. White III, Recent Development, Brothers v. Klevenhagen: The Fifth Circuit Gives Its Imprimatur to the Indiscriminate Use of Deadly Force Against Escaping Pretrial Detainees, 69 Tul. L. Rev. 1051, 1052–53 (1995); see also Graham, 490 U.S. at 393 (rejecting the "notion that all excessive force claims brought under § 1983 are governed by a single generic standard"); Baker, 443 U.S.
constitutional standard under which to review claims of excessive force under § 1983 is complicated by the fact that the circuit courts have differentiated an individual's rights at various stages of the arrest process.\textsuperscript{59}

II. CONSTITUTIONAL STANDARDS APPLIED TO EXCESSIVE FORCE CLAIMS

A. A Look at Arrest

The confusion surrounding the proper constitutional standard covering pretrial detainees once clouded the debate over the proper standard to govern claims of excessive force in the course of an arrest or seizure.\textsuperscript{60} The Supreme Court in \textit{Graham v. Connor}\textsuperscript{61} ended the debate over whether the Fourth Amendment's reasonableness standard or the Fourteenth Amendment Due Process Clause governed such claims during an arrest and applied the Fourth Amendment standard.\textsuperscript{62} While the Supreme Court in \textit{Graham} refused to rule on the proper constitutional standard governing pretrial detainees,\textsuperscript{63} an overview of the case law leading up to the \textit{Graham} decision outlines the standards utilized by courts to review claims of excessive force by law enforcement officers under § 1983.

1. The Fourteenth Amendment

The Fourteenth Amendment to the Constitution provides no State shall "deprive any person of life, liberty, or property, at 140 (1979) (stating that "[t]he first inquiry in any § 1983 suit is whether the plaintiff has been deprived of a right 'secured by the Constitution and laws' ").


\textsuperscript{60} \textit{See infra} notes 61–100 and accompanying text.

\textsuperscript{61} 490 U.S. 386 (1989).

\textsuperscript{62} \textit{See id.} at 394–95.

\textsuperscript{63} \textit{See id.} at 395 n.10.
Due process of law is a summarized constitutional guarantee of respect for those personal immunities that are “so rooted in the traditions and conscience of our people as to be ranked as fundamental,” or are “implicit in the concept of ordered liberty.” The Supreme Court has repeatedly emphasized that “the touchstone of due process is protection of the individual against arbitrary action of government.” The Due Process Clause protects individuals from the denial of fundamental procedural fairness, and the exercise of power by the state without a legitimate government objective. The application of the Fourteenth Amendment Due Process Clause to claims of excessive force by law enforcement officials originates with the Supreme Court decision in *Rochin v. California*.

In *Rochin*, the Court set forth the “shocks the conscience” standard utilized to review claims of excessive force under the Fourteenth Amendment. In *Rochin*, the Court vacated a state criminal conviction as a violation of the Due Process Clause of

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64 U.S. CONST. amend. XIV, §1. The term “due process of law” refers to the law of the land in each state exerted within the limits of fundamental principles of liberty and justice. 15 AM. JUR. 2D Civil Rights § 7 (2000).

65 Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).


68 See, e.g., Fuentes v. Shevin, 407 U.S. 67, 82 (1972) (finding the procedural Due Process Clause protects against “arbitrary taking[s]”).

69 See, e.g., Daniels v. Williams, 474 U.S. 327, 331 (1986) (stating the substantive due process guarantee protects against government power arbitrarily and oppressively exercised). “Unlike procedural due process claims, which challenge the adequacy of the procedures used by the government in deciding how to treat individuals, substantive due process claims allege that certain governmental conduct would remain unjustified even if it were accompanied by the most stringent of procedural safeguards.” Gilmere v. City of Atlanta, 774 F.2d 1495, 1500 (1985).

70 342 U.S. 165 (1952). In *Rochin*, the Supreme Court reversed Rochin’s conviction for possession of pills containing morphine. See id. at 174. Police officers, acting on a tip that Rochin was selling drugs, entered his home through an open door, forced their way into Rochin’s room, and jumped on him when they observed him swallowing pills the officers believed to be morphine. See id. at 166. Unable to retrieve the pills, the police took Rochin to the hospital where a doctor, at an officer’s direction, forced a solution into Rochin’s stomach to induce vomiting. See id. Although the vomiting did produce two pills containing morphine, the Court held the conviction was obtained by methods offensive to the Due Process Clause. See id. at 174; see also MacDonald, supra note 47 at 165–66. (discussing Rochin’s excessive force claim under the Fourteenth Amendment “shocks the conscience” standard).

71 See *Rochin*, 342 U.S. at 172–73.
the Fourteenth Amendment when the evidence was obtained by forcing the defendant to vomit.\textsuperscript{72} The Court held substantive due process prohibits convictions that are obtained by methods that offend a sense of justice\textsuperscript{73} and recognized an individual's right to be free from official conduct that "shock[ed] the conscience" of the Court.\textsuperscript{74} Applying the principles of due process,\textsuperscript{75} the Court held the manner the evidence used to convict Rochin was obtained does "more than offend some fastidious squeamishness or private sentimentalism about combatting crime too energetically. This is conduct that shocks the conscience."\textsuperscript{76}

It was the decision of the Supreme Court in \textit{Rochin} that led to the application of the substantive due process standard to claims of pretrial detainees of the use of excessive force by law enforcement officials.\textsuperscript{77} In \textit{Johnson v. Glick},\textsuperscript{78} the plaintiff claimed he had been assaulted by an officer while being held in the Manhattan House of Detention for Men prior to his trial on felony charges.\textsuperscript{79} The Second Circuit Court of Appeals in \textit{Johnson} relied upon \textit{Rochin} for the proposition that "apart from any 'specific' of the Bill of Rights, application of undue force by law enforcement officers deprives a suspect of liberty without due process of law."\textsuperscript{80} In determining whether there has been a violation of an individual's substantive due process rights actionable under § 1983, the test set forth in \textit{Johnson} requires a court to examine: (1) the need for the application of force; (2) the relationship between the need to apply force and the amount of

\textsuperscript{72} See id. at 173–74.
\textsuperscript{73} See id. at 173.
\textsuperscript{74} Id. at 172.
\textsuperscript{75} The Supreme Court stated in \textit{Rochin}, [T]he requirements of the Due Process Clause 'inescapably imposes upon this Court an exercise of judgment upon the whole course of proceedings [resulting in a conviction] in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses.' \textit{Id.} at 169 (quoting Malinski v. New York, 324 U.S. 401, 416–17 (1945)).
\textsuperscript{76} Id. at 172.
\textsuperscript{77} See MacDonald, supra note 47, at 166–67 (following the application of the Fourteenth Amendment "shocks the conscience" standard from \textit{Rochin} through the inception of the four-part \textit{Johnson} test set forth to determine whether the use of force by state law enforcement "shocks the conscience" of the court).
\textsuperscript{78} 481 F.2d 1028 (2d Cir. 1973).
\textsuperscript{79} See id. at 1029–30.
\textsuperscript{80} Id. at 1032.
force used; (3) the severity of the injury inflicted; and (4) 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.”

The federal circuit courts have almost unanimously adopted the Johnson substantive due process test or a variation of it when analyzing claims of excessive force by pretrial detainees, and extended its application to excessive force claims arising out of arrests.

2. The Fourth Amendment

The Fourth Amendment provides that “the right of the people to be secure ... against unreasonable searches and seizures, shall not be violated ...” The touchstone of the Fourth Amendment is reasonableness which is “measured in objective terms by examining the totality of the circumstances.” The Fourth Amendment “reasonableness inquiry ... is whether the officers’ actions are ‘objectively reasonable’ in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.”

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81 Id. at 1033.
82 See MacDonald, supra note 47, at 167–68; see, e.g., Dale v. Janklow, 828 F.2d 481, 487 (8th Cir. 1987) (finding no substantive due process violation in subduing arrestee by hitting him over the head with a catsup bottle when suspect was armed and made numerous threats); Byrd v. Clark, 783 F.2d 1002, 1008 (11th Cir. 1986) (denying defendant's motion for summary judgment where there was evidence arrestee suffered injury that required surgery to repair); Rutherford v. City of Berkley, 780 F.2d 1444, 1448 (9th Cir. 1986) (finding plaintiff stated a claim where there was allegations of unprovoked police assault, including kicking suspect while in custody); Gumz v. Morrissette, 772 F.2d 1395, 1404 (7th Cir. 1985) (finding no cause of action where the claimant suffered no physical injury). Some circuits adopted a three-part test in analyzing excessive force claims that very closely mirrors the Johnson test. See, e.g., Justice v. Dennis, 834 F.2d 380 (4th Cir. 1987) (adopting the three requirements of Johnson); Shillingford v. Holmes, 634 F.2d 263 (5th Cir. 1981) (adopting the three-part test); Hall v. Tawney, 621 F.2d 607 (4th Cir. 1980) (evaluating a student’s claim of corporal punishment under three-part test); see also Campbell, supra note 59, at 1369, 1376.

83 U.S. CONST. amend. IV.
85 Ohio v. Robinette, 519 U.S. 33, 39 (1996); see also Illinois v. Rodriguez, 497 U.S. 177, 183–85 (1990) (stating the Fourth Amendment proscribes only those state-initiated searches and seizures that are unreasonable); Katz v. United States, 389 U.S. 347, 360 (1967) (applying the Fourth Amendment reasonableness standard to claims of unreasonable intrusion upon individual’s right to privacy).
reasonable officer on the scene."87 "The calculus ... must ... allow[] for the fact that police officers are often forced to make split-second decisions ... about the amount of force that is necessary in a particular situation."88

The Fourth Amendment approach began to gain acceptance when, in 1985, the Supreme Court in *Tennessee v. Garner*,89 directly faced a claim of excessive force during an arrest brought under § 1983.90 In *Garner*, a father brought a wrongful death action under § 1983 after his son, who was fleeing the scene of a burglary, was shot to death by a police officer.91 The officer was authorized to use deadly force against a fleeing suspect under both Tennessee statutory law and Memphis Police Department policy.92 Rather than apply the substantive due process test, the Court concluded that the apprehension of a suspect by the use of deadly force is a seizure subject to the reasonableness requirements of the Fourth Amendment.93

The *Garner* Court asserted that when evaluating the constitutionality of a seizure, courts "'must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.' "94 The Court stated the inquiry must be "whether the totality of the

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87 Id. at 396.
88 Id. at 396–97. Factors that have been taken into account in determining the reasonableness of an officer's conduct include "the severity of the crime, whether the suspect posed a threat to the safety of the officers or others, and whether the suspect was resisting arrest." Moore v. Novak, 146 F.3d 531, 535 (8th Cir. 1998) (addressing a claim of excessive force by law enforcement officers during the booking process) (quoting Foster v. Metro. Airports Comm'n, 914 F.2d 1076, 1081 (8th Cir. 1990) (addressing claim of excessive force by law enforcement officers in making arrest)). The officer's subjective intentions are irrelevant—a pure heart will not make unreasonable acts constitutional nor will malice turn a reasonable act into a violation of the Fourth Amendment. See *Graham*, 490 U.S. at 397.
90 See generally *MacDonald*, supra note 47, at 169–72 (discussing the significance of the *Garner* decision).
92 See id. at 4. The Tennessee statute provided that "[i]f after notice of the intention to arrest the defendant, he either flee[s] or forcibly resist[s], the officer may use all the necessary means to effect the arrest." See id. at 4 (quoting TENN. STAT. ANN. § 40-7-108 (1982)). The department policy, although slightly more restrictive than the statute, still permitted the use of deadly force in cases of burglary. See id. at 5.
93 See id. at 7.
94 See id. at 8 (quoting United States v. Place, 462 U.S. 696, 703 (1983)).
circumstances justified a particular sort of search or seizure.95 The Court balanced the intrusiveness of the deadly force used against the “governmental interest in effective law enforcement[,]”96 and was not convinced that “use of deadly force is a sufficiently productive means of accomplishing [law enforcement goals] to justify the killing of nonviolent suspects.”97 The opinion by the Supreme Court mentioned neither substantive due process nor the Johnson test,98 even though the lower court had found the Tennessee statute unconstitutional on both Fourth Amendment and due process grounds.99

After Garner, the federal appellate courts continued to apply the Johnson test, and only the Seventh Circuit expressly rejected the continued application of the Johnson substantive due process standard.100 In Lester v. City of Chicago,101 the Seventh Circuit found the district court erred in applying the “substantive due process” standard in a claim arising from the use of force during an arrest,102 and found “the only correct way to deal with plaintiff's excessive force claim was through the application of the objective Fourth Amendment standards articulated by the Supreme Court in Garner.”103 This view is consistent with that articulated by the Supreme Court in Graham v. Connor.104

95 Id. at 8–9.
96 Id. at 9.
97 Id. at 10.
98 See Freyermuth, supra note 34, at 693.
99 See Garner v. Memphis Police Dep't, 710 F.2d 240, 241 (6th Cir. 1983) (holding that the “Tennessee statute [is] unconstitutional because it authorizes severe and excessive, and therefore unreasonable, methods of seizure of the person under the Fourth and Fourteenth Amendments”).
101 830 F.2d 706 (7th Cir. 1987).
102 See id. at 713–14.
103 S. Nahmod, Civil Rights and Civil Liberties Litigation: The Law of Section 1983 151 n.160 (1989 Supp.); see also Fayz, supra note 100, at 1513; Freyermuth, supra note 34, at 693. In Lester, a woman arrested for disorderly conduct at a police station alleged excessive force had been used to arrest her. See Lester, 830 F.2d at 707. The Seventh Circuit held all excessive force claims during the course of an arrest should be analyzed under the Fourth Amendment standard and not the substantive due process standard. See id. at 710. Reviewing the Supreme Court's holding in Garner, the court stated although the issue addressed in Garner was the use of deadly force, “implicit in its totality of circumstances approach is that police use of less than deadly force would violate the Fourth Amendment if not justified under the circumstances.” Id. at 711.
104 490 U.S. 386 (1989). In Graham, the plaintiff sued five individual officers
In *Graham*, the Supreme Court found claims of excessive force against law enforcement officials "in the course of an arrest, investigatory stop or other 'seizure' of a free citizen," must be analyzed under the Fourth Amendment. The Court thus eliminated the substantive due process test as a standard of review for such claims and held the Fourth Amendment reasonableness standard is the exclusive standard by which courts should evaluate excessive force claims. The Court also stated excessive force claims by convicted prisoners should be analyzed under the Eighth Amendment prohibition against cruel and unusual punishment.

3. The Eighth Amendment

The Cruel and Unusual Punishment Clause of the Eighth Amendment is applicable after conviction and sentencing, and provides the substantive protection against violation of prisoners' constitutional rights. In *Whitley v. Albers*, the Supreme Court stated, "[T]he Eighth Amendment, which is specifically concerned with the unnecessary and wanton infliction of pain in penal institutions, serves as the primary source of substantive protection to convicted prisoners in cases ... where the deliberate use of force is challenged as excessive and unjustified." Again in *Graham v. Connor*, the Court stated, "[T]he less protective Eighth Amendment standard applies 'only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions.'" The Court went on to state that the Eighth Amendment analysis for

and the City of Charlotte, North Carolina under § 1983, alleging a deprivation of his constitutional right to be free from excessive force under the Fourteenth Amendment. See *id.* at 387–88.

105 *Id.* at 395.

106 Federal courts, when addressing a claim that police used excessive force in making an arrest had applied a Fourteenth Amendment substantive due process test, a Fourth Amendment reasonableness standard, or a combination of the two, to assess the constitutionality of the police officers' conduct.

107 See *id.* at 398–99 (citing *Ingraham v. Wright*, 430 U.S. 651, 671 n.40 (1977)).

108 *See Graham*, 490 U.S. at 392 n.6.


111 *Id.* at 327.

112 *Graham*, 490 U.S. at 398 (quoting *Ingraham v. Wright*, 430 U.S. 651, 671 n.40 (1977)).
excessive force would still consider “‘whether the force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically . . . [to cause] harm.’”113 Although the Supreme Court has clearly defined when the protection of the Eighth Amendment begins,114 the Court has not articulated where that protection ends.115

III. FILLING THE GAP “BEYOND THE POINT AT WHICH ARREST ENDS AND PRETRIAL DETENTION BEGINS”116

While Graham established that the Fourth Amendment is the proper standard to apply in cases of excessive force in the course of an arrest, confusion still exists as to whether the Fourth Amendment standard continues to apply following arrest and during pretrial detention. The Supreme Court’s decision in Graham left unanswered the question of whether the Fourteenth Amendment substantive due process test or the Fourth Amendment “objective reasonableness” test is the proper standard for evaluating excessive force claims made by pretrial detainees.117 In a footnote in Graham, the Supreme Court specifically stated it was leaving open the question of whether the Fourth Amendment continues to provide protection against the use of excessive force by law enforcement officials “beyond the point at which arrest ends and pretrial detention begins.”118

As outlined by the Eighth Circuit in Wilson v. Spain,119 there is considerable disagreement among the federal circuits on

113 Id. at 398 n.11.
114 See id. at 392 n.6 (stating that “Eighth Amendment’s protections [do] not attach until after conviction and sentence”); see also Bell v. Wolfish, 441 U.S. 520, 535 n.16 (1979); Ingraham, 430 U.S. at 671 n.40.
115 See Graham, 490 U.S. at 395 n.10; see also White, supra note 58, at 1055. The standard of review under the Due Process Clause of the Fourteenth Amendment, as established by the Supreme Court in Rochin v. California, 342 U.S. 165 (1952), refers to conduct that “shocks the conscience.” Id. at 172. The Court stated the standard requires an evaluation based on “disinterested inquiry pursued in the spirit of science, on a balanced order of facts exactly and fairly stated, on the detached consideration of conflicting claims . . . [and] . . . duly mindful of reconciling the needs both of continuity and of change in a progressive society.” Id. (citations omitted). The Court went further and stated that judges may not draw on “merely personal and private notions and [wrongfully] disregard the limits that bind judges in their judicial function.” Id. at 170.
116 Graham, 490 U.S. at 395 n.10.
117 See id. at 395.
118 Id. at 395 n.10.
119 209 F.3d 713 (8th Cir. 2000).
The Second, Sixth, Ninth, and Tenth Circuits have applied the Fourth Amendment "objective reasonableness" standard to claims of excessive force occurring after the initial arrest. The Ninth Circuit, in Robins v. Harum, endorsed the idea of continuing seizure—finding that a seizure continues between the arrest and the formal charging of a suspect and police conduct during this period is subject to the Fourth Amendment reasonableness standard. The Fourth, Fifth, Seventh, and Eleventh Circuits have refused to extend the protection of the Fourth Amendment beyond the initial act of arrest to pretrial detainees in custody, and instead apply the substantive due process standard of the Fourteenth Amendment. For example, in Wilkins v. May, the Seventh Circuit stated that a strong case for the application of "substantive due process, . . . would be a case in which a person who had been arrested but not charged or convicted was brutalized while in custody."

120 See id. at 715–16.
121 See Pierce v. Multnomah County, 76 F.3d 1032, 1041 (9th Cir. 1996) (finding the Fourth Amendment's "objectively reasonable" standard applies to the evaluation of an excessive force claim in the context of a custodial arrest); Powell v. Gardner, 891 F.2d 1039, 1044 (2d Cir. 1989) (holding the Fourth Amendment standard applies to the period of time when the person arrested is arraigned or formally charged, and remains in the custody of the arresting officer); McDowell v. Rogers, 863 F.2d 1302, 1306 (6th Cir. 1988) (finding the Fourth Amendment applies to claims of excessive force while individual is in the custody of arresting officers); Robins v. Harum, 773 F.2d 1004, 1010–11 (9th Cir. 1985) (applying the Fourth Amendment standard to excessive force claim arising out of events occurring en route to the police station).
122 773 F.2d 1004 (9th Cir. 1985).
123 See id. at 1009–10.
124 See Riley v. Dorton, 115 F.3d 1159, 1161–64 (4th Cir. 1997) (en banc) (finding plaintiff's claim of excessive force while awaiting booking was properly analyzed under the Fourteenth Amendment); Cottrell v. Caldwell, 85 F.3d 1480, 1490 (11th Cir. 1996) (finding "[c]laims involving the mistreatment of arrestees or pretrial detainees in custody are governed by the Fourteenth Amendment's Due Process Clause"); Brothers v. Klevenhagen, 28 F.3d 452, 457 (5th Cir. 1994) ("Once an individual . . . is placed into police custody, and surely after the arresting officer has transferred the individual to a jail cell, the individual becomes a pretrial detainee, protected against excessive force by the Due Process Clause."); Valencia v. Wiggins, 981 F.2d 1440, 1443–45 (5th Cir. 1993) (taking the position that substantive due process applies after that act of arrest); Justice v. Dennis, 834 F.2d 380, 383 (4th Cir. 1987) (utilizing the Fourteenth Amendment standard of "shocks the conscience" in determining whether the force used against a pretrial detainee was excessive).
125 872 F.2d 190 (7th Cir. 1989).
126 Id. at 193–95.
A. The "Not-So Bright Line" Between Arrest and Pretrial Detention

A pretrial detainee has been defined as "one lawfully arrested and being held prior to a formal adjudication of guilt." Courts and commentators refer to this period of pretrial detention, following arrest but prior to conviction and sentencing, as a "legal twilight zone." The fact that there is no clear defining point at which arrest ends and pretrial detention begins has created considerable confusion in the federal courts.

The Fifth Circuit, unlike the Supreme Court, has attempted to draw a clear line between arrest and the pretrial detention period. In Valencia v. Wiggins, the Fifth Circuit considered the appropriate constitutional standard to be applied to the plaintiff's claim of excessive force during the third week of his pretrial detention. The Valencia court determined pretrial...

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127 United States v. Cobb, 905 F.2d 784, 788 (4th Cir. 1990) (finding an individual escorted by arresting officers to a "holding area" or "booking room" was a pretrial detainee); see also Bell v. Wolfish, 441 U.S. 520, 535 (1979) (stating a person lawfully committed to pretrial detention has not been adjudged guilty of any crime); Gerstein v. Pugh, 420 U.S. 103, 114 (1975) (stating a pretrial detainee has had only a determination of "probable cause as a prerequisite to [the] extended restraint of [his] liberty following arrest"); Martin v. Gentile, 849 F.2d 863, 865–66 (4th Cir. 1988) (defining a pretrial detainee as one who is lawfully detained prior to trial); Padraic P. Lyndon, Escape: A Deadly Proposition? Prisoners and Pretrial Detainees, 21 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 203, 219 (1995) (defining a pretrial detainee as one who has been arrested but not convicted).

128 Wilson v. Spain, 209 F.3d 713, 715 (8th Cir. 2000). Various courts and commentators have utilized similar phrases to describe the pretrial detention period. See Lyndon, supra note 127, at 219 (referring to the "gray area between arrest and conviction"); White, supra note 58, at 1055, 1059 (referring to the existence of pretrial detainees in "constitutional limbo" and to the "mongrel nature of pretrial detainees") (citations omitted).

129 See Wilson v. Williams, 83 F.3d 870, 874 (7th Cir. 1996) ("Wilson's disagreements with the trial court's instruction are not surprising given the paucity and ambiguity of case law regarding the standards applicable to a pretrial detainee's § 1983 claim of excessive force and the trial court's struggle to accommodate the different theories of the parties at trial.").

130 981 F.2d 1440 (1993).

131 See Valencia, 981 F.2d at 1442. Valencia was arrested on drug charges and detained in the Brewster County (Texas) Jail. See id. "One evening, three weeks into his pretrial detention, Valencia took part in a jail disturbance in which the inmates made excessive noise and threw objects out of cells." Id. Following a similar disturbance the following night, Valencia claimed he was singled out from the other inmates and subjected to excessive force—he was put in a choke hold that made him lose consciousness and forced into a drunk tank where he was struck by officers several times while handcuffed and on his knees. See id.
detention does not begin until "after the incidents of arrest are completed, after the plaintiff has been released from the arresting officer's custody, and after the plaintiff has been in detention awaiting trial for a significant period of time." The court limited Fourth Amendment protection to individuals who, though arrested, had not yet been subject to institutional security. The Valencia court found that after an individual had been in detention "for a significant period of time[,]" the Fourth Amendment no longer provided "an appropriate constitutional basis for protecting against deliberate official uses of force." The Valencia court did not provide guidance as to what constituted a "significant period of time." While the court found an individual to be a pretrial detainee after three weeks, other courts that have followed the Valencia framework found plaintiffs to be pretrial detainees after shorter time periods. For example, in Rankin v. Klenvenhagen, the court found an individual to be a pretrial detainee after two weeks. Further, in Bender v. Brumley, the court found the plaintiff became a pretrial detainee in less than a day. A number of circuits have extended the Fourth Amendment protection to the period between arrest and charge, or through the period in which the arrestee remains in the arresting officer's custody, or to the

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132 Id. at 1443-44.
133 See id. at 1444-45.
134 Id. at 1444.
135 Id. at 1443.
136 Id. at 1444. The Fifth Circuit only stated that the three-week period at issue in Valencia constituted an "attenuated stage of pretrial detention" and consequently the Fourth Amendment would not continue to protect against wrongful uses of force. Id. at 1444.
137 5 F.3d 103 (5th Cir. 1993).
138 See id. at 106.
139 1 F.3d 271 (5th Cir. 1993).
140 See id. at 273.
141 See Valencia, 981 F.2d at 1444; see also Austin v. Hamilton, 945 F.2d 1155, 1162 (10th Cir. 1991) (holding the Fourth Amendment's objective reasonableness standard applies post-arrest up to the arrested suspect's first judicial hearing); Hammer v. Gross, 884 F.2d 1200, 1204 (9th Cir. 1989), vacated en banc on other grounds, 932 F.2d 842 (1991) (finding the Fourth Amendment applies to force used to compel drunk driving arrestee to consent to chemical tests because the force constituted search incident to arrest).
142 See Hammer, 884 F.2d at 1204; see also Powell v. Gardner, 891 F.2d 1039, 1044 (2d. Cir. 1989) ("[T]he Fourth Amendment standard probably should be applied at least to the period prior to the time when the person arrested is
end of the booking process. Such cases prove it is difficult to draw a clear distinction between an arrestee and a pretrial detainee for the purposes of differentiating rights belonging to each. Even in an attempt to draw such a line, Valencia comes up short. It is impossible to demarcate in each individual set of circumstances where arrest ends and pretrial detention begins without subjecting individuals to the arbitrary application of constitutional standards.

While some courts have distinguished between the various stages of arrest, pretrial detention and post-conviction incarceration, other courts have referred to the “constitutional continuum” that runs through initial arrest or seizure, post-arrest or pretrial detention, and post-conviction incarceration. It is this constitutional continuum that should dictate the proper constitutional standard that governs claims of the use of excessive force by law enforcement officials. “The constitutional right to be free from unreasonable interference by police officers is incontrovertible.”

The interest of persons in the integrity of their bodies is a liberty interest of high order. The order of this
liberty interest is precisely as high among persons accused of crime as among persons unaccused of crime.\textsuperscript{149} It is clear that a single standard should be applicable in all types of excessive force cases—"regardless of the plaintiff's status or the circumstances surrounding the use of force."\textsuperscript{150}

B. Weighing the Options: The Application of the Fourth and Fourteenth Amendments Beyond Arrest

If a single constitutional standard is to apply throughout arrest and pretrial detention, it becomes necessary to weigh the arguments for applying either the Fourth Amendment reasonableness standard or the Fourteenth Amendment "shocks the conscience" standard under substantive due process.

C. Particularized Rights Under the Constitution—The Fourth and Eighth Amendments

Some commentators have criticized the Fourteenth Amendment standard, stating substantive due process has become "shorthand for a judicial privilege to condemn things the judges do not like or cannot understand."\textsuperscript{151} Furthermore, the "shocks the conscience" test is a "vague standard... inviting decisionmakers to consult their sensibilities rather than objective circumstances."\textsuperscript{152} The Fourth Amendment standard of objectivity is also subject to the assignment of values by the court to the respective interests of the governmental interest in the level of force employed and the intrusion on the individual's constitutional right to be free from unreasonable search and seizure.\textsuperscript{153} Clearly, in applying either the Fourth Amendment or the Fourteenth Amendment, judges are permitted neither to ignore the facts surrounding the particular case nor abandon judicial responsibility for their own personal notions of justice.\textsuperscript{154}

\textsuperscript{150} Freyermuth, supra note 34, at 696.
\textsuperscript{151} Gunz v. Morrissette, 772 F.2d 1395, 1406 (7th Cir. 1985) (Easterbrook, J., concurring).
\textsuperscript{152} Id. at 1407.
\textsuperscript{154} See Campbell, supra note 59, at 1386 (stating the Fourth Amendment's objectivity is subject to attack and requires the assignment of values to the interests of individual liberty and governmental need in applying the standard).
While issues of vagueness plague both standards, it is important to note the Supreme Court places little weight on claims of violations of due process when they are better addressed under a particularized right guaranteed under the Bill of Rights. The Supreme Court has made clear the Fourth Amendment's protection against unreasonable seizures and the Eighth Amendment's protection against cruel and unusual punishment are the two principal sources of constitutional protection against excessive force by law enforcement officials. Graham v. Connor requires a constitutional claim covered by a specific constitutional provision, such as the Fourth or Eighth Amendment, must be analyzed "under the standard appropriate to that specific provision, not under the rubric of substantive due process." Of these two principal sources of constitutional protection, it is the Fourth Amendment's reasonableness standard that arguably applies to claims of pretrial detainees, as the Eighth Amendment's protection does not attach until after conviction.

155 For a discussion of this trend, see Whitley v. Albers, 475 U.S. 312, 326 (1986), where the Court stated that while there may be some overlap between the protections provided under the Eighth and Fourteenth Amendments, the Eighth Amendment "which is specifically concerned with the unnecessary and wanton infliction of pain . . . serves as the primary source of substantive protection to convicted prisoners."; see also Graham v. Connor, 490 U.S. 386, 394 (1989) (stating the Fourth and Eighth Amendments are the two primary sources of protection against physically abusive government conduct).

156 See Graham, 490 U.S. at 395. The Supreme Court stated a claim of excessive force in the course of a "seizure" should be analyzed under the Fourth Amendment, which provides "an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct." Id. The Court rejected "the more generalized notion of 'substantive due process'" as the appropriate guide in such cases. Id.

157 See Graham, 490 U.S. at 395. The claims of a pretrial detainee are not cognizable under the Eighth Amendment's protection against cruel and unusual punishment, it does not apply "until after conviction and sentencing." Id. at 392
D. Does a "Seizure" Under the Fourth Amendment Extend Beyond the Initial Arrest?

The Fourth Amendment establishes that "the right of the people to be secure ... against unreasonable searches and seizures, shall not be violated." The Fourth Amendment governs claims of excessive force during the course of an arrest, investigatory stop, or other seizure of a person. The debate over the proper constitutional standard to be applied to claims of excessive force by law enforcement officials during the pretrial detention period is centered on whether the Fourth Amendment is directed at the actual arrest of an individual or whether it includes conditions controlling subsequent pre-trial detention.

In defining a "seizure" in the context of an arrest, the Supreme Court quoted Thompson v. Whitman for the proposition, "a seizure is a single act, and not a continuous fact." Some courts have stated the Fourth Amendment does not embrace the theory of a "continuing seizure" and does not extend to the mistreatment of pretrial detainees in custody.

n.6. Also, a claim of excessive force cannot be examined until after the state has secured "a formal adjudication of guilt in accordance with due process of law." Ingraham v. Wright, 430 U.S. 651, 671-72 n.40 (1977). "Eighth Amendment scrutiny is appropriate only after the state has complied with the constitutional guarantees traditionally associated with criminal prosecutions." Id. The Court in Graham noted the "Eighth Amendment 'serves as the primary source of substantive protection ... in cases ... where the deliberate use of force is challenged as excessive and unjustified.'" Graham, 490 U.S. at 395 n.10 (quoting Whitley v. Albers, 475 U.S. 312, 327 (1986)).

159 U.S. CONST. amend. IV.

160 See Graham, 490 U.S. at 388; Tennessee v. Garner, 471 U.S. 1, 6 n.7 (1985) (addressing the constitutionality of the use of deadly force to prevent the escape of an apparently unarmed suspected felon).

161 Compare Terry v. Ohio, 392 U.S. 1, 16 (1968) (recognizing there is a "seizure" whenever a police officer accosts an individual and restrains his freedom to walk away), with Wilkins v. May, 872 F.2d 190, 192-93 (7th Cir. 1989) (stating that the word "seizure" is limited to the initial arrest and not to subsequent events).

162 85 U.S. (18 Wall.) 457 (1873).

163 Thompson, 85 U.S. (18 Wall.) at 471; see also Terry, 392 U.S. at 16 (recognizing there is a "seizure" whenever a police officer accosts an individual and restrains his freedom to walk away); Wilkins, 872 F.2d at 193 ("A natural although not inevitable interpretation of the word 'seizure' would limit it to the initial act of seizing, with the result that subsequent events would be deemed to have occurred after rather than during the seizure."); Bella v. Chamberlain, 24 F.3d 1251, 1256 (10th Cir. 1994) (stating an officer's show of authority must succeed in restraining the person in order for there to be a "seizure" within the meaning of the Fourth Amendment).

164 See Brothers v. Klevenhagen, 28 F.3d 452, 456 (5th Cir. 1994) (holding a
“Although the Graham opinion avoided a direct pronouncement on this particular issue [of pretrial detention], the Court's recognition of the broad applicability of Fourth Amendment standards to excessive force claims in the arrest context has played a role in the development of a standard applicable to post-arrest police conduct.”

The right to be secure from unreasonable seizures protects an “individual’s legitimate expectations that in certain places and at certain times he has ‘the right to be let alone.’” In Terry v. Ohio, the Supreme Court acknowledged the breadth of the “right to be let alone” and recognized that a seizure of a person includes any conduct that “by means of physical force... has in some way restrained the liberty of a citizen.” Terry states a very broad notion of what constitutes a seizure—one compelling the conclusion that “any application of physical force to a citizen which has the effect of disabling him physically to any extent” is a seizure.

The United States Court of Appeals for the Fourth Circuit, in Justice v. Dennis, stated the Supreme Court “has long since settled that a ‘seizure’ of a person within the Fourth Amendment’s meaning is not limited to conduct that constitutes a ‘technical arrest,’ and instead encompasses any conduct that ‘by means of physical force... has in some way restrained the liberty of a citizen.” Clearly, because the liberty of an individual is compromised, a “seizure” continues beyond the

pretrial detainee is protected against excessive force by the Due Process Clause of the Fourteenth Amendment; Valencia v. Wiggins, 981 F.2d 1440, 1443-45 (5th Cir. 1993) (holding the Fourth Amendment does not provide an appropriate constitutional basis for protecting against deliberate uses of force and a pretrial detainee receives protection under the Due Process Clause of the Fourteenth Amendment); Wilkins, 872 F.2d at 192-93 (“A natural although not inevitable interpretation of the word ‘seizure’ would limit it to the initial act of seizing, with the result that subsequent events would be deemed to have occurred after rather than during the seizing.”).

Austin v. Hamilton, 945 F.2d 1155, 1159 (10th Cir. 1991) (finding the constitutionality of law enforcement officers’ entire course of conduct is to be evaluated under the Fourth Amendment).


392 U.S. 1 (1968).

Id. at 20 n.16.


834 F.2d 380 (4th Cir. 1987).

Id. at 387 (citing Terry v. Ohio 392 U.S. 1, 19 n.16).
point of actual arrest to the post-arrest, pre-trial detention of a citizen. In *Winston v. Lee*, the Supreme Court found the Fourth Amendment is concerned with whether a citizen has been subjected to "unreasonable governmental intrusions into any area in which he has a reasonable expectation of privacy." If the citizen has been subjected to such intrusions, those intrusions are unconstitutional regardless of the individual's status as an arrestee, a pretrial detainee, or a prisoner.

E. Pretrial Detainees and Concerns of Institutional Security

In *Graham v. Connor*, the Supreme Court stated, "It is clear . . . that the Due Process Clause protects a pretrial detainee from the use of excessive force that amounts to punishment." The *Graham* Court is referring to the fact that procedural due process protects pretrial detainees from force that amounts to punishment, rather than substantive due process rights.

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172 The Supreme Court has further recognized the Fourth Amendment does not cease to apply simply because an arrest is complete. In both *Winston v. Lee*, 470 U.S. 753 (1985), and *Schmerber v. California*, 384 U.S. 757 (1966), the suspect's arrest had been effected prior to the charged physical intrusions, yet in each case, the Court applied the reasonableness standard of the Fourth Amendment to judge the constitutionality of the state's action. See *Winston*, 470 U.S. at 766; *Schmerber*, 470 U.S. at 767–68. In *Schmerber*, the court held admitting evidence obtained from a warrantless blood test did not violate the Fourth Amendment. See *Schmerber*, 384 U.S. at 766–72. In *Winston*, the court used a Fourth Amendment analysis to hold a state could not compel a suspect to undergo surgery to remove bullets that could provide evidence of the suspect's guilt or innocence. See *Winston*, 470 U.S. at 766; see also *United States v. Montoya de Hernandez*, 473 U.S. 531, 541 (1985) (using a Fourth Amendment analysis to uphold the detention of a drug smuggler, so that law enforcement officials could examine her feces). These decisions demonstrate that the Fourth Amendment is not concerned with whether the excessive force was brought to bear on the plaintiff when he was an "arrestee" or a "detainee."


174 *Winston*, 470 U.S. at 767 (emphasis added).

175 It would be strange if police were forbidden to use excessive force in making an arrest, but free to beat the arrested person senseless as soon as the arrest was complete—yet after he was convicted and imprisoned, were again forbidden—this time by the Eighth Amendment from using excessive force amounting to punishment. See *Schmerber*, 384 U.S. at 768–70.


177 See *MacDonald*, *supra* note 47, at 183–84 (stating that while due process protects a pretrial detainee from force that amounts to punishment, it is not an endorsement of the application of the substantive due process test to all claims of excessive force by pretrial detainees). Moreover, the reference to the Due Process Clause in *Graham* cannot be construed as an endorsement of the use of the substantive due process test to pretrial detainee claims of excessive force, but rather
Importantly, the portion of *Bell v. Wolfish*\(^{178}\) cited by the Supreme Court referred only to a detainee's procedural due process, noting that under the Due Process Clause, a detainee cannot be punished prior to a formal adjudication of guilt.\(^{179}\)

In *Bell v. Wolfish*, the Court rejected a Fourth Amendment challenge by pretrial detainees to jail rules authorizing random cell searches and visual body cavity searches.\(^{180}\) The Court stated that a pretrial detainee's expectations of privacy "would be of a diminished scope" as a result of such practices.\(^{181}\) Similarly, in *Hudson v. Palmer*,\(^{182}\) the Court concluded the Fourth Amendment protects neither a prisoner's privacy interest in his prison cell nor his possessory interest in personal property contained in his cell.\(^{183}\) In *Hudson*, a convicted prisoner filed a § 1983 action claiming a search of his cell and seizure of his property discovered during the search violated his Fourth Amendment rights.\(^{184}\) The Court held that "the Fourth Amendment proscription against unreasonable searches does not apply within the confines of the prison cell,"\(^{185}\) and stated, "[S]ociety is not prepared to recognize as legitimate any subjective expectation of privacy that a prisoner might have in his prison cell."\(^{186}\)

It is important not to confuse a pretrial detainee's right to be free from bodily intrusion under the Fourth Amendment with the right of law enforcement officials to maintain institutional security. To state that a detainee does not have a reasonable expectation of privacy from an inspection of his cell is not to say he does not have a legitimate expectation of privacy under the Fourth Amendment against an arbitrary and excessive beating.\(^{187}\) The Court in *Bell* and *Hudson* did not address the issue of whether an individual in a cell retains a legitimate

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\(^{178}\) 441 U.S. 520 (1979).

\(^{179}\) See *Bell*, 441 U.S. at 535.

\(^{180}\) See id. at 555–56. In *Bell*, the Supreme Court refused to hold that a pretrial detainee has a privacy interest in his person that is protected by the Fourth Amendment. See id. at 557.

\(^{181}\) Id. at 557.


\(^{183}\) See id. at 527–28.

\(^{184}\) See id. at 520.

\(^{185}\) Id. at 526.

\(^{186}\) Id.

\(^{187}\) See Freyermuth, supra note 34, at 704.
expectation of privacy in his bodily integrity that protects him from excessive force.188

While "maintaining institutional security and preserving internal order and discipline are essential goals that may require limitation or retraction of the retained constitutional rights of both convicted prisoners and pretrial detainees,"189 this is not always the case.190 A pretrial detainee does not relinquish all Fourth Amendment rights upon being taken into custody and detained.191 While both pretrial detainees and convicted inmates are subject to institutional security, not every pretrial detainee will be found guilty. An arrestee does not lose his protection under the Fourth Amendment simply because he is placed in a cell, and there is no justification for affording a detainee less protection against excessive force than is afforded an arrestee.192

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188 Rather, the Supreme Court in *Bell* examined conditions and restrictions of pretrial detention alleged to be unconstitutional, such as “double-bunking,” a “publisher only” rule, and the practice of body cavity searches following contact visits. “Double-bunking” is the practice of placing two inmates in a room designed for one. See *Bell v. Wolfish*, 441 U.S. 520, 541–43 (1979). The “publisher only” rule allows inmates to receive published materials only if mailed directly from the publisher or bookstore. See id. at 548–49. Nothing in *Bell* restricts the right of an individual held in custody not to be “beaten or threatened” following their initial arrest. Gray v. Spillman, 925 F.2d 90, 93–94 (4th Cir. 1991) (upholding an individual’s right not to be beaten and threatened during a custodial interrogation); see also Riley v. Dorton, 115 F.3d 1159, 1169–70 (4th Cir. 1997) (Michael, J., dissenting) (asserting that the Fourth Amendment should be applied in cases of excessive force during pretrial detention).

189 *Bell*, 441 U.S. at 546.

190 In *Bell*, the Supreme Court stated there is no basis for concluding pretrial detainees pose any lesser security risk than convicted inmates, and in a federal system, a detainee is committed to a detention facility because there is no better means to assure his presence at trial. See id. at 547 n.28.

191 But see Freyermuth, *supra* note 34, at 703 (stating that language in some Supreme Court decisions implies that incarcerated pretrial detainees lose all their Fourth Amendment rights).

192 See MacDonald, *supra* note 47, at 185. The author sets forth the following example:

Two suspects, A and B, are arrested at the same time for the same offense. For any physical encounter with the police during the respective arrests, the Fourth Amendment reasonableness standard will be applied to evaluate any alleged police brutality. Assume that A and B are booked and while A posts bail and is released, B cannot afford to post bail and is placed in pretrial confinement. In any physical encounter between A and the police while A is free on bail, the police may only use force objectively reasonable under the circumstances. However, a correctional officer, in an encounter with B, could use a greater amount of force against B, so long as that force is not maliciously and sadistically applied for the purpose of causing harm. There is simply no justification for treating A and B
While concerns of institutional security will sometimes outweigh a detainee's expectation of freedom from physical force, it will not do so in every case.\textsuperscript{193}

IV. ARRIVING AT A "REASONABLE" COMPROMISE

The protections provided by both the Fourth and Fourteenth Amendments are strikingly similar. Although there is no fundamental right to be free from excessive force,\textsuperscript{194} under both the Fourth and Fourteenth Amendments, an individual, whether at liberty, detained, or incarcerated, has a certain expectation of bodily integrity.\textsuperscript{195}

The Due Process Clause of the Fourteenth Amendment guarantees "[t]he right to be free of state-occasioned damage to a person's bodily integrity."\textsuperscript{196} This right includes freedom from "state intrusions into realms of personal privacy and bodily security through means so brutal, demeaning, and harmful as to literally shock the conscience of the court."\textsuperscript{197} The Fourteenth Amendment "shocks the conscience" standard\textsuperscript{198} under Johnson v. Glick required the court to balance "the need for the application of force [] [and] the relationship between the need and the amount of force that was used."\textsuperscript{199} This due process standard also requires courts to consider issues such as the officer's subjective state of mind or the extent of the plaintiff's injury, which create a higher threshold for recovery under § 1983.\textsuperscript{200}

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\item \textsuperscript{193} See Freyermuth, supra note 34, at 704 (noting that a state's interest in institutional security does not always outweigh a detainee's reasonable expectation of privacy in his cell).
\item \textsuperscript{194} See Graham v. Connor, 490 U.S. 386, 393 (1989) (rejecting the idea that there is a general "right" to be free from excessive force).
\item \textsuperscript{195} In her concurring opinion in Garcia v. City of Chicago, 24 F.3d 966 (7th Cir. 1994), Justice Cudahy stated that "the Fourth Amendment's prohibition against 'unreasonable' seizures is coextensive with the Fourteenth Amendment's prohibition against deprivations of liberty without due process." Id. at 975 (Cudahy, J., concurring).
\item \textsuperscript{196} Shillingford v. Holmes, 634 F.2d 263, 265 (5th Cir. 1981); see also Hall v. Tawney, 621 F.2d 607, 613 (4th Cir. 1980).
\item \textsuperscript{197} Hall, 621 F.2d at 613.
\item \textsuperscript{198} See supra notes 61–78 and accompanying text.
\item \textsuperscript{199} Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973).
\item \textsuperscript{200} See Jenkins v. Averett, 424 F.2d 1228, 1232 (4th Cir. 1970) (stating that
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The right to bodily integrity has also been premised on the Fourth Amendment guarantee of "[t]he right of... people to be secure in their persons..." The application of force implicates a person's Fourth Amendment right whenever that person maintains a reasonable expectation of privacy in his bodily integrity that protects him from such intrusion. Determining whether the force used is "reasonable" under the Fourth Amendment standard requires the court to "balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." An officer's subjective state of mind or the extent of a plaintiff's injuries are irrelevant when considering the rights implicated by the use of force.

The most problematic feature is the state of mind requirement of the Johnson test, which requires a court to inquire into the officer's subjective state of mind to determine whether the officer was motivated by a desire to maintain order or a malicious intent to cause harm to the plaintiff. Thus, an officer acting in good faith to maintain order could use objectively unreasonable and unnecessary force on an arrestee without violating their due process rights. The government cannot condone the application of force where none is justified or

once a constitutional violation has been made out under § 1983, a showing of malice or intent to injure is not required to recover; Freyermuth, supra note 34, at 693.

201 Jenkins, 424 F.2d at 1232 (4th Cir. 1990) (stating it is clear that the Fourth Amendment guarantee of person security "covers the individual's physical integrity"); see also Shillingford, 634 F.2d at 265.


203 See supra notes 82-86 and accompanying text.


205 See, e.g., Graham v. City of Charlotte, 644 F. Supp. 246, 248-49 (W.D.N.C. 1986) (granting a defense motion for directed verdict, the court found that the force used against the plaintiff was applied in a "good faith effort to maintain or restore order in the face of a potentially explosive situation"), aff'd, 827 F.2d 945 (4th Cir. 1987), vacated sub. nom., Graham v. Connor, 490 U.S. 386, 394 (1989).

206 See MacDonald, supra note 47, at 168-69 (stating that the subjective inquiry into an officer's state of mind received a good deal of criticism from commentators and § 1983 plaintiffs); Freyermuth, supra note 34, at 693, 700 (stating that an officer's subjective intent is often irrelevant under the Fourth and Eighth Amendment tests developed by the Supreme Court to protect individuals from excessive force by law enforcement officials); Campbell, supra note 59, at 1382 (arguing that "the substantive due process standard gives greater protection to [unlawful] police conduct than does the [F]ourth [A]mendment approach").
condemn the application of excessive force only where there is proof of malice.\textsuperscript{207}

Further, the extent of the injury inflicted is equally irrelevant to the issue of whether there has been a violation of an individual’s constitutional rights.\textsuperscript{208} Where an individual has a reasonable expectation of security in his bodily integrity, any injury caused by an intrusion is a violation of a constitutional right.\textsuperscript{209} The “shocks the conscience” standard places too heavy a burden on pretrial detainees who become the victims of the excessive use of force by law enforcement officials.

As stated by the Eighth Circuit in Wilson v. Spain,\textsuperscript{210} it is the “objective reasonableness” standard of the Fourth Amendment that strikes the most appropriate balance between the rights of a pretrial detainee and the governmental interest in maintaining order.\textsuperscript{211} The Court in Wilson properly applied the Fourth Amendment to Wilson’s claim that Officer Spain used unreasonable force against him while he was in custody.\textsuperscript{212} The Eighth Circuit did not, however, have to distinguish between standards applicable to a claim of excessive force during arrest as opposed to pretrial detention.\textsuperscript{213} Rather, the “objective reasonableness” balancing under the Fourth Amendment applies to any intrusion upon an individual’s bodily integrity, regardless of their status as arrestees or pretrial detainees.

V. INTERNATIONAL HUMAN RIGHTS NORMS

In addition to the constitutional analysis, the United States is also bound by several international treaties that provide guidance. Where the Constitution does not provide a clear solution, the courts should be guided by international and civil rights norms.\textsuperscript{214}

\textsuperscript{207} Under § 1983, once a constitutional violation has been made out, a showing of malice or intent to injure is not required to recover. See Jenkins v. Averett, 424 F.2d 1228, 1232 (4th Cir. 1970).
\textsuperscript{208} The extent of the injury inflicted “is probative of the amount of force used[,]” however, and may bear on the sum to be awarded in damages. Norris v. District of Columbia, 737 F.2d 1148, 1157 (U.S. App. D.C. 1984) (Doyle, J., concurring) (quoting Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973)).
\textsuperscript{209} See id.
\textsuperscript{210} 209 F.3d 713 (8th Cir. 2000).
\textsuperscript{211} See id. at 716.
\textsuperscript{212} See id. at 716–17.
\textsuperscript{213} See id. at 715–16.
\textsuperscript{214} “In addition to violating state and federal law, the use of excessive force also
There have been three major human rights treaties ratified by the United States, in recent years. Once ratified, these treaties are binding on the government as the law of the land.\textsuperscript{215} While the executive and legislative branches of the federal government are responsible for the submission and ratification of treaties, once ratified the treaties are binding on all levels of government—federal, state and municipal—and it is the duty of all government officials to uphold these obligations.\textsuperscript{216}

Police abuse, including the excessive use of force by police officers, is explicitly prohibited by two major international human rights treaties to which the United States is a party.\textsuperscript{217} In 1992, the United States ratified the International Covenant on Civil and Political Rights (ICCPR). The ICCPR sets forth certain important civil and political rights, including the right to life, freedom from torture, the right to a fair trial, and the right to privacy.\textsuperscript{218} ICCPR states,

\begin{quote}
Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.\textsuperscript{219}
\end{quote}

Article 6 of the ICCPR states: “Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”\textsuperscript{220} Article 7 states, “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”\textsuperscript{221} While none of these provisions differentiate between arrestees, pretrial detainees and prisoners, Article 10 requires that “[a]ll persons deprived of their liberty shall be treated with humanity and with respect for

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\textsuperscript{215} HUMAN RIGHTS WATCH, supra note 48, at 111.
\textsuperscript{216} See id.
\textsuperscript{217} See id.
\textsuperscript{218} The International Covenant on Civil and Political Rights (ICCPR) and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.
\textsuperscript{220} Id. at pt. III, art. 6, § 1.
\textsuperscript{221} Id. at pt. III, art. 7.
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the inherent dignity of the human person." Additionally, Article 26 asserts "[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law." 

Similar protections are included in the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which the United States ratified in 1994. In addition to prohibiting torture, the State Parties have an obligation "to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture." As ratified treaties, "these covenants are now U.S. domestic law and, in some cases, should provide enhanced human rights protections for those within the U.S." 

Apart from legally binding treaties, there are other international human rights standards addressing police abuse. The United Nations Code of Conduct for Law Enforcement Officials provides: "In the performance of their duty, law enforcement officials shall respect and protect human dignity and maintain and uphold the human rights of all persons . . . [a]nd law enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty." The Code also states that "[n]o

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222 Id. at pt. II, art. 10, § 1.
223 Id. at pt. III, art. 26.
227 HUMAN RIGHTS WATCH, supra note 48, at 113. The United States, however, has ratified these treaties with "reservations, declarations and understandings that carve away many of their expanded protections." See id. Principal among these is the declaration that none of the treaties' provisions are self-executing, meaning that upon ratification they do not automatically become available as the basis for lawsuits, but must await the passage of implementing legislation. At the same time, the Executive Branch specifically declares that no implementing legislation is necessary because existing law provides adequate protections.
228 See id. at 115.
law enforcement official may inflict, instigate or tolerate any act of torture or other cruel, inhuman or degrading treatment or punishment ...” While the code is not expressly binding, it provides the courts with guidance for interpreting international human rights law regarding policing.

As a leading nation in the fight against human rights violations throughout the world, it is imperative that the United States compel its courts to be guided by the fundamental human dignity of all citizens, as outlined in the International Covenant on Civil and Political Rights and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, when examining claims of excessive force by law enforcement officials. Such human rights norms should be applied in all cases examining claims of excessive force by individuals regardless of their status as arrestees, pretrial detainees or convicted prisoners.

CONCLUSION

The existing case law and constitutional standards do not provide clear guidance for litigants in § 1983 excessive force claims “beyond the point at which arrest ends and pretrial detention begins.” What is clear is that individuals—whether free, detained before trial or incarcerated—are protected from the arbitrary and abusive use of force by law enforcement officials.

Difficulty arises when trying to distinguish between an arrestee and a pretrial detainee for the purposes of the Fourth and Fourteenth Amendments. The courts should apply the Fourth Amendment reasonableness standard to claims of excessive force prior to a formal adjudication of guilt. This constitutional right, however must be applied with due consideration for the concerns of institutional security existing during the pretrial detention period. While pretrial detainees may possess limited Fourth Amendment rights with regard to property within their cell, they still possess Fourth Amendment protection from unreasonable interference with bodily integrity. The Fourteenth Amendment due process standard requires the

230 Id.
231 See HUMAN RIGHTS WATCH, supra note 48, at 115.
court to consider issues—such as an officer’s subjective motivation or the extent of the plaintiff’s injury—that are irrelevant under the standards set forth under the United States Constitution and international human rights norms.

The decision of the Eighth Circuit in *Wilson v. Spain* only highlights the confusion surrounding claims of excessive force under § 1983. The courts must establish rules that discourage frivolous cases without undermining the integrity and consistency of constitutional standards. Until the Supreme Court elects to eliminate the split among the circuits with regard to protection of pretrial detainees from excessive force by law enforcement officials, the confusion will continue creating uncertainty for those detained by law enforcement officials.

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233 209 F.3d 713 (8th Cir. 2000).
234 See Graham, 490 U.S. at 395 n.10.