JUDICIAL ILLUMINATION OF THE CONSTITUTIONAL "TWILIGHT ZONE": PROTECTING POST-ARREST, PRETRIAL SUSPECTS FROM EXCESSIVE FORCE AT THE HANDS OF LAW ENFORCEMENT

Abstract: Police brutality is one of the most serious and enduring human rights violations in the United States today. One means by which victims may seek redress is under 42 U.S.C. § 1983, which provides a civil cause of action against state actors who deprive individuals of their constitutional rights. This Note examines § 1983 litigation brought by post-arrest, pretrial detainees alleging the use of excessive force by law enforcement officials. There is currently a circuit split regarding whether such claims must be brought under the Fourth Amendment's proscription of unreasonable seizures of the person or the Fourteenth Amendment's guarantee that no State will deprive a citizen of liberty without due process of law. This issue's resolution has significance as to the plaintiff's burden of proof, and thus, his or her likelihood of attaining a favorable verdict. This Note contends that the best approach is a hybrid model that involves a synthesis of both Fourth and Fourteenth Amendment standards because it is both practical and mindful of recent lines of U.S. Supreme Court precedent.

INTRODUCTION

As Connie Jo Austin and Steven Snyder returned to the United States from a visit to Mexico, customs agents found a small amount of marijuana inside their car.[1] Following this discovery, the agents seized them and transported them to a detention facility.[2] While in custody, officers repeatedly assailed Austin and Snyder without provocation.[3] Although Austin and Snyder fully cooperated with their inquiries, agents beat them until they fell to the floor.[4] These assaults were so

[1] Austin v. Hamilton, 945 F.2d 1155, 1157 (10th Cir. 1991).
[2] *Id.*
[3] *Id.*
[4] *Id.*

severe that both lost consciousness.[5] After Austin and Snyder awoke, these beatings continued.[6]

Following these attacks, officers fastened Austin's and Snyder's handcuffs so tightly that both lost feeling in their hands.[7] During this period, officers denied their requests for water.[8] Additionally, the agents refused to grant them restroom access, causing both to soil their clothes.[9] Austin and Snyder were then forced to remain in these clothes overnight.[10] After twelve hours of custody and without filing charges, the officers finally released them.[11]

As this case exemplifies, police brutality is one of the most serious and enduring human rights violations in the United States today.[12] The problem is nationwide and institutional in nature.[13] Each year, police officers engage in severe beatings and unnecessarily rough physical treatment[14] of suspects in every region of the nation.[15] One avenue of redress for victims of police violence is 42 U.S.C. § 1983, which provides a civil cause of action against state actors who deprive individuals of their constitutional rights.[16]

In the context of police brutality, § 1983 actions are intended to fulfill two principal purposes.[17] First, they are designed to compensate victims of excessive force through an award of compensatory dam-

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[5] *See id.*

[6] *See Austin*, 945 F.2d at 1157.

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Austin*, 945 F.2d at 1157.

[12] HUMAN RIGHTS WATCH, SHIELDED FROM JUSTICE: POLICE BRUTALITY AND ACCOUNTABILITY IN THE UNITED STATES 1 (Human Rights Watch ed., 1998).

[13] *Id.*

[14] This type of unnecessarily rough police behavior is what this Note refers to as excessive force. Excessive force can be generally understood as force applied by a police officer where the amount of force used is disproportionate to the amount that was actually needed. *See* Graham v. Connor, 490 U.S. 386, 390 (1989).

[15] *See* HUMAN RIGHTS WATCH, *supra* note 12, at 1. This information is based on research conducted in fourteen U.S. cities over two and a half years. *Id.* In researching this data, Human Rights Watch interviewed and corresponded with attorneys representing victims alleging ill treatment by police, representatives of police department internal affairs units, police officers, citizen review agency staff, city officials, Justice Department officials, representatives of federal U.S. Attorneys' offices, local prosecutors' office representatives, experts on police abuse, and victims of abuse. *Id.*

[16] 42 U.S.C. § 1983 (2000). Thus, in order to maintain a § 1983 action, plaintiffs must allege a specific constitutional violation. *See id.*

[17] HUMAN RIGHTS WATCH, *supra* note 12, at 119; *see also* 42 U.S.C. § 1983.

ages.[18] Second, Congress intended these actions to make police officers and departments answerable to constitutionally required standards of conduct.[19]

One important and controversial area of § 1983 litigation involves claims brought by post-arrest, pretrial detainees[20] alleging the use of excessive force by law enforcement officials.[21] The controversy centers upon which constitutional provision these claims must be brought under: the Fourth Amendment's proscription of unreasonable seizures of the person[22] or the Fourteenth Amendment's guarantee that no State will deprive a citizen of liberty without due process of law.[23] Currently, the federal circuit courts of appeals are split on this issue.[24]

This controversy has significance beyond issues of mere constitutional interpretation because a plaintiff's burden of proof and likelihood of securing a favorable verdict are significantly influenced by which constitutional standard governs his or her claim.[25] If a court determines that the Fourth Amendment applies, a plaintiff need only show that the force exerted was objectively unreasonable based on the totality of the circumstances surrounding the incident.[26] If the Fourteenth Amendment governs, however, a plaintiff must demonstrate that an officer applied force maliciously and sadistically to cause harm, irrespective of the unreasonableness of the force.[27]

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[18] HUMAN RIGHTS WATCH, *supra* note 12, at 119; *see also* 42 U.S.C. § 1983.

[19] HUMAN RIGHTS WATCH, *supra* note 12, at 119; *see also* 42 U.S.C. § 1983.

[20] This term refers to suspects whom police have already arrested but remain in custody either for administrative booking procedures or for extended confinement, as in the case of a suspect who is denied bail. Because not all post-arrest detainees proceed to the trial phase of the criminal process, with instances of police brutality during early custodial phases, it is not yet clear if an arrestee will be charged and brought to trial. Thus, use of the term "pretrial detainee" refers both to those suspects detained pending trial and those suspects in early post-arrest custody who may or may not eventually proceed to trial. *See* cases cited *infra* note 316.

[21] *See, e.g.*, Wilson v. Spain, 209 F.3d 713, 714 (8th Cir. 2000).

[22] U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .").

[23] U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .").

[24] *See* cases cited *infra* note 106.

[25] *See* E. Bryan MacDonald, Graham v. Connor: *A Reasonable Approach to Excessive Force Claims Against Police Officers*, 22 PAC. L.J. 157, 180 (1990).

[26] *Graham*, 490 U.S. at 388, 396.

[27] *See* Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973); MacDonald, *supra* note 25, at 180.

Thus, the use of unreasonable force against a pretrial detainee passes constitutional muster in jurisdictions applying the Fourteenth Amendment when a plaintiff cannot establish an officer's subjective malice.[28] An identical use of force, however, is found to violate the Constitution in jurisdictions utilizing a Fourth Amendment standard.[29] In 1989, in *Graham v. Connor*, the U.S. Supreme Court resolved this issue as it applied to arrestees by holding that during an arrest, the Fourth Amendment provides the proper constitutional standard to assess excessive force claims.[30] The Court, however, refused to determine the proper standard applicable to claims brought by pretrial detainees following an arrest.[31]

Much of the confusion over this issue stems from the elusive constitutional position of pretrial detainees from a textual standpoint.[32] The Fourth Amendment forbids the use of excessive force during a "seizure" or arrest whereas the Eighth Amendment supplies a similar protection in the post-arrest context for convicted criminals.[33] Arguably, a pretrial detainee fits into neither of these categories.[34] One court attempting to resolve this issue noted that the period between arrest and conviction is a constitutional "twilight zone," due to the absence of a textually explicit source of constitutional protection.[35]

Because of the need for constitutional consistency and the growing problem of police brutality as a public policy concern, this twilight zone is badly in need of illumination.[36] The federal judicial system can accomplish this end by formulating a uniform approach to adjudicate pretrial detainees' excessive force claims.[37] This Note argues that the best approach involves a synthesis of both Fourth and Fourteenth

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[28] *See, e.g.*, Valencia v. Wiggins, 981 F.2d 1440, 1449 (5th Cir. 1993).

[29] *See, e.g.*, *Graham*, 490 U.S. at 397.

[30] *Id.* at 394.

[31] *Id.* at 395 n.10.

[32] *See Wilson*, 209 F.3d at 715.

[33] U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

[34] *Wilson*, 209 F.3d at 715. It is unclear if a pretrial detainee is still being "seized" or arrested for purposes of the Fourth Amendment. *See id.* It is clear, however, that the Eighth Amendment's ban on cruel and unusual punishment does not protect individuals who have not yet been convicted and sentenced. *Graham*, 490 U.S. at 392 n.6 (citing Ingraham v. Wright, 430 U.S. 651, 671 n.40 (1977)).

[35] *Wilson*, 209 F.3d at 715.

[36] *See* HUMAN RIGHTS WATCH, *supra* note 12, at 1.

[37] *See id.*

Amendment standards.[38] This approach is both practical and mindful of recent lines of U.S. Supreme Court precedent.[39]

Part I of this Note reviews the U.S. Supreme Court's historical applications of the Fourth and Fourteenth Amendments up to its landmark 1989 decision in *Graham*.[40] Part I.A examines the Court's interpretations of the Unreasonable Seizure Clause of the Fourth Amendment and how the Court has applied it to claims of excessive force.[41] Part I.B focuses on the development of the Fourteenth Amendment's doctrine of substantive due process as it relates to excessive force claims.[42] Part I.C discusses the Court's decision in *Graham* and then highlights the questions it raises for pretrial detainees' excessive force claims.[43]

To answer the questions raised by *Graham*, Part II of this Note reviews the Court's post-*Graham* treatment of the two pertinent constitutional provisions: the Fourth Amendment and the Fourteenth Amendment's doctrine of substantive due process.[44] Part II.A discusses how, following *Graham*, the Court has steadily expanded the scope of Fourth Amendment protections.[45] Part II.B similarly examines the Court's post-*Graham* efforts to limit the applicability of substantive due process claims.[46]

Part III then examines the various approaches adopted by the lower federal courts in adjudicating pretrial detainees' excessive force claims following *Graham*.[47] Part III.A discusses the approach that relies exclusively on the Fourteenth Amendment's doctrine of substantive due process.[48] Part III.B addresses the continuing seizure approach, which applies the Fourth Amendment until the trial phase of the criminal process.[49] Part III.C examines the hybrid approach, which applies the Fourth Amendment until a detainee has been brought before a judicial official for a probable cause hearing and then applies the Fourteenth Amendment.[50]

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[38] *See infra* notes 270–377 and accompanying text.
[39] *See infra* notes 270–377 and accompanying text.
[40] *See infra* notes 56–106 and accompanying text.
[41] *See infra* notes 56–70 and accompanying text.
[42] *See infra* notes 71–84 and accompanying text.
[43] *See infra* notes 85–106 and accompanying text.
[44] *See infra* notes 107–153 and accompanying text.
[45] *See infra* notes 111–131 and accompanying text.
[46] *See infra* notes 132–153 and accompanying text.
[47] *See* cases cited *infra* note 106.
[48] *See infra* notes 160–201 and accompanying text.
[49] *See infra* notes 202–225 and accompanying text.
[50] *See infra* notes 226–269 and accompanying text.

Finally, Part IV critically analyzes these approaches and argues that based on U.S. Supreme Court precedent, the hybrid model is the best-reasoned and most practical approach.[51] Part IV.A argues that the substantive due process model is unable to account for the Court's post-*Graham* expansions of Fourth Amendment protections.[52] Part IV.B similarly contends that alternative approaches are unable to account for the Court's efforts to limit the availability of substantive due process claims.[53] Part IV.C maintains that the hybrid model is able to harmonize both lines of U.S. Supreme Court precedent interpreting the Fourth and Fourteenth Amendments.[54] Finally, Part IV.D posits that the hybrid approach is the most practical model in terms of institutional feasibility and common sense.[55]

I. The U.S. Supreme Court's Applications of the Fourth Amendment and the Fourteenth Amendment's Doctrine of Substantive Due Process to Excessive Force Claims

A. *Fourth Amendment Jurisprudence Prior to* Graham v. Connor

To evaluate the merits of applying the Fourth Amendment to pretrial detainees' excessive force claims, it is important to gain an understanding of that Amendment's protections.[56] The Fourth Amendment is commonly understood as a limitation on the power of police to search for and seize evidence, instrumentalities, and fruits of a crime.[57] This Amendment, however, also protects the right of citizens to be secure in their persons.[58] An illegal arrest or other unreasonable seizure of a person is itself a violation of the Fourth Amendment.[59] Fourth Amendment cases involve balancing an individual's expectation of privacy against the government's interest in investigat-

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[51] *See infra* notes 270–377 and accompanying text.
[52] *See infra* notes 275–303 and accompanying text.
[53] *See infra* notes 304–324 and accompanying text.
[54] *See infra* notes 325–346 and accompanying text.
[55] *See infra* notes 347–377 and accompanying text.
[56] *See* U.S. Const. amend. IV.
[57] 3 Wayne R. LaFave, Search And Seizure: A Treatise on the Fourth Amendment § 5.1 (3d ed. Supp. 2003).
[58] *Id.*
[59] *Id.*

ing and preventing crime.[60] The Amendment itself sets the minimum standard for a seizure to be constitutional: it must be reasonable.[61]

In 1985, in *Tennessee v. Garner*, the U.S. Supreme Court first applied the Fourth Amendment to a suspect's claim of excessive force during a seizure.[62] The *Garner* Court characterized the Fourth Amendment test as a means of determining whether, under the totality of the circumstances, a particular type of search or seizure was justified.[63] Under this analysis, an officer's use of force becomes excessive when it is objectively unreasonable.[64] In an attempt to guide this analysis, the *Garner* Court noted that an application of the Fourth Amendment must balance the nature and quality of the intrusion against the importance of the governmental interests alleged to justify that intrusion.[65]

In post-arrest excessive force situations, there is no issue as to whether a seizure has occurred because the suspect is in police custody.[66] Rather, the key inquiry is whether the seizure is still taking place at the time the force is exerted.[67] If the seizure is still ongoing when force is applied, it is subject to the reasonableness requirement of the Fourth Amendment.[68] If it is determined that the seizure has ended, however, the Fourth Amendment will be inapplicable.[69] Instead, the source of constitutional protection, if any, must be found in the Due Process Clause of the Fourteenth Amendment.[70]

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[60] Thomas K. Clancy, *The Supreme Court's Search for a Definition of a Seizure: What Is a "Seizure" of a Person Within the Meaning of the Fourth Amendment?*, 27 AM. CRIM. L. REV. 619, 620 (1990).

[61] *Id.* (citing U.S. CONST. amend. IV).

[62] 471 U.S. 1, 7 (1985). *Garner* involved a § 1983 action filed after a police officer killed a fleeing teenage burglar despite being reasonably sure the suspect was unarmed. *Id.* at 3. The officer had acted in accordance with a Tennessee statute providing that if, after an officer gave notice of an intent to arrest, the suspect resists or flees, the officer may use all necessary means to effect the arrest. *Id.* at 4. Applying the Fourth Amendment balancing test, the Court concluded that the suspect's fundamental interest in his own life outweighed the government interest in effective law enforcement. *Id.* at 9–10.

[63] *Id.* at 8–9.

[64] *Id.* at 7.

[65] *Id.* at 8.

[66] *See* Valencia v. Wiggins, 981 F.2d 1440, 1444 (5th Cir. 1993).

[67] *See* Pierce v. Multonmah County, 76 F.3d 1032, 1042 (9th Cir. 1996).

[68] Graham v. Connor, 490 U.S. 386, 388 (1989).

[69] *See, e.g.*, Wilkins v. May, 872 F.2d 190, 192–93 (7th Cir. 1989). This is because the Fourth Amendment, by its own terms, regulates "seizures." *See* U.S. CONST. amend. IV. Therefore if the police conduct in question did not occur during the course of a seizure, it is not within the ambit of that Amendment's protection. *See id.*

[70] *See Wilkins*, 872 F.2d at 194.

B. *Fourteenth Amendment Substantive Due Process Jurisprudence Prior to* Graham v. Connor

Substantive due process is the body of law created by the courts that uses the Due Process Clause of the Fourteenth Amendment to review government action on its substantive merits.[71] This review is accomplished by the application of a means-ends test that determines whether an unacceptable deprivation of liberty has occurred, regardless of the procedures followed by the State.[72] Substantive due process law is not governed by a set of controlling principles.[73] Instead, the doctrine's essence is best captured by the most persistently recurring theme in due process cases: the government must not treat citizens arbitrarily.[74] Therefore, substantive due process adjudication does not divide into categories but occurs along a continuum.[75] This continuum is marked by what the U.S. Supreme Court interprets to be widely shared beliefs and intuitions that impose duties on government and define standards of reasonableness.[76]

In 1952, in *Rochin v. California*, the U.S. Supreme Court first applied a substantive due process analysis to a claim of excessive force.[77] Addressing the claim of an arrestee whose stomach was forcibly pumped by order of his arresting officer, the Court held that police conduct which "shocks the conscience" offends Fourteenth Amendment due process.[78] The Court reached this conclusion by relying on the basic canons of decency and fairness, which embody the concept of ordered liberty.[79]

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[71] Michael J. Phillips, *The Non-Privacy Applications of Substantive Due Process*, 21 RUTGERS L.J. 537, 539 (1990). One commentator states:

> Although substantive due process as just defined differs considerably from the procedural due process that traditionally has been the focus of the due process clauses, these two forms of due process do share common features. First, both require the government to have deprived the claimant of life, liberty or property before their distinct protections come into play. Second, neither a procedural nor a substantive due process claim can be based on merely negligent government behavior.

Id. at 540–41.

[72] *Id.* at 540.

[73] Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 322 (1993).

[74] *Id.* at 322–23.

[75] *Id.* at 323.

[76] *Id.*

[77] 342 U.S. 165, 172 (1952).

[78] *Id.*

[79] *Id.* at 174.

In 1973, in *Johnson v. Glick*, the Second Circuit Court of Appeals expanded upon the *Rochin* standard.[80] The *Glick* court introduced a four-part test to determine precisely when the use of police force shocks the conscience.[81] These factors include: 1) the need for application of force; 2) the relationship between the need and the amount of force that was used; 3) the extent of the injury inflicted; and 4) whether the force was applied in a good faith effort to maintain or restore discipline, or maliciously and sadistically for the very purpose of causing harm.[82] Most federal courts applying the Fourteenth Amendment to pretrial detainees' excessive force claims utilize the *Glick* standard.[83] Because the substantive due process test involves a subjective inquiry into the defendant's state of mind, courts and commentators agree that it is less likely to result in plaintiffs' verdicts than the objective Fourth Amendment analysis.[84]

C. Graham v. Connor: *The Fourth Amendment Is the Exclusive Standard Governing Claims of Excessive Force During an Arrest*

In 1989, in *Graham v. Connor*, the U.S. Supreme Court clarified its interpretation of the Fourth and Fourteenth Amendments as each relates to police brutality.[85] The Court held that the Fourth Amendment provides the proper constitutional standard to assess claims of excessive force during the course of an arrest.[86] In settling this constitutional issue, the *Graham* Court found that the lower court had erred in applying the *Glick* substantive due process test to an arrestee's claim that his arresting officers beat him before and after he was handcuffed and placed in a squad car.[87]

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[80] Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973).

[81] *Id.*

[82] *Id.*

[83] *See Graham*, 490 U.S. at 393.

[84] *See, e.g.*, Wilson v. Spain, 209 F.3d 713, 716 (8th Cir. 2000) (noting that the substantive due process test is "more burdensome" than the Fourth Amendment standard); Jill I. Brown, Comment, *Defining "Reasonable" Police Conduct:* Graham v. Connor *and Excessive Force During Arrest*, 38 UCLA L. REV. 1257, 1271 (1991) (characterizing the substantive due process test as a more "onerous" burden of proof than the Fourth Amendment objective reasonableness standard); *see also* MacDonald, *supra* note 25, at 180 (noting that under the Fourth Amendment standard, more § 1983 excessive force claims will withstand motions for summary judgment and directed verdict than under a Fourteenth Amendment standard).

[85] *See* 490 U.S. at 393.

[86] *Id.* at 388.

[87] *Id.* at 393.

The Court held that the Fourth Amendment provides the proper standard in the arrest context because it contains an explicit textual source of constitutional protection against that type of physically intrusive governmental conduct.[88] According to the Court, the reasonableness of an officer's use of force must be determined by reference to the particular facts and circumstances including: 1) the severity of the crime at issue; 2) whether the suspect poses an immediate threat to the safety of the officers or others; and 3) whether the suspect actively resists arrest or attempts to evade arrest by flight.[89]

The *Graham* Court explained that this test is completely objective in that it does not consider an officer's subjective motivation in applying force.[90] According to the Court, an officer's malicious intentions do not make a Fourth Amendment violation out of an objectively reasonable use of force; nor does an officer's good intentions make an objectively unreasonable use of force constitutional.[91] Thus, according to the *Graham* Court, the substantive due process test improperly inquires into an officer's state of mind to determine whether the force exerted was excessive.[92]

The Court noted further that all excessive force claims must be analyzed by first identifying the specific constitutional right allegedly infringed upon.[93] In most instances, the Court observed, that will be either the Fourth or Eighth Amendment because they are the two primary sources of constitutional protection against physically abusive governmental conduct.[94] In this particular instance, because the force occurred during the course of Dethorne Graham's arrest, it was clearly a seizure governed by the Fourth Amendment.[95] Commentators agree that *Graham*'s removal of the Fourteenth Amendment's

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[88] *Id.* at 395.

[89] *Id.* at 396.

[90] 490 U.S. at 397.

[91] *Id.*

[92] *Id.* (rejecting the applicability of the substantive due process test in these circumstances and disagreeing with the suggestion of the Court of Appeals that the subjective elements of the substantive due process test are merely another way of describing conduct that is objectively unreasonable).

[93] *Id.* at 394.

[94] *Id.* at 394–95.

[95] *Graham*, 490 U.S. at 394, 395 (explaining that this holding merely makes explicit what was implicit in the *Garner* Court's analysis: that all claims of excessive force during the course of an arrest should be analyzed under the Fourth Amendment's reasonableness standard).

subjective malice requirement is more beneficial to plaintiffs alleging the use of excessive force.[96]

Despite resolving this constitutional issue as it applied to arrestees, the Court declined to address the question of whether the Fourth Amendment continues to provide the accused with protection from excessive force beyond the point at which arrest ends and pretrial detention begins.[97] Citing its 1979 decision in *Bell v. Wolfish*,[98] the Court held that at a minimum, the Fourteenth Amendment's Due Process Clause protects a pretrial detainee from the use of excessive force that amounts to punishment.[99] In *Bell*, the Court reviewed due process challenges to institutional practices of a New York penal facility housing pretrial detainees.[100] The Court held that the proper inquiry was whether such practices[101] amount to punishment of the detainee.[102] If such practices are punitive, then the detainee's due process rights are violated.[103] The *Bell* Court concluded that a practice is not punishment if it is rationally related to a legitimate non-punitive government purpose and is not excessive in relation to that purpose.[104]

Despite reaffirming *Bell*'s constitutional minimum that protects the accused from punishment in the post-arrest context, the *Graham* Court explicitly left open the question of whether additional protection flowed to this class of individuals from the Fourth Amendment.[105] By leaving this issue unresolved, *Graham* has led federal courts to

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[96] *See, e.g.*, MacDonald, *supra* note 25, at 180. *But see* Michael C. Fayz, Comment, Graham v. Connor: *The Supreme Court Clears the Way for Summary Dismissal of Section 1983 Excessive Force Claims*, 36 WAYNE L. REV. 1507, 1527 (1990) (arguing that by eliminating the question of an officer's subjective malice, an important factual determination for a jury is removed from excessive force cases; therefore, excessive force claims are more likely to be disposed of at the summary judgment phase).

[97] *Graham*, 490 U.S. at 395 n.10.

[98] 441 U.S. 520, 535 (1979).

[99] *Graham*, 490 U.S. at 395 n.10.

[100] 441 U.S. at 523.

[101] The practices at issue included: housing inmates in cells containing double bunk beds; preventing detainees from receiving books and magazines unless mailed directly from a publisher; refusing to allow detainees to receive packages containing food or personal property; conducting unannounced searches of prisoners' cells at irregular intervals; and conducting body cavity searches following visits from outsiders. *Id.* at 525–30.

[102] *Id.*

[103] *See id.*

[104] *Id.*; *see* Phillips, *supra* note 71, at 558 (noting that although the majority opinion did not use the term "substantive due process," the case involved a due process challenge to substantive prison regulations and used a means-ends standard to review that challenge).

[105] *See Graham*, 490 U.S. at 395 n.10.

adopt divergent approaches in adjudicating excessive force claims brought by post-arrest, pretrial detainees.[106]

II. The U.S. Supreme Court's Post-*Graham v. Connor* Extensions of Fourth Amendment Protections and Restrictions on Substantive Due Process

To answer the question explicitly left open by *Graham v. Connor*, it is necessary to examine the U.S. Supreme Court's post-*Graham* treatment of the two pertinent constitutional provisions: the Fourth Amendment and the Fourteenth Amendment's doctrine of substantive due process.[107] Although the Court has not decided an excessive force case since *Graham*, its attitudes towards these two constitutional provisions illuminate the major issues present in the excessive force context.[108] Section A examines the U.S. Supreme Court's post-*Graham* expansions of the scope of Fourth Amendment protections.[109] Section B then discusses the Court's affirmative efforts to limit the applicability of the doctrine of substantive due process.[110]

A. *Post-*Graham *Expansions of Fourth Amendment Protections*

Although the *Graham* Court explicitly refrained from deciding whether the Fourth Amendment provides protection to pretrial detainees, the U.S. Supreme Court has since held that the Fourth Amendment does protect this class of individuals.[111] Two years after *Graham*, in 1991, the U.S. Supreme Court decided *County of Riverside v. McLaughlin*.[112] In *McLaughlin*, the Court reaffirmed and expanded upon its earlier 1975 decision in *Gerstein v. Pugh*, in which it held that the Fourth Amendment requires a judicial determination of probable

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[106] *See, e.g.*, Moore v. Novak, 146 F.3d 531, 535 (8th Cir. 1998) (holding that the Fourth Amendment continues to provide the accused with constitutional protection following an arrest); Austin v. Hamilton, 945 F.2d 1155, 1160 (10th Cir. 1991) (holding that the Fourth Amendment provides the accused with constitutional protection until the accused has been brought before a judicial officer for a probable cause hearing); *Wilkins*, 872 F.2d at 192–93 (holding that the Fourteenth Amendment exclusively governs excessive force claims in the post-arrest context).

[107] *See, e.g.*, Albright v. Oliver, 510 U.S. 266, 274 (1994); County of Riverside v. McLaughlin, 500 U.S. 44, 47, 56 (1991); Parratt v. Taylor, 451 U.S. 527, 535 (1981); Gerstein v. Pugh, 420 U.S. 103, 114 (1975).

[108] *See* Pierce v. Multnomah County, Or., 76 F.3d 1032, 1043 (9th Cir. 1996).

[109] *See infra* notes 111–131 and accompanying text.

[110] *See infra* notes 132–153 and accompanying text.

[111] *See McLaughlin*, 500 U.S. at 47, 56.

[112] *Id.* at 44.

cause before the extended detention of suspects following an arrest.[113] The plaintiffs in *Gerstein* were detained for extended periods without hearings to determine if there was probable cause for their arrests and continued detention.[114] The Court held that during the period of pretrial detention, failure to provide detainees with such hearings violated their Fourth Amendment rights.[115]

The Court in *Gerstein* explicitly recognized the Fourth Amendment's general applicability to the period of pretrial detention.[116] It noted that the Fourth Amendment was tailored specifically for the criminal justice system and held that its balance between individual and public interests defines the process that is due for seizures of persons in criminal cases, including their pretrial detention.[117] According to the Court, during pretrial detention, the Fourth Amendment furnishes protection from all unfounded interferences with liberty.[118]

Despite this clear and explicit indication that the Fourth Amendment applies to pretrial detainees, the Court in *Graham* (whose membership had changed considerably since *Gerstein*)[119] appeared to cast doubt on this notion by refusing to state whether the Fourth Amendment protects pretrial detainees from excessive force.[120] Two years after *Graham*, in *McLaughlin*, however, the Court clarified its position on this issue by reaffirming and expanding upon *Gerstein*.[121]

At issue in *McLaughlin* was what constituted a prompt determination of probable cause for purposes of *Gerstein*.[122] Although reluctant to announce that the Constitution requires a specific time limit, the Court held that jurisdictions providing probable cause hearings within forty-eight hours of arrest, as a general matter, comply with the Fourth Amendment.[123] The Court recognized that because of the need to provide police departments with flexibility, under certain circumstances (for example, holidays and three-day weekends), it may be permissible under the Fourth Amendment to wait as long as four

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[113] *Id.* at 47, 56.

[114] *See* 420 U.S. at 105 n.1.

[115] *Id.* at 114.

[116] *Id.* at 125 n.27.

[117] *Id.*

[118] *See id.* at 114.

[119] In the period between *Gerstein* and *Graham*, Justices Douglas, Stewart, Burger, and Powell were replaced by Justices Stevens, O'Connor, Scalia, and Kennedy, respectively.

[120] Graham v. Connor, 490 U.S. 386, 395 n.10 (1989).

[121] *McLaughlin*, 500 U.S. at 56.

[122] *Id.* at 50.

[123] *Id.* at 56.

days before providing a probable cause hearing.[124] Thus, the Court explicitly recognized, at least in some situations, that the Fourth Amendment continues to apply to pretrial detainees up to four days following an arrest.[125]

In 1994, in *Albright v. Oliver*, the U.S. Supreme Court provided another broad post-*Graham* interpretation of Fourth Amendment protections.[126] *Albright* involved a plaintiff's claim that the State's filing of charges against him without probable cause violated his substantive due process rights.[127] The Court dismissed his claim, holding that it needed to be brought under the Fourth Amendment.[128] Following its reasoning in *Graham*, the Court held that the Fourth Amendment provides an explicit textual source of constitutional protection against this particular sort of governmental conduct.[129] According to the Court, the Fourth Amendment governs claims of malicious prosecution because it was drafted to protect against all pretrial deprivations of liberty.[130] The *Albright* Court clearly interpreted the Fourth Amendment more expansively than did the *Graham* Court, which refused to determine whether the Fourth Amendment applied past the point of arrest into the period of pretrial detention.[131]

B. *Post-*Graham *Restrictions on the Doctrine of Substantive Due Process*

In addition to expanding the scope of the Fourth Amendment following *Graham*, the U.S. Supreme Court has also limited the availability of substantive due process claims.[132] Commentators attribute this effort to the fact that substantive due process is the most problematic category in constitutional law due to its historic dependence on the personal feelings of justices.[133] The U.S. Supreme Court itself

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[124] *Id.* at 58–59.

[125] *See id.* In all situations, however, the Fourth Amendment applies to pretrial detainees for at least two days into their detention. *Id.*

[126] 510 U.S. at 274.

[127] *Id.* at 271.

[128] *Id.*

[129] *Id.* at 273–74.

[130] *Id.* at 274.

[131] *See Albright*, 510 U.S. at 274; *Graham*, 490 U.S. at 395 n.10.

[132] *See, e.g.*, *Albright*, 510 U.S. at 271–72.

[133] *See* Eric S. Connuck, *Constitutional Law: The Viability of Section 1983 Actions in Response to Police Misconduct*, 1990 ANN. SURV. AM. L. 747, 777 (1992) (classifying substantive due process as "shorthand for judicial privilege to condemn things that the judges do not like or cannot understand") (quoting Gumz v. Morrissette, 772 F.2d 1395, 1406 (7th Cir. 1985) (Easterbrook, J., concurring)); Fallon, *supra* note 73, at 314.

has even acknowledged this problem and has attempted to resolve it.[134]

In determining that the Fourth Amendment was the proper constitutional standard governing claims of excessive force during an arrest, the *Graham* Court clearly manifested its intent to limit the doctrine of substantive due process.[135] According to the Court, § 1983 analysis must begin by identifying the specific constitutional right allegedly infringed upon by a state actor.[136] The Court held that when there is an explicit textual source of constitutional protection against the type of governmental conduct alleged, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing that claim.[137]

The *Graham* Court recognized that after the Second Circuit's decision in *Johnson v. Glick*, the vast majority of lower federal courts had indiscriminately applied a substantive due process standard to all excessive force claims.[138] The Court openly chastised this practice and characterized it as an undesirable expansion of substantive due process law.[139] Thus, the Court, in mandating the exclusive use of the Fourth Amendment, explicitly recognized the wholesale elimination of a broad range of substantive due process claims.[140]

The U.S. Supreme Court continued this effort five years later in *Albright*, which in addition to providing a source of Fourth Amendment expansion also limited the availability of substantive due process claims.[141] In holding that Kevin Albright's § 1983 claim of malicious prosecution must be brought under the Fourth Amendment rather than the Fourteenth Amendment, the Court once again expressed its desire to limit the doctrine of substantive due process.[142] The Court noted its general reluctance to expand that doctrine because its vague standards lend themselves to irresponsible decision making.[143]

In his concurring opinion, Justice Scalia noted that *Graham* requires the rejection of substantive due process claims wherever a

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[134] *Albright*, 510 U.S. at 271–72 (noting that the doctrine of substantive due process should not be expanded because it lacks guideposts for responsible decision making).

[135] 490 U.S. at 395.

[136] *Id.* at 394.

[137] *Id.* at 395.

[138] *Id.* at 393.

[139] *Id.*

[140] *See Graham*, 490 U.S. at 395.

[141] 510 U.S. at 271.

[142] *Id.* at 271–72.

[143] *Id.* (quoting Collins v. Harker Heights, 503 U.S. 115, 125 (1992)).

more specific constitutional provision might apply.[144] According to Scalia, the pretrial period was no longer an area where substantive due process claims could be maintained against state officials because more specific constitutional protections clearly applied.[145] The Court's effort in *Albright* to restrict the applicability of substantive due process was also recognized in Justice Kennedy's concurring opinion.[146]

According to Kennedy, this narrowing of substantive due process was a trend, traceable back to the Court's 1981 decision in *Parratt v. Taylor*.[147] In *Parratt*, the Court held that plaintiffs cannot maintain § 1983 claims based on due process violations if a State provides an adequate post-violation remedy.[148] The plaintiff in *Parratt* was a Nebraska prison inmate who filed a § 1983 claim against the prison alleging that by negligently losing his property, it violated his Fourteenth Amendment due process rights.[149]

Although the Court recognized that the plaintiff's claim satisfied the prerequisites of a valid due process claim, it held that he could not proceed under § 1983 because the State's tort remedies provided a means of redress for that deprivation.[150] According to the Court, these remedies were adequate to protect plaintiffs' Fourteenth Amendment rights on their own, without the need for an additional federal cause of action under § 1983.[151]

According to Justice Kennedy's *Albright* concurrence, *Parratt* represents an affirmative effort by the Court to limit the scope of substantive due process claims by preventing such actions from creating a system of federal tort law under the Fourteenth Amendment.[152] Commentators agree that *Parratt* is best understood as an "abstention decision," which calls upon federal courts to avoid substantive due

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[144] *See id.* at 276 (Scalia, J., concurring).

[145] *Id.* (Scalia, J., concurring) ("The Bill of Rights sets forth, in the Fifth and Sixth Amendments, procedural guarantees relating to the period before and during trial .... Those requirements are not to be supplemented through the device of 'substantive due process.'").

[146] *See* 510 U.S. at 284 (Kennedy, J., concurring).

[147] *See id.* (Kennedy, J., concurring) (citing *Parratt*, 451 U.S. at 535–44).

[148] *See* 451 U.S. at 544.

[149] *Id.* at 529.

[150] *Id.* at 536–37.

[151] *Id.* at 545.

[152] *Albright*, 510 U.S. at 284 (Kennedy, J., concurring) (quoting Paul v. Davis, 424 U.S. 693, 701 (1976)).

process rulings where state tort law adequately protects constitutional values.[153]

III. Judicial Approaches to Excessive Force Claims in the Post-Arrest Context

Despite recent cases clearly articulating its interpretations of the Fourth and Fourteenth Amendments, the U.S. Supreme Court's failure in *Graham v. Connor* to specify whether pretrial detainees are protected by the Fourth Amendment has led the lower federal courts to answer that question in three different ways.[154] Each of these approaches differs in regard to its interpretation of constitutional protections.[155] Section A discusses those jurisdictions refusing to apply the Fourth Amendment beyond the initial act of arrest.[156] These jurisdictions interpret the Fourteenth Amendment to be the sole source of protection for pretrial detainees.[157]

Section B examines those jurisdictions that interpret the Fourth Amendment to furnish protection for the entire time a suspect remains in state custody.[158] Finally, Section C addresses those circuits that apply the Fourth Amendment until a suspect has been brought before a judicial officer for a probable cause hearing and thereafter apply the Fourteenth Amendment.[159]

A. *The Substantive Due Process Approach: Excessive Force Claims of Pretrial Detainees Are Governed Exclusively by the Fourteenth Amendment*

One approach taken by the federal courts to protect post-arrest suspects from excessive force relies exclusively on the Due Process Clause of the Fourteenth Amendment.[160] For example, in 1989, in *Wilkins v. May*, the Seventh Circuit Court of Appeals refused to apply the Fourth Amendment to a claim of excessive force during an interrogation.[161] Luther Wilkins, Jr., following his arrest for suspicion of bank robbery, was taken to a police station and placed in a holding

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[153] *See* Fallon, *supra* note 73, at 311.

[154] *See, e.g.*, Moore v. Novak, 146 F.3d 531, 535 (8th Cir. 1998); Austin v. Hamilton, 945 F.2d 1155, 1160 (10th Cir. 1991); Wilkins v. May, 872 F.2d 190, 192–93 (7th Cir. 1989).

[155] *See, e.g.*, *Moore*, 146 F.3d at 535; *Austin*, 945 F.2d at 1160; *Wilkins*, 872 F.2d at 192–93.

[156] *See infra* notes 160–201 and accompanying text.

[157] *See, e.g.*, *Wilkins*, 872 F.2d at 192–93.

[158] *See infra* notes 202–225 and accompanying text.

[159] *See infra* notes 226–269 and accompanying text.

[160] *See, e.g.*, *id.*

[161] *See id.* at 191, 192.

cell.[162] Later that day, in an interrogation room, two FBI agents questioned Wilkins.[163] Wilkins alleged that during questioning, one of the agents pressed a handgun against his temple.[164]

Finding the Fourth Amendment to be inapplicable in this context, the court noted that the seizure of Wilkins ended upon the completion of his arrest.[165] The opinion noted that the pertinent question was whether the constitutionality of the manner or duration of Wilkins's detention shifted from a Fourth Amendment question to one of due process.[166] The court recognized that after conviction, excessive force claims must be brought under the Eighth Amendment.[167] It noted the unusual situation that would arise if the Constitution forbade the use of excessive force during an arrest, allowed it as soon as the arrest was complete, and then forbade it again after the suspect was convicted.[168]

The court suggested that one way of filling this unattractive gap in the Constitution is to interpret a seizure as continuing beyond the point of arrest in order to place it within the scope of the Fourth Amendment.[169] The court, however, rejected this notion based on two objections.[170] First, the court noted that the criteria used to determine reasonableness under the Fourth Amendment do not apply after an arrest ends.[171] The usual issue in a Fourth Amendment excessive force case is whether there was probable cause for the force used.[172] As the court observed, probable cause is determined by examining whether the force used to seize a suspect was excessive in relation to the danger he or she posed if left at large.[173] The court noted that these issues are not present when a suspect is already in custody.[174]

Second, the court objected that such an application of the Fourth Amendment would be an unwarranted expansion of constitutional law.[175] To illustrate this point, the court hypothesized an alter-

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[162] *Id.* at 191.
[163] *Id.*
[164] *Wilkins*, 872 F.2d at 191.
[165] *Id.* at 192.
[166] *Id.* at 193.
[167] *Id.*
[168] *Id.*
[169] *Wilkins*, 872 F.2d at 193.
[170] *Id.*
[171] *Id.*
[172] *Id.*
[173] *Id.*
[174] *Wilkins*, 872 F.2d at 193–94.
[175] *Id.* at 194.

nate situation in which the defendant merely stuck his tongue out at Wilkins.[176] According to the court, this would be unreasonable but there are no limiting principles within the Fourth Amendment to prevent such behavior from being deemed unconstitutional.[177] For the *Wilkins* court, the problem with this continuing seizure concept is that it attenuates the element that makes police conduct problematic: the unreasonable deprivation of a person's liberty.[178] After an arrest is complete, the court noted, the arrestee has already lost his or her liberty.[179] Thus, the court rejected the prospect of a seizure continuing past the point of initial arrest.[180]

Instead, the *Wilkins* court found that the proper constitutional standard to analyze this claim was the Due Process Clause of the Fourteenth Amendment.[181] The court noted that if there was ever a strong case for a substantive due process claim, it was where a post-arrest, pretrial suspect has been brutalized while in custody.[182] Employing the *Johnson v. Glick* test, the court noted that the question before it was whether police questioning at gunpoint was so conscience shocking as

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[176] *Id.*

[177] *Id.*

[178] *Id.*

[179] *Wilkins*, 872 F.2d at 194.

[180] *Id.*

[181] *See id.* There is considerable support among commentators for this approach. *See* H.L. "Mike" McCormick, *Excessive Force Claims Under the Fourteenth Amendment*, 29 URB. LAW. 69, 72 (1997). For example, one commentator states:

> The logical basis for application of the Fourteenth Amendment to excessive force claims is the Amendment's prohibition against punishment without due process. . . . [S]uch excessive force violates the detainee's substantive due process rights. In the case of a suspect who has been handcuffed and placed in a police cruiser, any use of force thereafter could very well constitute "punishment" prior to conviction in violation of the Fourteenth Amendment. . . . The federal courts of appeals continue to properly apply the Fourteenth Amendment substantive due process standard in the context of persons in custody awaiting trial.

Id.; *see also* Phillips, *supra* note 71, at 557 (noting that the most important set of protections for pretrial detainees stems from the Fourteenth Amendment as a matter of substantive due process). *But see* Connuck, *supra* note 133, at 751 (noting that the substantive due process test is internally inconsistent because it simultaneously requires both an objective and a subjective analysis; that is, its first two factors, the need for force and the relationship between this need and the amount of force used, call for a determination of whether the police conduct was objectively unreasonable, whereas the fourth factor requires an examination of the officer's subjective intent).

[182] *Wilkins*, 872 F.2d at 194.

to constitute a deprivation of liberty within the meaning of the Due Process Clause.[183]

Applying similar reasoning, in 1993, in *Valencia v. Wiggins*, the Fifth Circuit Court of Appeals held that the Due Process Clause of the Fourteenth Amendment provides the exclusive constitutional standard protecting pretrial detainees from excessive force.[184] There, Raul Jose Valencia claimed that three weeks into his pretrial detention for drug charges, jail officials choked him to the point of unconsciousness, and upon his awakening, handcuffed and beat him.[185] The court held that the Fourteenth Amendment was the appropriate standard because the force was applied after the incidents of arrest were completed, after the plaintiff had been released from the custody of his arresting officer, and after he had been in detention awaiting trial for a significant period of time.[186]

The court next cited three justifications for its refusal to apply the Fourth Amendment to Valencia's claim.[187] First, the court held, the Fourth Amendment provides weak textual support for an extension to pretrial detainees.[188] Because it protects against unreasonable "seizures," the court noted, the Fourth Amendment is directed to the initial act of restraining an individual's liberty.[189] According to the court, the three-week duration of Valencia's detention made it especially clear that his seizure had ended.[190]

The second justification the *Wiggins* court advanced for its refusal to extend the Fourth Amendment to the post-arrest context centered on the U.S. Supreme Court's unwillingness to do so in similar contexts.[191] For example, in *Bell v. Wolfish*, the court noted, the U.S. Supreme Court was unwilling to hold that a pretrial detainee had a privacy interest in his person protected by the Fourth Amendment.[192] The third justification the court gave was the U.S. Supreme Court's

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[183] *See id.* at 195.

[184] 981 F.2d 1440, 1445 (5th Cir. 1993).

[185] *Id.* at 1442.

[186] *Id.* at 1444.

[187] *Id.*

[188] *Id.*

[189] *Wiggins*, 981 F.2d at 1444.

[190] *Id.*

[191] *Id.*

[192] *Id.*; *see also* Bell v. Wolfish, 441 U.S. 520, 557 (1979). Similarly, the *Wiggins* court observed, in *Hudson v. Palmer*, the U.S. Supreme Court concluded that the Fourth Amendment does not protect a prisoner's privacy interest in his cell or his possessory interest in personal property contained in his cell. *Wiggins*, 981 F.2d at 1444 (citing Hudson v. Palmer, 468 U.S. 517, 526 (1984)).

explicit recognition in *Graham* that the Fourteenth Amendment provides a constitutional basis for pretrial detainees' excessive force claims.[193] The court noted that although *Graham* left open the question of whether the Fourth Amendment applies post-arrest, it did hold that the Due Process Clause shields pretrial detainees from the use of excessive force that amounts to punishment.[194]

More recently, in 1997, in *Riley v. Dorton*, the Fourth Circuit Court of Appeals also held that the Fourteenth Amendment's Due Process Clause provides the exclusive standard governing pretrial detainees' excessive force claims.[195] At issue there was Charles Riley's claim that police officers beat him at a booking facility following his arrest.[196] Rejecting Riley's suggestion that the Fourth Amendment governed his claim, the court emphasized that the events at issue took place two hours and almost one hundred miles from the time and place of his arrest.[197] The court declined to apply the Fourth Amendment until an arrestee leaves his or her arresting officer's custody because that approach makes Fourth Amendment coverage depend on the fortuity of how long an arresting officer happens to remain with a suspect.[198]

In holding that post-arrest excessive force claims are governed exclusively by the Due Process Clause, the court noted that a deprivation of liberty must be distinguished from a condition of detention.[199] The court observed that, in evaluating the constitutionality of such conditions, the U.S. Supreme Court in *Bell* specifically directed that the proper inquiry is whether those conditions or restrictions amount to punishment of the detainee under the Due Process Clause.[200] According to the *Riley* court, this interpretation results in the best fit with the body of U.S. Supreme Court precedent interpreting the Fourth Amendment as governing the initial decision to detain the accused, and interpreting a seizure as a single act, not a continuing process.[201]

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[193] *Wiggins*, 981 F.2d at 1444.

[194] *Id.*

[195] 115 F.3d 1159, 1166 (4th Cir. 1997).

[196] *Id.* at 1160.

[197] *Id.* at 1161.

[198] *Id.* at 1164.

[199] *Id.* at 1162.

[200] *Riley*, 115 F.3d at 1162.

[201] *Id.* at 1163 (citing California v. Hodari D., 499 U.S. 621, 625 (1991); *Bell*, 441 U.S. at 533–34)).

B. *The Continuing Seizure Approach: The Fourth Amendment Continues to Provide Protection in the Post-Arrest Context*

In contrast to those courts relying exclusively on the Fourteenth Amendment to adjudicate excessive force claims in the post-arrest context, other circuits have interpreted the Fourth Amendment to provide concurrent protection.[202] For example, in 1997, in *United States v. Johnstone*, the Third Circuit Court of Appeals held that the Fourth Amendment continues to provide protection after a suspect is taken into custody.[203] The case involved a suspect's allegation that his arresting officer beat him in a stationhouse garage following his arrest.[204] The defendant argued that the district court erred by applying the Fourth Amendment because the arrest was over when he applied the force at issue.[205] Without determining the precise point at which an arrest ends and pretrial detention begins, the court adopted the continuing seizure concept.[206] According to the court, the stationhouse beating occurred while the arrest was still in progress and was therefore governed by the Fourth Amendment as required by *Graham*.[207]

The *Johnstone* court interpreted *Graham* to hold that an arrest is a continuing event because the force used against Graham occurred after police took him into custody.[208] In holding that the defendant committed the assault during the arrest, the *Johnstone* court observed that a seizure can be a process or a continuum, which is not necessarily a discrete moment of initial arrest.[209] The court read *Graham* to hold that a person can remain free for purposes of the Fourth Amendment for some time after being taken into police custody.[210] Thus, the seizure did not automatically end at the moment of arrest and Fourth Amendment protection continued beyond that point.[211]

Similarly, in 1998, in *Moore v. Novak*, the Eighth Circuit Court of Appeals found that the Fourth Amendment continues to protect the accused from excessive force in the post-arrest context.[212] There, Fre-

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[202] *See, e.g.*, Robins v. Harum, 773 F.2d 1004, 1009 (9th Cir. 1985).
[203] 107 F.3d 200, 206–07 (3d Cir. 1997).
[204] *Id.* at 203.
[205] *Id.* at 205.
[206] *See id.* at 205, 206–07.
[207] *See id.* at 205.
[208] *Johnstone*, 107 F.3d at 205.
[209] *Id.* at 206.
[210] *Id.* at 206–07.
[211] *See id.* at 207.
[212] *See* 146 F.3d at 535.

derick Darnell Moore claimed that following his arrest, and while his arms were handcuffed behind his back, jail corrections officers threw him to the floor and repeatedly shocked him with a stun gun until he was unconscious.[213] These events occurred after Moore's arrest had been completed and while he was securely in the custody of jail officials.[214] Despite the termination of Moore's initial seizure, the court found the proper standard governing his claim to be the reasonableness test of the Fourth Amendment.[215] According to the court, Moore was still being seized for purposes of the Fourth Amendment even though his arrest had ended and he was being held in a detention facility.[216]

In 2001, in *Fontana v. Haskin*, the Ninth Circuit Court of Appeals reaffirmed its pre-*Graham* position that the Fourth Amendment applies after an arrestee is in custody.[217] The *Haskin* court held that a seizure continues throughout the course of a criminal trial.[218] *Haskin* involved an arrestee's claim that one of her arresting officers inappropriately touched and sexually harassed her during transport to a police station.[219] The court noted that although this was not traditional excessive force, it fell within the Fourth Amendment's reasonableness standard, which forbids unreasonable intrusions of an arrestee's bodily integrity.[220]

According to the Ninth Circuit, once a seizure begins, it continues while the arrestee remains in the custody of an arresting officer and until the termination of criminal proceedings.[221] Therefore, the use of excessive force by the defendant during transport to a police station gave rise to a Fourth Amendment claim.[222] The *Haskin* court recognized that Mia Fontana's claim could have also been brought

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[213] *Id.* at 534.

[214] *Id.* at 532, 534.

[215] *See id.* at 535.

[216] *See id.*

[217] 262 F.3d 871, 879 (9th Cir. 2001).

[218] *Id.* (citing Albright v. Oliver, 510 U.S. 266, 278 (1994) (Ginsburg, J., concurring) (noting that a seizure continues throughout a criminal trial)). According to one commentator, the continuing seizure approach best achieves a balance between individual liberties and the public's interest in law enforcement because it promulgates a single objective standard. *See* Connuck, *supra* note 133, at 777. Connuck argues that consistency is better served by this objective inquiry than a Fourteenth Amendment analysis because the latter generates too much uncertainty by inquiring into an officer's subjective motivations. *Id.*

[219] 262 F.3d at 875.

[220] *Id.* at 878–79.

[221] *See id.* at 879.

[222] *See id.*

under the Fourteenth Amendment's Due Process Clause.[223] It noted, however, that because the force occurred while she was being "seized" by the police, it was better framed as a Fourth Amendment issue.[224] That is, under *Graham*, if a claim is covered by a specific constitutional provision, it should be brought under that standard rather than the doctrine of substantive due process.[225]

C. *The Hybrid Model: The Fourth Amendment Applies Until a Probable Cause Hearing*

A third approach taken by federal courts combines the continuing seizure and substantive due process approaches by applying the Fourth Amendment to post-arrest claims of excessive force until the suspect receives a probable cause hearing.[226] After that point, the Fourteenth Amendment is applied.[227] For example, in 1991, in *Austin v. Hamilton*, the Tenth Circuit Court of Appeals held that the end of an arrest does not preclude application of the Fourth Amendment.[228] There, the plaintiffs' complaint alleged that following their arrest for marijuana possession, they were repeatedly assaulted without provocation, denied water, refused restroom access, and forced to remain overnight in the clothes they subsequently soiled.[229]

At the outset of its inquiry into the appropriate constitutional standard, the *Austin* court recognized that there are different points along the "custodial continuum" along which variable constitutional standards attach.[230] This continuum runs through initial arrest, pre-hearing custody, pretrial detention, and post-conviction incarceration.[231] The court noted that although *Graham* avoided a direct pronouncement on whether the Fourth Amendment applied following

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[223] *Id.* at 881.

[224] *Haskin*, 262 F.3d at 881.

[225] *Id.* at 882.

[226] *See, e.g.*, *Austin*, 945 F.2d at 1160. According to some commentators, this is the best-reasoned approach taken by the lower federal courts. *See, e.g.*, Wayne C. Beyer, *Police Misconduct: Claims and Defenses Under the Fourteenth Amendment Due Process and Equal Protection Clauses*, 30 URB. LAW. 65, 74 (1998). According to Beyer, applying the Fourth Amendment until a probable cause hearing makes sense from both a legal and common-sense perspective because at this stage the actions of the police in seizing the individual are either ratified or rejected. *Id.* at 76 (citing Grant v. City of Twin Falls, 813 P.2d 880, 886–87 (Idaho 1991)).

[227] *See Austin*, 945 F.2d at 1160.

[228] *See id.*

[229] *Id.* at 1157.

[230] *Id.* at 1158–59.

[231] *Id.* at 1158.

an arrest, *Graham*'s recognition of the broad applicability of the Fourth Amendment led to its application to post-arrest police conduct.[232] According to the *Austin* court, despite U.S. Supreme Court precedent suggesting that Fourth Amendment protection was limited to the initial act of arrest, *Graham* reopened that question.[233]

In holding that the Fourth Amendment applies until a probable cause hearing, the court pointed out that, according to the U.S. Supreme Court's decisions in *Gerstein v. Pugh* and *County of Riverside v. McLaughlin*, the Fourth Amendment provides the standard to assess the constitutionality of prolonged, post-arrest custody of pretrial detainees.[234] The *Austin* court recognized that although this was not conclusive authority in the context of excessive force, it found it persuasive in the absence of other guiding principles.[235] The court concluded that just as the Fourth Amendment provides the applicable limitations regarding both duration and legal justification for pretrial detention, its protections also persist to restrict the treatment of pretrial detainees prior to a probable cause hearing.[236]

The *Austin* court next responded to the two arguments advanced by the Seventh Circuit in *Wilkins* against extending the Fourth Amendment to pretrial detainees.[237] The court first addressed the assertion that the Fourth Amendment issues of whether a suspect poses a danger to an arresting officer and the surrounding community are mooted once a suspect is in custody.[238] The *Austin* court held that these concerns were not inapposite because suspects remain a threat to arresting officers and nearby persons.[239] The court also noted that as escape risks, suspects remain a threat to the general community.[240]

Next, the court responded to the *Wilkins* court's objection that application of the Fourth Amendment would be an unwarranted expansion of constitutional law due to a lack of limiting principles within the Amendment itself.[241] The court observed that the same objection could be made in any excessive force context and noted that

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[232] *See Austin*, 945 F.2d at 1159.

[233] *See id.*

[234] *Id.* at 1162.

[235] *Id.*

[236] *Id.*

[237] *See Austin*, 945 F.2d at 1160 n.3.

[238] *See id.*

[239] *Id.*

[240] *Id.*

[241] *See id.* This refers to the contention that the Fourth Amendment could be used to sue an officer who merely sticks his tongue out at a suspect. *See Wilkins*, 872 F.2d at 194.

the standard of reasonableness is an adequate safeguard against trivial claims.[242]

This same approach was adopted by the Ninth Circuit, in 1996, in *Pierce v. Multonmah County*.[243] That case involved Stephanie Pierce's allegations that during the four hours she spent in jail, following her arrest for furnishing false information to a police officer, she was repeatedly assaulted by corrections officers.[244] Pierce argued that the trial court erred in utilizing the Eighth Amendment to determine whether the officers' use of force was excessive.[245] According to the court, the question before it was whether the Fourth Amendment protects an arrestee during the second custodial stage: post-arrest but pre-arraignment custody.[246]

The court noted that after *Graham*, the appropriate constitutional standard governing treatment at various stages of custody is an open question of law subject to *de novo* review.[247] The court observed that the defendant's argument that the Eighth Amendment controlled the situation was clearly erroneous because that Amendment does not attach until after conviction and sentencing.[248] To determine the applicable constitutional standard, the court held, it must determine what constitutional protection governs this particular point on the custodial continuum.[249]

The court recognized that in a prior case, it held that a seizure continues throughout the time an arrestee is in the custody of arresting officers and that any use of excessive force during this period is subject to Fourth Amendment scrutiny.[250] Pierce contended that the Fourth Amendment should also supply constitutional protection to an arrestee who is kept at a booking facility prior to a probable cause hearing or arraignment.[251] The court reasoned that in order to accept this argument, it would have to assume that a seizure continues past the point of initial arrest.[252]

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[242] *Austin*, 945 F.2d at 1160 n.3.

[243] *See* 76 F.3d 1032, 1043 (9th Cir. 1996).

[244] *Id.* at 1036.

[245] *Id.* at 1042.

[246] *See id.*

[247] *Id.*

[248] *Pierce*, 76 F.3d at 1042 (citing Graham v. Connor, 490 U.S. 386, 392 n.6 (1989) (noting that the Eighth Amendment does not apply until after conviction and sentence)).

[249] *Id.*

[250] *Id.* (citing *Robins*, 773 F.2d at 1010).

[251] *Id.* at 1042.

[252] *Id.*

Like the Tenth Circuit in *Austin*, the *Pierce* court was persuaded by the U.S. Supreme Court's decision in *Gerstein*, which applied the Fourth Amendment to assess the duration of and legal justification for pretrial detention.[253] This authority, according to the court, provided sufficient justification for assessing the conditions of such custody under the Fourth Amendment.[254] Accordingly, the court held that the Fourth Amendment sets the applicable constitutional limits on the treatment of an arrestee detained without a warrant until a probable cause hearing is provided.[255]

In 1989, in *Henson v. Thezan*, the U.S. District Court for the Northern District of Illinois adopted this same line of reasoning.[256] According to Kenneth Ray Henson's complaint, after his arrest for suspicion of rape and attempted murder, his arresting officers threw him down a flight of stairs before beating him in an interrogation room.[257] Henson argued that because the officer in *Graham* exerted most of the force at issue after the suspect was in police custody, the U.S. Supreme Court implicitly held that a seizure continues beyond the point of arrest.[258] Therefore, Henson argued, the Fourth Amendment properly governed his claim.[259]

In addressing the defendant's reliance on *Wilkins*, the court agreed that *Graham* calls *Wilkins*'s analysis into question.[260] In *Wilkins*, the Seventh Circuit drew a line between seizure and detention by holding that the former ends when the police have the individual in custody.[261] The court noted that *Graham* applied the Fourth Amendment despite the fact that the plaintiff was in custody.[262] In other words, according to the *Henson* court, *Graham* undercut the view that a seizure ends at the moment the police gain custody and control of the suspect.[263]

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[253] *See Pierce*, 76 F.3d at 1043.

[254] *See id.*

[255] *Id.*

[256] *See* 717 F. Supp. 1330, 1336 (N.D. Ill. 1989).

[257] *Id.* at 1331.

[258] *See id.* at 1334.

[259] *See id.*

[260] *Id.*

[261] *Henson*, 717 F. Supp. at 1334.

[262] *Id.*

[263] *Id.* at 1335 ("*Graham* seems to hold, contrary to *Wilkins*, that when the police beat an individual senseless after gaining control over (initially seizing) him, the Fourth Amendment still can provide the appropriate framework for assessing the lawfulness of their conduct.").

Similar to the courts in *Austin* and *Pierce*, the *Henson* court acknowledged a parallel to *Gerstein*, in which the U.S. Supreme Court applied the Fourth Amendment to assess the duration of post-arrest, pre-arraignment custody.[264] The court noted that although *Graham* made no mention of *Gerstein*, its willingness to apply the Fourth Amendment to the officer's use of force after Graham was in custody, makes it more likely that the Fourth Amendment should at least apply until an arrestee has appeared before a judicial officer for a probable cause hearing.[265]

As the foregoing discussion shows, the federal circuit courts of appeals have adopted divergent approaches to adjudicate the excessive force claims of pretrial detainees.[266] Each approach varies with respect to whether the Fourth Amendment applies only to the precise moment an individual is seized or if it also applies to events beyond that point.[267]

Among those courts interpreting the Fourth Amendment to apply beyond initial arrest under the continuing seizure and hybrid approaches, there is additional disagreement over precisely how long that Amendment continues to apply.[268] The next Part of this Note argues that those jurisdictions adopting the hybrid approach employ the most practical and accurate reading of the Fourth and Fourteenth Amendments as they have been expounded by the U.S. Supreme Court.[269]

IV. Analysis: The Hybrid Approach Is the Most Consistent with U.S. Supreme Court Precedent and the Most Institutionally Feasible

The hybrid approach is the best-reasoned and most practical method of adjudicating the excessive force claims of post-arrest, pretrial suspects.[270] This model is the most faithful to recent U.S. Supreme Court precedents interpreting the Fourth and Fourteenth Amendments.[271] Since *Graham v. Connor*, the Court has clearly manifested its intention to expand Fourth Amendment protections and to

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[264] *See id.*

[265] *See id.* at 1335–36.

[266] *See supra* notes 160–265 and accompanying text.

[267] *Compare Haskin*, 262 F.3d at 879, *with Wilkins*, 872 F.2d at 192.

[268] *Compare Haskin*, 262 F.3d at 879, *with Austin*, 945 F.2d at 1160.

[269] *See infra* notes 270–377 and accompanying text.

[270] *See infra* notes 275–377 and accompanying text.

[271] *See supra* notes 111–153 and accompanying text.

limit the availability of substantive due process claims.[272] The hybrid approach best achieves this dual aim.[273] This approach also has superior practicality because: 1) it supplies a bright line of constitutional demarcation; 2) by making use of already required judicial proceedings, it imposes no additional procedural barriers on law enforcement officials; and 3) due to its furnishing of judicial approval of pretrial detention, it supplies a logical point at which to impose a more demanding burden of proof on plaintiffs under the Fourteenth Amendment.[274]

A. *Courts Holding That Fourth Amendment Protection Ends with the Completion of an Arrest Ignore U.S. Supreme Court Precedent*

Lower federal courts refusing to apply the Fourth Amendment past the point of initial arrest often rely on the argument that its application to pretrial detainees would be an unwarranted expansion of constitutional law.[275] This view, however, ignores U.S. Supreme Court precedents that have already interpreted the Fourth Amendment to protect this class of individuals.[276] The U.S. Supreme Court's decisions in *Gerstein v. Pugh* and *County of Riverside v. McLaughlin* expanded the scope of Fourth Amendment protection to the area of pretrial detention.[277] These cases provide a § 1983 cause of action under the Fourth Amendment for pretrial suspects detained without probable cause hearings.[278] Courts citing these cases have properly noted that because they did not relate to excessive force they are only persuasive authority.[279] These courts, however, have failed to acknowledge the dicta in these cases that show that their reasoning is directly applicable to excessive force claims.[280]

Although *Gerstein* and *McLaughlin* pertained to the duration of, and legal justification for, prolonged custody of pretrial detainees, the Court discussed the Fourth Amendment in broader terms.[281] The Court explicitly recognized that the Fourth Amendment applies to

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[272] *See* Albright v. Oliver, 510 U.S. 266, 271–72 (1994); County of Riverside v. McLaughlin, 500 U.S. 44, 56 (1991).

[273] *See infra* notes 275–377 and accompanying text.

[274] *See infra* notes 347–377 and accompanying text.

[275] *See* Wilkins v. May, 872 F.2d 190, 194 (7th Cir. 1989).

[276] Pierce v. Multnomah County, 76 F.3d 1032, 1043 (9th Cir. 1996).

[277] *See, e.g.*, Austin v. Hamilton, 945 F.2d 1155, 1160 (10th Cir. 1991).

[278] *See McLaughlin*, 500 U.S. at 56; Gerstein v. Pugh, 420 U.S. 103, 114 (1975).

[279] *See Austin*, 945 F.2d at 1160.

[280] *See Gerstein*, 420 U.S. at 125 n.27.

[281] *See McLaughlin*, 500 U.S. at 56; *Gerstein*, 420 U.S. at 125 n.27.

the entire criminal justice system, not merely one aspect of it.[282] The Court observed that the requirements of the Fourth Amendment apply broadly to the rights of suspects incident to their detention pending trial, not simply the duration of and justification for that detention.[283] Most importantly, the Court noted that the standards for pretrial detention, not merely the procedures, are derived from the Fourth Amendment.[284] Thus, after *Gerstein* and *McLaughlin*, it is difficult to maintain that the Fourth Amendment is inapplicable to pretrial detainees' excessive force claims.[285]

One possible argument against *Gerstein*'s support for the Court's effort to expand Fourth Amendment protection to pretrial detainees is that it was decided before *Graham*, which explicitly left open the question of whether pretrial detainees were protected by the Fourth Amendment.[286] Two years after *Graham*, in *McLaughlin*, however, the Court clarified its position by reaffirming and expanding upon *Gerstein*.[287]

The *McLaughlin* Court explicitly recognized that the Fourth Amendment continues to protect pretrial detainees past the point of initial arrest.[288] Indeed, the Court held that under the Fourth Amendment, it may be permissible in certain cases to wait four days before providing a detainee with a probable cause hearing.[289] Thus, the Court acknowledged that the Fourth Amendment can protect pretrial detainees up to four days following an arrest.[290] Although *Graham* cast doubt on whether the Court would continue to apply the Fourth Amendment past the point of initial arrest, *McLaughlin* reestablished the Court's broad interpretation of the Amendment's breadth.[291]

It can also be argued that the probable cause determinations required by *Gerstein* and *McLaughlin* relate back to the initial act of arrest.[292] This argument suggests that a probable cause determination is

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[282] *Gerstein*, 420 U.S. at 125 n.27.

[283] *Id.*

[284] *Id.* at 111.

[285] *See McLaughlin*, 500 U.S. at 56; *Gerstein*, 420 U.S. at 125 n.27.

[286] Graham v. Connor, 490 U.S. 386, 395 n.10 (1989). At first glance, this seems to be a plausible argument, especially in light of the significant changes in the Court's membership from *Gerstein* to *Graham*. *See supra* note 119 and accompanying text.

[287] *See McLaughlin*, 500 U.S. at 56.

[288] *See id.*

[289] *See id.* at 58–59.

[290] *See id.*

[291] *See id.*

[292] *See McLaughlin*, 500 U.S. at 50; *Gerstein*, 420 U.S. at 111.

not concerned with the standards or conditions of pretrial detention but focuses instead on whether there was an adequate legal justification for the arrest and subsequent detention.[293] Therefore, it is suggested that these cases do not apply to the conditions of pretrial detention such as the use of force.[294] This argument, however, is unpersuasive.[295]

Although a probable cause determination examines the circumstances surrounding an arrest, that does not explain why, according to the U.S. Supreme Court, the act of detaining an individual without such a hearing, days after an arrest, is itself an independent violation of the Fourth Amendment.[296] In *Gerstein* and *McLaughlin*, Fourth Amendment claims did not arise from the arrests themselves but from the continued detention of suspects without hearings.[297] This is convincing proof that the U.S. Supreme Court interprets the Fourth Amendment to provide protection past the point of arrest regarding the conditions of pretrial detention.[298]

A final argument against application of the Fourth Amendment to pretrial detainees' excessive force claims is that *Gerstein* and *McLaughlin* involved interpretations of the Fourth Amendment's probable cause requirement.[299] This argument notes that in cases of excessive force, it is the Fourth Amendment's reasonable seizure requirement that is actually violated.[300] This portion of the Amendment, it is suggested, is not advanced by *Gerstein* and *McLaughlin* into the period of pretrial detention.[301] This argument, however, ignores the fact that the U.S. Supreme Court has historically interpreted the Fourth Amendment's probable cause and reasonable seizure requirements in tandem.[302] Consequently, it is illogical to argue that one requirement of the Fourth Amendment can be applied to pretrial detainees to the exclusion of others.[303]

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[293] *See McLaughlin*, 500 U.S. at 50; *Gerstein*, 420 U.S. at 111.
[294] *See McLaughlin*, 500 U.S. at 50; *Gerstein*, 420 U.S. at 111.
[295] *See infra* notes 296–298 and accompanying text.
[296] *See McLaughlin*, 500 U.S. at 56; *Gerstein*, 420 U.S. at 114.
[297] *See McLaughlin*, 500 U.S. at 56; *Gerstein*, 420 U.S. at 114.
[298] *See McLaughlin*, 500 U.S. at 55; *Gerstein*, 420 U.S. at 114.
[299] *See Wilkins*, 872 F.2d at 193.
[300] *See id.*
[301] *See id.*
[302] *See, e.g.*, Katz v. United States, 389 U.S. 347, 356–57 (1967).
[303] *See id.*

B. *Exclusive Reliance on the Doctrine of Substantive Due Process Conflicts with U.S. Supreme Court Precedent Limiting That Doctrine*

In addition to ignoring the U.S. Supreme Court's recent Fourth Amendment jurisprudence, courts relying exclusively on the doctrine of substantive due process in the post-arrest, pretrial context disregard the U.S. Supreme Court's recent efforts to limit the availability of substantive due process claims.[304] In *Parratt v. Taylor*, *Graham*, and *Albright v. Oliver*, the U.S. Supreme Court clearly expressed its growing distaste for the vague and open-ended area of substantive due process law where a more specific constitutional provision might apply.[305] In each of these cases, the Court explicitly acknowledged its intent to limit the availability of substantive due process claims.[306]

In *Graham* the Court openly criticized the lower federal courts for utilizing substantive due process analyses where the Fourth Amendment could have been applied instead.[307] This criticism continued in *Albright*, in which the Court described substantive due process as an impetus for irresponsible judicial decision making.[308] Justice Scalia wrote separately in *Albright* to emphasize that the pretrial period was no longer an area where substantive due process claims could be maintained against law enforcement officials.[309] According to Scalia, this foreclosure stems from the availability of more specific constitutional protections.[310] Justice Kennedy also wrote separately in *Albright* to point out that the Court's recent limitations on the doctrine of substantive due process were not a series of isolated decisions but part of a cohesive pattern that sought to minimize the circumstances in which such claims could be advanced.[311] According to Kennedy, this pattern began with the Court's 1981 decision in *Parratt*.[312]

One possible response to Kennedy's contention is that this shrinkage of substantive due process does not reach pretrial detainees' excessive force claims due to *Graham*'s incorporation of *Bell v. Wolfish*.[313] In leaving open the question of whether the Fourth

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[304] *See, e.g.*, *Albright*, 510 U.S. at 271–72.

[305] *Albright*, 510 U.S. at 271–72; *Graham*, 490 U.S. at 395; Parratt v. Taylor, 451 U.S. 527, 543 (1981).

[306] *See, e.g.*, *Albright*, 510 U.S. at 271–72.

[307] 490 U.S. at 393.

[308] *See* 510 U.S. at 271–72.

[309] *See id.* at 276 (Scalia, J., concurring).

[310] *See id.* (Scalia, J., concurring).

[311] *See id.* at 284 (Kennedy, J., concurring).

[312] *See id.* (Kennedy, J., concurring).

[313] *See Graham*, 490 U.S. at 395 n.10.

Amendment protects pretrial detainees from excessive force, the *Graham* Court held that under *Bell*, the Due Process Clause protects pretrial detainees from the use of excessive force that amounts to punishment.[314] Thus, despite the Court's efforts to limit the availability of substantive due process claims in other areas, it is argued, the Court chose not to do so in the context of pretrial detainees' excessive force claims.[315] The persuasiveness of this argument is diminished, however, when the class of individuals protected in *Bell* by the Fourteenth Amendment is distinguished from individuals detained at earlier stages on the custodial continuum.[316]

The plaintiffs protected under the Fourteenth Amendment in *Bell* were individuals housed at a facility specifically built for the long-term housing of detainees who, for security reasons, were required to remain in custody until trial.[317] As the Court pointed out, this class of individuals shares more in common with convicted criminals than with post-arrest detainees merely in custody for booking procedures.[318] The Court acknowledged that the Eighth Amendment's proscription of cruel and unusual punishment could not protect these plaintiffs because that Amendment did not apply until after conviction and sentencing.[319]

Instead, the *Bell* Court relied on the Due Process Clause of the Fourteenth Amendment to provide pretrial detainees with protection analogous to that supplied by the Eighth Amendment.[320] As one court applying the *Bell* standard observed, it is impractical to distinguish the claims brought by the plaintiffs in *Bell* from the claims of convicted prisoners due to the similarity of the conditions surrounding their confinement.[321] Thus, although using the broad term "pretrial de-

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[314] *Id.*

[315] *See id.*

[316] *Compare* Bell v. Wolfish, 441 U.S. 520, 524–25 (1975) (plaintiffs protected by the Fourteenth Amendment were pretrial detainees required to remain in custody until trial; these detainees were housed in a penal facility for extended periods of time), *with Pierce*, 76 F.3d at 1036 (plaintiff receiving Fourth Amendment protection was also technically a "pretrial detainee" but was only kept in custody for four hours until administrative booking procedures were completed).

[317] 441 U.S. at 524.

[318] *See id.* at 546 n.28. Indeed, the housing facility in *Bell* not only housed pretrial detainees but convicted inmates as well. *Id.* at 524.

[319] *See id.* at 535 n.16.

[320] *Id.*; *see* Beyer, *supra* note 226, at 69 (noting that the *Bell* Court discusses the Eighth Amendment at length because the due process standard it formulates is borrowed from the Eighth Amendment).

[321] Valencia v. Wiggins, 981 F.2d 1440, 1446 (5th Cir. 1993).

tainee,"[322] the *Bell* Court referred specifically to those detainees kept in detention after administrative booking for extended periods of time prior to trial.[323] Therefore, foreclosing the availability of substantive due process claims to pretrial detainees at earlier stages on the custodial continuum does not conflict with the holdings of *Bell* or *Graham*.[324]

C. *The Hybrid Approach Accounts for Both Lines of U.S. Supreme Court Precedent Expanding the Fourth Amendment and Limiting the Availability of Substantive Due Process Claims*

The hybrid approach adopted by the lower federal courts in adjudicating the excessive force claims of pretrial detainees is able to synthesize both lines of precedent discussed above.[325] Those courts refusing to apply the Fourth Amendment past the point of initial arrest are unable to account for the U.S. Supreme Court's rulings that the Fourth Amendment may apply for several days beyond that point.[326] Additionally, courts relying exclusively on the doctrine of substantive due process ignore the efforts by the U.S. Supreme Court to limit that doctrine's availability where a more specific constitutional provision may apply.[327] The Court's decisions in *Albright*, *Gerstein*, and *McLaughlin* clearly demonstrate that the Fourth Amendment does, in fact, apply to pretrial detainees.[328]

Equally flawed are those courts that adopt the "continuing seizure" approach.[329] Although this approach properly recognizes that a seizure continues past the point of initial arrest, it is unable to supply a clear stopping point to Fourth Amendment protection.[330] Taken to its logical conclusion, this approach envisions a seizure lasting from the time a suspect is arrested until the time he or she is either acquitted or convicted.[331] This mode of analysis is unable to account for the U.S. Supreme Court's recognition in *Graham* that under *Bell*, a due

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[322] *See* cases cited *supra* note 316.
[323] *See* 441 U.S. at 524.
[324] *See id.*
[325] *See supra* notes 111–153 and accompanying text.
[326] *See Gerstein*, 420 U.S. at 125 n.27.
[327] *Graham*, 490 U.S. at 395.
[328] *Albright*, 510 U.S. at 274; *McLaughlin*, 500 U.S. at 56; *Gerstein*, 420 U.S. at 125 n.27.
[329] *See, e.g.*, Fontana v. Haskin, 262 F.3d 871, 879 (9th Cir. 2001).
[330] *See id.*
[331] *See, e.g.*, *Albright*, 510 U.S. at 279 (Ginsburg, J., concurring).

process analysis governs pretrial detainees' excessive force claims after prolonged periods of detention.[332]

Proponents of the continuing seizure model may argue that *Bell* and *Graham* do not present a problem because under their approach, the Fourth and Fourteenth Amendments are interpreted to provide concurrent protection.[333] Therefore, it may be suggested, a due process excessive force claim may be advanced contemporaneously with a Fourth Amendment excessive force claim.[334] This argument, however, ignores the *Graham* Court's admonition that where a Fourth Amendment claim is available, a plaintiff cannot also assert a substantive due process claim.[335] Thus, the Court in *Graham* implicitly reasoned that plaintiffs bringing excessive force claims under *Bell*'s due process standard could not also avail themselves of a Fourth Amendment claim.[336]

Unlike the continuing seizure and substantive due process approaches, the hybrid approach accounts for U.S. Supreme Court precedent regarding both the Fourth Amendment and the doctrine of substantive due process.[337] Under the hybrid approach, Fourth Amendment protection ends when a suspect is brought before a judicial officer for a probable cause hearing.[338] After that point, a detainee's § 1983 claim must be brought under the Fourteenth Amendment.[339]

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[332] *See Graham*, 490 U.S. at 395 n.10.

[333] *See, e.g.*, *Haskin*, 262 F.3d at 881.

[334] *See id.*

[335] 490 U.S. at 395.

[336] *See id.* One response to this argument is that the *Bell* Court's due process standard incorporated by *Graham* is one of procedural, not substantive, due process. *See* MacDonald, *supra* note 25, at 183–84. Therefore, it may be suggested, the availability of such a claim to pretrial detainees would not conflict with the Court's efforts to limit substantive due process claims. *See id.* This argument, however, ignores the fact that the primary issue in procedural due process cases is whether a plaintiff was deprived of a protected liberty interest without a hearing. *See* Beyer, *supra* note 226, at 143. *Graham*, however, was not concerned with any pre- or post-excessive force hearing. *See* Phillips, *supra* note 71, at 559. Rather, the Court was concerned with the substantive rights of detainees to be free from the arbitrary beatings, a hallmark of substantive due process. *See* McCormick, *supra* note 181, at 72 (characterizing the *Bell* standard as one of substantive due process). Indeed, it would be quite unusual for the Court to declare that force that is excessive somehow becomes permissible because a hearing has been provided. *See id.* Thus, the most feasible reading of the *Graham* Court's reference to Fourteenth Amendment protections is one of substantive due process. *See id.*

[337] *See supra* notes 111–153 and accompanying text.

[338] *See Austin*, 945 F.2d at 1160.

[339] *See id.*

This mode of analysis is able to account for the U.S. Supreme Court's holdings in *Gerstein* and *McLaughlin* that the Fourth Amendment applies to pretrial detainees until a probable cause hearing.[340] Thus, the hybrid approach renders arguments inapposite that such application of the Fourth Amendment is an unwarranted expansion of constitutional law.[341] Additionally, by foreclosing the availability of a substantive due process claim prior to a probable cause hearing, the hybrid approach complies with the U.S. Supreme Court's efforts in *Parratt*, *Graham*, and *Albright* to eliminate substantive due process claims where a more specific constitutional claim is available.[342]

Finally, the hybrid approach is able to account for the Court's pronouncements in *Bell* and *Graham* that after a prolonged period of custody, pretrial detainees' excessive force claims must be brought under the Due Process Clause of the Fourteenth Amendment.[343] Under the hybrid approach, Fourth Amendment protections end after a probable cause hearing.[344] Thus, that *Graham* and *Bell* require individuals detained for extended periods to bring excessive force claims under the Fourteenth Amendment is perfectly consistent with the hybrid approach.[345] This approach would also apply the Fourteenth Amendment because under *Gerstein* and *McLaughlin* those suspects would have already received probable cause hearings.[346]

D. *The Hybrid Model Is the Most Practical Approach*

One of the major criticisms of applying the Fourth Amendment in the post-arrest context is that there is no clear and non-arbitrary point at which to terminate its protections.[347] According to the Fourth Circuit in *Riley v. Dorton*, the most logical point at which to cut off Fourth Amendment protections following an arrest would be when the suspect leaves the custody of his or her arresting officer.[348] As the *Riley* court pointed out, however, this is not a bright line of constitutional demarcation because it makes application of the Fourth Amendment depend on the fortuity of how long an arresting officer

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[340] *McLaughlin*, 500 U.S. at 56; *Gerstein*, 420 U.S. at 114.
[341] *Austin*, 945 F.2d at 1160.
[342] *Albright*, 510 U.S. at 271–72; *Graham*, 490 U.S. at 395; *Parratt*, 451 U.S. at 543.
[343] *See Graham*, 490 U.S. at 395 n.10.
[344] *Pierce*, 76 F.3d at 1043.
[345] *See McLaughlin*, 500 U.S. at 56.
[346] *See id.*
[347] *See, e.g.*, Riley v. Dorton, 115 F.3d 1159, 1164 (4th Cir. 1997).
[348] *See id.* at 1162, 1163–64.

happens to remain with the suspect.[349] This perceived absence of a practical point at which to cut off Fourth Amendment protection led the court to rely exclusively on the Fourteenth Amendment.[350]

The hybrid model, however, cannot be criticized for failing to provide a clear stopping point of Fourth Amendment protection.[351] Under this approach, Fourth Amendment protections end when a suspect receives a probable cause hearing.[352] This line is neither fortuitous nor arbitrary, in light of the U.S. Supreme Court's decisions in *Gerstein* and *McLaughlin*, which clearly set out the guidelines for when a probable cause hearing must be granted.[353] In most cases, according to the Court, a probable cause hearing will be granted within forty-eight hours of arrest.[354] Therefore, the hybrid model eliminates the opportunity for police to avail themselves of the more deferential Fourteenth Amendment standard by immediately taking a suspect from the custody of his or her arresting officer.[355]

The hybrid model's provision of a clear point of constitutional demarcation fulfills the need recognized by the U.S. Supreme Court for readily applicable bright-line rules in the Fourth Amendment context.[356] According to the Court, the need for bright-line rules in this area relates to the Fourth Amendment's purpose of regulating police behavior.[357] That is, Fourth Amendment doctrine must be expressed in terms that are readily applicable by the police in the context of their daily activities.[358] The hybrid model, through its utilization of a bright line at a preexisting point in the criminal process, fulfills this end.[359]

The hybrid model's utilization of procedures already required by U.S. Supreme Court precedent demonstrates its institutional practicality in an additional way.[360] In holding that the Fourth Amendment requires a probable cause hearing prior to extended detention, the Court in *Gerstein* expressed concern with imposing cumulative hear-

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[349] *Id.* at 1164.

[350] *See id.* at 1166.

[351] *See Pierce*, 76 F.3d at 1043.

[352] *Id.*

[353] *McLaughlin*, 500 U.S. at 56; *Gerstein*, 420 U.S. at 114.

[354] *See McLaughlin*, 500 U.S. at 56.

[355] *See Riley*, 115 F.3d at 1164.

[356] *See* New York v. Belton, 453 U.S. 454, 458 (1981); Mitchell W. Karsch, *Excessive Force and the Fourth Amendment: When Does Seizure End?*, 58 FORDHAM L. REV. 823, 827–29 (1990).

[357] *Belton*, 453 U.S. at 458.

[358] *See id.*

[359] *See id.*

[360] *See Gerstein*, 420 U.S. at 113.

ing requirements on law enforcement.[361] According to the Court, this concern could be met by the States' ability to combine the probable cause hearing with preexisting procedural requirements such as bail hearings or arraignments.[362]

In contrast to *Gerstein*, which involved a new procedure to be integrated with established ones, the hybrid model merely makes additional use of an established procedure.[363] Thus, the hybrid approach is able to account for the *Gerstein* Court's concern with imposing cumulative procedural requirements on law enforcement.[364] The hybrid approach is even better suited to address this concern because it adds nothing new to criminal procedure.[365] Although the continuing seizure and substantive due process approaches do not impose additional procedural requirements on law enforcement, they lack the additional advantage of complying with U.S. Supreme Court precedents as the hybrid model does.[366] Thus, the hybrid model is the superior approach because it both harmonizes U.S. Supreme Court precedents and has a negligible effect on criminal procedure.[367]

Finally, the hybrid model supplies the most practical approach because it provides a logical point at which to terminate Fourth Amendment protections and impose a more demanding burden of proof under the Fourteenth Amendment.[368] Under this approach, Fourth Amendment protections end when a suspect receives a probable cause hearing.[369] This line of constitutional division is inherently sensible from a practical standpoint.[370] At a probable cause hearing, a judicial officer either ratifies or rejects the actions of the police in seizing a suspect.[371] At this stage, state officials also decide whether to charge a suspect, and if so, whether to release or detain him or her until trial.[372]

In the period before a probable cause hearing, however, a suspect's custody may be based solely on the discretion of a single police

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[361] *See id.*

[362] *See id.* at 123–24.

[363] *See, e.g.*, *Pierce*, 76 F.3d at 1043.

[364] *See* 420 U.S. at 113.

[365] *See Pierce*, 76 F.3d at 1043.

[366] *See supra* notes 111–153 and accompanying text.

[367] *See id.*

[368] *See* Beyer, *supra* note 226, at 76 (citing Grant v. City of Twin Falls, 813 P.2d 880, 886–87 (Idaho 1991)).

[369] *Pierce*, 76 F.3d at 1043.

[370] *See* Beyer, *supra* note 226, at 76 (citing *Grant*, 813 P.2d at 886–87).

[371] *Id.*

[372] *Id.*

officer.[373] At that point it remains to be seen if the arrest should have even occurred.[374] At this stage, it makes intuitive sense to subject claims of excessive force to the less deferential Fourth Amendment standard because the custody lacks judicial sanction.[375] In the period following a probable cause hearing, however, the propriety of an arrest and continued detention have been judicially assessed.[376] Judicial approval of arrest and continued detention thus marks a practical point at which to impose the more demanding burden of proof upon plaintiffs under the Fourteenth Amendment because it provides an objective evaluation of police behavior.[377]

Conclusion

The hybrid model is the soundest method of adjudicating the excessive force claims of post-arrest, pretrial detainees. Unlike the substantive due process and continuing seizure models, this approach is able to account for the U.S. Supreme Court's recent expansions of Fourth Amendment protections and its limitations on the availability of substantive due process claims. Additionally, the hybrid model is an inherently practical approach to adjudicating these claims. This practicality stems from its ability to supply a bright line of constitutional demarcation and its use of preexisting judicial proceedings that impose no further procedural burdens on law enforcement. The hybrid model's provision of judicial approval of an arrest and continued detention further demonstrates its practicality because such approval provides a logical point at which to impose a more demanding burden of proof under the Fourteenth Amendment. Because of the hybrid model's doctrinal consistency and inherent practicality, it is the approach best suited to illuminate the constitutional twilight zone.

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[373] *See id.*

[374] *See id.*

[375] *See* Beyer, *supra* note 226, at 76 (citing *Grant*, 813 P.2d at 886–87).

[376] *See id.*

[377] *See id.*