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Excessive Force Claims: Is Significant Bodily Injury the Sine Qua Non to Proving a Fourth Amendment Violation?

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EXCESSIVE FORCE CLAIMS: IS SIGNIFICANT BODILY INJURY THE *SINE QUA NON* TO PROVING A FOURTH AMENDMENT VIOLATION?

INTRODUCTION

Before the Supreme Court's recent decision in *Graham v. Connor*,[1] federal courts were divided[2] regarding the specific constitutional right implicated when a plaintiff alleged that a police officer used excessive force[3] during arrest. The *Graham* Court resolved that uncertainty. It held that all claims[4] alleging that law enforcement officials[5] used excessive force in the course of arrest, investigatory stop or other "seizure" should be ana-

1. 109 S. Ct. 1865 (1989).

2. Before *Graham*, most federal courts looked to the fourteenth amendment, analyzing excessive force claims under a substantive due process standard. *See* Rinker v. County of Napa, 831 F.2d 829, 831-32 (9th Cir. 1987); Dale v. Janklow, 828 F.2d 481, 484-85 (8th Cir. 1987), *cert. denied* 485 U.S. 1014 (1988); McRorie v. Shimoda, 795 F.2d 780, 785-86 (9th Cir. 1986); Hewett v. Jarrard, 786 F.2d 1080, 1084-85 (11th Cir. 1986); Rutherford v. City of Berkeley, 780 F.2d 1444, 1446 (9th Cir. 1986); Fundiller v. City of Cooper City, 777 F.2d 1436, 1441 (11th Cir. 1985); Gilmere v. City of Atlanta, 774 F.2d 1495, 1500-01 (11th Cir. 1985), *cert. denied*, 476 U.S. 1115 (1986); Putman v. Gerloff, 639 F.2d 415, 420-22 (8th Cir. 1981); Eng v. Coughlin, 684 F. Supp. 56, 63 (S.D.N.Y. 1988).

Other courts analyzed excessive force claims applying fourth amendment principles. *See* Martin v. Gentile, 849 F.2d 863, 867-69 (4th Cir. 1988); Martin v. Malhoyt, 830 F.2d 237, 261-62 (D.C. Cir. 1987); Lester v. City of Chicago, 830 F.2d 706, 713-14 (7th Cir. 1987); Spell v. McDaniel, 824 F.2d 1380, 1384 n.3 (4th Cir. 1987), *cert. denied*, 484 U.S. 1027 (1988); Dugan v. Brooks, 818 F.2d 513, 516-17 (6th Cir. 1987); Jenkins v. Averett, 424 F.2d 1228, 1232 (4th Cir. 1970); *see also* Freyermuth, *Rethinking Excessive Force*, 1987 Duke L.J. 692, 694-701 (examining disparate approaches to excessive force claims); Note, *The "Reasonable" Approach to Excessive Force Cases Under Section 1983*, 64 Notre Dame L. Rev. 136, 140-47 (1989) (discussing divergence of constitutional standards utilized by federal courts in excessive force claims); Comment, *Excessive Force Claims: Removing the Double Standard*, 53 U. Chi. L. Rev. 1369, 1370-81 (1986) (same).

3. *See, e.g.*, Miller v. Lovett, 879 F.2d 1066, 1068 (2d Cir. 1989) (officers beat unresisting plaintiff during arrest causing multiple bruises and lacerations); Calamia v. City of New York, 879 F.2d 1025, 1029 (2d Cir. 1989) (police officer applied handcuffs tightly and kept plaintiff in an unreasonable position for hours); Brown v. Glossip, 878 F.2d 871, 872 (5th Cir. 1989) (officer forcibly twisted arrestee's arm, which later required surgery); Johnson v. Morel, 876 F.2d 477, 478 (5th Cir. 1989) (en banc) (per curiam) (plaintiff alleged that after he peacefully submitted to arrest, officer verbally abused him, treated him roughly and applied handcuffs so tightly that his wrists had permanent scars); Henson v. Thezan, 717 F. Supp. 992, 994-95 (S.D.N.Y. 1989) (state trooper struck quiescent plaintiff in groin while he was lying on the ground before being handcuffed).

4. These claims are brought under Section 1983 of Title 42 ("section 1983") which reads:

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

42 U.S.C. § 1983 (1982).

5. Typically, excessive force claims are brought against police officers or other law enforcement officials in their individual and official capacities. *See, e.g.*, Miller v. Lovett,

lyzed under the fourth amendment[6] rather than the substantive due process standard of the fourteenth amendment.[7]

Accordingly, section 1983 claimants must now demonstrate that an officer's use of force amounted to an "unreasonable seizure"[8] in violation of the fourth amendment. The fourth amendment reasonableness inquiry is wholly objective, examining whether the officers' actions were objectively reasonable in light of the facts and circumstances confronting officers without regard to the officers' underlying intent.[9]

A reading of *Graham* and other federal court decisions suggests that the constitutional threshold in excessive force claims is met once a jury concludes that an officer's use of force was objectively unreasonable.[10] In the wake of *Graham*, however, some federal courts have implicitly rejected this interpretation by requiring a plaintiff to show that he sustained a "significant or meaningful injury" separately from proving that the officer's conduct during arrest was objectively unreasonable.[11] By imposing this requirement, these courts have effectively heightened the

879 F.2d 1066, 1066 (2d Cir. 1989) (officer sued individually and in official capacity); Pastre v. Weber, 717 F. Supp. 987, 987 (S.D.N.Y. 1988) (same).

Courts generally find that officers sued in their individual and official capacities have qualified immunity provided they do not violate "clearly established statutory or constitutional rights." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). The test of qualified immunity is an objective one: would a reasonable police officer believe that his actions did not violate clearly established statutory or constitutional rights? *See* Anderson v. Creighton, 483 U.S. 635, 641 (1987). After *Graham*, police officers invoking a qualified immunity defense must show that a reasonable police officer would have found their actions to be objectively reasonable under the circumstances.

Plaintiffs may sue a local municipality under section 1983 for any custom or policy that deprives an individual of a federal constitutional right. *See* Monell v. Department of Social Serv., 436 U.S. 658, 690-91 (1978); Mitchell v. City of Sapulpa, 857 F.2d 713, 719 (10th Cir. 1988) (per curiam). The Court recently held, however, that a "single incident" of police behavior does not sufficiently manifest a custom or pattern of police activity. *See* City of Oklahoma v. Tuttle, 471 U.S. 808, 823-24 (1985); *see also* City of Canton v. Harris, 109 S. Ct. 1197, 1210 (1989) (O'Connor, J., dissenting in part) (quoting *Tuttle* with approval).

Even though section 1983 does not address unconstitutional actions under color of federal law, a plaintiff may nonetheless bring a cause of action against such actors under federal and state common law. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971).

6. The fourth amendment protects "[t]he right of the people to be secure in their persons . . . against unreasonable . . . seizures." U.S. Const. amend. IV.

7. *See* Graham v. Connor, 109 S. Ct. 1865, 1872 (1989).

8. A "seizure" triggering the fourth amendment's protection occurs only when government actors have "by means of physical force or show of authority . . . in some way restrained the liberty of a citizen." *Graham*, 109 S. Ct. at 1871 n.10 (1989) (quoting Terry v. Ohio, 392 U.S. 1, 19 n.16 (1968)).

9. *See Graham*, 109 S. Ct. at 1872; Scott v. United States, 436 U.S. 128, 138 (1978).

10. Although *Graham* did not explicitly state whether the question of "objective reasonableness" was for a judge or jury, this inquiry is presumably for the jury. *See, e.g.*, Hansen v. Black, 885 F.2d 642, 645 (9th Cir. 1989) (objective unreasonableness a jury question); Miller v. Lovett, 879 F.2d 1066, 1070 (2d Cir. 1989) (same); Calamia v. City of New York, 879 F.2d 1025, 1033-35 (2d Cir. 1989) (same); McDowell v. Rogers, 863 F.2d 1302, 1307 (6th Cir. 1988) (same).

11. *See* cases *supra* note 93.

fourth amendment reasonableness standard to one closely resembling the substantive due process standard that the Court rejected in *Graham*.

Part I of this Note surveys judicial treatment of excessive force claims prior to the Supreme Court's decision in *Graham*. Part II analyzes the Court's holding in *Graham* against the backdrop of its prior fourth amendment balancing jurisprudence. Part III examines the divergent approaches to determining whether the amount of force applied during an arrest was constitutionally excessive. Part IV concludes that a "significant or meaningful" injury requirement does not comport with the Supreme Court's decisions in *Graham* and *Tennessee v. Garner*[12] and thwarts the broad[13] remedial purposes of section 1983.

I. PRE-*GRAHAM* ANALYSIS OF EXCESSIVE FORCE CLAIMS

A. *Substantive Due Process Standard*

Prior to *Graham*, most courts[14] analyzed excessive force claims under a substantive due process standard[15] governed by the fourteenth amend-

12. 471 U.S. 1 (1985). For a discussion of *Garner*, see *infra* notes 129-131.

13. *See* Felder v. Casey, 487 U.S. 131 (1988) (Section 1983 is accorded " 'a sweep as broad as its language.' ") (quoting United States v. Price, 383 U.S. 787, 801 (1966)).

14. Some courts, however, presaged the Supreme Court's decision in *Graham* by holding that excessive force claims are properly analyzed under the fourth amendment. See *supra* note 2. In the seminal circuit court case, *Lester v. City of Chicago*, 830 F.2d 706 (7th Cir. 1987), the plaintiff went to the police station to retrieve her father from jail. *See id.* at 708. Upon her arrival, a confrontation between the plaintiff and the attending desk officer ensued. Although there was some conflicting evidence, all parties agreed that the police arrested the plaintiff, took her to a nearby office and handcuffed her to a radiator. *See id.* at 709. The plaintiff claimed that as a result of her treatment, she sustained bruises to the back of her leg and scratched wrists because of tightly applied handcuffs. *See id.* She sued the police officer under section 1983 for using excessive force against her. At trial, the judge charged the jury under the fourteenth amendment "shock the conscience" test adopted by the Seventh Circuit in Gumz v. Morrissette, 772 F.2d 1395 (7th Cir. 1985), *cert. denied*, 475 U.S. 1123 (1986), *overruled by*, 830 F.2d 706, 713 (7th Cir. 1987). The plaintiff filed an appeal asserting that the jury charge was improper.

On appeal, the Seventh Circuit agreed and held that the fourth amendment was the exclusive constitutional right implicated in an excessive force claim. *See Lester*, 706 F.2d at 712. Faced with the challenge of determining the appropriate standard, the *Lester* court surveyed relevant Supreme Court decisions since *Rochin v. California*, 342 U.S. 165 (1952). *See Lester*, 830 F.2d at 710-13. The court noted a definitive shift from a substantive due process "shocks the conscience" standard to an objective fourth amendment analysis in the area of personal security. *See id.* at 711; *see also* Freyermuth, *supra* note 2, at 707-08 (arguing substantive due process is no longer applicable to excessive force claims in light of post-*Rochin* Supreme Court decisions); Comment, *supra* note 2, at 1379-81 (discussing demise of substantive due process standard in excessive force cases).

15. The substantive due process doctrine recognizes limitations on the use of government power not explicitly supported in the text of the Constitution. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 153 (1973) (woman's right to abortion a privacy interest protected by fourteenth amendment). *See generally* L. Tribe, American Constitutional Law § 15-2 (2d ed. 1988) (discussing non-textual constitutional rights of privacy). Accordingly, under a substantive due process standard, plaintiffs would allege that law enforcement officials, in applying excessive or undue force during arrest, deprived them of liberty interests guaranteed under the fourteenth amendment's due process clause. *See supra* note 2 (cases applying substantive due process standard).

ment.[16] In order to appraise the constitutionality of a law enforcement official's conduct during arrest, most courts applied versions of the "shock the conscience" test[17] suggested by Judge Friendly in *Johnson v. Glick*.[18] Judge Friendly's test requires the fact finder to assess four factors when determining whether police conduct during arrest[19] "shocked the conscience": 1) the need for the officer's application of force, 2) the relationship between the amount of force needed and the amount that was used, 3) the severity of the planitiff's injuries, and 4) whether force was applied in good faith.[20]

Judge Friendly's "shock the conscience" test, did not enjoy uniform interpretation, however.[21] The test engendered judicial disagreement as

16. The due process clause of the fourteenth amendment provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law. . . ." U.S. Const. amend. XIV.

17. The "shock the conscience" test originated in Rochin v. California, 342 U.S. 165, 172 (1952). In *Rochin*, the Court reversed a defendant's criminal conviction because a police officer had obtained inculpatory evidence in a manner that "offend[ed] even hardened sensibilities" and "shock[ed] the conscience." *Id.* at 172. Specifically, the officer forced an emetic into defendant's stomach, causing him to vomit, in order to retrieve drug capsules later used against defendant at trial. *See id.* at 166. The Court employed a substantive due process analysis, asserting that the officer's shocking conduct deprived defendant of a substantive "liberty" interest guaranteed under the due process clause of the fourteenth amendment. *See id.* at 168-69. For a discussion of the substantive due process doctrine as it relates to excessive force claims, see Wells & Eaton, *Substantive Due Process and the Scope of Constitutional Torts*, 18 Ga. L. Rev. 201, 226-34 (1984) (tracing origin of substantive due process analysis in excessive force claims to *Rochin*); Freyermuth, *supra* note 2, at 694-95 (same).

18. 481 F.2d 1028 (2d Cir.), *cert. denied*, 414 U.S. 1033 (1973). In *Johnson v. Glick*, a prisoner sued a police officer under section 1983 alleging that the officer violated his constitutional rights. *See id.* at 1029-31. Specifically, Johnson maintained that the officer beat him when he hesitated to heed the officer's order. Johnson further alleged that the officer subsequently denied him medical attention. *See id.* at 1029-30. The court rejected Johnson's eighth amendment claim, holding that the officer's actions did not constitute "punishment" under the eighth amendment. *See id.* at 1032. The court did hold, however, that Johnson's claim should be remanded and reevaluated under a substantive due process standard, adopting the "shock the conscience" test articulated by the Supreme Court in *Rochin*. *See id.* at 1032-34.

For courts applying Judge Friendly's test, see, Rinker v. County of Napa, 831 F.2d 829, 831-32 (9th Cir. 1987); McRorie v. Shimoda, 795 F.2d 780, 785 (9th Cir. 1986); Fernandez v. Leonard, 784 F.2d 1209, 1216 (1st Cir. 1986); Putman v. Gerloff, 639 F.2d 415, 420 (8th Cir. 1981); Eng v. Coughlin, 684 F. Supp. 56, 62 (S.D.N.Y. 1988); Greene v. City of New York, 675 F. Supp. 110, 117-18 (S.D.N.Y. 1987).

19. Although the plaintiff in *Glick* was a pre-trial detainee, Judge Friendly's standard has been consistently applied to excessive force claims alleging misconduct during arrest. *See* Dale v. Janklow, 828 F.2d 481, 484-85 (8th Cir. 1987), *cert. denied*, 485 U.S. 1014 (1988); Byrd v. Clark, 783 F.2d 1002, 1005-07 (11th Cir. 1986); Rutherford v. City of Berkeley, 780 F.2d 1444, 1446-48 (9th Cir. 1986); Fundiller v. City of Cooper City, 777 F.2d 1436, 1439-42 (11th Cir. 1985); Wilson v. Beebe, 770 F.2d 578, 581-83 (6th Cir. 1985) (en banc); *see also* Comment, *supra* note 2, at 1376 (discussing application of *Glick* test in arrest cases). This Note addresses only excessive force claims arising out of investigatory stops or police conduct during arrest.

20. *See Glick*, 481 F.2d at 1033.

21. *See* Urbonya, *Establishing a Deprivation of a Constitutional Right to Personal Security Under Section 1983: The Use of Unjustified Force by State Officials in Violation of*

to whether it required a showing of significant bodily injury before excessive force claimants could recover under section 1983.[22] Some courts held that only "serious"[23] or "severe"[24] injuries are actionable under section 1983. These courts adhered to a "shock the conscience" test, emphasizing that not every tort committed by a law enforcement official deprives a person of a liberty interest guaranteed by the fourteenth amendment.[25] Accordingly, section 1983 plaintiffs in these jurisdictions were not compensated for minor injuries.[26]

In other judicial fora, a finding of severe injury was not required.[27] Underscoring the second prong of the *Glick* test, judges in these jurisdictions instructed juries to focus on whether the amount of force was justified under the circumstances. A serious injury requirement was not imposed.[28] Juries could find that a constitutional violation had occurred even when the plaintiff suffered no serious bodily injury as a result of mistreatment during arrest.

For example, in *Lewis v. Downs*,[29] a police officer, after subduing the plaintiff, kicked her in the back and buttocks as she lay face down on the ground.[30] Although the plaintiff was not seriously injured, the court found that the plaintiff had nevertheless demonstrated a claim capable of redress under section 1983 and held that serious or permanent injury is

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the Fourth, Eighth, and Fourteenth Amendments, 51 Alb. L. Rev 173, 178 (1987); Comment, *supra* note 2, at 1373; *see also* Wells & Eaton *Constitutional Torts*, *supra* note 17, at 234-36 (lack of Supreme Court guidance resulting in varied application of *Glick* test).

22. *See* Comment, *supra* note 2, at 1373.

23. *See* Ricketts v. Derello, 574 F. Supp. 645, 646-47 (E.D. Pa. 1983).

24. *See* Gumz v. Morrissette, 772 F.2d 1395, 1400 (7th Cir. 1985), *cert. denied*, 475 U.S. 1123 (1986), *overruled by*, Lester v. City of Chicago, 830 F.2d 706, 713 (7th Cir. 1987); Hall v. Tawney, 621 F.2d 607, 613 (4th Cir. 1980); *see also* Comment, *supra* note 2, at 1373 (requirement of severe injury comports with fourteenth amendment jurisprudence).

25. *See, e.g.*, Shillingford v. Holmes, 634 F.2d 263, 265 (5th Cir. Unit A Jan. 1981) (not every personal injury by state officer constitutes fourteenth amendment violation, for some injuries are so small as to occasion only a tort claim); Hall v. Tawney, 621 F.2d 607, 613 (4th Cir. 1980) (not every violation of state tort law is a violation of substantive due process). *See generally* Burnham, *Separating Constitutional and Common-Law Torts: A Critique and a Proposed Constitutional Theory of Duty*, 73 Minn. L. Rev. 515, 544-47 (1989) (discussing blurred distinctions between civil rights claims and common law tort actions).

26. *See Shillingford*, 634 F.2d at 266; *Derello*, 574 F.2d at 647.

27. *See, e.g.*, Robison v. Via, 821 F.2d 913, 924 (2d Cir. 1987) (severe or permanent injuries not required under section 1983); Checki v. Webb, 785 F.2d 534, 538 (5th Cir. 1986) (no physical injury required for section 1983 claim); Lewis v. Downs, 774 F.2d 711, 714 (6th Cir. 1985) (serious or permanent injury not a prerequisite); Norris v. District of Columbia, 737 F.2d 1148, 1150-51 (D.C. Cir. 1984) (no threshold requirement of permanent injuries); Bowman v. Casler, 622 F. Supp. 836, 838 (N.D.N.Y. 1985) (no severe or permanent injury required); *see also* Wells & Eaton, *supra* note 17, at 248-50 (rejecting necessity of severity of injury requirement); *cf.* Hodges v. Stanley, 712 F.2d 34, 36 (2d Cir. 1983) (gratuitous and excessive force not causing permanent injury still actionable under section 1983).

28. *See Downs*, 774 F.2d at 714; *Norris*, 737 F.2d at 1152.

29. 774 F.2d 711 (6th Cir. 1985).

30. *See id.* at 712.

not a prerequisite to such a claim.[31] The court emphasized that in excessive force claims the facts surrounding the application of force should be carefully scrutinized and weighed,[32] an approach which resembles the "totality of circumstances" approach eventually endorsed by the Supreme Court in *Graham*.

II. *GRAHAM V. CONNOR*: FOURTH AMENDMENT REASONABLENESS INQUIRY BECOMES EXCLUSIVE STANDARD IN EXCESSIVE FORCE CLAIMS

In *Graham*, the Supreme Court refused to apply substantive due process principles to Graham's section 1983 claim alleging that a police officer used excessive force during arrest.[33] Graham, a diabetic, asked his companion, Berry, to drive him to a convenience store so that he could buy orange juice in order to counteract a sugar reaction.[34] After entering the store and seeing the number of people on line, Graham hurried out of the store and instructed Berry to drive him to a friend's house.[35]

The police officer saw Graham hastily leave the store and conducted an investigatory stop. Although Berry told the officer that Graham was experiencing an insulin attack, the officer ordered Berry to wait while he ran an investigatory check. While the officer was in his squad car, Graham got out of Berry's car, ran around it twice and passed out on the ground.[36]

Another officer arrived on the scene, rolled the unconscious Graham over and handcuffed his hands tightly behind his back, ignoring Berry's plea for medical assistance. Some time during the arrest, Graham sustained a broken foot, cuts on his wrists and a bruised forehead.[37]

Graham filed suit in district court under section 1983 claiming that the officers had used excessive force during arrest.[38] The district court analyzed the claim under the substantive due process standard, applying the four-factor *Glick* test.[39] Finding that the amount of force was not constitutionally excessive, the district court granted the officer's motion for directed verdict.[40] Without attempting to identify the specific constitutional provision under which that claim arose, a divided panel of the Fourth Circuit affirmed the district court's finding, holding that the

31. *See id.* at 714.
32. *See id.*
33. Graham v. Connor, 109 S. Ct. 1865, 1871 (1989).
34. *See id.* at 1868.
35. *See id.*
36. *See id.*
37. *See id.*
38. Graham v. Charlotte, 644 F. Supp. 246, 248 (W.D.N.C. 1986), *aff'd*, 827 F.2d 945, 946 (4th Cir. 1987).
39. *See id.*
40. *See id.* at 248-49.

force applied was not unconstitutionally excessive.[41]

Affirming the holding implicit in *Garner*, the Supreme Court reversed the Fourth Circuit's decision, holding that "the Fourth Amendment provides [the] explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, [and] that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims."[42] The Court remanded Graham's claim to the district court for reconsideration under the fourth amendment standard.[43]

On remand, a jury employing the fourth amendment reasonableness standard would likely find in favor of Graham. The record readily suggests that the officers' conduct was objectively unreasonable under the circumstances. Because Graham was apparently unconscious when apprehended, the officer's use of force was clearly inappropriate. Moreover, the officers' failure to acknowledge Graham's medical condition, in the face of repeated warnings that he was suffering from an insulin reaction, further militates toward a finding of unreasonableness.

A. *Fourth Amendment Balancing Principles*

When fact finders are asked to determine whether the force used during an arrest was "objectively unreasonable," *Graham* requires them to balance " 'the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing governmental interests at stake."[44] The *Graham* Court did not elaborate on the methodology of this balancing test, however.

41. Graham v. City of Charlotte, 827 F.2d 945, 949-50 (4th Cir. 1987), *rev'd*, 109 S. Ct. 1865 (1989).

42. *Graham*, 109 S. Ct. at 1871. The Court explicitly declined to decide whether the fourth amendment continues to provide protection against the deliberate use of physical force beyond the point at which arrest ends and pretrial detention begins. *See id.* at 1871 n.10. The federal courts remain divided on this issue. Some courts have held that the fourth amendment's protection continues to apply beyond initial arrest to pretrial detention. *See, e.g.*, Hammer v. Gross, 884 F.2d 1200, 1207-08 (9th Cir. 1989) (use of physical force applied during detainment following plaintiff's arrest for driving while intoxicated analyzed under fourth amendment); Henson v. Thezan, 717 F. Supp. 1330, 1335 (N.D. Ill. 1989) (fourth amendment's protections extend until probable cause hearing before judicial officer); Jones v. County of Du Page, 700 F. Supp. 965, 971 (N.D. Ill 1988) (same). Others have applied substantive due process standards once the arrest has been completed. *See, e.g.*, Wilkins v. May, 872 F.2d 190, 194 (7th Cir. 1989) (fourth amendment protections end after initial arrest when police officers have suspect securely in custody).

43. *See* Graham v. Connor, 109 S. Ct. 1865, 1873 (1989).

44. *Graham*, 109 S. Ct. at 1871-72; *see* Tennessee v. Garner, 471 U.S. 1, 8 (1985) (quoting United States v. Place, 462 U.S. 696, 703 (1983)); Delaware v. Prouse, 440 U.S. 648, 654 (1979); United States v. Martinez-Fuerte, 428 U.S. 543, 555 (1976). *See generally* Greenberg, *The Balance of Interests Theory and the Fourth Amendment: A Selective Analysis of Supreme Court Action Since* Camara *and* See, 61 Calif. L. Rev. 1011, 1014-16 (1973) (discussing balancing principles); Urbonya, *supra* note 21, at 201-04 (same); Comment, *Double Standard*, *supra* note 2, at 1386 (same); Note, *The Civil and Criminal Methodologies of the Fourth Amendment*, 93 Yale L.J. 1127, 1128-44 (1984) (same).

Prior to *Graham*, the Supreme Court had employed fourth amendment balancing principles to analyze an excessive force claim brought under section 1983 only once.[45] The Court's balancing analysis in *Garner*, however, is not particularly illustrative of the Court's balancing scheme in general. *Garner* was an easy case because the plaintiff's interest in preserving his life clearly out-weighed the government's interest in apprehending a non-violent fleeing felon.[46] The Court did not specify the fourth amendment interests threatened when police officers use non-deadly physical force during arrest.[47]

Supreme Court excessive force jurisprudence under section 1983 is obviously limited. Therefore, in order to identify these interests, as fact finders invariably must, it is helpful to review the Supreme Court's fourth amendment balancing methodology as applied in the context of criminal proceedings.

1. Plaintiff's Interests

Although the Court arrived at different conclusions in *Winston v. Lee*[48] and *Schmerber v. California*,[49] it emphasized in both cases that "the overriding function of the Fourth Amendment is to protect [individuals'] personal privacy and dignity against unwarranted intrusion by the State."[50] Similarly, in *Terry v. Ohio*,[51] Justice Warren, writing for the

45. *See* Tennessee v. Garner, 471 U.S. 1, 8-9 (1985).

46. *See id.* at 9.

47. *See id.* The Court noted that "[t]he intrusiveness of a seizure by means of deadly force is unmatched." *Id.*

48. 470 U.S. 753 (1985). In *Winston*, the Court invoked balancing principles to analyze a proposed surgical operation into the chest muscle of an armed robbery suspect to search for evidence—a bullet allegedly fired by the victim. *See id.* at 763-66. Weighing Winston's interests in "privacy and bodily integrity" against the state's interest in procuring marginally probative evidence, the Court struck the balance in favor of Winston's dignity interests, holding that the proposed surgery was not reasonable under the fourth amendment. *See id.* at 764. The Court noted that fourth amendment intrusions typically do not injure the physical person, but "damage the individual's sense of personal privacy and security." *See id.* at 762.

49. 384 U.S. 757 (1966). In *Schmerber*, a somewhat less serious physical intrusion was held not to offend the criminal defendant's fourth amendment interests. The Court decided that a warrantless seizure of a blood sample from a DWI suspect was reasonable under the fourth amendment. *See id.* at 772. The sample was obtained in a medically acceptable manner but over the objections of the defendant. *See id.* at 759.

Applying balancing principles, the Court considered the particular type of intrusive procedure and the manner in which the test was performed. *See id.* at 771-72. Finding that the procedure "involve[d] virtually no risk, trauma, or pain," the court held that the measure was reasonable in light of the state's interest in enforcing drunk driving laws. *See id.* at 771. The Court, however, limited its holding to the precise facts at issue, asserting that the Constitution permits such intrusions under "stringently limited conditions." *See id.* at 772.

50. *Winston*, 470 U.S. at 760 (quoting *Schmerber*, 384 U.S. at 767); *see* Terry v. Ohio, 392 U.S. 1, 17 (1968). *But see* Texas v. Brown, 460 U.S. 730, 747 (1983) (Stevens, J., concurring) ("The Amendment protects two different interests of the citizen—the interest in retaining possession of property and the interest in maintaining personal privacy."). *See generally* Serr, *Great Expectations of Privacy: A New Model for Fourth Amendment*

majority, broadly characterized the personal security and privacy interests protected by the fourth amendment:

> No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law. . . . [W]herever an individual may harbor a 'reasonable expectation of privacy,' he is entitled to be free from unreasonable governmental intrusion.[52]

The Court, however, has yet to elaborate on the vague characterizations[53] of fourth amendment interests articulated in *Schmerber*, *Terry* and *Winston*.[54] Instead, it seems that the Court generally devotes most of its balancing analysis to examining the purported governmental interests at stake when evaluating the reasonableness of a particular seizure.

2. The Government's Interests

In excessive force claims, the government's primary interest is in the apprehension of criminal suspects.[55] That interest is jeopardized whenever a suspect forcibly resists arrest or attempts to avoid detention by fleeing.[56] The government is also concerned about the health and safety of police officers who are often confronted by armed or otherwise dangerous suspects during the course of an arrest or investigatory stop.[57]

As the Court made clear in *Chimel v. California*,[58] it is entirely reasonable for a police officer "to search the person arrested in order to remove any weapons that [the arrestee] might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated."[59] Moreover, the government has an interest in preventing arrestees from concealing or destroying evanes-

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Protection, 73 Minn. L. Rev. 583, 591-98 (1989) (discussing plaintiffs' fourth amendment interests); Urbonya, *supra* note 21, at 204-11 (same); Comment, *supra* note 2, at 1385-86 (same).

51. 392 U.S. 1 (1968).

52. *Id.* at 9 (citations omitted). The *Terry* Court depicted a limited bodily frisk, performed pursuant to an investigatory stop, as a "serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly." *Id.* at 17.

53. One commentator has posited that any attempt to place an objective value on fourth amendment rights would fail because individuals invariably differ in their perception of what constitutes an invasion of privacy or personal security. *See* Note, *Protecting Privacy Under the Fourth Amendment*, 91 Yale L.J. 313, 327 (1981).

54. Justice Powell has even suggested that an individual subject to custodial arrest "retains no significant Fourth Amendment interest in the privacy of his person." United States v. Robinson, 414 U.S. 218, 237 (1973) (Powell, J., concurring).

55. *See* Tennessee v. Garner, 471 U.S. 1, 9 & n.8 (1985).

56. Kidd v. O'Neil, 774 F.2d 1252, 1256 (4th Cir. 1985).

57. *See Garner*, 471 U.S. at 11-12.

58. 395 U.S. 752 (1969).

59. *Id.* at 763.

cent evidence during arrest.[60]

Accordingly, the *Graham* Court recognized that "the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it."[61] The Court's apparent deference to varying degrees of physically coercive police conduct derives from and comports with the common-law tort principle that police officers are privileged in making forcible arrests.[62]

B. *Not Every Push or Shove Is a Fourth Amendment Violation*

The *Graham* Court explicitly warned that " '[n]ot every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers,'. . . violates the Fourth Amendment."[63] The Court undoubtedly wanted to afford police officers a reasonable amount of authority to combat violent crime on increasingly violent streets.[64]

Accordingly, the Court endorsed a "reasonableness at the moment" standard that requires fact finders, when assessing the reasonableness of a particular seizure, to take into account the unpredictable dynamics of the arrest environment.[65] The Court noted that police officers are often forced to make "split-second judgments" about the amount of force necessary in a particular situation under circumstances that are "tense, uncertain, and rapidly evolving."[66]

As the Court did not explain its "not every push or shove" admonition, *Glick* may offer an explanation. In *Glick*, the majority opined that the constitutional protection for prisoners bringing excessive force claims under section 1983 is not as extensive as that afforded by state law battery actions.[67] The court distinguished a simple battery, where "the least touching of another in anger" constitutes actionable conduct at common law, from a constitutional tort actionable under section 1983.[68] It reasoned that the management of prisoners, "not usually the most gentle or tractable of men and women," may demand "the occasional use of a de-

60. *See id.*; *see also* Cupp v. Murphy, 412 U.S. 291, 296 (1973) (limited police search justified to protect highly evanescent evidence).

61. Graham v. Connor, 109 S. Ct. 1865, 1871 (1989).

62. *See* Tennessee v. Garner, 471 U.S. 1, 12 (1985). The rule has been tempered in modern times so that "[t]he use of force against another for the purpose of effecting the arrest or recapture of the other, or of maintaining the actor's custody of him, is not privileged if the means employed are in excess of those which the actor reasonably believes to be necessary." Restatement (Second) of Torts § 132 (1965).

63. *Graham*, 109 S. Ct. at 1872 (quoting Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973), *cert. denied*, 414 U.S. 1033 (1973)); *see* Miller v. Lovett, 879 F.2d 1066, 1070 (2d Cir. 1989); Lester v. City of Chicago, 830 F.2d 706, 713-14 (7th Cir. 1987).

64. *Cf.* Note, *supra* note 2, at 155.

65. *See Graham*, 109 S. Ct. at 1872.

66. *See id.*

67. *See* Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973), *cert. denied*, 414 U.S. 1033 (1973).

68. *See id.*

gree of intentional force."[69]

Extending these observations from *Glick* to the pre-detention arrest scenario, police officers often must deal with hostile and potentially dangerous suspects. Peaceable suspects may, without warning, offer harmful or deadly resistance at any time during the arrest. A police officer may incorrectly anticipate an arrestee's gestures, responding with coercive physical force. *Graham*'s language suggests that in these circumstances police officers enjoy immunity for the application of such force, even though in hindsight the use of such force seems unnecessary.[70]

C. *Totality of Circumstances*

As both *Graham* and *Garner* mandate, a fact finder, when attempting to distinguish privileged force from constitutionally excessive force, must look to whether the "totality of circumstances"[71] justified the use of force. Under the *Graham* test, a fact finder must consider the "severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether [the plaintiff] is actively resisting arrest or attempting to evade arrest by flight."[72]

From *Graham*'s three-part test, it follows that when the crime or offense is relatively minor and the suspect neither resists nor attempts to flee, the use of significant physical force may be constitutionally excessive. The state's justification for applying force in those situations would be obviated by the suspect's peaceful submission to arrest.[73] Therefore, even minimal physically intrusive police conduct may offend an arrestee's fourth amendment rights where the government's law enforcement interests are not justified under the circumstances.[74] These situations are likely to arise when a police officer has neutralized a placid suspect and subsequently applies unnecessary physical force.

This was precisely the situation in *Johnson v. Morel*.[75] The plaintiff in *Morel*, a black man, was driving across a bridge with four black passengers.[76] After the car stalled on the bridge, a white police officer began pushing Johnson's stalled vehicle with a squad car while shouting racial epithets.[77] When the cars reached the foot of the bridge, Johnson got out

69. *Id.*

70. *See supra* note 63 and accompanying text.

71. *Graham*, 109 S. Ct. at 1871-72 (quoting Tennessee v. Garner, 471 U.S. 1, 8-9 (1985)); *see also* Schmerber v. California, 384 U.S. 757, 768 (1966) (fourth amendment protects against unjustified intrusions but not against reasonable ones); Lester v. City of Chicago, 830 F.2d 706, 713 (7th Cir. 1987) (question is whether totality of circumstances justified police conduct); Comment, *supra* note 2, at 1378 (discussing totality of the circumstances approach in *Garner*).

72. *Graham*, 109 S. Ct. at 1871-72 (citing *Garner*, 471 U.S. at 8-9).

73. *See* Kidd v. O'Neil, 774 F.2d 1252, 1256-57 (4th Cir. 1985).

74. *Cf.* Ybarra v. Illinois, 444 U.S. 85, 92-93 (1979) (simple pat-down search violated individual's fourth amendment rights where government's justification was feeble).

75. 876 F.2d 477 (5th Cir. 1989) (en banc) (per curiam).

76. *See id.* at 478.

77. *See id.*

of his vehicle and peacefully submitted to the officer's investigation.[78]

Despite Johnson's acquiescence, the officer continued to verbally abuse him, promising to make an example of him.[79] After discovering that Johnson had failed to renew his driver's license, the officer searched and arrested Johnson, applying handcuffs so tightly that they caused severe lacerations on his wrists that left permanent scars.[80] As a result of the incident, Johnson was unable to return to work for two weeks.[81]

After reviewing Johnson's excessive force claim under a fourteenth amendment standard that required a showing of "objectively severe injuries," the district court granted summary judgement for the defendant police officer.[82] On appeal, the Fifth Circuit, citing *Graham*, reinstated and remanded Johnson's claim to the district court to be evaluated under a fourth amendment standard.[83] A jury undertaking *Graham*'s fourth amendment reasonableness inquiry would arguably find that under the circumstances, the police conduct was constitutionally excessive.

Likewise, in *Ramirez v. Webb*,[84] plaintiffs were physically and mentally harassed after being seized by a border patrol agent.[85] As a result of the incident, the plaintiffs complained of negligible physical injury, pleading only that they sustained bruises and back pain.[86] Their primary claim involved emotional injury—shock, fear, humiliation, and embarrassment.[87] Notwithstanding the plaintiffs' lack of palpable bodily harm, the plaintiffs were held to be entitled to compensatory damages for a violation of their fourth amendment rights.[88]

Employing *Graham*'s three-factor test, *Ramirez* held the officer's *de minimis* use of force unreasonable under the circumstances.[89] The decision noted that the potential crime at issue—illegal presence in the country—was not one generally involving violence,[90] that the plaintiffs did not pose a threat to the officer's safety and that no evidence indicated that they actively resisted arrest.[91] The *Ramirez* court therefore held that it was "unnecessary and unreasonable" for the agent "to grab [the plaintiff] forcibly, . . . to force him to walk to the patrol car, and to push or shove him against the car."[92] Not all lower courts, however, have followed *Graham* so precisely.

78. *See id.*
79. *See id.*
80. *See id.*
81. *See id.*
82. *See* Johnson v. Morel, 843 F.2d 846, 847 (5th Cir. 1988).
83. Johnson v. Morel, 876 F.2d 477, 480 (5th Cir. 1989) (en banc) (per curiam).
84. 719 F. Supp. 610 (W.D. Mich. 1989).
85. *See id.* at 615.
86. *See id.*
87. *See id.*
88. *See id.* at 617-18.
89. *See id.*
90. *See id.*
91. *See id.*
92. *Id.*

III. DIVERGENT STANDARDS AFTER *GRAHAM*

Federal courts have not applied *Graham*'s fourth amendment standard uniformly.[93] In response to Johnson's appeal, the Fifth Circuit, sitting *en banc* in *Morel* held that in order to prevail on an excessive force claim under section 1983 a plaintiff must prove three separate elements: "(1) a significant injury which (2) resulted directly and only from the use of force that was clearly excessive to the need; and the excessiveness of which was (3) objectively unreasonable."[94]

Interestingly, a showing of objective unreasonableness, the sole inquiry mandated by the *Graham* Court, is only one of three elements a plaintiff must prove to sustain an excessive force claim in the Fifth Circuit. The *Morel* majority offered scant reasoning for imposing additional requirements to the fourth amendment reasonableness inquiry set forth in *Graham*.[95] Citing no authority,[96] the *Morel* court briefly discussed the inevitable unpleasantness of the arrest experience and concluded that "[a]n officer's use of excessive force does not give constitutional import to . . . minor harms."[97]

The Fifth Circuit's rationale for creating a significant injury requirement seems to derive from earlier fourteenth amendment jurisprudence in which the court applied a "shock the conscience" test to excessive force claims. Similar language appears in *Shillingford v. Holmes*,[98] a Fifth Circuit case overruled by *Morel*. By incorporating shades of the more stringent fourteenth amendment standard into its fourth amendment jurisprudence, the *Morel* court has seemingly hybridized the two standards.

Shillingford emphasized that not all physical injuries sustained during

93. Some courts mandate a showing of "significant or meaningful" physical injury before a plaintiff can make out a fourth amendment violation under section 1983. *See, e.g.*, Johnson v. Morel, 876 F.2d 477, 479 (5th Cir. 1989) (en banc) (per curiam) (in addition to objective unreasonableness, defendant must also prove he sustained "significant [bodily] injury"); Brown v. Glossip, 878 F.2d 871, 873 (5th Cir. 1989) (following *Morel*'s "significant injury" requirement); Palmer v. Williamson, 717 F. Supp. 1218, 1223 (W.D. Tex. 1989) (meaningful injury required). Other courts leave the question of whether a fourth amendment violation has occurred to the jury, irrespective of the extent of the plaintiff's injuries. *See, e.g.*, Hansen v. Black, 885 F.2d 642, 645 (9th Cir. 1989) (jury question whether police violated fourth amendment where plaintiff sustained only trifling injuries); Calamia v. City of New York, 879 F.2d 1025, 1035 (2d Cir. 1989) (same); *see also* Titran v. Ackman, 893 F.2d 145, 147 (7th Cir. 1990) (Judge Easterbrook disagrees with Fifth Circuit's "significant injury" requirement).

94. Johnson v. Morel, 876 F.2d 477, 480 (5th Cir. 1989) (en banc) (per curiam).

95. The *Morel* dissent noted that "[a]lthough the [*Graham*] Court did not rule on the [significant injury] question explicitly, its opinion surely contains no quantum-of-injury criterion." *Id.* at 481. Moreover, the *Morel* dissent criticized the majority for confecting a new causation requirement that compels plaintiff to prove that his injury resulted " 'directly and only' " from the use of excessive force. *See id.* (Rubin, J., dissenting).

96. The dissent in *Morel* observed that the majority imposed these added requirements "without so much as a citation of authority or a statement of reasons for imposing them." *Morel*, 876 F.2d at 480 (Rubin, J., dissenting).

97. *Id.* at 480.

98. 634 F.2d 263, 265 (5th Cir. Unit A Jan. 1981).

arrest amount to constitutional violations under the fourteenth amendment.[99] Where the injuries are slight, the court urged plaintiffs to seek redress by pursuing battery claims in state court.[100] The *Morel* court apparently wanted to limit the claims brought into federal courts under section 1983.[101]

With respect to Johnson's claim, the Fifth Circuit held that a jury must determine whether Johnson's injuries were constitutionally significant.[102] Apparently unconvinced that Johnson had successfully pleaded a fourth amendment violation under this test, the court cast doubt on the validity of Johnson's claim, noting that Johnson's injuries were of a "different order" than the injuries suffered by the plaintiff in *Graham*.[103]

Similarly, in *Palmer v. Williamson*,[104]a Texas district court held that a plaintiff must demonstrate "meaningful" physical injury in order to establish an excessive force claim under the fourth amendment.[105] In *Palmer*, a sixteen-year-old plaintiff brought an excessive force claim against a police officer who attempted, at gunpoint, to pull the plaintiff from a moving automobile because the plaintiff had been speeding through the off-duty police officer's neighborhood.[106] The court rejected Palmer's claim and granted summary judgment in favor of the officer because the plaintiff's physical injuries were "nothing major."[107]

Although the decision in *Palmer* acknowledged that *Graham* required a fourth amendment reasonableness standard, it effectively retained the stringent substantive due process standard used prior to *Graham*, omitting only the scienter requirement of Judge Friendly's four-part test.[108] The court found that a remaining prong of the substantive due process test—that the plaintiff sustained a "meaningful" injury—need not be discarded for the test to conform with the fourth amendment reasonableness standard.[109]

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99. *See id.*

100. *See id.*

101. An attempt to distinguish substantively between excessive force claims under the fourth amendment and common-law battery claims against police officers is a difficult task. The jury questions in each are essentially the same. *Compare* State v. Montgomory, 230 Mo. 660, 132 S.W. 232 (1910) (fact finder must evaluate whether the amount of force used to effect an arrest was necessary in light of surrounding circumstances) *with* Tennessee v. Garner, 471 U.S. 1, 8-9 (1989) (question is whether totality of circumstances justified amount of force used to effect arrest). An extended discussion of the separation of common-law and constitutional torts is, however, beyond the scope of this note.

102. *See* Johnson v. Morel, 876 F.2d 477, 479 (5th Cir. 1989) (en banc) (per curiam).

103. *See id.* As a result of mistreatment during arrest, Graham suffered a broken foot, cuts on his wrists, a bruised forehead and an injured shoulder. *See* Graham v. Connor, 109 S. Ct. 1865, 1868 (1989).

104. 717 F. Supp. 1218 (W.D. Tex. 1989).

105. *See id.* at 1223.

106. *See id.* at 1219.

107. *Id.* at 1223. Apparently, the plaintiff's wrists were bruised from the handcuffing during arrest.

108. *See id.* at 1221-22.

109. *See id.*

Since *Graham*, other circuits have implicitly recognized that a showing of significant physical injury is not the *sine qua non* to proving a fourth amendment violation.[110] In *Hansen v. Black*,[111] the Ninth Circuit reversed a grant of summary judgment in favor of a police officer in an excessive force claim where the officer's conduct caused the plaintiff minor physical injuries.[112]

Specifically, Mrs. Hansen's complaint alleged that the officer's treatment during arrest caused her bruises on her wrists and upper arm.[113] A witness testified that the arresting officer was "using unnecessary force and the situation did not warrant [it, and]. . . [w]hen the policeman handcuffed Mrs. Hansen he was rough and abusive to her person."[114]

Employing *Graham*'s fourth amendment reasonableness standard, the Ninth Circuit held that if a jury believed Mrs. Hansen's version of the facts, the officer's use of force was "objectively unreasonable" in light of the circumstances confronting the officer, and therefore violated the fourth amendment.[115]

Similarly, in *Calamia v. City of New York*,[116] the Second Circuit, citing *Graham*, ordered that the excessive force claim be heard by a jury to determine whether the police officer's use of force during the arrest was unreasonable under a fourth amendment standard.[117] Apparently, the plaintiff had suffered no permanent injury as a result of his mistreatment during arrest.[118] Instead, he contended that the officer had applied handcuffs too tightly and forced him to sit in an uncomfortable position for several hours.[119] The Second Circuit made no reference to a threshold of injury requirement.

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110. *See, e.g.*, Hansen v. Black, 885 F.2d 642, 645 (9th Cir. 1989) (plaintiff's claim with stood summary judgment motion while alleging only minor injuries); Calamia v. City of New York, 879 F.2d 1025, 1034-35 (2d Cir. 1989) (excessive force not necessarily significant physical injury); Ramirez v. Webb, 719 F. Supp. 610, 617 (W.D. Mich. 1989) (plaintiff awarded compensatory damages despite failure to show significant bodily injury).

111. 885 F.2d 642 (9th Cir. 1989). Because the plaintiff's son had been suspected of robbing a local gas station, police officer Black had been instructed to watch plaintiff's home until a search warrant could be obtained. *See id.* at 643. When the plaintiff emerged from the house carrying two trash bags and walked to the street where a garbage truck had stopped, the officer told her to leave the bags at the curb. *See id.* When the plaintiff proceeded to put the garbage into the truck, the officer then attempted to retrieve the bags himself. *See id.*

The facts conflicted as to whether the plaintiff tried to hinder the officer's efforts to retrieve the trash, but the officer nonetheless arrested the plaintiff. *See id.*

112. *See id.* at 645.

113. *See id.*

114. *Id.*

115. *See id.*

116. 879 F.2d 1025 (2d Cir. 1989).

117. *See id.* at 1035. Originally, the claim had been improperly brought under the fourteenth amendment.

118. *See id.* at 1035.

119. *See id.*

IV. QUANTUM-OF-INJURY REQUIREMENT NOT COMPATIBLE WITH FOURTH AMENDMENT

The fourth amendment reasonableness inquiry requires a fact finder to address only one question: was the amount of force used by the officer objectively reasonable given the totality of circumstances?[120] It is the objectively unreasonable seizure itself that crosses the constitutional threshold regardless of whether the plaintiff sustained severe physical injuries.[121] Therefore, proper construction of the fourth amendment should emphasize the reasonableness of a seizure rather than focusing myopically on the severity of a plaintiff's bodily injuries.[122]

The Fifth Circuit, however, appraises the constitutionality of police conduct according to a three-part test.[123] A finding of "significant injury" must be established independently of a finding that a police officer's conduct was objectively unreasonable under the circumstances.[124] In other words, a fourth amendment seizure can never be unconsdtitutional if the plaintiff's injuries are slight. Accordingly, any complaint that does not plead that police conduct caused "significant injuries" will be dismissed,[125] and the jury will never decide the issue of reasonableness.

A significant or meaningful injury requirement can prevent a fact finder from determining the reasonableness of an officer's conduct in light of the "totality of circumstances." For example, the facts in *Palmer* indicate that the arresting officer's behavior may well have led a jury to conclude that the officer acted unreasonably under the circumstances. Yet, in *Palmer*, a jury was never permitted to make such a determination because the court found that the plaintiff's injuries were constitutionally insignificant as a matter of law.[126]

Similarly, in *Morel*, the plaintiff's mistreatment during arrest could be characterized as not only physically abusive, but patently humiliating.[127] Yet, such plaintiff would not recover under section 1983 if a jury finds

120. *See* Graham v. Connor, 109 S. Ct. 1865, 1872 (1989); Tennessee v. Garner, 471 U.S. 1, 8-9 (1985); Lester v. City of Chicago, 830 F.2d 706, 713 (7th Cir. 1987).

121. *See Lester*, 830 F.2d at 712-13; McDowell v. Rogers, 863 F.2d 1302, 1306 (6th Cir. 1988); *see also* Comment, *supra* note 2, at 1383 (damages recoverable even when no physical injury is alleged under fourth amendment).

122. *Cf. Lester*, 830 F.2d at 713 (fourth amendment protects against unreasonable seizures irrespective of plaintiff's injuries).

123. *See supra* note 94 and accompanying text.

124. *See* Johnson v. Morel, 876 F.2d 477, 479-80 (5th Cir. 1989) (en banc) (per curiam).

125. These claims will invariably be dismissed under Rule 12(b)(6), which provides:

> Every defense, in law or fact, to claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted.

Fed. R. Civ. P. 12(b)(6).

126. *See* Palmer v. Williamson, 717 F. Supp. 1218, 1223-24 (W.D. Tex. 1989).

127. *See* notes 76-81 and accompanying text.

that his physical injuries were not "significant" under the Fifth Circuit's test. The egregious circumstances surrounding Johnson's arrest would be overlooked if the jury determines that he failed to meet the Fifth Circuit's quantum-of-injury requirement.

Although the severity of a plaintiff's injuries might properly be considered in assessing the reasonableness of a particular seizure, a jury should not be instructed that a finding of severe or significant injury is the *sine qua non* to recovery in an excessive force claim. Otherwise, jurors will be unable to find for those plaintiffs who experienced unreasonable treatment during arrest but sustained only minor injuries.

A. *Fifth Circuit Backsliding*

Although the general trend in contemporary Supreme Court jurisprudence has been to limit substantively a plaintiff's ability to prevail in civil rights claims,[128] the Court has recently augmented a plaintiff's ability to sustain claims against police officers under section 1983. In *Garner*, for example, the Court expanded the scope of police liability[129] under section 1983 by invalidating a state statute authorizing the use of deadly force against a non-violent fleeing burglary suspect.[130] The Court held that the officer's use of deadly force under the circumstances was constitutionally excessive even though the police officer had not deviated from departmental policy or applicable state law.[131]

Likewise, the *Graham* Court opened the door to increased section 1983 litigation by endorsing a lower threshold[132] for finding police behavior during arrest unconstitutional.[133] Before the *Graham* decision, excessive force plaintiffs in jurisdictions employing a fourteenth amendment standard were only protected from egregious[134] police conduct that

128. *See* Bruce, *Emotional Distress Claims for Police Misconduct: Does a Cause of Action Really Exist Under Section 1983?*, 22 Val. U.L. Rev. 61, 61 (1987).

129. *See id.* at 64-65.

130. *See* Tennessee v. Garner, 471 U.S 1, 11 (1985).

131. *See id.* at 20-22.

132. Many courts have observed that the fourth amendment reasonableness standard is less stringent than the substantive due process standard under the fourteenth amendment. *See, e.g.*, Johnson v. Morel, 876 F.2d 477, 481 (5th Cir. 1989) (en banc) (per curiam) (Rubin, J., concurring) (fourteenth amendment standard more "stringent" than fourth amendment standard); Justice v. Dennis, 834 F.2d 380, 386 (4th Cir. 1987) (Phillips, J., dissenting) (objective unreasonableness test a "much less stringent standard" than substantive due process), *vacated*, 109 S. Ct. 2461 (1989); Fonte v. Collins, 718 F. Supp. 1, 2 (D. Me. 1989) (excessive force claims should be analyzed under fourth amendment standard rather than "heightened" substantive due process standard) *aff'd* 1989 U.S. App. Lexis 3802.

133. Graham v. Connor, 109 S. Ct. 1865, 1870-73 (1989).

134. *See, e.g.*, Hull v. City of Duncanville, 678 F.2d 582, 584 (5th Cir. 1982) (officer's conduct must be "sufficiently egregious" to be actionable under section 1983); Wise v. Bravo, 666 F.2d 1328, 1333 (10th Cir. 1981) (police officer's conduct must be "egregious") (quoting Williams v. Kelley, 624 F.2d 695, 697 (5th Cir. 1980), *cert. denied*, 451 U.S. 1019 (1981)); Holmes v. Wampler, 546 F. Supp. 500, 503 (E.D. Va. 1982) (only "egregious" police conduct falls within substantive due process protection); *see also*

caused severe injuries. In contrast, the fourth amendment test announced in *Graham* is more restrictive, protecting individuals from police conduct that is objectively unreasonable.[135]

By imposing a "significant injury" requirement,[136] the Fifth Circuit has seemingly reversed the expansion of police liability under section 1983. The court has restricted the class of excessive force plaintiffs with actionable section 1983 claims to those plaintiffs who sustained palpable bodily injuries as a result of mistreatment during arrest. Such a requirement seems to be a veiled attempt to revive the "shock the conscience" test[137] that the Court repudiated in *Graham*.[138]

B. *Special Purposes of Section 1983*

Section 1983 not only provides a right to compensation for physical injury, but allows for the "vindicat[ion of] cherished constitutional guarantees."[139] As explained in *Wood v. Breier*,[140] section 1983 enables the citizenry to safeguard constitutionally protected interests.

> Each citizen "acts as a private attorney general who 'takes on the mantel of the sovereign,' " guarding for all of us the individual liberties enunciated in the Constitution. Section 1983 represents a balancing feature in our governmental structure whereby individual citizens are encouraged to police those who are charged with policing us all.[141]

By requiring a threshold of injury, however, the Fifth Circuit discourages plaintiffs from challenging the reasonableness of police activity under section 1983. According to the test set forth in *Morel*, only plaintiffs who have sustained "significant" physical injury as a result of police misconduct during arrest need apply for section 1983 recovery.[142] Arrestees who are treated unreasonably during arrest but who fortuitously avoid physical injury will be less inclined to press claims against police officers under section 1983.

Advocates of a significant injury requirement would argue that these plaintiffs can instead pursue battery claims against police officers in state court. As the Supreme Court observed in *Bivens v. Six Unknown Named*

United States v. Robinson, 414 U.S. 218, 236 (1973) (conduct necessary to violate substantive due process must be "extreme or patently abusive" conduct).

135. *See* Comment, *supra* note 2, at 1385.

136. *See Johnson*, 876 F.2d at 480.

137. *See supra* notes 14-20 and accompanying text.

138. *See* Graham v. Connor, 109 S. Ct. 1865, 1870 (1989).

139. Gomez v. Toledo, 446 U.S. 635, 639 (1980) (quoting Owen v. City of Independence, 445 U.S. 622, 651 (1980)); *see also* Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 399 (1971) (Harlan, J., concurring) (federal courts have power to award damages for violations of "constitutionally protected interests").

140. Wood v. Breier, 54 F.R.D. 7 (1972).

141. *Id.* at 10-11 (citation omitted).

142. *See* Johnson v. Morel, 876 F.2d 477, 479-80 (5th Cir. 1989) (en banc) (per curiam).

Agents of the Federal Bureau of Narcotics,[143] however, existing state tort remedies may be "inconsistent [with] or even hostile" towards federally protected fourth amendment interests.[144] For this reason, it seems, at least one court has held that the existence of state tort remedies does not preclude a plaintiff from bringing an excessive force claim under section 1983.[145]

A significant injury requirement, moreover, runs contrary to the Supreme Court's characterization of section 1983 in *Felder v. Casey*.[146] The *Casey* Court indicated that section 1983 should not be construed to impose substantial limitations on section 1983 litigation.[147] The Fifth Circuit's quantum-of-injury requirement not only makes claims against police officers more difficult, it renders them impossible for plaintiffs who fail to show palpable bodily injury.

C. *Section 1983 Damages Not Limited to Compensation for Physical Injury*

As the Supreme Court held in *Carey v. Piphus*,[148] actual damages need not be shown in order to prove a constitutional violation under section 1983. It follows *a fortiori* that *physical* injury need not be shown in a section 1983 suit. Rather, as the Court explained in *Memphis Community School District v. Stachura*,[149] the primary purpose of allowing damages in section 1983 actions is to compensate for injuries caused by a violation of a plaintiff's constitutional rights.[150]

Stachura further explained that remedies available under section 1983 mirror remedies available in common-law tort actions.[151] Therefore, damages available to excessive force plaintiffs under section 1983 are appropriately fashioned after the damages awarded plaintiffs in common-law battery claims.[152] At common law, courts traditionally allowed

143. 403 U.S. 388 (1971)

144. *Id.* at 394.

145. *See* Felder v. Casey, 150 Wis. 2d 458, 473, 441 N.W.2d 725, 732 (1989).

146. 487 U.S. 131, 141-42 (1988).

147. *See id.*

148. 435 U.S. 247 (1978). In *Carey*, a high school student sued his high school principal under section 1983, alleging a due process violation. The Court held that although the plaintiff had proven a due process violation, he could not recover compensatory damages in the absence of proof of actual injury flowing from the violation. *See id.* at 266. The Court, however, awarded the plaintiff nominal damages, thereby acknowledging the violation of plaintiff's constitutional rights. *See id.* at 248.

149. 477 U.S. 299 (1986). In *Stachura*, the school board suspended a tenured school teacher with pay because he taught sex education in class. *See id.* at 301. Although Stachura was subsequently reinstated and lost no salary, he sued under section 1983, claiming violations of due process and the first amendment. *See id.* at 301-02. The Court permitted recovery for Stachura's personal humiliation, mental anguish and emotional distress. *See id.* at 307.

150. *See id.*

151. *See id.* at 307 & n.10.

152. *See, e.g.*, Ramirez v. Webb, 719 F. Supp. 610, 617-18 (W.D. Mich. 1989) (damages awarded for mental humiliation in an excessive force claim under section 1983).

plaintiffs in battery actions to recover for any mental anguish such as fright, revulsion or humiliation resulting from the tortfeasor's offensive physical contact.[153]

Contrary to dicta in *Morel*,[154] excessive force plaintiffs should be entitled to recover damages for any emotional distress or personal humiliation incurred as a result of mistreatment during arrest, even when the plaintiff has sustained no significant bodily injury.[155] A fair reading of *Graham* compels a finding that fourth amendment rights are violated whenever arrestees are treated unreasonably during arrest, irrespective of the injuries they sustain.[156]

Furthermore, a jury may award nominal damages in an excessive force claim where the plaintiff suffered no discernable physical injuries and minimal mental anguish as a result of an officer's unreasonable use of force.[157] Allowing recovery of nominal damages in an excessive force claim acknowledges that constitutionally-protected interests were violated.[158]

E. *Judicial Expediency Should Not Be Elevated Above Fourth Amendment Liberties*

Admittedly, a "significant injury" requirement facilitates the disposition of excessive force cases. It enables judges to dismiss on summary judgment all claims by excessive force plaintiffs who have pleaded only minor physical injuries.[159] Such a requirement may also facilitate the dismissal of false or frivolous claims.

Fourth amendment safeguards, however, cannot be compromised in the interest of judicial expediency. By dismissing excessive force claims

153. *See, e.g.*, Glickstein v. Setzer, 78 So. 2d 374, 375 (Fla. 1955) (jury properly considered humiliation, embarrassment and mental suffering in awarding damages); Smith v. Hubbard, 253 Minn. 215, 91 N.W.2d 756, 764 (1958) (proper for jury to award damages for mental anguish). *See generally* W. Prosser & P. Keeton, The Law of Torts § 9 (5th ed. 1984) (discussing damages available to plaintiffs in battery actions).

154. *See* Johnson v. Morel, 876 F.2d 477, 480 (5th Cir. 1989) (en banc) (per curiam).

155. *See, e.g.*, Ramirez v. Webb, 719 F. Supp. 610, 617-18 (W.D. Mich. 1989) (damages awarded *Biven*'s plaintiff where plaintiff suffered only transient emotional distress and no physical injury).

156. *See supra* notes 120-122 and accompanying text.

157. *Morel*, 876 F.2d at 481 (Rubin, J., concurring); *see* Memphis Community School Dist. v. Stachura, 477 U.S. 299, 308 n.11 (1986); *see, e.g.*, Bilbrey v. Brown, 738 F.2d 1462, 1472 (9th Cir. 1984) (nominal damages available in § 1983 claim analyzed under fourth amendment); Hunter v. Auger, 672 F.2d 668, 677 (8th Cir. 1982) (same); *see also* Bruce, *supra* note 128, at 67 (discussing availability of nominal damages for violations of constitutional rights).

158. *See* Gomez v. Toledo, 446 U.S. 635, 638-40 (1980); *see also* Schmerber v. California, 384 U.S. 757, 772 (1966) ("The integrity of an individual's person is a cherished value of our society."); *cf.* Bell v. Hood, 327 U.S. 678, 684 (1946) ("[W]here legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.").

159. *See, e.g.*, Palmer v. Williamson, 717 F. Supp. 1218, 1223-24 (W.D. Tex. 1989) (summary judgment appropriate where plaintiff's injuries deemed insignificant).

simply because plaintiffs suffered no "significant" physical injury, judges will effectively bar legitimate claims of plaintiffs who were treated "unreasonably" during arrest but sustained no palpable bodily injury.

As *Graham* made clear, plaintiffs are entitled to have a jury assess the reasonableness of police conduct under the "totality of circumstances." Significantly, *Graham*'s "not every push or shove"[160] maxim implies that some pushes and shoves may in fact violate the fourth amendment. Depending on the circumstances, applying unnecessary physical force may offend an individual's fourth amendment interests.[161]

Graham cannot be read to stand for the proposition that all physically coercive police conduct yielding little or no physical injury is reasonable *per se* under the fourth amendment. Such a reading, apparently undertaken by courts imposing a quantum-of-injury requirement, affords police officers an automatic right to inflict physical force as long as use of force leaves no traceable physical injuries. As the concurrence warned in *Morel*, such a standard may permit a police officer to escape liability under section 1983 for beating a person on the head without justification, if the beating causes only a bruise.[162]

CONCLUSION

Not all physically coercive police conduct attendant to arrest is reasonable *per se* under the fourth amendment. As the Supreme Court indicated in *Graham*, only careful attention to the facts and circumstances of each case will allow a fact finder to determine whether the totality of circumstances justified the manner in which a particular seizure was carried out. In some instances, even minimally intrusive force that causes no serious bodily injury may constitute an unreasonable seizure under the fourth amendment.

A significant injury requirement runs contrary to the fourth amendment because it permits as a matter of law all physically intrusive police behavior that does not result in bodily injury. A significant injury requirement, moreover, thwarts the remedial purposes of section 1983 by failing to allow plaintiffs to collect compensatory damages for non-physical harm.

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160. Graham v. Connor, 109 S. Ct. 1865, 1872 (1989).

161. A comment to the Second Restatement of Torts warns that a police officer "may not misuse his custody by any conduct which is clearly unnecessary to maintain it and which . . . is grossly offensive to a reasonable sense of personal dignity or modesty." Restatement (Second) of Torts § 132 comment b (1965).

162. *See* Johnson v. Morel, 876 F.2d 477, 481 (Rubin, J., dissenting).