Fordham Law Review

Volume 58 | Issue 4 Article 10

1990

Excessive Force and the Fourth Amendment: When Does Seizure End?

Mitchell W. Karsch

EXCESSIVE FORCE AND THE FOURTH AMENDMENT: WHEN DOES SEIZURE END?

INTRODUCTION

In *Graham v. Connor*,[1] the Supreme Court settled an ongoing controversy by holding that all claims that law enforcement officers used excessive force in the course of an arrest, investigatory stop or other seizure should be analyzed under the fourth amendment's protection against unreasonable seizures.[2] Claims of excessive force during pretrial detention, however, are evaluated under the fourteenth amendment's due process clause. Courts examining claims by pretrial detainees consider whether they were deprived of liberty to an extent that amounts to punishment without due process of law.[3]

Although the sources of constitutional protection in excessive force claims have been identified, courts continue their struggle to determine whether an individual is under seizure or pretrial detention. Fundamental disagreement remains about when a seizure ends, whether there is a gap between the end of seizure and the commencement of pretrial detention, and the source of excessive force protection during such a gap.[4] The bright-line rules the courts have developed to settle these issues do

---

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

2. *See* Graham v. Connor, 109 S. Ct. 1865, 1871 (1989).

The fourth amendment states:

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

U.S. Const. amend IV.

Prior to *Graham*, the federal judiciary was divided concerning the constitutional source of protection for individuals claiming excessive force during seizure. Several courts looked to the fourteenth amendment's guarantee of due process to test the constitutionality of excessive force during seizure. *See* Rochin v. California, 342 U.S. 165, 172 (1952); 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)); Wilson v. Beebe, 770 F.2d 578, 586 (6th Cir. 1985) (en banc). Others applied fourth amendment analysis for excessive force claims arising during seizure. *See* Tennessee v. Garner, 471 U.S. 1, 7 (1985); Lester v. City of Chicago, 830 F.2d 706, 710 (7th Cir. 1987); Robins v. Harum, 773 F.2d 1004, 1010 (9th Cir. 1985).

3. *See* Bell v. Wolfish, 441 U.S. 520, 535 (1979); *see also Graham*, 109 S. Ct. at 1871 n.10 (due process clause protects pretrial detainees from excessive force that amounts to punishment).

During his trial, a suspect is considered a pretrial detainee because he has not been adjudicated guilty of a crime. *See* Johnson v. Glick, 481 F.2d 1028, 1032 (1973). Once he has been convicted of a crime, he is no longer considered a pretrial detainee. Any claim of excessive force after conviction is analyzed by the cruel and unusual punishment clause of the eighth amendment. *See* Whitley v. Albers, 475 U.S. 312, 327 (1986).

4. The Supreme Court raised the issue of the source of protection during the gap and left it unresolved in *Graham*. *See Graham*, 109 S. Ct. at 1871 n.10. The Court stated that "[o]ur cases have not resolved the question whether the Fourth Amendment continues to provide individuals with protection against the deliberate use of excessive physical force

not sufficiently address the issues.[5] This confusion has lead to inconsistent decisions even within the same circuit.[6]

This Note argues that two bright-line rules should be established to aid courts in deciding excessive force cases. In warrantless arrests, the rule would define the end of a seizure as the first appearance of the suspect before a judicial officer for a probable cause hearing. In warrant arrests, the end of a seizure would be the first appearance before a judicial officer. Until this appearance, the individual is protected from the use of excessive force by the fourth amendment. Thereafter, he is considered a pretrial detainee and is protected by the fourteenth amendment's due process clause from the use of excessive force amounting to punishment. Part I of this Note discusses the sources of constitutional protection against excessive force and the corresponding standards that the courts use. Part II examines the need for bright-line rules in fourth amendment cases and considers the rules that courts have already established to define when a seizure ends and to determine whether there is a gap between the end of a seizure and pretrial detention. Part III concludes that courts should adopt the proposed bright-line rules defining the end of seizure because they eliminate the problem of case-by-case evaluation of when seizure ends and because they are easily understood standards for law enforcement officers.

I. CONSTITUTIONAL SOURCES OF PROTECTION AGAINST EXCESSIVE FORCE

A. *During Seizure—The Fourth Amendment*

Prior to the Supreme Court's decision in *Graham*, several courts decided claims of unconstitutional excessive force during seizure based on the fourteenth amendment's guarantee of due process.[7] Other courts ap-

beyond the point at which arrest ends and pretrial detention begins, and we do not attempt to answer that question today." *Id.*

The courts that have struggled with resolving these issues have attempted to create bright-line rules defining the end of a seizure. *See, e.g.*, Wilkins v. May, 872 F.2d 190, 193 (7th Cir. 1989) (seizure ends after individual has been placed securely in custody; within the gap period, the individual is protected by the fourteenth amendment), *cert. denied*, 110 S. Ct. 733 (1990); Justice v. Dennis, 834 F.2d 380, 388 (4th Cir. 1987) (en banc) (Phillips, J., dissenting) (seizure lasts as long as arresting officer retains custody of suspect; there is no gap because pretrial detainees do not lose fourth amendment protection), *vacated*, 109 S. Ct. 2461 (1989); Henson v. Thezan, 717 F. Supp. 1330, 1335-36 (N.D. Ill. 1989) (no gap period; seizure ends once individual has had a probable cause hearing and thereafter he is considered a pretrial detainee).

5. *See supra* notes 41-49, 57-65 and accompanying text.

6. *See, e.g., Wilkins*, 872 F.2d at 193 (Seventh Circuit held seizure ends after individual has been placed securely in custody; within the gap period, the individual is protected by the fourteenth amendment); Edwards v. May, 718 F. Supp. 1379, 1383 (N.D. Ill. 1989) (district court in Seventh Circuit followed *Wilkins*); Henson v. Thezan, 717 F. Supp. 1330, 1336 (N.D. Ill. 1989) (district court in Seventh Circuit, in decision after *Wilkins*, held that seizure ends when suspect brought before judicial officer for probable cause hearing).

7. *See* Rochin v. California, 342 U.S. 165, 172 (1952); Rinker v. Napa County, 831

plied fourth amendment analysis for such claims.[8]

In *Graham*, the Supreme Court held that excessive force claims brought under section 1983 are not governed by a single, generic standard.[9] Analysis for this type of claim must begin with identification of the specific constitutional right allegedly violated by the use of force.[10] The validity of the claim must then be judged by the constitutional standard governing that right rather than by a general excessive force standard.[11] In *Graham*, the Court held that the fourth amendment is the constitutional source of protection against excessive force arising during arrest, investigatory stop or other seizure.[12]

"[T]he 'reasonableness' of a particular seizure depends not only on *when* it is made, but on *how* it is carried out."[13] In *Graham*, the Supreme Court stated that determining whether the force used during a seizure was reasonable under the fourth amendment requires a careful balancing of the nature and quality of the intrusion on the individual's fourth amendment interests with the governmental interests that allegedly justify the intrusion.[14] Courts must evaluate the facts of each case, judging the reasonableness of a particular use of force from the perspective of a reasonable police officer making split-second judgments in circumstances that are tense and rapidly changing.[15] The inquiry is an objective one: "the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard

F.2d 829, 831-32 (9th Cir. 1987); Gumz v. Morrissette, 772 F.2d 1395, 1399 (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)); Wilson v. Beebe, 770 F.2d 578, 586 (6th Cir. 1985) (en banc).

Adopting the Supreme Court's analysis in Tennessee v. Garner, 471 U.S. 1 (1985), the Seventh Circuit overruled *Gumz* in Lester v. City of Chicago, 830 F.2d 706, 713 (7th Cir. 1987), and concluded that the fourth amendment is the source of constitutional protection against excessive force during seizure. *See Lester*, 830 F.2d at 711.

8. *See* Tennessee v. Garner, 471 U.S. 1, 7 (1985); Lester v. City of Chicago, 830 F.2d 706, 710 (7th Cir. 1987); Robins v. Harum, 773 F.2d 1004, 1010 (9th Cir. 1985).

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

10. *See id.* (citing Baker v. McCollan, 443 U.S. 137, 140 (1979)).

11. *See id.*

In *Graham*, the plaintiff alleged that excessive force was used while he was handcuffed and thrown into a police car during an investigatory stop. *See id.* at 1868.

12. *See id.* at 1871.

The *Graham* Court made explicit what was implicit in Tennessee v. Garner, 471 U.S. 1 (1985). In *Garner*, a police officer used deadly force to prevent a fleeing felon from escaping. *See Garner*, 471 U.S. at 4. The Supreme Court held that apprehension by deadly force is a seizure subject to the reasonableness requirement of the fourth amendment. *See id.* at 7. It is not constitutionally unreasonable to use deadly force as a last resort when the officer has probable cause to believe that an escaping suspect poses a threat of serious physical harm to the officer or to others. *See id.* at 11. The Tennessee statute at issue in *Garner* was held unconstitutional because it allowed the use of deadly force to effectuate the arrest of any felon without regard to the seriousness of the offense or the likelihood of physical harm. *See id.*

13. *Graham*, 109 S. Ct. at 1871 (emphasis in original).

14. *See id.*

15. *See id.* at 1871-72.

to their underlying intent or motivation."[16]

B. *While in Pretrial Detention—The Fourteenth Amendment*

A suspect who has been charged with a crime but has not yet been tried is considered a pretrial detainee.[17] Pretrial detainees are afforded constitutional protection against excessive force by the due process clause of the fourteenth amendment.[18] Claims of excessive force by pretrial detainees raise the issue of whether there has been a deprivation of liberty amounting to punishment without due process of law.[19]

The standard of review for determining whether the condition or restriction of confinement of a pretrial detainee was punishment is whether it was imposed with the expressed intent to punish or whether it was reasonably related to a legitimate governmental objective.[20] If there was

16. *Id.* at 1872. Subjective concepts such as malice and sadism are not a part of the fourth amendment analysis. *See id.* at 1873.

17. *See* Bell v. Wolfish, 441 U.S. 520, 523 (1979).

18. *See* Graham v. Connor, 109 S. Ct. 1865, 1871 n.10 (1989); *Bell*, 441 U.S. at 535; Johnson v. Glick, 481 F.2d 1028, 1032-33 (2d Cir.), *cert. denied*, 414 U.S. 1033 (1973).

19. *See Bell*, 441 U.S. at 535; *see also* Graham v. Connor, 109 S. Ct. 1865, 1871 n.10 (1989) (due process clause protects pretrial detainees from excessive force that amounts to punishment).

There are several objectives that justify the restraints and conditions on pretrial detainees. The government has an interest in ensuring that the detainee is present at his trial and in ensuring effective management and security of the detention facility once the individual is confined. *See Bell*, 441 U.S. at 539-40.

20. *See Bell*, 441 U.S. at 538-39.

Prior to *Graham*, many courts applied due process analysis to all claims of excessive force whether the claim arose during seizure or pretrial detention. *See, e.g.*, Rinker v. Napa County, 831 F.2d 829, 831-32 (9th Cir. 1987) (due process clause applied during seizure); Wilson v. Beebe, 770 F.2d 578, 586 (6th Cir. 1985) (en banc) (same); Johnson v. Glick, 481 F.2d 1028, 1032 (2d Cir. 1973) (due process clause applied during pretrial detention). The test the courts used to determine whether an individual's due process rights had been violated was based on the "shocks the conscience" test originated in Rochin v. California, 342 U.S. 165, 172 (1952). In *Rochin*, the defendant was handcuffed in his home and taken to a hospital, where an emetic was forced into his stomach to retrieve evidence for a narcotics sale prosecution. *See id.* at 166. The Supreme Court held that the defendant's due process rights had been violated because the force the police officers used to obtain the evidence "shocks the conscience." *See id.* at 172.

The test was further developed in Johnson v. Glick, 481 F.2d 1028 (2d Cir.), *cert. denied*, 414 U.S. 1033 (1973), to require the consideration of four factors: "the need for the application of force, the relationship between the need and the amount of force that was used, the extent of injury inflicted, and whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically" to cause harm. *Id.* at 1033.

Although most courts have applied the *Glick* test, they have not consistently interpreted the four factors. *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 the Fourth, Eighth, and Fourteenth Amendments*, 51 Alb. L. Rev. 173, 178 (1987); *see, e.g.*, Robison v. Via, 821 F.2d 913, 924 (2d Cir. 1987) (permanent or severe injury not necessary); Fernandez v. Leonard, 784 F.2d 1209, 1216 (1st Cir. 1986) (malice not required); Wise v. Bravo, 666 F.2d 1328, 1333-34 (10th Cir. 1982) (severe injury and malice required).

Subsequent to *Glick*, the Supreme Court confirmed that the due process clause is the

no legitimate governmental purpose, intent to punish may be inferred.[21]

II. BRIGHT-LINE RULES IN FOURTH AMENDMENT ANALYSIS

A. *The Need for Bright-Line Rules*

Both the Supreme Court and commentators have recognized the need for readily applicable bright-line rules in the fourth amendment arena.[22] The Court has developed fourth amendment doctrine that gives police officers relatively clear rules to follow.[23]

---

proper textual source of protection against excessive force for pretrial detainees. *See Graham*, 109 S. Ct. at 1871 n.10; *Bell*, 441 U.S. at 535. In both cases, however, the Court made it clear that the standard for determining whether a pretrial detainee's constitutional protection against excessive force was violated is whether the force used amounted to punishment. *See Graham*, 109 S. Ct at 1871 n.10; *Bell*, 441 U.S. at 535. In *Bell*, the Court did not mention *Rochin* and its "shocks the conscience" test or the four-factor *Glick* test. In *Graham* the Court mentioned both, *see Graham*, 109 S. Ct. at 1870, but did not discuss either in relation to the punishment standard it so clearly articulated.

Several courts have followed the guidance of *Bell* and *Graham* and applied the punishment standard to excessive force claims by pretrial detainees. *See, e.g.*, Titran v. Ackman, 893 F.2d 145, 147 (7th Cir. 1990) ("Did the state punish?—and not more ambulatory inquiries into the consciences of jurors or the severity of injury— is the right question" for excessive force claim by pretrial detainee); Martin v. Gentile, 849 F.2d 863, 870 (4th Cir. 1988) ("the pretrial detainee, who has yet to be adjudicated guilty of any crime, may not be subjected to *any* form of 'punishment.' ") (emphasis in original); Byrd v. Hafer, No. 84 C 10943 (N.D. Ill. Jan. 31, 1990) (LEXIS, Genfed library, Dist file) (" '[T]he Due Process Clause protects a pretrial detainee from the use of excessive force that amounts to punishment.' ") (quoting Graham v. Connor, 109 S. Ct. 1865, 1871 n.10 (1989)). One court adopted the punishment standard but used both the *Glick* test *and* the test followed in Martin v. Gentile, 849 F.2d 863, 870 (4th Cir. 1988). *See* Brooks v. Pembroke City Jail, 722 F. Supp. 1294, 1299 (E.D.N.C. 1989) (the test cited in *Martin* was the test the Supreme Court developed in *Bell*).

21. *See Martin v. Gentile*, 849 F.2d 863, 870 (4th Cir. 1988).

22. *See* New York v. Belton, 453 U.S. 454, 458 (1981).

> Fourth Amendment doctrine . . . is primarily intended to regulate the police in their day-to-day activities and thus ought to be expressed in terms that are readily applicable by the police in the context of the law enforcement activities in which they are necessarily engaged. A highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions, may be the sort of heady stuff upon which the facile minds of lawyers and judges eagerly feed, but they may be "literally impossible of application by the officer in the field."

Id. (quoting LaFave, *"Case-by-Case Adjudication" Versus "Standardized Procedures": The Robinson Dilemma*, 1974 Sup. Ct. Rev. 127, 141). *See, e.g.*, E. Griswold, Search and Seizure: A Dilemma of the Supreme Court 47 (1975); Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L. Rev. 349, 417-29 (1974); Dworkin, *Fact Style Adjudication and the Fourth Amendment: The Limits of Lawyering*, 48 Ind. L.J. 329, 365-66 (1973); LaFave, *The Fourth Amendment in an Imperfect World: On Drawing "Bright Lines" and "Good Faith"*, 43 U. Pitt. L. Rev. 307, 320-33 (1982) [hereinafter *On Drawing Bright Lines*]; McGowan, *Rule-Making and the Police*, 70 Mich. L. Rev. 659 (1972).

23. *See* LaFave, *On Drawing Bright Lines, supra* note 22, at 322-24.

One method the Supreme Court has used is to express a fourth amendment rule in terms of a standardized procedure that would be applied regardless of the fact pattern, thus alleviating the need for ad hoc decision making by the police or the courts. *See id.* at 323; *see also* E. Griswold, *supra* note 22, at 47 (courts could standardize their decisions by developing "type situations" and establish a rule that will apply to all cases of that

Formulating rules to guide fourth amendment analysis provides safeguards against arbitrary searches and seizures.[24] Rule-making is also needed to slow the proliferation of police practices that have presented the Supreme Court with great problems in developing a coherent body of fourth amendment law.[25] The bright-line needed, however, "is one which irradiates, not one which bedazzles."[26]

The pursuit of clear rules must progress with care if reasonable and predictable results are to be achieved.[27] Misconceived bright-line rules will lead to substantial injustice and will actually be difficult to apply.[28] They will create a multiplicity of rules, marking the boundaries of the rules will become guesswork, and the creation of bright-line rules for certain situations will necessarily create such rules for other situations.[29] Fourth amendment doctrine must be expressed in language that is easily

---

type regardless of the particular factual variations). In Chimel v. California, 395 U.S. 752 (1969), the Supreme Court held that when an arrest is made "[t]here is ample justification . . . for a search of the arrestee's person and the area 'within his immediate control'—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence." *Id.* at 763.

The Supreme Court has also attempted to stem the development of overly complicated rules by refusing to add sophistication to already existing rules. *See* LaFave, *On Drawing Bright Lines*, *supra* note 22, at 323. In Dunaway v. New York, 442 U.S. 200 (1979), the Supreme Court refused to adopt a multifactor balancing test to cover all seizures that did not amount to technical arrests, stating "[a] single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront." *Id.* at 213-14 (footnotes omitted).

24. *See* Amsterdam, *supra* note 22, at 418.

25. *See id.* at 419.

26. LaFave, *On Drawing Bright Lines*, *supra* note 22, at 327. Professor LaFave argues,

> as between a complicated rule which in a theoretical sense produces the desired result 100% of the time, but which well-intentioned police could be expected to apply correctly in only 75% of the cases, and a readily understood and easily applied rule which would bring about the theoretically correct conclusion 90% of the time, the latter is to be preferred over the former.

Id. at 321.

27. *See id.* at 333.

28. *See* Alschuler, *Bright Line Fever and the Fourth Amendment*, 45 U. Pitt. L. Rev. 227, 231 (1984).

Professor LaFave offers guidance in establishing a bright-line rule by formulating four questions that should be used to evaluate the rule before it is adopted by the courts:

> (1) Does it have clear and certain boundaries, so that it in fact makes case-by-case evaluation and adjudication unnecessary? (2) Does it produce results approximating those which would be obtained *if* accurate case-by-case application of the underlying principle were practicable? (3) Is it responsive to a genuine need to forego case-by-case application of a principle because that approach has proved unworkable? (4) Is it not readily subject to manipulation and abuse?

LaFave, *On Drawing Bright Lines*, *supra* note 22, at 325-26 (emphasis in original).

As an example, Professor LaFave states that a bright-line rule calling for a standardized procedure must be set out in crystal clear language to pass the first question. *See id.* at 326-27. Otherwise the rule does not serve its purpose of relieving the officer from case-by-case evaluation. *See id.*

29. *See* Alschuler, *supra* note 28, at 321.

communicated to police officers so that they will know what they may and may not do.[30] There is a genuine need for a bright-line rule defining the end of seizure because the courts continue to follow inconsistent rules defining the demarcation between seizure and detention.[31]

B. *Bright-Line Rules to Determine When Seizure Ends*

There are essentially three bright-line rules that define when seizure ends. Based on their definition of the end of seizure, the "continuing seizure," "custody" and "probable cause" rules then dictate whether the fourth or fourteenth amendment is the appropriate source of constitutional protection and hence which standard must be used in evaluating an excessive force claim.

1. Continuing Seizure

In his dissent in *Justice v. Dennis*,[32] Judge Phillips stated that "arrest" lasts as long as the arresting officer retains custody of the suspect and, therefore, that fourth amendment protections apply throughout this period.[33] Judge Phillips used *Terry v. Ohio*[34] as the basis for his argument that the seizure of a person does not relate only to the event of "arrest,"

30. *See* E. Griswold, *supra* note 22, at 53.

31. *See, e.g.*, Wilkins v. May, 872 F.2d 190, 193-94 (7th Cir. 1989) (seizure ends after individual placed securely in custody), *cert. denied*, 110 S. Ct. 733 (1990); Justice v. Dennis, 834 F.2d 380, 388 (4th Cir. 1987) (en banc) (Phillips, J., dissenting) (seizure lasts as long as arresting officer retains custody of suspect), *vacated*, 109 S. Ct. 2461 (1989); Henson v. Thezan, 717 F. Supp. 1330, 1335-36 (N.D. Ill. 1989) (seizure ends once individual has had a probable cause hearing).

Since the Supreme Court decision in *Graham*, the circuit courts have not provided law enforcement officers with clear and consistent guidelines regarding seizure and excessive force. *Compare* Powell v. Gardner, 891 F.2d 1039, 1044 (2d Cir. 1989) ("[T]he Fourth Amendment standard probably should be applied at least to the period prior to the time when the person arrested is arraigned or formally charged, *and* remains in the custody . . . of the arresting officer.") (emphasis added) *with* Titran v. Ackman, 893 F.2d 145, 147 (7th Cir. 1990) (though plaintiff had not been placed in a cell when alleged force was used, plaintiff's "presence in the jail and the completion of the booking marked the line between 'arrest' and 'detention' ").

32. 834 F.2d 380 (4th Cir. 1987) (en banc), *vacated*, 109 S. Ct. 2461 (1989).

33. *See id.* at 388 (Phillips, J., dissenting); *see also* Lester v. City of Chicago, 830 F.2d 706, 713 n.7 (7th Cir. 1987) (arrest lasts as long as the " 'arrestee is in the company of the arresting officers.' " (quoting Robins v. Harum, 773 F.2d 1004, 1010 (9th Cir. 1985))).

In *Justice*, the plaintiff brought a claim for injuries caused by the arresting officer's alleged use of excessive force in restraining the plaintiff following his appearance before the magistrate for a probable cause hearing. The Fourth Circuit held that the jury instruction, using a standard based on the *Glick* test to determine whether the plaintiff's due process rights were violated, *see Justice*, 834 F.2d at 386 (Phillips, J., dissenting), was the correct standard to use. *See id.* at 383.

The Fourth Circuit, however, applied the four-part due process test without considering whether the excessive force claim implicated a specific constitutional right controlled by a different standard. *See* Graham v. Connor, 109 S. Ct. 1865, 1870 (1989).

34. 392 U.S. 1 (1968).

and that arrest does not end when probable cause is found.[35] Any application of force that physically disables a person is both a restraint on his liberty and a seizure subject to the fourth amendment standard of reasonableness.[36]

According to the "continuing seizure" rule, the plaintiff's excessive force claim in *Justice* should have been evaluated under the fourth amendment standard of reasonableness because the plaintiff was still in the custody of the arresting officers when he was subjected to force.[37] Under the continuing seizure standard, it is irrelevant that the plaintiff had already appeared before a magistrate who found probable cause for the arrest.[38]

Judge Phillips stated that a suspect does not "lose all his fourth amendment rights to be secure in his person against unreasonable searches and seizures" once he becomes a pretrial detainee.[39] Therefore, he concluded that it is unnecessary to find the arrest technically in effect in order to continue to apply the fourth amendment standard.[40] The logical result of Judge Phillips' argument is that there is no gap between the end of seizure and the beginning of pretrial detention because both sources of constitutional protection overlap.

Both the continuing seizure bright-line rule and Judge Phillips' arguments are flawed in several ways. First, it is not clear to what extent a pretrial detainee retains fourth amendment protection against excessive force.[41] The Supreme Court has made it clear, however, that the due

35. *See Justice*, 834 F.2d at 387-88 (Phillips, J., dissenting).

In *Terry*, the Supreme Court held that the fourth amendment governs seizures of a person that are not considered "arrests" in the traditional sense of the term, including instances where the individual is not brought to the police station and prosecuted for the crime. *See Terry*, 392 U.S. at 16. "It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." *Id.*

36. *See Justice*, 834 F.2d at 388 (Phillips, J., dissenting).

37. *See id.* (Phillips, J., dissenting).

38. In *Justice*, the majority held that a standard based on *Glick*'s due process standard applied where a suspect was subjected to excessive force after he had appeared before a magistrate for his probable cause hearing. *See id.* at 383. The Supreme Court recently vacated and remanded *Justice* for reconsideration by the Fourth Circuit in light of *Graham*. *See* Justice v. Dennis, 109 S. Ct. 2461, 2462 (1989).

In *Graham*, the Supreme Court specifically rejected the notion held by the *Justice* majority, that all claims of excessive force are governed by a single generic standard, *see* Graham v. Connor, 109 S. Ct. 1865, 1870 & n.8 (1989), stating that section 1983 " 'is not itself a source of substantive rights.' " *Id.* at 1870 (quoting Baker v. McCollan, 443 U.S. 137, 144 n.3 (1979)). Based on *Graham*'s specific reference to *Justice*, it is probable that the Supreme Court vacated *Justice* because it used a generic standard, not because it used a due process analysis for a pretrial detainee. *See* Henson v. Thezan, 717 F. Supp. 1330, 1334 (N.D. Ill. 1989).

39. *Justice*, 834 F.2d at 387 (Phillips, J., dissenting) (citing Winston v. Lee, 470 U.S. 753, 755 (1985)). The plaintiff may be protected simultaneously by the fourth amendment and the due process clause's protection of his liberty interest in bodily security while he is a pretrial detainee. *See id.* (Phillips, J., dissenting).

40. *See id.* at 388 (Phillips, J., dissenting).

41. In Bell v. Wolfish, 441 U.S. 520 (1979), the Supreme Court upheld the constitu-

process clause is the appropriate source of constitutional protection for pretrial detainees from detention practices and conditions that amount to punishment.[42] The continuing seizure rule requires the use of the fourth amendment standard even when the suspect is a pretrial detainee. In *Graham*, however, the Supreme Court reiterated that the due process clause is the constitutional source of protection against excessive force amounting to punishment during pretrial detention.[43]

Dissenting in *Justice*, Judge Phillips stated that a suspect may be entitled to the concurrent protection of the due process clause and the fourth amendment because a pretrial detainee does not lose all his fourth amendment rights.[44] This presents the second problem. Even if the pretrial detainee does retain fourth amendment rights in a particular case, the two constitutional sources of protection have different standards with which to evaluate excessive force claims. Judge Phillips' argument does not indicate which standard should apply when the pretrial detainee is protected by both the fourth and fourteenth amendments. According to *Graham*, however, the specific constitutional source of protection must be identified.[45]

Third, the continuing seizure rule is arbitrary because it turns upon the point at which the arresting officer leaves the arrestee, and hence could produce different results in cases with similar fact patterns.[46] For example, consider the following arrest situations. In the first case, an arresting

---

tionality of detainment searches. *Id.* at 558. In his majority opinion, however, Justice Rehnquist did not concede that pretrial detainees retain all substantial fourth amendment privacy rights; he simply assumed for "present purposes" that the detainee did retain some fourth amendment protection. *See id.* Justice Rehnquist noted that a pretrial detainee may not retain any expectation of privacy and therefore fourth amendment protection regarding his cell, and any expectation of privacy he might retain, would be of diminished scope. *See id.* at 556-57. In United States v. Robinson, 414 U.S. 218 (1973), Justice Powell stated that an individual subject to lawful arrest retains no significant fourth amendment privacy rights. *See id.* at 237 (Powell, J., concurring); *cf.* Hudson v. Palmer, 468 U.S. 517, 525-26 (1984) (prisoners have no reasonable expectation of privacy in their prison cell).

However, in Winston v. Lee, 470 U.S. 753 (1985), the Supreme Court held that subjecting a pretrial detainee to a forced surgical procedure to remove a bullet for evidentiary purposes is an unreasonable search under the fourth amendment. *Id.* at 766.

These cases, which deal with fourth amendment privacy rights against unreasonable searches during pretrial detention, do not discuss fourth amendment protection against the use of excessive force while in pretrial detention.

42. *See Bell*, 441 U.S. at 535; Comment, *Excessive Force Claims: Removing the Double Standard*, 53 U. Chi. L. Rev. 1369, 1387-88 (1986) (citing *Bell*, 441 U.S. at 535-36 and Block v. Rutherford, 468 U.S. 576, 583, 592, 596 (1984)).

43. *See* Graham v. Connor, 109 S. Ct. 1865, 1871 n.10 (1989).

44. *See* Justice v. Dennis, 834 F.2d 380, 387 (4th Cir. 1987) (en banc) (Phillips, J., dissenting), *vacated*, 109 S. Ct. 2461 (1989).

45. *See Graham*, 109 S. Ct. at 1870 (citing Baker v. McCollan, 443 U.S. 137, 140 (1979)).

46. While the "continuing seizure" rule satisfies Professor LaFave's first question because it has clear and certain boundaries, the rule does not necessarily meet the second, which asks whether the rule will produce results similar to those that would be obtained if case-by-case adjudication were feasible. *See* LaFave, *On Drawing Bright Lines, supra*

officer leaves an arrested individual with a backup officer because he is called to another location. Under the continuing seizure rule, the arrested individual would no longer be considered under seizure for fourth amendment purposes. In the second case, the arresting officer accompanies the arrestee to the police station and stays with him through booking, interrogation, and the probable cause hearing.[47] In this scenario, the individual is still considered under arrest and is protected by the fourth amendment for a much longer period than was the arrestee in the first scenario. Such divergent results following from an ostensibly bright-line rule defeat the very purpose of the rule.

The continuing seizure rule may also be subject to manipulation and abuse.[48] The determination of excessive force varies tremendously depending on whether the individual is deemed under seizure or pretrial detention. Allowing the demarcation between seizure and pretrial detention to be in the control of the individual officer would encourage manipulation and abuse.[49]

2. Custody

In *Wilkins v. May*,[50] the Seventh Circuit created the "custody" rule, which maintains that once an arrest has taken place and the arrestee has been placed securely in custody, the seizure is over and the individual is no longer protected by the fourth amendment.[51] The *Wilkins* court argued that "[a] natural although not inevitable interpretation of the word 'seizure' would limit it to the initial act of seizing, with the result that subsequent events would be deemed to have occurred after rather than during the seizure."[52] *Wilkins* held that after the initial seizure, any fur-

note 22, at 325-26. Whether the rule will approximate the correct result depends solely on when the arresting officer decides to leave the individual.

47. This scenario is analogous to the facts in *Justice*. *See* Justice v. Dennis, 834 F.2d 380, 381 (4th Cir. 1987) (en banc), *vacated*, 109 S. Ct. 2461 (1989).

48. *Cf.* LaFave, *On Drawing Bright Lines*, *supra* note 22, at 326 (LaFave's fourth question asks whether the rule is subject to manipulation and abuse).

49. In his dissent in *Justice*, Judge Phillips argued for extended application of the fourth amendment in the criminal procedure process. *See Justice*, 834 F.2d at 387 (Phillips, J., dissenting). In the fact pattern of *Justice*, the continuing seizure rule would produce such a result because the arrestee was in the custody of the arresting officer after his probable cause hearing. *See id.* at 381. Judge Phillips, however, declined to discuss the situation in which, under the continuing seizure rule, the duration of an arrestee's protection by the fourth amendment would actually decrease. *See* first hypothetical, *supra* Section II(B)(1).

50. 872 F.2d 190 (7th Cir. 1989), *cert. denied*, 110 S. Ct. 733 (1990).

51. *See id.* at 193-94.

In *Wilkins*, the plaintiff brought a claim of excessive force against the officers for the infliction of severe mental distress by an officer's pointing a gun at the plaintiff's head during an interrogation. *See id.* at 191-92. The plaintiff had not appeared before a magistrate and had not been charged.

52. *Id.* at 192-93.

In *Wilkins*, the Seventh Circuit raised the issue of the source of the individual's constitutional protection in the period between arrest and charge. *See id.* at 193. The same issue was raised and left unresolved in *Graham*. *See* Graham v. Connor, 109 S. Ct. 1865,

ther restraints on a suspect's liberty do not constitute seizures but are deprivations of liberty in violation of the due process clause.[53]

Wilkins raised two objections to using the fourth amendment to evaluate claims of excessive force in the period between arrest and charge. First, once the arrestee is securely in custody, the typical fourth amendment concerns are no longer at issue.[54] *Wilkins* states that the usual question that arises under the fourth amendment is whether there was probable cause for the arrest.[55] With excessive force claims, *Wilkins* contends that under the fourth amendment, a court must determine whether the force used was excessive in relation to the danger the suspect posed if left at large.[56]

The *Wilkins* court, however, misstated the test for excessive force claims under the fourth amendment. The fourth amendment standard is whether the force used is objectively reasonable in light of the facts and circumstances that confront the police officers.[57] This is still at issue after the suspect has been placed securely in custody because the facts in a given case may require the arresting officers to use force. A suspect that has been placed in the custody of the arresting officer may pose a threat that requires the officer to use force to control the suspect.

Second, the *Wilkins* court held that extending fourth amendment protection to the period between arrest and the charge "could lead to an unwarranted expansion of constitutional law."[58] Essentially any push or shove after the initial seizure might be considered unreasonable and therefore a fourth amendment violation.[59] As a result, the Seventh Circuit rejected the idea of a continuing seizure.[60]

In *Graham*, however, the Supreme Court specifically rejected the notion that the reasonableness standard would turn every push or shove into a violation of the fourth amendment.[61] The plaintiff in *Graham* was securely in police custody when he was subjected to alleged excessive

---

1871 n.10 (1989). In *Graham*, the interval between arrest and charge was termed the period between arrest and pretrial detention. *See id.*

53. *See Wilkins*, 872 F.2d at 194-95.

54. *See id.* at 193-94.

55. *See id.* at 193.

56. *See id.*

57. *See* Scott v. United States, 436 U.S. 128, 137 (1977); *see also* Graham v. Connor, 109 S. Ct. 1865, 1872 (1989) (under fourth amendment reasonableness inquiry, question is whether force used is " 'objectively reasonable' in light of facts and circumstances confronting them, without regard to their underlying intent or motivation").

58. Wilkins v. May, 872 F.2d 190, 194 (7th Cir. 1989), *cert. denied*, 110 S. Ct. 733 (1990).

59. *See id.*

60. *See id.* According to the court in *Wilkins*, the concept of continuing seizure weakens the problematic element of police conduct during arrest. When an individual is arrested, the police are taking away a person's liberty. *See id.* Interrogation while in custody, as is the case in *Wilkins*, does not further limit a person's freedom of action because presumably he has already lost that freedom. *See id.*

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

Wilkins was decided before the recent Supreme Court decision in *Graham*, which held

force.[62] The fact that the plaintiff was securely in police custody, however, "did not prevent the Supreme Court from applying the Fourth Amendment reasonableness standard to the entire incident."[63] The reasoning of the Court in *Graham* undermines *Wilkins'* criticism of extending fourth amendment protection beyond the point at which the suspect is securely in custody.[64]

While purporting to solve the problem of defining the end of seizure, the Seventh Circuit actually added to it. The custody rule fails to draw clear and certain boundaries because it does not specify what constitutes custody.[65] The custody rule, therefore, fails to satisfy the very reason for developing bright-line rules for the fourth amendment.

3. Probable Cause

In *Jones v. County of DuPage*,[66] a district court in the Seventh Circuit created the "probable cause" rule. The rule states that in warrantless arrests, seizure ends and pretrial detention begins when the police take the arrestee before a judicial officer for a probable cause determination.[67]

Jones held that the fourth amendment clearly applies to the *duration* of a seizure until the individual is taken before a judicial officer.[68] There-

---

that all claims of excessive force in the course of an arrest, investigatory stop or other seizure should be analyzed under the fourth amendment. *See id.* at 1871.

62. *See id.* at 1868.

63. Henson v. Thezan, 717 F. Supp. 1330, 1334 (N.D. Ill. 1989) (footnote omitted).

64. The fourth amendment has been applied beyond the point at which the police officers have the suspect securely in custody. *See, e.g.*, *Graham*, 109 S. Ct. at 1871 (fourth amendment applied after the plaintiff was handcuffed and thrown into the police car); United States v. Montoya de Hernandez, 473 U.S. 531, 544 (1985) (fourth amendment applied where plaintiff had been detained for over twenty-four hours after her arrest); Schmerber v. California, 384 U.S. 757, 771-72 (1966) (fourth and fourteenth amendments applied where blood sample taken from plaintiff after his arrest); Hammer v. Gross, 884 F.2d 1200, 1204 (9th Cir. 1989) (fourth amendment applied where blood sample taken from plaintiff after his arrest).

The custody rule, therefore, leaves open the question of when fourth amendment protection ends and fourteenth amendment protection begins.

65. In *Henson,* the District Court noted the difficulty of distinguishing between seizure and custody. *See Henson*, 717 F. Supp. at 1334 n.3; *cf.* LaFave, *On Drawing Bright Lines*, *supra* note 22, at 325 (fourth amendment bright-line rules must have clear and certain boundaries). Defining "securely in custody" is arguably just as difficult as defining the end of seizure.

The custody rule may also require a multiplicity of rules to define when an individual is considered "securely in custody." *Cf.* Alschuler, *supra* note 28, at 231 (bright-line fourth amendment rules will create multiplicity of rules).

66. 700 F. Supp. 965 (N.D. Ill. 1988).

67. *See id.* at 971.

In *Jones*, the suspect was arrested on misdemeanor charges, brought to jail and released by arresting officers to the jail officials. *See id.* at 966-67. The officials placed the suspect in an isolation cell where he later hanged himself. *See id.* at 967. The decedent's estate brought claims against the police alleging that his treatment during his arrest and detention violated the decedent's constitutional rights. *See id.*

68. *See id.* at 970 (citing Gramenos v. Jewel Companies, 797 F.2d 432, 437 (7th Cir. 1986), *cert. denied*, 481 U.S. 1028 (1987)).

In Gerstein v. Pugh, 420 U.S. 103 (1975), the Supreme Court held that in warrantless

fore, the fourth amendment applies to the *conditions* of the seizure as well.[69]

Under the probable cause bright-line rule, no gap exists between arrest and pretrial detention. The fourth amendment protects the individual until he appears before a judicial officer for the probable cause hearing. Thereafter, he is considered a pretrial detainee and is protected by the due process clause.

III. THE PROPER BRIGHT-LINE RULE TO DEFINE THE END OF SEIZURE

The bright-line rules that the courts have developed to define the end of seizure have resulted in inconsistent rules which do not sufficiently

---

arrests, the police officer's assessment of probable cause justifies arresting a person and for a brief period of detention following the arrest to perform administrative tasks incident to the arrest. *See id.* at 113-14. Once in custody, the suspect's need for a neutral determination of probable cause increases significantly. *See id.* at 114. Therefore, the fourth amendment requires a judicial determination of probable cause to further restrain a suspect's liberty. *See id.* The determination of probable cause by a judicial officer must be made either before or promptly after arrest. *See id.* at 125.

69. *See Jones*, 700 F. Supp. at 970.

The *Jones* court relied on the Supreme Court's decision in United States v. Montoya de Hernandez, 473 U.S. 531, 544 (1985), to support the view that the fourth amendment applies to the conditions of the seizure. *See Jones*, 700 F. Supp. at 970; *infra* notes 75-77 and accompanying text. While *Jones* is a negligence and deprivation of life case and deals with constitutional rights other than the use of force, the district court held that the fourth amendment applies to all claims challenging the treatment of arrestees. *See Jones*, 700 F. Supp. at 971.

Jones was decided before the Seventh Circuit rejected the idea of the continuing seizure and the probable cause analogy in *Wilkins*, and before the Supreme Court's decision in *Graham*. However, in Henson v. Thezan, 717 F. Supp. 1330 (N.D. Ill. 1989), decided after both *Wilkins* and *Graham*, the district court did not follow *Wilkins*' custody bright-line rule because it believed that the recent Supreme Court decision in *Graham* undercut the rule of *Wilkins*. *See id.* at 1335. *But see* East v. City of Chicago, 719 F. Supp. 683, 689 (N.D. Ill. 1989); Edwards v. May, 718 F. Supp. 1379, 1383 (N.D. Ill. 1989). *Henson* followed the reasoning of *Jones* in affirming the bright-line rule that the "line of demarcation between seizure and detention, and hence between Fourth Amendment and Fourteenth Amendment scrutiny" is when the police bring the arrestee before a judicial officer for probable cause determination. *Henson*, 717 F. Supp. at 1336. The district court held that because the plaintiff had not appeared before a judicial officer when he suffered the alleged beatings, the fourth amendment governs his claim. *See id.*

Both *Jones* and *Henson* relied on Gerstein v. Pugh, 420 U.S. 103 (1975), as an analogy, not as precedent. *See Henson*, 717 F. Supp. at 1335; *Jones*, 700 F. Supp. at 970. *Jones* illustrates policy considerations for holding that an individual is protected by the fourth amendment reasonableness standard until judicial determination of probable cause. *See Jones*, 700 F. Supp. at 971; *infra* notes 78-79 and accompanying text.

In developing the custody bright-line rule, *Wilkins* rejected the use of *Gerstein*'s holding that the fourth amendment guarantees an individual a probable cause hearing as a prerequisite to further detention, as an analogy for determining when seizure ends. *See* Wilkins v. May, 872 F.2d 190, 193 (7th Cir. 1989), *cert. denied*, 110 S. Ct. 733 (1990). The *Wilkins* court stated that *Gerstein* involved the fourth amendment's probable cause requirement and was not controlling in excessive force cases that dealt with reasonableness. *See id.* *Wilkins* argued that the *Gerstein* holding does not imply that every moment of detention is a fresh seizure. *See id.*

address the issue of defining the end of seizure.[70] Careful analysis indicates that a variation of the probable cause rule best resolves the inconsistency and, by creating a clear demarcation, protects the rights of arrestees and pretrial detainees.

A. *"Probable Cause" in Warrantless Arrests*

The probable cause bright-line rule should be adopted as the rule defining when seizure ends. All claims of excessive force that arise before the probable cause hearing should be evaluated under the fourth amendment reasonableness standard.

The Supreme Court already applies the fourth amendment beyond the traditionally defined arrest in excessive force claims.[71] Providing fourth amendment protection against excessive force until the probable cause hearing, therefore, would not constitute an expansion of fourth amendment protection.

Historically, the Supreme Court has moved toward fourth amendment analysis in excessive force claims.[72] In *Graham*, the Court held that the

---

70. *See, e.g., Wilkins*, 872 F.2d at 193-94 (seizure ends after individual has been placed securely in custody); Justice v. Dennis, 834 F.2d 380, 387-88 (4th Cir. 1987) (en banc) (Phillips, J., dissenting) (seizure lasts as long as arresting officer retains custody of suspect), *vacated*, 109 S. Ct. 2461 (1989); Henson v. Thezan, 717 F. Supp. 1330, 1336 (N.D. Ill. 1989) (seizure ends once individual had a probable cause hearing).

71. In *Graham*, the Supreme Court used the fourth amendment to evaluate the plaintiff's claim of excessive force after he had been handcuffed and thrown into the police car. *See* Graham v. Connor, 109 S. Ct. 1865, 1871 (1989).

In United States v. Montoya de Hernandez, 473 U.S. 531 (1985), the suspect had been stopped for smuggling drugs into the United States. *See id.* at 532-33. The customs agent suspected that the defendant had swallowed the drugs in balloons and held her for over twenty-four hours until the drugs exited her body. *See id.* at 534-36. The Supreme Court applied the fourth amendment to evaluate the extended detention of the defendant, holding that it was not unreasonable. *See id.* at 544.

In Schmerber v. California, 384 U.S. 757 (1966), the Supreme Court held that taking a blood sample from an individual who had been arrested for driving under the influence of alcohol was not a violation of his rights under the fourth and fourteenth amendments to be free of unreasonable searches and seizures. *See id.* at 772; *see also* Hammer v. Gross, 884 F.2d 1200, 1204 (9th Cir. 1989) (obtaining blood sample from arrestee is an incident of arrest and, therefore, evaluated under the fourth amendment).

72. *See* Graham v. Connor, 109 S. Ct. 1865, 1871 (1989).

In Lester v. City of Chicago, 830 F.2d 706 (7th Cir. 1987), the Seventh Circuit noted the shift in the Supreme Court since Rochin v. California, 342 U.S. 165 (1952), and followed Tennessee v. Garner, 471 U.S. 1 (1985), holding that claims of excessive force during seizure are subject to fourth amendment analysis. *See Lester*, 830 F.2d at 711-12.

After *Rochin*, the Supreme Court applied the fourth amendment exclusionary rule to the states. *See* Mapp v. Ohio, 367 U.S. 643, 655-56 (1961). "Consequently, the Court has not relied on the *Rochin* 'shocks the conscience' standard but has instead applied a Fourth Amendment reasonableness analysis in cases that, like *Rochin*, involved highly intrusive searches or seizures." *Lester*, 830 F.2d at 711. It is clear that after its recent decision in *Graham*, the Court would have applied fourth amendment analysis because the defendant in *Rochin* was under seizure.

In recent years, the Supreme Court has relegated *Rochin* to passing mention in footnotes or has not cited it at all. *See* Gumz v. Morrissette, 772 F.2d 1395, 1406 (7th Cir. 1985) (Easterbrook, J., concurring), *cert. denied*, 475 U.S. 1123 (1986) (overruled by Les-

specific constitutional right allegedly infringed must be identified in excessive force claims because the same standard does not govern all section 1983 claims.[73] Because the probable cause rule bases its determination of the applicable constitutional right on an identifiable point in time, the rule offers the courts precise guidance in applying the appropriate constitutional right.

In addition, the fourth amendment guarantees an arrestee a probable cause hearing before further detention.[74] Thus, the fourth amendment already protects the arrestee during his detention before his probable cause hearing. In developing the probable cause rule, the district court in *Jones* referred to *United States v. Montoya de Hernandez*,[75] in which the Supreme Court held that although the arrestee's detention was long, uncomfortable and humiliating, it was not unreasonable under the fourth amendment.[76] *Jones* stated that "it is clear . . . that the court examined both the duration and the conditions of the detention in upholding the seizure. . . . Thus, the case strongly suggests that, so long as the Fourth Amendment governs the duration of a person's detention, it governs the conditions of that detention as well."[77]

Policy and practicality also favor the application of the more stringent fourth amendment analysis until judicial determination of probable cause. The probable cause hearing changes the nature of the individual's incarceration. The probable cause hearing indicates that the individual's continuing detention is dependent less upon an individual officer's assessment and more upon the routines and protections of the criminal justice system. An individual is in a "uniquely vulnerable position" when arrested, and any fear and distress he may feel because of the arrest may be "magnified until he comes before a judicial officer."[78] In addition, in warrantless arrests, stricter fourth amendment protection is necessary to prevent "overzealousness" by police officers, who have sole responsibility for their conduct.[79]

It is very clear whether a suspect has appeared before a judicial officer

---

ter v. City of Chicago, 830 F.2d 706, 713 (7th Cir. 1987)). The Supreme Court has abolished subjective inquiries from the law of "good faith" or qualified immunity for police conduct because in subjective inquiries there " 'often is no clear end to the relevant evidence' " and they make summary judgment impossible. *Gumz*, 772 F.2d at 1407 (Easterbrook, J., concurring) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 817 (1982)).

One commentator has argued that "reasonableness" should also be the standard for due process claims of excessive force by pretrial detainees. *See* Comment, *supra* note 42, at 1397. Another commentator has suggested that the due process clause should not be applied in excessive force cases because the fourth amendment is the primary source of constitutional protection from excessive force. *See* Freyermuth, *Rethinking Excessive Force*, 1987 Duke L.J. 692, 693 (1987).

73. *See Graham*, 109 S. Ct. at 1870.
74. *See* Gerstein v. Pugh, 420 U.S. 103, 114 (1975).
75. 473 U.S. 531 (1985).
76. *See id.* at 544.
77. Jones v. County of DuPage, 700 F. Supp. 965, 971 (N.D. Ill. 1988).
78. *Id.*
79. *See id.*

for a probable cause hearing. Because the probable cause rule has clear and certain boundaries,[80] it can easily be understood by police officers.[81] The rule, therefore, will eliminate the need for case-by-case evaluation of the precise demarcation between seizure and pretrial detention.[82]

Finally, the probable cause rule is not readily subject to manipulation and abuse.[83] The fourth amendment guarantees a suspect a timely judicial determination of probable cause.[84] It would be almost impossible to flout the rule by forcing a suspect to become a pretrial detainee faster than usual in order to take advantage of the less stringent due process standard of protection.[85] In addition, the demarcation between seizure and pretrial detention under the probable cause rule is immune to the manipulation of an individual law enforcement officer.[86]

B. *"First Appearance" Rule in Warrant Arrests*

The probable cause bright-line rule is not directly applicable to warrant arrests.[87] When an arrest is made with a warrant, the probable cause hearing takes place before the actual arrest.[88]

To apply to warrant arrests, the probable cause rule should be extended to state that the individual arrested with a warrant is considered under seizure until his first appearance before a judicial officer.[89] Under

80. *Cf.* LaFave, *On Drawing Bright Lines*, *supra* note 22, at 325 (LaFave's first question asks whether rule has clear and certain boundaries).

81. *Cf. id.* at 333 (bright-line rules with the fourth amendment must be easily understood by police officers).

82. The boundaries of the probable cause rule are clear and will not become guesswork. In contrast, the custody rule will be unpredictable because it is not always clear to the police officers or the courts what constitutes "custody." *See supra* note 65 and accompanying text; *cf.* Alschuler, *supra* note 28, at 231 (marking the boundaries of fourth amendment bright-line rules will become guesswork).

83. *Cf.* LaFave, *On Drawing Bright Lines*, *supra* note 22, at 326 (LaFave's fourth question asks whether rule is subject to manipulation or abuse).

84. *See* Gerstein v. Pugh, 420 U.S. 103, 124-25 (1975).

85. The suspect must still appear before a judicial officer for the probable cause determination. This requirement will most likely require the law enforcement officers to follow the routine procedure of the jurisdiction.

86. This is unlike the continuing seizure rule, under which the police officers have complete control over when the seizure is considered to have ended. *See supra* notes 48-49 and accompanying text.

87. The Supreme Court has expressed a preference for the use of arrest warrants and search warrants. *See* United States v. Ventresca, 380 U.S. 102, 105-07 (1965); Aguilar v. Texas, 378 U.S. 108, 110-11 (1964). "Although an arrest may be authorized in advance by a judicially issued warrant, the vast majority of all arrests are made on the officer's own initiative, without a warrant." W. LaFave & J. Israel, Criminal Procedure § 1.4, at 9 (1985). The probable cause rule, therefore, will cover the vast majority of the cases.

88. Probable cause is decided by a neutral and detached person who has the capability of determining if probable cause exists. *See* Shadwick v. City of Tampa, 407 U.S. 345, 350 (1972). The next review of probable cause in a warrant arrest will be at the preliminary hearing, which may not occur for one or two weeks after the first appearance. *See* W. LaFave & J. Israel, Criminal Procedure § 1.4, at 14-15 (1985).

89. Following the arrest, the suspect is brought to the police station or other holding facility where he is "booked." *See id.* § 1.4, at 10. The arrestee's name and the offense

this rule, an individual is protected against excessive force by the fourth amendment until his first appearance. Thereafter, he is considered a pretrial detainee and is protected by the due process clause of the fourteenth amendment from excessive force that amounts to punishment.

By drawing the line between seizure and pretrial detention at the suspect's first appearance, a clearly identifiable point in time marks the change from fourth to fourteenth amendment protection against excessive force. The importance of the first appearance is reflected in state laws that require that a person arrested with a warrant be brought before the magistrate without unnecessary delay.[90] This requirement in the criminal procedure process clearly offers significant protection of the arrestee's rights. The first appearance is a critical point in the criminal procedure process because it changes the nature of the arrestee's incarceration.[91]

Criminal procedures vary from jurisdiction to jurisdiction and can even vary within the same jurisdiction.[92] The requirement of a prompt appearance before a judicial officer, however, is compelled by state law;

---

for which he was arrested are entered in the police log, and the arrestee is usually fingerprinted. *See id.*

The arrestee is then presented before the magistrate in what is usually called a "first appearance." *See id.* § 1.4, at 13-14. The suspect is informed of the charge against him and of various rights he has in the proceedings. Bail and a date for a preliminary hearing are usually set at this time. *See id.* § 1.4, at 13-14. In most instances, the arrestee must be brought before the magistrate without unnecessary delay, usually within several hours after his arrest. *See id.* § 1.4, at 13.

In a warrantless arrest, the fourth amendment requires a judicial determination of probable cause to further restrain an arrestee's liberty. *See* Gerstein v. Pugh, 420 U.S. 103, 114 (1975).

In arrests with warrants, the probable cause determination takes place before the arrest occurs. *See* W. LaFave & J. Israel, Criminal Procedure § 3.3, at 110 (1985). The probable cause determination must be made by a neutral and detached person who is capable of determining whether probable cause exists for the arrest. *See Shadwick*, 407 U.S. at 350.

90. *See* Cal. Penal Code § 825 (West Supp. 1990); Colo. Rev. Stat. § 16-3-108 (1986); Idaho Code § 19-515 (1987); Ill. Ann. Stat. ch. 38, para. 109-1(a) (Smith-Hurd Supp. 1989); Ind. Code Ann. § 35-33-2-2 (Burns 1985); Iowa Code Ann. § 813.3 Rule 39 (West 1979); Nev. Rev. Stat. Ann. § 171.178.1 (Michie 1986); N.M. Stat. Ann. § 31-1-4(C) (1978); N.Y. Crim. Proc. Law § 120.90(1) (McKinney 1981); N.C. Gen. Stat. § 15A-511(a)(1) (1988); Pa. R. Crim. P., 122, 42 Pa. Cons. Stat. Ann. (Purdon 1989); Tex. Crim. Proc. Code Ann. art. 15.16 (Vernon 1977); Va. Code Ann. § 19.2-80 (Supp. 1989); W. Va. Code § 62-1-5 (1989).

91. As with the probable cause hearing as the demarcation, the first appearance indicates that the individual's continuing detention is dependent upon the routines and protections of the criminal justice system, not the individual officer's assessment. "Whatever fear and distress [an arrestee] might feel on account of his having been arrested at all might remain magnified until he comes before a judicial officer." Jones v. County of DuPage, 700 F. Supp. 965, 971 (N.D. Ill. 1988). While the *Jones* court stated this in the context of a probable cause hearing in a warrantless arrest, *see id.*, the same fears and apprehensions will be felt by an arrestee in a warrant arrest.

92. *See* W. LaFave & J. Israel, Criminal Procedure § 1.2, at 2 (1985). Three factors create the variations in structure of the criminal procedure process. First, criminal prosecution can be on the state or federal level. *See id.* § 1.2, 2-3. Second, in most jurisdictions substantial discretionary authority is given in criminal justice administration. *See*

the appearance, therefore, must take place regardless of the unique procedure of the jurisdiction.[93] The first appearance thus serves as a logical point of demarcation between seizure and pretrial detention in warrant arrests.

Depending on the jurisdiction, the first appearance may or may not be the same time at which probable cause is determined after warrantless arrests.[94] It is unlikely that the first appearance will take place until at least several hours after the actual arrest.[95] Even if the first appearance before the judicial officer is not when probable cause is determined for warrantless arrests, the first appearance will not be at such a significantly different point in time as to make a practical difference between the protection afforded individuals arrested with a warrant and those arrested without a warrant.

The first appearance before a judicial officer as the demarcation between seizure and pretrial detention meets the goals of a fourth amendment bright-line rule. Like the probable cause rule, the first appearance rule provides clear and certain boundaries, is not subject to abuse and manipulation and is easily understood by police officers.[96]

CONCLUSION

There is a need for rules and guidelines to aid the police and the courts in interpreting fourth amendment doctrine. With the probable cause bright-line rule, an individual arrested without a warrant is protected against excessive force by the fourth amendment until he is brought before a judicial officer for a probable cause hearing. Thereafter, he is considered a pretrial detainee and is protected by the due process clause of the fourteenth amendment against excessive force that amounts to punishment. Under the first appearance rule, an individual arrested with a warrant is protected against excessive force by the fourth amendment until his first appearance before a judicial officer. Thereafter, he is considered a pretrial detainee and is protected against excessive force that amounts to punishment by the fourteenth amendment's due process clause.

Both rules create guidelines for determining whether a suspect is under

---

id. § 1.2, 3-4. Third, in most jurisdictions there is typically a distinction in the applicable procedures between minor and major offenses. *See id.* § 1.2, 4-5.

93. *See supra* note 90 and accompanying text.

94. *See* Gerstein v. Pugh, 420 U.S. 103, 123-24 (1975). The Supreme Court recognized that the criminal procedure systems of the states vary. *See id.* at 123. It may be desirable to determine probable cause at the arrestee's first appearance in front of a judicial officer, in the bail setting procedure or in other proceedings fixing the terms of pretrial release. *See id.* at 123-24.

95. *See* W. LaFave & J. Israel, Criminal Procedure § 1.4, at 13 (1985).

96. *See supra* notes 80-86 and accompanying text; *cf.* LaFave, *On Drawing Bright Lines, supra* note 22, at 325-26, 333 (LaFave's first question asks whether rule has clear and certain boundaries; the fourth question asks whether rule is subject to manipulation or abuse; and the rule must be easily understood by police officers).

seizure or in pretrial detention in order to determine the specific source of the individual's constitutional protection against excessive force. There is no gap between arrest and pretrial detention and therefore no gap in the accused's constitutional protection. The rules eliminate the problem of case-by-case evaluation of when seizure ends and are clear, easily understood, and readily applicable for the law enforcement officers whom the fourth amendment controls.

Mitchell W. Karsch