St. John's Law Review

Volume 62
Number 4 *Volume 62, Summer 1988, Number 4*

Article 8

June 2012

When Police Use Excessive Force: Choosing a Constitutional Threshold of Liability in Justice v. Dennis

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WHEN POLICE USE EXCESSIVE FORCE: CHOOSING A CONSTITUTIONAL THRESHOLD OF LIABILITY IN *JUSTICE v. DENNIS*

Although a police officer is privileged to use force to arrest and maintain control of a criminal suspect,[1] exceeding the amount of force required by the particular circumstances of the arrest may subject the arresting officer to civil or criminal liability.[2] Formerly,

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[1] *See* W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 26, at 155-56 (5th ed. 1984) [hereinafter PROSSER & KEETON]; W. LAFAVE & A. SCOTT, CRIMINAL LAW § 5.10, at 470 (2d ed. 1986). The privilege was recognized at common law. *See* S. SINGER & M. HARTMAN, CONSTITUTIONAL CRIMINAL PROCEDURE HANDBOOK § 9.8, at 330 (1986). Statutory enactments regarding the amount of force a police officer may use when arresting a criminal suspect generally permit that which is reasonable under the circumstances. *See, e.g.*, CAL. PENAL CODE § 835a (Deering 1983); N.Y. PENAL LAW § 35.30(1) (McKinney 1987). New York's Penal Law is typical of such statutes:

> A police officer or a peace officer, in the course of effecting or attempting to effect an arrest, or of preventing or attempting to prevent the escape from custody, of a person whom he reasonably believes to have committed an offense, may use physical force when and to the extent he reasonably believes such to be necessary to effect the arrest, or to prevent the escape from custody, or to defend himself or a third person from what he reasonably believes to be the use or imminent use of physical force . . . .

Id.; *see also* E. FISHER, LAWS OF ARREST § 134, at 296-97 (1976) (discussing parameters of state officer's privileged use of reasonable force); V.A. LEONARD, THE POLICE, THE JUDICIARY, AND THE CRIMINAL 28-32 (2d ed. 1975) (outlining factors limiting police officer's privilege to use force against criminal suspects); 1 L. ORFIELD, CRIMINAL PROCEDURE UNDER THE FEDERAL RULES § 4.25, at 99 (2d ed. 1985) (flight or resistance sometimes requires using force to insure apprehension).

The state officer's privilege to use force continues after the arrest for as long as the officer has custody of the suspect. *See* CAL. PENAL CODE § 835a; N.Y. PENAL LAW § 35.30; *see also* RESTATEMENT (SECOND) OF TORTS § 134 & comment d (1977) ("The actor is no more privileged to employ . . . excessive means to maintain his custody of another . . . than . . . to effect the other's arrest.").

[2] *See* E. FISHER, *supra* note 1, § 138, at 306. Once the officer employs force exceeding the scope of his privilege, he becomes criminally and civilly liable for his actions. *Id.* However, the officer is only held liable for as much of the force as is judged to be excessive. *See* City of Miami v. Albro, 120 So. 2d 23, 26 (Fla. Dist. Ct. App. 1960); RESTATEMENT (SECOND) OF TORTS § 133(a) (1977). The scope of criminal liability will encompass that force which exceeds the limit imposed by statute. *See supra* note 1 and accompanying text. Furthermore, "[i]n order to have the benefit of the defense of crime prevention, it is necessary that the actor act with the purpose (motive) of crime prevention." W. LAFAVE & A. SCOTT, *supra* note 1, § 5.10, at 476. The use of excessive force by an arresting officer will generally not affect the validity of the arrest. *See* Houghtaling v. State, 11 Misc. 2d 1049, 1055, 175

the arrestee's sole civil recourse was through a state law tort action for assault and battery.[3] The enactment of section 1983 of title 42 of the United States Code,[4] however, provides a civil remedy for

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N.Y.S.2d 659, 666 (Ct. Cl. 1958).

[3] *See* Newman, *Suing the Lawbreakers: Proposal to Strengthen the Section 1983 Damage Remedy for Law Enforcers' Misconduct*, 87 YALE L.J. 447, 450 (1978) (suggesting civil damage remedy); *see also* PROSSER & KEETON, *supra* note 1, §§ 9-10, at 39-46 (discussing assault and battery). In a battery action brought against him, the arresting officer bears the burden of proving the amount of force he used was reasonable. *See* Posner, *Police Defendants Must Prove Force Used in Arrest was 'Reasonable,'* L.A. Daily J., Aug. 15, 1986, at 4, col. 3 & cases cited therein. Several states have enacted statutes which provide recourse for arrestees deprived of their constitutional rights in the course of an arrest. *See, e.g.*, CAL. CIV. CODE §§ 52, 52.1 (Deering Supp. 1988); N.Y. CIV. RIGHTS LAW §§ 40-c, 40-d (McKinney Supp. 1988).

[4] 42 U.S.C. § 1983 (1982). Section 1983 provides in part:

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

Id.; *see* C. ROBINSON, LEGAL RIGHTS, DUTIES AND LIABILITIES OF CRIMINAL JUSTICE PERSONNEL 88-89 (1984) (examining what constitutes deprivation of rights secured by Constitution and laws within meaning of section 1983). Enacted as a provision of the Civil Rights Act of 1871, section 1983 claims were initially circumvented because state officer defendants were able to assert the defense that adequate state remedies were available. *See* Newman, *supra* note 3, at 451-52. In 1961, however, the Supreme Court held that the availability of a state remedy would not defeat a section 1983 claim. *See* Monroe v. Pape, 365 U.S. 167, 184-85 (1961), *overruled in part on other grounds*, Monell v. Department of Social Servs., 436 U.S. 658 (1978). *See generally* C. ROBINSON, *supra*, at 84-87 (discussing historical development of section 1983 cause of action). Almost immediately following the *Monroe* case, the federal courts were inundated with section 1983 litigation. *See* Bacharach, *Section 1983 and the Availability of a Federal Forum: A Reappraisal of the Police Brutality Cases*, 16 MEM. ST. U.L. REV. 353, 354 (1986). Section 1983 is now "the primary statutory basis for federal actions seeking to remedy police abuse." M. AVERY & D. RUDOVSKY, POLICE MISCONDUCT: LAW AND LITIGATION § 2.2, at 2-2.2 (2d ed. 1987). The usual form of relief in section 1983 actions is monetary damages. *See, e.g.*, Carey v. Piphus, 435 U.S. 247, 257 (1978) (damages governed by "principle of compensation"); O'Neill v. Krzeminski, 839 F.2d 9, 10 (2d Cir. 1988) (plaintiff awarded compensatory and punitive damages after defendants found liable under section 1983 for using excessive force against him subsequent to his arrest).

Another remedy available to claimants is injunctive relief, although courts are reluctant to grant injunctions restraining police conduct unless the plaintiff proves it is sufficiently probable that such misconduct will be repeated. *Compare* Los Angeles v. Lyons, 461 U.S. 95, 110 (1983) (denial of injunctive relief to plaintiff who had been subjected to chokehold after police officer stopped him for traffic violation, despite evidence of fifteen deaths resulting from the practice) *with* Lankford v. Gelston, 364 F.2d 197, 202-03 (4th Cir. 1966) (granting of injunctive relief after police conducted over 300 searches in predominantly black neighborhood following shootout killing of police officer). *See generally* C. ROBINSON, *supra*, at 255-62 (discussing difficulties confronting criminal claimants requesting injunctive relief under section 1983).

arrestees deprived of constitutionally protected rights.[5] Arrestees' excessive force claims have been found to implicate the fourth amendment[6] as well as the due process clauses of the fifth and fourteenth amendments.[7] Courts have applied different standards to these claims depending on the particular amendment alleged to have been violated.[8] Specifically, for a fourth amendment violation, the state officer must have used force which is considered unreasonable under the circumstances,[9] whereas the standard for a due

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[5] *See* M. AVERY & D. RUDOVSKY, *supra* note 4, § 2.3(a)-(m), at 2.5-2.44 (review of particular types of police misconduct found actionable under section 1983).

[6] *See, e.g.*, Tennessee v. Garner, 471 U.S. 1, 8 (1985); Lester v. City of Chicago, 830 F.2d 706, 711-12 (7th Cir. 1987); Robins v. Harum, 773 F.2d 1004, 1008 (9th Cir. 1985). The fourth amendment provides: "The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated . . . ." U.S. CONST. amend. IV. Whenever a police officer restrains an individual's freedom to walk away, he has "seized" that individual within the meaning of the fourth amendment. *See* Terry v. Ohio, 392 U.S. 1, 16 (1968). "[O]nce a seizure has occurred, it continues throughout the time the arrestee is in custody of the arresting officers." *Robins*, 773 F.2d at 1010.

The eighth amendment also provides protection from excessive force, but it is routinely applied only to individuals convicted of crimes. *See* Whitley v. Albers, 475 U.S. 312, 318 (1986); Ingraham v. Wright, 430 U.S. 651, 664, 671 n.40 (1977). The eighth amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

[7] *See, e.g.*, Gilmere v. City of Atlanta, 774 F.2d 1495, 1501 (11th Cir. 1985), *cert. denied*, 476 U.S. 1115, *cert. denied*, 476 U.S. 1124 (1986); Lewis v. Downs, 774 F.2d 711, 713 (6th Cir. 1985). The fifth amendment due process clause provides: "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ." U.S. CONST. amend V. Similarly, the fourteenth amendment due process clause provides: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . ." U.S. CONST. amend. XIV, § 1. There is effectively no difference between fifth and fourteenth amendment due process. *See* Lebowitz v. Forbes Leasing & Fin. Corp., 326 F. Supp. 1335, 1354 (E.D. Pa. 1971), *aff'd*, 456 F.2d 979 (3d Cir.), *cert. denied*, 409 U.S. 843 (1972). Furthermore, the due process restraints imposed on the federal government's exercise of police power by the fifth amendment are no greater than the due process restraints imposed on the state governments by the fourteenth amendment. *See* Bowles v. Willingham, 321 U.S. 503, 518 (1944).

[8] *See* Bacharach, *supra* note 4, at 355-56; *see also* Comment, *Excessive Force Claims: Removing the Double Standard*, 53 U. CHI. L. REV. 1369, 1369-81 (1986) (examining independent development of fourth amendment and due process standards of reviewing excessive force claims). While no definitive standard has been articulated, it is uncontroverted that section 1983 actions are not meant to merely parrot state tort law claims. *See* Baker v. McCollan, 443 U.S. 137, 146 (1979); Jamieson v. Shaw, 772 F.2d 1205, 1210 (5th Cir. 1985) ("injuries inflicted by state law enforcement officers must transcend the concerns of state tort law and take on constitutional proportions"); Bacharach, *supra* note 4, at 354-55.

[9] *See Lester*, 830 F.2d at 709. Reasonableness is determined by balancing "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *Garner*, 471 U.S. at 8 (citations omitted). Specifically, the fact finder must consider "the scope of the particular intrusion, the manner in which it [was] conducted, the justification for initiating it, and the place in which it [was] conducted." Bell v. Wolfish, 441 U.S. 520, 559 (1979); *see also*

process violation is force which "shocks the conscience."[10] Recently, in *Justice v. Dennis*,[11] the Court of Appeals for the Fourth Circuit overruled its earlier decision in *Kidd v. O'Neil*[12] and held that liability for the use of excessive force by an arresting officer should be determined by applying the due process "shocks the conscience" analysis, rather than the fourth amendment "reasonableness" test.[13]

In *Justice*, the plaintiff, Gary Wayne Justice, was arrested for driving under the influence of alcohol by trooper W.B. Rose of the North Carolina Highway Patrol.[14] Rose drove Justice to the Highway Patrol Office where a Breathalyzer test, which indicated a high blood alcohol concentration, was administered.[15] While there, Justice physically resisted and verbally abused the officers present.[16] Justice's behavior prompted Rose to request a fellow officer, John W. Dennis, to assist him in transporting Justice from the patrol office to the magistrate's office.[17] The magistrate found probable cause for Justice's arrest and set bail at $150.[18] Rose and Dennis then had to forcibly move Justice to the booking area, where they ordered him to remain in an unlocked room to await processing.[19] Justice, however, emerged from the room and confronted the of-

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Terry, 392 U.S. at 27 ("in determining whether the officer acted reasonably . . . due weight must be given . . . to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience").

[10] *See Gilmere*, 774 F.2d at 1500 (quoting Rochin v. California, 342 U.S. 165, 172 (1952)); *Lewis*, 774 F.2d at 713. In determining whether this standard has been met, a court must look to factors such as 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 applied maliciously and sadistically for the very purpose of causing harm. Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir.), *cert. denied*, 414 U.S. 1033 (1973), *cited with approval in Lewis*, 774 F.2d at 713.

[11] 834 F.2d 380 (4th Cir. 1987) (en banc).

[12] 774 F.2d 1252 (4th Cir. 1985). *Kidd* similarly involved a section 1983 excessive force claim brought by an individual who had allegedly been beaten, kicked, and maced by police officers subsequent to his arrest. *Id.* at 1253. The *Kidd* court held that the "reasonableness" standard was applicable. *Id.* at 1256-57.

[13] *Justice*, 834 F.2d at 383.

[14] *Id.* at 381.

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.* Justice's resistance required Officer Rose to push Justice down the length of a hallway. *Id.*

ficers, kicking at both and spitting in Dennis' face.[20] At this point, Dennis pushed Justice, whose hands were cuffed behind his back, face first into a wall, an act which Justice later claimed cracked his two front teeth.[21] Justice continued to resist when Rose and Dennis brought him back to the booking area, prompting a third officer, Gary Dixon, who had been observing the scene, to hand Dennis a can of mace.[22] Dennis sprayed the mace in Justice's face and Justice offered no further resistance.[23]

Justice brought a civil rights action against Dennis pursuant to section 1983, alleging that Dennis had used "brutal and excessive force" against him, thereby depriving him of liberty without due process of law.[24] The jury returned a verdict in favor of Dennis and Justice's motion for judgment notwithstanding the verdict was denied.[25]

Justice appealed to the Court of Appeals for the Fourth Circuit, claiming that the magistrate's excessive force instruction to the jury misstated the applicable constitutional standard and established a prejudicially high threshold for liability under section 1983.[26] The Fourth Circuit panel reversed the judgment and remanded the case, agreeing that the challenged instruction was flawed in several respects.[27] On rehearing en banc, however, the

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[20] *Id.*

[21] *Id.* There was evidence that Justice's teeth had been damaged in a prior accident or were otherwise unusually vulnerable to injury. *Id.* at 381 n.1.

[22] *Id.* at 381. Dennis never requested the can of mace from the onlooking officer. *Id.*

[23] *Id.* Dennis later admitted that he "could have . . . probably subdued" Justice without the mace. *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.* Justice argued, alternatively, that reasonable men could not differ as to whether the use of mace on a handcuffed prisoner amounts to constitutionally excessive force. *Id.* The court flatly rejected this contention, asserting that the question of liability would depend upon the circumstances in which the mace was used. *Id.* at 383.

[27] Justice v. Dennis, 793 F.2d 573, 579 (4th Cir. 1986), *superseded*, 834 F.2d 380 (4th Cir. 1987) (en banc). Although the panel agreed with the trial court's choice of the due process standard, it maintained the jury instruction was flawed in three respects. *See id.* at 577-79. First, the panel found the trial court had misstated the "shocks the conscience" test by requiring the jury to determine whether the officer's conduct would shock the conscience of the court, rather than each juror's conscience. *Id.* at 577. Second, the trial court mistakenly set out three requirements for liability when it should have merely suggested that these were three factors the jury should consider. *Id.* at 577-78. The jury was required to reach a number of conclusions before it could return a verdict for the plaintiff: first, that the force applied caused severe injury; second, that the force was disproportionate under the circumstances; and third, that the use of force was "so inspired by malice or sadism rather than a merely careless or unwise excess of zeal that it amounted to a brutal or inhumane abuse of

court found no reversible error in the jury instructions and affirmed the magistrate's decision.[28]

Judge Hall, writing for the en banc court, stressed the importance of establishing a higher threshold of liability for constitutional tort actions under section 1983 than for ordinary tort actions.[29] The court agreed with Justice that the jury must determine that the force used was unreasonable under the circumstances,[30] but the court went on to hold that the jury must continue its inquiry and determine if the state actor had exceeded the bounds of privilege.[31] The court approved a jury instruction articulated in an earlier Fourth Circuit case,[32] which apprised the jury that excessive force is that which "shocks a reasonable person's conscience" and directed the jury to consider whether the force had been applied "maliciously and sadistically for the purpose of causing harm."[33] The court found this instruction to be a rational and widely accepted method of focusing the jury's inquiry, equally applicable to the facts in *Justice*.[34] While the court found the magistrate's jury instructions to be rambling and needlessly repetitive, it determined that, taken as a whole, they nonetheless adequately articu-

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official power literally shocking to the conscience." *Id.* at 577. Finally, the panel stated that it was error for the trial court to require Justice to prove Dennis acted maliciously or sadistically when proof of "recklessness, wantonness, or gross and culpable negligence may be sufficient for a section 1983 excessive force claim." *Id.* at 578. The magistrate's instruction was based on language initially adopted by the Fourth Circuit in Hall v. Tawney, 621 F.2d 607, 613 (4th Cir. 1980), a case involving corporal punishment of a public school child, and subsequently applied to a prisoner's excessive force claim in King v. Blankenship, 636 F.2d 70, 73 (4th Cir. 1980). *See Justice*, 834 F.2d at 382 n.2.

[28] *Justice*, 834 F.2d at 383.

[29] *Id.* at 382. According to the court, to allow an identical threshold "would offend the Supreme Court's repeated determination that the due process clause is not intended to superimpose a 'font of tort law' upon whatever systems may already be administered by the state." *Id.* (citing Daniels v. Williams, 474 U.S. 327, 332 (1986)). In *Daniels*, the Supreme Court determined that mere negligence by a state official is insufficient to constitute a deprivation under the due process clause, but never reached the issue of how high the threshold for liability should be. *See* 474 U.S. 327, 328 (1986).

[30] *Justice*, 834 F.2d at 383.

[31] *Id.*

[32] *Id.*; *see* Bailey v. Turner, 736 F.2d 963, 970 (4th Cir. 1984). *Bailey* involved an excessive force claim brought by a prison inmate for an alleged violation of his eighth amendment rights. *Id.* at 965.

[33] *Bailey*, 736 F.2d at 970; *see Justice*, 834 F.2d at 383. Perhaps the "shocks the conscience" standard should be applied only in the context of alleged eighth amendment violations, for which a jury must find that the force used constituted "cruel and unusual punishment." *See Bailey*, 736 F.2d at 965.

[34] *See Justice*, 834 F.2d at 383.

lated the pertinent legal principles.[35]

Judge Phillips, in a vigorous dissent, argued that it was reversible error for the magistrate to direct the jury to assess Justice's excessive force claim based upon the substantive due process standard.[36] Judge Phillips found that Justice had properly asserted a fourth amendment claim,[37] thereby requiring the jury to apply the fourth amendment standard.[38] According to Judge Phillips, the fourth amendment protections properly extend beyond the initial arrest, lasting at least as long as the arresting officer retains custody of the suspect.[39]

By applying a due process standard to an excessive force claim, the Fourth Circuit ignored the guidance of a recent Supreme Court decision which encouraged the use of the fourth amendment reasonableness test and implicitly criticized the due process approach.[40] It is submitted that a claim alleging a constitu-

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[35] *Id.*

[36] *Id.* (Phillips, J., dissenting).

[37] *Id.* at 385 & n.10 (Phillips, J., dissenting). Literally, Justice alleged in his complaint that he had been deprived of his liberty "without due process of law in violation of the Fourteenth Amendment . . . and . . . § 1983." *Id.* at 385 (Phillips, J., dissenting). The majority construed Justice's claim as implicating the due process clause of the fifth amendment. *Id.* at 382. Judge Phillips, on the other hand, argued that Justice's complaint "clearly comprehend[ed] . . . a fourth amendment claim." *Id.* at 385 n.10 (Phillips, J., dissenting). Judge Phillips liberally construed the pleadings in discerning a fourth amendment claim, pointing to the fact that under the incorporation doctrine, the due process clause of the fourteenth amendment incorporates the guarantees of the fourth amendment. *Id.* (Phillips, J., dissenting). The precepts of notice pleading, embodied in the Federal Rules of Civil Procedure, demand only that the pleader state the basis for his claim and then require the court to construe the pleading to ensure the achievement of substantial justice. FED. R. CIV. P. 8(a) & (f).

[38] *Justice*, 834 F.2d at 388 (Phillips, J., dissenting).

[39] *Id.* (Phillips, J., dissenting).

[40] *See* Tennessee v. Garner, 471 U.S. 1, 7 (1985). In *Garner*, a Memphis police officer shot and killed a fleeing fifteen-year-old boy, whom the officer suspected of having committed a burglary. *Id.* at 3-4. The Supreme Court held that a Tennessee statute which, as applied, permitted a police officer to use deadly force to arrest an unarmed, nondangerous, fleeing felony suspect, was unconstitutional under the fourth amendment's prohibition of unreasonable seizures. *Id.* at 22. Although *Garner* involved the use of deadly force at the moment of arrest, it has been suggested that the decision indicates the Supreme Court's strong preference for the fourth amendment reasonableness standard in all claims alleging excessive force incident to arrest. *See* Comment, *supra* note 8, at 1378. "*Garner* and other recent Supreme Court cases portend a shift away from due process analysis in the arrest context, toward an exclusive focus on the fourth amendment standard." *Id.*; *see also* Bacharach, *supra* note 4, at 365 ("*Garner* has spawned new interest in the fourth amendment as a source of constitutional protection against police brutality").

Several circuit court decisions have followed the Supreme Court's direction in *Garner* and have employed the fourth amendment standard. *See* Lester v. City of Chicago, 830 F.2d

tional violation under section 1983 for the use of excessive force occurring before the individual leaves the custody of the arresting officers should be presumed to implicate the individual's fourth amendment rights. It is further suggested that the "shocks the conscience" standard used in determining the threshold of liability in due process claims obscures the individual's constitutional rights and shields police misconduct. Finally, it is submitted that the fourth amendment reasonableness test provides a clear standard for reviewing a state officer's use of force that adequately protects the individual's rights throughout the arrest process without impeding the state's interest in effectuating arrests.

DISTINGUISHING AMONG ARRESTEES, PRETRIAL DETAINEES, AND PRISONERS

Determining the proper threshold of liability in excessive force claims under section 1983 has been complicated by the assumption that an individual's constitutional rights change at different stages of the arrest process.[41] At the moment of arrest, the arrestee's fourth amendment right to be free from unreasonable seizure is undeniably implicated.[42] Notwithstanding the arrestee's fourth amendment interests, an excessive use of force by a state officer during an arrest might also constitute a deprivation of the individual's liberty without due process of law, in contravention of the fifth and fourteenth amendments.[43] At some point after the arres-

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706, 710 (7th Cir. 1987). In *Lester*, a woman arrested for disorderly conduct at a police station alleged that excessive force had been used to arrest her. *Id.* at 707. The Seventh Circuit held that all excessive force in arrest claims should be analyzed under the fourth amendment standard and not the fourteenth amendment substantive due process standard. *Id.* at 710. Interpreting the Supreme Court's holding in *Garner*, the court stated that "[a]lthough the issue in *Garner* was deadly force, implicit in its totality of circumstances approach is that police use of less than deadly force would violate the Fourth Amendment if not justified under the circumstances." *Id.* at 711; *see also* Gilmere v. City of Atlanta, 774 F.2d 1495, 1502 (11th Cir. 1985) (physical abuse and unwarranted shooting of arrested person by police officers are grounds for relief under the fourth amendment), *cert. denied*, 476 U.S. 1115, *cert. denied*, 476 U.S. 1124 (1986); Jamieson v. Shaw, 772 F.2d 1205, 1209 (5th Cir. 1985) (following *Garner*, "it is now settled that the Fourth Amendment limits the level of force that may be used to accomplish a seizure of the person").

[41] *See Justice*, 834 F.2d at 382; *see also Lester*, 830 F.2d at 713 n.7. In *Lester*, the Seventh Circuit was careful to limit its discussion to excessive force *in arrest* claims, admitting that other constitutional standards might be applicable to other situations, such as pretrial detention. *Id.*; *cf.* Comment, *supra* note 8, at 1387-88 (discussing how constitutional protections change from the initial arrest to the pretrial detainment phase).

[42] *See Garner*, 471 U.S. at 7-8.

[43] *See, e.g., Gilmere*, 774 F.2d at 1501-02 (excessive force used during arrest violated

tee has appeared before a magistrate and probable cause for his arrest has been established, he becomes a pretrial detainee.[44] The Supreme Court has suggested that pretrial detainees retain certain limited fourth amendment rights, as long as such rights do not interfere with a countervailing state interest.[45] Excessive force used against a detainee, however, has most often been deemed a due process violation.[46] Under the due process clause, a state officer is not entitled to punish a detainee prior to an adjudication of guilt.[47] If the officer uses force for the purpose of punishment, he has violated the detainee's due process rights.[48] Once the detainee is properly tried and sentenced, he becomes a prisoner whose rights are most directly protected by the eighth amendment's guarantee against cruel and unusual punishment.[49] The prisoner, like the pretrial detainee, also retains some limited fourth amendment protection, as well as fifth and fourteenth amendment due process protections.[50]

The most logical demarcation between the fourth amendment standard and the substantive due process standard in reviewing an excessive force claim is the point at which the arresting officer de-

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arrestee's fourth amendment and substantive due process rights); Lewis v. Downs, 744 F.2d 711, 712 (6th Cir. 1985) (arrestees pleaded and proved fourteenth amendment due process violation).

[44] *See* Bell v. Wolfish, 441 U.S. 520, 523 (1979) (pretrial detainees are persons charged with a crime but not yet tried); *cf. Lester*, 830 F.2d at 713 n.7 ("the line between arrest and pretrial detention is not always clear"). In *Justice*, the Fourth Circuit panel presumed that since bail had been set, the plaintiff was a pretrial detainee. 793 F.2d 573, 576 (4th Cir. 1986), *superseded*, 834 F.2d 380 (4th Cir. 1987) (en banc).

[45] *See Wolfish*, 441 U.S. at 545; *see also* Winston v. Lee, 470 U.S. 753, 755 (1985) (compelling pretrial detainee to undergo proposed surgical procedure for purpose of obtaining evidence would constitute violation of fourth amendment rights).

[46] *See* Johnson v. Glick, 481 F.2d 1028, 1032-33 (2d Cir.), *cert. denied*, 414 U.S. 1033 (1973); *see also* Brenneman v. Madigan, 343 F. Supp. 128, 142 (N.D. Cal. 1972) ("subjecting pre-trial detainees to restrictions and privations other than those which inhere in their confinement itself or which are justified by compelling necessities of jail administration, is a violation of the due process . . . clause[] of the Fourteenth Amendment").

[47] *See Wolfish*, 441 U.S. at 535-39; *see also* Anderson v. Nosser, 438 F.2d 183, 190 (5th Cir. 1971) (an individual's constitutional rights change from pretrial to postconviction incarceration), *cert. denied*, 409 U.S. 848 (1972).

[48] *See Brenneman*, 343 F. Supp. at 136-37; *see also* Block v. Rutherford, 468 U.S. 576, 584 (1984) (intent to punish pretrial detainee may be inferred from proof that prison official's conduct was " 'not reasonably related to a legitimate goal' " (quoting *Wolfish*, 441 U.S. at 593)).

[49] *See* Whitley v. Albers, 475 U.S. 312, 318 (1986); Ingraham v. Wright, 430 U.S. 651, 671 n.40 (1977); *see also supra* note 6 (text of eighth amendment).

[50] *See* Bell v. Wolfish, 441 U.S. 520, 545 (1979) (listing Supreme Court decisions upholding limited constitutional rights for prisoners).

livers the arrestee to the penal institution to await trial.[51] It is only at this point that the individual's fourth amendment rights are diminished.[52] If the individual offers resistance at this stage, the state officials have the dual responsibility of restraining him and maintaining order in the prison facility.[53] The prison setting offers a justification for a higher threshold for liability in assessing an excessive force claim.[54] As long as the arrestee remains in the presence of the arresting officers, however, he should be entitled to the full protection of the fourth amendment and his excessive force claim should be judged accordingly.[55]

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[51] *See* Johnson v. Glick, 481 F.2d 1028, 1032-33 (2d Cir.) (suggesting brutality by police officers is defined differently than brutality by correctional officers), *cert. denied*, 414 U.S 1033 (1973); *see also* Comment, *supra* note 8, at 1388 (force used during arrest is to be appraised under fourth amendment, while force used in a post-arrest setting is evaluated under due process clause).

[52] *See Wolfish*, 441 U.S. at 556-57. Reviewing the claims of pretrial detainees who alleged that their fourth amendment rights were violated by unannounced room searches, the Supreme Court in *Wolfish* held:

> It may well be argued that a person confined in a detention facility has no reasonable expectation of privacy with respect to his room or cell and that therefore the Fourth Amendment provides no protection for such a person. In any case, given the realities of institutional confinement, any reasonable expectation of privacy that a detainee retained necessarily would be of a diminished scope. Assuming, *arguendo*, that a pretrial detainee retains such a diminished expectation of privacy after commitment to a custodial facility, we nonetheless find that the room-search rule does not violate the Fourth Amendment.

Id. (citations omitted).

[53] *See id.* at 540. The *Wolfish* Court noted that:

> [T]he Government must be able to take steps to maintain security and order at the [penal] institution and make certain no weapons or illicit drugs reach detainees. Restraints that are reasonably related to the institution's interest in maintaining jail security do not, without more, constitute unconstitutional punishment, even if they are discomforting and are restrictions that the detainee would not have experienced had he been released while awaiting trial.

Id. (footnote omitted).

[54] *See* Brenneman v. Madigan, 343 F. Supp. 128, 140 (N.D. Cal. 1972). In *Brenneman*, prison officials were permitted to segregate pretrial detainees who posed troublesome disciplinary problems. *Id.* Though jail administrators must respect the rights of pretrial detainees, they may "restrict the exercise of those rights which would substantially interfere with the operation of the institution." *Id.*

[55] *See* Robins v. Harum, 773 F.2d 1004 (9th Cir. 1985). In *Robins*, the Ninth Circuit held that the excessive force used by police officers while transporting arrestees to a sheriff's department violated the fourth amendment. *Id.* at 1010. The court concluded that once a suspect was seized and arrested by the police, fourth amendment protection continued while he remained in the custody of the arresting officers. *See id.*; *cf. Justice*, 834 F.2d at 388 (Phillips, J., dissenting) (using concepts of "rearrest" and "successive seizures" to justify extended application of fourth amendment protections).

DISADVANTAGES OF THE DUE PROCESS "SHOCKS THE CONSCIENCE" STANDARD

Before the Supreme Court decided that the fourteenth amendment incorporated the protections of the fourth amendment, courts referred to the due process clause to evaluate section 1983 excessive force in arrest claims.[56] The Supreme Court has recognized two forms of due process guaranteed by the Constitution: procedural[57] and substantive.[58] Unless the arrestee complained of specific procedural improprieties committed in the course of the arrest,[59] a court's discussion would focus on the arrestee's substantive due process rights.[60] However, substantive due process has

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[56] *See* Gumz v. Morrissette, 772 F.2d 1395, 1406 (7th Cir. 1985) (Easterbrook, J., concurring), *cert. denied*, 475 U.S. 1123 (1986). *Gumz* was effectively overruled by Lester v. City of Chicago, 830 F.2d 706, 713 (7th Cir. 1987). While *Gumz* was decided under a due process standard, *Lester* now requires all excessive force claims to be decided by reference to the fourth amendment standard. *Id.* Judge Easterbrook concurred with the judgment of the *Gumz* majority only because he concluded the officers involved had acted reasonably within the meaning of the fourth amendment standard. *Gumz*, 772 F.2d at 1409 (Easterbrook, J., concurring).

[57] *See* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 451-52 (3d ed. 1986). The due process clauses of the fifth and fourteenth amendments require that certain procedural measures be employed if the government is to deprive a person of his "life, liberty or property." *Id.* at 452. Essentially, procedural due process guarantees the right to reasonable notification and the opportunity to be heard. *See* Fuentes v. Shevin, 407 U.S. 67, 80-82 (1972) (discussing history and meaning of procedural due process).

[58] *See* Poe v. Ullman, 367 U.S. 497, 515-18 (1961) (Douglas, J., dissenting). The controversial doctrine of substantive due process involves the ongoing historical debate within the Supreme Court over the meaning of "liberty" in the two due process clauses. *See* J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 57, at 360-66. The supporters of substantive due process in the Court have held that "liberty" includes the specific guarantees found in the Bill of Rights, as well as other unstated fundamental rights derived from "emanations of other specific guarantees." *Poe*, 367 U.S. at 516-17 (Douglas, J., dissenting).

[59] *See* J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 57, at 493-503 (listing constitutional guidelines for criminal process). Significantly, in Parratt v. Taylor, 451 U.S. 527 (1981), *overruled in part*, Daniels v. Williams, 474 U.S. 327 (1986), the Supreme Court held that when a plaintiff alleges a violation of due process in support of a section 1983 action, the claim will be dismissed if a sufficient remedy is available under state tort law. *Id.* at 543-44. *Parratt*, however, has been interpreted as applying only to claims based on violations of *procedural* due process. *See* Gilmere v. City of Atlanta, 774 F.2d 1495, 1500 (11th Cir. 1985), *cert. denied*, 476 U.S. 1115, *cert. denied*, 476 U.S. 1124 (1986); Wolf-Lillie v. Sonquist, 699 F.2d 864, 872 (7th Cir. 1983); Duncan v. Poythress, 657 F.2d 691, 704-05 (5th Cir. Unit B Sept. 1981), *cert. dismissed*, 459 U.S. 1012 (1982). Therefore, a substantive due process claim may be asserted in a federal court under section 1983, regardless of whether a parallel state tort remedy exists. *Gilmere*, 774 F.2d at 1500.

[60] *See* Rochin v. California, 342 U.S. 165, 172-74 (1952). In *Rochin*, the Supreme Court held that forcing an emetic down the throat of a person suspected of swallowing illegal contraband was violative of substantive due process. *Id.* The Court reasoned that regard for substantive due process " 'inescapably imposes upon this Court an exercise of judgment

been criticized for allowing the individual judge to interpret the Constitution according to his or her own particular notions of individual liberty.[61] It is submitted that an explicit constitutional guarantee, such as the fourth amendment protection against unreasonable seizures, would provide more definite guidelines for assessing an excessive force claim under section 1983.[62]

The "shocks the conscience" standard, which was derived from the Supreme Court's language in *Rochin v. California*,[63] has become inextricably linked to the substantive due process analysis of excessive force claims.[64] Nothing in the *Rochin* opinion, however, suggests this standard was intended to serve as the minimum threshold of liability for all excessive force claims.[65] It is submitted

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upon the whole course of the proceedings . . . in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples.' " *Id.* at 169 (quoting Malinsky v. New York, 324 U.S. 401, 416-17 (1945)).

[61] *See generally* Lupu, *Untangling the Strands of the Fourteenth Amendment*, 77 MICH. L. REV. 981, 1030-50 (1979) (discussing judicial competence to determine fundamental rights deserving constitutional protection). The debate over substantive due process reached a feverish pitch following Roe v. Wade, 410 U.S. 113 (1973). In *Roe*, the Court used the fundamental right of privacy to strike down state criminal abortion legislation. *Id.* at 154. Some commentators have argued that the *Roe* Court used substantive due process to enlarge the scope of judicial review beyond that which the Constitution's framers intended. *See* Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 945-49 (1973).

The Supreme Court has itself criticized its application of the substantive due process doctrine, at least within the context of judicial review of commercial legislation. *See* North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, 414 U.S. 156, 164-67 (1973); Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525, 535-37 (1949).

[62] *See* Gumz v. Morrissette, 772 F.2d 1395, 1404 (7th Cir. 1985) (Easterbrook, J., concurring), *cert. denied*, 475 U.S. 1123 (1986). According to Judge Easterbrook, "[t]he most natural way to think about a claim that officers used excessive force in making an arrest is as an assertion that they violated the commands of the Fourth Amendment, the only part of the Constitution directly addressing seizures of the person by police." *Id.* (Easterbrook, J., concurring).

[63] 342 U.S. 165, 172 (1952). Reversing the conviction, the Supreme Court in *Rochin* held that "the proceedings by which this conviction was obtained [forcing an emetic down the throat of the accused] do more than offend some fastidious squeamishness or private sentimentalism about combatting crime too energetically. This is conduct that shocks the conscience." *Id.*

[64] *See, e.g.*, Robinson v. City of Mount Vernon, 654 F. Supp. 170, 172 (S.D.N.Y. 1987); Luce v. Hayden, 598 F. Supp. 1101, 1103-04 (D. Me. 1984); Frost v. City & County of Honolulu, 584 F. Supp. 356, 363 (D. Haw. 1984); Dandridge v. Police Dep't of Richmond, 566 F. Supp. 152, 156 (E.D. Va. 1983); Schiller v. Strangis, 540 F. Supp. 605, 614 (D. Mass. 1982).

[65] *See Rochin*, 342 U.S. at 172. The Court stated:

> Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents—this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and the

that the court was merely describing a factual situation in which a state actor's conduct clearly exceeded constitutional limits.

The "shocks the conscience" test focuses the factfinder's attention on the state officer's motive for applying force rather than the extrinsic circumstances giving rise to the privilege.[66] The standard would be met if the force was applied maliciously or sadistically for the purpose of causing harm to the arrestee.[67] If, on the other hand, the state officer applied the force in good faith, it would be unlikely that the complaining arrestee would be able to prove a due process violation, regardless of the amount of force or the surrounding circumstances.[68]

Furthermore, the "shocks the conscience" standard is vague and difficult for the factfinder to apply.[69] The outcome depends upon the subjective and emotional responses of the jury to a state officer's use of force.[70] Differing levels of juror sensitivity will invariably lead to inconsistent results.[71]

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screw to permit of constitutional differentiation.

Id.

[66] *See* Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir.), *cert. denied*, 414 U.S. 1033 (1973). In *Johnson*, Judge Friendly listed motive as one of several factors which a court should consider when applying the "shocks the conscience" standard. *See id.* at 1033; *see also Gumz*, 772 F.2d at 1407 (Easterbrook, J., concurring) (due process standard requires scrutiny of state officer's motive, while fourth amendment standard forbids it). However, when the standard was adopted by the Fourth Circuit in Hall v. Tawney, 621 F.2d 607 (4th Cir. 1980), Judge Friendly's list of factors was transformed into a three-prong test. *See id.* at 613. It was this three-prong test which appeared in the controversial jury instruction in *Justice*. *See Justice*, 834 F.2d at 382; *see also supra* note 27 and accompanying text (discussing jury instruction).

[67] *See* Gumz v. Morrissette, 772 F.2d 1395, 1407 (7th Cir. 1985) (Easterbrook, J., concurring) ("[t]he bulk of the evidence [at trial] was devoted to showing that the defendants had a long running dispute with Gumz and set up his arrest in order to annoy, aggravate, frighten, and humiliate him"), *cert. denied*, 475 U.S. 1123 (1986). Therefore, for all practical purposes, motive has become the dominant aspect of the three-prong test. *See id.* (Easterbrook, J., concurring). A finding of grossly disproportionate force will usually accompany sufficient evidence of malicious intent. *Id.* at 1400 (Easterbrook, J., concurring). The court in *Gumz*, however, concluded that the case had not involved the kind of "severe harm redressible under § 1983." *Id.* (Easterbrook, J., concurring).

[68] *See* Williams v. Liberty, 461 F.2d 325, 328 (7th Cir. 1972); *see also* Newman, *supra* note 3, at 459-62 (criticizing good faith defense in § 1983 actions).

[69] *See Gumz*, 772 F.2d at 1407 (Easterbrook, J., concurring).

[70] *See id.* (Easterbrook, J., concurring); *see also* Bacharach, *supra* note 4, at 362 n.85 ("shocks the conscience" standard is vague and subjective).

[71] *See Gumz*, 772 F.2d at 1407 (Easterbrook, J., concurring). In addition, Judge Easterbrook noted that the "shocks the conscience" test offered insufficient guidance to police officers: "Sensibilities vary from person to person and place to place; an officer told to do nothing that 'shocks the consciences' of six people to be drawn out of a jury wheel some years hence would have considerable difficulty knowing how to behave." *Id.* (Easterbrook,

THE ADVANTAGE OF THE FOURTH AMENDMENT REASONABLENESS STANDARD

The fourth amendment's mandate against unreasonable seizures of the person is the only explicit constitutional provision governing the manner in which the police may subdue a criminal suspect.[72] In *Tennessee v. Garner*,[73] the Supreme Court's most recent decision regarding a police officer's use of excessive force incident to an arrest, the Court applied a fourth amendment analysis in determining whether excessive force was applied.[74] *Garner* also stressed that the reasonableness test should be used to evaluate all claims implicating the fourth amendment.[75]

The fourth amendment reasonableness standard gives greater protection to individuals from overzealous state officers than the fourteenth amendment due process standard.[76] Unlike the substantive due process standard, the fourth amendment standard does not require proof of the arresting officer's bad intent or condone the use of excessive force merely because the officer claims to have acted in good faith.[77] There is no mention of intent in either the

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J., concurring).

[72] *See supra* note 6; *see also* Lester v. City of Chicago, 830 F.2d 706, 712 (7th Cir. 1987) ("the Fourth Amendment, unlike the Fourteenth Amendment, is specifically directed to unreasonable seizures" and, therefore, sets constitutional limit on amount of force state officer may use while making arrest); Gilmere v. City of Atlanta, 774 F.2d 1495, 1502 (11th Cir. 1985) (plaintiff's fourth amendment interest in his bodily security determines the manner in which arrest may be conducted), *cert. denied*, 476 U.S. 1115, *cert. denied*, 476 U.S. 1124 (1986); Gumz v. Morrissette, 772 F.2d 1395, 1404 (7th Cir. 1985) (Easterbrook, J., concurring) (use of excessive force by arresting officer violated "people's 'right to be secure in their persons . . . against unreasonable . . . seizures' ") (quoting U.S. CONST. amend. IV), *cert. denied*, 475 U.S. 1123 (1986).

[73] 471 U.S. 1 (1985).

[74] *Id.* at 7-8; *see supra* note 40. Prior to *Garner*, the Supreme Court, on several occasions, chose the fourth amendment standard to evaluate the use of force against arrested persons. *See, e.g.*, Winston v. Lee, 470 U.S. 753, 755 (1985) (performing surgery upon arrestee to obtain evidence would constitute "substantial intrusion" violating fourth amendment right to be secure in his person); Gerstein v. Pugh, 420 U.S. 103, 114 (1975) (fourth amendment requires judicial determination of probable cause after arrest and before extended detention). *See generally* Note, Tennessee v. Garner—*The Use of Deadly Force to Arrest as an Unreasonable Search and Seizure*, 65 N.C.L. REV. 155, 164-67 (1986) (discussing *Garner* within context of prior fourth amendment cases).

[75] *See Garner*, 471 U.S. at 7-8.

[76] *See* Comment, *supra* note 8, at 1382.

[77] *See* Beck v. Ohio, 379 U.S. 89, 96-97 (1964). In *Beck*, the Supreme Court held that when the constitutionality of an arrest is challenged on fourth amendment grounds, " 'good faith on the part of the arresting officer is not enough.' If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, . . .' only in the discretion of the police." *Id.* at 97 (quoting

fourth amendment or section 1983.[78] Asking the jury to consider whether the state officer subjectively believed his use of force was justified thwarts the constitutional scheme designed to objectively monitor the arrest process.[79]

The fourth amendment standard requires the jury to consider any and all extrinsic factors which might justify or condemn actions taken by a state officer in restraining a criminal suspect.[80] The issue is whether the officer acted as would a reasonably prudent person under the same circumstances.[81] Although courts have struggled to define reasonable behavior,[82] they have had greater

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Henry v. United States, 361 U.S. 98, 102 (1959)); *see also* Gumz v. Morrissette, 772 F.2d 1395, 1407 (7th Cir. 1985) (Easterbrook, J., concurring), *cert. denied*, 475 U.S. 1123 (1986). Judge Easterbrook noted that: "The Fourth Amendment . . . calls for objective inquiry only. The officer's pure heart provides no defense if his conduct was unreasonable in light of the facts he knew or should have known; [conversely,] the officer's evil design does not invalidate his acts if the facts otherwise support his deeds." *Id.* (Easterbrook, J., concurring) (citing Scott v. United States, 436 U.S. 128, 135-39 (1978)).

[78] *See supra* notes 4 & 6; *see also* Comment, *supra* note 8, at 1374-75 (discussing history of intent requirement of substantive due process standard, noting there is little authority to support intent requirement for due process violation). Compare 42 U.S.C. § 1983 (1982), *supra* note 4, with 18 U.S.C. § 242 (1982), which provides:

> Whoever, under color of any law, statute, ordinance, regulation, or custom, *willfully* subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such an inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if death results shall be subject to imprisonment for any term of years or for life.

Id. (emphasis added).

[79] *See* Terry v. Ohio, 392 U.S. 1, 21-22 (1968). In *Terry*, the Supreme Court held:

> The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances. And in making that assessment it is imperative that the facts be judged against an *objective* standard . . . . Anything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches . . . .

Id. (footnotes and citations omitted) (emphasis added).

[80] *See, e.g.*, Tennessee v. Garner, 471 U.S. 1, 8-9 (1985) (look to "totality of the circumstances" to determine if action was justified); United States v. Montoya de Hernandez, 473 U.S. 531, 537 (1985) (look to circumstances surrounding action and nature of action itself); *see also supra* note 9 and accompanying text (discussing reasonableness standard).

[81] *See Terry*, 392 U.S. at 27. In *Terry*, the Court advised that "in determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience." *Id.*

[82] *See* Gumz v. Morrissette, 772 F.2d 1395, 1406 (7th Cir. 1985) (Easterbrook, J., con-

difficulty explaining what conduct "shocks the conscience."[83]

CONCLUSION

In *Justice v. Dennis*, the Court of Appeals for the Fourth Circuit used the due process "shocks the conscience" standard to determine whether an arrested person was subjected to excessive force immediately following his arrest. By choosing this standard over the fourth amendment "reasonableness" standard, the court has provided a police officer with an unjustifiably high level of protection from excessive force claims. Concededly, a police officer's duty to subdue and maintain control over criminal suspects should not be hampered by the fear that a decision to use force may subject him to civil liability. Nevertheless, the judiciary must oversee police conduct to ensure that the bounds of privilege are not overstepped in violation of the arrested person's constitutional rights. The fourth amendment reasonableness test properly balances these conflicting concerns. Only when a jury is instructed to consider all of the circumstances incident to a state officer's use of force does the law enforcement system operate as Congress and the Supreme Court have ordained.

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curring), *cert. denied*, 475 U.S. 1123 (1986). Courts may consult the considerable body of case law and scholarship which has grown from the attempt to define reasonable behavior within the context of state tort law. *See, e.g.*, Charbonneau v. MacRury, 84 N.H. 501, 508, 153 A. 457, 462 (1931) (defendant held to standard of "the average prudent person placed in his position"); Vaughan v. Menlove, 132 Eng. Rep. 490, 492 (1837) (defendant in negligence action "bound to proceed with such reasonable caution as a prudent man would have exercised under such circumstances"); *see also* James, *The Qualities of the Reasonable Man in Negligence Cases*, 16 Mo. L. REV. 1, 1-2 (1951) (negligence is objective test with some subjectivity); Seavey, *Negligence—Subjective or Objective?*, 41 HARV. L. REV. 1, 27-28 (1928) (negligence is objective-subjective test). However, when defining the limits of reasonable behavior within the context of a section 1983 action, courts must instruct juries to give proper weight to the often adverse circumstances under which police officers must make decisions. *See Garner*, 471 U.S. at 26 (O'Connor, J., dissenting) ("The clarity of hindsight cannot provide the standard for judging the reasonableness of police decisions made in uncertain and often dangerous circumstances."). *See generally* V.A. LEONARD, *supra* note 1, at 30-31 (discussing perils confronting police officers in the line of duty).

[83] *See Gumz*, 772 F.2d at 1406 (Easterbrook, J., concurring).