Volume 123 | Issue 1 Article 11

September 2020

Uncertain Immunity: Assessing Qualified Immunity in the Context of Post-Arrest Excessive-Force Claims Arising Prior to a Judicial Determination of Probable Cause

J. Tyler Barton
West Virginia University College of Law

UNCERTAIN IMMUNITY: ASSESSING QUALIFIED IMMUNITY IN THE CONTEXT OF POST-ARREST EXCESSIVE-FORCE CLAIMS ARISING PRIOR TO A JUDICIAL DETERMINATION OF PROBABLE CAUSE

I. INTRODUCTION

On the night of May 12, 2006, Louis Aldini, Jr., a 24 year-old Air Force First Lieutenant based at the Wright Patterson Air Force Base in Montgomery County, Ohio, was celebrating his birthday with his friends at the Hammerjax Night Club in Dayton.[1] After having a few too many drinks, Aldini was asked to leave the club after midnight.[2] Unfortunately for Aldini, his exit was far from graceful. On his way out, he kicked the club's door and broke its glass, an act the club's bouncer simply could not tolerate.[3] After the bouncer took Aldini to the ground, he was subsequently arrested by Dayton police officers for "criminal damaging" and disorderly conduct.[4]

While the story may end with a night in jail for similar parties in similar situations, Aldini's story was just beginning. After Aldini was transported to the Montgomery County Jail for booking and detention, he was told to wait in the booking area until his photograph could be taken.[5] During this time, Aldini made repeated requests to use the telephone so that he could call his friends and ask

---

1 Aldini v. Johnson, 609 F.3d 858, 860 (6th Cir. 2010).

2 *Id.*

3 *Id.*

4 *Id.* at 860–61.

5 *Id.* at 861.

them to post bond.[6] Shortly thereafter, Aldini was asked to enter one of the cells lining the back wall of the booking room, and he complied.[7] While in the cell, Aldini continued making requests to use the telephone.[8] Aldini's persistent—and ultimately damning—requests peaked the frustrations of one officer in particular, Officer Dustin Johnson.[9] Officer Johnson, whose tolerance with Aldini had run dry, exclaimed "that [i]s it,"[10] began moving towards Aldini and pushed Aldini against the back wall of the cell—despite Aldini placing his hands behind his head and pleading that he was "not resisting."[11]

Perhaps one might assume that Aldini's story would end here—that Officer Johnson would restrain Aldini, that Aldini would sit in the cell until his photograph could be taken, and that the booking process would ultimately conclude. That assumption would be wrong. After Officer Johnson's initial altercation with Aldini, several other officers entered the cell, took Aldini to the ground, and "viciously beat" him as he laid in a submissive position.[12] Aldini's body was then held face down and elevated above the floor with an officer holding each of his limbs in a "crucifix or Vitruvian Man position."[13] The officers punched, kicked, and mocked Aldini's military service for several minutes.[14] Despite Aldini's submissiveness and desperate pleas for help, no one came to stop the beating, and Aldini's anguish would continue.[15]

At this point, the officers determined that Aldini's punishment—being viciously beaten and mocked—did not fit his crime—requesting a phone call to ask his friends to post bond.[16] So, the officers did what they believed necessary—they retrieved a taser and tased him at least twice over a span of ten minutes.[17] Aldini screamed in agonizing pain and requested that the officers "just kill [him]"[18] because he felt as though he was being tortured.[19] The officers'

---

6 *Id.* Nothing in the record indicated that Aldini "yelled, swore, or became abusive" through his efforts. *See id.*

7 *Id.*

8 *Id.*

9 *Id.*

10 *Id.*

11 *Id.*

12 *Id.*

13 *Id.*

14 *Id.*

15 *Id.*

16 *Id.*

17 *Id.*

18 *Id.* at 862.

19 *Id.*

response? They laughed and asked Aldini "why he did not just pass out and what kind of drugs he was on."[20]

When the officers determined they were through with Aldini, Aldini was "bleeding profusely, with blood coating his face."[21] Perhaps one would assume that Aldini would be given immediate medical attention for his injuries. Wrong again. Aldini was placed in another cell with a hood over his face and was restrained in a chair for nearly three hours.[22] At 6:00 AM, Aldini was finally released from his restraints when his girlfriend and friend paid his bond.[23] After Aldini's release, he was transported by his friends to Miami Valley Hospital where he received treatment for his injuries.[24] The hospital's medical records indicate that Aldini had a three centimeter laceration over his left eye, a one centimeter laceration on his face, at least six twin taser marks on his back, and signs of trauma including multiple areas of swelling and bruising.[25]

As one commentator notes, "police brutality is one of the most serious and enduring human rights violations in the United States today."[26] Yet, "[p]ublic attitudes toward the criminal justice system and law enforcement are diverse and multidimensional."[27] According to a 2020 Gallup poll,[28] only 48% of all American adults have "a great deal" or "quite a lot" of confidence in the police—a decline of five points from 2019 in which nearly 53% of Americans had "a great deal" or "quite a lot" of confidence in the police. Perhaps no greater indication of the complexity and diversity of the American public's attitude towards the criminal justice system and law enforcement is the poll's finding that nearly 56% of white American adults say they have "a great deal" or "quite a lot" of confidence in the police while only 19% of black American adults say the same.[29] Since Gallup began measuring the public's confidence in the police as an institution in 1993, the gap between white and black American's confidence

---

20 *Id.*

21 *Id.*

22 *Id.*

23 *Id.*

24 *Id.*

25 *Id.*

26 Eamonn O'Hagan, *Judicial Illumination of the Constitutional "Twilight Zone": Protecting Post-Arrest, Pretrial Suspects From Excessive Force at the Hands of Law Enforcement*, 44 B.C. L. REV. 1357, 1358 (2003).

27 Timothy J. Flanagan & Michael S. Vaughn, *Public Opinion About Police Abuse of Force*, *in* POLICE VIOLENCE 113, 114 (William A. Geller & Hans Toch eds.,1996).

28 Megan Brenan, *Amid Pandemic, Confidence in Key U.S. Institutions Surges*, GALLUP (Aug. 12, 2020), https://news.gallup.com/poll/317135/amid-pandemic-confidence-key-institutions-surges.aspx.

29 Jeffrey M. Jones, *Black, White Adults' Confidence Diverges Most on Police*, GALLUP (Aug. 12, 2020), https://news.gallup.com/poll/317114/black-white-adults-confidence-diverges-police.aspx.

in the police has widened from a 25 point difference to 37 points.[30] While public attitudes towards the police certainly vary—especially among demographics—one thing is certain: cases such as Louis Aldini's have certainly contributed to the demise of the public's confidence in law enforcement.

Admittedly, Aldini's case is not generally thought of in a discussion centered on police brutality. Consider recent cases causing national outrage over police brutality: Eric Garner,[31] Michael Brown,[32] Freddie Gray,[33] Philando Castile,[34] and now—most recently—George Floyd,[35] Jacob Blake,[36] and Breonna Taylor.[37] While each of these incidents are, at least, equally as appalling as Aldini's and certainly deserve to be denounced by the public at large, each incident shares a common characteristic distinct from Aldini's: the incidents occurred before the victims were detained, or "seized," by law enforcement. Nonetheless, the circumstances surrounding Aldini's case are particularly important because federal circuits are split as to which constitutional standard applies to the rights afforded to arrestees who experience police brutality after the initial arrest but before a judicial determination of probable cause.[38]

---

30 *Id.*

31 J. David Goodman, *Eric Garner Died in a Police Chokehold. Why Has the Inquiry Taken So Long?*, N.Y. TIMES (Nov. 7, 2018), https://www.nytimes.com/2018/11/07/nyregion/eric-garner-trial-nypd.html.

32 Timothy Williams, *Five Years After Michael Brown's Death, His Father Wants a New Investigation*, N.Y. TIMES (Aug. 15, 2019, 2:47 PM), https://www.nytimes.com/2019/08/09/us/ferguson-michael-brown.html.

33 Joshua Barajas, *Freddie Gray's Death Ruled a Homicide*, PBS (May 1, 2015, 11:13 AM), https://www.pbs.org/newshour/nation/freddie-grays-death-ruled-homicide.

34 Camila Domonoske & Bill Chappell, *Minnesota Gov. Calls Traffic Stop Shooting "Absolutely Appalling at All Levels"*, NPR (July 7, 2016, 7:19 AM), https://www.npr.org/sections/thetwo-way/2016/07/07/485066807/police-stop-ends-in-black-mans-death-aftermath-is-livestreamed-online-video.

35 Jennifer Brooks, *George Floyd and the City That Killed Him*, STAR TRIB. (May 28, 2020, 5:28 AM), https://www.startribune.com/brooks-george-floyd-and-the-city-that-killed-him/570818542/.

36 Shayndi Raice, *Jacob Blake Shooting: What Happened in Kenosha, Wis.?*, WALL ST. J. (Aug. 28, 2020), https://www.wsj.com/articles/jacob-blake-shooting-what-happened-in-kenosha-wisconsin-11598368824.

37 Richard A. Oppel Jr., Derrick Bryson Taylor & Nicholas Bogel-Burroughs, *What We Know About Breonna Taylor's Case and Death*, N.Y. TIMES (Sept. 24, 2020), https://www.nytimes.com/article/breonna-taylor-police.html.

38 Brandon J. Demyan, Aldini v. Johnson*: The Fourth or Fourteenth Amendment—Which Applies to Excessive Force Suits Prior to Arraignment?*, 34 AM. J. TRIAL ADVOC. 433 (2010) (noting the importance of the choice between the Fourth Amendment's "objective reasonableness" test and the Fourteenth Amendment's "shock the conscience" standard).

Consequently, the rights guaranteed to such arrestees by the Constitution remain uncertain.

This circuit split is particularly relevant in the context of qualified immunity because qualified immunity is the initial hurdle that excessive-force plaintiffs must clear. For excessive-force-plaintiffs to have the merits of their claim decided, they first must establish (1) that the officer violated a constitutional right afforded to them and (2) that this constitutional right was "clearly established."[39] As such, the nature of the constitutional right afforded to such arrestees[40] may play a dispositive role before the merits of the arrestee's claim are ever heard.

The majority of federal circuits apply the Fourth Amendment's "objective reasonableness" standard to excessive-force claims arising after the initial act of arrest but before a judicial determination of probable cause.[41] On the other hand, a minority of federal circuits have applied the Fourteenth Amendment's "shock the conscience" standard to examine an individual's constitutional protections under such circumstances.[42] This standard presents "[a] substantially higher hurdle . . . to make a showing of excessive force" than the Fourth Amendment's objective reasonableness standard.[43] In fact, the Supreme Court has noted that "only the most egregious [official conduct] can be said to be 'arbitrary'" enough to satisfy the Fourteenth Amendment's "shock the conscience" standard.[44] Consequently, the distinction between the two constitutional standards plays an important, and potentially dispositive, role in analyzing whether law enforcement officers are entitled to the defense of qualified immunity.[45]

Perhaps now, more than any other moment in our Nation's clear and unequivocal struggle with police brutality, is the precise moment in which the doctrine of qualified immunity should be reconsidered altogether. In fact, many

---

39 *See* Saucier v. Katz, 533 U.S. 194, 201 (2001).

40 Whether the Fourth Amendment's "objective reasonableness" or the Fourteenth Amendment's "shock the conscience" standard applies.

41 *See* Aldini v. Johnson, 609 F.3d 858, 867 (6th Cir. 2010); Wilson v. Spain, 209 F.3d 713, 715–16 (8th Cir. 2000); Pierce v. Multnomah County, 76 F.3d 1032, 1042–43 (9th Cir. 1996); Austin v. Hamilton, 945 F.2d 1155, 1160 (10th Cir. 1991); Powell v. Gardner, 891 F.2d 1039, 1043–44 (2d Cir. 1989); *see also* Torres v. McLaughlin, 163 F.3d 169, 174 (3d Cir. 1997) (noting in dicta that the Fourth Amendment extends past completion of the arrest).

42 *See* Riley v. Dorton, 115 F.3d 1159, 1162–63 (4th Cir. 1997); Cottrell v. Caldwell, 85 F.3d 1480, 1490 (11th Cir. 1996); Brothers v. Klevenhagen, 28 F.3d 452, 455–56 (5th Cir. 1994); Wilkins v. May, 872 F.2d 190, 192, 195 (7th Cir. 1989).

43 Darrah v. City of Oak Park, 255 F.3d 301, 306 (6th Cir. 2001).

44 *See* County of Sacramento v. Lewis, 523 U.S. 833, 834 (1998).

45 *See* Ilan Wurman, *Qualified Immunity and Statutory Interpretation*, 37 SEATTLE UNIV. L. REV. 939 (2014) ("As a result of federal qualified immunity doctrine, which many states have adopted for themselves, excessive force cases rarely get to trial, plaintiffs often cannot recover, and courts struggle to find principled distinctions from one qualified immunity case to the next.").

commentators and pundits have recently called for the end of the doctrine that has shielded the culpability of countless officers from facing civil liability for their egregious actions.[46] However, this debate—albeit completely valid and justified—is not the focus of this Note. Rather, this Note addresses a narrow legal question within the realm of qualified immunity and excessive-force jurisprudence: How has the circuit split identified above affected the merits of plaintiffs' § 1983 excessive-force claims, and what can be done moving forward to assure that those individuals harmed by police use of excessive force are adequately remedied?

With Americans' trust and confidence in the Legislative and Executive branches teetering near 40%,[47] this Note proposes a judicial solution to the narrow set of circumstances of claims of excessive force arising after the initial act of arrest but before a judicial determination of probable cause. Specifically, this Note proposes that the Fourth Amendment's "objective reasonableness" standard should be applied to cases involving claims of excessive force arising under these circumstances to clarify the constitutional rights afforded to such arrestees. Clarifying the applicable constitutional standard in such cases could solve many issues often associated with excessive-force claims and, specifically, qualified immunity—namely the notions that "excessive force cases rarely get to trial," that "plaintiffs often cannot recover," and that "courts struggle to find principled distinctions from one qualified immunity case to the next."[48]

Part II of this Note provides necessary background information to understand the development of excessive-force and qualified-immunity jurisprudence at both the Supreme Court of the United States level and among federal circuit courts of appeals.[49] Sections II.A[50] and II.B[51] introduce the Fourth and Fourteenth Amendments and the standards for reviewing excessive-force

---

46 *See* The Editorial Board, Opinion, *How the Supreme Court Lets Cops Get Away with Murder*, N.Y. TIMES (May 29, 2020), https://www.nytimes.com/2020/05/29/opinion/Minneapolis-police-George-Floyd.html; Mark Joseph Stern, *The Supreme Court Broke Police Accountability. Now It Has the Chance To Fix It*, SLATE (May 27, 2020, 5:54 PM), https://slate.com/news-and-politics/2020/05/george-floyd-supreme-court-police-qualified-immunity.html.

47 Megan Brenan, *Trust in U.S. Legislative Branch 40%, Highest in Nine Years*, GALLUP (Oct. 1, 2018), https://news.gallup.com/poll/243293/trust-legislative-branch-highest-nine-years.aspx#:~:text=%20Trust%20in%20U.S.%20Legislative%20Branch%2040%25%2C%20Highest,judicial%20branch%20has%20consistently%20been%20the. . .%20More%20. While the Legislative and Executive branches of government inspire trust and confidence in only roughly 40% of Americans, the judicial branch has steadily maintained the trust and confidence of nearly 70% of all Americans. *Id.*

48 *See* Wurman, *supra* note 45.

49 *See infra* Part II.

50 *See infra* Section II.A.

51 *See infra* Section II.B.

claims under both amendments, respectively, while Section II.C[52] will introduce and elaborate on the circuits addressing the issue of whether the Fourth or Fourteenth Amendment applies to excessive-force cases arising after the initial act of arrest but before a judicial determination of probable cause. Section II.D[53] will briefly review the federal qualified immunity doctrine, and Section II.E will introduce and examine a recent Supreme Court decision which has led some commentators to believe that the Supreme Court has resolved the issue addressed in this Note.[54] Part III of this Note will revisit the role of "reasonableness" in three distinct contexts with regard to § 1983 excessive-force claims: (1) assessing Fourth Amendment excessive-force violations, (2) assessing Fourteenth Amendment excessive-force violations, and (3) assessing whether an individual officer is entitled to qualified immunity.[55] Part IV examines the consequences of applying the Fourth Amendment, as well as the Fourteenth Amendment, to such cases by examining two recent cases that have applied both constitutional standards to such excessive-force cases.[56] Section IV.C takes particular care to examine these consequences in the context of qualified immunity.[57] Finally, Part V of this Note will make the argument that the Fourth Amendment's "objective reasonableness" standard should apply in excessive-force cases arising after the initial act of arrest but before a judicial determination of probable cause.[58]

II. BACKGROUND

The events giving rise to excessive-force claims are not governed by a single, generic constitutional standard.[59] Rather, they fall on different points along the "custodial continuum" to which different constitutional standards attach.[60] The various constitutional standards that may attach to an excessive-

---

52 *See infra* Section II.C.

53 *See infra* Section II.D.

54 *See infra* Section II.E.

55 *See infra* Part III.

56 *See infra* Part IV; *see also* McMillen v. Windham, No. 3:16-cv-00558-RGJ-CHL, 2019 WL 4017240 (W.D. Ky. Aug. 26, 2019) (applying the Fourth Amendment's "objective reasonableness" standard); Runyon v. Hannah, 2013 WL 2151235 (S.D.W. Va. May 16, 2013) (applying the Fourteenth Amendment).

57 *See infra* Section IV.C.

58 *See infra* Part V.

59 *See* Graham v. Connor, 490 U.S. 386, 394 (1989) (noting that an analysis of excessive-force claims brought under § 1983 begins with identifying the specific constitutional right allegedly infringed—most cases being the Fourth Amendment's prohibition against unreasonable seizures of the person, or the Eighth Amendment's ban on cruel and unusual punishments).

60 *See* Austin v. Hamilton, 945 F.2d 1155, 1158 (10th Cir. 1991). For example, Supreme Court precedent has clearly established that the Eighth Amendment applies to post-trial detainees, whereas the Fourth Amendment applies to individuals alleging excessive-force claims "in the course of an arrest, investigatory stop, or other 'seizure.'" *Compare* Ingraham v. Wright, 430 U.S.

force claim include the Fourth Amendment[61]—which prohibits unreasonable seizures of the person; the Fourteenth Amendment[62]—which prohibits violations of due process; and the Eighth Amendment[63]—which prohibits cruel and unusual punishment. As noted above, the constitutional standards of concern for the purposes of this Note arise from the Fourth Amendment's prohibition against unreasonable seizures of the person and the Fourteenth Amendment's prohibition against violations of due process. The Eighth Amendment standard, which prohibits cruel and unusual punishment, "is specifically concerned with the unnecessary and wanton infliction of pain in penal institutions," and is the "primary source of substantive protection to convicted prisoners."[64] As such, the Eighth Amendment will not be considered in the remaining Sections of this Note.

A. The Fourth Amendment

The Fourth Amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."[65] Generally, the Fourth Amendment is thought of "as a limitation on the power of police to search for and seize evidence, instrumentalities, and fruits of crime."[66] The Fourth Amendment "also protects the 'right of the people to be secure in their persons,' and it is clear that an illegal arrest or other unreasonable seizure of the person is itself a violation of the Fourth Amendment."[67] The Fourth Amendment serves to balance "the individual expectation of privacy against the governmental interest in investigating and preventing crime."[68] A litany of academic literature and case law exists

651, 671 n.40 (1977) ("[T]he State does not acquire the power to punish with which the Eighth Amendment is concerned until after it has secured a formal adjudication of guilt in accordance with due process of law.") *with Graham*, 490 U.S. at 395 ("[A]ll claims that law enforcement officers have used excessive force . . . in the course of an arrest, investigatory stop, or other 'seizure' . . . should be analyzed under the Fourth Amendment.").

61 *See Graham*, 490 U.S. at 394.

62 *See* Rochin v. California, 342 U.S. 165 (1952).

63 *See* Whitley v. Albers, 475 U.S. 312 (1986).

64 *Id.* at 327.

65 U.S. CONST. amend. IV.

66 *See* WAYNE R. LAFAVE, SEARCH AND SEIZURE § 5.1 (5th ed. 2019).

67 *Id.* (footnotes omitted) (first citing Terry v. Ohio, 392 U.S. 1 (1968) and then citing Henry v. United States, 361 U.S. 98 (1959)).

68 Thomas K. Clancy, *The Supreme Court's Search for a Definition of a Seizure: What Is a "Seizure" of a Person Within the Meaning of the Fourth Amendment?*, 27 AM. CRIM. L. REV. 619, 620 (1990) (noting that "[t]he essence of the [Fourth Amendment] is a balancing test, weighing the individual expectation of privacy against the governmental interest in investigating and preventing crime").

examining when a Fourth Amendment seizure has occurred.[69] This examination is not important for the purposes of this Section. Rather, this Section is concerned with the standard for assessing when an individual officer's use of force in effectuating a Fourth Amendment seizure is reasonable—or unreasonable—for the purposes of § 1983 excessive-force suits. As such, this section will examine the Supreme Court's development of Fourth Amendment excessive-force jurisprudence with this question in mind.

The test for determining whether an individual officer's use of force is consistent with an individual's Fourth Amendment rights is whether the officer's use of force was "objectively reasonable." The Supreme Court's first use of the Fourth Amendment's "objective reasonableness" standard in an excessive-force claim came in 1985 in *Tennessee v. Garner*.[70] In *Garner*, the Supreme Court held that "apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment."[71] The *Garner* Court articulated this standard as 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."[72] Although the Supreme Court articulated the standard to be applied in excessive-force cases arising under the Fourth Amendment in *Garner*, it was the Court's decision in *Graham v. Connor*[73] that has proved to be instrumental in adjudicating excessive-force claims arising during the course of an arrest.

On November 12, 1984, Dethorne Graham, a diabetic, felt the onset of an insulin reaction.[74] A friend of Graham's, William Berry, drove Graham to a convenience store so he could purchase orange juice to counteract the reaction.[75] When Graham entered the store, he noticed a number of people ahead of him in the checkout line and decided to leave in favor of Berry driving him to a friend's house instead.[76] In the meantime, Officer Connor observed Graham "hastily enter and leave the store" and became suspicious that something was amiss.[77] Officer Connor followed Berry's car and made an investigative stop about half a mile from the convenience store.[78] Despite Berry telling Connor that Graham was simply suffering from a sugar reaction, Officer Connor ordered Berry and

---

69 *See id.*

70 471 U.S. 1 (1985).

71 *Id.* at 7.

72 *Id.* at 8.

73 490 U.S. 386 (1989).

74 *Id.* at 388.

75 *Id.*

76 *Id.* at 388–89.

77 *Id.* at 389.

78 *Id.*

Graham to wait while he investigated what happened at the convenience store.[79] As Officer Connor returned to his patrol car to request backup assistance, Graham got out of Berry's vehicle, ran around it twice, and eventually passed out on the curb.[80] Other officers arrived on the scene, and one cuffed Graham's hands tightly behind his back.[81] Despite Berry's attempts to warn the officers of Graham's condition, the officers continued their efforts, ultimately carrying Graham to Berry's car, and throwing him face down on the hood.[82] As the struggle between Graham and the officers continued, a third friend of Graham's arrived on the scene with orange juice, but the officers refused to permit Graham to have the juice.[83] Officer Connor finally received confirmation that nothing occurred at the convenience store and the officers drove Graham home and released him.[84] As a result of the incident, Graham sustained a broken foot, cuts on his wrists, a bruised forehead, and an injured shoulder.[85] Graham filed suit under § 1983, alleging a violation of his Fourteenth Amendment rights.[86]

The federal district court applied a four-factor test outlined in *Johnson v. Glick*[87] to Graham's claim.[88] The district court identified the four factors as

> (1) the need for the application of force; (2) the relationship between that need and the amount of force that was used; (3) the extent of the injury inflicted; and (4) "[w]hether the force was applied in a good faith effort to maintain and restore discipline or maliciously and sadistically for the very purpose of causing harm."[89]

The district court granted a directed verdict to the defendants after

> [f]inding that the amount of force used by the officers was "appropriate under the circumstances," that "[t]here was no discernable injury inflicted," and that the force used "was not applied maliciously or sadistically for the very purpose of

---

79 *Id.*

80 *Id.*

81 *Id.*

82 *Id.*

83 *Id.*

84 *Id.*

85 *Id.* at 390.

86 *Id.*

87 481 F.2d 1028, 1033 (2d Cir. 1973).

88 *Graham*, 490 U.S. at 390.

89 *Id.* (quoting Graham v. Charlotte, 644 F. Supp. 246, 248 (W.D.N.C. 1986)).

> causing harm," but in "a good faith effort to maintain or restore order in the face of a potentially explosive situation."[90]

A divided panel of the Fourth Circuit Court of Appeals affirmed, holding that the district court applied the correct legal standard—the substantive due process standard—in assessing Graham's excessive-force claim.[91]

The Supreme Court granted certiorari and reversed the Fourth Circuit's decision.[92] The Court rejected the Fourth Circuit's opinion that all excessive-force claims brought under § 1983 are "governed by a single generic standard."[93] Rather, the Court noted that "all excessive force claims" must be analyzed by first "identifying the specific constitutional right allegedly infringed upon by the challenged application of force."[94] For claims of excessive force arising during the course of an arrest, investigatory stop, or other "seizure" of a person, the Court held that the Fourth Amendment's "objective reasonableness" standard governs.[95] The Court reasoned that the Fourth Amendment "provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct." Thus the Fourth Amendment, not substantive due process, is the guide for analyzing these claims.[96] Furthermore, the Court in *Graham* instructed lower courts to consider the following non-exhaustive factors to determine whether an individual officer's use of force was objectively reasonable: (1) "the severity of the crime at issue," (2) "whether the suspect poses an immediate threat to the safety of the officers or others," and (3) "whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight."[97] Nonetheless, the key takeaway from *Graham* is that excessive-force claims governed by the Fourth Amendment require that an officer's actions be objectively reasonable.

The Supreme Court's jurisprudence concerning the Fourth Amendment has clearly established that for a government seizure to be constitutional it must be "objectively reasonable."[98] Further, it is certain that any claim of excessive

---

90 *Id.* at 390–91.

91 *Id.* at 391.

92 *Id.* at 392.

93 *Id.* at 393.

94 *Id.* at 394.

95 *Id.* at 388.

96 *Id.* at 395. The Supreme Court, however, did not foreclose the use of *Glick*'s four factors in other § 1983 excessive-force claims wherein the Fourteenth Amendment governs. *See* Feeley v. City of New York, 362 F. Supp. 3d 153, 158 (S.D.N.Y. 2019).

97 *Graham*, 490 U.S. at 396. It should be noted that the *Graham* Court did not intend for these factors to be conclusive. Rather the Court instructed lower courts that the Fourth Amendment excessive-force test "requires careful attention to the facts and circumstances of each particular case." *Id.*

98 *Id.* at 397.

force arising during the course of any "seizure" of the person is governed by the Fourth Amendment. What remains unclear—and what remains contested among the lower federal circuits—is the question of whether the Fourth Amendment's protection against unreasonable seizures extends to cases involving excessive force after an initial arrest but before a judicial determination of probable cause.[99] This question will be introduced in Section II.C and will be answered in Part V of this Note.

B. The Fourteenth Amendment

"The Fourteenth Amendment prohibits any state deprivation of life, liberty, or property without due process of law."[100] In this respect, the Fourteenth Amendment "seek[s] to balance the rights of . . . pre-trial detainees against the problems created for officials by the custodial context."[101] Accordingly, the Fourteenth Amendment establishes "qualified standards of protection for . . . pre-trial detainees—against . . . excessive force *that amounts to punishment*."[102] In *County of Sacramento v. Lewis*,[103] the Supreme Court held that to violate the substantive due process component of the Fourteenth Amendment, a law enforcement officer's conduct must "shock[] the conscience,"[104] a test derived from its prior decision in *Rochin v. California.*[105] This "shocks the conscience" standard has been characterized as a "substantially

---

99 *See* Riley v. Dorton, 115 F.3d 1159, 1162–63 (4th Cir. 1997) (declining to extend the Fourth Amendment's protections to plaintiff bringing a § 1983 claim of excessive force after arrest and during pretrial detainment and applying the Fourteenth Amendment's "shocks the conscience" standard); Cottrell v. Caldwell, 85 F.3d 1480, 1490 (11th Cir. 1996); Brothers v. Klevenhagen, 28 F.3d 452, 456 (5th Cir. 1994); Wilkins v. May, 872 F.2d 190, 192 (7th Cir. 1989). *But see* Powell v. Gardner, 891 F.2d 1039, 1044 (2d Cir. 1989) ("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 (sole or joint) of the arresting officer."); McDowell v. Rogers, 863 F.2d 1302, 1306 (6th Cir. 1988) (Fourth Amendment seizure "continues throughout the time the person remains in the custody of the arresting officers"); Robins v. Harum, 773 F.2d 1004, 1010 (9th Cir. 1985) ("[O]nce a seizure has occurred, it continues throughout the time the arrestee is in the custody of the arresting officers.").

100 Ingraham v. Wright, 430 U.S. 651, 672 (1977).

101 *Riley*, 115 F.3d at 1166.

102 *Id.* at 1167 (emphasis added) (internal citations omitted).

103 523 U.S. 833 (1998).

104 *Id.* at 846–47. The Court also noted, "[T]he substantive component of the Due Process Clause is violated by executive action only when it 'can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense.'" *Id.* at 847 (quoting Collins v. Parker Heights, 503 U.S. 115, 128 (1992)).

105 342 U.S. 165 (1952).

higher hurdle . . . to make a showing of excessive force" than the Fourth Amendment's "objective reasonableness" standard.[106] One commentator illustrates the consequences of applying the Fourteenth Amendment's standard:

> In this scenario, the extreme burden of proof lies on the innocent citizen to combat the testimony of those who temporarily have complete control of his liberty. In contrast, under the Fourth Amendment standard, the injured plaintiff must only show the law enforcement official's conduct was not objectively reasonable. Although the burden of proof still lies with the plaintiff, much less proof is required than under the shock the conscience standard of the Fourteenth Amendment.[107]

For the purposes of this Note, it is important to consider the Second Circuit's decision in *Johnson v. Glick*,[108] which applied the Fourteenth Amendment to a plaintiff's § 1983 excessive-force claim.[109] Although *Glick*'s principle that all excessive-force claims are governed by a single, generic standard was rejected by the Supreme Court in *Graham*, the decision remains relevant in the context of § 1983 excessive-force claims because the factors outlined in the *Glick* decision are still applied to § 1983 excessive-force claims analyzed under the Fourteenth Amendment.[110] As such, examining the *Glick* decision is imperative for understanding the increased burden placed on excessive-force-plaintiffs in adjudicating their claims.

Australia Johnson was held in the Manhattan House of Detention for Men (the "House of Detention") prior to and during his trial on felony charges.[111] While Johnson was being checked back into the House of Detention, Officer John Fuller reprimanded Johnson and other men for failing to follow instructions.[112] Subsequently, Johnson attempted to explain to Officer Fuller that the men were doing only what another officer had told them to do, and Officer Fuller rushed into the holding cell, grabbed Johnson by the collar, and struck him twice on the head with an object enclosed in his fist.[113] It was alleged that during this incident Officer Fuller threatened Johnson by saying, "I'll kill you, old man,

---

106 Darrah v. City of Oak Park, 255 F.3d 301, 306 (6th Cir. 2001).

107 Tiffany Ritchie, *A Legal Twilight Zone: From the Fourth to the Fourteenth Amendment, What Constitutional Protection Is Afforded a Pretrial Detainee?*, 27 S. ILL. UNIV. L.J. 613, 614 (2003).

108 481 F.2d 1028 (2d Cir. 1973).

109 *See id.*

110 *Id.*

111 *Id.* at 1029.

112 *Id.*

113 *Id.* at 1029–30.

I'll break you in half."[114] Officer Fuller then detained Johnson in the holding cell for two hours before returning him to his normal cell.[115] Johnson requested medical attention but was held in another cell for another two hours before being permitted to see the jail's doctor.[116]

On appeal, the Second Circuit derived its test from *Rochin*—wherein the Supreme Court created the "shocks the conscience" test.[117] The Second Circuit created four factors for lower courts to consider: (1) "the need for the application of force"; (2) "the relationship between the need and the amount of force that was used"; (3) "the extent of injury inflicted"; and (4) "whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm."[118] These factors continue to be applied in § 1983 excessive-force claims arising under the Fourteenth Amendment to analyze whether a particular officer's action "shocks the conscience."[119]

C. The Circuit Split

As Judge Seymour noted in *Austin v. Hamilton*,[120] "[t]he Supreme Court has 'not resolved the question whether the Fourth Amendment continues to provide individuals with protection against the deliberate use of excessive force beyond the point at which arrest ends and pretrial detention begins, and the lower courts have not reached a consensus.'"[121] This uncertainty is particularly relevant in the context of § 1983 claims. In analyzing § 1983 excessive-force claims, courts must first carefully identify "the specific constitutional right allegedly infringed by the challenged application of force."[122] The constitutional right infringed upon dictates the standard under which the court must analyze the § 1983 claim.[123] Circuits holding that pretrial detainees' constitutional protections originate under the Fourth Amendment have uniformly applied an

---

114 *Id.* at 1030.

115 *Id.*

116 *Id.*

117 *Id.* at 1032–33.

118 *Id.* at 1033.

119 *See* Edrei v. Macguire, 892 F.3d 525, 534 (2d Cir. 2018); Feeley v. City of New York, 362 F. Supp. 3d 153, 157 (S.D.N.Y. 2019).

120 945 F.2d 1155 (10th Cir. 1991).

121 *Id.* at 1159 (quoting Graham v. Connor, 490 U.S. 386, 395 n.10 (1989)).

122 *Graham*, 490 U.S. at 394.

123 Irene M. Baker, Wilson v. Spain*: Will Pretrial Detainees Escape the Constitutional "Twilight Zone"?*, 75 SAINT JOHN'S L. REV. 449, 458 (2001).

"objective reasonableness" standard to assess the merits of a plaintiff's excessive force claim. On the other hand, circuits holding that pretrial detainees' constitutional protections originate under the Fourteenth Amendment have uniformly applied a much higher standard—the "shocks the conscience" standard coupled with the four *Glick* factors—to assess the merits of a plaintiff's excessive-force claim.

The majority of federal circuits have held that the Fourth Amendment's "objective reasonableness" standard applies to excessive-force claims arising after the initial act of arrest but before a judicial determination of probable cause,[124] while a minority of federal circuits have held that the Fourteenth Amendment is applicable.[125] A brief review of two cases in the lower federal circuits is instructive—providing crucial insight into the rationales for applying either constitutional standard. Section II.C.1 introduces the lower federal circuits holding that a pretrial detainee's constitutional protections originate from the Fourth Amendment's prohibition against unreasonable seizures of the person.[126] Section II.C.2 introduces the lower federal circuits holding that a pretrial detainee's constitutional protections originate from the Fourteenth Amendment's prohibition against violations of substantive due process.[127]

1. Federal Circuits Applying the Fourth Amendment

As noted above, the majority of federal circuits have held that the Fourth Amendment's "objective reasonableness" standard should be applied to excessive-force cases arising after the initial act of arrest but before a judicial determination of probable cause.[128] Although an exhaustive analysis of each circuits' rationale is unnecessary, a brief review of the Sixth Circuit's opinion in *Aldini v. Johnson*[129] is instructive.

The facts in *Aldini* do not need to be reiterated, as they are outlined in Part I of this Note.[130] Accordingly, this section examines the Sixth Circuit's application of the Fourth Amendment to Aldini's case. In its analysis, the Sixth

---

124 *See* Aldini v. Johnson, 609 F.3d 858, 867 (6th Cir. 2010); Wilson v. Spain, 209 F.3d 713, 715–16 (8th Cir. 2000); Pierce v. Multnomah County, 76 F.3d 1032, 1042–43 (9th Cir. 1996); Austin v. Hamilton, 945 F.2d 1155, 1160 (10th Cir. 1991); Powell v. Gardner, 891 F.2d 1039, 1043–44 (2d Cir. 1989); *see also* Torres v. McLaughlin, 163 F.3d 169, 174 (3d Cir. 1998) (noting in dicta that the Fourth Amendment extends past completion of the arrest).

125 *See* Riley v. Dorton, 115 F.3d 1159, 1162–63 (4th Cir. 1997); Cottrell v. Caldwell, 85 F.3d 1480, 1490 (11th Cir. 1996); Brothers v. Klevenhagen, 28 F.3d 452, 455–56 (5th Cir. 1994); Wilkins v. May, 872 F.2d 190, 192, 195 (7th Cir. 1989).

126 *See infra* Section II.C.1.

127 *See id.*

128 *See supra* Part I.

129 609 F.3d 858 (6th Cir. 2010).

130 *See supra* Part I.

Circuit noted the Supreme Court's instruction in *Graham* to identify the specific constitutional right allegedly infringed by the challenged application of force.[131] The Sixth Circuit recognized the "legal twilight zone" that has arisen as a result of the Supreme Court deliberately failing to answer the question of whether the Fourth Amendment continues to provide protection against deliberate use of excessive force beyond the point at which arrest ends and pretrial detention begins.[132] Nonetheless, the Sixth Circuit noted that the question hinges on "the status of the plaintiff at the time of the incident, whether free citizen, convicted prisoner, or something in between."[133]

In analyzing the status of Aldini at the time the alleged use of force occurred, the Sixth Circuit noted its prior precedent that Fourth Amendment protections do not vanish at the moment of arrest.[134] In support of the notion that the Fourth Amendment applies to an individual's § 1983 excessive-force claim arising after the initial arrest but before a judicial determination of probable cause, the Sixth Circuit cited Supreme Court precedent.[135] First, the Sixth Circuit cited the Supreme Court's decision in *Bell v. Wolfish*.[136] The Sixth Circuit noted that the Supreme Court, albeit in dicta, stated that individuals who have not had a judicial determination of probable cause are not yet pretrial detainees for constitutional purposes.[137] Second, the Sixth Circuit cited the Supreme Court's decision in *Gerstein v. Pugh*.[138] The Sixth Circuit noted that the Supreme Court observed that "[b]oth the standards and procedures for arrest and detention have been derived from the Fourth Amendment and its common-law antecedents."[139] As such, the Sixth Circuit "[set] the dividing line between the Fourth and

---

131 *Aldini*, 609 F.3d at 864.

132 *Id.*

133 *Id.* at 864–65. The Sixth Circuit noted that "if the plaintiff was a free person at the time of the incident and the use of force occurred in the course of an arrest or other seizure of the plaintiff, the plaintiff's claim is governed by the Fourth Amendment's reasonableness standard." *Id.* at 865. Alternatively, "if a plaintiff is in a situation where his rights are not governed by either the Fourth or the Eighth Amendment, the Due Process Clause of the Fourteenth Amendment protects the individual against physical abuse by officials." *Id.*

134 *Id.* at 865 (citing Phelps v. Coy, 286 F.3d 295, 300 (6th Cir. 2002)). In *Phelps*, the Sixth Circuit held that the Fourth Amendment reasonableness standard governs throughout the seizure of a person: "[T]he seizure that occurs when a person is arrested continues throughout the time the person remains in the custody of the arresting officers." 286 F.3d at 301.

135 *Aldini*, 609 F.3d at 866.

136 *Id.* (citing Bell v. Wolfish, 441 U.S. 520 (1979)).

137 *Id.*

138 *Id.* (citing Gerstein v. Pugh, 420 U.S. 103 (1975)).

139 *Id.* (emphasis omitted) (quoting *Gerstein*, 420 U.S. at 111).

Fourteenth Amendment zones of protection at the probable-cause hearing."[140] Thus, because the circumstances surrounding Aldini's case took place in the middle of the booking procedure—prior to a probable cause hearing—the Sixth Circuit held that the Fourth Amendment governed Aldini's case.[141]

2. Federal Circuits Applying the Fourteenth Amendment

As previously noted, a minority of federal circuits have held that the Fourteenth Amendment's "shocks the conscience" standard should be applied to excessive-force cases arising after the initial act of arrest but before a judicial determination of probable cause.[142] An exhaustive review of each circuit considering the issue is unnecessary. Nonetheless, a brief review of the Fourth Circuit's opinion in *Riley v. Dorton*[143] is relevant to lay the proper foundation for understanding this circuit split.

At approximately 11:30 AM on March 31, 1993, Officer James Dorton arrested Charles Riley on charges of rape, sodomy, and abduction for immoral purposes, pursuant to outstanding warrants.[144] Riley was handcuffed and taken to the Norfolk Police Department, where he was later released into the custody of Officer Dorton and another officer, who transported Riley to Henrico County.[145] The three arrived at the Public Safety Building in Henrico County at 1:30 PM, where Riley's handcuffs were removed, and he was asked to sign a waiver for DNA samples to be taken without a search warrant.[146] Riley refused to sign the waiver and handcuffs were placed back on him.[147] Officer Dorton informed Riley that he would remain handcuffed until he was able to obtain a search warrant.[148] Shortly thereafter, several insults were exchanged between Riley and Officer Dorton.[149] However, the events leading to Riley's claim against Officer Dorton culminated when Officer Dorton inserted an ink pen a quarter of an inch into Riley's nose—threatened to rip it open, threatened to throw Riley into a corner and beat him, and slapped Riley across the face with "medium"

---

140 *Id.* at 867.

141 *Id.*

142 *See supra* Part I.

143 115 F.3d 1159 (4th Cir. 1997).

144 *Id.* at 1160–61.

145 *Id.*

146 *Id.* at 1161.

147 *Id.*

148 *Id.*

149 *Id.* According to Riley, Officer Dorton insulted Riley's family, calling them "a bunch of dumb country hicks," and threatened to tie Riley to a tree and leave him. *Id.* Moreover, the opinion notes that Officer Dorton asked Riley if he knew "what scum looked like," to which Riley responded by asking whether Officer Dorton had "looked in the mirror lately." *Id.*

force.[150] The Fourth Circuit noted that there was no medical evidence that Officer Dorton ever inflicted any injury on Riley.[151]

The Fourth Circuit began its analysis by noting the Supreme Court's instruction from *Graham v. Connor* that "[i]n addressing an excessive force claim brought under § 1983, analysis begins by identifying the specific constitutional right allegedly infringed by the challenged application of force."[152] The Fourth Circuit entertained Riley's request that it "broaden Fourth Amendment protection beyond the point of arrest to cover all persons in pretrial detention," but ultimately found this request meritless, thereby favoring the Fourteenth Amendment.[153] In reaching its conclusion in *Riley*, the Fourth Circuit made four observations.

First, it observed that the Supreme Court had "declined to adopt Riley's position, having reserved the question in *Graham v. Connor*."[154] In *Graham*, the Supreme Court noted that its precedent "[had] not resolved the question whether the Fourth Amendment continues to provide individuals with protection against the deliberate use of excessive physical force beyond the point at which arrest ends and pretrial detention begins," and it did not attempt to answer that question in *Graham*.[155] While this may be true, this observation is not particularly helpful in determining which constitutional standard is applicable to pretrial detainees.

Second, it observed a difference between a "deprivation of liberty" and a "condition of detention," the latter of which was identified as the issue in *Riley*.[156] The Fourth Circuit rejected Riley's argument that the Supreme Court's precedent in *Albright v. Oliver*[157] was controlling, favoring the Supreme Court's holding in *Bell v. Wolfish*.[158] The Fourth Circuit noted that "[t]he Court in *Albright* was addressing not a claim of excessive force after an arrest but rather a claim that the police lacked probable cause to initiate a criminal prosecution," and that "[t]he Framers considered the matter of pretrial deprivations of liberty, and drafted the Fourth Amendment to address it."[159] As such, the Fourth Circuit distinguished "deprivations of liberty"—which, in its view, are appropriately analyzed under the Fourth Amendment, and "condition[s] of detention"—which,

---

150 *Id.*

151 *Id.*

152 *Id.* (quoting Graham v. Connor, 490 U.S. 386, 394 (1989)).

153 *Id.* at 1162.

154 *Id.*

155 *Graham*, 490 U.S. at 395 n.10.

156 *Riley*, 115 F.3d at 1162.

157 510 U.S. 266 (1994).

158 441 U.S. 520 (1979).

159 *Riley*, 115 F.3d at 1162 (quoting *Albright*, 510 U.S. at 274).

in its view, should be analyzed under the Due Process Clause of the Fourteenth Amendment, as instructed by the Supreme Court in *Bell*.[160]

Third, the Fourth Circuit observed that Justice Ginsburg's "continuing seizure" theory was inconsistent and "in the face of squarely contrary Supreme Court precedent."[161] In *Albright*, Justice Ginsburg wrote separately to argue that the concept of a "continuing seizure" justified applying the Fourth Amendment beyond the point of arrest.[162] Justice Ginsburg contended that the seizure of a person, as contemplated by the Fourth Amendment, does not end after arrest but continues as long as the person is "seized" by the government.[163] However, the Fourth Circuit refused to accept Justice Ginsburg's rationale, noting that *Bell* instructed the court to analyze excessive-force claims of pretrial detainees under the Due Process Clause of the Fourteenth Amendment.[164] The Fourth Circuit observed that the Supreme Court's basic jurisprudence reinforced the Court's refusal to adopt Justice Ginsburg's "continuing seizure" theory.[165] As such, the Fourth Circuit refused to extend Fourth Amendment protections to Riley's situation and applied the Due Process Clause of the Fourteenth Amendment.[166]

D. Qualified Immunity in the Context of § 1983 Excessive-Force Claims

Qualified immunity is frequently asserted as a defense to § 1983 claims.[167] However, qualified immunity is not just immunity from liability, but also "immunity from suit," that is, from the burdens of having to defend the litigation.[168] Permitting government officials to assert qualified immunity was meant to address "the substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials

---

160 *Id.* (citing *Bell*, 441 U.S. at 535).

161 *Id.*

162 *Albright*, 510 U.S. at 276–81 (Ginsburg, J., concurring).

163 *Id.*

164 *Riley*, 115 F.3d at 1162 (citing *Bell*, 441 U.S. at 535).

165 *Id.* Chief Judge Wilkinson noted that the core of the Fourth Amendment's jurisprudence has focused on the initial deprivation of liberty, or, in other words, arrest: (1) what constitutes an arrest, *California v. Hodari D.*, 499 U.S. 621 (1991); (2) what constitutes probable cause to make an arrest, *Henry v. United States*, 361 U.S. 98 (1959); *Draper v. United States*, 358 U.S. 307 (1959); (3) when probable cause must be found by a neutral magistrate, *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991); *Gerstein v. Pugh*, 420 U.S. 103 (1975); (4) which officials may issue a warrant, *Shadwick v. City of Tampa*, 407 U.S. 345 (1972); (5) what type of information is required to support a valid warrant, *Whiteley v. Warden*, 401 U.S. 560 (1971); *Giordenello v. United States*, 357 U.S. 480 (1958); and (6) what force may be used during an arrest, *Graham v. Connor*, 490 U.S. 386 (1989); *Tennessee v. Garner*, 471 U.S. 1 (1985). *Riley*, 115 F.3d at 1162.

166 *Riley*, 115 F.3d at 1162.

167 Christopher Lyle McIlwain, *The Qualified Immunity Defense in the Eleventh Circuit and Its Application to Excessive Force Claims*, 49 ALA. L. REV. 941, 941–42 (1998).

168 *Id.* at 944.

in the discharge of their duties."[169] Government officials, including police officers, are immune from civil liability unless, in the course of performing their discretionary functions, they violate the plaintiff's clearly established constitutional rights.[170] This test was outlined in the Supreme Court's decision in *Saucier v. Katz*.[171] In *Katz*, the Court created a two-pronged analysis to determine whether an official is entitled to the qualified immunity defense.[172] First, a lower court must consider whether the facts alleged, taken in the light most favorable to the party asserting the injury, show the officer's conduct violated a constitutional right.[173] If a violation could be made out on a favorable view of the parties' submissions, the lower court must next consider whether the constitutional right allegedly violated was clearly established.[174] Although the Supreme Court retracted *Katz*'s requirement that courts address qualified immunity inquiries sequentially in *Pearson v. Callahan*,[175] it left in place *Katz*'s core analysis: to overcome a defense of qualified immunity, a plaintiff must show that an official violated a clearly established constitutional right.[176]

The right allegedly violated must be "clearly established" in a particularized sense: "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right."[177] In *Katz*, the Supreme Court noted that the qualified-immunity-objective-reasonableness test applies to Fourth Amendment excessive-force claims that are governed by the *Graham* objective reasonableness standard.[178] However, the pertinent qualified immunity inquiry is whether the officer reasonably, though mistakenly, believed that his use of force complied with the Fourth Amendment.[179]

The "clearly established" inquiry of a qualified immunity analysis has been a significant subject of litigation in the context of § 1983 excessive-force claims and presents many issues associated with such claims. Professor Linda Ross Meyer notes three issues commonly associated with qualified immunity

---

169 Anderson v. Creighton, 483 U.S. 635, 638 (1987).

170 Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

171 533 U.S. 194 (2001).

172 *Id.* at 200–01.

173 *Id.* at 201.

174 *Id.*

175 555 U.S. 223 (2009).

176 *Id.* at 232.

177 *Katz*, 533 U.S. at 202 (quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987)).

178 *Id.* at 204–05.

179 *Id.*

analyses.[180] First, courts tasked with assessing whether an officer is entitled to qualified immunity struggle to articulate the level of generality at which law must be "clearly established."[181] Second, courts tasked with assessing whether an officer is entitled to qualified immunity disagree as to what "source of authority" will "clearly establish" a law.[182] For example, courts have grappled with whether the Supreme Court must have spoken on the particular issue, whether the circuit court in one's own jurisdiction will suffice, whether authority from another jurisdiction will suffice, whether authority from a state's highest court will suffice, or whether the authority from a particular district court will suffice.[183] Third, courts tasked with assessing whether an officer is entitled to qualified immunity "struggle[] with the question of whether an officer can be 'reasonably unreasonable' in assessing probable cause or the necessity for application of force."[184]

Given the issues posed by Professor Meyer with respect to qualified immunity, the Author would further pose that the circuit split addressed in this Note further complicates a court's qualified immunity analysis. Particularly, the Author proposes that because the precise constitutional rights afforded to individuals after an initial act of arrest but before a judicial determination of probable cause are uncertain, courts have difficulty in assessing whether an officer has violated a "clearly established" law. Moreover, as a result of the circuit split addressed in this Note, one circuit may afford greater constitutional protections to individuals than another circuit. Thus, an officer's actions in one circuit may amount to a violation of a "clearly established" law, but in another circuit the same action may not amount to such a violation. Conversely, an officer's action that would not amount to a violation of a "clearly established" law in one circuit may amount to a violation of a "clearly established" law in another.

The inconsistency of the federal circuits with respect to the appropriate constitutional standard in the cases considered by this Note, compounded with the present issues with the qualified immunity doctrine posed by Professor Meyer, present many issues for courts to consider in assessing whether an officer is entitled to qualified immunity. Part IV of this Note will examine two recent federal district court opinions analyzing qualified immunity in excessive-force cases arising after the initial act of arrest but before a judicial determination of

---

180 Linda Ross Meyer, *When Reasonable Minds Differ*, 71 N.Y.U. L. REV. 1467, 1505–06 (1996).

181 *Id.* at 1506.

182 *Id.*

183 *See* Karen M. Blum, *Qualified Immunity: A User's Manual*, 26 IND. L. REV. 187, 203–05 (1993) (noting the circuit conflict over the relevance of extrajurisdictional authority in qualified immunity cases).

184 Meyer, *supra* note 180, at 1506.

probable cause.[185] However, a recent Supreme Court decision that some commentators believe has resolved the circuit split introduced in Section II.C[186] of this Note must be considered first.

E. The Effect of Kingsley v. Hendrickson *on Excessive-Force Jurisprudence*

The Supreme Court's opinion in *Kingsley v. Hendrickson*[187] has called into question the "continuing seizure" theory of the majority of federal circuits, holding that the Fourth Amendment continues to provide constitutional protections to individuals experiencing excessive force after the initial act of arrest but before a judicial determination of probable cause. This Section analyzes the *Kingsley* decision, and its effects on § 1983 excessive-force jurisprudence.

Michael Kingsley was arrested on a drug charge and detained in a Wisconsin county jail prior to his trial.[188] One evening, over the course of Kingsley's detainment, an officer performing a cell check noticed a piece of paper covering the light fixture above Kingsley's bed.[189] The officer instructed Kingsley to remove the paper, but Kingsley refused.[190] Other officers instructed Kingsley to remove the paper, and again, Kingsley refused.[191] The next morning, the jail administrator, Lieutenant Robert Conroy, ordered Kingsley to remove the paper, but again, Kingsley refused.[192] Kingsley was then moved to a receiving cell while officers removed the paper from his cell.[193]

In the course of removing Kingsley from his cell, four officers—including Sergeant Stan Hendrickson and Deputy Sheriff Fritz Degner—ordered Kingsley to stand, back up to the door, and keep his hands behind him.[194] Kingsley refused to comply, and the officers handcuffed him, forcibly removed him from the cell, carried him to a receiving cell, and placed him face down on a bunk with his hands handcuffed behind his back.[195] Hendrickson then placed

---

185 *See infra* Part IV.

186 *See supra* Section II.C.

187 576 U.S. 389 (2015).

188 *Id.* at 392.

189 *Id.*

190 *Id.*

191 *Id.*

192 *Id.*

193 *Id.*

194 *Id.*

195 *Id.*

his knee in Kingsley's back and proceeded to slam Kingsley's head into a concrete bunk with Degner's aid.[196] Thereafter, Hendrickson directed Degner to stun Kingsley with a taser.[197] Degner applied a taser to Kingsley's back for approximately five seconds.[198] The officers then left Kingsley handcuffed in the receiving cell for 15 minutes and, thereafter, returned to remove Kingsley's handcuffs.[199]

Based on these events, Kingsley filed a complaint alleging that Hendrickson and Degner violated his Fourteenth Amendment Due Process rights by using excessive force against him.[200] The officers moved for summary judgment, which the district court denied because "a reasonable jury could conclude that [the officers] acted with malice and intended to harm [Kingsley] when they used force against him."[201] Kingsley's claim proceeded to trial and the jury was instructed, among other things, to consider whether the officers "acted with reckless disregard of plaintiff's rights."[202] On appeal, Kingsley argued that this instruction did not comply with the objective standard to assess whether the officers complied with Kingsley's constitutional protections.[203] The Seventh Circuit disagreed and held that "the law required a 'subjective inquiry' into the officer's state of mind."[204] Kingsley filed a petition for certiorari asking the Supreme Court to determine whether the requirements of a § 1983 excessive-force claim brought by a pretrial detainee must satisfy the subjective standard or only the objective standard.[205]

The Supreme Court held that "a pretrial detainee must show only that the force purposely or knowingly used against him was objectively unreasonable."[206] Moreover, the Court instructed lower courts to consider a non-exhaustive list of factors in determining whether an officer's use of force was reasonable: (1) the relationship between the need for the use of force and the amount of force used; (2) the extent of the plaintiff's injuries; (3) any effort made by the officer to temper or to limit the amount of force; (4) the severity of the security problem at issue; (5) the threat reasonably perceived by the officer; and (6) whether the plaintiff was actively resisting.[207]

---

196 *Id.*

197 *Id.* at 393.

198 *Id.*

199 *Id.*

200 *Id.*

201 *Id.*

202 *Id.* (emphasis omitted).

203 *Id.*

204 *Id.*

205 *Id.* at 395.

206 *Id.* at 396–97.

207 *Id.* at 397.

Although some commentators have expressed belief that the Supreme Court's opinion in *Kingsley* has put to rest the "continuing seizure" theory of the majority of lower courts,[208] this may not be the case. First, the precise question addressed in *Kingsley* was whether an objective or subjective test was appropriate in determining whether the officers violated Kingsley's constitutional protections under the Fourteenth Amendment.[209] Although the Supreme Court held that the appropriate inquiry is an objective one, many lower federal courts still apply the factors outlined in *Johnson v. Glick* to determine whether an officer's alleged use of force "shocks the conscience." This standard—albeit an objective one—is still a much higher standard to meet than the Fourth Amendment's reasonableness standard.

Consider a recent post-*Kingsley* decision out of the Southern District of New York: *Feeley v. City of New York*.[210] Although this case does not involve detainment in any manner, it still involves a Fourteenth Amendment claim of excessive force.[211] In reaching his decision, Judge Castel first identified that *Kingsley* did not abandon *Johnson*, or the Court's application of the "shocks the conscience" test.[212] Rather, Judge Castel noted that "*Kingsley* did not 'abandon[]' the 'shocks the conscience' language," but expounded on the test by finding that "force that is objectively unreasonable is conscience-shocking."[213]

Moreover, it is unclear from the *Kingsley* opinion whether Kingsley was arrested pursuant to a lawful warrant. If Kingsley were arrested pursuant to a lawful warrant, then any claims of excessive force arising after the initial act of arrest would correctly be analyzed under the Fourteenth Amendment under the minority approach outlined in Section II.C.1. On the other hand, if Kingsley was not arrested pursuant to a lawful warrant, then any excessive-force claims would be governed by the Fourth Amendment—consistent with the approach of the majority of circuits, as well as the position of this Note—until a judge determined whether the officers had probable cause to effectuate his arrest. Any claims of excessive force subsequent to a judicial determination of probable cause would thereafter be analyzed under the Fourteenth Amendment—as was the case in *Kingsley*.

Accordingly, *Kingsley* does not appear to be conclusive as to whether the Fourth Amendment or Fourteenth Amendment standard governs excessive-

---

208 *See* MARTIN A. SCHWARTZ, SECTION 1983 LITIGATION CLAIMS & DEFENSES § 3.12 (Aspen Pub. 4th ed. 2020).

209 *See Kingsley*, 576 U.S. at 391–92.

210 362 F. Supp. 3d 153 (S.D.N.Y. 2019).

211 *Id.*

212 *Id.* at 158–59.

213 *Id.*

force claims arising after the initial act of arrest but before a judicial determination of probable cause. Moreover, it is unclear whether the Fourteenth Amendment's "objective reasonableness" test articulated by the Supreme Court in *Kingsley* imposes the same burden on excessive-force-plaintiffs as the Fourth Amendment's "objective reasonableness" test. Although the *Kingsley* decision does establish that both inquiries are objective, the Fourteenth Amendment standard still appears to be a much higher standard to meet for excessive-force-plaintiffs given the application of the four *Glick* factors in the federal district courts.

III. THE ROLE OF REASONABLENESS IN EXCESSIVE-FORCE CASES

As this Note has illustrated, "reasonableness" can play a drastically different role depending on whether a court is tasked with analyzing a Fourth Amendment excessive-force claim, a Fourteenth Amendment excessive-force claim, or a qualified immunity defense. Before considering the issues associated with qualified immunity and the question of whether the Fourth or Fourteenth Amendment should apply to claims of excessive force arising after the initial act of arrest but before a judicial determination of probable cause, it is helpful to briefly summarize the role of "reasonableness" in these analyses.

A. The Role of Reasonableness Under the Fourth Amendment

As noted above, the Supreme Court articulated the role of reasonableness in assessing a plaintiff's excessive-force claim under the Fourth Amendment in *Graham v. Connor*. "[A]ll claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard . . . ."[214] This inquiry is an objective one, "whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation."[215] Whether a law enforcement officer's use of force is "reasonable" under the Fourth Amendment, the Court noted, "requires a careful balancing of 'the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing governmental interests at stake."[216] The Court noted three factors for lower courts to consider in balancing these interests: (1) the severity of the crime at issue; (2) whether the suspect poses an immediate threat to the safety of the officers or others; and (3) whether the suspect is actively resisting arrest or attempting to evade arrest by flight.[217] These factors all appear

---

214 Graham v. Connor, 490 U.S. 386, 395 (1989) (emphasis omitted).

215 *Id.* at 397.

216 *Id.* at 396.

217 *Id.*

to focus the inquiry on the threat posed by the individual to the law enforcement officer. Conversely, as will be discussed in the next section, the Fourteenth Amendment inquiry appears to focus on the level of force used by the law enforcement officer.

B. The Role of Reasonableness Under the Fourteenth Amendment

As noted in Section II.E, the Supreme Court has articulated the standard for assessing pretrial detainees' claims of excessive force under the Fourteenth Amendment in *Kingsley*.[218] The Supreme Court has instructed lower courts to consider whether a pretrial detainee has shown "that the force purposely or knowingly used against him was objectively unreasonable."[219] As noted earlier, some commentators have claimed that this standard has put to rest the circuit split identified in Section II.C of this Note. However, this Section will consider the intricacies of this Fourteenth Amendment excessive-force standard and the role of reasonableness under it.

The role of reasonableness under *Kingsley* is drastically favorable to law enforcement in assessing an excessive-force claim under the Fourteenth Amendment. Lower federal courts continue to apply the four *Glick* factors to assess whether an officer's use of force amounts to excessive force. These factors include (1) "the need for the application of force"; (2) "the relationship between the need and the amount of force that was used"; (3) "the extent of injury inflicted"; and (4) "whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm."[220] Thus, under the Fourteenth Amendment, whether an officer's use of force against a pretrial detainee amounts to excessive force is often determined by the same factors used to assess whether an officers' use of force "shocks the conscience." As such, this inquiry is focused on the level of force applied by the law enforcement officer. Consequently, if an officer's use of force does not amount to a "conscience shocking" use of force, an excessive-force-plaintiff has no claim.

C. The Role of Reasonableness in Qualified Immunity

As noted earlier, a law enforcement officer is entitled to the defense of qualified immunity unless (1) the officer violated a plaintiff's constitutional

---

218 576 U.S. 389 (2015).

219 *Id.* at 396–97.

220 Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973).

rights, and (2) the right allegedly violated was clearly established.[221] These two inquiries have been labeled as "the constitutional question" and "the qualified-immunity question," respectively.[222] Interestingly, "reasonable" or "reasonableness" is nowhere to be found in the language of this test. Rather, the Supreme Court has said that for a right to be "clearly established," "[t]he contours of the right must be sufficiently clear that a *reasonable* official would understand that what he is doing violates that right."[223] The principle case outlining the role of reasonableness in determining whether a law enforcement officer is entitled to qualified immunity is *Harlow v. Fitzgerald*.[224] This objective inquiry affords government officials qualified immunity "[when] their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[225] Moreover, the Supreme Court requires that "existing precedent must have placed the statutory or constitutional question beyond debate."[226] Thus, reasonableness's role in the context of qualified immunity is much different than its role in assessing whether an officer has violated a plaintiff's Fourth or Fourteenth Amendment rights. Rather, in the context of qualified immunity, courts are tasked with determining whether a reasonable officer would have known that his or her conduct was in violation of a plaintiff's statutory or constitutional rights. Therefore, even if an officer's conduct amounts to a Fourth or Fourteenth Amendment violation, if a reasonable officer would not have known that such conduct was violative, the officer is entitled to qualified immunity.

IV. QUALIFIED IMMUNITY CASE STUDIES: APPLICATION OF THE FOURTH AND FOURTEENTH AMENDMENTS IN EXCESSIVE-FORCE CASES ARISING AFTER THE INITIAL ACT OF ARREST BUT BEFORE A JUDICIAL DETERMINATION OF PROBABLE CAUSE.

Although it is useful to consider the federal circuits' decisions that have considered whether the Fourth or Fourteenth Amendment is applicable to the excessive-force cases considered in this Note, two recent cases from the United States District Courts for the Western District of Kentucky and the Southern District of West Virginia illustrate the consequences of applying both standards. These cases illustrate the workability and appropriateness of the Fourth Amendment's "objective reasonableness" standard and the difficulty for

---

221 Michael Silverstein, *Rebalancing* Harlow*: A New Approach to Qualified Immunity in the Fourth Amendment*, 68 CASE W. RSRV. L. REV. 495, 500 (2017).

222 *Id.*

223 Anderson v. Creighton, 483 U.S. 635, 640 (1987) (emphasis added).

224 457 U.S. 800 (1982).

225 *Id.* at 818.

226 Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011).

plaintiffs to overcome the qualified immunity hurdle when the Fourteenth Amendment is applied.

A. The Fourth Amendment's "Objective Reasonableness" Standard as Applied in the Western District of Kentucky: McMillen v. Windham[227]

On January 10, 2016, the Shelbyville Police Department responded to a domestic dispute between Michelle McMillen and her daughter, Gynnya McMillen, at their home in Shelbyville, Kentucky.[228] Police arrested Gynnya without a warrant, and a Shelby County District Court judge ordered Gynnya's detention at the Lincoln Village Regional Juvenile Detention Center ("Lincoln Village") until her scheduled court date on Monday morning.[229] When she arrived at Lincoln Village, Gynnya went through an intake process that included a search for contraband.[230] Gynnya refused to remove her jacket, telling officers to "get out of [her] face."[231] After receiving authorization to restrain Gynnya, a supervisor "yell[ed] and point[ed] at Gynnya and then repeatedly slap[ped] the intake desk."[232] One of the officers restrained Gynnya's arms, after which another officer frisked Gynnya.[233] As a result of this struggle, Gynnya suffered injuries to her thigh and leg area.[234] Gynnya was then placed in a cell where the mattress pad had been removed, leaving her alone with only a metal bed frame.[235] While Gynnya was placed in the cell, Lincoln Village employees failed to conduct mandatory bed checks at set intervals as required by their internal rules and regulations.[236] The next morning, Gynnya was found unresponsive in her cell and eventually died as a result of a genetic mutation that causes ventricular fibrillation, which produces a significant drop in blood pressure.[237] A medical expert testified that Gynnya may have survived had she received "prompt

---

227 McMillen v. Windham, No. 3:16-cv-00558-RGJ-CHL, 2019 WL 4017240 (W.D. Ky. Aug. 26, 2019).

228 *Id.* at *1.

229 *Id.*

230 *Id.*

231 *Id.*

232 *Id.*

233 *Id.*

234 *Id.*

235 *Id.* at *2.

236 *Id.*

237 *Id.*

resuscitative intervention" between the time she began exhibiting symptoms and when she died.[238]

Gynnya's mother, individually and as administratix of Gynnya's estate, brought suit alleging violations of the Fourth and Fourteenth Amendments under § 1983.[239] The defendants moved to dismiss under Rule 12(b)(6) on the basis of qualified immunity.[240] Because the defendants also asserted qualified immunity as a defense in their motions for summary judgment, the court considered the qualified immunity defenses as part of its summary judgment analysis.[241]

Judge Jennings began her analysis by identifying the *Katz* two-pronged test as controlling when resolving questions of qualified immunity: (1) "whether a plaintiff has presented facts sufficient to find a violation of a constitutional right;" and (2) "whether the right at issue was 'clearly established' at the time of the alleged misconduct."[242] Thus, Judge Jennings first considered the appropriate constitutional standard to be applied to McMillen's excessive-force claim.[243] Judge Jennings noted Sixth Circuit precedent holding that "[w]hen authorities arrest an individual without a warrant, the Fourth Amendment's reasonableness standard applies until a probable-cause hearing occurs, after which the Fourteenth Amendment's more-stringent 'shocks-the-conscience' standard applies."[244] In McMillen's case, because law enforcement arrested Gynnya without a warrant and ordered her detained until her court date, the Fourth Amendment's reasonableness standard governed her claim.[245]

1. Violation of a Constitutional Right

Judge Jennings considered three particular instances in determining whether the Lincoln Village intake staff violated Gynnya's Fourth Amendment rights: (1) the initial search of Gynnya for contraband, (2) the force used by the intake staff to effectuate the search, and (3) the intake staff's decision to remove Gynnya's mattress pad from her cell.[246]

---

238 *Id.*

239 *Id.* at *3.

240 *Id.*

241 *Id.*

242 *Id.* at *5.

243 *Id.*

244 *Id.*

245 *Id.*

246 *Id.* at *6–8.

i. The Initial Search

With regard to the initial search for contraband, Judge Jennings noted that the search, "which only included a frisk, was limited in scope and justified by the legitimate interest of keeping contraband out of the detention center."[247] Thus, Judge Jennings found that the Lincoln Village intake staff did not violate Gynnya's Fourth Amendment rights by conducting the initial search for contraband.[248]

ii. The Force Used to Effectuate the Search

Moreover, the intake staff did not violate Gynnya's Fourth Amendment rights in the manner that they effectuated the search.[249] Judge Jennings noted that "an official's violation of internal operating procedures does not, without more, amount to a constitutional violation."[250] Because the intake staff's response to Gynnya's refusal to remove her hoodie jacket was an "objectively reasonable method to maintain order and effectuate the intake search," Judge Jennings found that the intake staff's use of force in effectuating the search did not violate Gynnya's Fourth Amendment rights.[251]

iii. The Removal of Gynnya's Mattress Pad

Although neither of the above instances amounted to a violation of Gynnya's Fourth Amendment rights, Judge Jennings noted that "[t]he Intake Staff's decision to remove the mattress pad from [her] cell [was] another matter."[252] Judge Jennings noted that the Fourth Amendment's prohibition against excessive force controls "the permissible duration of 'warrantless, post-arrest, pre-arraignment custody,'" as well as "the condition of such custody."[253] Judge Jennings noted the instructiveness of the Supreme Court's Fourteenth Amendment jurisprudence on pretrial detention.[254] The Supreme Court has held that the Fourteenth Amendment's Due Process Clause "protects a pretrial

---

247 *Id.* at *6.

248 *Id.*

249 *Id.*

250 *Id.*

251 *Id.*

252 *Id.* at *7.

253 *Id.*

254 *Id.*

detainee from the use of excessive force that amounts to punishment."[255] Thus, Judge Jennings noted the proper inquiry to determine whether an official's action is a permissible restraint or an impermissible punitive measure is "whether there is 'objective evidence that the challenged governmental action is not rationally related to a legitimate governmental objective or that it is excessive in relation to that purpose.'"[256] In McMillen's case, Judge Jennings found that a reasonable jury could find that Lincoln Village's intake staff behaved unreasonably when they removed the mattress pad from Gynnya's cell.[257] Judge Jennings noted "[t]he undisputed facts, considered with the intake staff's failure to explain its decision to remove the mattress pad after the search, present 'objective evidence that the challenged governmental action [was] not rationally related to a legitimate governmental objective.'"[258] As such, Judge Jennings found that a jury could find that the intake staff violated Gynnya's Fourth Amendment rights.[259]

2. Was the Right "Clearly Established"?

Although Judge Jennings found that a reasonable jury could find the intake staff's removal of Gynnya's mattress pad a violation of her Fourth Amendment rights, the qualified immunity analysis did not end there. Judge Jennings's next inquiry was whether "the official's conduct violate[d] a clearly established right."[260] It was this prong that made McMillen's excessive-force claims futile. For a constitutional violation to be "clearly established," existing precedent must "place the statutory or constitutional question beyond debate."[261] In McMillen's case, Judge Jennings was required to look "first to decisions of the Supreme Court," then to Sixth Circuit cases and "decisions of other courts within the circuit, and then to decisions of other Courts of Appeals."[262] The legal precedent from these decisions "'must dictate, that is, truly compel (not just suggest or allow or raise a question about), the conclusion that the conduct is unlawful."[263]

Judge Jennings noted that "McMillen [did] not point to precedent analogous to the removal of Gynnya's mattress pad that would show a violation of a clearly established law," and found that this alone warranted grant of summary judgment in the intake staff's favor on the basis of qualified

---

255 *Id.*

256 *Id.*

257 *Id.* at *8.

258 *Id.*

259 *Id.*

260 *Id.*

261 *Id.*

262 *Id.*

263 *Id.*

immunity.[264] However, Judge Jennings considered Sixth Circuit precedent, as well as precedent from other circuits to be sure.[265] She noted an unpublished opinion from the Sixth Circuit holding "that confinement to a cell without a mattress for a period of seven days, despite falling below minimal standards of decency, did not violate clearly established law because there was no evidence that such conditions posed a substantial risk of serious harm."[266] She also noted precedent from other circuits holding that "short-term deprivations of a mattress pad pass constitutional muster,"[267] but that "frequent or long term deprivations" could be constitutionally problematic.[268]

Nonetheless, Judge Jennings found that the intake staff's removal of Gynnya's mattress pad did not amount to a violation of clearly established law.[269] She noted that Gynnya "was not deprived of a mattress when she passed away from sudden cardiac event," and that "[t]he Intake Staff's removal of the mattress pad for a period of nine hours during the daytime [did] not amount to a prolonged exposure to unlivable or dangerous conditions."[270] Thus, Judge Jennings held that "it [was] not clear from precedent that 'every reasonable official would have understood . . . beyond debate' that the Intake Staff's conduct in [Gynnya's] circumstances constituted excessive force."[271] Accordingly, Judge Jennings granted the intake staff's motion for summary judgment as to McMillen's excessive-force claim on the basis of qualified immunity.[272]

B. The Fourteenth Amendment's Standard as Applied in the Southern District of West Virginia: Runyon v. Hannah[273]

On February 21, 2012, Arvil Runyon, Sr. visited the Mingo County Sheriff's Department to secure the release of his impounded vehicle.[274] Sheriff Lonnie Hannah, then–Sheriff of Mingo County, met with Runyon in his office in the Mingo County Courthouse, but he was unable to locate Runyon's keys.[275]

---

264 *Id.* at *10.

265 *Id.*

266 *Id.*

267 *Id.*

268 *Id.*

269 *Id.* at *24.

270 *Id.* at *31.

271 *Id.* at *10 (emphasis omitted).

272 *Id.*

273 Runyon v. Hannah, No. 2:12-1394, 2013 WL 2151235 (S.D.W. Va. May 16, 2013).

274 *Id.* at *1.

275 *Id.*

Runyon and the Mingo County officers disagreed as to the events that subsequently ensued.[276] Runyon claimed that Sergeant Joe Smith "forcibly escorted" him to the door after "a brief exchange of words" with Sheriff Hannah.[277] In the course of escorting Runyon to the door, Runyon claimed that Sergeant Smith's grip on him forced blood to run down his arms.[278] After the two reached the door, Runyon claimed that he was deprived of his cane and dragged down the hallway by Sergeant Smith, Deputy Michael Miller, and an unidentified third officer.[279] Runyon claimed that he was subsequently "choked, beaten, slammed to the ground, and pinned with his arms twisted painfully behind his back, all without provocation."[280]

The officers, however, described Runyon as "incensed, spewing colorful epithets and inviting [Sheriff] Hannah to 'step outside and take off his gun and badge.'"[281] Sergeant Smith eventually issued Runyon a citation for "profanity, swearing, [and] obstructing an officer."[282] The officers alleged that when Runyon was informed of the citation, he pushed Sergeant Smith, raised his cane, and threatened to "knock . . . [his] [expletive] brains out."[283] The officers alleged that a struggle ensued as deputies attempted to remove Runyon's cane, and they were forced to bring Runyon to the ground—given his continuing resistance to being handcuffed.[284]

After these events occurred, the officers arrested Runyon for battering an officer.[285] As such, Runyon was required to be arraigned before a magistrate.[286] The magistrate court was located next door on the third floor of an adjacent building.[287] Sergeant Smith and Deputy Miller transported Runyon to the adjacent building in a wheelchair since Runyon was unable to walk without a cane.[288] When the officers arrived at the building housing the magistrate court, they were informed that the primary elevator was inoperative and that the

---

276 *Id.*

277 *Id.*

278 *Id.*

279 *Id.*

280 *Id.*

281 *Id.*

282 *Id.*

283 *Id.*

284 *Id.*

285 *Id.*

286 *Id.*

287 *Id.*

288 *Id.*

secondary elevator did not provide access to the third floor.[289] Runyon and the officer also disagreed as to the ensuing events that occurred.[290]

The officers contended that they offered Runyon an alternative location—the basement of the adjacent building—to be arraigned in, so that he might avoid ascending several flights of stairs—given Runyon's physical disabilities.[291] Runyon denied being offered an alternate location for his arraignment, but noted that he agreed to use the stairs if the officers would provide him with his cane and time to rest.[292] Runyon then alleged that Sergeant Smith and Deputy Miller repeatedly kicked, pushed, and shoved him in the stairwell.[293]

Runyon sued Sheriff Hannah, Sergeant Smith, and Deputy Miller in the United States District Court for the Southern District of West Virginia, alleging, among other things, a § 1983 claim of excessive force against Sergeant Smith and Deputy Miller.[294] Sergeant Smith and Deputy Miller moved for summary judgment as to Runyon's § 1983 excessive-force claim.[295] Senior District Judge John T. Copenhaver was tasked with determining whether two distinct uses of force amounted to excessive force: (1) the officers' use of force during Runyon's arrest, and (2) the officers' use of force subsequent to Runyon's arrest.[296]

1. Excessive Force During Runyon's Arrest

Judge Copenhaver first began his excessive-force analysis by identifying the Fourth Amendment's reasonableness standard as the governing standard for analyzing Runyon's excessive-force claim arising before his arrest.[297] Nonetheless, given Runyon's admitted battery—a crime involving physical violence—of a police officer, and video evidence of the altercation between Runyon and the officers depicting Runyon as an immediate threat to the officers, Judge Copenhaver found that the officers' use of force during the initial arrest was reasonable under the circumstances.[298] It is no surprise that Judge Copenhaver came to this conclusion. Moreover, this use of force by the officers

---

289 *Id.*

290 *Id.* at *2.

291 *Id.*

292 *Id.*

293 *Id.*

294 *Id.*

295 *Id.*

296 *Id.*

297 *Id.* at *5.

298 *Id.* at *5–6.

is not the sort of circumstances considered by this Note. Rather, the next use of force considered by Judge Copenhaver—the officers' use of force subsequent to Runyon's arrest but before any judicial determination of probable cause—is the precise set of circumstances addressed in this Note.

2. Excessive Force Subsequent to Runyon's Arrest

Ironically, Judge Copenhaver dismissed the officers' motion for summary judgment regarding Runyon's allegations of excessive force subsequent to his arrest insofar as they "incorrectly . . . assume[d] that the Fourth Amendment govern[ed] [Runyon's] allegations that [Deputy] Miller and [Sergeant] Smith physically abused him in the stairwell . . . , subsequent to his arrest."[299] Thus, because the officers failed to establish their entitlement to judgment as a matter of law, Judge Copenhaver denied their motion for summary judgment "with respect to the claims concerning any abuse suffered by [Runyon], while in custody, in the stairwell."[300]

Nevertheless, for the purposes of this Note, the sections that follow will consider Runyon's case had the officers correctly asserted a Fourteenth Amendment defense. In his opinion, Judge Copenhaver identifies the Fourteenth Amendment as governing a pretrial detainee's claim of excessive force.[301] He further identifies that in analyzing Fourteenth Amendment excessive-force claims, the court must consider the *Johnson v. Glick* factors discussed above.[302] These factors include (1) "the need for the application of force," (2) "the relationship between the need and the amount of force used," (3) "the extent of the injury inflicted," and (4) "whether the force was applied in a good faith effort to maintain and restore discipline or maliciously and sadistically for the very purpose of causing harm."[303] Each factor will be considered in turn.

i. The Need for the Application of Force

Notwithstanding the fact that Runyon was arrested for battering a police officer—a crime of physical violence—it is questionable whether Sergeant Smith and Deputy Miller needed to apply force to Runyon in the stairwell. Moreover, the facts alleged by the officers did not state whether or not Runyon was resisting any instructions by the officers or was otherwise being disobedient in the stairwell. However, the officers did allege that they did not exercise any use of force against Runyon in the stairwell, whereas Runyon alleged that

299 *Id.* at *7.

300 *Id.*

301 *Id.* at *6.

302 *Id.*

303 *Id.*

Sergeant Smith and Deputy Miller kicked, pushed, and shoved him in the stairwell.[304] As such, it is questionable whether Sergeant Smith and Deputy Miller needed to use force and whether they actually used any amount of force against Runyon.

ii. The Relationship Between the Need and the Amount of Force Used

As noted above, it is unclear from the facts alleged by either party whether Sergeant Smith and Deputy Miller needed to exercise force against Runyon. Moreover, the parties' factual allegations differ as to whether Sergeant Smith and Deputy Miller actually applied force to Runyon in the stairwell. On the one hand, if the officers used an exorbitant amount of force to restrain Runyon without any need to exercise such force, one could certainly assume that this factor would weigh heavily in Runyon's favor. On the other hand, if Runyon were to have continued his prior antics, which ultimately led to his arrest for battering a police officer, and the officers applied a level of force consistent with Runyon's version of the facts, one could certainly assume that this factor would weigh in the officers' favor. Nonetheless, because the alleged circumstances were inconsistent between the parties, it is questionable whether this factor would weigh heavily for Runyon or the officers.

iii. The Extent of the Injury Inflicted

Judge Copenhaver's opinion does not outline the injuries suffered by Runyon as a result of the officers' alleged use of force in the stairwell. Nonetheless, in the *Johnson v. Glick* opinion, the Second Circuit noted that "[n]ot every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates a prisoner's constitutional rights."[305] Thus, if the injuries suffered by Runyon were rather minimal, it is unlikely that Sergeant Smith and Deputy Miller violated his Fourteenth Amendment constitutional rights. On the other hand, if Runyon suffered significant injuries as a result of Sergeant Smith's and Deputy Miller's alleged use of force, Runyon may have a better chance of showing a constitutional violation under the Due Process Clause of the Fourteenth Amendment—especially given Runyon's diminished physical capacity. Still, it is unclear from the facts alleged whether Runyon suffered injuries as a result of Sergeant Smith's and Deputy Miller's alleged use of force.

---

304 *Id.* at *2.

305 Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973).

iv. Whether the Force Was Applied in a Good Faith Effort To Maintain and Restore Discipline or Maliciously and Sadistically for the Very Purpose of Causing Harm

In Runyon's case, Judge Copenhaver notes that the officers' use of force before Runyon's arrest was reasonable given the circumstances of Runyon's behavior.[306] However, it is not clear whether Runyon posed the same level of threat to the officers in the stairwell. From Runyon's perspective, one could certainly deduce that the officers would have no reason to "maintain and restore discipline" with regard to Runyon in the stairwell insofar as he posed no immediate threat to the officers.[307] On the other hand, given Runyon's recent history of battering officers, one could certainly conclude that—if the officers indeed applied force to Runyon in the stairwell—it was a good faith effort to maintain discipline in the stairwell. Furthermore, no facts were alleged by Runyon illustrating any ill-motive or ill-intent on the parts of Sergeant Smith and Deputy Miller. Accordingly, the fourth and final factor would likely not weigh in Runyon's favor.

Because none of the *Glick* factors are likely to weigh in Runyon's favor, a Fourteenth Amendment analysis of his case would likely result in the officers being entitled to qualified immunity, or, at the very least, summary judgment before trial.

C. The Consequential Effect of Applying Both Constitutional Standards On Qualified Immunity

As *McMillen* and *Runyon* illustrate, whether the Fourth or Fourteenth Amendment standards apply to a given § 1983 excessive-force claim is potentially a dispositive question with regard to qualified immunity. Given the first prong of a qualified immunity analysis—whether the officer violated a plaintiff's constitutional right—the appropriate constitutional standard is highly relevant. As was seen in *McMillen*, the Fourth Amendment's reasonableness standard provided a much more plaintiff-friendly standard for assessing whether the Lincoln Village intake staff violated Gynnya McMillen's constitutional rights. Although Judge Jennings ultimately concluded that the intake staff had not violated a "clearly established" constitutional right, it was determined that the intake staff did violate Gynnya McMillen's Fourth Amendment right to be free from unreasonable seizure when it removed the mattress pad from her cell.[308] On the other hand, it is unlikely that a court would find the Mingo County deputies' actions in *Runyon* to violate a plaintiff's Fourteenth Amendment

306 *Runyon*, 2013 WL 2151235, at *5–6.

307 *Id.* at *6.

308 McMillen v. Windham, No. 3:16-cv-00558-RGJ-CHL, 2019 WL 4017240 (W.D. Ky. Aug. 26, 2019).

protections under the Due Process Clause. As such, a qualified immunity challenge to Runyon's claims would likely result in dismissal or summary judgment because the officers' actions did not amount to a violation of the Due Process Clause of the Fourteenth Amendment.

V. THE FOURTH AMENDMENT'S "OBJECTIVE REASONABLENESS" STANDARD IS THE APPROPRIATE STANDARD TO ASSESS THE CONSTITUTIONAL RIGHTS AFFORDED TO POST-ARREST DETAINEES BEFORE A JUDICIAL DETERMINATION OF PROBABLE CAUSE HAS OCCURRED

As noted above, in the context of excessive-force actions, the initial hurdle that plaintiffs encounter is qualified immunity. Under the narrow set of circumstances addressed by this Note, this hurdle requires a determination of the precise constitutional rights afforded to individuals alleging excessive force after the initial act of arrest but before a judicial determination of probable cause.[309] Excessive-force plaintiffs must then establish that the constitutional right violated by the law enforcement officer was "clearly established" such that a reasonable officer must have known that the use of such force was objectively unreasonable.[310] Clearly, the split among the lower federal courts is especially problematic with regard to qualified immunity because there is no consensus as to the constitutional rights afforded to such excessive-force-plaintiffs.

Ilan Wurman proposes that "[t]he level of generality at which the courts apply the [clearly established rights] prong is crucial."[311] He illustrates that although it is certainly "clearly established that excessive force is unconstitutional, the requisite inquiry for qualified immunity purposes is more specific: "[W]as the particular use of force in these particular circumstances so clearly unconstitutional as to violate clearly established law?"[312] Wurman goes on to present three problems resulting from the qualified immunity doctrine: (1) that qualified immunity in excessive-force cases has created a "complete mess"

---

309 Jurisdictions applying the Fourth Amendment's "objective reasonableness" standard must first determine whether the force used by the law enforcement officer was objectively unreasonable. *See* Tahir Duckett, *Unreasonably Immune: Rethinking Qualified Immunity in Fourth Amendment Excessive Force Cases*, 53 AM. CRIM. L. REV. 409, 411 (2016). Jurisdictions applying the Fourteenth Amendment's "shock the conscience" standard must first determine whether the force used by the law enforcement officer was so egregious that it would "shock the conscience." *See* County of Sacramento v. Lewis, 523 U.S. 833, 834 (1998).

310 Duckett, *supra* note 309.

311 Wurman, *supra* note 45, at 944.

312 *Id.*

among federal circuits;[313] (2) that plaintiffs rarely get recovery in such cases;[314] and (3) that the mixed results are "hardly required by the common law or principles of statutory or constitutional interpretation."[315]

Certainly, the split in authority among the circuits has contributed significantly to confusion in determining whether a particular use of force falling under the particular circumstances proposed by this Note amounts to a violation of clearly established law. As such, many excessive-force-plaintiffs experience many of the problems presented by Wurman, such as rare recovery in their cases. Moreover, such excessive-force-plaintiffs struggle to have the merits of the cases heard due to the split of authority. Specifically, this set of circumstances has caused the emergence of a "temporal gap," which has left the constitutional rights of an arrestee uncertain.[316] In the context of qualified immunity, this is especially problematic considering the requirement that excessive-force plaintiffs establish that an officer has violated a "clearly established" constitutional right.

Subsequent to the Court's decision in *Kingsley*, lower courts still must determine the appropriate constitutional standard to assess excessive-force claims arising after the initial act of arrest but before a judicial determination of probable cause. If the claim arises during the initial act of arrest, Supreme Court jurisprudence instructs lower courts to consider the excessive-force claim under the governance of the Fourth Amendment's reasonableness standard. Furthermore, Supreme Court jurisprudence instructs lower courts to analyze any claims of excessive force arising after a judicial determination of probable cause—including cases of excessive force involving pretrial detainees who were arrested subject to a lawful arrest warrant—under the Fourteenth Amendment's Due Process Clause. Yet, it is the narrow set of circumstances discussed by this Note that remains unresolved. A line must be drawn for excessive-force claims, and the appropriate point at which an individual's constitutional protections shift from the Fourth Amendment to the Fourteenth Amendment is a judicial determination of probable cause.

Supreme Court jurisprudence with regard to Fourth Amendment seizures has always focused on whether an arresting officer had probable cause to effectuate the arrest. For example, a warrantless arrest is an unreasonable seizure of the person under the Fourth Amendment if it is not supported by probable

---

313 *Id.* at 944–48.

314 *Id.* at 948.

315 *Id.*

316 See Diana E. Cole, *The Antithetical Definition of Personal Seizure: Filling the Supreme Court Gap in Analyzing Section 1983 Excessive-Force Claims Arising After Arrest and Before Pretrial Detention*, 59 CATH. U. L. REV. 493, 495–97 (2010) (identifying the emergence of a "temporal gap" which has left the constitutional rights of an arrestee uncertain, and accrediting this gap to the Supreme Court's failure to define when a Fourth Amendment seizure ends). Filling in this "gap" would "allow courts, plaintiffs, and law enforcement to know which constitutional rights attach at any given time during the arrestee's time in custody." *Id.* at 497.

cause,[317] notwithstanding some exceptions to the probable cause requirement.[318] However, even if an officer may arrest an individual without a warrant, the officer still must promptly secure a judicial determination of probable cause.[319] Moreover, magistrate judges issuing warrants for an individual's arrest must make the determination as to whether the arresting officers have probable cause to effectuate the arrest. It is only when probable cause has been established that an arrest has been completed for law enforcement purposes. Without this determination, the arrest may be held unlawful, and individuals subject to unlawful arrests may be entitled to remedies.

As Eamonn O'Hagan notes, placing the dividing line between Fourth Amendment protection and Fourteenth Amendment protection at the judicial determination of probable cause is appropriate for several reasons. First, placing the dividing line at the probable cause hearing is "neither fortuitous nor arbitrary."[320] Rather, it is a clear point along the "custodial continuum" that would not only provide a bright-line rule clarifying the constitutional rights of individuals finding themselves in this particular custodial situation, but would also provide a rule that is consistent with Fourth and Fourteenth Amendment jurisprudence. Second, placing the dividing line at the probable cause hearing provides a bright-line rule to be applied in this Fourth Amendment context—a need articulated by the Supreme Court.[321] Bright-line rules such as this are not only favorable for jurists navigating Section 1983 excessive force claims, but are also favorable for litigants. There will certainly be much variation in determining whether a particular set of circumstances gives rise to a Fourth Amendment violation. But, a bright-line rule establishing the timeline during which an arrestee's rights are governed by the Fourth Amendment will help facilitate a consistent development of Fourth Amendment jurisprudence to be applied to these particular excessive force claims. Third, placing the dividing line at the

---

317 *See* Katz v. United States, 389 U.S. 347, 357 (1967) (noting that the Fourth Amendment imposes a presumptive warrant requirement for searches and seizures); Johnson v. United States, 333 U.S. 10, 14–15 (1948) (noting that the Fourth Amendment requires a warrant for a search or seizure unless a preexisting exception applies).

318 These exceptions include investigatory detentions, some warrantless arrests, searches incident to a valid arrest, seizures of items in plain view, searches and seizures justified by exigent circumstances, consent searches, searches of vehicles, searches of containers, inventory searches, border searches, searches at sea, administrative searches, and searches in which the special needs of law enforcement make the probable cause and warrant requirements impracticable.

319 Georgetown Univ. L. Ctr., *Warrantless Searches and Seizures*, 35 GEO. L.J. ANN. REV. CRIM. PROC. 37, 56–57 (2006).

320 O'Hagan, *supra* note 26, at 1393.

321 *Id.*

probable cause hearing demonstrates "institutional practicality."[322] Fourth, placing the dividing line at the probable cause hearing "makes additional use of an established procedure."[323] Finally, placing the dividing line at the probable cause hearing "provides a logical point at which to terminate Fourth Amendment protections and impose a more demanding burden of proof under the Fourteenth Amendment."[324]

In addition to the arguments made by O'Hagan in support of placing the dividing line between Fourth Amendment protection and Fourteenth Amendment protection at the judicial determination of probable cause, placing the dividing line at this point is also appropriate in the context of qualified immunity. First, and most importantly, the "clearly established law" prong of the qualified immunity analysis is impacted by the disparity in authority governing excessive-force claims. Placing the dividing line at the probable cause hearing will allow for Fourth Amendment jurisprudence under the narrow circumstances discussed in this Note to fully develop such that officers are put on notice as to what is acceptable law enforcement practice, and excessive-force-plaintiffs will, at the very least, be able to have the merits of their excessive-force cases heard. Second, even if police conduct may not result in the violation of a "clearly established" law, at the very least, lower courts should be able to establish that certain uses of force by law enforcement violate an individual's Fourth Amendment rights. This, too, should result in the development of Fourth Amendment jurisprudence in the lower courts. Finally, placing the dividing line at the probable cause hearing will result in police departments across the country having a particular point in the law enforcement continuum to assess the constitutionality of their actions. Transparency between law enforcement and citizens is crucial to the advancement of law enforcement relations. As such, establishing the Fourth Amendment's objective reasonableness standard as the exclusive standard governing excessive-force claims arising after the initial act of arrest but before a judicial determination of probable cause, is one critical step towards repairing law enforcement relations between police officers and citizens.

VI. CONCLUSION

The circuit split with regards to the appropriate constitutional standard to analyze excessive-force claims arising after the initial act of arrest but before a judicial determination of probable cause has left the constitutional rights of some excessive-force-plaintiffs uncertain. Moreover, it has left lower courts analyzing qualified immunity defenses in disarray, as the rights of such individuals are not "clearly established." Although some legal commentators hold the belief that the Supreme Court solved this issue in *Kingsley v.*

322 *Id.*

323 *Id.*

324 *Id.* at 1394.

Hendrickson, the lower courts are unconvinced. As such, until the Supreme Court articulates the appropriate standard for assessing such claims, lower courts should consider drawing the dividing line at the probable cause hearing. Individuals alleging excessive force after the initial act of arrest, but before a judicial determination of probable cause, should have the merits of their claims assessed under the Fourth Amendment's objective reasonableness standard. After a judicial determination of probable cause—whether in the form of a lawful warrant or the form of an arraignment or other post-arrest hearing—claims of excessive force should be governed by the Fourteenth Amendment.

*J. Tyler Barton**

* J.D. Candidate, West Virginia University College of Law, 2021; B.S. in Agricultural and Medical Biotechnology, University of Kentucky, 2018; Senior Editor, Volume 123 of the *West Virginia Law Review*. The Author would like to thank his peers on the West Virginia Law Review for their hard work and dedication to the journal. The Author would also like to thank Professor and Interim Dean John Taylor and Professor Robert Bastress for their guidance in producing this Note. Lastly, the Author is particularly grateful for his family and his girlfriend, Francesca Rollo, for their unconditional love and support. Any errors contained herein are the Author's alone.