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Establishing a Deprivation of a Constitutional Right to Personal Security under Section 1983: The Use of Unjustified Force by State Officials in Violation of the Fourth, Eighth, and Fourteenth Amendments

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ESTABLISHING A DEPRIVATION OF A CONSTITUTIONAL RIGHT TO PERSONAL SECURITY UNDER SECTION 1983: THE USE OF UNJUSTIFIED FORCE BY STATE OFFICIALS IN VIOLATION OF THE FOURTH, EIGHTH, AND FOURTEENTH AMENDMENTS

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When individuals acting under color of state law physically injure a person, they may have committed what courts call an "ordinary" tort, recognized under state law, a constitutional tort, actionable under 42 U.S.C. § 1983,[1] or both.[2] In struggling to discern the differences between these two torts,[3] courts have stated vague standards of liability: they have examined claims to determine whether state officials crossed the "constitutional line" and committed a constitutional

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[1] Civil Rights Act of 1871, 42 U.S.C. § 1983 (1982). Section 1983 states that "[e]very person who, under color of [state law], subjects, or causes to be subjected, any citizen . . . to the deprivation of any rights . . . secured by the Constitution and laws, shall be liable to the party injured." The United States Supreme Court has characterized claims brought under section 1983 as personal injury claims. Wilson v. Garcia, 471 U.S. 261, 266-68 (1985) (state statute of limitation for personal injury actions is applicable to claims under section 1983). Section 1983 addresses constitutional violations by individuals acting under color of state law. Even though the statute does not apply to unconstitutional actions taken under color of federal law, a plaintiff may nevertheless establish a cause of action against these actors. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971).

[2] *See, e.g.*, Gilmere v. City of Atlanta, 774 F.2d 1495, 1496-1504 (11th Cir. 1985) (en banc), *cert. denied*, 476 U.S. 1115, 1124 (1986).

[3] One court found that the task of distinguishing the ordinary tort from the constitutional tort is similar to the difficult task of defining negligence; both tasks involve concepts that "necessarily must be expressed in general, non-precise terms." Williams v. Mussomelli, 722 F.2d 1130, 1134 (3d Cir. 1983). *See generally* Jackson v. City of Joliet, 465 U.S. 1049, 1051 (1984) (denying certiorari) (White, J., dissenting) (courts lack "definitive guidelines for determining when tortious conduct by state officials rises to the level of a constitutional tort"); Kidd v. O'Neil, 774 F.2d 1252, 1253-54 (4th Cir. 1985) (district court had erroneously declared that the decisions by the Fourth Circuit Court of Appeals failed to provide "a workable guideline"), *overruled on other grounds*, Justice v. Dennis, 834 F.2d 380 (4th Cir. 1987) (en banc). Professor Monaghan has argued that to distinguish a constitutional tort from its common-law counterpart the constitutional tort must have additional aggravating circumstances. Monaghan, *State Law Wrongs, State Law Remedies, and the Fourteenth Amendment*, 86 COLUM. L. REV. 979, 992-93 (1986).

tort,[4] whether the conduct was "sufficiently egregious"[5] as to constitute a constitutional tort, or whether the conduct constituted " 'the sort of abuse of governmental power' that is cognizable under [section] 1983."[6]

Some courts have referred to these claims as "personal security claims,"[7] constitutional torts committed by using unjustified force and causing physical injury.[8] The right to personal security arises from various amendments: the fourteenth amendment right not to be deprived "of life [or] liberty . . . without due process of law,"[9] the fourth amendment "right of the people to be secure in their persons,"[10] and the eighth amendment right to be free from "cruel and unusual punishments."[11] These amendments protect cognate lib-

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[4] *See, e.g.*, Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir.), *cert. denied*, 414 U.S. 1033 (1973). Judge Friendly articulated four factors to aid courts in ascertaining this line. *Id.*; *see also infra* notes 59-74, 186-87 and accompanying text. Since *Glick*, other courts have adopted these factors to distinguish an ordinary tort from a constitutional tort. *See, e.g.*, Meredith v. Arizona, 523 F.2d 481, 482-83 (9th Cir. 1975).

[5] *See, e.g.*, New v. City of Minneapolis, 792 F.2d 724, 726 (8th Cir. 1986); Rutherford v. City of Berkeley, 780 F.2d 1444, 1446-48 (9th Cir. 1986); *Gilmere*, 774 F.2d at 1500 n.4.

[6] *See, e.g.*, Williams v. Kelley, 624 F.2d 695, 698 (5th Cir. 1980), *cert. denied*, 451 U.S. 1019 (1981). Some courts also question whether the conduct "rises to the level of a constitutional violation." *See, e.g.*, Whitley v. Albers, 475 U.S. 312, 325 (1986); Garcia v. Miera, 817 F.2d 650, 655-56 (10th Cir. 1987), *petition for cert. filed*, 56 U.S.L.W. 3322 (U.S. Oct. 13, 1987) (No. 87-603); Black v. Stephens, 662 F.2d 181, 188 (3d Cir. 1981), *cert. denied*, 455 U.S. 1008 (1982). *See generally* Bell v. Wolfish, 441 U.S. 520, 534 (1979) (pretrial detainee's interest to be free from discomfort does not "rise to the level of those fundamental liberty interests" delineated in prior cases).

[7] *See, e.g.*, Kidd v. O'Neil, 774 F.2d 1252, 1257-61 (4th Cir. 1985), *overruled on other grounds*, Justice v. Dennis, 834 F.2d 380 (4th Cir. 1987) (en banc). The Supreme Court in Ingraham v. Wright, 430 U.S. 651 (1977), stated, "Among the historic liberties . . . protected [by the due process clause of the fifth amendment] was a right to be free from, and to obtain judicial relief for, unjustified intrusions on personal security." *Id.* at 673.

[8] Courts, however, have stated that some psychiatric injuries are actionable under section 1983. *See, e.g.*, Gumz v. Morrissette, 772 F.2d 1395, 1401-02 (7th Cir. 1985), *cert. denied*, 475 U.S. 1123 (1986), *overruled on other grounds*, Lester v. City of Chicago, 830 F.2d 706 (7th Cir. 1987). *See generally* Sanders v. Kennedy, 794 F.2d 478, 481 (9th Cir. 1986) (plaintiff had stated a fourth amendment claim based on "extensive force," in the form of a ten-hour unlawful siege of plaintiffs' house by police using helicopters and missiles). This Article addresses constitutional torts arising from physical injuries inflicted by persons acting under color of state law.

[9] U.S. CONST. amend. XIV, § 1. The fifth amendment of the United States Constitution also provides that an individual may not be "deprived of life [or] liberty . . . without due process of law." U.S. CONST. amend. V. This Article examines the unlawful use of force by state officials in section 1983 actions. Individuals claiming a violation of their fifth amendment right—rather than their fourteenth amendment right—not to be deprived of life or liberty without due process of law may seek relief by bringing a *Bivens* action. *See supra* note 1.

[10] U.S. CONST. amend. IV. The fourth amendment is applicable to the states by the fourteenth amendment. *See* Mapp v. Ohio, 367 U.S. 643, 660 (1961); Wolf v. Colorado, 338 U.S. 25, 27-28 (1949), *overruled in part*, Mapp v. Ohio, 367 U.S. 643 (1961).

[11] U.S. CONST. amend. VIII. The eighth amendment is applicable to the states by the fourteenth amendment. Robinson v. California, 370 U.S. 660, 667 (1962).

erty interests.[12]

Plaintiffs have traditionally invoked the protection of the fourteenth amendment by alleging a violation of substantive due process,[13] which prohibits conduct that "shocks the conscience."[14] To determine whether force "shocks the conscience," courts have generally considered the four factors Judge Friendly articulated in *Johnson v. Glick*[15]: 1) the need for the force, 2) the relationship between the need and the amount of force used, 3) the extent of the injury inflicted, and 4) the officer's motives.[16] Courts have also recently considered the significance of the time at which the injury occurred: if the injury occurred when state officials arrested the plaintiff, some courts have found a violation of the fourth amendment, which prohibits unreasonable force[17]; if the injury occurred when state officials imprisoned the plaintiff after her conviction, some courts have found a violation of the eighth amendment, which prohibits wanton and unnecessary force[18]; and if the injury occurred when state officials detained the plaintiff before trial, some courts have found a violation of substantive due process.[19]

The courts, however, have disagreed as to the standards for establishing personal security claims under the various amendments[20] and have differed as to whether substantive due process is a viable ground for recovery when a plaintiff may alternatively invoke the protection of the fourth or eighth amendments.[21] In addition, the courts have

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[12] In Kidd v. O'Neil, 774 F.2d 1252 (4th Cir. 1985), *overruled on other grounds,* Justice v. Dennis, 834 F.2d 380 (4th Cir. 1987) (en banc), Judge Phillips attempted to mitigate the lower court's confusion in interpreting cases that discussed physical injuries based on the fourth, eighth, and fourteenth amendment. 774 F.2d at 1253-61. He stated that each plaintiff had asserted a constitutional right "to be free from bodily harm, of physical abuse, at the hands of government's agents." *Id.* at 1258. He referred to these rights as "cognate liberty interests in 'personal security.' " *Id.* at 1260. He recognized that the court had used a variety of adjectives to describe how state actors had exceeded their privilege to use force under the various amendments. *Id.* Even though the court had used different adjectives in its opinions, he explained, the asserted rights were nevertheless cognate liberty interests. *Id.* He stated, "Because the nature of the state interests, hence agent privilege, differs depending upon the context, the nature of the conduct necessarily exceeding [the] privilege may also differ in 'degree' or severity from context to context." *Id.* at 1261 n.15. He therefore concluded that any guidelines given by the court must be imprecise because analyzing personal security claims is an *ad hoc* process. *Id.*

[13] *See infra* notes 36-75 and accompanying text.

[14] *See infra* notes 45-75 and accompanying text.

[15] 481 F.2d 1028 (2d Cir.), *cert. denied,* 414 U.S. 1033 (1973).

[16] *Id.* at 1033.

[17] *See infra* notes 225-80 and accompanying text.

[18] *See infra* notes 399-427 and accompanying text.

[19] *See infra* notes 271-80 and accompanying text.

[20] *See infra* notes 183-88, 225-80, 399-427 and accompanying text.

[21] *See infra notes* 231-51, 405-27 and accompanying text.

disagreed as to whether a plaintiff has alleged a violation of substantive due process, which prohibits the abuse of power by officials, or procedural due process, which prohibits deprivations of liberty without procedural safeguards.[22]

Several recent decisions by the United States Supreme Court have engendered these different interpretations of personal security claims.[23] In *Daniels v. Williams*[24] and *Davidson v. Cannon*,[25] the Supreme Court held that negligent conduct cannot cause a deprivation of procedural or substantive due process within the meaning of the fourteenth amendment to the United States Constitution.[26] The Court left undecided whether gross negligence or recklessness would support a claim for a deprivation of due process.[27] In *Tennessee v. Garner*,[28] the Court afforded broad protection to persons seized with deadly force under the fourth amendment,[29] and in *Whitley v. Albers*,[30] a case involving physical injury during a prison riot, the Court afforded narrow protection to prisoners under the eighth amendment.[31]

The purpose of this Article is to reveal the conflicting standards that courts have used in examining personal security claims under the fourth, eighth, and fourteenth amendments. In addition, the Article offers a preliminary assessment of the appropriate standards for liability. Part I of the Article considers the claims raised by plaintiffs under substantive due process.[32] Part II considers those claims asserted

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[22] *See, e.g.*, Gilmere v. City of Atlanta, 774 F.2d 1495, 1497-1514 (11th Cir. 1985) (en banc), *cert. denied*, 476 U.S. 1115, 1124 (1986). In *Gilmere* six judges determined that state officials had violated both the fourth amendment and substantive due process, *id.* at 1497-1505; three judges determined that the plaintiff had failed to establish a fourth amendment violation and that substantive due process merely duplicates the protection provided by the fourth amendment, *id.* at 1505-11 (Tjoflat, J., concurring in part, dissenting in part); and one judge determined that the plaintiff alleged only a violation of procedural due process, *id.* at 1513 (Hill, J., dissenting). *See also infra* notes 37 & 181.

[23] *See infra* notes 225-80, 399-427 and accompanying text.

[24] 474 U.S. 327 (1986). For a discussion of this case, see *infra* notes 144-84 and accompanying text.

[25] 474 U.S. 344 (1986). For a discussion of this case, see *infra* notes 144-84 and accompanying text.

[26] *Davidson*, 474 U.S. at 347; *see also infra* note 156 and accompanying text (citing view that Court's decisions in *Daniels* and *Davidson* did not foreclose basing a deprivation of *substantive* due process on negligent conduct).

[27] *Daniels*, 474 U.S. at 334 n.3.

[28] 471 U.S. 1 (1985). For a discussion of this case, see *infra* notes 197-224 and accompanying text.

[29] *Garner*, 471 U.S. at 7- 20. *See generally* S. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983 § 3.04, at 132 (2d ed. 1986) (*Garner* "will have considerable impact in § 1983 cases involving claims of police use of excessive force").

[30] 475 U.S. 312 (1986). For a discussion of this case, see *infra* notes 347-98 and accompanying text.

[31] *Whitley*, 475 U.S. at 318-27.

[32] *See infra* notes 36-187 and accompanying text.

under the fourth amendment,[33] and part III discusses claims raised under the eighth amendment.[34] Although courts have disagreed as to the appropriate standards for evaluating personal security claims, they have nonetheless recognized that they must balance the interests presented in each case. In striking the balance under all three categories of personal security claims, courts have considered the first three *Glick* factors—the need for the force, the relationship between the need and the amount of force, and the extent of injury. These factors are relevant to all personal security claims because they help to focus a court's attention on the parties' interests.[35] Courts, however, should also recognize that the specific amendment upon which a plaintiff's claim is grounded can aid in ascertaining the identity and weight of the interests at stake. The Article therefore proposes that, in order to establish consistency in addressing personal security claims, courts should recognize that the fundamental inquiry in all of these claims is whether the force was unjustified.

I. Personal Security Claims Under Substantive Due Process

In asserting personal security claims, certain plaintiffs have alleged that a state actor violated their right to liberty, as protected by the fourteenth amendment to the United States Constitution.[36] The fourteenth amendment due process clause provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."[37] In suing under the fourteenth amendment,

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[33] *See infra* notes 189-280 and accompanying text.

[34] *See infra* notes 281-427 and accompanying text.

[35] *See infra* notes 428-59 and accompanying text.

[36] For example, see the discussion of Johnson v. Glick, 481 F.2d 1028 (2d Cir.), *cert. denied*, 414 U.S. 1033 (1973), *infra* notes 59-74 and accompanying text.

[37] U.S. Const. amend. XIV, § 1. In determining the scope of the protection afforded by the phrase "due process," courts have struggled to understand whether allegations indicate 1) a violation of due process based on a right protected by the Bill of Rights, which has been incorporated into the fourteenth amendment by the due process clause; 2) a violation of procedural due process; or 3) a violation of substantive due process. *See, e.g.*, Gilmere v. City of Atlanta, 774 F.2d 1495, 1499-1514 (11th Cir. 1985) (en banc), *cert. denied*, 476 U.S. 1115, 1124 (1986). With respect to the first category, a court may refer to a violation of the fourth amendment, which guards against unreasonable seizures, as a violation of "substantive due process" as distinguished from a violation of procedural due process, which seeks to prevent deprivations of liberty without procedural safeguards. *See, e.g.*, Mann v. City of Tucson, 782 F.2d 790, 792 (9th Cir. 1986) (per curiam) (district court erred in dismissing plaintiff's "substantive due process claims, based on a violation of the fourth amendment protection against unreasonable searches and seizures"). The *Mann* court's use of the expression "substantive due process" to

plaintiffs have alleged that officials violated their right to substantive due process, which prohibits conduct that "shocks the conscience."[38] To determine whether conduct "shocks the conscience," courts have applied the factors set out in *Johnson v. Glick*.[39] Yet they have not consistently interpreted the *Glick* factors.[40]

To understand a personal security claim alleging a violation of substantive due process, one must first recognize the courts' attempts to clarify the scope of an oxymoron—"substantive due process."[41] Numerous courts have expressed criticism, some stating that the oxymoron "evades rather than expresses precise meaning,"[42] while other courts reject the use of substantive due process because it has "no pedigree other than a trail of defunct, little-mourned, and sometimes . . . pernicious doctrines."[43] The United States Supreme Court, however, has looked to both history and semantics as tools in ascertaining the scope of personal security claims based on substantive due process.[44]

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describe the first category may create confusion when trying to understand the nature of substantive due process claims with respect to the third category. A claim in the third category is not based on procedural inadequacies nor on a violation of the Bill of Rights; it is based on conduct that "shocks the conscience," which may lead to a finding that the alleged conduct nonetheless violated a person's constitutional right to liberty. *See, e.g.*, Daniels v. Williams, 474 U.S. 327, 336-40 (1986) (Stevens, J., concurring); Burch v. Apalachee Comm. Mental Health Serv., Inc., 804 F.2d 1549, 1552 (11th Cir. 1986), *vacated and reh'g granted*, 812 F.2d 1339 (11th Cir. 1987); *see also infra* notes 172-78 and accompanying text (briefly discussing Justice Stevens' views on the distinctions between procedural and substantive due process in his concurrence to *Daniels* and *Davidson*). The focus of this section is on the scope of the protection afforded by substantive due process, as distinguished from the substantive rights of the fourth and eighth amendments.

[38] *See infra* note 187 and accompanying text.

[39] 481 F.2d 1028 (2d Cir.), *cert. denied*, 414 U.S. 1033 (1973); *see infra* note 187 and accompanying text.

[40] *See infra* notes 185-87 and accompanying text.

[41] *See* Ellis v. Hamilton, 669 F.2d 510, 512 (7th Cir.) (phrase is an "ubiquitous oxymoron"), *cert. denied*, 459 U.S. 1069 (1982).

[42] Duckworth v. Franzen, 780 F.2d 645, 652 (7th Cir. 1985), *cert. denied*, 107 S. Ct. 71 (1986) ("substantive due process" is an oxymoron as is "all deliberate speed"); *see also* Johnson v. Barker, 799 F.2d 1396, 1400 (9th Cir. 1986) (standards for "substantive due process violations are somewhat hazy"); Fundiller v. City of Cooper City, 777 F.2d 1436, 1440 (11th Cir. 1985) ("[d]efining the exact scope of a substantive due process claim is by its nature an imprecise task").

[43] Gumz v. Morrissette, 772 F.2d 1395, 1406 (7th Cir. 1985) (Easterbrook, J., concurring), *cert. denied*, 475 U.S. 1123 (1986), *overruled on other grounds*, Lester v. City of Chicago, 830 F.2d 706 (7th Cir. 1987).

[44] Developed prior to the Civil War, the concept of due process originally connoted procedure. J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW § 11.1, at 336 (3d ed. 1986). The Court began to perceive substantive content in the due process clause when considering natural rights. *Id.* In evaluating legislation under the due process clause, the Court questioned whether the law violated the guarantees of the basic social compact, which afford protection to certain natural rights. *Id.* This method of analysis flourished until 1937, when the Court deferred to

A. Substantive Due Process: The Shield of Rochin *and the Sword of* Glick

In 1952, the Court in *Rochin v. California*[45] recognized substantive due process as a shield to protect a defendant from conviction in a criminal proceeding.[46] The defendant in *Rochin* had been convicted of possessing morphine.[47] By using unusual force the government obtained the unlawful drug from Rochin.[48] An intermediate appellate court affirmed the conviction, even though it stated that the officers were guilty of "assaulting, battering, torturing and falsely imprisoning" the defendant.[49] The Supreme Court reversed the judgment, holding that the officers' conduct violated the due process clause of the fourteenth amendment.[50]

In determining the scope of substantive due process, the Court used the analysis from its prior substantive due process decisions,[51] and asked the following familiar questions: whether the conduct " 'offend[s] those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses' "[52]; whether the asserted right is " 'so rooted in the traditions and conscience of our people[53] as to be ranked as fundamental' "[54]; and whether the right is " 'implicit in the concept of ordered liberty.' "[55] Although the Court characterized these open-

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legislative judgment on economic matters, *id.* § 11.4, at 350-60; yet, it continued to use substantive due process to protect an individual's civil rights, *id.* § 11.6, at 363.

[45] 342 U.S. 165 (1952)

[46] *Id.* at 168-74.

[47] *Id.* at 166.

[48] *Id.* Three deputy sheriffs forcibly entered Rochin's house, saw two capsules beside his bed on a night stand, and jumped him in an attempt to extract the capsules that he had swallowed in response to their query, "Whose stuff is this?" *Id.* The sheriffs then handcuffed him and took him to a hospital where a doctor, at the sheriffs' direction, "forced an emetic solution through a tube into Rochin's stomach against his will." *Id.* The emetic caused Rochin to vomit; the sheriffs then found the capsules in the vomit. *Id.*

[49] *Id.* at 167 (citing People v. Rochin, 101 Cal. App. 2d 140, 143, 225 P.2d 1, 3 (1951), *rev'd*, 342 U.S. 165 (1952)).

[50] *Id.* at 174.

[51] *Id.* at 169-71.

[52] *Id.* at 169 (quoting Malinski v. New York, 324 U.S. 401, 416-17 (1945)).

[53] For a discussion of the significance of the Court's use of the word "conscience," see *infra* note 57 and accompanying text.

[54] *Rochin*, 342 U.S. at 169 (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)).

[55] *Id.* at 169 (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)). The Supreme Court has stated that this test helps the Court to identify rights protected under substantive due process. *See, e.g.*, Bowers v. Hardwick, 106 S. Ct. 2841, 2844 (1986). The Supreme Court recently used this phrase to determine whether the Bail Reform Act of 1984, with its provisions for

ended questions as objective guides in determining the scope of substantive due process, it summarized them with a pithy subjective test.[56] After evaluating all the circumstances, the Court stated that the officers' "conduct shocks the conscience."[57]

The Court's subjective "shocks the conscience" test provided little guidance for interpreting future civil rights claims.[58] In 1973, Judge

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preventive detention of adults under indictment, violated substantive due process. United States v. Salerno, 107 S. Ct. 2095, 2101 (1987). The Court has also identified rights protected by substantive due process by considering whether the asserted right is " 'deeply rooted in [our] Nation's history and tradition.' " *Bowers*, 106 S. Ct. at 2844 (quoting Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977)).

The Court recognized that the process of discerning whether the conduct violated due process was vague, *Rochin*, 342 U.S. at 169-70; yet, it found vagueness was not a problem because analysis of the "more specific" fourth amendment right to be free from unreasonable search and seizure similarly evokes sharp disagreement, *id.* at 170. It explained, "In dealing not with the machinery of government but with human rights, the absence of formal exactitude, or want of fixity of meaning, is not an unusual or even regrettable attribute of constitutional provisions." *Id.* at 169. The Court, while reluctant to classify its evaluation of the facts as *ad hoc*, *id.* at 172, did acknowledge the need to balance conflicting interests, *id.* at 171 (in reviewing convictions, the Court considers society's interests, which "push[] in opposite directions").

[56] *Id.* at 169-72.

[57] *Id.* at 172. The Court did not specify as to whose conscience it was referring, but in explaining the scope of due process, the Court had previously stated that due process protects those immunities that are " 'so rooted in the traditions and *conscience of our people* as to be ranked fundamental.' " *Id.* at 169 (emphasis added) (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)). The Court added that the "brutal" methods used to obtain the conviction "do more than offend some fastidious squeamishness or private sentimentalism about combatting crime too energetically." *Id.* at 172.

In Duncan v. Louisiana, 391 U.S. 145 (1968), Justice Black stated, "[T]he 'fundamental fairness' test is one on a par with that of shocking the conscience of the *Court*." 391 U.S. at 168-69 (Black, J., concurring) (emphasis added). Since *Rochin*, courts considering personal security claims have referred to conduct that shocks the conscience of the court. *See, e.g.*, Marchese v. Lucas, 758 F.2d 181, 185 (6th Cir. 1985) (conduct must be "so brutal, demeaning, and harmful as *literally* to shock the conscience of the court") (emphasis added), *cert denied*, 107 S. Ct. 1369 (1987); Hall v. Tawney, 621 F.2d 607, 613 (4th Cir. 1980), *cited with approval in* Justice v. Dennis, 834 F.2d 380, 382 & n.2 (4th Cir. 1987) (en banc). Others have not specified whose conscience by simply stating that the conduct "shocks the conscience." *See, e.g.*, Hendrix v. Matlock, 782 F.2d 1273, 1275 (5th Cir. 1986).

[58] The Supreme Court has not expressly rejected using substantive due process as a defense for invalidating a criminal conviction. *See* Moran v. Burbine, 475 U.S. 412, 432-34 (1986). In *Moran*, state officials had conveyed false information to an attorney, who had been contacted by the defendant's sister, effectively preventing the attorney from seeing the defendant, who had not requested the assistance of an attorney prior to interrogation. *Id.* at 416-20. The Court did not find a violation of substantive due process, but warned that police deception might "rise to a level of a due process violation" if the facts were "more egregious." *Id.* at 432. The dissent in *Moran* criticized the majority for having only a "troubled conscience"; it also stated that the proper test in this case "is not the majority's simple 'shock the conscience' test," but rather "the principle that due process requires fairness, integrity, and honor in the operation of the criminal justice system." *Id.* at 466-68 (Stevens, J., dissenting). Professor Kamisar, in his analysis of *Moran*, stated that few cases will present facts egregious enough to support a substantive due process violation which would cause the Court to reverse a conviction. *Constitutional Law Conference*, 55 U.S.L.W. 2232 (Oct. 28, 1986). He proposed that the Court would

Friendly of the Second Circuit Court of Appeals attempted in *Johnson v. Glick*[59] to clarify the scope of *Rochin*'s "shocks the conscience" test.[60] In *Glick* a plaintiff sought to use his claim of substantive due process as a sword in asserting a section 1983 personal security claim. The plaintiff alleged that prior to and during his felony trial he had been held in state facilities where he was injured when an official, without provocation, struck him with his fist.[61] Judge Friendly held that the plaintiff's allegations were sufficient to state a cause of action under section 1983 against the guard who allegedly inflicted the injury.[62]

In identifying the specific constitutional amendment violated, Judge Friendly focused on the separate protections afforded by the eighth amendment, which prohibits cruel and unusual punishment, the fourth amendment, which prohibits unreasonable searches and seizures, and by substantive due process, which prohibits conduct that "shocks the conscience."[63] Because Johnson, the plaintiff, had not been convicted at the time of the alleged attack, Judge Friendly determined that the attack was not "punishment" within the meaning of the eighth amendment,[64] and as a consequence, the amendment was not applicable.[65] Without explanation he found the fourth amendment inap-

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find a violation if the defendant's sister and lawyer had come to the police station and had dashed into the interrogation room only to have the police officer knock down or beat up the sister and shoot the attorney (even if the defendant did not hear the shots). *Id.*

[59] 481 F.2d 1028 (2d Cir.), *cert. denied*, 414 U.S. 1033 (1973).

[60] *Id.* at 1033.

[61] *Id.* at 1029. He also alleged that the officer threatened to kill him and continued to harass him by detaining him in a holding cell for two hours before permitting him to return to his cell. *Id.* at 1030. In addition, he claimed that the official detained him another two hours before letting him receive medical attention, and that even with pain pills he continued to have "terrible pains in his head." *Id.*

[62] *Id.* at 1033. Although the court mentioned the guard's denial of medical treatment, most courts have applied Judge Friendly's analysis to claims of unlawful force rather than to claims of insufficient medical care. *See infra* notes 185-87, 225-80, 319-45, 399-427 and accompanying text. Three years after the *Glick* decision, the Supreme Court articulated the standard for analyzing claims based on a denial of medical care. Estelle v. Gamble, 429 U.S. 97, 104 (1976). For a discussion of this case, see *infra* notes 297-302 and accompanying text.

[63] *Glick*, 481 F.2d at 1032-33.

[64] *Id.* at 1032. The Supreme Court has determined that the eighth amendment applies only to convicted individuals who challenge conduct relating to their confinement. Ingraham v. Wright, 430 U.S. 651, 664-71 (1977); *see also infra* note 88 and accompanying text (describing Supreme Court's eighth amendment analysis).

[65] *Glick*, 481 F.2d at 1032. Judge Friendly noted that the Supreme Court had upheld the conviction of an official under 18 U.S.C. § 242, the criminal counterpart of 42 U.S.C. § 1983, based on a jury instruction that permitted a finding of guilty if the official had beaten the victim " 'for the purpose of imposing illegal summary *punishment* upon him' as well as if the beating was 'for the purpose of forcing him to make a confession.' " 481 F.2d at 1032 n.5 (emphasis added) (quoting Williams v. United States, 341 U.S. 97, 104 (1951)). In considering

plicable as well.[66] With neither of these amendments applicable, he stated, "[I]t would be absurd to hold that a pre-trial detainee has less constitutional protection against acts of prison guards than one who has been convicted."[67] He then looked to *Rochin*, which had recognized substantive due process as a shield, for support in using substantive due process as a sword.

Judge Friendly noted that the Supreme Court's "shocks the conscience" test in *Rochin* set a standard that needed greater definition.[68] He recognized that the Court's standard was not coextensive with the common-law actions for assault and battery,[69] thus distinguishing the ordinary tort from the constitutional tort. He found, however, the line between the ordinary tort and the constitutional tort difficult to define because of the prison environment,[70] an environment in which guards must manage a large number of prisoners, who are not by nature "the most gentle or tractable of men and women."[71] Acknowledging the difficulties faced by prison authorities, Judge Friendly accepted that some force may be permissible even if in retrospect the force was "unnecessary."[72]

Judge Friendly set forth the following factors to aid in defining

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unlawful force claims, one commentator, however, has argued that an attack occurring before trial constitutes punishment. Note, *Excessive Force Claims: Removing the Double Standard*, 53 U. CHI. L. REV. 1369, 1390 (1986). He maintained that the use of force prior to trial is a failure of *proper procedures* because officials inflicting harm are able to " 'skip[] the trial on the way to punishment.' " *Id.* (quoting Gumz v. Morrisette, 772 F.2d 1395, 1405 (7th Cir. 1985) (Easterbrook, J., concurring), *cert. denied*, 475 U.S. 1123 (1986), *overruled on other grounds*, Lester v. City of Chicago, 830 F.2d 706 (7th Cir. 1987)). Most courts, however, have viewed these claims as alleging a violation of a *substantive* right. *See, e.g., infra* notes 137-40 and accompanying text. Courts have also rejected the view that an attack can constitute punishment. *See infra* note 296 and accompanying text. The Supreme Court recently distinguished substantive and procedural due process claims in determining whether the Bail Reform Act of 1984 was unconstitutional. United States v. Salerno, 107 S. Ct. 2095, 2101-04 (1987). The Court stated:

> So-called "substantive due process" prevents the government from engaging in conduct that "shocks the conscience," or interferes with rights "implicit in the concept of ordered liberty." When government action depriving a person of life, liberty, or property survives substantive due process scrutiny, it must still be implemented in a fair manner. This requirement has traditionally been referred to as "procedural" due process.

Id. at 2101 (citations omitted).

[66] *Glick*, 481 F.2d at 1032-33.

[67] *Id.* at 1032.

[68] *Id.* at 1033. The language the Court used in *Rochin* could provide some insight into interpreting the Court's "shocks the conscience" test: in that case the conduct was "brutal," Rochin v. California, 342 U.S. 165, 173 (1952); the conduct "offend[ed] even hardened sensibilities," *id.* at 172; and the conduct did more than "offend some fastidious squeamishness or private sentimentalism about combatting crime too energetically," *id.*

[69] *Glick*, 481 F.2d at 1033.

[70] *Id.*

[71] *Id.*

[72] *Id.*

the type of force necessary to give rise to a constitutional tort based on substantive due process:

> [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.[73]

After considering these factors, Judge Friendly found that Johnson had alleged sufficient facts to support a substantive due process claim against the guard.[74]

The difficult task of determining what constitutes actionable conduct under *Rochin*'s "shocks the conscience" test has caused courts to apply the *Glick* factors to substantive due process claims.[75] Since the *Rochin* and *Glick* decisions, courts have disagreed, however, not only as to how to apply *Rochin*'s "shocks the conscience" test and the *Glick* factors, but also as to how to distinguish substantive due process and procedural due process claims.

B. Distinguishing Substantive Due Process from Procedural Due Process

Several decisions by the United States Supreme Court have engendered confusion in interpreting the due process clause of the fourteenth amendment.[76] In *Ingraham v. Wright*,[77] the Court recognized that the spanking of school children may "implicate" their liberty interests, but does not necessarily cause a "deprivation" without due process.[78] In *Parratt v. Taylor*,[79] the Court stated that negligent

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[73] *Id.*

[74] *Id.* He did not, however, explain how he derived these factors. *Id.* One judge dissented, raising arguments commonly made in section 1983 litigation. *Id.* at 1034-35 (Moore, J., dissenting). The dissent worried that the decision to permit an action based on an alleged isolated incident of misconduct, rather than a pattern of misconduct, would overburden the federal courts and would cause unnecessary monitoring of state institutions. *Id.* at 1035.

Although Judge Friendly did not discuss federalism, he nevertheless argued that logic dictated that the due process clause protects a pretrial detainee's liberty at least to the extent that the eighth amendment protects a prisoner's liberty. *Id.* at 1032. He noted, however, that what constitutes "brutality" may change depending on the circumstances. *Id.* at 1033. He said that the principle underlying the invalidation of Rochin's conviction should support finding substantive due process as a sword in a section 1983 action, even though "the notion of what constitutes brutality may not necessarily be the same." *Id.*

[75] *See infra* notes 186-87 and accompanying text.

[76] *See infra* notes 86-187 and accompanying text.

[77] 430 U.S. 651 (1977).

[78] *Id.* at 672; *see infra* notes 86-105 and accompanying text.

[79] 451 U.S. 527 (1981).

conduct could constitute a "deprivation,"[80] but that the availability of adequate state remedies nevertheless satisfied the requirement of "due process."[81] Finally, in *Davidson v. Cannon*[82] and *Daniels v. Williams*,[83] the Court overruled in part its decision in *Parratt* by holding that negligent conduct could not constitute a "deprivation" of either procedural or substantive due process.[84] Although the Supreme Court has not yet determined whether personal security claims may be based on violations of both substantive and procedural due process, most courts have determined that personal security claims generally do not involve procedural due process issues because personal security claims challenge the conduct of officials, not a state's procedures.[85]

1. Interpreting Procedural Due Process Claims

In *Ingraham v. Wright*[86] junior high school students alleged that their teachers had infringed their liberty interests by subjecting them to exceptionally harsh paddling as a means of maintaining discipline.[87] They asserted violations of the eighth amendment,[88] procedural due

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[80] Parratt v. Taylor, 451 U.S. 527, 536 (1981), *overruled in part*, Daniels v. Williams, 474 U.S. 327 (1986).

[81] *Id.* at 544-45; *see infra* notes 106-43, 181 and accompanying text.

[82] 474 U.S. 344 (1986).

[83] 474 U.S. 327 (1986).

[84] *Id.* at 330-31; *Davidson*, 474 U.S. at 347; *see infra* notes 144-78 and accompanying text.

[85] *See infra* note 137-40.

[86] 430 U.S. 651 (1977).

[87] Ingraham v. Wright, 430 U.S. 651, 653 (1977).

[88] *Id.* at 663-71. In addressing the eighth amendment claim, the Court considered the common-law rule on corporal punishment, the country's current practice, and the history of the eighth amendment, which was designed to protect those convicted of crimes. *Id.* at 664. In addition, the Court focused on the difference between the punishment of children and the punishment of prisoners. *Id.* at 669-71. The Court found that children did not need the protections of the eighth amendment because the openness of the public schools, the community's control of the schools, and the availability of civil and criminal remedies are all "significant safeguards" against improper punishment. *Id.* at 670. The Court therefore held that the eighth amendment was not applicable to the punishment of students. *Id.* at 664. The Court declared that the eighth amendment is applicable to a personal security claim based on improper punishment if the alleged conduct occurred after the state has secured a formal adjudication of guilt in accordance with due process of law. Prior to this formal adjudication, due process is applicable. *Id.* at 671-72 n.40. Justice White, however, rejected the Court's analysis of the eighth amendment, arguing that public view of corporal punishment does not make it less offensive. *Id.* at 690 (White, J., dissenting). He also stated that the eighth amendment does more than guard against "cruel and unusual punishment" because the Court had previously recognized that indifference to the serious medical needs of inmates can constitute a violation of the eighth amendment. *Id.* at 688 n.4 (citing Estelle v. Gamble, 429 U.S. 97 (1976)). In addition, he noted that in *Estelle v.*

process,[89] and substantive due process.[90] The Supreme Court did not address their substantive due process claim because it did not grant certiorari as to that issue.[91]

In examining the students' procedural due process claim, the Court

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Gamble the Court held that the availability of a state remedy, which would have allowed the prisoner to sue for medical malpractice, was not determinative of whether there was an eighth amendment violation. *Id.* at 690-91. The Court left open the question whether the eighth amendment applies to punishments analogous to criminal punishments, such as involuntary confinements in mental or juvenile institutions. *Id.* at 669 n.37. In Youngberg v. Romeo, 457 U.S. 307 (1982), the Court stated, however, that a person involuntarily committed to a mental institution could not allege a violation of personal security under the eighth amendment. 457 U.S. at 325. The Court held that the proper basis for seeking recovery was substantive due process, which requires the Court to balance the liberty interests of an individual and the state's interests in restraint. *Id.* at 320-21. The Court recognized that even a criminal conviction and incarceration cannot destroy an individual's right to be free from arbitrary bodily restraint. *Id.* at 316. The Court labeled this interest as the "core of the liberty protected by the Due Process Clause." *Id.* The Court concluded that this liberty interest requires the state to "provide minimally adequate or reasonable training to ensure safety and freedom from undue restraint." *Id.* at 319.

[89] *Ingraham*, 430 U.S. at 653.

[90] *Id.* at 659 n.12.

[91] *Id.* at 679 n.47 (left open whether there is "an independent federal cause of action to vindicate substantive rights under the Due Process Clause"). Justice White in dissent stated that because the Court left open this issue, the majority opinion subtly advises attorneys how to draft complaints. *Id.* at 689 n.5 (White, J., dissenting). Although the Fifth Circuit Court of Appeals in *Ingraham* refused "to look at each individual instance of [corporal] punishment to determine if it [had] been administered arbitrarily or capriciously," Ingraham v. Wright, 525 F.2d 909, 917 (5th Cir. 1976), *aff'd*, 430 U.S. 651 (1977), other courts have found that the paddling of students may constitute a violation of substantive due process. *See, e.g.*, Garcia v. Miera, 817 F.2d 650, 654-56 (10th Cir. 1987), *petition for cert. filed*, 56 U.S.L.W. 3322 (U.S. Oct. 13, 1987) (No. 87-603); Hall v. Tawney, 621 F.2d 607, 611-13 (4th Cir. 1980). Two years after the Court's decision in *Ingraham*, the Supreme Court examined the constitutionality of conditions for pretrial detainees under substantive due process. Bell v. Wolfish, 441 U.S. 520, 535-44 (1979). The Court stated that the conditions would be unconstitutional if they constituted punishment. *Id.* at 535. The Court explained that pretrial detainees could successfully challenge the conditions if they directly proved an intent to punish or indirectly proved an intent to punish by demonstrating that the regulation was purposeless or arbitrary. The Court set forth the following test for determining a violation of substantive due process:

> A court must decide whether the disability is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose. . . . [I]f a particular condition or restriction of . . . detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to "punishment." Conversely, if a restriction or condition is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon [inmates].

Id. at 538-39; *see also* Jones v. Mabry, 723 F.2d 590, 594 (8th Cir. 1983) (difficult to distinguish punishment from permissible restrictions arising from detention), *cert. denied*, 467 U.S. 1228 (1984). Since the Court's decision in *Bell*, the Court has applied the same test to reject other substantive due process challenges by pretrial detainees. United States v. Salerno, 107 S. Ct. 2095, 2100-04 (1987) (held federal statute authorizing preventive detention was facially valid); Block v. Rutherford, 468 U.S. 576, 577-91 (1984) (upheld denial of contact visits and secret searches of cells).

stated that the historic right to personal security[92] encompasses the right to be free from bodily restraint and punishment.[93] The Court found that the students' liberty interests were "implicated"[94] by the paddling because the action constituted punishment;[95] but the Court conditioned the students' recovery under a procedural due process theory on a finding that any available state common-law remedies would be inadequate to redress the students' injuries.[96] Although the Court stated that the issue before it was the adequacy of the available state remedy, it only briefly discussed the state remedy.[97]

The Court instead focused on the issue whether notice and a hearing were necessary *prior* to the paddling, even though the plaintiffs had a state remedy.[98] To resolve this latter issue, the Court used the balancing test it established in *Mathews v. Eldridge*,[99] which requires courts to weigh three factors: 1) the individual's interests, 2) the risk of erroneously depriving the individual of her interests and the probable value of additional procedural safeguards, and 3) the burdens imposed upon the state if the safeguards were required.[100]

With respect to the first *Mathews* factor, the Court found that students have "a strong interest in [having] procedural safeguards that minimize the risk of wrongful punishment."[101] In examining the second and third factors of the *Mathews* test, the probable value of requiring process prior to punishment and the burden of that process on the state, the Court found that an advance hearing would only

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[92] The right to personal security constitutes one of the fundamental rights recognized by Blackstone. 1 W. BLACKSTONE, COMMENTARIES *134; *see* Slaughterhouse Cases, 83 U.S. (16 Wall.) 36, 115 (1872) (Bradley, J., dissenting) (Blackstone classified fundamental rights under three divisions: "the right of personal security, the right of personal liberty, and the right of private property"). In *Ingraham*, the Court noted that although the scope of this historic liberty has "not been defined precisely," it was certain that the interest protects an individual's right to be free from "bodily restraint and punishment" unless the state affords due process. 430 U.S. at 673-74.

[93] *Ingraham*, 430 U.S. at 672-74.

[94] The Court distinguished between two actions, one that "implicates" a liberty interest and one that causes only a "*de minimus* level of imposition." *Id.* at 674. The latter classification is perhaps the test preceding the courts' current standardless test: "Does the action rise to the level of a constitutional violation." *See supra* note 6.

[95] *Ingraham*, 430 U.S. at 674.

[96] *Id.* at 674-75. In a footnote the Court clarified that the case did not involve any state-created interest in liberty or property. *Id.* at 674 n.43.

[97] *Id.* at 676-78. The Court discussed the state remedy in evaluating the factors of *Mathews v. Eldridge*, 424 U.S. 319 (1976). *See infra* notes 99-105 and accompanying text. The Court described the state remedy as a safeguard against erroneous deprivation of liberty. *Ingraham*, 430 U.S. at 676-78.

[98] *Ingraham*, 430 U.S. at 674-676, 678-82.

[99] 424 U.S. 319 (1976).

[100] *Id.* at 335.

[101] *Ingraham*, 430 U.S. at 676.

marginally reduce the risk of erroneous deprivation,[102] while resulting in a "significant intrusion" into the domain of education.[103] Because requiring a hearing before a paddling could cause numerous problems, the Court determined that the students' strong interest in having a hearing prior to punishment did not outweigh the costs of the hearing.[104] The Court therefore held that even though the paddling implicated the students' liberty interests, a hearing was not necessary prior to punishment, because the available common-law remedies could afford the students due process.[105]

In *Parratt v. Taylor*[106] a plurality of the Court stated that its analysis of an alleged deprivation of property without due process was consistent with the Court's analysis in *Ingraham*.[107] In *Parratt* a prisoner alleged that prison officials had negligently failed to give

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[102] *Id.* at 682.

[103] *Id.* The Court stated that requiring a hearing before paddling could cause teachers to forego using corporal punishment as a disciplinary tool, *id.* at 680-81, could cause students to suffer unnecessary prolonged anxiety about the possibility of forthcoming punishment, *id.* at 681 n.51, and could generally undermine the educational process, *id.* at 680-81.

[104] *Id.* at 682.

[105] *Id.* Justice White disagreed, arguing that the remedy was inadequate. *Id.* at 693-95 (White, J., dissenting). He noted that the students could not recover under state law if the teachers had acted in good faith and that, more important, a postdeprivation remedy could not make them whole. *Id.* at 694-95 (White, J., dissenting). He declared, "The infliction of physical pain is final and irreparable; it cannot be undone in a subsequent proceeding." *Id.* at 695 (White, J., dissenting). Justice Stevens also argued that postdeprivation remedies may not fully compensate a person who has suffered unlawful physical restraint or punishment, in contrast to some one who has suffered a deprivation of property. *Id.* at 701 (Stevens, J., dissenting). In commenting on the nature of the interest, both Justices White and Stevens raised arguments that the lower courts have used in determining whether Parratt v. Taylor, 451 U.S. 527 (1981), *overruled in part,* Daniels v. Williams, 474 U.S. 327, 329-31 (1986), is applicable to an alleged personal security claim. *See infra* note 137 and accompanying text. In rejecting the Court's analysis that the availability of common-law remedies afforded due process to the students, Justice White contrasted the need for predeprivation procedures under the fourth amendment with the need for predeprivation procedures under the due process clause of the fourteenth amendment. *Ingraham,* 430 U.S. at 697-700 (White, J., dissenting). He stated that the fourth amendment requires courts to balance the individual's interests and the public's interests and that this balancing defines the " 'process that is due.' " *Id.* at 698 (White, J., dissenting) (quoting Gerstein v. Pugh, 420 U.S. 103, 125 n.27 (1975)). Warrantless arrests are permissible, he explained, because the balancing process indicates that police officers could not otherwise perform their duties. *Id.* at 697-99. If police officers violate the fourth amendment, their victims may seek to suppress the evidence that was unlawfully seized or seek a civil remedy. Justice White argued that the balancing process built into the fourth amendment is not applicable to students subject to corporal punishment; he contended that if the Court were to correctly balance the factors outlined in Mathews v. Eldridge, 424 U.S. 319 (1976), the balance would tip in favor of providing notice and informal hearings for students prior to punishment. *Id.* at 697-700 (White, J., dissenting).

[106] 451 U.S. 527 (1981), *overruled in part,* Daniels v. Williams, 474 U.S. 327, 329-31 (1986).

[107] *Id.* at 542. The Court stated that the facts in *Ingraham* were "arguably" "more egregious" than the facts in *Parratt* because *Ingraham* involved intentional conduct and a deprivation of liberty. *Id.*

him mail-ordered hobby materials, which had arrived while he was in segregation.[108] Unlike the students in *Ingraham*, the prisoner did not challenge the lack of notice and a hearing prior to his loss; he simply sought to recover the value of the hobby materials.[109]

Addressing the question whether the prisoner had suffered a constitutional violation, the plurality stated that the officials had allegedly acted under color of law,[110] that the hobby kit fell within the definition of property,[111] and that the negligent act amounted to a "deprivation."[112] Even though the plaintiff had suffered a deprivation of property, the Court stated that a constitutional violation exists only when the deprivation was without due process of law.[113] In resolving the due process issue, the plurality considered the adequacy of the state tort remedies.[114]

The plurality recognized that determining a procedural due process violation requires balancing.[115] It did not balance the factors mentioned in *Mathews v. Eldridge*, as the Court did in *Ingraham*, because it was not addressing whether notice and a hearing were necessary *prior* to the deprivation.[116] The plurality instead questioned whether pre-

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[108] *Id.* at 529-30.

[109] *Id.* at 529.

[110] *Id.* at 535.

[111] *Id.* at 529 n.1 (prison officials did not dispute that the prisoner had a property interest).

[112] *Id.* at 536-37.

[113] *Id.* at 537 (citing Baker v. McCollan, 443 U.S. 137, 145 (1979)).

[114] *Id.* at 537-44. The plurality also considered the issue of whether section 1983 contains a state-of-mind requirement. *Id.* at 534-35. It determined that the *statute* does not require an individual to act with a certain state-of-mind. *Id.* Since *Parratt* the Supreme Court has stated that certain amendments, which a plaintiff would use as the basis for an action, might require the state actor to have acted with a particular state-of-mind. *See, e.g.*, Daniels v. Williams, 474 U.S. 327, 334 (1986). In examining the statute, the plurality in *Parratt* relied on the Court's analysis of *Monroe v. Pape*, 365 U.S. 167 (1961), in which the Court contrasted the language of 18 U.S.C. § 242, which is the criminal counterpart of 42 U.S.C. § 1983, with the language of section 1983. *Parratt*, 451 U.S. at 534-35. For a discussion of *Monroe v. Pape*, see *infra* note 141. Because section 242 requires the alleged unlawful conduct to have been done willfully and section 1983 (formerly referred to as section 1979) does not contain this adverb, the Court in *Monroe* stated that section 1983 did not require willful conduct. *Monroe*, 365 U.S. at 187. The plurality in *Parratt* therefore concluded that the statute does not require a person to act with a particular state-of-mind for the conduct to be actionable under section 1983. *Parratt*, 451 U.S. at 535. One commentator has argued that the state-of-mind or degree of culpability is irrelevant to establishing a *prima facie* case when a plaintiff brings a section 1983 action. Mead, *Evolution of the "Species of Tort Liability" Created by 42 U.S.C. § 1983: Can Constitutional Tort be Saved from Extinction?*, 55 FORDHAM L. REV. 1, 4 (1986) ("section 1983 is a strict liability species of tort and the Supreme Court should explicitly classify it as such to ensure the continued evolution of the constitutional tort species").

[115] *Parratt*, 451 U.S. at 538-40.

[116] Courts have used the factors of Mathews v. Eldridge, 424 U.S. 319 (1976), in three areas: to determine whether a hearing is necessary prior to a government action that would deprive an individual of a property or liberty interest, to determine what procedures are necessary at

deprivation process was feasible.[117] The plurality explained that even though due process requires a hearing at some time before a state *finally* deprives a person of property,[118] a predeprivation hearing may sometimes not be practicable because of a need to act quickly[119] or because the alleged act was random and unauthorized.[120] In considering the deprivation involved in *Parratt*, the plurality determined that a predeprivation hearing was not practicable because the actions of the prison officials were random and unauthorized.[121] Under these circumstances, the plurality stated, a state may still afford due process to the person who suffered a deprivation if the state provides an adequate post-deprivation remedy.[122]

After finding that a predeprivation hearing was not possible, the plurality then considered the adequacy of the state remedy.[123] It noted that state law could afford an adequate remedy, even if it were not identical to the remedies available under section 1983.[124]

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a hearing, and to determine the standard of proof that the government must meet to deprive an individual of a property or liberty interest. *See, e.g.*, J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 44, § 13.8, at 490-92 (and cases cited therein). The *Mathews v. Eldridge* factors, however, do not allow a person to "accurately predict" the result in a case "unless one knows the personal value systems of those doing the balancing." *Id.* § 13.8, at 490. In addition, the factors do not require courts to find a system for identifying due process values. *Id.* (citing Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in* Mathews v. Eldridge: *Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28 (1976)).

[117] *Parratt*, 451 U.S. at 540-44. Professor Bandes has interpreted *Parratt* as creating an "impracticability exception" to *Mathews*. Bandes, "Monell, Parratt, Daniels, and Davidson": *Distinguishing a Custom or Policy from a Random, Unauthorized Act*, 72 IOWA L. REV. 101, 134 (1986). She stated, "If *Mathews* requires the government to provide predeprivation process and predeprivation process is impracticable, it may instead provide postdeprivation process." *Id.* (footnotes omitted).

[118] *Parratt*, 451 U.S. at 540.

[119] *Id.* at 538-39. To support the proposition that a predeprivation hearing is not always necessary, the Court referred to a state's need to prevent harm to the public by destroying tainted food and drugs and by seizing the assets of a bank to prevent mismanagement. *Id.* Although the Court in *Ingraham* did not explicitly state that teachers must be able to use corporal punishment quickly if they are to use it effectively, underlying the Court's balancing is a belief that corporal punishment works only if teachers use it without hesitation, subject to the knowledge of common-law actions for improper discipline. *See supra* note 103 and accompanying text.

[120] *Parratt*, 451 U.S. at 541.

[121] *Id.*

[122] *Id.* at 543-44.

[123] *Id.* at 543-44.

[124] *Id.* The plurality did not use the *Mathews v. Eldridge* test to determine the adequacy of the state remedy. It found the remedy adequate even though state law did not provide for a jury trial and punitive damages and would permit an action against the state, not against the individual employees. *Id.* Since *Parratt*, courts have been uncertain in determining what constitutes an adequate state remedy. *See, e.g.*, Bell v. City of Milwaukee, 746 F.2d 1205, 1238 (7th Cir. 1984); Note, Parratt v. Taylor *Revisited: Defining the Adequate Remedy Requirement*, 65 B.U.L. REV. 607, 616-649 (1985) (author proposes that state immunity signifies that the state remedy is inadequate).

The plurality's analysis engendered one opinion concurring and dissenting and three opinions concurring. Justice Marshall concurred and dissented in part, agreeing with the plurality's decision to consider the availability of state remedies, but disputing the plurality's finding that the remedy was adequate.[125] Justice Stewart argued that the prisoner was not deprived of his property within the meaning of the fourteenth amendment and, in the alternative, even if he had been deprived of his property, the state remedies satisfied due process.[126]

Justice Blackmun, joined by Justice White, sought to narrow the plurality's holding by rejecting procedural due process as a basis for a personal security claim. He maintained that the plurality's reasoning would not apply to deprivations of life or liberty interests, nor to substantive due process claims.[127] He also contended that if a state could institute procedures to direct intentional actions, then the availability of a postdeprivation remedy would be irrelevant.[128]

Justice Powell's concurrence, however, rejected the prisoner's claim, arguing that negligent conduct could not constitute a deprivation of property within the meaning of the fourteenth amendment.[129] To support this contention, Justice Powell relied on a narrow definition of the word "deprivation"; the purpose of section 1983, which was "to deter real abuses by state officials"; and the need to "avoid trivializing the right of action provided in section 1983."[130] He contended that the word " 'deprivation' connotes an intentional act . . . or, at the very least, a deliberate decision not to act."[131] He added that negligent conduct could not constitute a deprivation of substantive due process, a claim not considered by the Court.[132]

Since the division of the Supreme Court in *Parratt*, the Court has

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[125] *Parratt*, 451 U.S. at 554-56 (Marshall, J., concurring in part, dissenting in part).

[126] *Id.* at 544-45 (Stewart, J., concurring).

[127] *Id.* at 545-46 (Blackmun, J., concurring).

[128] *Id.* In Hudson v. Palmer, 468 U.S. 517 (1984), all of the justices agreed that *Parratt* is also applicable to random, unauthorized, *intentional* conduct that causes a deprivation of property. 468 U.S. at 533. The Court declared that the key issue is whether the State is in a position to provide for predeprivation process. *Id.* at 532. The Court stated:

> The state can no more anticipate and control in advance the random and unauthorized intentional conduct of its employees than it can anticipate similar negligent conduct. Arguably, intentional acts are even more difficult to anticipate because one bent on intentionally depriving a person of his property might well take affirmative steps to avoid signalling his intent.

Id. at 533.

[129] *Parratt*, 451 U.S. at 546-54 (Powell, J., concurring).

[130] *Id.* at 546-54.

[131] *Id.* at 548 (citing WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. 1945)).

[132] *Id.* at 552-53.

applied the *Parratt* analysis to random, unauthorized, and intentional deprivations of property,[133] but has excluded its application to property deprivations carried out pursuant to an established state procedure.[134] Because the Court in *Parratt* and its progeny discussed property interests, lower courts have been uncertain as to how to harmonize *Parratt* and *Ingraham*, which discussed liberty interests.[135] Some courts have applied the Court's analysis in *Parratt* to violations of liberty; they interpret *Parratt* to require them to consider whether the alleged conduct was random and unauthorized, and they interpret *Ingraham* to require them to consider whether the state remedy is adequate.[136] A majority of lower federal courts, however, have held that *Parratt* is not applicable to liberty interests[137] protected by the fourth amend-

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[133] Hudson v. Palmer, 468 U.S. 517, 530-34 (1984). In *Hudson* the Court held that a prison official's intentional destruction of an inmate's property during a shakedown search did not violate the fourteenth amendment. *Id.* at 536. The Court considered the same issues it discussed in *Parratt*; it found that the state could not predict intentional conduct and that the state remedy was adequate. *Id.* at 533-35.

[134] Logan v. Zimmerman Brush Co., 455 U.S. 422, 435-38 (1982). In *Logan* Justice Blackmun held that an aggrieved employee had a property interest arising from the state's procedural act, which afforded employees with an adjudicatory process. *Id.* at 431-33. When the state employment commission failed to convene a fact-finding hearing, it foreclosed the employee from invoking the adjudicatory process. *Id.* at 426-27. Justice Blackmun held that established state procedures had destroyed the employee's property interest. *Id.* at 436. He found the case distinguishable from *Parratt*. *Id.* He stated, "Unlike the complainant in *Parratt*, [the employee] is challenging not the Commission's error, but the 'established state procedure' that destroys his entitlement without according him proper procedural safeguards." *Id.*

[135] *See infra* notes 136-40 and accompanying text.

[136] *See, e.g.*, Thibodeaux v. Bordelon, 740 F.2d 329, 334-39 (5th Cir. 1984); Daniels v. Williams, 748 F.2d 229, 232 (4th Cir. 1984), *aff'd on other grounds*, 474 U.S. 327 (1986); Gilmere v. City of Atlanta, 737 F.2d 894, 905-10 (11th Cir. 1984), *vacated on this ground*, 774 F.2d 1495, 1497-1500 (1985) (en banc), *cert. denied*, 476 U.S. 1115, 1124 (1986); Gumz v. Morrissette, 772 F.2d 1395, 1409 (7th Cir. 1985) (Easterbrook, J., concurring), *cert. denied*, 475 U.S. 1123 (1986), *overruled on other grounds*, Lester v. City of Chicago, 830 F.2d 706 (7th Cir. 1987); *see also* McGowan v. Riley, 628 F. Supp. 1087, 1088 (N.D. Miss. 1985) (deprivation of life). One commentator has argued that not only is *Parratt* applicable to liberty interests, but also that the courts should not use substantive due process as a means to avoid applying *Parratt* to liberty claims. Comment, *Due Process: Applications of the* Parratt *Doctrine to Random and Unauthorized Deprivations of Life and Liberty*, 52 FORDHAM L. REV. 887, 891-902 (1984).

[137] *See, e.g.*, *Gilmere*, 774 F.2d at 1497-1502 (and cases cited therein). *See generally* Moore, Parratt, *Liberty, and the Devolution of Due Process: A Time for Reflection*, 13 W. ST. U. L. REV. 201, 253-59 (1985) (counselling against the application of *Parratt* to the deprivation of liberty interests). In Augustine v. Doe, 740 F.2d 322 (5th Cir. 1984), the Fifth Circuit Court of Appeals explained that *Parratt* is applicable to only some procedural due process claims:

> *Parratt v. Taylor* is not a magic wand that can make any section 1983 action resembling a tort suit disappear into thin air. *Parratt* applies only when the plaintiff alleges a deprivation of procedural due process; it is irrelevant when the plaintiff has alleged a violation of some substantive constitutional proscription. Further, in the context of procedural due process, *Parratt* applies only when the nature of the challenged conduct is such that the provision of predeprivation procedural safeguards is impracticable or infeasible.

740 F.2d at 329. *See generally* Morello v. James, 810 F.2d 344, 348 (2d Cir. 1987) (and cases

ment,[138] the eighth amendment,[139] and substantive due process.[140] Even though the Supreme Court has not yet addressed the applicability of *Parratt* to personal security claims,[141] in its recent companion decisions in *Daniels v. Williams*[142] and *Davidson v. Cannon*[143] the Court never-

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cited therein) (*Parratt* not applicable to "[i]ntentional, substantive violations of constitutional rights"); Bandes, *supra* note 117, at 120-21 n.142 (*Parratt* is not applicable to unlawful force claim based on one of the specific guarantees of the Bill of Rights).

[138] *See, e.g.*, Sanders v. Kennedy, 794 F.2d 478, 481 (9th Cir. 1986); *Gilmere*, 774 F.2d at 1501-02; Wolf-Lillie v. Sonquist, 699 F.2d 864, 872 (7th Cir. 1983). *See generally* McIntosh v. Arkansas Repub. Party, 816 F.2d 409, 411 (8th Cir.) (*Parratt* not applicable to fourth amendment "false arrest" claim), *vacated*, 825 F.2d 184 (8th Cir. 1987).

[139] *See, e.g.*, McRorie v. Shimoda, 795 F.2d 780, 785 (9th Cir. 1986).

[140] *See, e.g.*, Franklin v. Aycock, 795 F.2d 1253, 1259 (6th Cir. 1986); Rutherford v. City of Berkeley, 780 F.2d 1444, 1447 (9th Cir. 1986); *Gilmere*, 774 F.2d at 1499-1502; *Gumz*, 772 F.2d at 1399-1400 n.3; Davidson v. O'Lone, 752 F.2d 817, 823 (3d Cir. 1984), *aff'd on other grounds sub nom.* Davidson v. Cannon, 474 U.S. 344 (1986). One commentator has argued that plaintiffs should allege violations of substantive due process to avoid the application of *Parratt*. Shapiro, *Keeping Civil Rights Actions against State Officials in Federal Court: Avoiding the Reach of* Parratt v. Taylor *and* Hudson v. Palmer, 3 LAW & INEQUALITY 161, 170-71 (1985). Professor Nahmod has noted, however, that most courts have not explained why *Parratt* is not applicable to substantive due process claims. Nahmod, *Due Process, State Remedies, and Section 1983*, 34 U. KAN. L. REV. 217, 236 (1985).

[141] Although the Supreme Court rendered its decision in *Parratt* two decades after its decision in *Monroe v. Pape*, 365 U.S. 167 (1967), the *Monroe* decision supports the proposition that *Parratt* is not applicable to personal security claims. In *Monroe* plaintiffs alleged that thirteen city police officers without warrants had broken into their home early in the morning and forced them to stand naked in one room while they went from room to room, emptying drawers and ripping mattress covers. 365 U.S. at 169. One plaintiff also alleged that he was unlawfully detained for ten hours at the police station. *Id.* These alleged actions constituted a violation of the fourth amendment and of state law. *Id.* The Supreme Court held that Congress in enacting section 1983 intended to afford a federal remedy to parties deprived of their constitutional rights as a result of an official's misuse of state power. *Id.* at 172. Even though the alleged actions also violated state law, the Court held that the plaintiffs did not have to bring their action in state court. *Id.* at 183. The Court stated, "The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." *Id.*

The Court also stated that section 1983 (formerly section 1979) had three purposes: to override unlawful state laws; to provide a federal remedy when the state remedy was inadequate; and "to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice." *Id.* at 173-74. The Court explained that an official's *unauthorized* conduct is actionable under section 1983 because the state gives that official the power to act. *Id.* at 172. In determining that unauthorized conduct was actionable under section 1983, the Court did not consider whether the plaintiffs, who had suffered an intentional and unauthorized deprivation by state officials, had an adequate remedy under state law. The *Monroe* decision therefore would not support applying *Parratt* to fourth amendment claims, even though the Court in *Parratt* found controlling that state law afforded an adequate remedy based on an alleged deprivation of due process resulting from random and unauthorized conduct. Since the Court's decision in *Monroe*, most courts have also afforded plaintiffs a federal forum for their personal security claims based on conduct that violated the eighth amendment and substantive due process. *See supra* notes 139-40 and accompanying text.

[142] 474 U.S. 327 (1986).

[143] 474 U.S. 344 (1986).

theless provided some guidance in analyzing both procedural and substantive due process claims.

2. Interpreting Substantive Due Process Claims

In *Daniels v. Williams*,[144] the plaintiff, an inmate in a city jail, allegedly sustained back and ankle injuries when he fell on a jail stairway.[145] He alleged that a correctional deputy had negligently left a pillow on the stairway, which caused him to slip and fall.[146]

Davidson v. Cannon,[147] on the other hand, was a case evading the classic negligence characterization. While Davidson was an inmate in a state prison, he was attacked and injured by another inmate.[148] Two days before the attack occurred, Davidson had alerted prison officials to the possibility he would be assaulted, but the officials failed to follow the normal procedures to avert the altercation.[149]

In considering the facts of these two cases, all of the justices agreed that Daniels' action was based on negligence,[150] but disagreed as to whether Davidson's action was based on negligence or recklessness.[151] Although the Court in *Daniels* reaffirmed that section 1983 does not contain a state-of-mind requirement,[152] it held that negligent conduct cannot constitute a deprivation of due process.[153] Yet, Justice Rehnquist, writing for the Court, left open the questions whether gross

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[144] 474 U.S. 327 (1986).

[145] *Id.* at 328.

[146] *Id.*

[147] 474 U.S. 344 (1986).

[148] *Id.* at 346. As a result of the attack, Davidson broke his nose and injured his head, neck, and shoulder. *Id.*

[149] *Id.* When the assistant superintendent of the prison read Davidson's note about the possibility of a fight, the superintendent did not separate the antagonistic inmates, nor did he place Davidson in custody, or talk to the inmates about the gravity of the threat. *Id.* at 351 (Blackmun, J., dissenting). Instead he passed the note to a corrections officer, who did not read the note after being informed of the threat. *Id.* at 345. The corrections officer failed to follow the normal procedure of interviewing the complainants, nor did he report the threat to the weekend shift when he left work. *Id.* at 351 (Blackmun, J., dissenting).

[150] *Daniels*, 474 U.S. at 335-36. Justice Stevens, however, found that determining the state-of-mind of the jail official was not necessary. *Id.* at 341; *see infra* notes 172-77 and accompanying text.

[151] In *Davidson*, the majority opinion stated that the issue before the Court was only the state's alleged negligent conduct because the prisoner did not appeal the district court's finding that the state officials did not act with deliberate or callous indifference. *Davidson*, 474 U.S. at 347; *see infra* notes 165-67 and accompanying text.

[152] 474 U.S. at 329-30; *see also supra* note 114.

[153] 474 U.S. at 330-36.

negligence[154] or recklessness could constitute a deprivation.[155] The Court in *Davidson*, however, interpreted *Daniels* as holding that negligent conduct cannot violate either procedural due process or substantive due process.[156]

In *Daniels*, the Court overruled that portion of *Parratt* which held that negligent conduct could constitute a deprivation.[157] It noted, however, that negligent conduct may violate other constitutional provisions.[158] Justice Rehnquist sought to support his narrow definition of "deprivation" by considering the history of the due process clause.[159] He stated, "Historically, [the] guarantee of due process has been applied to *deliberate* decisions of government officials to deprive a person of life, liberty, or property."[160] He noted that history indicates that the due process clause protects individuals from the "arbitrary exercise" of governmental powers.[161] He added that if there is " 'no affirmative abuse of power' " by a state actor, a plaintiff should not have a federal forum.[162]

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[154] The Eighth Circuit, however, has interpreted *Daniels* as holding that gross negligence is not actionable under the fourteenth amendment, even though the Supreme Court left this issue open. Myers v. Morris, 810 F.2d 1437, 1468-69 (8th Cir. 1987), *cert. denied*, 108 S. Ct. 97 (1987).

[155] *Daniels*, 474 U.S. at 334 n.3.

[156] *Davidson*, 474 U.S. at 348. In *Daniels*, Justice Rehnquist mentioned that the due process clause not only requires procedural fairness, but also guards against oppressive conduct. 474 U.S. at 331 (citing Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 277 (1856) (discussing due process under the fifth amendment)). One commentator has argued, however, that because *Daniels* did not address substantive due process the Court has *not* determined that negligent conduct cannot constitute a deprivation of *substantive* due process. Comment, *Civil Rights—42 U.S.C. § 1983—The Actionability of a Negligent Deprivation of a Liberty Interest in Light of* Daniels *and* Davidson, 69 MARQ. L. REV. 599, 633-34 (1986). The author contends that negligent conduct can constitute a deprivation of substantive due process. *Id.* at 629 n.158.

[157] 474 U.S. at 329-31. In overruling *Parratt*, Justice Rehnquist relied on Justice Powell's concurring opinion in *Parratt*. *Id.* (citing Parratt v. Taylor, 451 U.S. 527, 547-49 (1981) (Powell, J., concurring), *overruled in part*, Daniels v. Williams, 474 U.S. 527 (1986)). For a brief discussion of Justice Powell's concurrence, see *supra* notes 129-31 and accompanying text.

[158] 474 U.S. at 334.

[159] *Id.* at 331.

[160] *Id.* (citations omitted).

[161] *Id.*

[162] *Id.* at 330 (quoting Parratt v. Taylor, 451 U.S. 527, 548-49 (1981) (Powell, J., concurring), *overruled in part*, Daniels v. Williams, 474 U.S. 327 (1986)). The Court's use of the phrase "affirmative abuse of power" will not be problematic when courts examine claims dealing with unlawful force allegedly inflicted by officials because they have necessarily affirmatively used their power. The phrase, however, is more problematic in examining allegations that officials failed to act, as exemplified by the Court's analysis in *Davidson*. *See supra* notes 147-49 and accompanying text. Some courts have held that the due process clause guards against "negative" liberty deprivations, based on the right to be let alone, and not "positive" liberty deprivations, based on the right to receive protective services. *See, e.g.*, Walker v. Rowe, 791 F.2d 507, 510 (7th Cir.) (Bill of Rights is "a charter of negative liberties" (citing Bowers v. DeVito, 686 F.2d

The majority determined that because *Daniels* involved only negligence, the state's conduct did not constitute a deprivation.[163] The Court therefore rejected the inmate's claim that the state deprived him of a liberty interest protected by the due process clause.[164]

By adhering to its narrow definition of "deprivation," a majority of the Court in *Davidson* rejected Davidson's claims, which were based on the eighth and fourteenth amendments.[165] The Court stated that because Davidson had failed to appeal the district court's finding that the officials did not act with deliberate or callous indifference, the only issue before the Court was Davidson's claim that the defendants were negligent.[166] Because the majority viewed the case as involving only negligence, it found *Daniels* controlling and therefore held that the state had not deprived Davidson of a liberty interest.[167]

Justice Blackmun, joined in dissent by Justice Marshall, agreed that as a general rule negligence does not constitute a deprivation, but contended that under some circumstances negligence is actionable.[168] In the alternative, Justice Blackmun stated that if the defendants acted recklessly, Davidson would have a claim under the due process clause.[169] He maintained that protection available under the due process clause is broader than the protection available under the eighth amendment.[170] He argued that because recklessness or

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616 (7th Cir. 1982)), *cert. denied*, 107 S. Ct. 597 (1986); Jackson v. City of Joliet, 715 F.2d 1200, 1203-04 (7th Cir. 1983), *cert. denied*, 465 U.S. 1049 (1984).

[163] *Daniels*, 474 U.S. at 330-31.

[164] *Id.* at 332-33.

[165] *Davidson*, 474 U.S. at 346.

[166] *Id.* at 347.

[167] *Id.* at 347-48. Even though Justice Brennan agreed with the Court in *Daniels* and *Davidson* that negligent conduct cannot cause a deprivation, he dissented in *Davidson* because he disagreed with the Court's interpretation of the record. *Id.* at 349 (Brennan, J., dissenting). He stated that the Court should remand the case to the court of appeals, which should review the district court's finding that the defendants were not reckless or callously indifferent to Davidson's needs. *Id.*

[168] *Id.* at 353-56 (Blackmun, J., dissenting). He explained that because the state prohibited prisoners from striking back when assaulted, the prisoners had to depend upon the guards for their security. *Id.* at 354-55. Under the circumstances of this case, he found that the state's conduct deprived Davidson of his liberty interest. *Id.* at 352-53.

[169] *Id.* at 356-58.

[170] *Id.* at 358 (Blackmun, J., dissenting). Whether prisoners may assert claims under both the eighth and fourteenth amendments is unclear. In Whitley v. Albers, 475 U.S. 312 (1986), the Court held that the protection available under the two amendments is identical when a prisoner, who incurred physical injury during the quelling of a prison riot, asserts violations of the eighth and fourteenth amendments. 475 U.S. at 327. The breadth of the Court's holding is unclear because of its language. The Court stated:

> Because this case involves prison inmates rather than pretrial detainees or persons enjoying unrestricted liberty we imply nothing as to the proper answer to that question outside the *prison security context* by holding . . . that in these circumstances the Due Process Clause

deliberate indifference is actionable under the eighth amendment, then recklessness should be actionable under the due process clause.[171]

Justice Stevens, in contrast to the other eight members of the Court, refused to consider a defendant's state-of-mind in interpreting the word "deprivation."[172] He stated in his concurrence to *Daniels* and *Davidson* that "deprive" signifies that a person has incurred a loss.[173] To reject the procedural due process claims raised in both *Daniels* and *Davidson*, Justice Stevens argued that the Court did not need to redefine the meaning of "deprive."[174] Justice Stevens maintained that the due process clause does not prohibit the state from depriving a person of life, liberty, or property, but rather it prohibits only deprivations that are without due process of law.[175] To determine whether a deprivation is without due process of law, Justice Stevens contended that the Court should examine the adequacy of the state remedy.[176] He stated that "fundamental fairness," a totality of the circumstances inquiry, is the test for determining the adequacy of a state remedy.[177] In addition, he stated that the issue of fair procedures is irrelevant when plaintiffs assert claims based on substantive due process and those rights specified in the Bill of Rights that have been incorporated in the fourteenth amendment.[178]

The various opinions in *Davidson* and *Daniels* raise and leave

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affords [the prisoner] no greater protection than does the Cruel and Unusual Punishments Clause.

Id. (emphasis added). The Court specifically left open the question of the protection available under substantive due process to pretrial detainees and citizens at large. If the Court's phrase "in the prison security context" refers to the specific facts of the case—a prison riot—then pretrial detainees and prisoners may have broader protection under substantive due process than under the eighth amendment. If the phrase refers to the state's general interest in maintaining discipline in the jails, then pretrial detainees and prisoners may have identical protection under substantive due process and the eighth amendment. *See generally* Bell v. Wolfish, 441 U.S. 520, 546 n.28 (1979) ("[t]here is no basis for concluding that pretrial detainees pose any lesser security risk than convicted inmates. . . . [in] certain circumstances [detainees] present a greater risk to jail security and order"); Block v. Rutherford, 468 U.S. 576, 587 (1984) (same); *see also infra* note 282 and accompanying text.

[171] *Davidson*, 474 U.S. at 356-58 (Blackmun, J., dissenting). Justice Blackmun also argued that the prisoner had suffered a deprivation of liberty without due process because the available state remedy would be inadequate. *Id.* at 358-60. The state remedy would have afforded immunity to the state defendants. *Id.* at 358.

[172] *Daniels*, 474 U.S. at 341 (Stevens, J., concurring).

[173] *Id.*

[174] *Id.* at 340-41.

[175] *Id.* at 338-40.

[176] *Id.* at 341.

[177] *Id.* In contrast to Justice Blackmun, Justice Stevens found that a state system, which gives defendants the shield of immunity, may nevertheless be fundamentally fair. *Id.* at 342-43.

[178] *Id.* at 339-40.

unanswered many questions about the scope of due process. By defining "deprivation" to exclude negligent conduct as a basis for asserting either a violation of substantive due process or procedural due process, the Court found it unnecessary to discuss the applicability of *Parratt* to liberty interests. Consequently, the Court did not offer guidance to lower courts who have disagreed as to the reach of *Parratt*'s reasoning.[179]

Justice Stevens in *Daniels* and *Davidson*, however, addressed the question of *Parratt*'s applicability, stating that *Parratt* and the cases under consideration raised claims based on procedural, not substantive due process.[180] He explained that a person asserting a procedural due process claim contends that the *state's procedures* fail to provide due process and that a person asserting a substantive due process claim contends that the *state's conduct* was unconstitutional the moment it occurred, regardless of the availability of postdeprivation procedures.[181]

Justice Stevens' focus on the differences between procedural and substantive claims is harmonious with the Court's prior decision in *Ingraham v. Wright*.[182] In *Ingraham*, the Court's analysis indicates

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[179] *See supra* notes 136-43 and accompanying text.

[180] *Daniels*, 474 U.S. at 341 (Stevens, J., dissenting).

[181] *Id.* at 342. In discussing procedural and substantive due process claims, one court has stated that sometimes "procedural due process shades into substantive due process." Thibodeaux v. Bordelon, 740 F.2d 329, 338 n.9 (5th Cir. 1984). Justice Stevens discussion of procedural and substantive due process, however, provides the proper framework for analysis. Some facts may raise both procedural and substantive due process issues. In Baker v. McCollan, 443 U.S. 137 (1979), a person who had been detained in jail three days pursuant to a valid warrant alleged that a sheriff had negligently failed to establish identification *procedures* that would have revealed that he was not the person sought by the police. 443 U.S. at 139. Even though the inmate had alleged mere negligence, the Court did not dismiss the case on that ground; instead it determined that the facts failed to indicate a deprivation of liberty without due process of law because due process does not require officials to take "every conceivable step" to avoid convicting an innocent person. *Id.* at 145. The Court explained, however, that if officials failed to respond to an inmate's repeated protests of mistaken identification "after the lapse of a certain amount of time," then the inmate would suffer a deprivation of liberty without due process of law. *Id.* In his concurrence Justice Blackmun stated that failure to act under those circumstances would constitute a violation of substantive due process. *Id.* at 148 (Blackmun, J., concurring). In Garcia v. Miera, 817 F.2d 650, 655-56 (10th Cir. 1987), *petition for cert. filed*, 56 U.S.L.W. 3322 (U.S. Oct. 13, 1987) (No. 87-603), the Tenth Circuit Court of Appeals stated that the paddling of students may indicate a violation of procedural due process or substantive due process, depending on the egregiousness of the facts. The court explained:

> We thus envision three categories of corporeal punishment. Punishments that do not exceed the traditional common law standards of reasonableness are not actionable; punishments that exceed the common law standard without adequate state remedies violate procedural due process rights; and finally, punishments that are so grossly excessive as to be shocking to the conscience violate substantive due process rights, without regard to the adequacy of state remedies.

817 F.2d at 656.

[182] 430 U.S. 651 (1977).

that a deprivation of liberty could establish two different claims, one based on procedural due process and the other on substantive due process. *Parratt* would therefore be applicable to claims challenging the state's procedures and would be inapplicable to claims challenging the state's conduct.

The decisions in *Daniels* and *Davidson* also explicitly left open the questions of whether grossly negligent or reckless conduct could constitute a deprivation of due process.[183] With respect to procedural due process claims, Justice Stevens correctly perceived that the official's state-of-mind is irrelevant.[184] When confronted with substantive due process claims, the Court has articulated the "shocks the conscience" test, which would seem to require intentional conduct, or at the very least, reckless conduct.[185] In using the *Glick* factors to interpret this test, some courts, however, have found less culpable conduct to be actionable.[186] The lack of uniformity in applying the *Glick* factors indicates the difficulty of understanding the Court's

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[183] In *Daniels* the Court recognized that its decision could engender questions as to what constitutes gross negligence and recklessness. 474 U.S. at 334. The Court stated, however, that other areas of the law also abound in "nice distinctions." *Id.*

Professors Prosser and Keeton have attempted to define the terms "gross negligence" and "recklessness." W. PROSSER & W. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS § 31-32, at 169-85 (5th ed. 1984). Although they believe that there is no generally accepted meaning as to what constitutes gross negligence, they explained that when a court uses the term, it probably signifies "more than ordinary inadvertence or inattention, but less perhaps than conscious indifference to the consequences." *Id.* § 34, at 212. In defining recklessness, they stated that courts use willful and wanton as synonyms for recklessness. These terms, they explained, suggest that "the actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow, and which thus is usually accompanied by a conscious indifference to the consequences." *Id.* at 213. They described these terms as representing "quasi-intent." *Id.* at 212. In attempting to interpret the kind of conduct required by the due process clause, the United States in its amicus curiae brief in *Davidson* argued that intentional conduct is necessary. Brief for Amicus curiae at 16, Davidson v. Cannon, 474 U.S. 344 (1986). It emphasized that the fifth amendment due process clause contains an "equal protection component" and that the equal protection clause of the fourteenth amendment requires intentional conduct. *Id.* It therefore concluded that the due process clause must similarly require intentional conduct. *Id.* The Sixth Circuit, prior to *Davidson*, held that substantive due process claims require intentional conduct. Wilson v. Beebe, 770 F.2d 578, 586 (6th Cir. 1985) (en banc). *But see* Nishiyama v. Dickson County, 814 F.2d 277, 282 (6th Cir. 1987) (court determined that, after *Wilson*, gross negligence is actionable under substantive due process). Other courts, however, have not required intentional conduct when considering substantive due process claims. *See, e.g.*, Fernandez v. Leonard, 784 F.2d 1209, 1214-16 (1st Cir. 1986) (gross negligence actionable); Coon v. Ledbetter, 780 F.2d 1158, 1163 (5th Cir. 1986) (same).

[184] *But see* Comment, *supra* note 156, at 631 (arguing that a showing of gross negligence or recklessness is sufficient for a violation of procedural due process).

[185] *See, e.g.*, *Wilson*, 770 F.2d at 586 (substantive due process requires intentional conduct).

[186] *See, e.g.*, *Fernandez*, 784 F.2d at 1214-16 (gross negligence actionable); *Coon*, 780 F.2d at 1163 (same).

"shocks the conscience" test.[187]

Some courts have also been uncertain in determining the scope of a substantive due process claim when the plaintiff's status at the time of injury may invite the protection of another amendment. By examining the nature of the claims asserted under the fourth and eighth amendments, one should be better able to discern whether the claims are duplicative of claims asserted under substantive due process.[188]

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[187] Although all courts have looked to Judge Friendly's decision in *Glick* for guidance in examining unlawful force claims, the courts have not been consistent in examining substantive due process claims. Many courts quote the factors mentioned in *Glick*. *E.g.*, McRorie v. Shimoda, 795 F.2d 780, 785 (9th Cir. 1986); Gilmere v. City of Atlanta, 774 F.2d 1495, 1500-01 (11th Cir. 1985) (en banc), *cert. denied*, 476 U.S. 1115, 1124 (1986); Davis v. Forrest, 768 F.2d 257, 258 (8th Cir. 1985); Norris v. District of Columbia, 737 F.2d 1148, 1150-52 (D.C. Cir. 1984). In Shillingford v. Holmes, 634 F.2d 263 (5th Cir. Unit A 1981), the Fifth Circuit Court of Appeals explained the *Glick* factors as follows: the officer's action caused "severe injuries, was grossly disproportionate to the need for action under the circumstances and was inspired by malice rather than merely careless or unwise excess of zeal so that it amounted to an abuse of official power that shocks the conscience." *Id.* at 265. Some courts have also required severe injuries and malice. *E.g.*, Garcia v. Miera, 817 F.2d 650, 655-56 (10th Cir. 1987), *petition for cert. filed*, 56 U.S.L.W. 3322 (U.S. Oct. 13, 1987) (No. 87-603); Wise v. Bravo, 666 F.2d 1328, 1333 (10th Cir. 1982); *see also* M. SCHWARTZ & J. KIRKLIN, SECTION 1983 LITIGATION: CLAIMS, DEFENSES, AND FEES § 3.3, at 44 (1986) (serious injury necessary). *But see* Robison v. Via, 821 F.2d 913, 924 (2d Cir. 1987) ("permanent or severe" injury not necessary); Hewitt v. City of Truth or Consequences, 758 F.2d 1375, 1379 (10th Cir.) (factors include the "extent of the injury"), *cert. denied*, 474 U.S. 844 (1985); Wells & Eaton, *Substantive Due Process and the Scope of Constitutional Torts*, 18 GA. L. REV. 201, 246-50 (1984) (rejecting extent of the injury factor; bad motive alone is sufficient).

Other courts, however, have stated that malice is not necessary. *E.g.*, *Fernandez*, 784 F.2d at 1214; Fiacco v. City of Rensselaer, 783 F.2d 319, 323 (2d Cir. 1986), *cert. denied*, 107 S. Ct. 1384 (1987). In addition, the Seventh Circuit, in its now overruled decision in Gumz v. Morrissette, 772 F.2d (7th Cir. 1985), *cert denied*, 475 U.S. 1123 (1986), *overruled on this ground*, Lester v. City of Chicago, 830 F.2d 706 (7th Cir. 1987), stated that the *Glick* factors are requirements that a plaintiff must prove. 772 F.2d at 1400. Another court, however, has stated that the *Glick* factors are only some of the factors in determining whether the force was unlawful under the circumstances. Justice v. Dennis, 834 F.2d 380 (4th Cir. 1987) (en banc).

[188] In examining the *Daniels* and *Davidson* opinions, one judge noted that Justice Stevens, as he articulated the three rights protected by due process, did not mention that an act can violate more than one provision. Mann v. City of Tucson, 782 F.2d 790, 798 (9th Cir. 1986) (Sneed, J., concurring). Judge Sneed stated an act of assault and battery may violate three provisions: procedural due process, substantive due process, and the eighth amendment. *Id.* at 799. He contended that the issue is whether the federal court is the proper forum for the claims, not whether there is a violation. *Id.* at 797 n.5. He argued that the federal courts should consider claims based only on injuries occurring as a result of an established state procedure; he maintained that *Parratt* should be applicable to all other claims. *Id.* at 798.

If claims are duplicative, then a plaintiff may recover only once. Fowler v. Carrollton Public Library, 799 F.2d 976, 982 (5th Cir. 1986) ("[b]ecause § 1983 damages are based on a principle of compensation, a characterization of plaintiff's loss which permits duplicative recovery for one type of harm is not allowed"); Burton v. Livingston, 791 F.2d 97, 101 n.2 (8th Cir. 1986) (court did not decide the eighth amendment claim because recovery would duplicate recovery under substantive due process). *See generally* Memphis Community School Dist. v. Stachura,

II. Personal Security Claims Under the Fourth Amendment

The first clause of the fourth amendment declares that it is "the right of the people to be secure in their persons . . . against unreasonable searches and seizures."[189] Plaintiffs have alleged personal security claims under the protection afforded by this amendment, but, prior to the United States Supreme Court's decision in *Tennessee v. Garner*,[190] few courts sought to determine if the force used during an arrest was violative of the fourth amendment.[191] After *Johnson v. Glick*,[192] courts used the factors Judge Friendly articulated to decide whether the alleged conduct violated substantive due process,[193] regardless of whether the state official injured the plaintiff during an arrest, during pretrial incarceration, or after a conviction.[194] The

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106 S. Ct. 2537, 2543-45 (1986) (trial court improperly allowed jury to assess duplicative damages by instructing them to consider the inherent value of a constitutional right in addition to considering actual losses); Carter v. Rogers, 805 F.2d 1153, 1157 (4th Cir. 1986) (only one recovery for act forming bases of state assault and battery claim and federal excessive force claim); Carter v. District of Columbia, 795 F.2d 116, 118-20, 133-35 (D.C. Cir. 1986) (only one recovery for violation of fourth amendment and state false arrest claim).

[189] U.S. CONST. amend. IV. The second clause provides that probable cause is necessary to support the issuance of an arrest or a search warrant. *Id.* The latter clause articulates the general rule that a warrant is necessary prior to an arrest or a search; the first clause states the exception to the general rule. *See, e.g.*, C. WHITEBREAD & C. SLOBOGIN, CRIMINAL PROCEDURE § 4.03, at 136-41 (2d ed. 1986). If an arrest or a search is not pursuant to a warrant, then the arrest or search may be valid only if it is "reasonable." *Id.* When an official violates the fourth amendment, the injured party may consider two sanctions: she may seek to invoke the exclusionary rule in her state criminal proceeding and she may consider bringing an action under section 1983.

[190] 471 U.S. 1 (1985); *see infra* notes 197-224 and accompanying text.

[191] Jenkins v. Averett, 424 F.2d 1228, 1231-33 (4th Cir. 1970). In *Jenkins* the plaintiff and his friends were allegedly harassing another group of boys. *Id.* at 1230-31. When police officers saw them, all the boys dispersed, except for the plaintiff who was holding a tire tool which had been thrown at him. *Id.* A police officer, who stated that he could not tell that the bar was not a gun, began chasing the plaintiff. *Id.* When the officer ordered the plaintiff to halt, he dropped the bar. *Id.* The police officer then shot him at close range. *Id.* The officer stated that he accidentally shot the plaintiff in the thigh while trying to arrest him and admitted that the shot could have hit the plaintiff in the stomach. *Id.* The Fourth Circuit Court of Appeals found that the officer was reckless and wanton, and that such action was arbitrary. *Id.* at 1232. The court found that the conduct violated the plaintiff's right to personal security under the fourth amendment. *Id.* Although the court based its holding on the fourth amendment, its findings that the conduct was reckless and arbitrary could also support a violation of substantive due process. *See supra* notes 186-87 and accompanying text.

[192] 481 F.2d 1028 (2d Cir.), *cert. denied*, 414 U.S. 1033 (1973).

[193] *See, e.g.*, Gumz v. Morrissette, 772 F.2d 1395, 1399 (7th Cir. 1985), *cert. denied*, 475 U.S. 1123 (1986), *overruled*, Lester v. City of Chicago, 830 F.2d 706 (7th Cir. 1987).

See, e.g., id. at 1404 (Easterbrook, J., concurring). *But see* Metcalf v. Long, 615 F. Supp. 1108, 1118-21 (D. Del. 1985) (fourth amendment applies to claims based on the manner of arrest; substantive due process applies to claims based on force used when suspect is in custody).

Supreme Court's recent decision in *Garner*, however, has caused courts to examine whether the alleged conduct violated the fourth amendment.[195] But *Garner* has not dispelled the uncertainty as to the proper relationship between claims raised under the fourth amendment and claims raised under substantive due process.[196]

A. Balancing Interests Under the Fourth Amendment

In *Tennessee v. Garner*,[197] a police officer thought that Garner, an unarmed burglary suspect, would elude capture if allowed to climb a nearby fence; to prevent a possible escape, the officer shot Garner in the back of the head, killing him.[198] The issue before the Court was the constitutionality of a Tennessee statute[199] that authorized officers to use deadly force to stop a fleeing felon after warning the felon of their intention to arrest.[200] The Court held that the statute was not facially invalid under the fourth amendment, but rather invalid as applied to these circumstances because it appeared to authorize the officer's "use of deadly force to prevent the escape of all felony suspects, whatever the circumstances."[201]

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[195] *See infra* notes 231-70 and accompanying text.

[196] *See infra* notes 231-80 and accompanying text.

[197] 471 U.S. 1 (1985).

[198] *Garner*, 471 U.S. at 3. The police officer was "reasonably sure" that Garner was unarmed while committing a burglary at night. *Id.* The officer ordered Garner to stop, but Garner did not heed the command. *Id.* at 4.

[199] TENN. CODE ANN. § 40-7-108 (1982). The statute provides that "[i]f, after notice of the intention to arrest the defendant, he either flee or forcibly resist, the officer may use all the necessary means to effect the arrest." *Id.*

[200] 471 U.S. at 3.

[201] *Id.* at 11-12. Some judges, however, have interpreted the *Garner* decision as one not addressing whether the statute was constitutional, but rather whether the police officer's conduct was a violation of the fourth amendment. *See, e.g.*, Gilmere v. City of Atlanta, 774 F.2d 1495, 1507 n.12 (11th Cir. 1985) (en banc) (Tjoflat, J., concurring in part, dissenting in part), *cert. denied*, 476 U.S. 1115, 1124 (1986). In *Gilmere*, Judge Tjoflat stated, "Since the state statute could not cure any fourth amendment violation that might have occurred, its provisions were irrelevant in the Court's analysis of the scope of the fourth amendment." *Id.*

The procedural history of *Garner*, however, reveals that when the Sixth Circuit had first considered the case, it affirmed the district court's dismissal of the claims against the officer and his superiors because of the officers' qualified immunity from liability for constitutional claims. Garner v. Memphis Police Dep't, 600 F.2d 52, 54 (6th Cir. 1979). The Sixth Circuit had found that the officer had acted in good faith reliance on the Tennessee statute, which had authorized deadly force, but remanded for a determination of the City's liability. *Id.* at 54-55. The lower court then held that the statute was constitutional, but the Sixth Circuit reversed the district court's judgment. Garner v. Memphis Police Dep't, 710 F.2d 240, 249 (6th Cir. 1983) (en banc), *aff'd sub nom.* Tennessee v. Garner, 471 U.S. 1 (1985). The Supreme Court in *Garner* thus had before it the issue of the constitutionality of the statute. 471 U.S. at 3;

The Court first determined that the officer had seized Garner within the meaning of the fourth amendment.[202] The Court stated that officers seize an individual whenever they "restrain the freedom of a person to walk away."[203] The Court emphasized that even though police officers may have probable cause to seize an individual, their seizure may nonetheless violate the fourth amendment if the means used are unreasonable.[204]

In determining whether the seizure violated the fourth amendment, the Court recognized "the balancing of competing interests" as the "key principle of the fourth amendment."[205] The Court stated that the fourth amendment requires the courts to balance an individual's interest in being free from intrusion against the government's interests in causing the intrusion.[206] When considering the plaintiff's interests, the Court found that he had a fundamental interest in his life and that both he and society had an interest in ensuring a judicial determination of his guilt.[207] In contrast to these significant interests, the Court found that the state had an interest in providing effective law enforcement.[208] The Court also found that studies of police departments do not indicate that the use of deadly force inhibits flight.[209] After considering these interests, the Court stated, "It is not better that all felony suspects die than that they escape."[210] The Court declared that officers may use deadly force to seize a suspect only when they believe the person "poses a threat of serious physical harm, either to the officer or to others."[211] Because it determined that

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see also Fernandez v. Leonard, 784 F.2d 1209 (1st Cir. 1986). The *Fernandez* court stated, "The novel issue in *Garner*, however, was not whether a shooting by the police was a seizure subject to the reasonableness requirement of the fourth amendment but whether a state statute that authorized the use of deadly force to secure the arrest of nondangerous fleeing felons violated that reasonableness requirement." *Id.* at 1217 n.3. These different interpretations of the holding of *Garner* may have arisen as a result of a statement made by the dissent in *Garner*. Justice O'Connor stated, "The issue is not the constitutional validity of the Tennessee statute on its face or as applied to some hypothetical set of facts. Instead, the issue is whether the use of deadly force by [the officer] under the circumstances of this case violated Garner's constitutional rights." *Garner*, 471 U.S. at 25.

[202] *Garner*, 471 U.S. at 7.

[203] *Id.*

[204] *Id.* at 7-8.

[205] *Id.* at 8 (quoting Michigan v. Summers, 452 U.S. 692, 700 n.12 (1981)).

[206] *Id.* The Court examined the reasonableness of the means by considering the extent of the intrusion against the need for it. *Id.* at 20-22. The dissent agreed that the fourth amendment requires courts to balance "the important public interest in crime prevention and detection" against the individual's interest. *Id.* at 25-26 (O'Connor, J., dissenting). The dissent also recognized that balancing entails examination of the "nature and quality of the intrusion." *Id.*

[207] *Id.* at 9.

[208] *Id.*

[209] *Id.* at 10.

[210] *Id.* at 11.

[211] *Id.*

burglary did not "automatically justify the use of force," the Court found that under the circumstances of this case the plaintiff's interests outweighed the state's interests.[212] The officer's conduct, which the statute authorized, was therefore unreasonable within the meaning of the fourth amendment.[213]

After weighing the interests involved, the Court rejected interpreting the fourth amendment to incorporate the common-law rule that officers may use whatever force is necessary to stop a fleeing felon.[214] The Court noted that even though almost one-half of the states had adopted the common-law rule[215] and that there is not a "constant or overwhelming trend away from the common-law rule,"[216] the rule was nevertheless inappropriate for modern times.[217]

Justice O'Connor dissented, joined by Chief Justice Burger and Justice Rehnquist.[218] She contended that the Court had created a constitutional right to flee for burglary suspects.[219] In her view, the Court had improperly weighed the asserted interests[220] by failing to fully account for the damaging effects of its decision on law enforcement and public safety.[221]

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[212] *Id.* at 21-22.

[213] *Id.*

[214] *Id.* at 12-15.

[215] *Id.* at 15-16.

[216] *Id.* at 18.

[217] *Id.* at 18-20. The Court explained that the rule developed when all felonies were punishable by death and weapons were rudimentary. *Id.* at 13-15. In addition, the Court commented that some police departments have adopted procedures that are more restrictive than the common-law rule. *Id.* at 15-20. The Court also stated that because the common-law rule permitted officers to use deadly force to capture fleeing felons but not fleeing misdemeanants, officers would have less difficulty in the field distinguishing between individuals who are dangerous and those who are not dangerous than they would in distinguishing between individuals committing felonies and those committing misdemeanors. *Id.* at 20.

[218] *Id.* at 22-33 (O'Connor, J., dissenting).

[219] *Id.* at 23.

[220] *Id.* at 25-31.

[221] *Id.* With respect to a suspect's fundamental interest in her life, Justice O'Connor commented that a suspect can protect this interest by heeding an officer's command to halt. *Id.* at 29. She also found that the state's interest in crime prevention and detection was compelling because burglary is a serious and dangerous felony. *Id.* at 26-28. She determined that under the circumstances, the officer's decision to seize the burglary suspect was reasonable within the meaning of the fourth amendment. *Id.* at 29-30. She also summarily rejected other claims based on the sixth and eighth amendments and on substantive due process, *id.* at 30-31; thereby disagreeing with the Sixth Circuit's holding that the statute violated both the fourth amendment and substantive due process, Garner v. Memphis Police Dep't, 710 F.2d 240, 246-47 (6th Cir. 1983) (en banc), *aff'd sub nom.* Tennessee v. Garner, 471 U.S. 1 (1985).

In the alternative, she argued that even if the officer's conduct violated the fourth amendment, she would not join the Court's opinion, because the Court failed to limit its holding to the use of firearms by police officers. *Garner*, 471 U.S. at 31. She found that the Court's opinion could prohibit any force by police officers that could be lethal. *Id.* With respect to weapons carried

Even though all the Justices agreed in *Garner* that examining the constitutionality of the state statute required the Court to balance the interests of the seized individual against the interests of the state, they failed to agree on the proper weight to accord to these interests. They also failed to agree on the significance of the common-law rule and the states' current practices.[222] Although the Court found the statute unconstitutional as applied under the fourth amendment, some courts[223] and commentators[224] have found the Court's analysis indistinguishable from its analysis of substantive due process issues.

B. The Circuits' Evaluation of Personal Security Claims Under the Fourth Amendment and Substantive Due Process

Prior to the Supreme Court's decision in *Garner*, the circuit courts had evaluated personal security claims using the *Glick* factors to determine whether the alleged conduct violated substantive due process.[225] Since *Garner,* many courts have begun addressing personal security claims based on an alleged violation of the fourth amendment.[226] As a result, some courts have compared and contrasted claims based on the fourth amendment with those based on substantive due

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by suspects, she stated that the Court's opinion was deficient because it failed to indicate whether weapons, such as knives, baseball bats, and rope, could support an officer's belief that an individual was dangerous. *Id.* at 32. She emphasized that because officers have only a few seconds to decide whether to use deadly force, the Court's opinion will result in courts "second-guessing" police officers and will engender many suits seeking to determine whether the particular object posed a danger under the circumstances. *Id.* at 31-32.

[222] Professor Aleinikoff has stated that the Court's decision in *Garner* demonstrates "grisly instrumentalism" because the Court focused on whether "shooting suspects is a 'sufficiently productive means' of furthering its law enforcement interests." Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 990-91 (1987). He criticized the Court for its poor analysis of the fourth amendment, and contended that the Court failed to examine "the purpose, scope or source of the protection against unreasonable seizures." *Id.* at 990.

[223] *See infra* notes 261-67 and accompanying text.

[224] *See, e.g.*, Winter, Tennessee v. Garner *and the Democratic Practice of Judicial Review*, 14 N.Y.U. REV. L. & SOC. CHANGE 679, 686-87 (1986) (Court's analysis in *Garner* is similar to its analysis of incorporation issues, which involves a normative approach); Comment, *Constitutional Law—Deadly Force and the Fourth Amendment:* Tennessee v. Garner, 20 SUFFOLK U.L. REV. 76, 84 (1986) (Court did not examine the decedent's expectation of privacy, but instead focussed on due process issues). *See generally* Comment, *Criminal Law—The Right to Run: Deadly Force and the Fleeing Felon*, Tennessee v. Garner, 11 S. ILL. U.L.J. 171, 183 (1986) (legislatures, not the Court, should balance public and private interests).

[225] *See supra* notes 192-94 and accompanying text.

[226] *See infra* notes 231-40, 261-67 and accompanying text.

process.[227] Some courts, however, have avoided discussing the relationship[228] or have combined the reasonableness test under the fourth amendment with the *Glick* factors under substantive due process.[222] Responding to the array of different positions on the issue, the Fourth Circuit Court of Appeals now appears ready to apply a single standard of liability to all personal security claims—regardless of whether the claim is based on fourth, eighth, or fourteenth amendment rights.[230]

The Eleventh Circuit Court of Appeals, sitting en banc, held that the use of force by police officers during an arrest violated both substantive due process and the fourth amendment.[231] The Eleventh Circuit examined the district court's findings that the beating during an arrest had occurred with little or no provocation and that the officer who shot the decedent could not have reasonably believed that his life was in danger.[232] After considering *Rochin*'s "shocks the conscience" test and the *Glick* factors,[233] the court held that the beating and shooting of the decedent constituted a violation of substantive due process.[234]

In examining the fourth amendment claim, the court referred to the balancing test articulated in *Garner*.[235] The court stated that

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[227] *See, e.g.*, Dodd v. City of Norwich, 827 F.2d 1, 3-6 (2d Cir.), *rev'd on reargument*, 827 F.2d 7 (2d Cir. 1987), *cert. denied*, 108 S. Ct. 701 (1988); Spell v. McDaniel, 824 F.2d 1380, 1384 n.3 (4th Cir. 1987), *cert denied sub nom.* City of Fayetteville v. Spell, 108 S. Ct. 752 (1988); Smith v. City of Fontana, 818 F.2d 1411, 1416-17 (9th Cir.), *cert. denied*, 108 S. Ct. 311 (1987); Dugan v. Brooks, 818 F.2d 513, 515-17 (6th Cir. 1987) (plaintiff stated a violation of the fourth amendment and substantive due process by alleging that the officer had maliciously inflicted a serious injury while arresting him without probable cause); Griffin v. Hilke, 804 F.2d 1052, 1056 (8th Cir. 1986), *cert. denied*, 107 S. Ct. 3184, 3185 (1987); New v. City of Minneapolis, 792 F.2d 724, 726 (8th Cir. 1986); Fernandez v. Leonard, 784 F.2d 1209, 1214-17 (1st Cir. 1986); Gilmere v. City of Atlanta, 774 F.2d 1495, 1499-1502 (11th Cir. 1985) (en banc), *cert. denied*, 476 U.S. 1115, 1124 (1986); Leber v. Smith, 773 F.2d 101, 104-05 (6th Cir. 1985), *cert. denied*, 475 U.S. 1084 (1986). *See generally* Shillingford v. Holmes, 634 F.2d 263, 265 (5th Cir. Unit A 1981) (the fourth and fourteenth amendments protect the "right to be free of state-occasioned damage to a person's bodily integrity").

[228] *See infra* notes 253-54 and accompanying text.

[229] *See infra* notes 261-67 and accompanying text.

[230] Justice v. Dennis, 834 F.2d 380 (4th Cir. 1987) (en banc); *see infra* notes 271-80 and accompanying text (discussing the Fourth Circuit position).

[231] *Gilmere*, 774 F.2d at 1499-1502. In *Gilmere*, the decedent, after avoiding an automobile collision, had allegedly threatened a driver with a gun. *Id.* at 1496. When two police officers arrived at the decedent's home they ordered the inebriated decedent to go to their car for questioning. *Id.* at 1496-97. When the decedent refused to go and attempted to flee, the officers began beating him, *id.* at 1497; and a scuffle ensued during which one of the officers' revolver fell to the ground, *id.* at 1497 n.1. The decedent then lunged toward the other officer, who reacted by fatally shooting him at close range. *Id.*

[232] *Id.* at 1501.

[233] *Id.* at 1500-01.

[234] *Id.* at 1501.

[235] *Id.* at 1502.

balancing entails consideration of four factors: 1) the scope of the particular intrusion; 2) the manner in which the officer conducts the intrusion; 3) the justification for initiating the intrusion, and 4) the place in which the officer conducts the intrusion.[236] The court found that the decedent had a significant interest in bodily security, the officers' use of force while the decedent was in custody was "only minimally, if at all, necessary to enable them to carry out their official duties,"[237] and the location of the scuffle did not pose a threat to the officers.[238] In addition, the court found that the decedent was not dangerous and did not provoke the officers' use of force.[239] The court therefore held that under the circumstances, both the beating and the shooting of the decedent violated the fourth amendment.[240]

The Seventh Circuit Court of Appeals, in contrast to the Eleventh Circuit, recently refused to allow a plaintiff injured during her arrest to assert both a violation of substantive due process and the fourth amendment.[241] It held that the fourth amendment was the sole basis for recovery.[242] In rejecting substantive due process as a basis for a claim alleging the use of unlawful force during an arrest, the Seventh Circuit overruled a prior decision which had applied the stringent substantive due process standard to a claim that officials had used excessive force to effectuate an arrest.[243] The Seventh Circuit stated two reasons why the fourth amendment was the sole basis for plaintiff's excessive force claim. First, the court noted that the terms of the fourth amendment are " 'specifically directed to methods of arrest and seizure of the person.' "[244] By looking to the language of the amendment, the court was impliedly relying on the maxim *expressio unius est exclusio alterius,* expression of certain powers implies ex-

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[236] *Id.* The court found these factors to be relevant because the Supreme Court had articulated them in Bell v. Wolfish, 441 U.S. 520 (1979), as it analyzed a fourth amendment issue presented by a prisoner. 441 U.S. at 559. In *Bell* a prisoner had challenged, *inter alia,* the prison's requirement of a visual body-cavity inspection after each contact visit with a person from outside the institution. *Id.* at 559-60. Although the Court recognized that abusive inspections would constitute a violation, the prison's rules, which did not require probable cause for inspection, were constitutional. *Id.*

[237] *Gilmere,* 774 F.2d at 1502.

[238] *Id.*

[239] *Id.*

[240] *Id.*

[241] Lester v. City of Chicago, 830 F.2d 706 (7th Cir. 1987).

[242] *Id.* at 710.

[243] Gumz v. Morrissette, 772 F.2d 1395, 1400 (7th Cir. 1985), *cert. denied,* 475 U.S. 1123 (1986), *overruled on this ground,* Lester v. City of Chicago, 830 F.2d 706, 710-14 (7th Cir. 1987).

[244] *Lester,* 830 F.2d at 710 (citing Bell v. Milwaukee, 746 F.2d 1205, 1278 n.87 (7th Cir. 1984) (*Bell*'s discussion of the point cites Garner v. Memphis Police Dep't, 710 F.2d 240, 243 (6th Cir. 1983), *aff'd sub nom.* Tennessee v. Garner, 471 U.S. 1 (1985))).

clusion of others.

As a second reason, the court explained that the history of substantive due process indicates that the fourth amendment—and not the fourteenth—is the proper basis for a claim arising from an arrest.[245] The court emphasized that the fourth amendment was not applicable to the states when the Supreme Court in *Rochin v. California*[246] recognized substantive due process as a defense in a criminal proceeding.[247] It stressed that in contexts similar to *Rochin* the Supreme Court had recently relied on the fourth amendment's "objective reasonableness" standard, not substantive due process.[248] The Seventh Circuit also rejected the assertion that substantive due process analysis, including the requisite showing of malice, entails "the same balancing of interests the Supreme Court undertook in *Garner*."[249] It found that the two standards were incompatible because the fourth amendment test proscribes *unreasonable* seizures, an objective inquiry which is conducted "without regard to the officer's underlying intent or motivation."[250] It is this objective reasonableness standard, the Seventh Circuit decided, which properly balances the individual and societal interests detailed in *Garner*.[251]

Although some courts and judges have articulated their views concerning the relationship of substantive due process claims and fourth amendment claims,[252] other courts have been less forthright and

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[245] *Id.* at 710-12.

[246] 342 U.S. 165 (1952).

[247] *Lester*, 830 F.2d at 710. Nine years after the decision in *Rochin*, the Supreme Court reversed its position and applied the fourth amendment exclusionary rule to the states in Mapp v. Ohio, 367 U.S. 643 (1961). *See Lester*, 830 F.2d at 711.

[248] *Lester*, 830 F.2d at 711 (citing Winston v. Lee, 470 U.S. 753 (1985); United States v. Montoya de Hernandez, 473 U.S. 531 (1985)).

[249] *Id.* at 712 (citing for comparison Jamieson v. Shaw, 722 F.2d 1205, 1210 (5th Cir. 1985)). In *Jamieson*, the Fifth Circuit stated that its test for excessive force, a test identical to the Seventh Circuit's test for substantive due process, was similar to the fourth amendment balancing standard used by the Supreme Court in *Garner*. 722 F.2d at 1210.

[250] *Lester*, 830 F.2d at 712.

[251] *Id.* at 711. Although a majority of the judges on the Seventh Circuit agreed with the decision in *Lester*, several judges opposed the elimination of substantive due process as an alternative or companion basis for bringing an excessive force claim arising from an arrest. *Id.* at 713 n.6. These judges argued that substantive due process analysis should be retained as an available method of analyzing fourth amendment cases involving, e.g., the exclusionary rule or the "fruit of the poisonous tree" doctrine, which may "fall within the traditional ambit of due process." *Id.* The judges also asserted that the majority had foreclosed resort to substantive due process unnecessarily, because there was no Supreme Court authority mandating a reassessment of the circuit's existing test for excessive force. *Id.*

[252] *See supra* notes 231-51 and accompanying text; *see also* Dodd v. City of Norwich, 827 F.2d 1, 3-6 (2d Cir.), *rev'd on reargument*, 827 F2d 7 (2d Cir. 1987), *cert. denied*, 108 S. Ct. 701 (1988). In Dodd v. City of Norwich, the Second Circuit Court of Appeals narrowly interpreted the Supreme Court's decision in *Garner*. *Id.* On reargument the court determined that an officer,

sometimes confusing. For example, when confronted with claims arising from force used during custody, the courts have used a variety of approaches. The Ninth Circuit Court of Appeals deliberately avoided discussing a substantive due process claim by upholding a jury's verdict under the fourth amendment.[253] It held that the fourth amendment was applicable to a claim alleging that a police officer had used force while transporting the plaintiff to the station.[254] The Second Circuit Court of Appeals examined a similar claim, but upheld the jury's verdict finding a violation of substantive due process.[255] In this case the plaintiff alleged that the officer had used excessive force *during* and *after* her arrest, violating her rights under the fifth and fourteenth amendments.[256] Although the court found a substantive due process violation, it approved of the lower court's jury instruction, which articulated a *fourth* amendment standard.[257] Adding to this mix of approaches is a decision of a Delaware federal district court, which after discussing the *Garner* decision,[258] adhered to a rigorous substantive due process standard in examining a claim based on an officer's unlawful use of force while the plaintiff was in custody.[259]

Other circuit courts have considered the *Glick* factors—including the factor of malice—in examining claims ostensibly based solely on the fourth amendment.[260] The Fifth Circuit Court of Appeals deter-

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who had accidently killed the decedent during an attempted arrest, had not violated the fourth amendment because "*Garner* bars the *deliberate* use of deadly force to seize an unarmed, fleeing, suspected felon." *Id.* at 7 (emphasis added). The court observed that because the decedent had been seized within the meaning of the fourth amendment by handcuffing him prior to the shooting and because the use of force was accidental, *Garner* was inapplicable. *Id.* It explained that negligent conduct does not violate the fourth amendment. *Id.* Judge Pratt, who vehemently dissented, cogently argued that even after the decedent was seized the fourth amendment required the officer to act reasonably. *Id.* at 8 (Pratt, J., dissenting).

[253] Robins v. Harum, 773 F.2d 1004, 1007-10 & n.1 (9th Cir. 1985).

[254] *Id.* at 1010; *But cf.* Brower v. County of Inyo, 817 F.2d 540, 546-47 (9th Cir. 1987) (fourth amendment protections inapplicable to police use of roadblock), *petition for cert. filed,* 56 U.S.L.W. 3165 (U.S. Aug. 13, 1987) (No. 87-248).

[255] Fiacco v. City of Rensselaer, 783 F.2d 319, 321-23, 325-26 (2d Cir. 1986), *cert. denied,* 107 S. Ct. 1384 (1987).

[256] *Id.* at 321-22.

[257] *Id.* at 325. The instruction had provided that police officers may use "such force as is necessary under the circumstances to effect a lawful arrest," *id.*, but that they may not use force that is "unreasonable, unnecessary, or violent," *id.* The court also approved the instruction which stated that to determine liability the jury did not need to find that the officer acted maliciously. *Id.*

[258] Metcalf v. Long, 615 F. Supp. 1108, 1118-19 (D. Del. 1985).

[259] *Id.* at 1120-21. The court did not find the alleged conduct to be brutal and shocking. *Id.* at 1121. The court stated that the fourth amendment is applicable to force claims based on the manner of the arrest and substantive due process is applicable to claims based on force used while the suspect was in custody. *Id.* at 1118-20.

[260] In Patzner v. Burkett, 779 F.2d 1363, 1371 (8th Cir. 1985), a case decided before *Garner*,

mined that a plaintiff had sufficiently alleged a violation of her fourth amendment right to be free from unreasonable force.[261] The plaintiff alleged that she had been a passenger in a car and sustained severe injuries when police officers impermissibly set up a roadblock in order to apprehend the driver.[262] The court stated that after *Garner*, "it is now settled that the Fourth Amendment limits the level of force that may be used to accomplish a seizure of the person: the level of force must be 'reasonable.' "[263] After determining that the officers had seized the plaintiff within the meaning of the fourth amendment,[264] the court noted that the fourth amendment requires courts to balance the parties' interests.[265] Although the court had stated that the fourth amendment forbids unreasonable seizures, it stated that the *Glick* factors express "a similar test."[266] The court explained that the fourth

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the Eighth Circuit Court of Appeals examined a double amputee's claim that the officers, who arrested him in his home, had dragged him to the police station without asking him if he wanted a wheelchair or his prosthetic legs. 779 F.2d at 1365-66. The court did not refer to the claim as one based on the fourth amendment or substantive due process. It labeled the plaintiff's claim as an "excessive force claim." *Id.* at 1371. Although the court mentioned *Glick*, it stated that a plaintiff may establish a violation of personal security if "the degree of force used was unreasonable under the circumstances, or if the force was used for an improper purpose." *Id.* The first test, reasonableness, states a fourth amendment standard, while the second test, improper purpose, is one of the *Glick* factors used in examining substantive due process claims. Other courts, before and after *Garner*, have similarly combined the standards. *See, e.g.*, Bailey v. Andrews, 811 F.2d 366, 373 (7th Cir. 1987) (while not specifically relying of the *Glick* factors, the Seventh Circuit holds "an officer may use only the degree of force that is reasonable under the circumstances"); Clark v. Beville, 730 F.2d 739 (11th Cir. 1984). The *Clark* court did not specify a basis for an unlawful force claim occurring during the arrest, stating that the test is reasonableness under the circumstances, and cited as support, Shillingford v. Holmes, 634 F.2d 263, 265 (5th Cir. Unit A 1981), a case using the *Glick* factors. *Clark*, 730 F.2d at 740.

[261] Jamieson v. Shaw, 772 F.2d 1205, 1209-12 (5th Cir. 1985).

[262] *Id.* at 1207. She alleged that the officers knew that there was not a warrant outstanding for the driver, that the driver was mentally ill, and that there were passengers in the car. *Id.*

[263] *Id.* at 1209.

[264] *Id.* at 1210. The court stated that the officers had seized the plaintiff when the officers deliberately placed the roadblock in front of the car in which they knew she was travelling. *Id. Contra* Brower v. County of Inyo, 817 F.2d 540 (9th Cir. 1987), *petition for cert. filed*, 56 U.S.L.W. 3165 (U.S. Aug. 13, 1987) (No. 87-248). In *Brower*, the Ninth Circuit held that a roadblock did not operate as a "seizure" of the driver of the target automobile. *Id.* at 546-47. The court distinguished the contrary authority in *Jamieson* by stating that the plaintiff in *Jamieson* was an unintended victim of the roadblock. *Id.* at 546. For incisive criticism of the majority's weak attempt in *Brower* to distinguish *Jamieson* and the Supreme Court decision in *Garner*, see the dissent in the *Brower* case by Judge Pregerson. *Id.* at 548-51 (Pregerson, J., concurring in part, dissenting in part).

[265] *Jamieson*, 772 F.2d at 1210. The court quoted *Garner*'s balancing test and it's statement that balancing is the essence of the fourth amendment. *Id.* It also recognized that balancing requires courts to examine the "totality of the circumstances." *Id.*

[266] *Id.* The court paraphrased the *Glick* factors as follows:

> In determining whether the state officer has crossed the constitutional line that would make the physical abuse actionable under Section 1983, we must inquire into the amount of force

amendment and the *Glick* test require the courts to balance "the same competing interests."[267]

In another decision, the Fifth Circuit explained its post-*Garner* requirements for establishing a personal security claim arising from an arrest.[268] It stated that the force used must not only be "grossly disproportionate under the circumstances, but also . . . so inspired by malice as to amount to an abuse of official power that shocks the conscience."[269] It found *Garner* applicable to claims asserted against municipalities, not against individual officers.[270]

In the Fourth Circuit Court of Appeals, the standard to be applied to a claim based exclusively on the fourth amendment is unclear. In one case involving an arrest,[271] the circuit court identified the fourth amendment as an independent source of protection against excessive force,[272] and applied a "reasonableness" test modeled on the standard developed by the Supreme Court in *Tennessee v. Garner*.[273] The reasoning of this decision was subsequently rejected by the circuit, sitting en banc, in a case involving infliction of force during custody.[274]

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used in relationship to the need presented, the extent of the injury inflicted and the motives of the state officer. If the state officer's action caused severe injuries, was grossly disproportionate to the need for action under the circumstances and was inspired by malice rather than merely careless or unwise excess of zeal so that it amounted to an abuse of official power that shocks the conscience, it should be redressed under Section 1983.

Id.

[267] *Id.* at 1210 n.7. In Bibbo v. Mulhern, 621 F. Supp. 1018, 1023-24 (D. Mass. 1985), a district court in Massachusetts came to the same conclusion. It found the *Glick* factors applicable to a fourth amendment personal security claim because the latter requires the court to consider the totality of the circumstances. 621 F. Supp. at 1024. In addition, he found that the *Glick* factors distinguish constitutional violations from ordinary torts. *Id.*

[268] Hendrix v. Matlock, 782 F.2d 1273, 1274-75 (5th Cir. 1986).

[269] *Id.* at 1275.

[270] *Id.*

[271] Kidd v. O'Neil, 774 F.2d 1252 (4th Cir. 1985), *overruled in part,* Justice v. Dennis, 834 F.2d 380 (4th Cir. 1987) (en banc). In *Kidd* the plaintiff brought a section 1983 action alleging that certain members of the Fairfax, Virginia police force " 'brutally' and 'severely' beat, kicked, and maced him while he was handcuffed" during the course of an attempted arrest. *Id.* at 1253.

[272] *Id.* at 1254-55 (*Garner* makes clear that the fourth amendment reasonableness requirement applies to the method by which seizures are to be made).

[273] *Id.* at 1256-57 (citing Tennessee v. Garner, 471 U.S. 1 (1985)). The Fourth Circuit stated that the terms "inhumane," "malicious," "sadistic," and "shocking to the conscience," which had been used in its prior fourth amendment tests, are not standards for establishing liability, but rather are descriptions of force that exceed an officer's privilege to use force in various contexts. *Id.* at 1261 & n.15. The court stated, "Because the nature of the state interests, hence agent privilege, differs depending upon the context, the nature of conduct necessarily exceeding privilege may also differ in 'degree' or severity from context to context." *Id.* at 1261 n.15.

[274] Justice v. Dennis, 834 F.2d 380 (4th Cir. 1987) (en banc). In *Justice,* the plaintiff, who had been arrested for driving under the influence of alcohol, was taken before a magistrate and then escorted to a booking area by the arresting officers. *Id.* at 381. Throughout the process the plaintiff verbally abused the police and engaged in "active physical resistance," until during the booking, when the plaintiff was maced by one of the officers. *Id.*

Although the claim might have been treated as one arising from an arrest,[275] the Fourth Circuit treated the claim as falling under the fifth amendment.[276] This distinction mattered little, however, because the court went on to identify the four factors of substantive due process as "basic principles" in all personal security claims.[277] Thus, although acknowledging distinctions between claims arising from the separate amendments, the court nevertheless chose to establish a standard which in effect imposes a state-of-mind requirement on fourth amendment claims, a result at odds with the objective reasonableness standard used by the Supreme Court in *Garner*.[278]

The Fourth Circuit's decision is confusing because it fails to indicate whether the circuit now holds the substantive due process analysis to be the functional equivalent of the balancing test in *Garner*, as the Fifth Circuit has decided,[279] or whether the circuit agrees with the Seventh and Eleventh Circuits that there exists a separate objective fourth amendment standard to be applied but only under the proper conditions.[280] The Fourth Circuit's vacillation is symptomatic of the difficult task of reconciling the separate interests embodied in the fourth amendment and the principles of substantive due process, a difficulty no less pronounced in the judicial attempts to set the proper relationship between substantive due process and the eighth amendment.

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[275] *See id.* at 388. (Phillips, J., dissenting). Judge Phillips, author of the court's prior opinion in *Kidd* and the dissent in *Justice*, argued that the fourth amendment covers more than just the "initial point" of taking custody over the person. *Id.* He argued that the fourth amendment remains a source of protection throughout the time the party arrested is in the custody of the arresting officer. *Id.* (citing Robins v. Harum, 773 F.3d 1004, 1010 (9th Cir. 1985) (fourth amendment covers use of excessive force while transporting arrested party to police station); Lester v. City of Chicago, 830 F.2d 706, 713 n.7 (7th Cir. 1987) (agreeing with *Robins*, and applying fourth amendment to use of excessive force while arrested party in the custody of arresting officers at the police station)).

[276] *Id.* at 383 n.4.

[277] *Id.* at 383. This application of the substantive due process factors to the fourth amendment setting had precedent from a panel decision of the circuit three months prior to the decision in *Justice*. Graham v. City of Charlotte, 827 F.2d 945 (4th Cir. 1987). In *Graham*, the court applied a formulation of the substantive due process test, including the factor of malice, to a personal security claim arising from the use of force during an investigatory stop. *Id.* at 948 (citing the test used in King v. Blankenship, 636 F.2d 70, 73 (4th Cir. 1980)). Curiously, however, the majority opinion in *Justice* fails to mention the earlier decision in *Graham*.

[278] *See supra* notes 205-13 and accompanying text.

[279] *See supra* notes 261-67 and accompanying text.

[280] Of course, the question of whether an objective standard is proper for fourth amendment claims is separate from the question of whether a section 1983 plaintiff should be allowed to employ such a standard in tandem with a claim grounded on principles of substantive due process. *Compare* Lester v. City of Chicago, 830 F.2d 706, 710-12 (7th Cir. 1987) (use of excessive force during arrest covered exclusively by fourth amendment) *with* Gilmere v. City of Atlanta, 774 F.2d 1495, 1499-1502 (11th Cir. 1985) (en banc) (use excessive force during arrest violates both fourth amendment and substantive due process), *cert. denied*, 476 U.S. 1115 , 1124 (1986).

III. Personal Security Claims Under the Eighth Amendment

The United States Supreme Court has recognized that "[t]here is no iron curtain drawn between the Constitution and the prisons of this country."[281] Courts, however, have recognized a need to accord deference to prison administrators[282] when examining a prisoner's[283] personal security claim based on the eighth amendment,[284] which in part prohibits "cruel and unusual punishments."[285] In determining whether a prisoner has established a constitutional violation under the eighth amendment, courts have struggled to determine the applicable standard.[286]

In *Whitley v. Albers*[287] the Supreme Court recently discussed the appropriate standard for establishing a personal security claim under the eighth amendment when guards injure a prisoner during the quelling of a prison riot.[288] It afforded broad deference to prison

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[281] Wolff v. McDonnell, 418 U.S. 539, 555-56 (1974).

[282] The Supreme Court recently reaffirmed that courts should afford broad deference to prison officials in Turner v. Safley, 107 S. Ct. 2254 (1987), as it examined prison regulations concerning mail and marriage. 107 S. Ct. at 2258. The Court attempted to explain its prior "prisoners' rights" cases by clearly defining the scope of deference accorded to prison officials. *Id* at 2259-62. The Court explained, "[W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." *Id.* at 2261. To determine the reasonableness of the regulation, the Court stated that four factors were relevant: whether there was a "valid rational connection" between the prison regulation and the government's asserted legitimate interest; whether prisoners have other ways of exercising the restricted right; whether accommodation by the prison official would affect guards, other prisoners, and prison resources; and whether there is an "obvious, easy alternative" available, signifying that the prison regulation is an "exaggerated response" by prison officials. *Id.* at 2262; *see also* O'Lone v. Estate of Shabazz, 107 S. Ct 2400, 2404-05 (1987) (adhering to test articulated in *Turner*). *See generally* Procunier v. Martinez, 416 U.S. 396, 405 (1974) (deference to prison officials should not "encompass any failure to take cognizance of valid constitutional claims").

[283] *See* Ingraham v. Wright, 430 U.S. 651, 664 (1977) (eighth amendment designed to protect those individuals convicted of crimes; eighth amendment not applicable to students' claim of excessive paddling).

[284] *See, e.g.*, McRorie v. Shimoda, 795 F.2d 780, 784 (9th Cir. 1986). *See generally* Wolff v. McDonnell, 418 U.S. 539, 556 (1973) (the Court stated that "there must be mutual accommodation between institutional needs and objectives and the provisions of the Constitution that are of general application").

[285] U.S. Const. amend. VIII. The eighth amendment is applicable to the states through the fourteenth amendment. Robinson v. California, 370 U.S. 660, 667 (1962).

[286] *See, e.g.*, Williams v. Mussomelli, 722 F.2d 1130, 1132 (3d Cir. 1983) (because the eighth amendment limits the government in various ways, "precedents established in one context do not always transfer comfortably to another and therefore must be read with the appropriate distinctions in mind").

[287] 475 U.S. 312 (1986).

[288] *See infra* notes 347-92 and accompanying text.

officials under the eighth amendment and also found that in this context protection available under the eighth amendment is coextensive with protection under substantive due process.[289]

A. *The Eighth Amendment Prohibition Against Cruel and Unusual "Punishments"*

The United States Supreme Court has frequently detailed the history of the eighth amendment.[290] Pointing out that the reach of eighth amendment protection extends only to prisoners,[291] the Court in *Ingraham v. Wright*[292] explained that the amendment limits the criminal process in three ways: it restricts the kinds of punishment that legislatures can impose, it "prohibits" punishment that is "grossly disproportionate to the severity of the crime," and it limits what acts a legislature may deem criminal.[293] The Court declared that for the eighth amendment to be applicable the questioned act must constitute "punishment."[294] In discussing the use of force in prisons, the Court stated, "Prison brutality . . . is 'part of the total *punishment* to which the individual is being subjected for his crime and, as such, is a proper subject for Eighth Amendment scrutiny.' "[295]

The Court's statement that "prison brutality" constitutes "punishment" within the meaning of the eighth amendment indicates that the Court has interpreted the word "punishment" to denote conduct

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[289] *See infra* notes 353-85 and accompanying text.

[290] *See, e.g.*, Gregg v. Georgia, 428 U.S. 153, 169-76 (1976) (Stewart, Powell & Stevens, JJ., concurring).

[291] Ingraham v. Wright, 430 U.S. 651, 664 n.40 (1977).

[292] 430 U.S. 651 (1977).

[293] *Id.* at 667; Williams v. Mussomelli, 722 F.2d 1130, 1132 (3d Cir. 1983); *see also* Whitley v. Albers, 475 U.S. 312, 318 (1986) (the Court observed that "[t]he language of the Eighth Amendment . . . manifests 'an intention to limit the power of those entrusted with the criminal-law function of government' ") (quoting *Ingraham*, 430 U.S. at 664); *infra* notes 360-64 and accompanying text (discussing eighth amendment standard in *Whitley*).

[294] *Ingraham*, 430 U.S. at 670 n.39. Pretrial detainees, however, may not be punished prior to an adjudication of guilt in accordance with due process of law. Bell v. Wolfish, 441 U.S. 520, 535 (1979). In *Bell*, the Supreme Court declared that a state's restrictions on the liberty of pretrial detainees were legitimate and not tantamount to punishment. *Id.* at 541-43.

[295] *Ingraham*, 430 U.S. at 669 (quoting Ingraham v. Wright, 525 F.2d 909, 915 (5th Cir. 1976)) (emphasis added); *see also* Rhodes v. Chapman, 452 U.S. 337, 345 n.11 (1981) (quoting same). The Court also relied on a prior decision in determining that after incarceration only the " 'unnecessary and wanton infliction of pain constitutes cruel and unusual punishment.' " 430 U.S. at 670 (citations omitted) (quoting Gregg v. Georgia, 428 U.S. 153, 173 (1976)); *see infra* notes 356-64 and accompanying text (discussing eighth amendment standard in *Whitley*).

not typically classified as punishment.[296] For example, in *Estelle v. Gamble*[297] the Court held that a prison guard's deliberate indifference to a prisoner's serious medical needs is actionable under the eighth amendment.[298] The Court implied that a prisoner need not prove an express intent to inflict pain.[299] Although other courts have stated that *Estelle* stands for the proposition that such deliberate indifference is "cruel and unusual *punishment*,"[300] the Court stated that such conduct "constitutes the 'unnecessary and wanton infliction of pain.' "[301] In adopting this language as a standard, the Court in *Estelle* thus recognized that the eighth amendment may forbid conduct that is not punishment.[302]

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[296] Some courts have distinguished between claims arising from an official's decision, made after reflection, to administer punishment as a penalty for the prisoner's impermissible conduct and an official's quick decision to administer coercive measures designed to regain control over the prisoner. *See, e.g.*, Ort v. White, 813 F.2d 318 (11th Cir. 1987). In *Ort*, the Eleventh Circuit observed,

> [P]unishment usually is administered to chastise the wrongdoer and to deter him and others from engaging in such unacceptable conduct in the future. Punishment in this sense is not designed to bring an ongoing violation to a halt. . . . Different considerations apply, however, to an immediate coercive measure undertaken by a prison official, necessitated by a spontaneous violation of a prison rule or regulation.

Id. at 322; Sampley v. Ruettgers, 704 F.2d 491, 494-95 (10th Cir. 1983) (an unauthorized beating, even though it does not constitute punishment, falls within the meaning of the eighth amendment). *See generally* Johnson v. Glick, 481 F.2d 1028, 1032 (2d Cir.), *cert. denied*, 414 U.S. 1033 (1973) (punishment is action "deliberately administered for a penal or disciplinary purpose"). Courts have found that both these claims, those arising from a need to discipline or to punish, are actionable under the eighth amendment. *See, e.g.*, Sampley v. Ruettgers, 704 F.2d at 494-95. In *Glick*, Judge Friendly stated that a spontaneous attack, though cruel and unusual, "does not fit any ordinary concept of 'punishment.' " 481 F.2d at 1032. He determined that substantive due process protects both pretrial detainees and prisoners from unnecessary force. *Id.*

[297] 429 U.S. 97 (1976).

[298] *Id.* at 104. In *Ingraham*, the dissent cited *Estelle* for support that the eighth amendment prohibits more than excessive punishment. *Ingraham*, 430 U.S. at 688 n.4 (White, J., dissenting). Justice White stated his belief that "deliberate indifference to a prisoner's medical needs clearly is not punishment inflicted for the commission of a crime; it is merely misconduct by a prison official." *Id.*

[299] *Estelle*, 429 U.S. at 104-05.

[300] *See, e.g.*, Rhodes v. Chapman, 452 U.S. 337, 347 (1981); *Sampley*, 704 F.2d at 495.

[301] *Estelle*, 429 U.S. at 104 (quoting Gregg v. Georgia, 428 U.S. 153, 173 (1976)). The Court first enunciated this phrase as an eighth amendment standard in *Gregg v. Georgia* as it examined a state's death penalty statute. *Gregg*, 428 U.S. at 168-187. The Court stated that "punishment must not involve the unnecessary and wanton infliction of pain" and it "must not be grossly out of proportion to the severity of the crime." *Id.* at 173.

[302] *See generally* Sampley v. Ruettgers, 704 F.2d 491 (10th Cir. 1983). The court in *Sampley* stated, "*Estelle* did not require that the guard's acts be authorized or acquiesced in by his superiors before they can be characterized as punishment. We conclude that under *Estelle*, a prison guard's *unauthorized* beating of an inmate can violate the eighth amendment." *Id.* at 495 (emphasis added). The Supreme Court in *Estelle* emphasized, however, that medical malpractice is not always a constitutional violation. 429 U.S. at 105. The Court explained that, like substantive due process claims, "an inadvertent failure to provide adequate medical care"

Similarly, in *Rhodes v. Chapman*,[303] the Court determined that prison conditions may constitute punishment within the meaning of the eighth amendment.[304] It declared that the "[c]onditions must not involve the wanton and unnecessary infliction of pain, nor may they be grossly disproportionate to the severity of the crime warranting imprisonment."[305] The Court recognized that although harsh conditions may properly constitute part of the prisoner's penalty in being sentenced to prison,[306] conditions that are "cruel and unusual under contemporary standards" are unconstitutional.[307] The Court explained that under the eighth amendment "[n]o static 'test' can exist" because the amendment " 'must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.' "[308] The Court tried to specify how it can make a determination under such

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is not " 'repugnant to the conscience of mankind.' " *Id.* at 105-06 (quoting Palko v. Connecticut, 302 U.S. 319, 323 (1937), *overruled on other grounds,* Benton v. Maryland, 395 U.S. 784, 794 (1969)). The Court recognized that deliberate indifference to serious medical needs, however, was inconsistent with "contemporary standards of decency," *id.* at 103, or with " 'evolving standards of decency,' " *id.* at 102 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958) (eighth amendment forbids punishments which are not in line with "the evolving standards of decency that mark the progress of a maturing society")).

[303] 452 U.S. 337 (1981).

[304] *Id.* at 347.

[305] *Id.*

[306] *Id.*

[307] *Id.* The Court has also considered the constitutionality of prison conditions for pretrial detainees under substantive due process. *See* Block v. Rutherford, 468 U.S. 576, 583-91 (1984); Bell v. Wolfish, 441 U.S. 520, 539-562 (1979). In *Bell v. Wolfish,* two years before the Court's decision in *Rhodes,* the Court stated that under the due process clause the proper test is "whether [the challenged] conditions amount to punishment of the detainee." *Bell,* 441 U.S. at 535; *see supra* note 91. The Court noted that under some circumstances pretrial detainees may present greater security risks than do convicted prisoners. *Id.* at 546 n.28. In *Block v. Rutherford,* three years after the Court's decision in *Rhodes,* the Court applied the *Bell* test in determining whether pretrial detainees have a constitutional right to contact visits and to observe shakedown searches of their cells. *Block,* 468 U.S. at 583-85. Again the Court noted that pretrial detainees may pose greater security risks than do convicted prisoners. *Id.* at 587. In both *Bell* and *Block* the Court stated that courts should accord prison administrators "wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and *discipline* and to maintain *institutional security.*" *Bell,* 441 U.S. at 547 (emphasis added); *Block,* 468 U.S. at 585 (quoting *Bell,* 441 U.S. at 547); *see also* Hudson v. Palmer, 468 U.S. 517, 522-30 (1984) (recognizing importance of institutional security when considering a fourth amendment challenge to a search and seizure within a prison). In *Bell* the Court added that courts should defer to the judgment of prison officials unless an inmate presents "substantial evidence" that prison officials exaggerated the need to preserve order. *Bell,* 441 U.S. at 548. The Court also stated that "the operation of our correctional facilities is peculiarly the province of the Legislative and Executive Branches of our Government, not the Judicial." *Id.* Therefore, even though prison officials may not punish pretrial detainees prior to trial, they may nevertheless discipline them because of the need for institutional security. In addition, prison officials are accorded broad deference in establishing internal security, whether the inmates are pretrial detainees or are prisoners.

[308] *Rhodes,* 452 U.S. at 346 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)).

a "flexible standard."[309] The Court stated that it considers not only the subjective views of the judges but also other "objective factors."[310] As an example of these latter factors, the Court said that in examining death penalty statutes it had considered history, state statutes, and sentences given by juries.[311]

In determining what constitutes impermissible punishment under the eighth amendment, the Court has thus looked to societal norms to ascertain whether the prisoner had suffered "unnecessary and wanton infliction of pain." The cases indicate that conduct or conditions, though not intentionally designed to punish, may nevertheless be actionable under the eighth amendment, which prohibits "cruel and unusual punishments." The Court's recent decision in *Whitley v. Albers*[312] recognized the history of the eighth amendment, yet raised many questions, which may affect not only the claims raised by prisoners, but pretrial detainees as well.

Both before and after the Supreme Court's decision in *Whitley*, the courts of appeals have applied different standards in examining a prisoner's personal security claims.[313] One court declared that judges in setting these standards "walk a precarious path" because they must not only recognize that prison officials often need to use force to control a large prison population, but also that prisoners need the courts to protect them from an abuse of power.[314] In examining these claims, some courts have failed to mention the amendment forming the basis of their analyses,[315] and other courts have not distinguished

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[309] *Id.* at 345. One commentator has stated that the *Rhodes* Court was reluctant to use decency as a distinct standard in evaluating a challenge to prison conditions. Note, *Eighth Amendment—A Significant Limit on Federal Court Activism in Ameliorating State Prison Conditions*, 72 J. CRIM. L. & CRIMINOLOGY 1345, 1359 (1981). The commentator found that the Court instead used as tests the language from *Gregg*—whether the "conditions involve the wanton and unnecessary infliction of pain" or are "grossly disproportionate to the severity of the crime[s] warranting imprisonment." *Id.* at 1345-46. He said that prior to *Rhodes*, justices that discerned a separate "decency" standard favored the judiciary's taking a leading role in defining public values." *Id.* at 1357 n.100. Other justices, according to the writer, interpreted "evolving standards of decency" to signify that the "definitions of cruelty and disproportionality may change over time." *Id.* at 1357.

[310] *Rhodes*, 452 U.S. at 346.

[311] *Id.* at 346-47.

[312] 475 U.S. 312 (1986).

[313] *See infra* notes 323-45, 400-27 and accompanying text.

[314] El'Amin v. Pearce, 750 F.2d 829, 831 (10th Cir. 1984).

[315] *See, e.g.*, Slakan v. Porter, 737 F.2d 368, 372 (4th Cir. 1984) (court implied an eighth amendment violation by stating that an unjustified beating of a prisoner by an official constitutes "cruel and unusual punishment" and that prison officials must comply with "evolving norms of decency"), *cert. denied*, 470 U.S. 1035 (1985); Akili v. Ward, 547 F. Supp. 729, 733-34 (N.D.N.Y. 1982) (court applied the *Glick* factors and stated that prison officials may use "reasonable force on prisoners when administering prison regulations").

eighth amendment claims from substantive due process claims.[316] After *Whitley*, the courts have disagreed as to whether a prisoner may assert a violation of both substantive due process and the eighth amendment.[317] Central to most of these decisions is Judge Friendly's decision in *Johnson v. Glick*.[318]

B. The Circuits' Evaluation of Personal Security Claims Under the Eighth Amendment and Substantive Due Process Prior to Whitley

In *Johnson v. Glick*,[319] Judge Friendly stated that due process affords protection against official brutality both before and *after* conviction.[320] Although the plaintiff in *Glick* was a pretrial detainee rather than a prisoner, Judge Friendly stated that an attack by a prison official, though "cruel" and "unusual," does not constitute "punishment."[321] He therefore declared that due process must necessarily protect both pretrial detainees and prisoners.[322]

Since *Glick*, a number of courts have agreed with Judge Friendly's dictum that prisoners may properly assert a violation of substantive due process when prison officials use unlawful force.[323] In examining a prisoner's claim, one court stated that substantive due process, not the eighth amendment, is the "preferred" basis for analysis.[324] Other courts, however, have used the *Glick* factors, whether they were analyzing a prisoner's claim under substantive due process,[325] or the

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[316] *See infra* notes 328-32 and accompanying text.

[317] *See infra* notes 402-27 and accompanying text.

[318] 481 F.2d 1028 (2d Cir.), *cert. denied*, 414 U.S. 1033 (1973); *see infra* notes 328-32, 402-22, 424 and accompanying text.

[319] 481 F.2d 1028 (2d Cir.), *cert. denied*, 414 U.S. 1033 (1973).

[320] *Id.* at 1032.

[321] *Id.*; *see also* George v. Evans, 633 F.2d 413, 415 (5th Cir. 1980) (stating that "[a]n isolated assault by an individual guard on an inmate is not, within the meaning of the eighth amendment, punishment"). *But see infra* notes 356-57 and accompanying text.

[322] *Glick*, 481 F.2d at 1032.

[323] *E.g.*, Freeman v. Franzen, 695 F.2d 485, 491-92 (7th Cir. 1982), *cert. denied*, 463 U.S. 1214 (1983).

[324] Franklin v. Aycock, 795 F.2d 1253, 1259 n.3 (6th Cir. 1986). Since the Supreme Court's decision in *Whitley*, the Sixth Circuit Court of Appeals has applied the eighth amendment to a prisoner's unlawful force claim, stating that substantive due process affords a prisoner no greater protection. Parrish v. Johnson, 800 F.2d 600, 604 n.5 (6th Cir. 1986).

[325] *E.g.*, Martinez v. Rosado, 614 F.2d 829, 832 (2d Cir. 1980); Meredith v. Arizona, 523 F.2d 481, 484 (9th Cir. 1975). *See generally* Burton v. Livingston, 791 F.2d 97, 99-101 (8th Cir. 1986) (court applied *Glick* factors to a prisoner's claim that a guard had verbally assaulted him).

eighth amendment.[326] Some courts have also applied a variation of the *Glick* factors.[327]

For example, the First Circuit Court of Appeals has applied a variant of the *Glick* factors to a prisoner's unlawful force claims under both substantive due process and the eighth amendment.[328] The court interpreted the *Glick* factors as imposing "a rather heavy burden" upon plaintiffs to show that officials used "unreasonable force."[329]

Similarly, the Seventh and Fifth Circuit Courts of Appeals have considered factors derived from the Supreme Court's eighth amendment cases and from *Johnson v. Glick*[330] when confronted with personal security claims arising from the prison setting. The Seventh Circuit stated that to find violations of substantive due process and the eighth amendment, a jury must decide that the prison officials "acted under [the] circumstances in callous and shocking disregard for the [prisoner's] well-being," that the officials' actions "shocked the conscience," or that the "actions were brutal and offensive to human dignity."[331] The Fifth Circuit has affirmed a district court's recognition

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[326] *See, e.g.*, Davis v. Lane, 814 F.2d 397, 400 (7th Cir. 1987); King v. Blankenship, 636 F.2d 70, 72-73 (4th Cir. 1980) (*Glick* factors aid the court in determining whether there was an "unjustified striking, beating, or infliction of bodily harm upon a prisoner . . . without just cause"). Recently, the Fourth Circuit cited the factors used in *King* as a basic standard for all claims brought pursuant to section 1983, not just those based on the eighth amendment. *See* Justice v. Dennis, 834 F.2d 380, 382-83 (4th Cir. 1987) (en banc).

In *Meredith v. Arizona*, the Ninth Circuit Court of Appeals first adopted the *Glick* factors to determine whether a prisoner had stated a violation of due process. 523 F.2d at 483. The court recognized that although Judge Friendly articulated the *Glick* factors when addressing a pretrial detainee's personal security claim nothing in its prior decisions required it to "adopt a position less restrictive." *Id.*

[327] *See, e.g.*, Freeman v. Franzen, 695 F.2d 485, 491-92 (7th Cir. 1982), *cert. denied*, 463 U.S. 1214 (1983) (in examining substantive due process claim, court used *Glick* factors and approved a jury instruction that provided that officials act unlawfully if they use "greater force than necessary to accomplish a lawful purpose"); Sampley v. Ruettgers, 704 F.2d 491, 494-96 (10th Cir. 1983) (in examining substantive due process and eighth amendment claims court applied *Glick* factors, but stated that under the eighth amendment, the challenged conduct must have also caused "the 'unnecessary and wanton infliction of pain' ") (quoting Gregg v. Georgia, 428 U.S. 153, 173 (1976)); *see also infra* notes 328-45 and accompanying text.

[328] Furtado v. Bishop, 604 F.2d 80, 95 (1st Cir. 1979), *cert. denied*, 444 U.S. 1035 (1980).

[329] *Id.* The standard approved by the court provided that a prisoner must show that a guard "used excessive force, excessive to the degree that a *reasonable* guard would realize, on the facts known to him when he did it, that it was excessive." *Id.* (emphasis added).

In describing the constitutional violation in terms of "unreasonable" conduct, the court did note that the district court's jury instruction quoted Judge Friendly's admonition that not every shove, though later deemed unnecessary, is actionable. *Id.*

[330] 481 F.2d 1028 (2d Cir.), *cert. denied*, 414 U.S. 1033 (1973).

[331] Bates v. Jean, 745 F.2d 1146, 1151 (7th Cir. 1984). The language used by the court relates to both substantive due process and eighth amendment cases. The reference to shocking conduct directly relates to *Rochin*'s "shock the conscience" test; the reference to actions that are brutal and offensive to human dignity relates to the *Rochin* Court's finding that the conduct was

that the eighth and fourteenth amendments prohibit conduct that is " 'incompatible with the evolving standards of decency that mark the progress of a maturing society . . . , or which involve the unnecessary and wanton infliction of pain.' " [332]

Another court has also added factors to the *Glick* test but in the context of considering only an eighth amendment claim.[333] The Third Circuit Court of Appeals reviewed the lower court's jury instructions, which specified the *Glick* factors and also provided that prison officials may not use force " 'which violates the standards of decency more or less universally accepted.' "[334] The magistrate had instructed the jury that the prisoner "had the right under the eighth amendment 'not to be subjected to unnecessary, unreasonable, and grossly excessive force by prison officials.' "[335] The Third Circuit determined that these instructions were similar to the plaintiff's proposed instructions, which provided that the officials had violated the eighth amendment only "if their conduct was 'physically barbarous, shocking to the conscience, contrary to notions of dignity, humanity, and decency, or such as to offend sensibilities, shock the conscience or constitute brutality.' "[336] The court declared that the difference between the given instructions and the requested instructions was "one of semantics, not substance."[337] The court noted that both the eighth amendment and substantive due process extend " 'protection from an

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brutal and to Justice Brennan's eighth amendment analyses, in which he considered whether the "punishment comports with human dignity." Rhodes v. Chapman, 452 U.S. 337, 361 (1981) (Brennan, J., concurring) (quoting Furman v. Georgia, 408 U.S. 238, 282 (1972) (Brennan, J., concurring)). Other courts have also considered the *Glick* factors when examining eighth amendment claims. In Soto v. Dickey, 744 F.2d 1260 (7th Cir. 1984), *cert. denied*, 470 U.S. 1085 (1985), the Seventh Circuit Court of Appeals considered the use of mace by prison officials under the eighth and fourteenth amendments. *Id.* at 1269-71. The court did not specify the *Glick* factors, but it did consider these elements in the course of its discussion of the eighth amendment standard. *Id.* The court found that the officials had not used excessive force in using the mace, that the mace had caused only temporary discomfort, and that the officers had acted in good faith. *Id.* at 1270-71. The court stated that the eighth amendment prohibits "the infliction of excessive or *grossly* severe punishment disproportionate to the severity of the offense, or the unnecessary and wanton infliction of pain or infliction of pain without justification." *Id.* at 1269 (emphasis added). The court concluded by finding that the prisoners had failed to meet their "burden of showing that the [officials] intentionally used *exaggerated* or excessive means to maintain discipline and provide the needed security for the institution." *Id.* at 1271 (emphasis added). The court also recognized that some deference was to be accorded to prison officials' decisions about maintaining order and discipline. *Id.*

[332] Smith v. Dooley, 591 F. Supp. 1157, 1167 (W.D. La. 1984) (quoting Estelle v. Gamble, 429 U.S. 97, 102-03 (1976)), *aff'd*, 778 F.2d 788 (5th Cir. 1985).

[333] Williams v. Mussomelli, 722 F.2d 1130, 1131-34 (3d Cir. 1983).

[334] *Id.* at 1132.

[335] *Id.*

[336] *Id.*

[337] *Id.* at 1134.

official's abusive exercise of his powers to inflict grossly undue harm.' "[338]

The Tenth Circuit, when considering an eighth amendment claim, similarly used the *Glick* factors and stated that the challenged conduct must have involved the " 'unnecessary and wanton infliction of pain.' "[339] The court explained that "wanton" signifies that the official intended to harm the prisoner, that "unnecessary" signifies that the force used was "more than appeared reasonably necessary . . . to maintain or restore discipline," and that "pain" signifies that the attack must have caused "either severe pain or a lasting injury."[340]

The Tenth Circuit also stated that the standard for substantive due process claims was similar to the standard it articulated for eighth amendment claims.[341] It explained that prison officials violate substantive due process when their "attack consists of force intended to harm the inmate that was greater than appeared reasonably necessary at the time to maintain or restore discipline and that caused either severe pain or a lasting injury."[342] The court identified, however, two differences between the analyses[343]: 1) only intentional conduct is actionable under the eighth amendment, but that less culpable conduct may be actionable under substantive due process[344]; and 2) *Parratt* was not applicable to eighth amendment claims, but that it was unsure if *Parratt* were applicable to substantive due process claims.[345] These unresolved questions remained open following the Supreme Court's examination of eighth amendment and substantive due process claims in *Whitley v. Albers*.[346]

C. Whitley v. Albers: *Using Force to Restore Prison Security*

In *Whitley v. Albers*[347] prisoner Albers alleged that prison officials had violated his right to personal security under the eighth and

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[338] *Id.* at 1133 (quoting Rhodes v. Robinson, 612 F.2d 766, 772 (3d Cir. 1979)).

[339] Sampley v. Ruettgers, 704 F.2d 491, 495 (10th Cir. 1983) (quoting Gregg v. Georgia, 428 U.S. 153, 173 (1976)).

[340] *Id.*

[341] *Id.* at 495 n.6. *See generally* Justice v. Dennis, 834 F.2d 383 (4th Cir. 1987) (en banc) (stating that *Glick* factors are relevant to the general inquiry for all excessive force claims, regardless of the amendment asserted).

[342] *Sampley*, 704 F.2d at 495 n.6.

[343] *Id.*

[344] *Id.*

[345] *Id.* at 495-96 n.6

[346] 475 U.S. 312 (1986).

[347] 475 U.S. 312 (1986).

fourteenth amendments.[348] Albers generally alleged that during a prison disturbance, in which prison officials attempted to free a hostage, a prison official deliberately shot Albers in the leg as he ran up the stairs to his cell.[349] Albers alleged that after the prisoners released the hostage, prison officials dragged Albers by the hair down some stairs, while allowing him to bleed profusely for ten to fifteen minutes.[350] He also alleged that as he lay on the floor an officer shoved the barrel of a gun into his face.[351] The majority opinion, however, considered only the constitutionality of the shooting.[352]

The Court discussed its prior eighth amendment decisions and the *Glick* factors.[353] The Court reiterated that " 'only the " 'unnecessary and wanton infliction of pain' " . . . constitutes cruel and unusual punishment.' "[354] It described this phrase as a "*general requirement* that an Eighth Amendment claimant [must] allege and prove."[355]

The Court explained that in challenging "conduct that does not purport to be punishment at all," a prisoner must prove more than a lack of ordinary care.[356] It recognized that under the eighth amendment prisoners may challenge different kinds of conduct—decisions regarding conditions of confinement, medical care, or restoration of control over "a tumultuous cellblock."[357] The Court explained, that regardless of the kind of challenged conduct, "obduracy and wantonness . . . characterize the conduct prohibited by [the eighth amendment]."[358] It emphasized, however, that in considering the general requirement that prisoners allege and prove "unnecessary and wanton infliction of pain," courts should consider the "kind of conduct" the prisoner is challenging.[359]

Although the Court stated that obduracy and wantonness characterize all valid eighth amendment claims, it stated that a "standard"

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[348] *Id.* at 317.

[349] *Id.* at 314-16. Whitley, the prison's security manager, stated that he had formed his assault team to end the disturbance after talking to the prison superintendent and the assistant superintendent and after determining that tear gas was an unworkable alternative. *Id.* at 315-16. He claimed that the plan was formed to protect not only the safety of the hostage, but also the safety of the inmates who were not rioting. *Id.* at 316.

[350] *Id.* at 332 (Marshall, J., dissenting).

[351] *Id.*

[352] *Id.* at 314-28.

[353] *Id.* at 318-22.

[354] *Id.* at 319 (quoting Ingraham v. Wright, 430 U.S. 651, 670 (1977), which quoted Estelle v. Gamble, 429 U.S. 97, 103 (1976)); *see supra* notes 297-302 and accompanying text.

[355] *Whitley*, 475 U.S. at 320 (emphasis added).

[356] *Id.* at 319.

[357] *Id.*

[358] *Id.*

[359] *Id.* at 320.

applied to some conduct forbidden under the eighth amendment is not necessarily applicable to other eighth amendment claims.[360] Analyzing the conduct challenged in *Whitley*, the Court stated that it involved "a prison security measure . . . undertaken to resolve a disturbance . . . that indisputably pose[d] significant risks to the safety of inmates and prison staff."[361] The Court then explained that determining whether the prison security measure inflicted unnecessary and wanton pain and suffering "ultimately turns on"[362] the final factor mentioned in *Glick*—" '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.' "[363] The Court set this factor as the one determining the "general requirement" of eighth amendment claims, even though it previously stated that the eighth amendment does not require "[a]n express intent to inflict unnecessary pain."[364]

To determine whether prison officials had acted maliciously, the Court stated that the other *Glick* factors are relevant—the need for the force, the relationship between the need and the amount of force, and the extent of the injury inflicted.[365] These remaining factors, the Court explained, create inferences relating to the question of malice and sadism.[366] The Court, however, classified the inferences into two categories: those that evince wantonness and those that indicate that the "use of force *could plausibly* have been thought necessary."[367]

In addition to using the remaining three *Glick* factors to determine malice or sadism, the Court articulated two other factors and emphasized the judiciary's role in examining such claims. The Court stated that courts should examine the danger to staff and inmates, as perceived by prison officials, and should consider whether the officials made any effort "to temper the severity of a forceful response."[368] In addition to considering the five specified factors, the

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[360] *Id.* To illustrate, the Court cited Estelle v. Gamble, 429 U.S. 97 (1976), which held that the eighth amendment prohibits deliberate indifference to a prisoner's serious medical needs. *Id.*; *see also supra* notes 297-302 and accompanying text. In examining Albers' claim, the Court stated that a standard of "deliberate indifference" would not properly recognize competing interests. *Id.* The Court explained that such a standard would fail to consider the prison officials' need to protect the prison staff, administrative personnel, visitors, and the inmates. *Id.*

[361] *Id.* at 320-21.

[362] *Id.*

[363] *Id.* (quoting Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir.), *cert. denied,* 414 U.S. 1033 (1973)).

[364] *Id.* at 319-20.

[365] *Id.* at 321.

[366] *Id.*

[367] *Id.* (emphasis added).

[368] *Id.*

Court stated, " 'Prison administrators . . . should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve *internal order* and *discipline* and to maintain *institutional security*.' "[369] Relying on its prior decision discussing pretrial detainees' substantive due process rights, the Court stated that the eighth amendment provides a remedy for prisoners for actions taken in bad faith or without a legitimate purpose.[370]

After articulating its five-factor test and the appropriate level of deference, the Court proceeded to analyze the facts to determine whether they could support a reliable inference of wantonness.[371] The Court found that the prison officials had not acted wantonly.[372] Albers' experts had testified that prison officials were possibly hasty in their decision to use firearms and could have considered using other means to release the hostage.[373] The Court explained, however, that a mere error in judgment does not establish a constitutional violation.[374] It stated, "[This evidence] falls far short of a showing that there was *no plausible basis* for the officials' belief that this degree of force was necessary" or that the belief was "wholly unreasonable."[375]

The Court also did not find wanton the prison official's order to shoot low at inmates running up the stairs, nor the failure to provide a verbal warning before shooting.[376] The Court determined that Albers

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[369] *Id.* at 321-22 (quoting Bell v. Wolfish, 441 U.S. 520, 547 (1979) (emphasis added)).

[370] *Id.* at 322; *see supra* notes 91 & 302.

[371] *Id.* at 322-26. Even though the Court had stated earlier that to prove an eighth amendment violation Albers would have to prove that the prison officials acted maliciously or sadistically, the Court analyzed the facts by questioning whether the prison officials' conduct was wanton. *Id.* at 322. The Court, however, related wantonness to an intent to punish, stating that inferring wantonness "is tantamount to [finding] a knowing willingness that [the unjustified intrusion] occur." *Id.* at 321. The Court cited as support three cases. In Duckworth v. Franzen, 780 F.2d 645 (7th Cir. 1985), *cert. denied*, 475 U.S. 1032 (1986), the Seventh Circuit Court of Appeals equated "deliberate indifference" under the eighth amendment with the criminal law definition of "recklessness," which is "an act so dangerous that the defendant's knowledge of the risk can be inferred". 780 F.2d at 652. In both *Block v. Rutherford* and *Bell v. Wolfish*, the Supreme Court stated that pretrial detainees may prove a violation of due process by establishing that prison officials intended to punish them. Block v. Rutherford, 468 U.S. 576, 584 (1984); Bell v. Wolfish, 441 U.S. 520, 539 (1979). The Court stated that courts may infer an intent to punish by finding that the challenged conduct was not "reasonably related to a legitimate goal." *Bell*, 441 U.S. at 539; *see Block*, 468 U.S. at 584; *see also supra* notes 362-69 and accompanying text.

[372] *Whitley*, 475 U.S. at 322-26.

[373] *Id.* at 323.

[374] *Id.*

[375] *Id.* (emphasis added).

[376] *Id.* at 324. The Court commented that the officials had no way of knowing which prisoners were aiding Klenk and those that were not. *Id.* It also found meritorious the prison officials argument that a verbal warning could have thwarted their efforts to recover the hostage. *Id.*

had failed to meet his "extremely heavy" burden in proving that the actual shooting was wanton.[377] The Court declared that even if an officer had intended to shoot Albers rather than shoot at the entire group of inmates, the officer, who had only a few seconds to react to the prisoners' activity, nevertheless had "some basis for believing that [Albers] constituted a threat to the hostage."[378]

After determining that the various actions were not wanton, the Court concluded with the only sentence discussing the primary *Glick* factor. It stated, "Under these circumstances, the actual shooting was part and parcel of a good-faith effort to restore prison security."[379] The Court therefore held that the prison officials had not violated the eighth amendment.[380]

As an alternative ground, the Court briefly discussed Albers' substantive due process claim and its relation to his eighth amendment claim. The Court stated that when prisoners assert the use of excessive and unjustified force, their "primary source of substantive protection" is the eighth amendment.[381] The Court stated that "conduct that 'shocks the conscience' or 'afford[s] brutality the cloak of law,' " in violation of substantive due process,[382] would also be " 'inconsistent with contemporary standards of decency' and 'repugnant to the conscience of mankind,' " in violation of the eighth amendment.[383] The Court therefore determined that when Albers failed to prove that "prison security measures" violated the eighth amendment, he failed to prove that the measures violated substantive due process because the due process clause does not afford more protection than does the eighth amendment.[384] The Court explicitly left open, however, whether the due process clause affords the same scope of protection to pretrial detainees and those individuals enjoying unrestricted liberty "outside the prison security context."[385]

Justice Marshall, joined by three other justices, dissented to the Court's eighth amendment analysis and rejected the Court's view of the protection afforded by substantive due process.[386] First, Justice

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[377] *Id.* at 325.

[378] *Id.* at 325-26. The Court stated that Albers' movement towards the stairs was equivocal conduct; in the Court's view, if he wanted to be safe Albers could have thrown himself on the floor. *Id.* at 325.

[379] *Id.* at 326.

[380] *Id.*

[381] *Id.* at 327. It did not, however, explain what it meant by "primary source."

[382] *Id.* (quoting Rochin v. California, 342 U.S. 165, 172, 173 (1952)).

[383] *Id.* (quoting Estelle v. Gamble, 429 U.S. 97, 103, 106 (1976)).

[384] *Id.*

[385] *Id.*

[386] *Id.* at 328-34 (Marshall, J., dissenting). Justices Brennan, Blackmun, and Stevens joined in the dissenting opinion, *id* at 328; except that Justice Stevens did not join Justice Marshall's discussion of substantive due process, *id.* at 334 n.2.

Marshall contended that even though a prisoner does bear a heavy burden in establishing an eighth amendment violation, the Court's eighth amendment standard was too onerous.[387] In analyzing the Court's malice or sadism standard, the dissent emphasized that the Court improperly used a single *Glick* factor, rather than all of them, to determine whether there was a constitutional violation.[388] The dissent stated that the clear eighth amendment standard was whether the challenged conduct was "unnecessary and wanton," and not whether it was expressly intended to inflict harm.[389]

Second, the dissent disagreed with the Court's conclusion that substantive due process affords Albers the same protection as does the eighth amendment.[390] As support for the proposition that the protection is not coextensive, the dissent cited Justice Blackmun's dissent in *Davidson v. Cannon*,[391] in which he stated that under some circumstances negligent conduct may constitute a violation of substantive due process.[392]

After the Court's decision in *Whitley*, the scope of protection afforded under the eighth amendment and substantive due process is unclear. Although the majority opinion specifically left open the question of the scope of protection afforded pretrial detainees under substantive due process, it did not clearly specify the scope of protection available under the eighth amendment. Both the majority and the dissent agreed that under the eighth amendment the relevant issue is whether the challenged conduct inflicted "unnecessary and wanton pain."[393] The majority, however, rephrased this "general requirement"[394] as one signifying that the official acted maliciously and

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[387] *Id.* at 328-30. In the alternative, the dissent argued that even if the Court's standard were proper, the Court failed to interpret the facts properly. *Id.* at 330-34. In the dissent's view, the Court failed to remember that Albers claimed that officers dragged him down the stairs by the hair, let him bleed for a long time and shoved a gun into his face. *Id.* at 332-33. Those facts, the dissent maintained, indicate that the jury should have determined whether the conduct was unnecessary and wanton. *Id.* at 333-34.

[388] *Id.* at 329 n.1.

[389] *Id.* at 328-29. The dissent emphasized that even though the Court stated that the eighth amendment does not require an intent to inflict harm the Court's announced standard nevertheless required Albers to prove an express intent to inflict harm. *Id.* The dissent argued that the Court's test allows a judge to impose this heightened standard after making two preliminary findings of fact: there was a "disturbance" and the disturbance posed "significant risks to the safety of inmates and prison staff." *Id.* at 329. He maintained that juries, not judges, should make these findings. *Id.* at 329-30.

[390] *Id.* at 334 n.2.

[391] 474 U.S. 344, 349 (1986) (Blackmun, J., dissenting).

[392] *Id.* at 350; *see supra* notes 168-71 and accompanying text.

[393] 475 U.S. at 320, 328.

[394] *Id.* at 320.

sadistically.[395] The majority, however, did not apply this specific standard, but rather questioned whether the conduct was wanton and unnecessary.[396]

In determining whether the conduct was impermissible, the majority in *Whitley* frequently noted that the case involved "prison security measures."[397] After reiterating the broad deference accorded prison officials under the due process clause and in this eighth amendment case, the majority concluded by stating that its holding does not determine the rights of other individuals "outside the prison security context."[398]

Thus, the majority opinion does not clearly indicate whether its heightened standard applies only to cases involving prison riots or if it also applies to cases involving general prison discipline. If by "prison security context" the majority meant to signify action taken by prison officials to maintain order in the prison, then lower courts may need to re-evaluate their prior decisions discussing the protection available to prisoners under the eighth amendment and substantive due process.

D. The Circuits' Evaluation of Personal Security Claims Under the Eighth Amendment and Substantive Due Process after Whitley

Since the Supreme Court's decision in *Whitley v. Albers*,[399] the lack of unity in examining prisoners' personal security claims has continued. Most courts have quoted *Whitley*'s formulation of the eighth amendment standard, but have emphasized different aspects of it.[400] In addition, the federal courts have not agreed as to whether, after *Whitley*, prisoners may concomitantly assert personal security claims under both the eighth amendment and substantive due process.[401]

The Fifth Circuit Court of Appeals discussed the Court's decision in *Whitley* when it evaluated a prisoner's claim that prison officials had failed to protect him from other inmates[402]; it did not, however, refer to *Whitley* when examining the prisoner's second claim, that

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[395] *Id.* at 320-21.

[396] *Id.* at 322; *see supra* notes 372-78 and accompanying text.

[397] *Whitley*, 475 U.S. at 327. The majority stated that the officials were trying to restore "official control over a tumultuous cellblock," *id.* at 319, that the officials were faced with a "prison disturbance," *id.* at 320, and that the officials' actions involved "prison security," *id.*

[398] *Id.* at 329.

[399] 475 U.S. 312 (1986); *see supra* notes 347-98 and accompanying text.

[400] *See infra* notes 402-27 and accompanying text.

[401] *Id.*

[402] Johnson v. Lucas, 786 F.2d 1254, 1259-60 (5th Cir. 1986).

the prison officials themselves had unlawfully beat him. In considering the latter claim, the court implied that it was considering the eighth amendment by stating that prison officials can incur liability when their "abuse of power inflicts cruel and unusual punishment."[403] The court applied the *Glick* factors and found that the force was "grossly disproportionate to the need [for force]" and that the officials were not merely careless or overly zealous.[404]

The Eleventh Circuit Court of Appeals, like many circuits, has extensively quoted the *Whitley* opinion when articulating the appropriate eighth amendment standard for personal security claims.[405] It applied the three *Glick* factors mentioned in *Whitley*[406] for determining whether the security measure " 'inflicted unnecessary and wanton pain and suffering.' "[407] It noted that this issue "turns upon" the final *Glick* factor—whether the force was applied maliciously and sadistically.[408] It did not, however, mention the fourth and fifth factors mentioned in *Whitley*, whether the officials considered the safety of the staff and inmates, and whether they made any effort to temper a forceful response.[409] The court determined that the officials needed to use force and that the prisoner suffered a minor injury.[410] From these two factors the court decided the third factor[411] and found that the amount of force involved a "mere dispute" about the reasonableness of the force.[412] The court concluded that these three factors, in light of the deference it must show prison officials, indicated that the evidence did not support " 'a reliable inference of wantonness.' "[413] The court also rejected the prisoner's substantive due process claim.[414] It found that the Court's decision in *Whitley* "established that the Due Process Clause affords a convicted prisoner no greater protection than the Cruel and Unusual Punishments Clause" of the eighth

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[403] *Id.* at 1257.

[404] *Id.* (citing Shillingford v. Holmes, 634 F.2d 263, 265 (5th Cir. Unit A Jan. 1981).

[405] Brown v. Smith, 813 F.2d 1187, 1188-1189 (11th Cir. 1987) (per curiam). The prisoner in *Brown* alleged that guards had used unlawful force when he refused to comply with their command to return to his cell. *Id.* at 1189. In examining this claim, the court stated that the actions by the officials implicated "institutional security interests." *Id.* at 1189 n.2; *see also id.* at 1189 n.3. The court concluded that because *Whitley* also involved security interests, it should accord prison officials broad deference. *Id.* at 1189 n.2.

[406] *Id.* at 1188-89.

[407] *Id.* at 1188 (quoting Whitley v. Albers, 475 U.S. 312, 320 (1985).

[408] *Id.*

[409] *Whitley,* 475 U.S. at 321.

[410] *Brown,* 813 F.2d at 1189.

[411] *Id.*

[412] *Id.*

[413] *Id.* at 1189-90 (quoting *Whitley,* 475 U.S. at 322).

[414] *Id.* at 1188.

amendment.[415]

The Sixth Circuit Court of Appeals similarly interpreted *Whitley* and found that the eighth and fourteenth amendments afford a prisoner coextensive protection.[416] In articulating the eighth amendment standard, the court stated that the challenged conduct must have been both "unnecessary and wanton."[417] The court agreed with the *Whitley* Court's statement of this standard, but it did not find that this issue "ultimately turns on" or "turns upon" whether the action was committed maliciously or sadistically.[418] The court explicitly rejected requiring proof of "malicious intent."[419] It stated that malicious intent is *not* "an indispensable element" of an eighth amendment claim.[420] "[R]eason or motivation for the conduct," the court observed, is only a single factor used to determine the issue of wantonness.[421] The court indicated that the other relevant factors were those specified in *Glick* and the element of deference to be afforded to prison officials.[422]

In contrast to the interpretations of *Whitley* by the Sixth and Eleventh Circuits is the Ninth Circuit Court of Appeals' view that *Whitley* does not bar a prisoner from raising both an eighth amendment claim and a substantive due process claim.[423] In examining these two types of claims, the court used the *Glick* factors when addressing the substantive due process claim[424]; but when evaluating the eighth amendment claim, the court relied on portions of the Supreme Court's decision in *Whitley*,[425] and examined the guard's use of force to

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[415] *Id.*

[416] Parrish v. Johnson, 800 F.2d 600, 604 n.5 (6th Cir. 1986). In *Parrish*, a paraplegic prisoner alleged that a guard forced him to sit in his own feces, assaulted him with a knife, extorted food from him, and verbally abused him. *Id.* at 605. The court examined these allegations in light of the Court's decision in *Whitley*. *Id.* Although this case does not involve the common allegation that a prison official beat a prisoner, the alleged actions nonetheless describe a personal security claim because of the prisoner's medical condition. The court in *Parrish* analyzed the claim under the eighth amendment, even though in a decision before *Whitley* the court had noted that most courts prefer analyzing these claims under substantive due process, not the eighth amendment. Franklin v. Aycock, 795 F.2d 1253, 1259 n.3 (6th Cir. 1986).

[417] *Parrish*, 800 F.2d at 604.

[418] *Id.* at 605.

[419] *Id.*

[420] *Id.*

[421] *Id.*

[422] *Id.* at 604-05.

[423] McRorie v. Shimoda, 795 F.2d 780, 784-86 (9th Cir. 1986). A dissenting judge warned the court that *Whitley* indicates that the protection available under the eighth amendment and substantive due process is coextensive. *Id.* at 787 (Wallace, J., concurring in part, dissenting in part). In *McRorie*, a prisoner alleged that a guard rammed a riot stick up his anus after he involuntarily giggled during a strip search. *Id.* at 781-82.

[424] *Id.* at 785.

[425] *Id.* at 784.

determine if the guard "could not plausibly have thought [it] necessary."[426] The court also explained that a prison official acts wantonly within the meaning of the eighth amendment when " 'the unjustified infliction of harm . . . is tantamount to a knowing willingness that it occur.' "[427]

The courts of appeals, before and after *Whitley*, have not applied a single standard when addressing prisoners' personal security claims, whether based on substantive due process or the eighth amendment. The courts have also displayed this lack of unity when analyzing personal security claims based on violations of substantive due process and the fourth amendment. Although personal security claims may arise under different amendments, courts could gain a better understanding of these claims by considering the methods they use to examine unlawful force claims.

IV. Striking the Balance Under the Fourth, Eighth, and Fourteenth Amendments

In examining unlawful force claims, most courts have balanced the interests of the parties without discussing how the alleged applicable amendment or amendments could affect the balance. They have applied the factors Judge Friendly articulated in *Johnson v. Glick*[428] to substantive due process claims. Guided by the United States Supreme Court's decisions in *Daniels v. Williams*,[429] *Davidson v. Cannon*,[430] *Tennessee v. Garner*,[431] and *Whitley v. Albers*,[432] courts have also addressed violations of personal security under the fourth and eighth amendments. Yet when assessing personal security claims based on the fourth, eighth, and fourteenth amendments, courts have not uniformly resolved the following two issues: whether a plaintiff must prove that officials acted maliciously, in accordance with the final *Glick* factor, and whether substantive due process duplicates the protection available under the fourth and eighth amendments. In the future when courts confront these issues, they should determine that plaintiffs need not prove malice to establish a violation of personal

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[426] *Id.*
[427] *Id.* (quoting Whitley v. Albers, 475 U.S. 312, 321 (1986)).
[428] 481 F.2d 1028 (2d Cir.), *cert. denied*, 414 U.S. 1033 (1973).
[429] 474 U.S. 327 (1986).
[430] 474 U.S. 344 (1986).
[431] 471 U.S. 1 (1985).
[432] 475 U.S. 312 (1986).

security and that substantive due process does not always duplicate the protection provided by the fourth and eighth amendments.

A. The Requirement of Malice for Personal Security Claims

Courts have properly discerned that the first three *Glick* factors—the need for force, the relationship between the need and the amount of force used, and the extent of the injury—provide an initial framework of analysis for all personal security claims, regardless of the amendment upon which the claim is based. These factors compel courts to balance the parties' interests as they resolve the fundamental inquiry of all unlawful force claims—whether the force employed by a state officer was unjustified. In addition to these three factors, some courts, however, have erroneously required plaintiffs to prove that officials acted maliciously, without regard to the amendment upon which they seek protection.[433]

Judge Friendly, in *Johnson v. Glick*,[434] specified four factors that have aided courts in interpreting the Supreme Court's "shocks the conscience" test for substantive due process claims.[435] Nowhere in his opinion, however, did Judge Friendly indicate that the fourth factor, a showing of malice, is necessary to establish all personal security claims.

In addition, the Supreme Court has never rendered a decision making malice an indispensable element of all such claims. Although the Supreme Court ruled in *Daniels v. Williams*[436] and *Davidson v. Cannon*[437] that negligent conduct did not violate substantive due process,[438] the Court specifically left open the question whether gross negligence or recklessness could constitute a deprivation of substantive due process.[439] The Court recognized that the due process clause affords individuals protection against " 'the arbitrary exercise of the powers of government.' "[440] Because reckless or grossly negligent conduct signifies that the party employing the force should have been

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[433] *See* Justice v. Dennis, 834 F.2d 380, 383 (4th Cir. 1987) (en banc). *But see* Lester v. City of Chicago, 830 F.2d 706, 712 (7th Cir. 1987) (applying a personal security analysis without the factor of malice).

[434] 481 F.2d 1028 (2d Cir.), *cert. denied*, 414 U.S. 1033 (1973).

[435] *Id.* at 1033.

[436] 474 U.S. 327 (1986).

[437] 474 U.S. 344 (1986).

[438] *Daniels*, 474 U.S. at 330-36.

[439] *Id.* at 334 n.3.

[440] *Id.* at 331 (quoting Hurtado v. California, 110 U.S. 516, 527 (1884)).

aware of the obvious risk of harm, courts should deem that this type of arbitrary, careless use of force by officials constitutes an abuse of power within the meaning of the fourteenth amendment.[441] This form of analysis will preserve the aim of the first three *Glick* factors in preventing the official exercise of unlawful force, while relieving the plaintiff of the stringent requirement of proving malice.

Similarly, in considering personal security claims based on the eighth amendment, courts should recognize that the Supreme Court in *Whitley v. Albers*[442] focused on whether the conduct was wanton, despite its assertion that the "test" was whether the conduct was malicious.[443] To determine whether the use of force during a prison riot violated the eighth amendment and substantive due process, the Court relied on the first three *Glick* factors as well as the threat to safety and the efforts made to temper a forceful response by the prisoners.[444] Although the Court used these factors to determine if the officials had acted maliciously, the Court fused its definition of "malice" with its definition of "wantonness," stating that wanton conduct is "*tantamount* to a knowing willingness that [the harm] occur."[445] By defining wanton conduct in this way, the Court did not require actual knowledge of the harm, that is, malice, but instead indicated that in some cases knowledge might be imputed to the official. The Court, therefore, impliedly found wanton conduct to be synonymous with reckless conduct because both signify that the ensuing harm is obvious, even if not known.

If courts do interpret *Whitley* as requiring actual malice, they should nevertheless recognize that the standard the Court set forth related to a unique context, a prison riot. The Court properly noted in *Whitley* that although a prisoner must generally allege that the official inflicted "unnecessary and wanton pain" to establish a violation of the eighth amendment, not all eighth amendment claims require the same level of culpability.[446] While it may be appropriate to require a

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[441] *See supra* note 183. Courts have struggled, however, to distinguish between gross negligence and recklessness. *See, e.g.*, Nishiyama v. Dickson County, 814 F.2d 277, 282 (6th Cir. 1987) (person acts grossly negligent if she "intentionally does something unreasonable with disregard to a known risk or a risk so obvious that [she] must be assumed to have been aware of it, and of a magnitude such that it is highly probable that harm will follow"). They have also had difficulty in distinguishing between recklessness and negligence. *See, e.g.*, Wilson v. Beebe, 743 F.2d 342, 350 (6th Cir. 1984) (court found an officer negligent for having his pistol cocked while trying to handcuff a suspect, stating that this action indicated a "reckless disregard for the rights of the suspect"), *vacated*, 770 F.2d 578 (6th Cir. 1985) (en banc).

[442] 475 U.S. 312 (1986).

[443] *Id.* at 322.

[444] *Id.* at 320-221.

[445] *Id.* at 321 (emphasis added).

[446] *Id.* at 320-21.

prisoner to prove malice for a claim arising from the use of force during a prison riot, such a strict standard would not be necessary absent the heightened exigencies of a riot. When interpreting eighth amendment personal security claims, courts should not hesitate to distinguish between those cases involving the state's substantial interest in maintaining prison order, as found in *Whitley*, and those cases devoid of this compelling state interest, cases which should only require a prisoner to prove the infliction of "unnecessary and wanton pain."

In resolving excessive force claims based on the fourth amendment, some courts have also erroneously required a showing of malice.[447] By doing so, these courts have failed to properly interpret the Supreme Court's decision in *Tennessee v. Garner*.[448] In *Garner*, the Court analyzed the force used to effectuate a seizure under the fourth amendment, an amendment traditionally requiring courts to balance the interests of the parties.[449] The *Garner* Court declared that the fourth amendment's reasonableness requirement applies not only to *when* an officer may seize a suspect, but also as to *how* the officer may seize her.[450] The Court stated that to determine whether an officer used reasonable means to seize a suspect, a court should " 'balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interest alleged to justify the intrusion.' "[451] The analysis in *Garner* thus included only the first three *Glick* factors: it considered the need for the force used, the relationship between the amount of force and the need for it, and the extent of injury. A personal security claim based on the fourth amendment, like other fourth amendment claims,[452] necessarily requires a court to consider whether the official's conduct was objectively reasonable. Courts that also require a plaintiff to prove malice, the fourth *Glick* factor, fail to recognize the objective

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[447] *See, e.g.*, Justice v. Dennis, 834 F.2d 380 (4th Cir. 1987) (en banc); Graham v. City of Charlotte, 827 F.2d 945 (4th Cir. 1987).

[448] 471 U.S. 1 (1985).

[449] *Id.* at 8.

[450] *Id.* (citing U.S. v. Ortiz, 422 U.S. 891, 895 (1975); Terry v. Ohio, 392 U.S. 1, 28-29 (1968)); *see also* Aleinikoff, *supra* note 222, at 965 (and cases cited therein). Professor Aleinikoff noted that the Supreme Court has balanced competing interests in the following fourth amendment areas:

> the scope of the Fourth Amendment, the definition of a search, the reasonableness of a search, the *reasonableness of a seizure*, the meaning of probable cause, the level of suspicion required to support stops and detentions, the scope of the exclusionary rule, the necessity of obtaining a warrant, and the legality of pretrial detention of juveniles.

Id. (emphasis added).

[451] *Garner*, 471 U.S. at 8 (quoting United States v. Place, 462 U.S. 696, 703 (1983)).

[452] *See, e.g.*, United States v. Leon, 468 U.S. 897 (1984) (exclusionary rule).

standard of reasonableness mandated by *Garner*'s interpretation of the fourth amendment.

Although a showing of malice will invariably enhance the credibility of a claim, such a showing should not be set up as a prerequisite for all personal security claims based on the fourth, eighth, and fourteenth amendments. Because the fourth amendment standard is one of objective reasonableness, an official's state of mind only affects the determination of liability under claims based on the eighth and fourteenth amendments. Identifying the constitutional basis for each type of excessive force claim should thus aid courts in selecting the appropriate standard of liability.

B. The Relationship of Substantive Due Process to Personal Security Claims Based on the Fourth and Eighth Amendments

To determine the scope of protection available to a plaintiff for a violation of personal security, courts should first seek to identify the interests protected by each amendment. For example, the Supreme Court recognized that both the eighth and fourteenth amendments protect the personal security of prisoners,[453] that the fourteenth amendment protects pretrial detainees,[454] and that the fourth amendment serves to protect individuals from unreasonable seizures.[455] This simple statement of coverage by the amendments, however, fails to explain how these separate constitutional guarantees may work together to protect against instances of official use of excessive force.[456]

When a court is presented with a claim which can be disposed of under either a fourth or eighth amendment standard, there is no

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[453] *See, e.g.*, Davidson v. Cannon, 474 U.S. 344 (1986); *see also supra* notes 147-56, 165-81 and accompanying text (discussing the *Daniels* and *Davidson* opinions).

[454] *See* Bell v. Wolfish, 441 U.S. 520 (1979); *see also supra* note 91 (discussing substantive due process issue in *Bell v. Wolfish*).

[455] Tennessee v. Garner, 471 U.S. 1 (1985).

[456] The lack of an explanation has led to a divergence of views among the federal circuit courts of appeals on the interplay of the fourteenth amendment with the fourth and eighth amendments. *Compare* Gilmere v. City of Atlanta, 774 F.2d 1495 (11th Cir. 1985) (en banc) (allowing plaintiff to bring separate claims based on the fourth and fourteenth amendments), *cert. denied*, 476 U.S. 1115, 1124 (1986) *with* Lester v. City of Chicago, 830 F.2d 706 (7th Cir. 1987) (plaintiff limited to single claim based on objective reasonableness standard of the fourth amendment). *Compare* McRorie v. Shimoda, 795 F.2d 780 (9th Cir. 1986) (permitting prisoner to raise both eighth amendment and substantive due process claims for personal security) *with* Brown v. Smith, 813 F.2d 1187 (11th Cir. 1987) (rejecting attempt by prisoner to raise substantive due process in addition to eighth amendment claim).

reason for the court to employ a more stringent substantive due process analysis because a plaintiff may not be allowed to recover twice for one type of harm.[457] Substantive due process becomes a viable alternative, however, when courts decide that the fourth amendment is not applicable because the plaintiff was not technically "seized" within the terms of that amendment. Thus, if the claim alleges the use of excessive force occurred after the technical arrest, but while the plaintiff was still in the custody of the arresting officer,[458] or if the court refuses to find that the plaintiff was "seized" when police set up a roadblock that resulted in physical injury,[459] substantive due process should remain as an available source of protection for the plaintiff.

The complex interrelationships among the fourth, eighth, and fourteenth amendments have given rise to the difficult questions concerning the proper place of malice and substantive due process doctrine in analyzing the official use of unlawful force. Although these specific questions are perhaps the most visible throughout the caselaw, they are but representative of the myriad difficulties in arriving at an enlightened and constitutionally consistent handling of all personal security claims.

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[457] *See supra* note 188 and accompanying text.

[458] *See* Justice v. Dennis, 834 F.2d 380 (4th Cir. 1987) (en banc) (employing a substantive due process analysis to the use of force while the plaintiff was still in the custody of the arresting officer). Unfortunately, the Fourth Circuit in *Justice* has apparently chosen to deny plaintiffs, who are injured by the use of excessive force while still in the custody of an arresting officer, the advantageous protection of the fourth amendment's objective reasonableness standard. The result is unfortunate because it restrictively construes the type of activity which constitutes a fourth amendment "seizure," and cuts against the Supreme Court's own recognition that pretrial detainees do not lose their fourth amendment rights. *See* Winston v. Lee, 470 U.S. 753 (1985) (fourth amendment protects robbery suspect from an unreasonable search for evidence which would have entailed the surgical removal of a bullet from his body). Indeed, as the dissent in *Justice* noted, it would be peculiar to find that individuals are "seized" when police officers briefly stop them on the street, but not when they are physically injured immediately after they are arrested. *Justice,* 834 F.2d at 388 (Phillips, J., dissenting). Courts in the future should construe the term "seizure" broadly enough to afford protection to those plaintiffs injured by the use of excessive force while still in the custody of an arresting officer.

[459] *See* Brower v. County of Inyo, 817 F.2d 540 (9th Cir. 1985), *petition for cert. filed,* 56 U.S.L.W. 3165 (U.S. Aug. 13, 1987) (No. 87-248) (holding that a police roadblock does not constitute a "seizure" under the fourth amendment). Contrary to the holding in *Brower,* courts should apply a fourth amendment standard, not a substantive due process standard, to claims based on injuries resulting from a police roadblock. In pursuing this analysis, courts should recognize that a roadblock accomplishing its task by causing injury effects a fourth amendment seizure similar to the seizure at issue in Tennessee v. Garner, 471 U.S. 1 (1985). The fleeing driver of an automobile, like the fleeing burglary suspect in *Garner,* should be given the level of protection afforded by the fourth amendment's objective standard.

V. CONCLUSION

In examining claims that a state official used unlawful force, courts have disagreed as to the scope of protection available under substantive due process, the fourth amendment, and the eighth amendment. Courts have applied different standards in addressing these personal security claims. Courts have also disagreed as to whether substantive due process is an appropriate ground for recovery, and if so, whether the protection available under substantive due process duplicates the protection available under the fourth and eighth amendments.

In addressing these claims, courts should recognize the balancing process inherent in all unlawful force claims. Judge Friendly recognized this process by indicating that the following factors are relevant to determining whether a plaintiff has established a violation of personal security: the need for the force, the relationship between the need for the force and the amount of force used, the extent of the injury inflicted, and the official's motives for using the force. Courts have generally applied the first three factors, or their functional equivalents, in examining all personal security claims; yet, the courts' application of the final factor of malice has been less clear.

To establish consistency in addressing personal security claims, courts should recognize that the fundamental inquiry when a personal security claim is asserted is simply whether the force was unjustified. This inquiry entails consideration of the applicable amendment, because the amendment can aid courts in identifying the proper standard for liability. By giving due consideration to the specific interests protected by an amendment, courts can better strive for consistency in discerning whether an official violated an individual's constitutional right to personal security.