The Antithetical Definition of Personal Seizure: Filling the Supreme Court Gap in Analyzing Section 1983 Excessive-Force Claims Arising After Arrest and Before Pretrial Detention

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COMMENTS

THE ANTITHETICAL DEFINITION OF PERSONAL SEIZURE: FILLING THE SUPREME COURT GAP IN ANALYZING SECTION 1983 EXCESSIVE-FORCE CLAIMS ARISING AFTER ARREST AND BEFORE PRETRIAL DETENTION

Diana E. Cole

Responding to a noise complaint, police officers arrested two individuals, handcuffed them, and placed them in a police vehicle. After forty-five minutes, one of the arrestees became unruly, kicking and screaming in the backseat. A police officer responded by threatening him with a Taser stun gun. However, instead of drawing the Taser, the officer drew a semiautomatic pistol and fired at the arrestee’s chest, mortally wounding him. In a subsequent lawsuit by the individual’s family claiming that the officer used excessive force, how should the police officer’s conduct be evaluated? Should the family be required to prove that the officer specifically intended to kill the victim, or must they show only that the officer’s conduct was unreasonable? Does it matter whether the officer who pulled the trigger was the same officer who initially arrested the victim?

Recently, in Torres v. City of Madera, the United States Court of Appeals for the Ninth Circuit determined that the Torres family only needed to demonstrate that the officer’s conduct was unreasonable in order to prevail in the lawsuit.1 Other circuit courts, however, would require the Torres family to prove that the officer consciously disregarded a substantial risk to the arrestee’s life in order to recover—a substantially greater burden.2 Between the time of initial arrest and pretrial detention, excessive-force claims are analyzed differently by the courts depending on the fixed point in time at

\[^\text{1}\] Torres v. City of Madera, 524 F.3d 1053, 1056 (9th Cir. 2008). The fact pattern set forth in the initial paragraph was drawn from this case. Id. at 1054–55.

\[^\text{2}\] See, e.g., Cottrell v. Caldwell, 85 F.3d 1480, 1491–92 (11th Cir. 1986).
which the assault occurs and the jurisdiction in which the arrestee brings suit, generating varying outcomes for excessive-force-claim plaintiffs.

3. Compare Moore v. Novak, 146 F.3d 531, 532, 535 (8th Cir. 1998) (finding that the arrestee is seized at the booking process), and United States v. Johnstone, 107 F.3d 200, 206 (3d Cir. 1997) (holding that seizure continues at the booking process), with Riley v. Dorton, 115 F.3d 1159, 1162 (4th Cir. 1997) (finding that seizure does not extend beyond arrest), Austin v. Hamilton, 945 F.2d 1155, 1162 (10th Cir. 1991) (noting that the Fourth Amendment is controlling until the arrestee’s “first judicial hearing” and ruling that the probable-cause hearing is the appropriate end for seizure), Powell v. Gardner, 891 F.2d 1039, 1044 (2d Cir. 1989) (“[T]he Fourth Amendment standard probably should be applied at least to the period prior to the time when the person arrested is arraigned or formally charged, and remains in the custody (sole or joint) of the arresting officer.”), McDowell v. Rogers, 863 F.2d 1302, 1306 (6th Cir. 1988) (“[T]he seizure that occurs when a person is arrested continues throughout the time the person remains in the custody of the arresting officers.”), and Robins v. Harum, 773 F.2d 1004, 1010 (9th Cir. 1985) (holding that the arrestee’s seizure “continues throughout the time the arrestee is in the custody of the arresting officers”).

4. Compare Johnstone, 107 F.3d at 206 (noting that in the Third Circuit seizure extends from the initial arrest through the booking process), and Austin, 945 F.2d at 1160–62 (holding that the Fourth Amendment standard of an unreasonable seizure extends to the probable-cause hearing in the Tenth Circuit), with Riley, 115 F.3d at 1162 (concluding that in the Fourth Circuit seizure does not extend after initial arrest), and Valencia v. Wiggins, 981 F.2d 1440, 1443–44 (5th Cir. 1993) (deciding that in the Fifth Circuit seizure ends at “the initial act of restricting an individual’s liberty”—the initial arrest).

42 U.S.C. § 1983\(^6\) grants an arrestee the authority to bring excessive-force claims against state police officers for violation of the arrestee’s constitutional rights.\(^7\) In § 1983 excessive-force claims, an arrestee’s Fourth Amendment rights, Fourteenth Amendment Due Process rights, and Eighth Amendment rights are subject to abuse depending on the timing of the alleged abuse.\(^8\) Each excessive-force claim is analyzed differently depending on which constitutional right is implicated.\(^9\) As a result, plaintiffs bringing excessive-force claims carry different burdens of proof depending on what constitutional right they allege has been violated.\(^10\) For example, plaintiffs bear a greater burden in bringing § 1983 excessive-force claims for violations of the Fourteenth Amendment and Eighth Amendment—requiring proof of the

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6. 42 U.S.C. § 1983 provides:
   Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer’s judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

In addition, the United States Supreme Court in Bivens v. Six Unknown Federal Narcotics Agents recognized a private cause of action for excessive-force claims against federal law-enforcement officers under the Fourth Amendment. 403 U.S. 388, 397 (1971). However, negligence is not sufficient to violate the Constitution. Daniels v. Williams, 474 U.S. 327, 334 (1986). Further, 18 U.S.C. § 242 makes it a federal crime to violate an individual’s constitutional rights:
   Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States... shall be fined under this title or imprisoned not more than one year, or both...

7. 42 U.S.C. § 1983. Individuals also may also invoke 42 U.S.C. § 1983 to bring claims for violation of federal statutory rights. \textit{Id.} To succeed in a § 1983 lawsuit, a plaintiff must prove that the defendant was “acting under color of law” and that the defendant violated the plaintiff’s constitutional or federal statutory rights. \textbf{ROLANDO V. DEL CARMEN, CRIMINAL PROCEDURE: LAW AND PRACTICE 421 (5th ed. 2001)}; \textit{see also ERWIN CHEMERINSKY, FEDERAL JURISDICTION §§ 8–9, at 575–76 (5th ed. 2007)} (noting that most § 1983 lawsuits are excessive-force claims brought against state and local government officials).


9. \textit{Id.} at 393–95, 395 n.10 (differentiating excessive-force claims arising under the Fourth Amendment and the Eighth Amendment).

subjective intent of the officer—than for violations of the Fourth Amendment—requiring proof of the officer's objectively unreasonable conduct.\textsuperscript{11}

The Supreme Court has delineated several principles for identifying which constitutional rights are implicated in § 1983 excessive-force claims.\textsuperscript{12} If the excessive-force claim arises when the arrestee is seized by law enforcement, then the arrestee's Fourth Amendment rights are implicated.\textsuperscript{13} If the excessive-force claim arises when the arrestee is in pretrial detention, then the arrestee's Fourteenth Amendment Due Process rights are implicated.\textsuperscript{14} If the excessive-force claim arises when the arrestee is convicted and imprisoned, then the arrestee's Eighth Amendment rights are implicated.\textsuperscript{15} Although the Court has identified the Fourth Amendment and the Fourteenth Amendment Due Process Clause as the sources of constitutional protection for § 1983 excessive-force claims arising before trial,\textsuperscript{16} the Court has not indicated which constitutional provision governs such claims arising between arrest and pretrial

\begin{itemize}
  \item \textsuperscript{11} See supra note 3; see also Whitley v. Albers, 475 U.S. 312, 319 (1986) (finding that "unnecessary and wanton infliction of pain" must be demonstrated in analyzing § 1983 excessive-force claims under the Eighth Amendment (quoting Ingraham v. Wright, 430 U.S. 651, 670 (1977)) (internal quotation marks omitted)); Sturgeon, supra note 5, at 137–38 (noting that the substantive Due Process standard imposes a higher burden on plaintiffs to prove subjective intent and serious injury than the Fourth Amendment reasonableness standard).
  \item \textsuperscript{12} See Graham, 490 U.S. at 394; Whitley, 475 U.S. at 327; Bell v. Wolfish, 441 U.S. 520, 535 (1979).
  \item \textsuperscript{13} See U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."); Graham, 490 U.S. at 395 ("[W]e hold that all claims that law enforcement officers have used excessive force—deadly or not—in the course of arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment . . . ").
  \item \textsuperscript{14} See U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law."); Bell, 441 U.S. at 533–34 ("We do not doubt that the Due Process Clause protects a detainee from certain conditions and restrictions of pretrial detention.").
  \item \textsuperscript{15} See U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."); Whitley, 475 U.S. at 327 ("[T]he Eighth Amendment, which is specifically concerned with the unnecessary and wanton infliction of pain in penal institutions, serves as the primary source of substantive protection to convicted prisoners . . . where the deliberate use of force is challenged as excessive and unjustified.").
  \item \textsuperscript{16} See Graham, 490 U.S. at 394 (finding that the Fourth Amendment governs excessive-force claims arising during initial seizure); Bell, 441 U.S. at 535 (holding that the Due Process Clause protects pretrial detainees from excessive force).
\end{itemize}
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Consequently, a temporal gap has emerged, leaving an arrestee’s constitutional rights uncertain. This temporal gap is the result of the Court’s failure to define when a Fourth Amendment seizure ends. Identifying the point in time after an arrest at which a Fourth Amendment seizure ends would allow courts, plaintiffs, and law enforcement to know which constitutional rights attach at any given time during the arrestee’s time in custody: the Fourth Amendment would apply to excessive-force claims arising from conduct during the course of a seizure, and the Fourteenth Amendment right to due process would apply to excessive-force claims arising after the seizure has ended.

In determining which constitutional right is implicated during this temporal gap, federal courts have attempted to determine when a seizure ends with varying results. Some federal courts, like the Ninth Circuit in Torres, have adopted the “continuing-seizure” rule by holding that a seizure extends beyond arrest to various points in time before pretrial detention.

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17. See Graham, 490 U.S. at 395 n.10 ("Our cases have not resolved the question whether the Fourth Amendment continues to provide individuals with protection against the deliberate use of excessive physical force beyond the point at which arrest ends and pretrial detention begins, and we do not attempt to answer that question today.").

18. See id.; see also Sturgeon, supra note 5, at 133 (noting that the Supreme Court has not specified how long a seizure extends under the Fourth Amendment).

19. See supra notes 3-4 and accompanying text; Sturgeon, supra note 5, at 133. Many plaintiffs have struggled to determine which constitutional right to assert when bringing § 1983 excessive-force claims. See Albright v. Oliver, 510 U.S. 266, 275 (1994) (plurality opinion). In Albright, the petitioner raised an excessive-force claim under the Fourteenth Amendment Due Process Clause, and did not bring the claim under the Fourth Amendment. Id. Writing for the plurality, Justice Rehnquist explicitly refrained from conducting a Fourth Amendment analysis: "We express no view as to whether petitioner's claim would succeed under the Fourth Amendment, since he has not presented that question in his petition for certiorari." Id.

20. See Graham, 490 U.S. at 395 n.10; see also Sturgeon, supra note 5, at 133.

21. See Graham, 490 U.S. at 394 (recognizing that the Fourth Amendment applies to seizures); Bell, 441 U.S. at 535 (holding that the Due Process Clause applies to post-seizure, pretrial excessive force).

22. See, e.g., United States v. Johnstone, 107 F.3d 200, 206–07 (3d Cir. 1997) (holding that a “seizure can continue and the Fourth Amendment protection against unreasonable seizures can apply beyond” the “moment a suspect is not free to leave”); Austin v. Hamilton, 945 F.2d 1155, 1160 (10th Cir. 1991) (noting that a seizure should continue at least until arraignment or a probable-cause hearing); Powell v. Gardner, 891 F.2d 1039, 1044 (2d Cir. 1989) (holding that a seizure continues until arraignment so long as the arrestee "remains in the custody (sole or joint) of the arresting officer"). But see, e.g., Riley v. Dorton, 115 F.3d 1159, 1162 (4th Cir. 1997) (en banc) (holding that a seizure ends after arrest).

23. See Torres v. Madera, 524 F.3d 1053, 1056 (9th Cir. 2008); Moore v. Novak, 146 F.3d 531, 532–33, 535 (8th Cir. 1998); Johnstone, 107 F.3d at 206–07; Austin, 945 F.2d at 1160; Powell, 891 F.2d at 1044; McDowell v. Rogers, 863 F.2d 1302, 1306 (6th Cir. 1988); Robins v. Harum, 773 F.2d 1004, 1010 (9th Cir. 1985); see also Eamonn O'Hagan, Note, Judicial Illumination of the Constitutional "Twilight Zone": Protecting Post-Arrest, Pretrial Suspects from Excessive Force at the Hands of Law Enforcement, 44 B.C. L. REV. 1357, 1373 (2003) (asserting that jurisdictions interpret seizure differently, with some extending seizure beyond the...
have rejected the continuing-seizure rule by holding that seizure ends at arrest. As a result, excessive-force claims arising after arrest and before pretrial detention are analyzed differently depending on how the court defines a seizure under the Fourth Amendment.

The disparate treatment of § 1983 excessive-force claims in federal courts can be remedied by adopting a uniform definition of when a seizure ends. Such a definition would enable federal courts to identify which constitutional right is implicated by a particular § 1983 claim and apply the appropriate constitutional analysis, thus providing for the similar treatment of excessive-force claims across jurisdictions.

The best definition for marking the end of personal seizure is the antithetical definition of the Court's current personal-seizure definition, which provides that a seizure occurs "whenever a police officer accosts an individual and restrains his freedom to walk away." The antithetical definition operates as a logical negation of the Court's established personal-seizure definition by embracing its opposite. Thus, personal seizure would end when the conditions that gave rise to the seizure—the restraint on an individual's "freedom to walk away"—no longer exist.

24. See Riley, 115 F.3d at 1162 (rejecting the "continuing seizure" theory of the Fourth Amendment); Cottrell v. Caldwell, 85 F.3d 1480, 1490 (11th Cir. 1996) (holding that the Fourteenth Amendment governed "[c]laims involving the mistreatment of arrestees"); Valencia v. Wiggins, 981 F.2d 1440, 1443-44 (5th Cir. 1993) (refusing to apply the continuing-seizure rule); Wilkins v. May, 872 F.2d 190, 194 (7th Cir. 1989) (rejecting the continuing-seizure interpretation).

25. Compare Riley, 115 F.3d at 1166 (applying the "excessive force that amounts to punishment" test under the substantive due process analysis after initial seizure), with Powell, 891 F.2d at 1044 (applying the Fourth Amendment reasonableness test after finding the arrestee's seizure continued while in custody of the arresting officer). Even federal circuit courts that adopt the substantive Due Process analysis apply different analytical tests. Brief for The United States as Amicus Curiae Supporting Petitioner at 9–11, Graham v. Connor, 490 U.S. 386 (1989) (No. 87-6571) (criticizing the different substantive due process tests adopted by the federal circuit courts). Compare Valencia, 981 F.2d at 1447 (applying the "maliciously and sadistically for the very purpose of causing harm" test in analyzing excessive-force claims under the substantive due process standard), with Lester v. City of Chicago, 830 F.2d 706, 714 (1987) (finding that the "shocks the conscience" inquiry governs excessive-force claims arising under the Fourteenth Amendment Due Process Clause).

26. See infra Part III.


28. See Terry v. Ohio, 392 U.S. 1, 16 (1968) (establishing the Court's personal-seizure definition).

29. Id.
Supreme Court precedent, provide greater guidance to courts in identifying what constitutional rights have been violated, and maintain uniform legal standards throughout the federal-court system.  

This Comment will determine the appropriate constitutional standard to govern excessive-force claims brought under 42 U.S.C. § 1983 in which the alleged misconduct occurred after arrest but before pretrial detention. First, this Comment will examine the Supreme Court’s treatment of excessive-force claims and demonstrate how a gap has emerged with respect to claims of excessive force that arise between arrest and pretrial detention. Next, this Comment will explore the Supreme Court’s personal-seizure definition. It then will analyze how federal courts have defined personal seizure differently in light of this gap created by the Supreme Court, either by adopting the continuing-seizure rule or rejecting it. This Comment will suggest that the rationales underlying the adoption or rejection of the continuing-seizure rule do not comport with the Supreme Court’s excessive-force and personal-seizure precedents. Finally, this Comment will propose adopting the antithetical definition of personal seizure, a uniform definition that would provide a timeline for the termination of seizure that corresponds with the Court’s precedent and treats all arrested persons equally after arrest and before pretrial detention.

I. ANALYSIS OF § 1983 PRETRIAL EXCESSIVE-FORCE CLAIMS

In Graham v. Connor, the Supreme Court established a framework for examining § 1983 excessive-force claims. The Court ruled that § 1983 excessive-force claims should not be analyzed under “some generalized ‘excessive force’ standard,” but under the “specific constitutional standard which governs the right” implicated by the facts and circumstances of the case. The Court has identified three specific sources of constitutional

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[T]he need for the application of force, the relationship between the need and the amount of force that was used, the extent of injury inflicted, and whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.

Johnson, 481 F.2d at 1033.

32. Graham, 490 U.S. at 393–94; see also Bell v. Wolfish, 441 U.S. 520, 533–35 (1979) (analyzing the plaintiff’s claim according to the specific constitutional provision violated).
protection governing § 1983 excessive-force claims: the Fourth, Eighth, and Fourteenth Amendments. 33

The Fourth Amendment is the constitutional source of protection for excessive-force claims that arise during the seizure of a person. 34 The Eighth Amendment is the constitutional source of protection for excessive-force claims that arise during imprisonment. 35 The Due Process Clause of the Fourteenth Amendment serves as the constitutional source of protection for excessive-force claims not arising during personal seizure or imprisonment. 36 Each constitutional provision requires a unique analysis to determine whether it has been violated by a government agent's use of excessive force. 37 To establish a violation of Fourteenth Amendment Due Process, a plaintiff must demonstrate that the conditions of detention amounted to punishment and that the officer specifically intended to punish the detainee with excessive force. 38 To establish a violation of the Eighth Amendment, a plaintiff must show that the officer exercised "unnecessary and wanton infliction of pain." 39 However, to establish a Fourth Amendment violation the plaintiff need only demonstrate

33. See Graham, 490 U.S. at 394 (recognizing that the Fourth and Eighth Amendments are implicated in most excessive-force claims); Bell, 441 U.S. at 534 (finding that the Due Process Clause is the source of constitutional protection for excessive-force claims that do not violate any specific provision of the Constitution).

34. Graham, 490 U.S. at 395 ("Because the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive government conduct, that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims."); see also Tennessee v. Garner, 471 U.S. 1, 7 (1985) (determining that the Fourth Amendment governs the use of deadly force in effecting the seizure of a person).


36. See Bell, 441 U.S. at 535 n.16 (affirming that the Due Process Clause of the Fifth Amendment applies to claims against the federal government). By parity of reasoning, the Bell majority noted that the Fourteenth Amendment Due Process Clause applied to claims against the states. Id. at 535 n.17. In his dissent, Justice John Paul Stevens noted that the Bell majority had departed from the Court's prior due process precedent by "mistakenly impl[y]ing] that the concept of liberty encompasses only those rights that are either created by statute or regulation or are protected by an express provision of the Bill of Rights." Id. at 580 (Stevens, J., dissenting). But see Collins v. Harker Heights, 503 U.S. 115, 125 (1992) (noting that the Supreme Court is reluctant to expand the applicability of substantive due process).

37. See Graham, 490 U.S. at 395 (adopting the objective-reasonableness test as the proper inquiry in evaluating excessive-force claims that violate the Fourth Amendment right to be free from unreasonable seizures); Whitley, 475 U.S. at 319 (finding that excessive-force claims arising under the Eighth Amendment are governed by the "unnecessary and wanton infliction of pain" analysis (internal quotation omitted)); Bell, 441 U.S. at 535 (holding that excessive-force claims arising under the Due Process Clause are examined by looking at whether the conditions amount to punishment).


39. Whitley, 475 U.S. at 319 (internal quotation omitted).
that the officer’s conduct was not objectively reasonable based on a totality of the circumstances; it does not require proof of a subjective specific intent.40 Given these principles, the Supreme Court applies a two-part analysis when evaluating § 1983 excessive-force claims.41 First, a court must identify what specific constitutional right is implicated based on the timing of the alleged misconduct.42 Then, the court must apply the appropriate test governing the specific constitutional right.43

A. Supreme Court Creates Constitutional Gap in Analyzing § 1983 Excessive-Force Claims Between Arrest and Pretrial Detention

Although the Supreme Court identified the proper method of inquiry for evaluating § 1983 excessive-force claims that arise during a person’s arrest,44 the Court declined to identify what constitutional right is violated in § 1983 excessive-force claims that arise after arrest and before pretrial detention.45 However, the Court’s excessive-force precedent and seizure precedent offer insight in deciding which constitutional provisions govern these claims.46

1. The Supreme Court’s § 1983 Excessive-Force Claim Precedent

In Bell v. Wolfish and Graham v. Connor, the Supreme Court identified the constitutional provisions that govern § 1983 excessive-force claims arising during seizure and during pretrial detention, respectively.47 In Bell, the Court held that the Due Process Clause is the source of constitutional protection for conditions during pretrial detention.48 In Bell, several pretrial detainees brought a class-action suit challenging, among other

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40. Graham, 490 U.S. at 399 (“[S]ubjective concepts like ‘malice’ and ‘sadism’ have no proper place in that inquiry.”). In Graham, the Court elaborated on the Fourth Amendment reasonableness test, finding that the analysis “requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.” Id. at 396; see also Al Kamen, Curb on Inmate Reading Matter Upheld; Supreme Court Also Backs Prohibition of Certain Visitors, WASH. POST, May 16, 1989, at A4 (noting that Graham only was required to prove that the police acted unreasonably under the Fourth Amendment).

41. Graham, 490 U.S. at 394.

42. Id. The court must first decide whether the Fourth, Eighth, or Fourteenth Amendment right is implicated. See id. at 393–94.

43. Id. at 395.

44. Id. at 394–95.

45. Id. at 395 n.10.

46. See infra Part I.A.1, 2.

47. See Graham, 490 U.S. at 394–95 (identifying the Fourth Amendment as governing excessive-force claims that arise during “an arrest or investigatory stop”); Bell, 441 U.S. at 535 (identifying the Due Process Clause as governing excessive-force claims that arise during pretrial detention).

48. Bell, 441 U.S. at 535 (“[U]nder the Due Process Clause, a detainee may not be punished before an adjudication of guilt in accordance with due process of law.”).
things, the "double-bunking" conditions at the Metropolitan Correctional Center in New York City as a violation of the Due Process Clause. The Court reasoned that the Due Process Clause governed the double-bunking conditions because the inmates' claim "implicate[d] only the protection against deprivation of liberty without due process of law," and no other constitutional provision addressed the conditions of pretrial detention.

In Graham, the Court held that the Fourth Amendment is the source of constitutional protection for excessive-force claims arising during an "arrest, investigatory stop, or other seizure of a free citizen." In Graham, a police officer conducted an investigative stop of a vehicle in which Graham was traveling as a passenger, after observing Graham behave erratically outside a convenience store. When the officer approached the vehicle, the driver informed him that Graham was in diabetic shock and needed medical attention. The officer called for police backup, and when those officers arrived, they too ignored Graham's pleading for medical assistance and, instead, rammed his face onto the hood of the police vehicle and threw him into the police vehicle headfirst. The Court reasoned that the officers' conduct implicated Graham's Fourth Amendment rights because the alleged excessive force was used during the course of an investigatory stop. The Court ultimately held, more broadly, that the Fourth Amendment governs excessive-force claims arising during any type of personal seizure.

Thus, the appropriate source of constitutional protection for § 1983 excessive-force claims arising after arrest and before pretrial detention turns on whether a person continues to be "seized" after the initial arrest, investigatory stop, or other seizure. If an individual remains "seized" after arrest, then the Fourth Amendment is the applicable source of constitutional protection. Conversely, if an individual is not "seized" after arrest, then Bell suggests that the Fourteenth Amendment Due Process Clause is the appropriate source of constitutional protection. Thus, the Court's § 1983 precedent indicates that excessive-force claims arising after arrest and before pretrial detention are

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49. Id. at 523-41. The inmates in Bell complained that "double-bunking"—housing two inmates in a cell originally designed to hold only one—constituted a violation of their due process rights. Id. at 541.

50. See id. at 535 n.16. Other constitutional provisions, such as the Eighth Amendment, attach only after the conviction and sentencing. Id.

51. Graham, 490 U.S. at 394-95.

52. Id. at 389.

53. Id.

54. Id.

55. Id. at 394.

56. Id. at 388, 394-95.

57. See id. at 394-95 & n.10.

58. See id. at 394-95.

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governed by either the Fourth Amendment or the Fourteenth Amendment Due Process Clause.

Justice v. Dennis provides an interesting example of the difficulty of distinguishing “seizure” from pretrial detention, and how the Supreme Court might resolve this issue. After the Court decided Graham, it granted certiorari in Justice v. Dennis,\(^{60}\) in which the Fourth Circuit, sitting en banc, applied the Fourteenth Amendment’s Due Process Clause to determine whether the force used by an officer after the suspect appeared before a magistrate was excessive.\(^{61}\) Following Graham, the Court vacated and remanded Justice to the United States Court of Appeals for the Fourth Circuit to be decided in accordance with Graham,\(^{62}\) thus suggesting Justice was “seized” when the incident occurred.

2. Supreme Court’s Personal-Seizure Precedent

The Court’s personal-seizure precedent also provides guidance in ascertaining which constitutional right is implicated in § 1983 excessive-force claims arising after arrest and before pretrial detention.\(^{63}\) In Terry v. Ohio, the Court expansively defined personal seizure, concluding that a person is seized “when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen.”\(^{64}\) The Court reasoned that where a police officer frisked a person’s outer clothing, even though the person was

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\(^{61}\) Justice v. Dennis, 834 F.2d 380, 381 (4th Cir. 1987) (en banc), vacated, 490 U.S. 1087 (1989). The Fourth Circuit held that a substantive due process claim requires the jury “to consider whether the force ‘shocks the conscience’ and appears to have been applied ‘maliciously and sadistically for the purpose of causing harm.’” Id. at 383 (quoting Bailey v. Turner, 736 F.2d 963, 970 (4th Cir. 1984)). In his dissent, Judge James Dickson Phillips Jr. strongly opposed the majority’s application of the substantive due process analysis to the plaintiff’s excessive-force claim arising after his arrest, but while he was in custody of the arresting officers:

It would be a strange doctrinal twist indeed that treated as “seizures” the limiting intrusions, without any use of physical force, that are routinely now considered “Terry stops,” but did not treat as a “seizure” the direct use of physical force in subduing a person in custody just because his “arrest” had already been effected. I am satisfied that it is a twist not present in controlling fourth amendment doctrine.

Id. at 388 (Phillips, J., dissenting).


\(^{63}\) See United States v. Mendenhall, 446 U.S. 544, 554 (1980) (elaborating on the conditions of seizure established in Terry); Terry v. Ohio, 392 U.S. 1, 21 (1968) (expanding on the Court’s conception of personal seizure).

\(^{64}\) Terry, 392 U.S. at 19 n.16 (recognizing that an individual may be seized during an investigatory stop); see also R. Wilson Freyermuth, Comment, Rethinking Excessive Force, 1987 DUKE L.J. 692, 698–99 (‘Terry states a broad notion of what constitutes a seizure—one that compels the conclusion that ‘any application of physical force to a citizen which has the effect of disabling him physically to any extent’ is a seizure.” (quoting Justice, 834 F.2d at 388 (Phillips, J., dissenting))).
not under arrest, the “stop” constituted a seizure because once the police accosted the individual he was no longer free to leave.\textsuperscript{65} \textit{Terry} dramatically expanded the scope of personal seizure by holding that a person may be seized without the existence of probable cause.\textsuperscript{66}

In expanding the definition of personal seizure, the Court highlighted the advantage of a flexible definition over a rigid one, noting that “a rigid all-or-nothing model of justification and regulation under the [Fourth] Amendment . . . obscures the utility of the limitations upon the scope, as well as the initiation, of police action as a means of constitutional regulation.”\textsuperscript{67} The Court further noted that a flexible definition provides Fourth Amendment protections against the full range of personal invasions.\textsuperscript{68}

The Supreme Court has elaborated on the two types of personal seizure: restraint by physical force,\textsuperscript{69} and restraint by submission to a show of authority.\textsuperscript{70}

\textbf{a. Restraint by Physical Force}

The Supreme Court has held, in several cases, that restraint by physical force constitutes a seizure.\textsuperscript{71} Thus, an individual is seized when law enforcement intentionally applies physical force to the individual, such as tackling a fleeing suspect.\textsuperscript{72}

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\item \textsuperscript{65} \textit{Terry}, 392 U.S. at 16; \textit{see also} \textit{Hayes v. Florida}, 470 U.S. 811, 816 (1985) (noting that the Fourth Amendment applies “when the police, without probable cause or a warrant, forcibly remove a person from his home or other place in which he is entitled to be and transport him to the police station, where he is detained, although briefly, for investigative purposes”).
\item \textsuperscript{66} \textit{See Terry}, 392 U.S. at 19–22, 30–31 (“We therefore reject the notions that the Fourth Amendment does not come into play at all as a limitation upon police conduct if the officers stop short of something called a ‘technical arrest’ or a ‘full-blown search.’”); \textit{see also} Richard W. Zahn, Comment, California v. Hodari D.: \textit{An Evolving Definition of Seizure under the Fourth Amendment}, 27 NEW ENG. L. REV. 447, 452 (1992) (noting that \textit{Terry} vastly expanded the conception of personal seizure). Before \textit{Terry}, a person could not be seized without probable cause. \textit{See Dunaway v. New York}, 442 U.S. 200, 208 (1979).
\item \textsuperscript{67} \textit{Terry}, 392 U.S. at 17.
\item \textsuperscript{68} \textit{Id.} at 19; \textit{see also} \textit{Tennessee v. Garner}, 471 U.S. 1, 7 (1985); \textit{Dunaway}, 442 U.S. at 212; DEL CARMEN, \textit{supra} note 7, at 140 (noting that the Fourth Amendment also extends to stop and frisk, border searches, and roadblocks).
\item \textsuperscript{69} \textit{Terry}, 392 U.S. at 19 n.16 (characterizing a restraint by physical force as seizure).
\item \textsuperscript{70} \textit{See California v. Hodari D.}, 499 U.S. 621, 629 (1991) (acknowledging that personal seizure occurs when law enforcement intentionally terminates freedom of movement); \textit{Brower v. County of Inyo}, 489 U.S. 593, 597 (1989) (finding that personal seizure encompasses law enforcement’s affirmative actions to prevent escape); \textit{United States v. Mendenhall}, 446 U.S. 544, 554 (1980) (concluding that a person is seized if a reasonable person would believe he was not free to leave based on a totality of the circumstances).
\item \textsuperscript{71} \textit{See Hodari D.}, 499 U.S. at 629; \textit{Brower}, 489 U.S. at 596–97; \textit{Garner}, 471 U.S. at 7; \textit{Dunaway}, 442 U.S. at 212.
\item \textsuperscript{72} \textit{Hodari D.}, 499 U.S. at 629.
\end{itemize}
When an individual is arrested and taken to the station house, the individual remains restrained by physical force. Additionally, an individual is restrained by physical force, and therefore seized, when law enforcement intentionally prevents a person from moving freely by placing a barrier in the individual’s escape route. In Brower v. County of Inyo, the Court held that a suspect driving a stolen vehicle was seized when the government stopped the suspect by intentionally placing an eighteen-wheel truck across the highway. The Brower Court commented that whether an individual is seized depends on whether the “governmental termination of freedom of movement” was achieved “through means intentionally applied.”

Law enforcement’s use of deadly force against an individual also constitutes restraint by physical force. In Tennessee v. Garner, the Court held that a burglary suspect was seized by a police officer when the police officer fatally wounded the fleeing suspect with a gunshot. These cases clearly show that the Court has accepted that restraint by physical force constitutes a seizure.

b. Submission to a Show of Authority

The Court also has held that submission to a show of authority constitutes a seizure. In United States v. Mendenhall, Justices Potter Stewart and William Rehnquist applied an objective test to determine whether an individual has submitted to a show of authority. The Court in Hodari D., adopting the objective test laid out by Justice Stewart in Mendenhall, held that an individual submits to a show of authority, and is therefore seized, “only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.” The Court also provided several

73. Dunaway, 442 U.S. at 212–14.
74. See Brower, 489 U.S. at 597–99.
75. *Id.* at 394, 399; see also Scott v. Harris, 550 U.S. 372, 381 (2007) (holding that the plaintiff was seized when the police officer rammed the plaintiff’s car bumper during a car chase).
76. See Brower, 489 U.S. at 597. An individual is not seized when fleeing from law enforcement. See *id.* However, once law enforcement intentionally terminates the individual’s escape, the individual is seized because he no longer possesses freedom of movement. See *id.* at 396–97.
78. *Id.* at 3–4.
80. See United States v. Mendenhall, 446 U.S. 544, 554 (1980) (Stewart, J., opinion); cf. Hodari D., 499 U.S. at 625–26 (holding that the suspect was not seized by show of authority when the suspect did not submit); Michigan v. Chesternut, 486 U.S. 567, 575 (1988) (holding that the mere presence of police, without more, is not a show of authority sufficient to procure a seizure).
81. Mendenhall, 446 U.S. at 554; see also Hodari D., 499 U.S. at 627–28 (affirming the use of the Mendenhall objective test for demonstrating submission to a show of authority).
82. Hodari D., 499 U.S. at 627–28 (quoting Mendenhall, 446 U.S. at 554).
examples that objectively demonstrate a valid show of authority by police, including "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled."\(^3\)

There is no seizure, however, if the suspect does not submit to a show of authority. \(^4\) Nor is a person seized when he or she is free to walk away or voluntarily acquiesces to law enforcement. \(^5\) A person does not submit to a show of authority, and thus is not seized, when fleeing from law enforcement. \(^6\) In *California v. Hodari D.*, the Court found that cocaine dropped by the fleeing defendant did not constitute the fruit of a seizure because the defendant was not seized when he dropped the cocaine, given that he was running from the police. \(^7\) In sum, submission to a show of authority requires either that the police restrict a suspect's freedom of movement, or that the suspect relinquish this freedom of movement at the insistence of police. \(^8\)

Moreover, the Court has held that where a police officer's treatment of a suspect is "indistinguishable from a traditional arrest," the suspect has been seized even though he has not been arrested formally and has not submitted to force or show of authority. \(^9\) For example, in *Dunaway v. New York*, the Court found that the plaintiff in a § 1983 suit was seized when law enforcement drove the plaintiff to the police station, placed him in an interrogation room, and never told him he was free to leave. \(^10\) In a concurrence to *Albright v.*

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83. Id.
84. *Hodari D.*, 499 U.S. at 629; *Mendenhall*, 446 U.S. at 554.
85. *Mendenhall*, 446 U.S. at 554–55 (noting that an individual's ability to walk away freely does not depend upon law enforcement informing the individual of the ability to walk away); see also *United States v. Drayton*, 536 U.S. 194, 204 (2002) (finding no seizure of bus occupants by police officers when "[t]here was no application of force, no intimidating movements, no overwhelming show of force, no brandishing of weapons, no blocking of exits, no threat, no command, not even an authoritative tone of voice").
86. *Hodari D.*, 499 U.S. at 626 ("It does not remotely apply, however, to the prospect of a policeman yelling 'Stop, in the name of the law!' at a fleeing form that continues to flee. That is no seizure."); see also *Michigan v. Chesternut*, 486 U.S. 567, 575 (1988) (holding that the suspect was not seized by police officers when the suspect fled from the police vehicle driving parallel to him). In *Chesternut*, the Court suggested that the packets of cocaine abandoned by the suspect before the suspect was apprehended by the police officers did not constitute the fruits of an unlawful seizure because the suspect was not seized by the police officers at the time the controlled substance was discarded. *Chesternut*, 486 U.S. at 575–76.
87. *Hodari D.*, 499 U.S. at 625–26. In *Hodari D.*, the Court suggested that law enforcement's efforts to pursue a fleeing suspect amounts to an attempted seizure at most. See id. at 626 n.2.
89. *Dunaway*, 442 U.S. at 212.
90. *Id.* at 212–13.
Oliver, Justice Ruth Bader Ginsburg used the submission-to-a-show-of-authority rationale to suggest that a defendant released from post-arrest, pretrial custody remains seized under the Fourth Amendment, stating that

[s]uch a defendant is scarcely at liberty; he remains apprehended, arrested in his movements, indeed "seized" for trial, so long as he is bound to appear in court and answer the state’s charges. He is equally bound to appear, and is hence "seized" for trial, when the state employs the less strong-arm means of a summons in lieu of arrest to secure his presence in court.\(^\text{91}\)

However, this view of personal seizure in the excessive-force context has not been adopted by the entire Court,\(^\text{92}\) and has been rejected affirmatively by some lower courts.\(^\text{93}\)

As illustrated above, both the Court’s § 1983 excessive-force claim precedent,\(^\text{94}\) and personal-seizure precedent\(^\text{95}\) provide useful background in determining which constitutional right governs § 1983 excessive-force claims arising after arrest and before pretrial detention. The Court’s § 1983 excessive-force claim precedent requires courts to identify either the Fourth Amendment or the Fourteenth Amendment Due Process Clause as the source of constitutional protection.\(^\text{96}\) Further, the Court’s personal-seizure precedent has elaborated on the timeline of the Fourth Amendment’s protections,

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\(^92\). See Becker v. Kroll, 494 F.3d 904, 915 (10th Cir. 2007); Trafton v. Devlin, 43 F. Supp. 2d 56, 63 (D. Me. 1999) (observing that the Supreme Court has not addressed the issue of whether a person on pretrial release is seized under the Fourth Amendment).

\(^93\). See DiBella v. Borough of Beachwood, 407 F.3d 599, 603 (3d Cir. 2005) (finding that pretrial restrictions are not governed by the Fourth Amendment); Kingsland v. City of Miami, 382 F.3d 1220, 1236 (11th Cir. 2004) ("[W]e cannot go so far as to say that the conditions of her pretrial release—which did not constitute a significant deprivation of liberty—constituted a seizure violative of the Fourth Amendment."); Riley v. Dorton, 115 F.3d 1159, 1162-64 (4th Cir. 1997) (en banc) (refusing to adopt the doctrine of continuing seizure). But see Gallo v. City of Philadelphia, 161 F.3d 217, 222 (3d Cir. 1998) (holding that a person who is required to post bond, meet with pretrial services, remain within the jurisdiction, and attend hearings is seized under the Fourth Amendment); Murphy v. Lynn, 118 F.3d 938, 945-46 (2d Cir. 1997) (holding that a defendant who is required to attend eight court dates and remain within the state is seized under the Fourth Amendment).


\(^96\). See Graham, 490 U.S. at 394 (ruling that the Fourth Amendment governs excessive-force claims arising during personal seizures, arrests, or investigatory stops); Bell, 441 U.S. at 534–35 (finding that the Due Process Clause is the source of constitutional protection for excessive-force claims arising during pretrial detention).
distinguishing the scope of Fourth Amendment protections from Fourteenth Amendment protections.97


The lower federal courts have responded to the constitutional gap left by the Supreme Court concerning § 1983 excessive-force claims that arise between arrest and pretrial detention by identifying when seizure ends.98 For example, some federal courts have adopted the continuing-seizure rule—that suspects remain seized for Fourth Amendment purposes from the time of their arrest to some fixed point in the future, ranging from the point at which the arresting officer relinquishes custody to the suspect's first probable-cause hearing. These federal courts analyze § 1983 excessive-force claims that fall in the gap under the Fourth Amendment.100

Other federal courts have rejected the continuing-seizure rule and hold that a seizure ends at arrest.101 These federal courts analyze § 1983 excessive-force claims that fall in the gap under the Fourteenth Amendment, given that the Fourth Amendment does not apply in the absence of a seizure.102 In adopting different definitions for when personal seizure ends, federal courts have applied different constitutional analyses to § 1983 excessive-force claims arising after arrest and before pretrial detention, resulting in the disparate treatment of § 1983 excessive-force claims in different jurisdictions.103

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97. See supra Part I.A.2.

98. Compare Moore v. Novak, 146 F.3d 531, 535 (8th Cir. 1998) (implementing the continuing-seizure rule to accommodate the constitutional gap), and United States v. Johnstone, 107 F.3d 200, 206 (3d Cir. 1997) (adopting the continuing-seizure rule to extend Fourth Amendment protections), with Riley, 115 F.3d at 1162 (refusing to adopt “continuing seizure” for post-arrest detainees), and Wilkins v. May, 872 F.2d 190, 194 (7th Cir. 1989) (declining to extend the scope of personal seizure beyond arrest).

99. See, e.g., Moore, 146 F.3d at 535 (applying the Fourth Amendment reasonableness standard to excessive-force claims arising from the suspect's post-arrest confinement); Johnstone, 107 F.3d at 206–07 (suggesting that seizure may continue after arrest, but declining to specify when it ends); Austin v. Hamilton, 945 F.2d 1155, 1160 (10th Cir. 1991) (suggesting that seizure ends with the probable-cause hearing); Powell v. Gardner, 891 F.2d 1039, 1044 (2d Cir. 1989) (holding that seizure persists so long as the suspect is in custody of arresting officer); McDowell v. Rogers, 863 F.2d 1302, 1306 (6th Cir. 1988) (holding that seizure persists while the suspect is in the custody of the arresting officer); Robins v. Harum, 773 F.2d 1004, 1010 (9th Cir. 1985) (holding that seizure persists during transfer of custody).

100. See, e.g., Moore, 146 F.3d at 535; Johnstone, 107 F.3d at 204–05; Austin, 945 F.2d at 1160; Powell, 891 F.2d at 1044; McDowell, 863 F.2d at 1306; Robins, 773 F.2d at 1010.

101. See, e.g., Riley, 115 F.3d at 1162; Cottrell v. Caldwell, 85 F.3d 1480, 1490 (11th Cir. 1996); Valencia v. Wiggins, 981 F.2d 1440, 1443–44 (5th Cir. 1993); Wilkins, 872 F.2d at 193–94.

102. See, e.g., Riley, 115 F.3d at 1162; Cottrell, 85 F.3d at 1490; Valencia, 981 F.2d at 1443–44; Wilkins, 872 F.2d at 193–94.

103. Compare supra notes 99–100 and accompanying text, with supra notes 101–02 and accompanying text. See also Bradley M. Campbell, Comment, Excessive Force Claims:
1. Federal Courts Adopting Continuing-Seizure Rule

The United States Courts of Appeal for the Second,\textsuperscript{104} Third,\textsuperscript{105} Sixth,\textsuperscript{106} Eighth,\textsuperscript{107} Ninth,\textsuperscript{108} and Tenth\textsuperscript{109} Circuits have adopted the continuing-seizure rule, holding that Fourth Amendment seizure continues beyond the point of arrest. However, these circuits differ in their approaches to the continuing-seizure rule and have established different fixed points in time for when personal seizure ends.\textsuperscript{110}

a. Seizure Extends until Transfer of Custody

The Second,\textsuperscript{111} Sixth,\textsuperscript{112} and Ninth\textsuperscript{113} Circuits apply the continuing-seizure doctrine until the arrestee is no longer in the custody of the arresting officer. In \textit{Powell v. Gardner}, the Second Circuit held that the continuing-seizure rule “probably should be applied at least to the period before the time when the person arrested is arraigned or formally charged and remains in the custody (sole or joint) of the arresting officer.”\textsuperscript{114} In \textit{Powell}, the plaintiff was assaulted after he was arrested, booked, and his bail was set.\textsuperscript{115} The court reasoned that Powell was seized when the alleged assault occurred in the squad room at the police station, at least in part because he was in the custody of the arresting officers at the time.\textsuperscript{116}

Likewise, the Ninth Circuit applies the continuing-seizure rule while the arrestee remains in the custody of the arresting officer.\textsuperscript{117} In \textit{Robins v. Harum}, the plaintiffs were assaulted after their arrest as they were being transported to

\textit{Removing the Double Standard}, 53 U. CHI. L. REV. 1369, 1397–98 (1986) (suggesting that the arrestees' due process rights are implicated after initial arrest, but proposing that the Due Process analysis adopt the Fourth Amendment reasonableness standard); Sturgeon, \textit{supra} note 5, at 133–34 (observing that some federal circuit courts rely on \textit{Bell} and refuse to extend seizure beyond arrest and other federal circuit courts rely on \textit{Graham} to extend seizure beyond arrest).

\textsuperscript{104} \textit{Powell}, 891 F.2d at 1044.
\textsuperscript{105} \textit{Johnstone}, 107 F.3d at 205–06.
\textsuperscript{106} \textit{McDowell v. Rogers}, 863 F.2d 1302, 1306 (6th Cir. 1988).
\textsuperscript{107} \textit{Moore v. Novak}, 146 F.3d 531, 534–35 (8th Cir. 1998).
\textsuperscript{108} \textit{Robins v. Harum}, 773 F.2d 1004, 1010 (9th Cir. 1985).
\textsuperscript{109} \textit{Austin v. Hamilton}, 945 F.2d 1155, 1160 (10th Cir. 1991).
\textsuperscript{110} See, e.g., \textit{Moore}, 146 F.3d at 535; \textit{Johnstone}, 107 F.3d at 205–06; \textit{Austin}, 945 F.2d at 1160; \textit{Powell v. Gardner}, 891 F.2d 1039, 1044 (2d Cir. 1989); \textit{McDowell}, 863 F.2d at 1306; \textit{Robins}, 773 F.2d at 1010; see also Sturgeon, supra note 5, at 133–34.
\textsuperscript{111} \textit{Powell}, 891 F.2d at 1044.
\textsuperscript{112} \textit{McDowell}, 863 F.2d at 1306.
\textsuperscript{113} \textit{Robins}, 773 F.2d at 1010.
\textsuperscript{114} \textit{Powell}, 891 F.2d at 1044 (citing \textit{Graham v. Connor}, 490 U.S. 386, 394, 395 n.10 (1989)).
\textsuperscript{115} Id. at 1041–42.
\textsuperscript{116} Id. at 1042, 1044.
\textsuperscript{117} \textit{Robins}, 773 F.2d at 1010.
the police station. The Ninth Circuit reasoned that the plaintiffs were seized while en route to the police station because the arresting officer was present and had restrained the plaintiffs' freedom to walk away.119 The Sixth Circuit, in *McDowell v. Rogers*, also adopted the continuing-seizure rule, holding that McDowell was seized "throughout the time [he was] in the custody of the arresting officer."120

Thus, the Second, Sixth, and Ninth Circuits all construe the continuing-seizure rule to apply at least until the time the arrestee is transferred from the custody of the arresting officer.

b. Seizure Extends through the Booking Process

The Eighth Circuit has adopted the continuing-seizure rule, extending personal seizure through the booking process.121 In *Moore v. Novak*, police officers used a stun gun to calm Moore after he became verbally irate and physically abusive during the booking process.122 The district court applied the Fourth Amendment's "objective reasonableness" test to Moore's excessive-force claim.123 The Eighth Circuit upheld the district court's application of the Fourth Amendment standard, finding that Moore was seized when police officers applied force to Moore during the booking process.124

c. Seizure Extends until a Probable-Cause Hearing Is Held

The Tenth Circuit has espoused an even broader view of the continuing-seizure rule in the limited context of warrantless arrests, holding that personal seizure continues until a probable-cause hearing is held.125 In *Austin v. Hamilton*, the plaintiffs were cited for possession of marijuana, handcuffed, and taken to the port of entry where they were assaulted by law-enforcement officers, finally being released after twelve hours.126 The Tenth Circuit reasoned that the plaintiffs' seizure extended until the probable-cause hearing because the plaintiffs were entitled to Fourth Amendment protections until a judicial officer made a finding of probable cause to support the warrantless arrest.127

In *Pierce v. Multnomah County*, the Ninth Circuit endorsed the Tenth Circuit's reasoning and also held that a seizure may continue to the probable-
cause hearing or release, in the case of a warrantless arrest. Thus, in both the Ninth and Tenth Circuits, a suspect that is arrested without a warrant is considered seized for Fourth Amendment purposes until a probable-cause hearing can be held, greatly extending the reach of the Fourth Amendment’s reasonableness test.

Several federal circuit courts have adopted the continuing-seizure rule to extend seizure to various points beyond arrest. These points include transfer from custody, booking, and a probable-cause hearing.

2. Federal Courts Rejecting the Continuing-Seizure Rule

Conversely, the United States Courts of Appeal for the Fourth, Fifth, Seventh, and Eleventh Circuits have rejected the continuing-seizure rule, finding that personal seizure ends once a person has been arrested. These circuit courts have rejected the continuing-seizure rule because they have concluded that the text of the Fourth Amendment, and its underlying rationale, do not support expanding its protections beyond arrest. In Riley v. Dorton, the Fourth Circuit justified limiting personal seizure to the point of arrest because the Fourth Amendment concerns “the initial decision to detain an accused,” and nothing more. The court reasoned that Fourth Amendment protections did not govern an assault on the plaintiff at the police station three-and-a-half hours after arrest because the Fourth Amendment’s protections only apply to the initial arrest, and not to the subsequent detention.

128. Pierce v. Multnomah County, 76 F.3d 1032, 1043 (9th Cir. 1996). In Pierce, the plaintiff was assaulted at the jail after being detained for four hours following the issuance of a citation. Id. at 1036.

129. See, e.g., Moore v. Novak, 146 F.3d 531, 533–35 (8th Cir. 1998); United States v. Johnstone, 107 F.3d 200, 206–07 (3d Cir. 1997); Austin, 945 F.2d at 1160; Powell v. Gardner, 891 F.2d 1039, 1044 (2d Cir. 1989); McDowell v. Rogers, 863 F.2d 1302, 1306 (6th Cir. 1988); Robins v. Harum, 773 F.2d 1004, 1010 (9th Cir. 1985).

130. See, e.g., Moore, 146 F.3d at 533–35 (extending seizure throughout the booking process); Austin, 945 F.2d at 1160 (determining that seizure continues until the probable-cause hearing); Powell, 891 F.2d at 1044 (finding that seizure lasts while the arrestee is in the custody of the arresting officer).


133. Wilkins v. May, 872 F.2d 190, 194 (7th Cir. 1989).


135. See, e.g., Valencia, 981 F.2d at 1443–45; Wilkins, 872 F.2d at 193–94.

136. Riley, 115 F.3d at 1162–63.

137. Id.

The core of this Fourth Amendment jurisprudence thus addresses arrest—what constitutes an arrest, what constitutes probable cause to make an arrest, when probable cause must be found by a neutral magistrate, which official may issue a warrant, what type of information is required to support a valid warrant, and what force may be used during an arrest.

Id. (internal citations omitted)
Likewise, in Wilkins v. May, the Seventh Circuit limited the reach of the Fourth Amendment to “the initial act of seizing.” In Wilkins, the plaintiff accused a police officer of using excessive force during a post-arrest custodial interrogation in which the officer held a gun to Wilkins’s head. The court reasoned that the Fourth Amendment did not apply to the plaintiff’s excessive-force claim because the Fourth Amendment is inapplicable once probable cause has been established by arrest. The court also was hesitant to expand seizure beyond arrest because it might result in “an unwarranted expansion of constitutional law,” requiring all police conduct to conform to the Fourth Amendment’s reasonableness standard.

Similarly, the Fifth Circuit declined to adopt the continuing-seizure rule because, in its view, the Fourth Amendment protections are no longer relevant once an individual has been arrested. In Valencia v. Wiggins, a pretrial detainee arrested on drug charges was assaulted by a police officer after the detainee participated in a jail disturbance. Relying on Bell, the Fifth Circuit reasoned that the pretrial detainee’s excessive-force claim was not governed by the Fourth Amendment because the Fourth Amendment’s probable-cause requirement and privacy protections do not extend beyond initial arrest.

The Eleventh Circuit also relied on Bell to find that the Fourteenth Amendment Due Process Clause applies to excessive-force claims that arise after an initial arrest. Thus, several federal circuit courts have rejected the continuing-seizure rule because they conclude, among other things, that the

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138. Wilkins, 872 F.2d at 192–93. In Wilkins, the court rejected the continuing-seizure approach because it feared expanding constitutional law under the Fourth Amendment and advocated a narrow interpretation of the Fourth Amendment:

> There are no obvious limiting principles within the [Fourth Amendment] itself. The problem is that the concept of continuing seizure attenuates the element that makes police conduct in the arrest situation problematic: the police are taking away a person’s liberty. Custodial interrogation does not curtail a person’s freedom of action; it presupposes that he has already lost that freedom—for by definition he is already in custody. We reject the concept of the continuing seizure.

\[Id. at 194.\]

139. \[Id. at 191–92.\]

140. \[Id. at 193–94.\]

141. \[Id. at 194.\]


143. \[Id. at 1442.\]

144. \[Id. at 1443–45 ("[I]n Bell v. Wolfish, the Supreme Court refused to hold that a pretrial detainee has a privacy interest in his person that is protected by the Fourth Amendment."). The Fifth Circuit also justified its conclusion on its finding that an individual’s Fourth Amendment privacy rights are not implicated after arrest, noting that the Fourth Amendment “protects neither a prisoner’s privacy interest in his prison cell nor his possessory interest in personal property contained in his cell.” Id. at 1445 (citing Hudson v. Palmer, 475 U.S. 312, 327 (1986)).\]

145. \[See e.g., Cottrell v. Caldwell, 85 F.3d 1480, 1490 (11th Cir. 1996). In Cottrell, the arrestee died after having been restrained and placed in a police vehicle in a position where he was unable to breathe. Id. at 1488.\]
Fourth Amendment is concerned with requiring probable cause for arrest and is, therefore, inapplicable once an arrest has been effected.\textsuperscript{146}

As illustrated, a circuit split has developed in defining personal seizure.\textsuperscript{147} Thus, § 1983 excessive-force claims arising after arrest and before pretrial detention receive disparate treatment depending on the jurisdiction in which the claim is brought.\textsuperscript{148}

Although Supreme Court precedent has offered some guidelines in evaluating § 1983 excessive-force claims that arise between arrest and pretrial detention,\textsuperscript{149} the guidance is insufficient, particularly with respect to the scope of personal seizure.\textsuperscript{150}

II. THE PERSONAL-SEIZURE APPROACHES ADOPTED BY THE FEDERAL CIRCUIT COURTS ARE INADEQUATE

The Supreme Court’s holdings in *Graham* and *Bell* led to a circuit split concerning the scope of personal seizure in § 1983 excessive-force claims.\textsuperscript{151} Specifically, circuits are split over whether a seizure for Fourth Amendment purposes continues past the initial arrest.\textsuperscript{152} The circuit courts have provided different justifications for adopting or rejecting the continuing-seizure approach.\textsuperscript{153} Some circuit courts have interpreted *Graham* to justify continuing seizure to a fixed point beyond arrest, ranging from transfer of custody to the probable-cause hearing.\textsuperscript{154} Other circuit courts have refused to continue seizure beyond arrest because the Fourth Amendment’s reasonableness standard is concerned with establishing probable cause for the initial arrest and does not concern police conduct once probable cause has been

\begin{itemize}
  \item \textsuperscript{146} See Riley v. Dorton, 115 F.3d 1159, 1162 (4th Cir. 1997) (en banc); Cottrell, 85 F.3d at 1490; Valencia, 981 F.2d at 1443–44; Wilkins, 872 F.2d at 194.
  \item \textsuperscript{147} Compare supra Part I.B.1 (discussing circuits that have adopted the continuing-seizure rule), with supra Part I.B.2 (discussing circuits that have rejected the continuing-seizure rule).
  \item \textsuperscript{148} See supra Part I.A; see also Sturgeon, supra note 5, at 133–34.
  \item \textsuperscript{149} See Graham v. Connor, 490 U.S. 386, 394 (1989) (holding that the Fourth Amendment governs excessive-force claims during personal seizure); Bell v. Wolfish, 441 U.S. 520, 534 (1979) (ruling that the Due Process Clause protects pretrial detainees from excessive force).
  \item \textsuperscript{150} See supra Part I.B.
  \item \textsuperscript{151} See supra Part I; see also O’Hagan, supra note 23, at 1366–67 (observing the different treatment of excessive-force claims under the Fourth Amendment and the Fourteenth Amendment Due Process Clause).
  \item \textsuperscript{152} See supra Part I.
  \item \textsuperscript{153} Compare United States v. Johnstone, 107 F.3d 200, 205 (3d Cir. 1997) (finding that *Graham* suggests seizure continues after an individual initially is restrained), and Austin v. Hamilton, 945 F.2d 1155, 1160 (10th Cir. 1991) (adopting the continuing-seizure rule to extend Fourth Amendment protections to warrantless arrestees), with Riley v. Dorton, 115 F.3d 1159, 1163 (4th Cir. 1997) (rejecting the continuing-seizure rule and holding that seizure is confined to a single act), and Valencia v. Wiggins, 981 F.2d 1440, 1444 (5th Cir. 1993) (refusing to apply the continuing-seizure rule because of "weak textual support" in the Fourth Amendment for this approach).
  \item \textsuperscript{154} See supra Part I.B.1.
\end{itemize}
established. However, the justifications for adopting or rejecting the continuing-seizure rule fail to account for the Supreme Court’s definition of personal seizure established in Terry.

A. Rejecting the Continuing-Seizure Rule Contradicts Supreme Court Precedent

Circuits that justify rejecting the continuing-seizure rule based on the notion that the Fourth Amendment only applies to the initial arrest, which must be based on probable cause, fail to give credence to the Court’s broad conception of personal seizure. In Terry, the Court established that personal seizure does not always require probable cause. The Court emphasized that investigative stops, which do not require probable cause, are nevertheless seizures for Fourth Amendment purposes. Although probable cause is a condition precedent to a lawful arrest, it plays no role in regulating police conduct during the course of a non-arrest seizure. Thus, the Court clearly has held in Terry and its progeny that the Fourth Amendment’s protection against unreasonable seizures is not limited to the requirement that all arrests be based on probable cause. Therefore, the Fourth, Fifth, Seventh, Tenth, and

155. See supra Part I.B.2.
156. See Terry v. Ohio, 392 U.S. 1, 20 n.16 (1968) (noting that a person is seized “when [an] officer, by means of physical force or show of authority, has in some way restrained the liberty of [that] citizen”).
157. See, e.g., Riley, 115 F.3d at 1162; Valencia, 981 F.2d at 1443–44.
158. See, e.g., Dunaway v. New York, 442 U.S. 200, 212 (1979) (“The application of the Fourth Amendment’s requirement of probable cause does not depend on whether an intrusion of this magnitude is termed an ‘arrest’ under state law.”); Terry, 392 U.S. at 16 (recognizing that an individual may be seized in the absence of probable cause and without arrest).
159. Terry, 392 U.S. at 16; see also Scott E. Sundby, A Return to Fourth Amendment Basics: Undoing the Mischief of Camara and Terry, 72 MINN. L. REV. 383, 401–02 (1988) (criticizing the Court’s expansion of personal seizure in Terry for eroding the probable-cause standard).
160. Terry, 392 U.S. at 16. The Court suggested in Terry that the Fourth Amendment offers citizens greater protection than those protections afforded by probable cause. See Akhil Amar, Terry and the Fourth Amendment First Principles, 72 ST. JOHN’S L. REV. 1097, 1098 (1998). Professor Akil Amar commented on the expansive view of seizure adopted by the Court in Terry, noting that the Court “embraced a broad definition of ‘searches’ and ‘seizures,’ enabling the Fourth Amendment to apply to myriad ways in which government might intrude upon citizens’ persons, houses, papers, and effects.” Id. Amar also highlighted the limited role probable cause plays in personal seizures, stating that “Terry did not insist that all warrantless intrusions be justified by probable cause.” Id. Finally, Amar concluded that “reasonableness—not the warrant, not probable cause—thus emerged as the central Fourth Amendment mandate and touchstone.” Id.
161. Carroll v. United States, 267 U.S. 132, 149 (1925) (finding that warrantless searches and seizures based upon probable cause are valid); see also Terry, 392 U.S. at 16 n.12.
162. See Graham v. Connor, 490 U.S. 386, 397 (1989) (“[T]he question is whether the officers’ actions are ‘objectively reasonable’ in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.”); see also supra notes 159–60.
Eleventh Circuits are not warranted in using the existence of probable cause and arrest as restrictions on the Fourth Amendment’s protections.

The circuit courts adverse to the continuing-seizure rule neglect to consider, as a general matter, the Court’s expansive definition of personal seizure adopted in *Terry* and that definition’s implementation in *Graham* and *Dunaway*. The *Terry* Court noted that a seizure occurs when an “officer, by means of physical force or show of authority has in some way restrained the liberty of a citizen.” Thus, personal seizure could extend beyond the initial arrest when an individual continues to be restrained beyond the initial arrest. *Graham* and *Dunaway* likewise suggest that seizure could extend beyond the point of arrest. In *Graham*, the Court implied that the plaintiff’s seizure continued after being handcuffed, thus the Fourth Amendment’s reasonableness standard applied to the excessive-force allegations arising “in the context of an arrest or investigatory stop,” but after the initial arrest. In *Dunaway*, the Court suggested that even though the suspect never actually was arrested, he effectively was arrested, and the plaintiff’s seizure continued after the “arrest” to the point at which he was riding in the police vehicle to the station and placed in the interrogation room.

Furthermore, the Court’s decision to remand *Justice* following *Graham* suggests that the Court determined that the Fourth Amendment was the appropriate constitutional standard to apply in *Justice*. As in *Dunaway*, the

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163. *See Terry*, 392 U.S. at 16, 19 n.16.
165. *Terry*, 392 U.S. at 19 n.16.
166. *See id. at 16, 19 n.16.
167. *See Graham*, 490 U.S. at 389, 394–95 (finding that the alleged excessive force used against the suspect occurred while he was seized for Fourth Amendment purposes after initially being restrained with handcuffs); *Dunaway*, 442 U.S. at 212–13 (holding that although the suspect never was arrested, but was treated as though he had been arrested, seizure continued beyond the initial “arrest” to the point at which he was “taken from a neighbor’s home to a police car, transported to a police station, and placed in an interrogation room”).
169. *Dunaway*, 442 U.S. at 212–13. The *Dunaway* Court quoted its earlier decision in *Davis v. Mississippi*, forcefully insisting that “to argue that the Fourth Amendment does not apply to the investigatory stage is fundamentally to misconceive the purposes of the Fourth Amendment . . . . [T]he Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, whether the intrusions be termed ‘arrests’ or ‘investigatory detentions.’” *Id.* at 214–15 (first alteration in original) (quoting *Davis v. Mississippi*, 394 U.S. 721, 726–27 (1969)).
170. *Justice v. Dennis*, 490 U.S. 1087, 1087 (1989) (vacating the judgment and remanding the case to the Fourth Circuit to be reconsidered in light of *Graham*).
171. Because the Court remanded *Justice*, it implicitly suggested that *Justice* should be analyzed in accordance with *Graham’s* Fourth Amendment reasonableness inquiry. See *Graham*, 490 U.S. at 394. As such, the Court declined to review the substantive due process analysis
excessive-force claim in *Justice* arose after the plaintiff had been arrested and while he was located in the magistrate’s office. Based on these reasons, the Supreme Court has suggested that seizure for Fourth Amendment purposes continues after the initial arrest. Therefore, the circuit courts are not justified in refusing to apply the continuing-seizure rule.

### B. Adoption of the Continuing-Seizure Rule Contradicts Supreme Court Precedent

Jurisdictions that have adopted the continuing-seizure rule neglect to embrace the Court’s expansive definition of personal seizure fully. These jurisdictions run afoul of the Court’s holding in *Terry* by ending the seizure period prematurely or by continuing seizure to the probable-cause hearing for reasons contrary to the Court’s personal-seizure precedent.

#### 1. Federal Circuit Courts Fail to Embrace the Supreme Court’s Definition of Personal Seizure by Ending Personal Seizure Prematurely

Jurisdictions that have held that seizure continues while the arrestee “remains in the custody (sole or joint) of the arresting officer” or throughout the booking process do not go far enough in applying the Court’s definition of personal seizure as restraint by physical force. These jurisdictions fail to recognize that the restraint on an arrestee’s freedom of movement continues applied by the Fourth Circuit in *Justice*. See *Justice v. Dennis*, 834 F.2d 380, 382–83 (4th Cir. 1987), vacated and remanded, 490 U.S. 1087 (1989).

172. *Justice*, 834 F.2d at 383.

173. Moore v. Novak, 146 F.3d 531, 535 (8th Cir. 1998); United States v. Johnstone, 107 F.3d 200, 206 (3d Cir. 1997); Austin v. Hamilton, 945 F.2d 1155, 1160 (10th Cir. 1991); Powell v. Gardner, 891 F.2d 1039, 1044 (2d Cir. 1989); McDowell v. Rogers, 863 F.2d 1302, 1306 (6th Cir. 1988); Robins v. Harum, 773 F.2d 1004, 1010 (9th Cir. 1985).

174. See *Terry*, 392 U.S. at 16, 19 n.16; see also supra Part II.A.

175. See, e.g., Moore, 146 F.3d at 535; Johnstone, 107 F.3d at 206; Powell, 891 F.2d at 1044; McDowell, 863 F.2d at 1306; Robins, 773 F.2d at 1010.

176. See, e.g., Pierce v. Multnomah County, 76 F.3d 1032, 1043 (9th Cir. 1996) (finding that the Fourth Amendment prohibition against unreasonable seizures applies until the suspect is released or until the probable-cause hearing is held for those arrested without a warrant); *Austin*, 945 F.2d at 1160 (finding that the Fourth Amendment’s reasonableness standard might apply until the suspect is released or until a probable-cause hearing is held).

177. Powell, 891 F.2d at 1044; see also, e.g., *McDowell*, 863 F.2d at 1306.

178. See, e.g., Moore, 146 F.3d at 534–35.

179. See *Terry*, 392 U.S. at 16, 19 n.16.
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after he is transferred from one officer to another and while he is in a holding cell at the police station.

Justice Stewart’s examples of personal seizure identified in *Mendenhall* imply that personal seizure extends beyond arrest and the booking process given that, in both circumstances, “a reasonable person [would believe] that he [is] not free to leave.” In doing so, Justice Stewart noted that a seizure may occur when a police officer displays a weapon, physically touches the arrestee, or is threatening the arrestee with his presence or the presence of other officers after arrest.

Curtailing the Fourth Amendment reasonableness standard at the point of the transfer of custody or to the booking process fails to comport with the Court’s personal-seizure precedent because the arrestee remains restrained by physical force and susceptible to police misconduct. Thus, the Second, Third, Sixth, Eighth, and Ninth Circuits are not justified in holding that seizure for Fourth Amendment purposes ends with the transfer of custody or the booking period.

180. See *Riley v. Dorton*, 115 F.3d 1159, 1164 (4th Cir. 1997) (en banc) (“[T]his rule would have Fourth Amendment coverage depend upon the fortuity of how long an arresting officer happens to remain with a suspect.”).

181. See 2 JOSHUA DRESSLER & ALAN C. MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE 95 (4th ed. 2006) (stating that an arrestee remains restrained after the booking process until the first appearance before a judicial officer).

182. See United States v. *Mendenhall*, 446 U.S. 544, 554 (1980) (Stewart, J., opinion). In Part II-A, Justice Stewart, joined by Justice Rehnquist, further noted that “otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person.” *Id.* at 555; see also *Brendlin v. California*, 551 U.S. 249, 255 (2007) (noting that the test for seizure was devised by Justice Stewart’s opinion in *Mendenhall* and is applicable when police are clear in their intent to restrain an individual).

183. See *Mendenhall*, 446 U.S. at 554; see also *Brendlin*, 551 U.S. at 263 (stating that Brendlin was seized from the moment the car stopped on the side of the road, even though there was no formal arrest).

184. See *Mendenhall*, 446 U.S. at 554; see also *Austin v. Hamilton*, 945 F.2d 1155, 1160 n.3 (10th Cir. 1991) (“[W]e disagree that seizure or arrest effects a pertinent, qualitative alteration in the justifications for force (an arrestee remains a risk to officers, nearby persons or property and, as an escape threat, the community at large . . . .”).


189. Robins v. Harum, 773 F.2d 1004, 1010 (9th Cir. 1985).

190. See *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968) (suggesting that seizure extends beyond the transfer of custody and the booking period because a person remains restrained by physical force).
2. Federal Circuit Courts Fail to Embrace the Supreme Court’s Definition of Personal Seizure by Continuing Seizure Based on Probable-Cause Justifications

The Ninth and Tenth Circuits’ rule that a seizure continues until a probable-cause hearing is held also fails because not all seizures require a probable-cause justification. A probable-cause determination is an independent inquiry that plays no role in evaluating a police officer’s conduct during the course of seizure. Rather, the probable-cause inquiry focuses on a police officer’s justifications for making a warrantless seizure, not on the length of personal seizure once an arrest has been made.

The probable-cause justification also treats those arrested with a warrant differently than those arrested without a warrant, offering additional protection for those arrested without a warrant even though both arrestees are subjected to the same excessive force at the same point during their detention. Because

191. See Pierce v. Multnomah County, 76 F.3d 1032, 1043 (9th Cir. 1996).
192. See Austin v. Hamilton, 945 F.2d 1155, 1160 (10th Cir. 1991).
193. See, e.g., Pierce, 76 F.3d at 1043. The Tenth Circuit, in Austin, agreed:

We conclude that just as the fourth amendment’s strictures continue in effect to set the applicable constitutional limitations regarding both duration (reasonable period under the circumstances of arrest) and legal justification (judicial determination of probable cause), its protections also persist to impose restrictions on the treatment of the arrestee detained without a warrant.

Austin, 945 F.2d at 1160.

194. Compare Terry, 392 U.S. at 19 n.16 (implying that probable cause is not necessary for personal seizure), with Carroll v. United States, 267 U.S. 132, 149 (1925) (finding that probable cause is necessary to make warrantless searches or seizures). In Terry, the Court demonstrated that seizure ranges from an investigative stop to arrest, stating “[i]t is quite plain that the Fourth Amendment governs ‘seizures’ of the person which do not eventuate in a trip to the station house and prosecution for crime—‘arrests’ in traditional terminology.” Terry, 392 U.S. at 16.

195. See Brinegar v. United States, 338 U.S. 160, 174 (1949) (noting that the probable-cause standard serves to “safeguard men from dubious and unjust convictions”); see also O’Hagan, supra note 23, at 1387 (“Although a probable cause determination examines the circumstances surrounding an arrest, that does not explain why, according to the U.S. Supreme Court, the act of detaining an individual without such a hearing, days after an arrest, is itself an independent violation of the Fourth Amendment.”).

196. See Brinegar, 338 U.S. at 175–76 (observing that the probable-cause inquiry concerns whether a police officer believes an individual has committed or is committing a criminal offense).

197. The Seventh Circuit, in Wilkins, noted that cases which hold that the Fourth Amendment places limits on the length of time an arrested person may be held before being brought before a magistrate, are not controlling either. They are interpretations of the Fourth Amendment’s requirement of probable cause; they do not hold or imply that every moment of detention is a fresh seizure.

Wilkins v. May, 872 F.2d 190, 193 (7th Cir. 1989).

198. See Karsh, supra note 27, at 824 (arguing that the probable-cause hearing operates as a bright-line rule in defining the end of seizure for warrantless arrestees and that the initial appearance operates as a bright-line rule in defining the end of seizure for warrant arrestees).
the probable-cause standard would create an unjustified disparity in the
treatment of the same excessive-force claim brought by warrant arrestees and
warrantless arrestees, the continuing-seizure rule cannot extend to the
probable-cause hearing based on the reasoning offered by the Ninth and Tenth
Circuits.

As demonstrated, the federal circuit courts that apply the continuing-seizure
rule fail to adhere to the Court's expansive definition of personal seizure by
either ending personal seizure prematurely199 or by extending seizure to the
probable-cause hearing based on a narrow interpretation of the Fourth
Amendment.200 As a result, none of the rationales advocated by the federal
circuit courts for rejecting or adopting the continuing-seizure rule properly can
govern the treatment of § 1983 excessive-force claims arising after initial arrest
and before pretrial detention.

III. A NEW APPROACH TO PERSONAL SEIZURE

A uniform application of federal law is essential to the legitimacy of the
judicial system as a whole.201 Citizens will be inclined to follow and respect
the law when the law treats similar offenses in a similar manner.202 Uniformity

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199. See United States v. Mendenhall, 446 U.S. 544, 554 (1980) (Stewart, J., opinion) (noting
that a person may be seized by the threatening presence of police officers, the displaying of a
weapon, or by physical touching); Terry, 392 U.S. at 19 n.16.

200. See supra note 198 and accompanying text.

201. See Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 347-48 (1816) (noting the
"necessity of uniformity of decisions throughout the whole United States, upon all subjects within
the purview of the constitution" and highlighting that "[t]he public mischiefs that would attend
such a state of [lack of uniformity] would be truly deplorable"); see also Caminker, supra note
30, at 40 ("[P]received legitimacy endures so long as the judiciary is seen as laboring to ground
its decisions in legal principle. Uniform interpretation of federal law throughout the land helps
preserve this perception."). Uniformity of law also played an integral role in the framing of the
Constitution itself: "A perfect uniformity must be observed thro' the whole union or jealousy and
unrighteousness will take place; and for a uniformity one judiciary must pervade the whole." A
Landholder V. CONNECTICUT COURANT, Dec. 3, 1787, reprinted in 14 THE DOCUMENTARY
HISTORY OF THE RATIFICATION OF THE CONSTITUTION 334-38 (John P. Kaminski & Gaspare J.
Saladino eds., 1983).

202. See Caminker, supra note 30, at 39 ("[G]eographical variances in the application of a
uniform rule caused by divergent judicial interpretations seems both irrational and unfair."); see
also Richard H. Fallon, Jr. & Daniel J. Meltzer, New Law, Non-Retroactivity, and Constitutional
in the application of federal law also allows for predictability, better enabling individuals both to conform their conduct to the standards required by law and to understand the penalties for violating the law.\textsuperscript{203} Predictability also enhances the execution of the laws by providing clear and unambiguous guidance to law-enforcement officers.\textsuperscript{204} Given the importance of uniformity of law, the federal circuit courts should adopt a uniform standard for defining the end of personal seizure\textsuperscript{205} that accounts for the Supreme Court’s § 1983 excessive-force claim precedent,\textsuperscript{206} as well as its flexible and expansive personal-seizure precedent.\textsuperscript{207} Adopting a uniform definition for the end of personal seizure will provide clearer guidance to the federal courts for analyzing § 1983 excessive-force claims that arise after arrest and before pretrial detention, and eliminate the disparate treatment among plaintiffs bringing such claims.\textsuperscript{208}

\textbf{A. Adopting the Antithetical Definition of Personal Seizure}

The best way to define the end of personal seizure, consistent with the Court’s personal-seizure precedent, is using the \textit{antithesis} of the Court’s definition of personal seizure\textsuperscript{209}—that is, personal seizure must end when jeopardizes the ideal of integrity or consistency, because we do have a single federal judicial system in which uniformity is a prominent aspiration.”).\textsuperscript{203} Caminker, \textit{supra} note 30, at 38 (“Predictability . . . better enables individuals to rely justifiably on particular legal rules when they order their affairs.”).

\textsuperscript{204} Id. at 39 (recognizing that uniform implementation of federal laws better enables the executive branch to enforce the law).

\textsuperscript{205} See Dunaway v. New York, 442 U.S. 200, 213–14 (1979) (“A single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront.”); \textit{see also} Anthony J. Bellia, \textit{State Courts and the Interpretation of Federal Statutes}, 59 VAND. L. REV. 1501, 1553 (2006) (“The Supremacy Clause’s characterization of federal law as the ‘supreme Law of the Land,’ fairly implies that at an appropriate level of generality federal law should have a uniform meaning in any state or federal court.” (internal citations omitted)).

\textsuperscript{206} See Graham v. Connor, 490 U.S. 386, 395 (1989) (referencing the scope of Fourth Amendment protections); Bell v. Wolfish, 441 U.S. 520, 535 (1979) (discussing Due Process Clause protections); \textit{see also supra} Part I.A.1.

\textsuperscript{207} See California v. Hodari D., 499 U.S. 621, 629 (1991) (adopting the definition of personal seizure advocated by Justice Stewart in \textit{Mendenhall} by stating that a person is seized if a reasonable person would believe he was not free to leave based on a totality of the circumstances); Terry v. Ohio, 392 U.S. 1, 17 (1968) (suggesting that the Fourth Amendment requires a flexible standard in governing police conduct).

\textsuperscript{208} See O’Hagan, \textit{supra} note 23, at 1359 (“This controversy has significance beyond issues of mere constitutional interpretation because a plaintiff’s burden of proof and likelihood of securing a favorable verdict are significantly influenced by which constitutional standard governs his or her claim.”).

\textsuperscript{209} See Alfred H. Lloyd, \textit{The Logic of Antithesis}, 8 PHIL. PSYCHOL. SCI. METHODS 281, 283 (1911) (suggesting that an antithetical definition provides “complete exclusion” from the first definition); \textit{see also} David Gary Carlson, \textit{Hegel’s Theory of Quantity}, 23 CARDOZO L. REV. 2027, 2086 (2002) (demonstrating how Kant invoked the antithesis in proving his thesis).
restraint by physical force no longer exists or when a reasonable person no longer would submit to a show of authority based on a totality of the circumstances.\textsuperscript{210}

1. Antithetical Definition of Personal Seizure Comports with Supreme Court Precedent

The antithetical definition of personal seizure should be adopted because it comports with the Court's treatment of § 1983 excessive-force claims in \textit{Graham}\textsuperscript{211} and \textit{Bell}\textsuperscript{212}. The antithetical definition of personal seizure also should be implemented because it advances the Court's expansive and flexible approach to personal seizure advocated in \textit{Terry}\textsuperscript{213} and maintains the objectivity articulated by Justice Stewart in \textit{Mendenhall}\textsuperscript{214}.

\textbf{a. Antithetical Definition of Personal Seizure Complies with Graham and Bell}

The antithetical definition adheres to the Court's precedent in \textit{Graham} and \textit{Bell} because it recognizes that seizure extends beyond the initial point of arrest or investigative stop as in \textit{Graham}\textsuperscript{215} and also accounts for seizure ending before the commencement of pretrial detention as articulated in \textit{Bell}\textsuperscript{216}. The antithetical definition of personal seizure follows \textit{Graham} because the suspect

\begin{itemize}
\item \textsuperscript{210} See United States v. Mendenhall, 446 U.S. 544, 553–54 (1980) (Stewart, J., opinion); Terry v. Ohio, 392 U.S. 1, 19 n.16 (1968); see also Lloyd, supra note 209, at 281 (demonstrating how the antithetical approach operates). Aristotle also was a strong supporter of the antithetical concept:

\textit{When the style is... antithetical, in each of the two members... an opposite is balanced by an opposite... This kind of style is pleasing, because things are best known by opposition, and are all the better known when the opposites are put side by side; and is pleasing also because of its resemblance to logic—for the method of refutation... is the juxtaposition of contrary conclusions.}

\textit{ARISTOTLE, THE RHETORIC OF ARISTOTLE 204–05 (Lane Cooper trans., 1932); see also Michael Frost, Justice Scalia's Rhetoric of Dissent: A Greco-Roman Analysis of Scalia's Advocacy in the VMI Case, 91 KY. L.J. 167, 214 (1994) ("[T]he more concise and antithetical the saying, the better it pleases, for the reason that, by the contrast, one learns the more, and, by the conciseness, learns with the greater speed." (quoting ARISTOTLE, supra, at 214)).}

\textsuperscript{211} See Graham v. Connor, 490 U.S. 386, 389, 393–95 (1989); see also supra Part II.A.

\textsuperscript{212} See Bell v. Wolfish, 441 U.S. 520, 535–37 (1979); see also supra Part II.A.

\textsuperscript{213} See Terry, 392 U.S. at 16–17.

\textsuperscript{214} See Mendenhall, 446 U.S. at 554.

\textsuperscript{215} See Graham, 490 U.S. at 389, 394. Other Supreme Court cases also have implemented the Fourth Amendment reasonableness analysis after a suspect was in the custody of the arresting officer. See Winston v. Lee, 470 U.S. 753, 755, 766–67 (1985) (applying a Fourth Amendment reasonableness analysis after police officers placed a suspect in custody and forced the suspect to undergo surgery to remove a bullet as evidence of a crime); Schmerber v. California, 384 U.S. 757, 758–59, 767–68 (1966) (applying a Fourth Amendment reasonableness analysis in evaluating the police officer's conduct when he forced a suspect to submit to a blood test at the hospital following an automobile accident).

\textsuperscript{216} See Bell, 441 U.S. at 523, 534–35.
in that case no longer was submitting to a show of authority or restrained by
physical force once released by the police officers.\textsuperscript{217} The antithetical
definition of personal seizure is also consistent with \textit{Bell} because the pretrial
detainees no longer were seized for purposes of the Fourth Amendment given
that their legal status had changed from "seized" to "defendants" after being
afforded the first legal opportunity for release at an appearance before a
judicial officer\textsuperscript{218}. In \textit{Bell}, while the Court had the option to extend seizure to
the pretrial detainee and invoke a Fourth Amendment analysis, it decided
instead to analyze the claims under the Due Process Clause.\textsuperscript{219} The Court's
decision to conduct a due process inquiry rather than a Fourth Amendment
analysis suggests that the pretrial detainees were not seized for purposes of the
Fourth Amendment. Accordingly, the Court's due process analysis dictates
that pretrial detainees are not seized for purposes of the Fourth
Amendment.\textsuperscript{220} Thus, the antithetical definition of personal seizure should be implemented
because it is consistent with the Court's treatment of §1983 excessive-force
claims in \textit{Graham} and \textit{Bell}.

\textbf{b. Antithetical Definition Advances Court's Seizure Precedent}

The antithetical definition of personal seizure also complies with the Court's
personal-seizure precedent established in \textit{Terry} because it offers a flexible
continuum for when personal seizure may end and provides guidance to courts
and law enforcement for determining when seizure ends.\textsuperscript{221} Unlike the various
approaches adopted by the federal circuit courts concerning personal seizure,
the antithetical definition of personal seizure does not mark the end of seizure
with a fixed point in time, such as arrest, transfer of custody, the booking
process, or the probable-cause hearing.\textsuperscript{222} Rather, the antithetical definition of
personal seizure is flexible because it permits personal seizure to end at various
points in time depending on when the indicia of a seizure no longer exist.\textsuperscript{223} In
addition, the antithetical definition comports with Justice Stewart's opinion in

\textbf{\textsuperscript{217} Graham}, 490 U.S. at 389 (noting that Graham was released after officers learned that
Graham was not involved in criminal conduct); see also \textit{California v. Hodari D.}, 499 U.S. 621,
628 (1991) (noting that an individual is seized when a reasonable person would have believed that
the officer's words and actions were intended to restrict his freedom of movement).

\textbf{\textsuperscript{218} See supra notes 48-50 and accompanying text.}

\textbf{\textsuperscript{219} Bell}, 441 U.S. at 535.

\textbf{\textsuperscript{220} See id.}

\textbf{\textsuperscript{221} See supra Part I.B; see also \textit{Terry v. Ohio}, 392 U.S. 1, 17 (1968).}

\textbf{\textsuperscript{222} Compare supra Part I.B, with supra Part III.A.}

\textbf{\textsuperscript{223} See \textit{Terry}, 392 U.S. at 17 (noting that the Fourth Amendment protections arise during
the initial contact between police officers and citizens, and extend through arrest). Personal
seizure may end at arrest, transfer of custody, the booking process, or at the first hearing before a
judicial officer. See also \textit{Gerstein v. Pugh}, 420 U.S. 103, 111 n.11 (1975) ("The length of pretrial
custody cannot be ascertained at the outset, and it may be ended at any time by release on
recognizance, dismissal of the charges, or a guilty plea, as well as by acquittal or conviction after
trial.").}
Mendenhall because it adopts the same standard of objective reasonableness—the totality of the circumstances as viewed by a reasonable person.\textsuperscript{224}

As demonstrated, the antithetical definition of personal seizure adheres to the Court’s personal-seizure precedent because it provides an objective standard\textsuperscript{225} and marks the end of a seizure as the point in time when a seizure under the rationale of Terry no longer exists.\textsuperscript{226}

B. Operation of the Antithetical Definition of Personal Seizure

The antithetical definition of personal seizure is appropriate in defining the end of seizure because it accounts for both restraint by physical force and submission to a show of authority.\textsuperscript{227}

1. Antithetical Definition of Personal Seizure Applied to Restraint by Physical Force and Submission to a Show of Authority

If an individual is seized by means of physical force,\textsuperscript{228} the antithetical definition provides that the seizure will end once the individual no longer is restrained by physical force.\textsuperscript{229} If an individual is seized by submission to a show of authority, the antithetical definition of personal seizure provides that the seizure will end once a reasonable person would no longer submit to a show of authority based on a totality of the circumstances.\textsuperscript{230} Seizure through restraint by physical force or submission to a show of authority may end by either legal\textsuperscript{231} or illegal\textsuperscript{232} means. Hodari D. demonstrated that one who escapes from law enforcement no longer is restrained by physical force because that individual has regained freedom of movement.\textsuperscript{233}

Conversely, restraint by physical force ends by legal means once the legal system provides a seized individual with his first opportunity for release.\textsuperscript{234}

\textsuperscript{224} See United States v. Mendenhall, 446 U.S. 544, 554 (1980) (Stewart, J., opinion).

\textsuperscript{225} See id.

\textsuperscript{226} See Terry, 392 U.S. at 19 n.16.

\textsuperscript{227} See id.; Mendenhall, 446 U.S. at 553–54.

\textsuperscript{228} Terry, 392 U.S. at 19 n.16 (articulating the definition of seizure).

\textsuperscript{229} See Lloyd, supra note 209, at 283 ("Doubtless to ordinary thought an antithesis signifies two terms that are what I call a single, ungraded, cataclysmic difference, meaning of course a difference of complete exclusion, a difference under which neither term has any contacts, or any dealings, with the other.").

\textsuperscript{230} See Mendenhall, 446 U.S. at 554 (articulating the definition for submission to a show of authority).

\textsuperscript{231} See Graham v. Connor, 490 U.S. 386, 389 (1989) (noting that the suspect was released at the police officers’ discretion).

\textsuperscript{232} See California v. Hodari D., 499 U.S. 621, 628 (1991) (suggesting that one who flees from law enforcement is not seized); see also United States v. MacDonald, 916 F.2d 766, 771 (2d Cir. 1990) (recognizing that escape from law enforcement constitutes "unlawful activity").

\textsuperscript{233} Hodari D., 499 U.S. at 628.

\textsuperscript{234} See Graham, 490 U.S. at 389 (implying that the suspect was a free citizen after being released at the police officer’s discretion); Bell v. Wolfish, 441 U.S. 520, 536–37 (1979)
The first opportunity for release ends personal seizure because the individual’s status in the legal system changes to either “free citizen” or “defendant.” For those restrained by physical force, the first opportunity for release may occur at several different times, such as when an individual is released by police officers, when an individual is released on bail before a judicial hearing, when an individual attends a probable-cause hearing, or when an individual makes a first appearance before a judicial officer. An individual who submits to a show of authority is afforded the first opportunity for release as a free citizen under Justice Stewart’s objective standard in *Mendenhall* when a reasonable person would feel free to leave based on a totality of the circumstances or when the individual has been released by law enforcement. Alternatively, law enforcement may escalate the individual’s seizure status by show of authority to restraint by physical force.

Given that the transition from restraint or submission to release or detention effectively changes a “seized” person’s status in the legal system, a person no longer remains restrained by physical force or subject to a show of authority after being afforded the first legal opportunity for release. Under the

(suggesting that persons released on bail and pretrial detainees qualify as defendants given that these persons are obligated to appear at trial); DRESSLER, supra note 181, at 545 (noting that the first legal opportunity for release often occurs at the initial hearing before a judicial officer).

235. See DRESSLER, supra note 181, at 8; see also ROBERT HENLEY WOODY, SEARCH AND SEIZURE: THE FOURTH AMENDMENT FOR LAW ENFORCEMENT OFFICERS 41 (2006). When an individual is released from police custody, his legal status changes from “seized” to “free citizen.” See *Graham*, 490 U.S. at 389. When an individual is released on bail before a judicial hearing, the individual’s legal status changes from “seized” to “defendant.” See *Bell*, 441 U.S. at 536–37. If an individual elects not to post bail or cannot afford to post bail before a judicial hearing, this individual has not been afforded the first legal opportunity for release because the individual’s legal status has not changed. See DRESSLER, supra note 181, at 545. Rather, the individual remains “seized” until the individual’s legal status changes. See id. When an individual attends a probable-cause hearing, the individual’s status legally changes from “seized” to “free citizen” or from “seized” to “defendant,” depending on the probable-cause ruling. See WOODY, supra, at 10–11, 41 (acknowledging that a person becomes a defendant when the magistrate determines that there is probable cause for arrest); see also DRESSLER, supra note 181, at 7–8 (noting that the magistrate decides whether the arrestee should be released, afforded bail, or detained on formal charges at the probable-cause hearing). The first appearance before a judicial officer is the last time where an individual may be afforded the first legal opportunity for release because all individuals are assigned for release as free citizens or detention as defendants. See DRESSLER, supra note 181, at 7–8; see also DEL CARMEN, supra note 7, at 167.

236. See DEL CARMEN, supra note 7, at 29 (noting that a person may be released after law enforcement issues a summons or citation).

237. DRESSLER, supra note 181, at 545.

238. See Lloyd, supra note 209, at 281 (demonstrating how the antithetical definition functions as the opposite).

239. See *Graham*, 490 U.S. at 389 (releasing the suspect after being held in police custody).

240. See supra note 40 and accompanying text.

241. See *Graham*, 490 U.S. at 389 (implying that Graham’s legal status changed to free citizen when the police officers released him); *Bell v. Wolfish*, 441 U.S. 520, 537 (1979) (suggesting that pretrial detainees were defendants); see also DRESSLER, supra note 181, at 545.
antithetical definition of personal seizure, illegal escape and the first opportunity for release account for the various points in time when restraint by means of physical force or submission to a show of authority may end for purposes of the Fourth Amendment. Thus, the antithetical definition of personal seizure should be adopted given its flexibility and applicability to all seizures.

IV. CONCLUSION

In the wake of its decision in *Graham*, the Supreme Court created a constitutional gap in determining what constitutional right is implicated in § 1983 excessive-force claims that arise after arrest and before pretrial detention. Federal courts currently fill this gap in a variety of ways depending on whether the circuit has adopted or rejected the continuing-seizure rule, which has resulted in disparate treatment of excessive-force claims across jurisdictions. Nevertheless, the federal courts’ justifications for adopting or rejecting the continuing-seizure rule fail to comport with the Supreme Court’s definition of personal seizure in *Terry*. Federal courts, therefore, should adopt the antithetical definition of personal seizure because it offers a logical solution for defining the end of personal seizure. The antithetical definition comports with the Supreme Court’s expansive seizure precedent and the flexible principles established in *Terry*, and corresponds with the Court’s excessive-force precedent in *Graham and Bell*.

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242. See, e.g., *Graham*, 490 U.S. 386, 389 (demonstrating that restraint by physical force ends upon release); Gerstein v. Pugh, 420 U.S. 103, 119 (1975) (implying that restraint by physical force ends at a probable-cause hearing given that a magistrate must decide whether to bring the case before the grand jury); see also DRESSLER, supra note 181, at 545 (noting that an individual’s status in the legal system changes by the time the individual makes a first appearance before a judicial officer).

243. See *Michigan v. Chesternut*, 486 U.S. 567, 574 (1988). The antithetical definition of personal seizure for submission to a show of authority accommodates the flexibility and guidance desired by the Supreme Court in *Michigan v. Chesternut* regarding the submission to a show of authority standard. See id. In *Chesternut*, Justice Harry Blackmun commended the submission-to-a-show-of-authority inquiry because it allowed for flexibility and guidance in determining when personal seizure begins, “[w]hile the test is flexible enough to be applied in the whole range of police conduct in an equally broad range of settings, it calls for consistent application from one police encounter to the next, regardless of the particular individual’s response to the actions of the police.” Id. Similarly, the antithetical definition of personal seizure provides a flexible test to measure when seizure ends and requires “consistent application” in identifying the different points where seizure may end. See id.