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Public School Officials' Use of Physical Force as a Fourth Amendment Seizure: Protecting Students from the Constitutional Chasm between the Fourth and Fourteenth Amendments

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I. Introduction

Violence has hit the public schools. Images of students shooting each other rerun in the nation's mind, like a recurring nightmare. To establish order in the classrooms, teachers and administrators themselves have used physical force to corporally punish and to grasp out-of-control students.[1] Using physical force implicates a student's constitutional right to personal security,[2] a right safeguarded by both the Fourth[3] and Fourteenth Amendments.[4]

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1 Several educational psychologists have contended that striking children as punishment teaches students to be violent and undermines their ability to learn. *See* Kathryn R. Urbonya, *Determining Reasonableness Under the Fourth Amendment: Physical Force to Control and Punish Students*, __ CORNELL J.L. & PUB. POL'Y __, __ (2001) (forthcoming). States have differed in the authority that they give school officials to use physical force as punishment. *See infra* note 117 (listing state statutes). Some school districts have expressly adopted policies prohibiting corporal punishment, while at the same time recognizing that school officials may need to use force to control disruptive students. *See, e.g.*, Taylor v. Brentwood Union Free Sch. Dist., 143 F.3d 679, 680 n.1 (2d Cir. 1998):

> Corporal punishment is not an effective means of developing self-discipline. The [Brentwood Union Free School] District will not condone or accept the use of physical force (corporal punishment) upon a pupil for the purpose of punishing that pupil. Reasonable physical force used for the following purposes is not to be misconstrued as corporal punishment: (1) to protect oneself from physical injury; (2) to protect another pupil or teacher or any other person from physical injury; (3) to protect the property of the school or of others; (4) to restrain or remove a pupil whose behavior is interfering with the orderly exercise and performance of school district functions, powers or duties, if that pupil has refused to comply with a request to refrain from further disruptive acts.

Some courts have distinguished between force to punish students and force to restrain students, but nevertheless have applied the same analysis to both types of claims. *See, e.g.*, Jones v. Witinski, 931 F. Supp. 364, 367 (M.D. Pa. 1996):

> Strictly speaking, [the student] does not allege that he was subjected to excessive corporal punishment. Our interpretation of this claim is that [the teacher] used excessive force in attempting to remove him physically from his chair and propel him toward the door after ordering him to leave the classroom. The allegations are, however, closely enough allied with claims of corporal punishment that cases involving the latter apply analogous principles and provide useful guidelines for deciding the [teacher's] summary judgment motion.

2 The United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") has characterized this "right" in numerous ways: "the right to bodily integrity, the right to be free from 'unjustified intrusions on personal security,'. . . the right to be free from excessive force, [and] the right to be free from arbitrary and excessive corporal punishment." P.B. v. Koch, 96 F.3d 1298, 1304 (9th Cir. 1996) (quoting Ingraham v. Wright, 430 U.S. 651, 673 (1977)) (internal citations omitted). *See also* Wallace *ex rel.* Wallace v. Batavia Sch. Dist. 101, 68 F.3d 1010, 1014-15 (7th Cir. 1995) (examining whether a teacher unreasonably restricted a student's interest in "liberty" under the Fourth Amendment when he grabbed a student's elbow to expedite the student's departure). Most courts, however, have analyzed students' physical force claims under the substantive due process component of the Fourteenth Amendment, not the Fourth Amendment. *See, e.g.*, Neal v. Fulton County Bd. of Educ., 229 F.3d 1069, 1075 (11th Cir. 2000) ("We . . . join the vast majority of Circuits in confirming that excessive corporal punishment, at least where not administered in conformity with a valid policy authorizing corporal punishment[,] . . . may be actionable under the Due Process Clause when it is tantamount to arbitrary, egregious, and conscience-shocking behavior.").

3 U.S. CONST. amend. IV.

4 U.S. CONST. amend. XIV, § 1.

The Fourth Amendment, as incorporated by the Due Process Clause, prohibits "unreasonable searches and seizures,"[5] and the Fourteenth Amendment bars deprivations of "life" and "liberty without due process."[6] Both amendments protect the historic right to personal security.[7] Nevertheless, under "the Rule of *Graham*,"[8] only *one* amendment applies when officials use physical force: "[W]here another provision of the Constitution 'provides an explicit textual source of constitutional protection,' a court must assess a

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5 U.S. CONST. amend. IV. This Article uses the phrase the "Fourth Amendment" as shorthand for the rights that students have under the Fourth Amendment, as incorporated by the Due Process Clause of the Fourteenth Amendment. *See* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 652 (1995) (stating that the "Fourteenth Amendment extends [the Fourth Amendment] guarantee to searches and seizures by state officials, . . . including public school officials") (citing New Jersey v. T.L.O., 469 U.S. 325, 336-37 (1985)).

6 U.S. CONST. amend. XIV. This Article discusses the substantive due process component of the Fourteenth Amendment and only briefly refers to its protection of procedural due process. *See infra* Part II.E.2 & Part III.A.2. *See generally* Zinermon v. Burch, 494 U.S. 113, 125-26 (1990) (explaining that the Due Process Clause of the Fourteenth Amendment encompasses three types of claims: (1)"specific protections defined in the Bill of Rights"; (2) a "substantive component that bars certain arbitrary, wrongful government actions 'regardless of the fairness of the procedures used to implement them'" (quoting Daniels v. Williams, 474 U.S. 327, 331 (1986)); and (3) "a guarantee of fair procedure"). For discussion of substantive due process claims see, for example, London v. Dirs. of the Dewitt Pub. Schs., 194 F.3d 873, 877 (8th Cir. 1999) (recognizing that a coach's use of force implicated a student's Fourteenth Amendment interest in personal security, but deciding that the force was constitutional because it was not "shocking to the conscience"); Wise v. Pea Ridge Sch. Dist., 855 F.2d 560, 564 (8th Cir. 1988) (stating that "at some point the administration of corporal punishment may violate a student's liberty interest in his personal security and substantive due process rights"); Metzger *ex rel.* Metzger v. Osbeck, 841 F.2d 518, 520-21 (3d Cir. 1988) (stating that disciplining a student by using excessive force may violate the child's liberty interest safeguarded by substantive due process); Webb v. McCulloch, 828 F.2d 1151, 1159 (6th Cir. 1987) (reversing grant of summary judgment for school principal, and holding that substantive due process applied because the "need to strike [the student] was so minimal or non-existent that the alleged blows were a brutal and inhumane abuse of . . . official power, literally shocking to the conscience"); Garcia *ex. rel.* Garcia v. Miera, 817 F.2d 650, 656 (10th Cir. 1987) (stating that corporal punishments "that are so grossly excessive as to be shocking to the conscience violate substantive due process rights, without regard to the adequacy of state remedies"); Hall v. Tawney, 621 F.2d 607, 613 (4th Cir. 1980) (stating that corporal punishment is actionable under substantive due process if it "amounted to a brutal and inhumane abuse of official power literally shocking to the conscience"); Jones v. Witinski, 931 F. Supp. 364, 366 (M.D. Pa. 1996) (stating that "disciplinary corporal punishment of public school students by teachers or administrators" may "give rise to a claim under the Substantive Due Process Clause of the Fourteenth Amendment"); Meyer *ex. rel.* Wyrick v. Litwiller, 749 F. Supp. 981, 985-87 (W.D. Mo. 1990) (denying summary judgment of substantive due process claims against teacher who did not know why he hit the student on the head with his grade book, allegedly causing student to have neck and back pain).

7 *See, e.g.*, Ingraham v. Wright, 430 U.S. 651, 673 n.42 (1977) (stating that "[t]he right of personal security is . . . protected by the Fourth Amendment, which was made applicable to the States through the Fourteenth Amendment because its protection was viewed as 'implicit in "the concept of ordered liberty". . . enshrined in the history and the basic constitutional documents of English-speaking peoples'" (quoting Wolf v. Colorado, 338 U.S. 25, 27-28 (1949))); *see also* Terry v. Ohio, 392 U.S. 1, 17 (1968) (stating that a police officer's frisking of a person for weapons "is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly"); Schmerber v. California, 384 U.S. 757, 772 (1966) (noting that "[t]he integrity of an individual's person is a cherished value of our society").

8 Graham v. Connor, 490 U.S. 386, 394 (1989). *See infra* Part II.D.

plaintiff's claims under that explicit provision and 'not the more generalized notion of "substantive due process."'"[9]

For students challenging school officials' use of force, the difference between the Fourth and Fourteenth Amendments matters *doctrinally*: officials violate the Fourth Amendment when they "unreasonably" seize a person,[10] but they violate the Fourteenth Amendment only when their actions "shock-the-conscience."[11] The *Graham* rule thus creates a constitutional chasm—if the Fourth Amendment applies to evaluating the constitutionality of school officials' use of force, then students stand on the more protective ground of a "reasonableness" standard; but if the Fourteenth Amendment applies, they fall into the deep chasm of the Fourteenth Amendment's difficult "shocks-the-conscience" standard.

Historically, students have fallen into this chasm when they have used the substantive due process component of the Fourteenth Amendment to challenge a school official's authority to hit them as punishment for violating school rules.[12] In contrast, courts have provided students with greater pro-

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9 Conn v. Gabbert, 526 U.S. 286, 293 (1999) (quoting *Graham*, 490 U.S. at 395). *Graham* also stated that "*all* claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach." *Id.* The Court recently quoted this "rule" again in County of Sacramento v. Lewis, 528 U.S. 833, 843 (1998). For a discussion of *Lewis*, see *infra* Part II.E.2.

10 *See infra* Part II.D.

11 *See infra* Part II.E.2.

12 Federal courts have interpreted the Fourteenth Amendment as affording little protection to students challenging disciplinary action. *See* Lillard v. Shelby County Bd. of Educ., 76 F.3d 716, 726 (6th Cir. 1996) (holding that an official's slapping of a student across the face, which did not result in "physical injury," was not actionable under the substantive due process component of the Fourteenth Amendment because the slapping was not "brutal" or "i: humane"); Wise v. Pea Ridge Sch. Dist., 855 F.2d 560, 565 (5th Cir. 1988) (stating that "[e]ven if the corporal punishment is excessive and beyond the common law privilege accorded school teachers it does not necessarily follow that the student's substantive due process rights have been violated" and further explaining that actionable conduct must be "shocking to the conscience and amount to a severe invasion of the student's personal security and autonomy"); Jones v. Witinski, 931 F. Supp. 364, 371 (M.D. Pa. 1996) (stating that a teacher's grabbing of a student to remove him from his chair did not constitute a substantive due process violation because the teacher lacked the intent to cause harm); Brooks v. Sch. Bd., 569 F. Supp. 1534, 1535-36 (E.D. Va. 1983) (holding that no Fourteenth Amendment violation occurred when a teacher stuck a student's arm with a straight pin to punish the student because this action did not "descend to the level of a brutal and inhumane, conscience-shocking, episode").

The United States Court of Appeals for the Fifth Circuit ("Fifth Circuit") has significantly and erroneously limited the scope of these substantive due process claims by holding that students have no substantive due process claim if state law provides adequate post-hitting remedies. *See, e.g.*, Fee v. Herndon, 900 F.2d 804, 810 (5th Cir. 1990) (granting a principal's motion to dismiss for failure to state a violation of substantive due process because state law provided both civil and criminal remedies); *accord* Harris v. Tate County Sch. Dist., 882 F. Supp. 90, 90-91 (N.D. Miss. 1995) (citing numerous Fifth Circuit cases dismissing students' corporal punishment claims because "adequate post-punishment remedies" were available). In 1990, the United States Supreme Court clearly stated that substantive due process claims do not invite consideration of whether state law provides adequate post-deprivation remedies. *See* Zinermon v. Burch, 494 U.S. 113, 125 (1990).

In addition, the Supreme Court in dicta has stated that schools have no Fourteenth Amendment duty to protect students from hurting each other, even though students are often subject to

tection when the students have invoked the Fourth Amendment to challenge school officials' searches[13] of their property or person for drugs, other types of contraband, or stolen property.[14]

The purpose of this Article is to advocate applying the Fourth Amendment, not the Fourteenth Amendment, to evaluate the constitutionality of school officials' intentional use of physical force to control or punish students.[15] Many actions by school officials, in light of the Court's jurisprudence

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compulsory attendance laws. *See* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 655-56 (1995). When school officials sexually assault students, however, substantive due process protects their right to personal security. *See, e.g.*, Plumeau v. Sch. Dist. No. 40 County of Yamhill, 130 F.3d 432, 438 (9th Cir. 1997) (stating that "public school children have a constitutionally protected right not to be sexually abused by school employees at school"); Doe v. Taylor Indep. Sch. Dist., 15 F.3d 443, 445 (5th Cir. 1994) (en banc) (holding that "schoolchildren do have a liberty interest in their bodily integrity that is protected by the Due Process Clause of the Fourteenth Amendment and that physical sexual abuse by a school employee violated that right"); Stoneking v. Bradford Area Sch. Dist., 882 F.2d 720, 727 (3d Cir. 1988) (holding that the Fourteenth Amendment encompasses "a student's right to be free from sexual assaults by his or her teachers"); Laura Oren, *Section 1983 and Sex Abuse in Schools: Making a Federal Case Out of It*, 72 CHI.-KENT L. REV. 747, 817 (1997) (arguing that "it is necessary to derive the claims of students sexually abused by their teachers from the Constitution of the United States, and not from ordinary crimes and torts").

Scholars have also discussed the lack of protection substantive due process affords schoolchildren from excessive corporal punishment. *See, e.g.*, Victoria N. Benz, *Corporal Punishment in Today's Public Schools: Child Discipline or Legal Abuse*, 13 J. JUV. L. 13, 25-26 (1992) (arguing that the courts' failure to define what is shocking conduct under the Fourteenth Amendment is "startling because much of the corporal punishment now administered would probably be deemed excessive by the general public, especially in light of this nation's heightened awareness of child abuse"); Jerry R. Parkinson, *Federal Court Treatment of Corporal Punishment in Public Schools: Jurisprudence That Is Literally Shocking to the Conscience*, 39 S.D. L. REV. 276, 310 (1994) ("[T]hus far, most federal courts have adopted a hands-off approach, in part because corporal punishment is still viewed as a time-honored tradition. . . . Let us not allow more children to be irreparably damaged simply because of the historical pedigree of schoolroom beatings."); Irene M. Rosenberg, *A Study in Irrationality: Refusal to Grant Substantive Due Process Protection Against Excessive Corporal Punishment in the Public Schools*, 27 HOUS. L. REV. 399, 400 (1990) (criticizing the Fifth Circuit for denying all substantive due process protection when students have available state tort remedies); Carolyn P. Weiss, *Curbing Violence or Teaching It: Criminal Immunity for Teachers Who Inflict Corporal Punishment*, 74 WASH. U. L. REV. 1251, 1273 (1996) (stating that the Fourteenth Amendment "standard established by the circuits . . . renders federal substantive protection inherently inadequate and inconsequential"). *See generally* Susan H. Bitensky, *Spare the Rod, Embrace Our Humanity: Toward a New Legal Regime Prohibiting Corporal Punishment of Children*, 31 U. MICH. J.L. REFORM 353, 359 (1998) (examining parents' and other custodians' authority to use corporal punishment).

13 The cases litigated under the Fourth Amendment have focused on school searches, not seizures, of students and their property. *See* WAYNE R. LAFAVE, 4 SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 10.11 (3d ed. 1997 & Supp. 2000) (collecting cases in which school officials have searched students). In his introduction, Professor LaFave summarized the major issues the cases consider: first, whether the Fourth Amendment applies to school officials' actions; second, whether school officials can give effective third party consent to searches of students by police officers; and third, whether the exclusionary rule applies to evidence found during searches made by school officials. *Id.* at 802. This Article focuses on Fourth Amendment "seizures" of students.

14 *See infra* notes 244-257 and accompanying text.

15 *See, e.g.*, P.B. v. Koch, 96 F.3d 1298, 1303 n.4 (9th Cir. 1996) (stating that "several courts have, post-*Graham*, still described a student's right to be free from excessive force in terms of substantive due process" and noting that one "circuit has applied the Fourth Amendment to a

teacher's use of force against a student"). In *Koch*, however, the Ninth Circuit did not decide whether the Fourth or Fourteenth Amendment applied to the use of force by a school official, because the force used was so egregious that it violated the standards of either amendment. *Id.* at 1303.

One of the few decisions applying the Fourth Amendment to school officials' use of force against students is *Wallace* ex. rel. *Wallace v. Batavia School District*, 68 F.3d 1010, 1014 (7th Cir. 1995):

> We thus hold that, in the context of a public school, a teacher or administrator who seizes a student does so in violation of the Fourth Amendment only when the restriction of liberty is unreasonable under the circumstances then existing and apparent. Therefore, in seeking to maintain order and discipline, a teacher or administrator is simply constrained to taking reasonable action to achieve those goals. Depending on the circumstances, reasonable action may certainly include the seizure of a student in the face of provocative or disruptive behavior.

After determining that the use of force was reasonable under the Fourth Amendment, the U.S. Court of Appeals for the Seventh Circuit ("Seventh Circuit") also held that the Fourteenth Amendment did not afford the student "any greater protection than the Fourth Amendment from unwarranted discipline while in school." *Id.* at 1015.

In 1977, the Supreme Court, in *Ingraham v. Wright*, 430 U.S. 651, 673 n.42 (1977), examined the procedural due process protections students have when they receive corporal punishment, briefly mentioning the Fourth Amendment:

> The right of personal security is also protected by the Fourth Amendment .... It has been said of the Fourth Amendment that its overriding function . . . is to protect personal privacy and dignity against unwarranted intrusion by the State. But the principal concern of that Amendment's prohibition against unreasonable searches and seizures is with intrusions on privacy in the course of criminal investigations. [The students] do not contend that the Fourth Amendment applies, according to its terms, to corporal punishment in public schools.

Id. (citations omitted). Even though the Supreme Court in its 1985 decision, *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), applied the Fourth Amendment to searches occurring within public schools for violations of school rules, several courts have nevertheless interpreted the dicta in *Ingraham* as precluding application of the Fourth Amendment to students' corporal punishment claims. *See, e.g.*, Fee v. Herndon, 900 F.2d 804, 810 (5th Cir. 1990) (concluding without analysis that "the paddling of recalcitrant students does not constitute a fourth amendment search or seizure"); Gaither v. Barron, 924 F. Supp. 134, 135 n.2 (M.D. Ala. 1996) (briefly referring to *Ingraham*'s statement that the principal concern of the Fourth Amendment was with "*criminal investigations*"); Thrasher v. General Cas. Co., 732 F. Supp. 966, 971 (W.D. Wis. 1990) (stating that the Seventh Circuit's limits on applying the Fourth Amendment and *Ingraham*'s statement did not require it to apply the Fourth Amendment to a student's claim that a teacher used excessive force to discipline him; also holding that material facts were in dispute as to whether the force violated the student's personal security interests as safeguarded by the substantive due process component of the Fourteenth Amendment). The *Thrasher* court stated in dicta that, although the student "was seized within the literal meaning of that term when he was pushed, thrown or shoved against the chalkboard, this contact constitute[d] a de minimus level of imposition that does not warrant the invocation of Fourth Amendment protection." *Id.*

Only the Fifth Circuit, when examining the use of force by school officials under substantive due process, has considered whether students might have available state tort remedies. *See Fee*, 900 F.2d at 808. The Fifth Circuit stated:

> We harbor no opinion as to the severity of the student's injuries in this case. We hold only that since Texas has civil and criminal laws in place to proscribe educators from abusing their charges, and further provides adequate post-punishment relief in favor of students, no substantive due process concerns are implicated because no arbitrary state action exists.

Id. at 810. Under Supreme Court precedent, the presence of coextensive state law remedies, however, is irrelevant to establishing whether a substantive due process violation has occurred. *See, e.g.*, Zinermon v. Burch, 494 U.S. 113, 125 (1990) (stating that "the Due Process Clause contains a substantive component that bars certain arbitrary, wrongful governmental ac-

limiting the reach of substantive due process, now constitute "seizures" within the meaning of the Fourth Amendment.[16] In examining personal security claims similar to those that students could pursue, the Supreme Court has considered the Fourth Amendment when police intentionally use physical force during investigatory stops,[17] arrests,[18] and high-speed vehicular chases,[19] and when police officers deprive a citizen of liberty by filing criminal charges against the citizen.[20] Lower federal courts have also relied on the Fourth Amendment, rather than the substantive due process component of the Fourteenth Amendment, in evaluating police officers' use of physical force against citizens.[21]

In recent years, the Supreme Court has repeatedly stated that when officials use physical force to "seize" a person, the Fourth Amendment, not the Fourteenth Amendment, applies.[22] It also recently explained that a prior decision based on substantive due process "today would be treated under the Fourth Amendment, albeit with the same result."[23]

These decisions raise as many questions as they purport to answer—including why a person's interest in personal security must be "covered" by

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tions . . . *regardless of any state-tort remedy that might be available to compensate . . . for the deprivation*" (emphasis added)).

16 Although the Supreme Court and other federal courts have evaluated *seizures* of students under the Fourth Amendment if a search first occurred, most litigation involving the use of force to control or discipline students in the absence of a preliminary search has occurred under the Fourteenth Amendment, not the Fourth Amendment. *See infra* note 12.

17 *See* California v. Hodari D., 499 U.S. 621, 624 (1991) (police tackling suspect after he tossed drugs while running); Graham v. Connor, 490 U.S. 386, 395 (1989) (officials slamming uncooperative suspect against car during investigation). For a discussion of these cases, see *infra* text accompanying notes 140-146.

18 *See* Brower v. County of Inyo, 489 U.S. 593, 596-97 (1989) (using force by setting up a roadblock to stop a fleeing motorist); Tennessee v. Garner, 471 U.S. 1, 3 (1985) (shooting fleeing felon in the back); Winston v. Lee, 470 U.S. 753, 759 (1985) (obtaining warrant to authorize surgery to remove bullet from suspect); for a discussion of these cases, see *infra* Part III.B.1.

19 County of Sacramento v. Lewis, 523 U.S. 833 (1998). For a discussion of this case, see *infra* Part II.E.2.

20 *See, e.g.*, Gallo v. City of Philadelphia, 161 F.3d 217, 224 (3d Cir. 1998) (stating that "pretrial restrictions on travel and required attendance at court hearings constitute a seizure"). *But see* Kerr v. Lyford, 171 F.3d 330, 343 (5th Cir. 1999) (Jones, J., concurring) (stating that "circuit courts are divided both on the application of the Fourth Amendment post-arraignment and on whether mere requirements of the posting of a bond and appearance at pretrial hearings, without more, constitute a 'seizure'"). *See generally* Andrew G. Ferguson, *Continuing Seizure: Fourth Amendment Seizure in Section 1983 Malicious Prosecution Cases, in* 15 NAT'L LAWYERS GUILD CIVIL LIBERTIES COMM. CIVIL RIGHTS LITIGATION & ATTORNEY FEES HANDBOOK 4-1, 4-7 to 4-26 (Steven Saltzman, ed. 1999) (summarizing how U.S. Courts of Appeals for the Second, Third, Fourth, Seventh, and Eleventh Circuits have examined the application of the Fourth Amendment to malicious prosecution claims).

21 *See infra* Part III.B.2. *See generally* MICHAEL AVERY ET AL., POLICE MISCONDUCT LITIGATION § 2.14-2.18 (3d ed. 1998) (summarizing numerous Fourth Amendment unreasonable force claims brought against police officers).

22 *See, e.g.*, *Lewis*, 523 U.S. at 844; United States v. Lanier, 520 U.S. 259, 272 n.7 (1997); Albright v. Oliver, 510 U.S. 266, 276 (1994) (Scalia, J., concurring); *Graham*, 490 U.S. at 395.

23 *Lewis*, 523 U.S. at 849 n.9. The Court reframed *Rochin v. California*, 342 U.S. 165 (1952) as a Fourth Amendment case. *Rochin* had held that police officers, who forced a suspect to swallow an emetic after he swallowed drugs, engaged in conscience shocking conduct that violated the substantive due process component of the Fourteenth Amendment.

only a single amendment. In light of the Court's doctrinal structure requiring only one constitutional source, this Article advocates evaluating the constitutionality of school officials' uses of force under the Fourth Amendment, not the substantive due process component of the Fourteenth Amendment.[24]

Part II begins with an historical perspective, revealing that courts initially examined all physical force claims under a single standard, without specifying the constitutional amendment providing this protection. Federal courts of appeal traditionally applied the four "*Glick* factors" that Justice Friendly created in 1973:[25] (1) the need for the force, (2) the relationship between the need and the amount of force, (3) the extent of injury, and (4) the presence of malicious intent to harm.[26] From 1978 to 1998, the Supreme Court began to limit these factors as it evaluated the constitutionality of offi-

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24 In analyzing the scope of substantive due process, several courts have contrasted school officials' use of physical force to discipline students with the abuse of officials' power to sexually abuse or harass students. *See, e.g.*, Plumeau v. Sch. Dist. No. 40, 130 F.3d 432, 438 (9th Cir. 1997) (stating that the "extent of harm inflicted by sexual abuse is immeasurable" and adding that "in contrast to corporal punishment, sexual abuse is never inflicted in 'good faith'"); Stoneking v. Bradford Area Sch. Dist., 882 F.2d 720, 726 (3d Cir. 1989) (stating that "[a] teacher's sexual molestation of a student is an intrusion of the schoolchild's bodily integrity not substantively different for constitutional purposes from corporal punishment by teachers" with respect to putting school official on notice that their sexual behavior violated the Fourteenth Amendment).

Similarly, when police officers use force to assault a person sexually, courts continue to apply the Fourteenth and not the Fourth Amendment. *See, e.g.*, Jones v. Wellham, 104 F.3d 620, 628 (4th Cir. 1997). In *Jones*, a woman claimed that a police officer, after giving her a warning for an alleged traffic offense, raped her before he drove her home. *Id.* at 622. The U.S. Court of Appeals for the Fourth Circuit ("Fourth Circuit") applied the Fourteenth Amendment:

> Because the harm inflicted did not occur in the course of an attempted arrest or apprehension of one suspected of criminal conduct, . . . the claim was not one of a Fourth Amendment violation, but of the violation of the substantive due process right under the Fourteenth Amendment not to be subjected by anyone acting under color of state law to the wanton infliction of physical harm.

Id. at 628. For a similar analysis, see United States v. Lanier, 520 U.S. 259, 262 (1997) (discussing a district court's analysis of a state court judge's alleged sexual assaults under the Fourteenth Amendment and quoting jury instruction that framed the issue as whether the conduct was "shocking to one's consci[ence]").

25 Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973). For discussion of these factors, see *infra* Part II.E.2.

26 *See, e.g.*, Hall v. Tawney, 621 F.2d 607, 613 (4th Cir. 1980). *Hall* noted the parallel between its standard for evaluating police brutality claims and whether school officials used excessive force:

> As in the cognate police brutality cases, the substantive due process inquiry in school corporal punishment cases must be whether the force applied caused injury so severe, was so disproportionate to the need presented, and was so inspired by malice or sadism rather than a merely careless or unwise excess of zeal that it amounted to a brutal and inhumane abuse of official power literally shocking to the conscience.

Id. (citing *Glick*, 481 F.2d at 1033). Other courts have also applied the *Glick* factors to claims involving school officials' hitting of students. *See, e.g.*, Wise v. Pea Ridge Sch. Dist. 855 F.2d 650, 564 (8th Cir. 1988). In *Wise*, the U.S. Court of Appeals for the Eighth Circuit ("Eighth Circuit") stated:

> We believe that a substantive due process claim in the context of disciplinary corporal punishment is to be considered under the following test: 1) the need for the application of corporal punishment; 2) the relationship between the need and the amount of punishment administered; 3) the extent of injury inflicted; and 4)

cials using physical force in a variety of contexts.[27] These decisions resulted in the Court enunciating the *Graham* rule (only one constitutional amendment applies to the use of physical force) and in limiting certain *Glick* factors to specific amendments.[28]

Consequently, under current law, the Fourth Amendment articulates an "unreasonable" standard and applies to persons "seized" within the meaning of the Fourth Amendment;[29] the Eighth Amendment has a judicially created "malice" standard and applies only to prisoners;[30] and the Fourteenth Amendment has a judicially created "shocks-the-conscience" standard that applies to all other persons who are not "seized" and who are not prisoners.[31]

Part III focuses on how the Court moved the Fourth Amendment into consideration when it examined *searches* in the public schools.[32] To protect students' interest in personal security, this section also argues for applying the Fourth Amendment to school official's use of physical force.

Part III also examines the two types of force used by school officials that constitute Fourth Amendment seizures: force used to control students and force employed to punish students. When school officials grab students who are fighting, their actions are similar to police officers trying to control unruly

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> whether the punishment was administered in a good faith effort to maintain discipline or maliciously and sadistically for the very purpose of causing harm.

Id. The *Wise* Court stated that, even if the coach had maliciously paddled the student, the hitting did not 'rise to the level of a substantive due process violation." *Id.* (The coach hit the student on the buttocks twice with a wooden paddle, causing the buttocks to become "reddened and slightly bruised." *Id.*)

27 *See Lewis*, 523 U.S. at 842-43 (holding that only the Fourteenth Amendment applies and explicitly refusing to apply the Fourth Amendment to a police officer's accidental hitting of a motorcycle passenger with his police cruiser, after he chased the fleeing driver of a motorcycle); *Graham*, 490 U.S. at 394-95 (explicitly refusing to apply the Fourteenth Amendment to police officers' use of physical force during an investigatory stop and declaring that only the Fourth Amendment applies); Brower v. County of Inyo, 489 U.S. 593, 594 (1989) (applying the Fourth Amendment to officers using a roadblock to stop a fleeing motorist); Tennessee v. Garner, 471 U.S. 1, 11-12 (1985) (evaluating a police officer's shooting of a fleeing felon under the Fourth Amendment).

28 *See infra* Part II.D-E.

29 *See, e.g., Lewis*, 528 U.S. at 842-50 (holding that the Fourth Amendment's unreasonableness standard did not apply because police officer's accidental hitting of a fleeing motorist with his cruiser was not a seizure); *Graham*, 490 U.S. at 398-99 (vacating and remanding because lower court erroneously included malice as an inquiry under the Fourth Amendment's unreasonableness standard); *Garner*, 471 U.S. at 20-22 (holding that police officer's intentional shooting of a fleeing unarmed burglary suspect was an unreasonable seizure). For a discussion of these cases, see *infra* Part II.E.2.

30 Hudson v. McMillian, 503 U.S. 1, 7 (1992) (holding that prisoners must prove under the Eighth Amendment that prison guards acted maliciously in using force to discipline them and that the force used was not "de minimus"); Whitley v. Albers, 475 U.S. 312, 320-21 (1985) (holding that, in the context of subduing a riot, the presence or absence of malice is the appropriate standard for evaluating the constitutionality of prison guards' use of force).

31 *Lewis*, 523 U.S at 847-49. For a discussion of this case, see *infra* Part II.E.2.

32 *See* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 665 (1995) (holding that school officials' drug testing of athletes was a reasonable search under the Fourth Amendment); New Jersey v. T.L.O., 469 U.S. 325, 333-43 (1985) (applying the Fourth Amendment to school officials' search of student's purse to discover cigarettes). For a discussion of these cases, see *infra* Part III.A.

citizens—this use of force is a Fourth Amendment seizure. But, when school officials use force to punish students, the analogy of their actions to police officers is less clear. Nevertheless, such force constitutes a Fourth Amendment seizure because it remains an intentional acquisition of physical control over students.

The Article concludes by noting that applying the Fourth Amendment to the intentional use of physical force by school officials does not unduly restrict school personnel in exercising their duties. The Fourth Amendment allows school officials significant discretion in determining reasonable educational policies, including the potential use of force. Nevertheless, these policies must be reasonable in order to safeguard students' Fourth Amendment interest in personal security.

II. The History of Physical Force Litigation: Moving to Identify a "Single" Constitutional Amendment

The history of physical force litigation reveals a fascinating path that has narrowed with each passing decade. In the 1970s, shortly after the birth of vigorous constitutional tort litigation under 42 U.S.C. § 1983,[33] suspects, pretrial detainees, prisoners, and students sued governmental officials, alleging that the force used against them was unconstitutional.[34] In considering these claims, courts often did not explicitly specify what constitutional provisions that the officials may have violated. Instead, courts and juries usually measured the constitutionality of force by considering the four common-sense *Glick* factors: the need for force, the relationship between the need and the amount, the extent of injury, and the official's good or bad faith.[35] In sharp contrast, courts today, adhering to more recent Supreme Court precedent, must evaluate the right to personal security only under the single amendment that applies to the specific factual situation litigated—-either the Fourth, Eighth, or Fourteenth Amendment.[36]

Although the Court characterizes its constitutional force decisions as being neatly rooted in either textual or historical analysis of a particular amendment, ultimately the Court has simply balanced a variety of interests. On one side of the scale is the injured person's interest in personal security; on the other side is society's interest in effective law enforcement, discipline, or con-

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33 *See, e.g.*, 1A MARTIN A. SCHWARTZ & JOHN E. KIRKLIN, SECTION 1983 LITIGATION: CLAIMS AND DEFENSES § 1.1 at 3 (3d ed. 1997) (noting that Section 1983 constitutional tort litigation "lay relatively dormant prior to 1961"); *see also* Thomas Y. Davies, *Recovering the Original Meaning of the Fourth Amendment*, 98 MICH. L. REV. 547, 567 (2000) (noting that the expansion of liability for police officers is due to the Supreme Court's broad state action doctrine: "The modern reading of the Bill of Rights as a comprehensive regulation of the conduct of government officers is possible only because of the Court's expansive redefinition of officer misconduct as a form of government action. Officer misconduct was not viewed as government illegality at the time of the framing.").

34 *See, e.g.*, Kathryn R. Urbonya, *Establishing a Deprivation of a Constitutional Right to Personal Security under Section 1983: The Use of Unjustified Force by State Officials in Violation of the Fourth, Eighth, and Fourteenth Amendments*, 51 ALB. L. REV. 173, 204-29 (1987).

35 *See infra* Part II.A.2 (discussing the federal courts' evaluation of personal security claims under these provisions).

36 See *infra* text accompanying notes 139-153.

trol. One may also link the individual's interest in personal security to society's interest in preventing unnecessary governmental force: safeguarding the individual from force also protects society by checking governmental abuse.

The Supreme Court's decisions on physical force litigation under the Fourth, Eighth, and Fourteenth Amendments reveal both this implicit balancing of interests and the Court's rigid focus on selecting a single amendment to be the "right" source of protection. How the Court has balanced interests and applied a single amendment has depended upon how it characterized a particular context: officials who use objectively unreasonable force violate a "seized" individual's Fourth Amendment right; prison officials who maliciously use force violate a prisoner's Eighth Amendment right; and officials who use shocking force violate a person's substantive due process right under the Fourteenth Amendment.

A. The Common Law: Blackstone and the Development of the Historic Glick *Factors*

The Fourth,[37] Eighth,[38] and Fourteenth[39] Amendments protect a person's right to personal security, a right that is also protected at common law.[40] In describing a person's constitutional right to bodily integrity, the Supreme Court has looked to the common law for guidance.[41] Which

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37 *See, e.g.*, Winston v. Lee, 470 U.S. 753, 759 (1985) (stating that the "Fourth Amendment generally protects the 'security' of 'persons'"); Terry v. Ohio, 392 U.S. 1, 24-25 (1968) (stating that "[e]ven a limited search of the outer clothing for weapons constitutes a severe, though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience").

38 *See, e.g.*, Ingraham v. Wright, 430 U.S. 651, 659 (1977) (stating that "in addressing the scope of the Eighth Amendment's prohibition on cruel and unusual punishment, this Court has found it useful to refer to '[t]raditional common law concepts, . . . and to the 'attitude[s] which our society has traditionally taken.'") (quoting Powell v. Texas, 392 U.S 514, 535, 531 (1968) (plurality opinion)).

39 *See, e.g.*, County of Sacramento v. Lewis, 523 U.S. 833, 848-49 (1998). In describing its shocks-the-conscience standard for substantive due process claims under the Fourteenth Amendment, the *Lewis* Court explained that the common law protections for personal security were broader than those provided by the Fourteenth Amendment:

> It should not be surprising that the constitutional concept of conscience shocking duplicates no traditional category of common-law fault, but rather points clearly away from liability, or clearly toward it, only at the ends of the tort law's spectrum of culpability. . . . [L]iability for negligently inflicted harm is categorically beneath the threshold of constitutional due process . . . . It is, on the contrary, behavior at the other end of the culpability spectrum that would most probably support a substantive due process claim; conduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to conscience-shocking level.

Id.

40 *See, e.g.*, California v. Hodari D., 499 U.S. 621, 624 (1991). The *Hodari* Court examined the common law:

> We have long understood that the Fourth Amendment's protection against 'unreasonable . . . seizures' includes seizure of the person . . . . For most purposes at common law, the word ["seizure"] connoted not merely grasping, or applying physical force to, the animate or inanimate object in question, but actually bringing it within physical control.

41 Both the Supreme Court and Fourth Amendment scholars have written volumes

amendment applies depends upon the circumstances surrounding the use of force. In short, fact-specific analysis forms the core of modern constitutional force litigation.

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describing the common law and quarreling about its significance when interpreting the Fourth Amendment's text. Professor Akhil Amar has been a strong proponent of interpreting the Fourth Amendment to focus on whether the governmental action was reasonable. *See* AKHIL R. AMAR, THE BILL OF RIGHTS 70 (1998) (stating that "[w]henever . . . [a warrantless] search or seizure occurred, a jury, guided by a judge in a public trial and able to hear arguments from both sides of the case, could typically assess the reasonableness of government action in an after-the-fact tort suit"); AKHIL R. AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE 2 (1997) (arguing that the "First Principle" of the Fourth Amendment is reasonableness). In contrast, and more traditionally, many scholars have interpreted reasonableness to presume the need for a warrant. *See* Davies, *supra* note 33, at 557 n.9, 619-68 (listing extensive scholarly support for this view and proceeding to criticize this perspective.) Most recently, Professor Davies contends that scholars on both sides of the debate about the Fourth Amendment's historical meaning have misinterpreted the historical evidence. *Id.* at 553-54 (arguing that there is a "lack of any actual evidence of a broad reasonableness-in-the-circumstances standard in framing-era arrest and search law" and also contending that the reason that "the Framers did not address warrantless intrusions was that they did not anticipate that a wrongful act by an officer might constitute a form of government illegality—rather, they viewed such misconduct as only a *personal* trespass by the person who held the office").

Modern Supreme Court decisions interpreting the Fourth Amendment no longer reiterate that the Warrant Clause of the Fourth Amendment is the starting point for evaluating whether searches and seizures are constitutional. *See, e.g.*, Wyoming v. Houghton, 526 U.S. 295, 299-300 (1999) (citations omitted). The *Houghton* Court articulated a two-part inquiry:

> In determining whether a particular governmental action violates [the Fourth Amendment], we inquire first whether the action was regarded as an unlawful search or seizure under the common law when the Amendment was framed . . . . Where that inquiry yields no answer, we must evaluate the search or seizure under traditional standards of reasonableness by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.

Id. See also Florida v. White, 526 U.S. 559, 563 (1999) (stating "[t]he Fourth Amendment is to be construed in light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner in which will conserve public interests as well as the interests and rights of individual citizens") (quoting Carroll v. United States, 267 U.S. 132, 149 (1925)); Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 652 (1995). The *Vernonia* Court also focused on the common law:

> Where there was no clear practice, either approving or disapproving the type of search at issue, at the time the constitutional provision was enacted, whether a particular search meets the reasonableness standard "'is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.'"

Id. (quoting Skinner v. Ry. Labor Ex' Ass'n, 489 U.S. 602, 619 (1989), which quoted Delaware v. Prouse, 440 U.S. 648, 654 (1979)). In contrast, the Court, in a per curiam decision, has recently restated the traditional presumption for warrants. *See* Flippo v. West Virginia, 528 U.S. 11, 13 (1999) (per curiam) (stating "[a] warrantless search by the police is invalid unless it falls within one of the narrow and well-delineated exceptions to the warrant requirement" (citing Katz v. United States, 389 U.S. 347, 357 (1967)). Further examination of the disputes among the Court and scholars as to the need for a warrant is not necessary for the purposes of this Article because the use of force by school officials, like the use of force by police officers, rarely implicates a need for a warrant. *But see Winston*, 470 U.S. at 767 (holding unreasonable a judicial order authorizing surgery to remove a bullet from a suspect).

1. The Common Law

The Court has used the common law as an important, but not dispositive, factor in evaluating two issues: (1) determining which amendment applies to the force used by governmental officials and (2) assessing the constitutionality of force under the amendment selected.

The Due Process clauses of the Fifth and Fourteenth Amendments provide that no person shall be deprived of "liberty" without due process of law.[42] The Supreme Court has interpreted the word "liberty" to include the common law's protection of bodily integrity: "Among the historic liberties so protected was a right to be free from and to obtain judicial relief, for unjustified intrusions on personal security."[43] The Court has observed that the Fourth and Eighth Amendments[44] also safeguard this liberty interest: "[t]he right to personal security is . . . protected by the Fourth Amendment [and Eighth Amendment], which [were] made applicable to the States through the Fourteenth because its protection was viewed as 'implicit in the concept of ordered liberty . . . enshrined in the history and basic constitutional documents of English-speaking peoples.'"[45]

In his Commentaries, Blackstone described how the common law protected personal security in a variety of ways.[46] For example, under the common law, police officers had a right to shoot fleeing felons, but not fleeing misdemeanants.[47] After determining that the act of intentionally killing a suspect was a Fourth Amendment seizure,[48] the Supreme Court nevertheless refused to use this common law rule to define the scope of Fourth Amendment reasonableness.[49] Instead it has more broadly protected the right to personal security than the common law's strict rules by recognizing changing circumstances.[50] The Court declared that "[b]ecause of sweeping change in legal and technological context, reliance on the common-law rule in this case would be a mistaken literalism that ignores the purposes of a historical inquiry."[51] It rejected the common law rule, in part, because police departments had begun to refrain from using deadly force against fleeing felons.[52] The Court, however, candidly noted that state statutes did not reveal a "constant or overwhelming trend away from the common-law rule."[53]

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42 U.S. CONST. amend. V & XIV, § 1.

43 Ingraham v. Wright, 430 U.S. 651, 673 (1977) (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *134).

44 *See* Robinson v. California, 370 U.S. 660, 666-67 (1962) (incorporating the Eighth Amendment right to be free from cruel and unusual punishments against the states).

45 *Ingraham*, 430 U.S. at 673 n.61 (quoting Wolf v. Colorado, 338 U.S. 25, 27-28 (1949)).

46 4 WILLIAM BLACKSTONE, COMMENTARIES *289.

47 *See* Tennessee v. Garner, 471 U.S. 1, 12 (1985) (citing 4 WILLIAM BLACKSTONE, COMMENTARIES *289).

48 *Garner*, 471 U.S. at 7.

49 *Id.* at 13.

50 *Id.*

51 *Id.*

52 *Id.* at 18 (noting that "[o]verwhelmingly, [police department policies] are more restrictive than the common law rule).

53 *Id.*

Blackstone also described personal security as a procedural liberty interest that individuals possess when governmental officials inflict "punishment."[54] In determining which amendment applies in personal security litigation, the Court has linked this procedural interest in liberty to the particular factual context.[55] Under the Eighth Amendment, a predeprivation hearing must occur *before* the government can inflict any criminal "punishment";[56] but, under the Fourteenth Amendment, such a hearing may not always be necessary.[57]

The difference between the procedural protections now constitutionally required depends upon which common law rule the Court applied. The common law protected all individuals subject to criminal process.[58] The common law also distinguished the force used against school children from that used against prisoners.[59] The Court, in *Ingraham*, cited Blackstone for the proposition that even though an individual had an "absolute right[ ] . . . to security from the corporal insults of menace, assaults, beating, and wounding, . . . [it was not] a 'corporal insult' for a teacher to inflict 'moderate correction' on a child in his care."[60] The common law permitted force against a child by a teacher if it was "'necessary to answer the purposes for which [the teacher] is employed."[61] In that circumstance, hitting was "'justifiable or lawful.'"[62]

The common law privilege to strike a child also depended upon parental permission.[63] The modern Court rejected this aspect of the common law when it allowed teachers to strike students even absent parental consent.[64]

State law, for the Court, sufficiently protected schoolchildren's procedural liberty interests, because that law provided all the "process" due under the Due Process Clause.[65] State law afforded students an opportunity to sue

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54 1 WILLIAM BLACKSTONE, COMMENTARIES *134.

55 *See, e.g.*, Ingraham v. Wright, 430 U.S. 651, 669 (1977) (stating that "[t]he prisoner and the schoolchild stand in wholly different circumstances, separated by the harsh facts of criminal conviction and incarceration.").

56 *Id.* at 667.

57 *Id.* at 664.

58 *See, e.g.*, United States v. Watson, 423 U.S. 411 (1976) (noting that "the balance struck by the common law in generally authorizing felony arrests on probable cause, but without a warrant, has survived substantially intact"; also adding that "[i]t appears in almost all of the States in the form of express statutory authorization").

59 *Ingraham*, 430 U.S. at 682.

60 *Id.* at 661 (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *134).

61 *Id.* (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *453).

62 *Id.* (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *453).

63 *See generally* Ingraham, 430 U.S. at 661-62 (noting that "[a]lthough the early cases viewed the authority of the teacher as deriving from the parents, the concept of parental delegation has been replaced by the view—more consonant with compulsory education laws—that the State itself may impose such corporal punishment as is reasonably necessary 'for the proper education of the child and for the maintenance of group discipline'") (quoting 1 F. HARPER & F. JAMES, LAW OF TORTS § 3.20, 292 (1956)); Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 681 n.1 (1995) (O'Connor, J., dissenting) (noting that "although children may have had fewer rights against the private schoolmaster at the time of the framing than they have against public school officials today, *parents* plainly had *greater* rights then than now").

64 *Ingraham*, 430 U.S. at 661 n.22 (citing Baker v. Owens, 423 U.S. 907 (1975)).

65 *Id.* at 672.

for school officials' actions *after* officials had deprived the students of their bodily integrity interests.[66]

The procedural protections for liberty thus vary: criminals get predeprivation process but students get only postdeprivation process. In justifying this distinction, the Court noted that "the Framers of the Eighth Amendment could not have envisioned our present system of public and compulsory education, with its opportunity for noncriminal punishments."[67] To apply the Eighth Amendment to students' punishments would be to "wrench the Eighth Amendment from its historical context" focused on criminal punishment.[68]

The *Ingraham* Court also considered policy reasons for not applying the Eighth Amendment protection against cruel and unusual punishments to schoolchildren.[69] Looking to the practices of the states and professionals, it stated: "Professional and public opinion is sharply divided on the practice [of school teachers hitting students for punishment], and has been for more than a century. Yet we can discern no trend toward its elimination."[70] Similarly, it found that other checks existed to prevent abusive practices: (1) public schools are open and subject to scrutiny by the community,[71] (2) the community may also supervise the schools,[72] (3) students may sue school officials under state tort law,[73] and (4) the state may criminally prosecute physically abusive school officials.[74]

As it defined the scope of Eighth Amendment constitutional rights, the Court considered modern practices as well as common law rules. The Court limited the common law rule both as applied to police officers' use of deadly force and teachers' use of force to punish children.[75] The Court's Eighth Amendment jurisprudence emphasizes modern practices by applying "evolving standards of decency"[76] to determine whether criminal punishments are constitutional.[77]

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66 *Id.* at 677. The *Ingraham* Court stated:

> If the punishment inflicted is later found to have been excessive—not reasonably believed at the time to be necessary for the child's discipline or training—the school authorities inflicting it may be held liable in damages to the child and, if malice is shown, they may be subject to criminal penalties.

Id.

67 *Id.* at 668.

68 *Id.* at 669.

69 *Id.* at 670-71.

70 Ingraham v. Wright, 430 U.S. 651, 660-61 (1977).

71 *Id.* at 670.

72 *Id.*

73 *Id.* at 677.

74 *Id.*

75 *See supra* Part II.A.1.

76 Trop v. Dulles, 356 U.S. 86, 101 (1958), *quoted in Ingraham*, 430 U.S. at 668 n.36.

77 More recently, Justices have sharply disagreed as to whether modern practices are relevant in defining the scope of protection under the substantive due process component of the Fourteenth Amendment. *Compare* County of Sacramento v. Lewis, 523 U.S. 833, 848 n.8 (1998) (considering "contemporary practices") *with id.* at 860 (Scalia, J. concurring in the judgment) (considering "'our Nation's history, legal traditions, and practices'" (quoting Washington v. Glucksberg, 521 U.S. 703, 720-22 (1997)). For example, in 1998, the Court stated that whether officials violated substantive due process depends both on the "history of liberty protection" and

The Court has employed the Fourth, Eighth, and Fourteenth Amendments to protect aspects of the common law interest in personal security. Nevertheless, instead of viewing the right to personal security as an embodiment of a fundamental right protected by numerous provisions of the Constitution, the Court has narrowed and fractured the right to personal security by selecting a single amendment for its coverage.[78] Examination of the doctrinal history of constitutional force litigation reveals this movement and its important consequences. To discern the Court's movement and its effects, one must consider the foundational *Glick*[79] factors and then examine the Court's evaluation of them in different contexts.

2. *The Foundational* Glick *Factors*

In *Glick*, decided in 1973, Judge Friendly of the U.S. Court of Appeals for the Second Circuit ("Second Circuit") described four factors for courts to consider when determining the constitutionality of force:

> [1] the need for the application of force, [2] the relationship between the need and the amount of force that was used, [3] the extent of injury inflicted, and [4] whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.[80]

Factors one and two simply question whether officials did anything impermissible. If the force used was just the "right" amount, then the official would have committed neither a constitutional violation nor a state tort. The third factor (the injury inflicted) raised a metaphorical and rhetorical question—does the force used "rise to the level of a constitutional violation?" For example, as Judge Friendly noted, an impermissible shove does not necessarily constitute a constitutional violation, even if the amount of force used was "unnecessary."[81] Only the fourth factor created significantly different interpretations for the federal courts of appeals: some courts viewed the fac-

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on "an understanding of traditional executive behavior, of contemporary practice, and of the standards of blame generally applied to them." *Lewis*, 523 U.S. at 848 n.8. Other justices similarly added that "history and tradition are the starting point, but not in all cases the ending point of the substantive due process inquiry. There is room as well for an objective assessment of the necessities of law enforcement . . . ." *Id.* at 857 (Kennedy, J., concurring) (joined by Justice O'Connor).

78 *See infra* Section II.

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

80 *Id.*

81 *Id.* The Supreme Court repeated this phrase in *Hudson v. McMillian*, 503 U.S. 1, 9 (1992), as it distinguished a constitutional cause of action from a state tort claim. The *Hudson* Court interpreted the Eighth Amendment not to require that prisoners prove a significant injury: "the absence of serious injury is . . . relevant to the Eighth Amendment inquiry, but does not end it." *Id.* at 7. The Court discerned two components to an Eighth Amendment personal security claim: a subjective component, which requires proof of malice, and an objective component, which is "contextual and responsive to 'contemporary standards of decency.'" *Id.* at 8 (quoting *Estelle v. Gamble*, 429 U.S. 97, 103 (1976)). The Court explained: "When prison officials maliciously and sadistically use force to cause harm, contemporary standards of decency always are violated." *Id.* at 9.

tor as a "requirement" for a constitutional violation; others interpreted it simply as a relevant, but not necessary, inquiry.[82]

When the Supreme Court interpreted the constitutionality of force under the Fourth, Eighth, and Fourteenth Amendments, it interpreted all amendments as considering the first three factors.[83] The Court treated differently the fourth factor, malice: the presence of malice became the *sole* inquiry under the Eighth Amendment;[84] the *sole* inquiry under the substantive due process component of the Fourteenth Amendment in certain circumstances;[85] and an *impermissible* requirement under the Fourth Amendment in all circumstances.[86]

In 1977, the Supreme Court cited the *Glick* decision when, in *Ingraham v. Wright*,[87] it ruled out applying the Eighth Amendment to school officials' use of force. The Court discussed personal security in the context of a Fourteenth Amendment procedural due process claim. Examination of *Ingraham* demonstrates the Court's dramatic shift in its understanding of the right of personal security.

B. Relying on State Law to Remedy Injury to Students' Personal Security Interests

The Supreme Court's 1977 decision in *Ingraham*[88] is both similar to and different from modern personal security litigation. It is similar to modern litigation in its refusal to apply the Eighth Amendment to personal security claims raised by school children, holding that the Eighth Amendment applies to prisoners, not to students.[89] But, in sharp contrast to modern litigation, and despite its utterance that students have a "strong interest" in personal security, the *Ingraham* Court undervalued students' interests in bodily integrity.[90] The link between *Ingraham*—now a 1977 relic—and modern personal security litigation is the Court's repeated consideration of contemporary views in assessing the constitutionality of officials' use of force.[91]

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82 *See* Kathryn R. Urbonya, *The Constitutionality of High-Speed Pursuits Under the Fourth and Fourteenth Amendments*, 35 ST. LOUIS U. L.J. 205, 209 n.14 (1991) (collecting cases).

83 *See infra* text accompanying notes 138, 167, 198-221.

84 *See infra* Part II.E.1.

85 *See infra* Part III.E.2.

86 *See infra* text accompanying notes 138-142.

87 430 U.S. 651, 669 n.38 (1977).

88 *Id.*

89 *Id.* at 670-71.

90 *Id.* at 676.

91 In *Ingraham*, the Court intertwined its discussion of common-law educational practices with contemporary views on corporal punishment. Before the Revolution, "public and compulsory education existed in New England, . . . but the demand for free public schools as we now know them did not gain momentum in the country as a whole until the mid-1800's." *Id.* at 660 n.14. Not until 1918 did public compulsory education exist throughout the nation. *Id.*

The common law allowed a private school master to "inflict 'moderate correction' on a child in his care," *id.* at 661 (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *134), and the master's authority was derivative of the parent's authority to discipline a child. *Id.* at 662. Nevertheless, Blackstone described the common law as establishing an individual's "'absolute right[ ] . . . to security from the corporal insults of menace, assaults, beating, and wounding.'" *Id.* at 661 (quoting 1 WLLIAM BLACKSTONE, COMMENTARIES *134).

The setting of *Ingraham*'s story is a Florida junior high school in 1970, thirty years ago.[92] Two students, James Ingraham and Roosevelt Andrews, challenged schools officials' physical punishment of them.[93] Ingraham alleged that because he was being disruptive in a class, Principal Wright stated that he would hit him five times with a wooden paddle.[94] When Ingraham refused "to assume a paddling position," two assistant principals grabbed Ingraham and Principal Wright hit him twenty times.[95] Ingraham then sought medical attention: he took painkillers for a large bruise, he used cold compresses to reduce swelling, and did not attend school for ten days because was unable to sit.[96] The pain persisted for three weeks.[97]

Andrews alleged that school officials had hit him on two different occasions.[98] When he refused to submit to the paddle, believing that he had not violated a school rule, an assistant principal "struck him on the arm, back, and across the neck."[99] He also alleged that on another occasion Principal Wright had paddled him on the back and wrist because he broke some glass during a sheet metal class.[100] He too visited a doctor; his pain lasted one week.[101]

The students alleged that school officials' hitting of them violated the substantive due process component of the Fourteenth Amendment, the Eighth Amendment's prohibition against "Cruel and Unusual Punishments," and the procedural due process afforded by the Fourteenth Amendment.[102] When the Supreme Court considered *Ingraham*, it granted review only of the Eighth Amendment and procedural due process claims[103] and rejected re-

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The *Ingraham* Court also considered how current society's practices differed from the common law. With the advent of compulsory education, public school officials acquired authority beyond that permitted by parents in order to fulfill their "custodial and tutelary" powers. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 655 (1995). In *New Jersey v. T.L.O.*, 469 U.S. 325, 336 (1985), the Supreme Court explained this expansion of state power: "Today public school officials do not merely exercise authority voluntarily conferred on them by individual parents; rather, they act in furtherance of publicly mandated educational and disciplinary policies."

The *Ingraham* Court noted that the nation had abandoned the common law practice of corporal punishment for criminals and opined that "professional and public opinion is sharply divided on the practice [of corporal punishment] and has been for more than a century." *Vernonia*, 515 U.S. at 660-61. Corporal punishment was "recognized in the laws of most States," and there was "no trend toward its elimination"—at least in 1977. *Id.* at 676.

Contemporary views of corporal punishment are quite different. *See infra* note 117. The trend is now in the other direction—towards its abandonment. *See infra* note 117.

92 *Ingraham*, 430 U.S. at 653.

93 Ingraham v. Wright, 430 U.S. 651, 653 (1977).

94 Ingraham v. Wright, 525 F.2d 909, 911 (5th Cir. 1976), *aff'd*, 430 U.S. 651 (1977).

95 *Id.*

96 *Id.*

97 *Id.*

98 *Id.*

99 *Id.*

100 Ingraham v. Wright, 525 F.2d 909, 911 (5th Cir. 1976), *aff'd*, 430 U.S. 651 (1977).

101 *Id.*

102 *Id.* at 911-12.

103 Ingraham v. Wright, 430 U.S. 651, 659 (1977).

view of the substantive due process claim,[104] noting that the students had not raised the Fourth Amendment as an alternate source of protection.[105]

The Court's refusal in *Ingraham* to apply the Eighth Amendment to the students' claims resembles modern decisions that limit the Eighth Amendment to prisoners' claims for brutality, by narrowly construing the Amendment's scope.[106] Its procedural due process analysis, however, seems dated, reflecting that the Court wrote on the legal slate of 1977. In *Ingraham*, the Court ruled that state-law remedies provided adequate process, even though students could seek protection only after school officials hit them;[107] since *Ingraham*, the Court has enunciated the general rule that predeprivation process is necessary before depriving a person of liberty.[108]

1. The Eighth Amendment Does Not Apply to School Punishments

Even though hitting students for their misbehavior constitutes "punishment" under any definition of the word,[109] the Supreme Court in *Ingraham* did not textually link this type of punishment to the Eighth Amendment's "Cruel and Unusual Punishments" Clause.[110] Instead it relied on its historical interpretation of the Eighth Amendment as applying to punishments for *criminal* convictions.[111]

In rejecting the Eighth Amendment as a basis for the students' personal security claims, the Court stated that school children are not prisoners.[112] One important difference for the Court was the 1970s view of corporal punishment as applied to prisoners and to students:

> Despite the general abandonment of corporal punishment as a means of punishing criminal offenders, the practice continues to

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104 *Id.* at 689 n.12.

105 *Id.* at 673 n.42.

106 *See, e.g.*, Hudson v. McMillian, 503 U.S. 1, 5-7 (1992) (interpreting the Eighth Amendment to require prisoners to prove that officials' maliciously used physical force, whether to stop a riot or to control prisoners one-on-one).

107 *Ingraham*, 430 U.S. at 676-82.

108 *See, e.g.*, Zinermon v. Burch, 494 U.S. 113, 127 (1990) (stating that "the Court usually has held that the Constitution requires some kind of hearing *before* the State deprives a person of liberty or property").

109 *See, e.g.*, MURRAY A. STRAUS, BEATING THE DEVIL OUT OF THEM: CORPORAL PUNISHMENT IN AMERICAN FAMILIES 8 (1994). Professor Straus noted that the language we use often influences how we view an act: a parent "hitting" a child sounds different from a parent "spanking" a child. *Id.* Both hitting and spanking are violent behavior, although each has different connotations. *Id.*

110 *Ingraham*, 430 U.S. at 670 n.39 (stating that "the Court has never held that *all* punishments are subject to Eighth Amendment scrutiny").

111 *Id.* at 667 (stating "[i]n light of this history, it is not surprising to find that every decision of this Court considering whether a punishment is 'cruel and unusual' within the meaning of the Eighth and Fourteenth Amendments has dealt with a criminal punishment" (citing Estelle v. Gamble, 429 U.S. 97 (1976); Gregg v. Georgia, 428 U.S. 153 (1976); Furman v. Georgia, 408 U.S. 238 (1972); Powell v. Texas, 392 U.S. 514 (1968); Robinson v. California, 370 U.S. 660 (1962); Trop v. Dulles, 356 U.S. 86 (1958) (plurality opinion); Louisiana *ex rel* Francis v. Resweber, 329 U.S. 459 (1947); Weems v. United States, 217 U.S. 349 (1910); Howard v. Fleming, 191 U.S. 126 (1903); *In re* Kemmler, 136 U.S. 436 (1890); Wilkerson v. Utah, 99 U.S. 130 (1879); Pevear v. Commonwealth, 5 Wall. [72 U.S.] 475 (1867)).

112 *Ingraham*, 430 U.S. at 669.

> play a role in the public education of schoolchildren in most parts of the country. Profession and public opinion is sharply divided on the practice, and has been for more than a century. Yet we can discern no trend toward its elimination.[113]

In the 1970s, criminal punishments—except for the death penalty—did not include punishment to prisoners' bodies,[114] but school punishments still include the inflicting of bodily pain.[115]

The Court also employed "contemporary approval of a reasonable corporal punishment"[116] to support its conclusion that school officials need not provide students with a hearing before hitting them as punishment. The *Ingraham* Court's state-by-state survey of current practices[117] is similar to the

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113 *Id.* at 660-61 (footnotes omitted).

114 Although the Supreme Court in *Furman v. Georgia*, 408 U.S. 238 (1972), altered death penalty jurisprudence under the Eighth Amendment, many states then "hurriedly passed replacement death-penalty statutes." James Acker, Robert Bohm & Charles S. Lanier, *Introduction, in* AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT, AND FUTURE OF THE ULTIMATE PENAL SANCTION 7 (James Acker, et al. eds. 1998) (noting that, as of publication, thirty-eight states have death penalty statutes).

115 *Ingraham,* 430 U.S. at 660.

116 *Id.* at 663.

117 The Court's summary of state statutes and practices in the 1970s differs dramatically from state statutes and practices in 2000. The *Ingraham* Court stated:

> Of 23 States that have addressed the problem through legislation, 21 have authorized the moderate use of corporal punishment in public schools. Of these States only a few have elaborated on the common-law test of reasonableness, typically providing for approval or notification of the child's parents, or for infliction of punishment by the principal or in the presence of an adult witness.
>
> Only two States, Massachusetts and New Jersey, have prohibited all corporal punishment in their public schools. Where the legislatures have not acted, the state courts have uniformly preserved the common-law rule permitting teachers to use reasonable force in disciplining children in their charge.

Id. at 662-63.

In contrast to the 1970s, when only two states prohibited teachers from hitting students as a means of discipline, today nineteen states and the public charter schools in the District of Columbia expressly forbid its use. ALASKA ADMIN. CODE tit. 4, § 07.010(c) (2000); CAL. EDUC. CODE § 49001 (West 1993); HAW. REV. STAT. § 3024-1141 (1998-99); 105 ILL. COMP. STAT. ANN. §§ 5/24-24, 5/34-84a (West 1998); IOWA CODE ANN. § 280.21 (West 1999); MD. CODE ANN., EDUC. § 7-306(a) (1999); MASS. GEN. LAWS ch. 71, § 37G (1996); MICH. COMP. LAWS ANN. § 380.1312 (West 1997); MINN. STAT. § 121A.58 (Supp. 1999); MONT. CODE ANN. § 20-4-302(3) (1999); NEB. REV. STAT. § 79-295 (1996); NEV. REV. STAT. ANN. 392.4633 (Michie 1996); N.J. STAT. ANN. § 18A:6-1 (West 1999); OR. REV. STAT. § 339.250(8)(a) (1993); VT. STAT. ANN. tit. 16 § 1161ac (Supp. 1999); VA. CODE ANN. § 22.1-279.1 (Michie 1997); WASH. REV. CODE ANN. § 28A.150.300 (West 1997); W. VA. CODE § 18A-5-1(d) (1997); WIS. STAT. ANN. § 188.31(2) (West 1999); D.C. CODE ANN. § 31-2817(f) (1998).

Fifteen states give to local school boards the discretion to decide whether to authorize corporal punishment as a means of discipline. ALA. CODE § 16-28A-1 (1995) ("Teachers are hereby given the authority and responsibility to use appropriate means of discipline up to and including corporal punishment as may be prescribed by the local board of education."); ARIZ. REV. STAT. ANN. § 15-843(B), B(2) (West 1999) ("The governing board of any school district shall, in consultation with the teachers and parents of the school district, prescribe rules for the discipline, suspension and expulsion of pupils. The rules shall include . . . [p]rocedures for the use of corporal punishment if allowed by the governing board."); ARK. CODE ANN. § 6-18-505(c)(1) (Michie 1999) ("Any teacher or school administrator in a school district that authorizes use of corporal punishment in the district's written student discipline policy may use corporal punish-

ment, provided only that the punishment is administered in accord with the district's written student discipline policy, against any pupil in order to maintain discipline and order within the public schools."); DEL. CODE ANN. tit. 14, § 701(b) (1999) (stating that a teacher or administrator has "the same authority to . . . control . . . and to discipline the student . . . as a parent" may exercise; adding that this "authority includes . . . corporal punishment where deemed reasonable and necessary" if administered "in accordance with the state or local board of education policy"); FLA. STAT. ANN. § 232.27(1), 1(j) (West 1998) ("Teachers and other instructional personnel shall have the authority to . . . [u]se corporal punishment according to school board policy" subject to certain additional statutory requirements.); GA. CODE. ANN. § 20-2-730 (1996) ("All area, county, and independent boards of education . . . to determine and adopt policies and regulations relating to the use of corporal punishment."); KY. REV. STAT. ANN. §§ 158.444(1), 158.444(2)(b)(3) (Banks-Baldwin 1999) ("The Kentucky Board of Education shall promulgate appropriate administrative regulations relating to . . . student discipline," and requiring that school districts report to the Board the "number of suspensions, expulsions, and corporal punishments."); LA. REV. STAT. ANN. § 17 416.1B (West Supp. 2000) ("Each parish and city school board shall have the discretion with respect to the use of corporal punishment."); MISS. CODE ANN. § 37-11-57(2) (1999) (stating that school officials using corporal punishment do not commit negligence if the hitting was in accordance with both federal law and the "rules or regulations of the State Board of Education or the local school board"; also adding that civil liability occurs only if any hitting was "in bad faith or with malicious purpose or in a manner exhibiting a wanton and willful disregard of human rights or safety"); MO. STAT. ANN. § 160.261(1) (West 2000) ("The local board of education of each school district shall clearly establish a written policy of discipline, including the district's determination on the use of corporal punishment and the procedures in which punishment will be applied."); N.M. STAT. ANN. §§ 22-5-4.3A, 22-5-4.3B (Michie 2000) ("Local school boards shall establish student discipline policies . . . and [e]ach school district discipline policy shall establish rules of conduct governing areas of student and school activity, detail specific prohibited acts and activities and enumerate possible disciplinary sanctions, which sanctions may include corporal punishment."); N.C. GEN. STAT. §§ 115C-390, 115C-391 (1999) (stating that school officials may use reasonable force to correct pupils, providing some guidance for corporal punishment, and mandatory that local boards of education adopt policies consistent with other laws regarding corporal punishment); OHIO REV. CODE ANN. § 3319.41 (Anderson 1999) (prohibiting corporal punishment unless the local school board specifically adopts a resolution permitting corporal discipline and forms a task force that will regularly study disciplinary procedure, develop written reports, and advise the board); S.C. CODE ANN. § 59-63-260 (Law. Co-Op. 1990) ("The governing body of each school district may provide corporal punishment for any pupil that it deems just and proper."); WYO. STAT. ANN. § 21-4-308(a)-(b) (Michie 1999) (stating that "[e]ach board of trustees in each school district . . . may adopt rules for reasonable forms of punishment and disciplinary measures" and insulating school personnel from liability for inflicting reasonable corporal punishment authorized by school district policy).

Without specifically addressing corporal punishment, two states generally authorize school boards to adopt rules for discipline. IDAHO CODE § 33-1224 (Michie 1995) ("It is the duty of a teacher to carry out the rules and regulations of the board of trustees in controlling and maintaining discipline."); IND. CODE ANN. § 20-8.1-5.1-3 (West 1995) (stating that "[i]n all matters relating to the discipline and conduct of students, school corporation personnel stand in the relation of parents and guardians to the students of the school corporation"; adding that "school corporation personnel have the right . . . to take any disciplinary action necessary to promote student conduct that conforms with an orderly and effective educational system").

Eight states authorize school officials to use reasonable force to foster a safe and educational environment. COLO. REV. STAT. ANN. § 18-1-703(1)(a) (West 1998) ("A teacher or other person entrusted with the care and supervision of a minor, may use reasonable and appropriate physical force . . . when and to the extent it is reasonably necessary and appropriate to maintain discipline or promote the welfare of the minor."); CONN. GEN. STAT. ANN. § 53a-18(6) (West 2001) (stating that a "teacher . . . may use reasonable physical force upon [a] minor when and to the extent he reasonably believes such to be necessary" in four circumstances: to "protect himself or other from immediate physical injury"; to "obtain possession of a dangerous instrument or controlled substance . . . upon or within the control of such minor"; to "protect property from

Court's modern personal security litigation under the Fourth, Eighth and Fourteenth Amendments, which also considers contemporary practices.[118]

2. *Procedural Due Process Applies to School Punishments*

In determining the kind of process necessary to protect students' interests in personal security, the *Ingraham* Court again looked to the common law and to current state practices. It held that school officials do not violate procedural due process when they fail to hold a pre-punishment hearing before hitting students.[119] Both the common law and modern 1970s practices became tools for the Court to limit students' interests in personal security.[120]

Even though the Court, in a backhanded way, recognized that hitting a child involves a significant liberty interest,[121] it limited this interest by noting

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physical damage"; and to "restrain such minor or remove such minor to another area, to maintain order"); ME. REV. STAT. ANN. tit. 17-A, § 106(2) (West 1996) ("A teacher . . . is justified in using a reasonable degree of force against any such person who creates a disturbance when and to the extent that he reasonably believes it necessary to control the disturbing behavior or to remove a person from the scene of such disturbance."); N.H. REV. STAT. ANN. § 627:6(II) (1996) ("A teacher . . . is justified . . . in using necessary force . . . when the minor creates a disturbance, or refuses to leave the premises or when it is necessary for the maintenance of discipline."); N.Y. PENAL LAW § 35.10 (McKinney 1998) ("A teacher . . . may use physical force, but not deadly physical force, upon [a person under twenty-one] when and to the extent that he reasonably believes it necessary to maintain discipline or to promote the welfare of such person."); PA STAT. ANN. tit. 18, §§ 509(2)(i), 509(2)(ii) (West 1998) (stating that "[t]he use of force upon or toward the person of another is justifiable if . . . [t]he actor is a teacher or person otherwise entrusted with the care or supervision for a special purpose of a minor and . . . the actor believes that the force used is necessary to further such special purpose, including the maintenance of reasonable discipline in a school, class or other group, and that the use of such force is consistent with the welfare of the minor"; also adding that the force used must not exceed that allowed to parents under state law); S.D. CODIFIED LAWS § 13-32-2 (Michie 1991) ("Superintendents, principals, supervisors, and teachers and their aids and assistants, have the authority, to use the physical force that is reasonable and necessary for supervisory control over students."); TEX. PENAL CODE ANN. § 9.62(1)-(2) (Vernon 1994) ("The use of force, but not deadly force, . . . is justified: (1) if the actor is entrusted with the care, supervision, or administration of the person for a special purpose; and (2) when and to the degree the actor reasonably believes the force is necessary to further the special purpose or to maintain discipline in a group.").

Two states directly grant school officials the authority to use corporal punishment. OKLA. STAT. ANN. tit. 21 § 844 (West 1998) (stating that state law does not prohibit a "parent, teacher or other person from using ordinary force as a means of discipline, including but not limited to spanking, switching or paddling"); TENN. CODE ANN. § 49-6-4103 (1996) (permitting any teacher or principal to use corporal punishment in a reasonable manner to maintain discipline and order).

One state—Utah—conditions the use of corporal punishment upon written consent by a student's parent or guardian. UTAH CODE ANN. § 53A-11-802(1) (1997).

One state—North Dakota—recently repealed its prior statute that had prohibited corporal punishment. N.D. CENT. CODE 15-47-47 (1999) (repealed).

Two states—Kansas and Rhode Island have not enacted a statute addressing the use of force by school officials. *See generally* R.I. GEN. LAWS § 16-12-3 (1956) ("Every teacher shall aim to implant and cultivate in the minds of all children committed to his care the principles of morality and virtue.")

118 *See infra* Part II.E.

119 *Ingraham*, 430 U.S. at 682.

120 *See supra* text accompanying notes 109-116.

121 *Ingraham*, 430 U.S. at 676. The Court described the student's interest in personal secur-

that both the common law and modern practices allowed school officials to inflict bodily punishment: "Were it not for the common-law privilege permitting teachers to inflict reasonable corporal punishment on children in their care, and the availability of the traditional remedies for abuse, the case for requiring advance procedural safeguards would be strong indeed."[122] The Court also noted that "[t]he concept that reasonable corporal punishment in school is justifiable continues to be recognized in the laws of most States."[123]

Even though students have a "strong interest in procedural safeguards that minimize the risk of wrongful punishment,"[124] the *Ingraham* Court found that Florida's state law—both civil and criminal—provided students with sufficient process for purposes of the claim under consideration—the procedural due process required by the Fourteenth Amendment.[125] Because it did not grant review of the students' substantive due process claim, the *Ingraham* Court's procedural decision is narrow.

Although the Court's more recent personal security cases do not focus on the personal security interests of students, they similarly indicate the Court's attempt to confine the right to personal security within one amendment—in this case the Fourth Amendment—and further demonstrate its consideration of modern practices in describing the scope of this right.

C. *Moving Personal Security Rights to the Fourth Amendment: Officers Using Deadly Force*

After the *Ingraham* decision in 1977, courts generally continued to define the scope of the substantive right to personal security by considering Judge Friendly's common law *Glick* factors.[126] But, in 1985, the Supreme Court, in *Tennessee v. Garner*,[127] moved its analysis of unconstitutional force against citizens to the Fourth Amendment, and specifically linked police shootings to this amendment, rather than to substantive due process.[128] Under this Fourth Amendment analysis, two issues emerged: (1) whether the shooting of a suspect constituted a Fourth Amendment seizure;[129] and (2) if

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ity as a "strong interest," but not one that outweighed the interests on the other side of the balance. *Id.*

122 *Id.* at 674.

123 *Id.* at 677.

124 *Id.*

125 *Id.* The Court stated:

> If the punishment inflicted is later found to have been excessive—not reasonably believed at the time to be necessary for the child's discipline or training—the school authorities inflicting it may be held liable in damages to the child and, if malice is shown, they may be subject to criminal penalties.

Id. The Court's phrasing of the civil state law remedy parallels its later Fourth Amendment jurisprudence, which has recognized a substantive right to be free from "unreasonable" force. The Court's description of the criminal penalty parallels its Fourteenth Amendment substantive due process jurisprudence, which has recognized a substantive right to be free from the malicious use of force. *See infra* Parts III.2.C & E.

126 *See supra* Part II.A.2.

127 471 U.S. 1 (1985).

128 *Id.* at 7.

129 *Id.*

so, whether the shooting was itself a constitutionally unreasonable seizure.[130] Under the facts of the case, the Court held that the shooting violated the Fourth Amendment.[131]

With respect to the first question of whether the shooting was a seizure, the Court described, without further analysis, the officer's intentional shooting of a fleeing burglary suspect as a Fourth Amendment "seizure."[132] Subsequent cases, however, have revealed that the Court's narrow definition of "seizure" in this context, and its focus on selecting one amendment for personal security litigation[133] has created a constitutional chasm between the standards imposed by the Fourth and Fourteenth Amendments: officials violate the Fourth Amendment by acting unreasonably, but they violate the substantive due process guarantee of the Fourteenth Amendment only when they commit shocking conduct.[134]

In *Garner*, the Court declared "unreasonableness" to be the primary standard for personal security litigation by focusing on the language of the Fourth Amendment, which explicitly prohibits "unreasonable searches and seizures." Yet, as the mass of Fourth Amendment debate and jurisprudence indicates, "unreasonable" is hardly self-defining. The Court attempted to clarify what unreasonableness means as applied to officers using deadly force. In doing so, the Court balanced societal against individual interests:

> Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.[135]

The Court vigorously protected the suspect's interest in personal security by determining that the Fourth Amendment barred officers from shooting all fleeing felons, a practice that had been permitted at common law.[136] It stated, "[t]he suspect's fundamental interest in his own life need not be elaborated upon."[137] Thus, the Court implicitly recognized that the first two

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130 *Id.* at 9-12.

131 *Id.* at 11.

132 *Id.* at 7. The Court stated:

> Whenever an officer restrains the freedom of a person to walk away, he has seized that person. . . . While it is not always clear just when minimal police interference becomes a seizure, . . . there can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment.

Id. (citations omitted). These few sentences constitute the Court's entire analysis of whether the Fourth Amendment should apply to a police shooting.

133 For a discussion of the Court's analysis of the "rule of *Graham*," see *supra* Part II.D.

134 County of Sacramento v. Lewis, 523 U.S. 833, 842-46 (1998); *see also infra* Part II.E.2.

135 *Garner*, 471 U.S. at 11-12.

136 *Id.* at 12 (stating that the common law rule "allowed the use of whatever force was necessary to effect the arrest of a fleeing felon, though not a misdemeanant").

137 *Id.* at 9.

foundational *Glick* factors—the need for force and the amount of force—helped to define the substantive right to personal security under the Fourth Amendment. The extent of injury—in this case, the loss of the suspect's life—outweighed the harm facing the officer or others *unless* the officer was threatened with the infliction of *serious* physical harm. In contrast, the Court's opinion implicitly rejected the fourth *Glick* factor—whether the officer acted maliciously, a factor later explicitly disregarded in *Graham v. Connor* as being irrelevant to determining whether a particular seizure is reasonable.[138]

D. *Applying Only the Fourth Amendment to "Seized" Persons: The* Graham *Rule*

Despite the *Garner* decision, some courts of appeal continued to apply malice as a factor when evaluating the use of nondeadly force by police officers.[139] In 1989, four years after *Garner*, the Supreme Court, in *Graham v. Connor*, held that the U.S. Court of Appeals for the Fourth Circuit ("Fourth Circuit") erred when, in its evaluation of police officers' use of nondeadly force, it merely considered whether malice, the fourth *Glick* factor, was present.[140] The Court stated that the Fourth Circuit failed to understand that the scope of the right to personal security depends upon the precise constitutional amendment at issue: although the Eighth Amendment imposes a malice standard for the use of force during a prison riot,[141] inquiry as to whether malice was present cannot even be a factor for a Fourth Amendment claim.[142] Police officers violate the Fourth Amendment by acting unreasonably—an objective, not subjective, issue.[143] The Court articulated the doctrinally significant "*Graham* rule:" if police officers "seized" an individual by using force, only the Fourth Amendment applies, not the substantive due process component of the Fourteenth Amendment.[144]

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138 Graham v. Connor, 490 U.S. 386, 397 (1989).

139 *See, e.g.*, Graham v. Connor, 827 F.2d 945 (4th Cir. 1987), *rev'd* 490 U.S. 386 (1989).

140 *Graham*, 490 U.S. at 399.

141 *Graham*, 490 U.S. at 398 n.11.

142 One scholar has aptly noted that the Fourth Amendment's reasonableness standard is not the objective reasonableness standard of "tort law negligence;" rather, the Fourth Amendment standard, as interpreted by courts, is "much more forgiving toward defendants." Barbara E. Armacost, *Race and Reputation: The Real Legacy of* Paul v. Davis, 85 VA. L. REV. 569, 601-02 (1999). Professor Armacost contends, however, that a subjective standard has its "virtues" and that "real loss [has been] occasioned by the Court's reallocation of excessive force claims from the Due Process Clause to the Fourth Amendment." *Id.* at 607. I respectfully disagree. Proving that an official's use of force was "shocking to the conscience" was, and remains, very difficult. *See supra* note 12. Although Armacost's complaints with Fourth Amendment litigation are sound, the problems she isolates are not with the Fourth Amendment itself or with its protections, but rather with how some courts have erroneously interpreted the scope of the protection that the Fourth Amendment provides for the right of personal security. *See* Kathryn R. Urbonya, *Dangerous Misperceptions: Protecting Police Officers, Society, and the Fourth Amendment Right to Personal Security*, 22 HASTINGS CONST. L.Q. 623, 691-705 (1995) (listing nine ways that courts have mistakenly limited the Fourth Amendment right to personal security).

143 *Graham*, 490 U.S. at 397.

144 *Id.* at 395.

Under the rule of *Graham*, as later interpreted by the Court in 1997 and 1998 decisions,[145] prisoners similarly may assert a personal security claim only under the Eighth Amendment. (The *Graham* opinion actually had not so narrowly limited substantive due process; it stated that "substantive due process" is "at best redundant of that provided by the Eighth Amendment.")[146]

Even though an objective reasonableness standard for the Fourth Amendment is hardly surprising because it prohibits "unreasonable" seizures, the *Graham* rule is unusual because it rejects substantive due process as an additional claim.[147] When either the Fourth or Eighth Amendment applies to an individual's claim to personal security, the *Graham* rule declares substantive due process to be irrelevant, even though it also protects personal security. In short, the *Graham* rule unmasks the Court's desire to rein in substantive due process jurisprudence.[148] The Court tried to justify

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145 *See* County of Sacramento v. Lewis, 523 U.S. 833, 843 (1998). The *Lewis* Court quoted with approval United States v. Lanier, 520 U.S. 259, 272 n.7 (1997):

> *Graham* simply requires that if a constitutional claim is covered by a specific constitutional provision, such as the Fourth or Eighth Amendment, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process.

Lewis, 523 U.S. at 843.

146 *Graham*, 490 U.S. at 395 n.10. Prior to *Graham*, the Court had similarly stated that substantive due process, at least in the context of a prison riot, does not provide more protection than does the Eighth Amendment. *See* Whitley v. Albers, 475 U.S. 312, 327 (1986).

147 *See* Toni M. Massaro, *Reviving Hugo Black? The Court's "Jot for Jot" Account of Substantive Due Process*, 73 N.Y.U. L. REV. 1086, 1090-91 (1998) (stating that the rule of *Graham* is an "analytical and doctrinal oddity," and has the potential to overrule the "Court's substantive due process 'unenumerated rights' caselaw altogether). Professor Massaro notes that *Graham* was actually a substantive due process case, which the Court transformed into a Fourth Amendment case. *See id.* He interpreted *Graham* as "another layer to the Court's resistance to *any* new substantive due process claims." *Id.*

148 Through the years, many cases reveal the Justices, either together or individually, limiting substantive due process as a source for protection for different kinds of interests. One decision capturing well this movement away from substantive due process in the context of personal security claims is *Albright v. Oliver*, 510 U.S. 266 (1994). The Court granted review to determine whether the alleged malicious criminal prosecution of an individual can violate substantive due process. *Id.* at 275 (plurality opinion). The Court produced six different opinions, but only Justice Stevens (joined by Justice Blackmun) declared that substantive due process was the appropriate basis for this type of claim.

In *Albright*, the plaintiff, who was the subject of an arrest warrant for selling drugs, surrendered into custody and complied with a limit on his traveling outside the state. At a preliminary hearing, a judge determined that the alleged selling of a powder that merely looked like cocaine was not a state crime. In viewing these facts, Justice Rehnquist (joined by Justices O'Connor, Scalia, and Ginsburg) stated that the Fourth Amendment applied to "pretrial deprivations of liberty," but expressed no view as to whether the plaintiff's allegations stated a claim under the Fourth Amendment. *Id.* at 274-75 (plurality opinion). Justice Scalia, in a separate opinion, reiterated his strong opposition to the Court employing substantive due process analysis when a plaintiff alleges "unspecified" liberty interests have been harmed. *Id.* at 275 (Scalia, J., concurring). Justice Ginsburg found that the restraint imposed upon Albright constituted a Fourth Amendment seizure, and suggested that the basis of his claim may have been that the arresting officer was responsible for "effectuating and maintaining" the seizure. *Id.* at 279 n.5 (Ginsburg, J., concurring). In contrast, Justice Kennedy (joined by Justice Thomas) concurred in the judgment, opining that a malicious prosecution claim is one actually alleging a violation of procedural due process. Unlike Justice Scalia, however, Justice Kennedy interpreted the due process

the rule by relying on the "text" of the Fourth and Fourteenth Amendments: the Fourth Amendment, according to the Court, is "an explicit textual source of constitutional protection against this sort of physical intrusive governmental conduct,"[149] but the Fourteenth Amendment is "more generalized."[150] Notwithstanding its focus on finding the "correct amendment," the Court found a place for substantive due process claims, stating in dicta that the Due Process Clause protects detainees from "excessive force that amounts to punishment."[151]

Thus, application of the *Graham* rule centers on selecting a particular amendment to employ to examine the constitutionality of physical force by government officials. In other contexts, the Court has sometimes applied the strict rule of only allowing a claim under "one-amendment"[152]—and some-

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clause to protect more than the liberty interests specified in the Bill of Rights. *Id.* at 283 (Kennedy, J., concurring). Justice Souter found the alleged injuries to be compensable under the Fourth Amendment. He also explicitly discussed the *Graham* rule: substantive due process applies to "homeless substantial claims." *Id.* at 288 (Souter, J., concurring). In short, according to Justice Souter, if no other amendment applies to the alleged conduct, substantive due process will if the claim is "substantial." But only Justice Stevens (joined by Justice Blackmun) viewed the claim as falling within substantive due process. *Id.* at 302 (Stevens, J., dissenting). Justice Stevens viewed the *Graham* rule differently, noting that "[n]othing in *Graham* . . . forecloses a general due process claim when a more specific source of protection is absent or, as here, open to question." *Id.* at 305. Justice Stevens' view of *Graham* is literally correct, but the progeny of *Graham* reveals the Court's adoption of Justice Souter's view: substantive due process applies only to "homeless substantial claims." *See infra notes* 154-155 and accompanying text.

The fear of finding "substance" in due process is also present in the Court's early discussions of the "right to privacy." For example, Justice Douglas found a "right to privacy" "emanati[ng]" from the "penumbras of the Bill of Rights," as the Court considered the constitutionality of a state law that banned the use and distribution of contraceptives, even to married couples. Griswold v. Connecticut, 381 U.S. 479, 480 (1965). He explicitly tried to distinguish this "right to privacy" from the much criticized economic substantive due process jurisprudence of *Lochner v. New York*, 198 U.S. 45 (1905). Justice Blackmun later found the "right to privacy" included an interest in having an abortion, with this right rooted in the Fourteenth Amendment's conception of personal liberty. Roe v. Wade, 410 U.S. 113, 153 (1973). Later, Justice O'Connor boldly stated that the Court could interpret the word "liberty": "Liberty must not be extinguished for want of a line that is clear." Planned Parenthood v. Casey, 505 U.S. 833, 869 (1992) (O'Connor J., Kennedy J. & Souter J., joint opinion).

149 *Graham*, 490 U.S. at 395.

150 *Id.*

151 *Id.* at 395 n.10.

152 *See, e.g.*, Conn v. Gabbert, 526 U.S. 286, 293 (1999) (holding that the Fourth Amendment, and not the substantive due process component of the Fourteenth Amendment, applied to an attorney's challenge to law enforcement officials' search of his briefcase while his client testified before a grand jury, making the attorney unavailable for consultation); United States v. Lanier, 520 U.S. 259, 272 n.7 (1997) (explaining that the *Graham* rule does not bar applying substantive due process to constitutional claims related to physical abuse by government officials when no other constitutional provision applies); Whren v. United States, 517 U.S. 806, 813 (1996) (stating that "the constitutional basis for objecting to intentionally discriminatory application of the laws is the Equal Protection Clause, not the Fourth Amendment"): *See generally* City of West Covina v. Perkins, 525 U.S. 234, 246 (Thomas, J., concurring in judgment) (rejecting view that procedural due process applies to the execution of criminal search warrants, and stating that "the majority's conclusion represents an unwarranted extension of procedural due process principles developed in civil cases into an area of law that has heretofore been governed exclusively by the Fourth Amendment").

times it has not.[153]

Because it inconsistently applies the single amendment rule, the Court has repeatedly had to explain what "the *Graham* rule" means. The short version of the Court's long and frequent discussion of the *Graham* rule is that substantive due process protection against physical force applies only when another Amendment does not provide relief. In the October 1998 term, for instance, the Court again explained the *Graham* rule: "[W]here another provision of the Constitution 'provides an explicit textual source of constitutional protection,' a court must assess a plaintiff's claim under that explicit provision and 'not under the more generalized notion of "substantive due process."'"[154] Thus, when a claim falls under either the Fourth Amendment or Eighth Amendment, substantive due process does not apply, but if a claim raises both a Fourth Amendment claim and a procedural due process claim under either the Fifth or Fourteenth Amendment, *both* amendments apply. In short, the Court's distinctions simply reflect its strong movement away from finding *substance* in the substantive due process component of the Fourteenth Amendment.[155]

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153 *See, e.g.*, Soldal v. Cook County, 506 U.S. 56, 60 (1992) (holding that the Fourth Amendment applied to the removal of a person's trailer-home and rejecting the Seventh Circuit's conclusion that only the procedural protections of the Due Process Clause applied to this seizure). In *Soldal*, the Court explicitly recognized that actions by governmental officials may violate more than one constitutional provision:

> Certain wrongs affect more than a single right and, accordingly, can implicate more than one of the Constitution's commands. Where such multiple violations are alleged, we are not in the habit of identifying as a preliminary matter the claim's "dominant" character. Rather, we examine each constitutional provision in turn. *Graham* is not to the contrary. Its holding was that claims of excessive force should be analyzed under the Fourth Amendment's reasonableness standard, rather than under the Fourteenth Amendment's substantive due process test. We were guided by the fact that, in that case, both provisions targeted the same sort of governmental conduct and, as a result, we chose the more explicit textual source of constitutional protection over the more generalized notion of substantive due process. Surely, *Graham* does not bar resort in this case to the Fourth Amendment's specific protection for "houses, papers, and effects" rather than the general protection of property in the Due Process Clause.

Id. at 70-71 (internal citations and quotations omitted); *see also* United States v. James Daniel Good Real Property, 510 U.S. 43, 51-52, 62 (1993) (holding that even if the government's *ex parte* seizure of a home did not violate the Fourth Amendment, it violated the procedural due process requirements of the Fifth Amendment): *See generally* Conn v. Gabbert, 526 U.S. at 294 (Stevens, J., concurring in judgment) (refusing to limit challenges of law enforcement search to a single amendment: "If their conduct had violated the Due Process Clause of the Fourteenth Amendment, there is no reason why such a violation would cease to exist just because they also violated some other constitutional provision.").

154 *Conn*, 526 U.S. at 293 (quoting *Graham*, 490 U.S. at 395).

155 Similarly, Justice Thomas and Chief Justice Rehnquist have questioned whether the Privileges and Immunities Clause of the Fourteenth Amendment "should displace, rather than augment, portions of the [Court's] equal protection and substantive due process jurisprudence." Saenz v. Roe, 526 U.S. 489, 528 (1999) (Thomas, J., dissenting, joined by Chief Justice Rehnquist). Justices Thomas and Scalia have also argued that only the Fourth Amendment should apply when an individual challenges the process used by police officers in seizing property, and not the procedural due process protections of the Fourteenth Amendment. *See Perkins*, 525 U.S. at 246 (1999) (Thomas, J., concurring) (stating that "the majority's conclusion represents an

The *Graham* rule as applied to bodily integrity claims, however, is more than merely a symbolic statement. It matters immensely to litigators for two reasons. First, the Court has narrowly defined what constitutes a Fourth Amendment "seizure."[156] If the alleged conduct does not constitute a "seizure" of a person, then either the Fourteenth or Eighth Amendment "cover" the alleged conduct. Second, because the current standards for Eighth[157] and Fourteenth[158] Amendment personal claims are difficult to leap over, plaintiffs seek to characterize purportedly unconstitutional uses of physical force against them as covered by the more protective Fourth Amendment.[159] (Ironically, in some contexts the Court has applied the same standard for both Eighth and Fourteenth Amendments.)[160]

A brief summary of the Court's Eighth and Fourteenth Amendment personal security decisions reveals both a protection of governmental officials when they need to make quick decisions[161] and limitations on a person's interest in bodily integrity. In contrast, the Court's Fourth Amendment decisions mute, but do not obliterate, the tremendous deference to officials typical in Eighth Amendment decisions,[162] giving greater protection to personal security.

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unwarranted extension of procedural due process principles into an area of law that has heretofore been governed exclusively by the Fourth Amendment").

156 *See infra* Part III.B.

157 *See infra* Part II.E.1.

158 *See infra* Part II.E.2.

159 *See, e.g.*, Childress v. City of Arapaho, 210 F.3d 1154 (10th Cir. 2000). In *Childress*, police officers, knowing that a van contained two hostages, a woman and a child, "fired a total of twenty-one rounds" at it "as it passed through an intersection." *Id.* at 1156. The officers shot the woman in the "hip, leg, lungs, chest, arm and hand," and hit the child in "her chest, legs and back." *Id.* The injured hostages alleged that the police officers "were grossly negligent, reckless and even deliberately indifferent to their plight." *Id.* at 1158. The U.S. Court of Appeals for the Tenth Circuit ("Tenth Circuit") held that the Fourth Amendment's reasonableness standard did not apply because the officers "did not 'seize' [the hostages] within the meaning of the Fourth Amendment but rather made every effort to deliver them from unlawful abduction." *Id.* at 1157. The shootings also did not violate the substantive due process component of the Fourteenth Amendment because the officers did not intend to harm the hostages. *Id.* at 1158. The *Childress* court relied on similar decisions from the Courts of Appeals from the First, Second, Fourth, and Tenth Circuits. *Id.* at 1157 (collecting cases holding that the Fourth Amendment did not apply because no "seizure" occurs when police officers intentionally fired upon vehicles, causing injury to hostages or bystanders).

160 *See infra* text accompanying notes 218-221.

161 *See, e.g.*, County of Sacramento v. Lewis, 523 U.S. 833, 852-53 (1998) (rejecting a standard of deliberate indifference for a substantive due process claim that challenged the constitutionality of a high-speed pursuit causing death; stating that "a purpose of causing harm" is the proper standard for both a police chase and a prison riot because "unforeseen circumstances demand an officer's instant judgment"); Hudson v. McMillian, 503 U.S. 1, 6 (1992) (stating "[w]hether the prison disturbance is a riot or a lesser disruption . . . 'prison administrators . . . should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security'") (quoting Bell v. Wolfish, 441 U.S. 520, 547 (1979)); *see also infra* Part II.E.

162 *See, e.g.*, Graham v. Connor, 490 U.S. 386, 396-97 (1989). The Court described the Fourth Amendment reasonableness standard as allowing "for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Id.* at

E. Applying the Eighth or Fourteenth Amendment to Claims by Prisoners and "Nonseized" Persons

1. Malice for Eighth Amendment Prisoners' Claims

The Eighth Amendment applies when prison guards use physical force to control prisoners, whether during a minor cell disturbance[163] or a prison riot.[164] In creating malice as the core inquiry, the Supreme Court unconvincingly stated that the text of the Eighth Amendment led it to recognize malice to be the appropriate standard.[165] Even some of the more conservative Justices thought that the Court's choice of this standard was misguided—they would have instead opted for a deliberate indifference standard that also required demonstration of a significant injury.[166]

In declaring this standard, the Court explicitly cited the *Glick* factors, but it selected only one of them to serve as the core inquiry—the presence of malice.[167] The Court still considered the other *Glick* factors as important, but only as methods for determining the presence or absence of malice.[168]

According to the Court, the need for force, the relationship between the need and the amount of force, and the extent of injury may create an inference of malice.[169] The Court interpreted the third *Glick* factor—the extent

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397. The Court also stated that officers' decisions to use force "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.* at 396.

163 *See Hudson*, 503 U.S. at 6-7.

164 Whitley v. Albers, 475 U.S. 312, 320-22 (1986). The Eighth Amendment does not, however, according to the Supreme Court, provide any protection for students when their teachers hit them as punishment. *See supra* Part II.B.1. Even though attendance for school children is mandatory, the Court in 1977 found a constitutional difference in the protection for students and prisoners. *See* Ingraham v. Wright, 430 U.S. 651, 669-72 (1977). Twenty years later, the *Lewis* Court ironically held that the protection available under the Eighth Amendment is at times identical to the standard under the Fourteenth Amendment, the amendment that the courts of appeal have applied to most corporal punishment claims raised by students. *See supra* note 12.

165 *See* Wilson v. Seiter, 501 U.S. 294, 300 (1991) ("The source of the intent requirement is not the predilections of this Court, but the Eighth Amendment itself, which bans only cruel and unusual *punishment.*"). The textual games that the Court has played under the Eighth Amendment have been amusing, but not persuasive. When the Court in *Ingraham* decided that the Eighth Amendment did not apply to the corporal punishment that students received for disciplinary infractions, the constitutional text—forbidding "cruel and unusual punishments"—was not prominent in the opinion. *Ingraham*, 430 U.S. at 672. And, unlike in some Fourth Amendment cases, there was no searching through old dictionaries for illumination as to what the word "punishment" meant. *See, e.g.*, California v. Hodari D., 499 U.S. 621, 624 (1991) (considering both old and modern dictionaries as an aid to define the meaning of a Fourth Amendment "seizure"). Instead, the Court relied on both the history of the Eighth Amendment and on policy reasons in deciding who may seek its protection. *See supra* Part II.B.1.

166 *Hudson*, 503 U.S. at 24 (Thomas, J., dissenting) (rejecting the majority's application of the *Whitley* malice standard to "all excessive force cases [under the Eighth Amendment], without regard to the constraints facing prison officials").

167 In both *Hudson* (a prison disturbance case) and *Whitley* (a prison riot case), the Court explicitly quoted *Glick*'s malice factor as the central legal question: "whether force was applied in good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm." *Hudson*, 503 U.S. at 6 (quoting *Glick*, 481 F.2d at 1028 (2d Cir. 1973)); *Whitley*, 475 U.S. at 320-21.

168 *Hudson*, 503 U.S. at 7; *Whitley*, 475 U.S. at 321.

169 *Hudson*, 503 U.S. at 27.

of injury—as not requiring a significant injury.[170] It also created two new factors: "[1] the threat to the safety of staff and inmates, as reasonably perceived by the responsible officials on the basis of the facts known to them and [2] any efforts made to temper the severity of a forceful response."[171] These five factors apply whether prison guards used force during a riot or just to control a particular prisoner.[172]

Despite the Court's declaration in *Wilson* that the malice standard is implicit in the language of the Eighth Amendment, it nevertheless has created a different standard under the Eighth Amendment for prisoners' bodily integrity claims related to medical care[173] and for conditions of confinement claims.[174] In these related contexts, the standard is instead subjective deliberate indifference to serious bodily needs and security.[175] The Court also explicitly rejected *Whitley*'s malice standard for conditions of confinement claims under the Eighth Amendment in *Wilson*.[176] The *Wilson* Court focused on the "constraints facing the official" as it determined that under the Eighth Amendment a deliberate indifference, not a malice standard, applied to conditions of confinement claims.[177] These bodily integrity claims require a significant personal deprivation; use of force claims, even those that result in only a *de minimus* injury, are actionable if the officials acted maliciously.[178]

The Court boldly (if naively) stated: "The source of the intent requirement is not the predilections of this Court, but the Eighth Amendment itself,

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170 *See id.*

171 In *Whitley*, the Court first articulated these additional factors, 475 U.S. at 321, and the *Hudson* Court subsequently cited them. *Hudson,* 503 U.S. at 7.

172 *See id.* at 6.

173 Estelle v. Gamble, 429 U.S. 97, 104-05 (1976).

174 *See, e.g.*, Farmer v. Brennan, 511 U.S. 825, 838 (1994) (applying Eighth Amendment to prison officials' duty to protect prisoners from each other); Wilson v. Seiter, 501 U.S. 294, 303 (1991) (applying the Eighth Amendment to prisoner's claim challenging his conditions of confinement).

175 *Farmer*, 511 U.S. at 837. The *Farmer* Court defined this subjective deliberate indifference standard in its holding:

> [A] prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.

Id. It equated this subjective inquiry with the standard for criminal recklessness. *Id.* The *Farmer* Court explicitly rejected an objective deliberate indifference standard, *id.* at 837, because it equated objective deliberate indifference with civil rather than criminal recklessness: a person is reckless under the civil law if the person "acts or (if the person has a duty to act) fails to act in the face of an unjustifiably high risk of harm that is either known or so obvious that it should be known." *Id.* at 836. The Court emphasized the difference between objective and subjective deliberate indifference: when determining subjective deliberate indifference, juries must decide whether an official *actually knew* the consequences of action or inaction, even though a "reasonable person would have known." *Id.* at 843 n.8.

176 *Wilson* 501 U.S. at 302-03.

177 *Id.* at 303.

178 *Hudson*, 503 U.S. at 9-10 (stating that the Eighth Amendment "excludes from constitutional recognition *de minimis* uses of physical force, provided that the use of force is not of a sort 'repugnant to the conscience of mankind.'") (quoting *Whitley*, 475 U.S. at 327, which quoted Estelle v. Gamble, 429 U.S. 97, 106 (1976)).

which bans only cruel and unusual *punishment*. . . . An intent requirement is either implicit in the word 'punishment' or it is not."[179] The Court attempted to explain the oddity of *one* amendment requiring prisoners to prove two different states of mind depending on the type of claim asserted, by emphasizing the nature of the balancing inquiry necessary to determining official misconduct. It declared, "'deliberate indifference to a prisoner's serious illness or injury' can typically be established or disproved without the necessity of balancing competing institutional concerns for the safety of prison staff or other inmates."[180] But when the Court had to describe the Eighth Amendment standard for conditions affecting safety, it encountered the intersection of these standards: the malice standard for officials directly harming prisoners[181] versus the subjective deliberate indifference standard for prisoners harming each other.[182]

Even though the Court has superficially tied its standard to the history of each amendment and to its view of constitutional text, underlying all these decisions is an implicit balancing of interests.[183] This balancing of interests also became the Court's foundation for substantive due process claims under the Fourteenth Amendment.

2. *Balancing for Substantive Due Process Claims*

In *County of Sacramento v. Lewis*, the Supreme Court for the first time *clearly* articulated that "shocks the conscience" was the appropriate standard for substantive due process claims when a "nonseized" person seeks damages for the use of force by governmental officials.[184] Both before and after *Lewis*, substantive due process jurisprudence has included numerous standards and descriptions, including a "professional judgment" standard,[185] an "undue burden" standard,[186] an explicit balancing standard,[187] a "shocks the conscience" standard,[188] and "an implicit in the concept of ordered liberty"

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179 *Wilson*, 501 U.S. at 300-01.

180 *Whitley*, 475 U.S. at 320 (quoting *Gamble*, 429 U.S. at 105).

181 *Hudson*, 503 U.S. at 6; *Whitley*, 475 U.S. at 320.

182 Farmer v. Brennan, 511 U.S. 825, 837-38 (1994).

183 *See id.* at 836-38.

184 County of Sacramento v. Lewis, 523 U.S. 833, 840-47 (1998).

185 *See* Youngberg v. Romeo, 457 U.S. 307, 323 (1982) (stating that "liability may be imposed only when the decision by the person is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment").

186 *See* Planned Parenthood v. Casey, 505 U.S. 833, 878 (1992) (O'Connor, J., Kennedy, J. and Souter, J., joint opinion) (stating that an "undue burden" standard protects a woman's substantive Fourteenth Amendment right to an abortion).

187 *See* Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 279 (1990) (assuming that if a person has a liberty interest in refusing artificial hydration and nutrition, determining whether the person's Fourteenth Amendment rights have been violated depends upon "balancing his liberty interests against the relevant state interests" (citing *Youngberg*, 457 U.S. at 321)).

188 *See* Collins v. Harker Heights, 503 U.S. 115, 128 (1992) (concluding that "the city's alleged failure to train its employees, or to warn them about known risks of harm, was [not] an omission that can be properly characterized as arbitrary, or conscience shocking, in a constitutional sense"); United States v. Salerno, 481 U.S. 739, 746 (1987) (stating that "[s]o-called 'substantive due process' prevents the government from engaging in conduct that 'shocks the

inquiry for determining whether a person had a fundamental right.[189] Even though the *Lewis* decision attempted to show how its "conscience-shocking" standard underlies many of its prior substantive due process standards,[190] one may question how broadly to read the decision, wondering whether the Court will later narrowly read *Lewis* by limiting it to its facts.

The Court applied the *Graham* rule to the facts of *Lewis*:[191] either the Fourth *or* the Fourteenth Amendment—but not both—applies to a police officer's accidental hitting of a passenger on a motorcycle during a high-speed pursuit.[192] It determined that only the protections of substantive due process applied because no Fourth Amendment "seizure" occurred.[193] For the Court, the hitting of the passenger was a mere accident, not an "intentional acquisition of physical control"[194] required for a Fourth Amendment "seizure."[195] It also further explained the *Graham* rule—failure to find a Fourth Amendment "seizure" did not automatically preclude relief under substantive due process, even though the Fourth Amendment clearly applies to a wide variety of police actions.[196] The *Graham* rule does not bar using

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conscience,' . . . or interferes with rights 'implicit in the concept of ordered liberty'") (quoting Rochin v. California, 342 U.S. 165, 172 (1952) and Palko v. Connecticut, 302 U.S. 319, 325-26 (1937)); *Rochin*, 342 U.S. at 172.

189 *See* Washington v. Glucksberg, 521 U.S. 702, 720 (1997). In *Glucksberg*, a plurality of the Court offered this view of its substantive due process precedents:

> Our established method of substantive-due-process analysis has two primary features: First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, "deeply rooted in this Nation's history and tradition," . . . . Second, we have required in substantive due process cases a "careful description" of the asserted fundamental liberty interest. . . . [T]he Fourteenth Amendment "forbids the government to infringe . . . 'fundamental' liberty interests at *all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest."

Id. (citations omitted). The opinion added that unless a fundamental right is present, a government's practice does not violate the Fourteenth Amendment if the means used rationally further a legitimate government interest. *Id.*

190 County of Sacramento v. Lewis, 523 U.S. 833, 847 (1998).

191 Two officers saw a motorcyclist after responding to a call to break up a fight. *Id.* at 836. The *Lewis* majority initially suggested that a police officer pursued a motorcyclist because the driver was speeding: the officer "saw a motorcycle approaching at high speed." *Id.* The officers had no reason to believe that the driver or passenger were involved in the fight. *Id.* The majority later quoted the Ninth Circuit's more precise description of the reason the officer chased the motorcyclist: "'the only apparent "offense" was the boys' refusal to stop when another officer told them to do so.'" *Id.* at 838 (quoting the Ninth Circuit's opinion). The chase occurred at 8:30 p.m. in a residential neighborhood and lasted for seventy-five seconds. *Id.* at 836-37. The motorcyclist drove dangerously, causing others to swerve off the road. *Id.* at 839. Both the motorcyclist and the pursuing officer traveled at 100 mph. *Id.* The Court noted that to stop effectively, the police officer needed 650 feet to stop; he had in fact only 100 feet. *Id.* When the driver of the motorcycle lost control, the police cruiser accidentally hit the passenger, who died at the scene. *Id.*

192 *Id.* at 842-43.

193 *Id.* at 843-44.

194 Brower v. County of Inyo, 489 U.S. 593, 596 (1989).

195 See *infra* text accompanying notes 253-272 for a discussion of what constitutes a Fourth Amendment "seizure."

196 *Lewis*, 523 U.S. at 843.

substantive due process as a fallback claim when the Fourth Amendment does not apply for lack of a "seizure."[197]

Next, the Court articulated what protections were available under substantive due process in this context. In defining what the phrase "substantive due process" means, the Court had a lot of historical baggage to consider, to say the least. For years, some Justices and scholars have wondered how the due process clause has any "substance" in it because the phrase "sounds" procedural.[198] In an opinion by Justice Souter, the Court began its description of substantive due process on neutral ground: due process protects against "arbitrary action,"[199] a phrase that one may interpret to sound both in procedure and substance. From this noncontroversial view of due process, the *Lewis* Court followed with an astonishing statement: "criteria to identify what is fatally arbitrary differ depending on whether it is legislation or a specific act of a governmental officer that is at issue."[200] The Court categorized substantive due process claims as falling within one of two classes: one challenging legislative acts and the other challenging "executive" acts.[201] The *Lewis* Court described these categories in a long footnote[202] and mentioned some cases from its wide-ranging substantive due process jurisprudence.

At issue in *Lewis* were the executive acts of an individual police officer, not legislative acts. For the Court, challenges to executive actions include

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197 *Id.* (citing United States v. Lanier, 520 U.S. 259, 272 n.7 (1997)).

198 *See* JOHN HART ELY, DEMOCRACY AND DISTRUST 18 (1980) (stating that "'substantive due process' is a contradiction in terms—sort of like 'green pastel redness'").

199 *Lewis*, 523 U.S. at 845 (citing Wolf v. McDonnell, 418 U.S. 539, 555 (1974) and Hurtado v. California, 110 U.S. 516, 527 (1884)).

200 *Id.* at 846 (citing no case for this proposition).

201 *Id.* The Court did not explain what it meant by executive acts.

202 *Id.* at 847 n.8. In describing these categories, the *Lewis* Court referred to *Washington v. Glucksberg*, 521 U.S. 702, 735 (1997), a case in which a sharply divided court determined that a state statute barring a person from causing or aiding the suicide of another was not facially unconstitutional under substantive due process:

> *Glucksberg* presented a disagreement about the significance of historical examples of protected liberty in determining whether a given statute could be judged to contravene the Fourteenth Amendment. The differences of opinion turned on the issues of how much history indicating the recognition of the asserted right, viewed at what level of specificity, is necessary to support the finding of a substantive due process right entitled to prevail over state legislation.
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> . . .[A] case challenging executive action on substantive due process grounds . . . presents an issue *antecedent* to any question about the need for historical examples of enforcing a liberty interest of the sort claimed . . . . [I]n a due process challenge to executive action, the threshold question is whether the behavior of the governmental officer is so egregious, so outrageous, that it may fairly be said to shock the *contemporary* conscience. That judgment may be informed by a history of liberty protection, but it necessarily reflects an understanding of traditional executive behavior, of *contemporary* practice, and of the standards of blame generally applied to them. Only if the necessary condition of egregious behavior were satisfied would there be a possibility of recognizing a substantive due process right to be free of such executive action, and only then might there be a debate about the sufficiency of historical examples of enforcement of the right claimed, or *its recognition in other ways.*

Lewis, 523 U.S. at 847 n.8 (emphasis added).

two broad issues: whether the conduct shocks the conscience;[203] and, if so, whether history or "other" grounds justify recognizing a violation of substantive due process.[204] In contrast, challenges to legislative actions focus only on the second inquiry into history, with probable disagreement as to how to characterize the right and how deeply rooted the right needs to be.[205]

The *Lewis* Court extracted the nebulous "conscience-shocking" standard from *Rochin v. California.*[206] *Rochin* questioned the constitutionality of police officers forcing a suspect to use an emetic to vomit the drugs he had swallowed.[207] Because the Court decided *Rochin* in 1952, before *Mapp v. Ohio* applied the exclusionary rule of the Fourth Amendment to the states,[208] *Rochin* considered whether substantive due process barred the government from using the capsules found in the vomit to convict.[209] In declaring due process violated and suppressing the evidence, the *Rochin* Court stated, "[t]his is conduct that shocks the conscience,"[210] offends "even hardened sensibilities,"[211] and is "too close to the rack and the screw" to allow.[212]

Why the *Lewis* Court chose "shocks the conscience" as the standard to meet for challenges to executive actions one can only surmise, although the Court's selection of this standard is consistent with its general trend of limiting the scope of the "substance" protected by the due process clause. The Court had granted certiorari to resolve a conflict by the courts as to the standard to apply in the context of high-speed vehicular police pursuits: "'shocks the conscience,' . . . 'deliberate indifference' or 'reckless disregard.'"[213] In his concurring opinion, Chief Justice Rehnquist noted that *assuming* that substantive due process applies, "'shocks the conscience' is the right choice among the alternatives."[214]

With conscience-shocking as the standard, the *Lewis* Court attempted to fit its prior decisions under this rubric, a task that it failed by interpreting shocking conduct to include both malicious actions and deliberate indifferent actions in some circumstances.[215] The Court reframed tort law by declaring that deliberately indifferent conduct at times can be "constitutionally shocking."[216] It stated: "It should not be surprising that the constitutional concept of conscience shocking duplicates no traditional category of common-law fault, but rather points clearly away from liability, or clearly toward it, only at

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203 *Id.* at 846.

204 *Id.* at 847.

205 *Id.*; *see also id.* at 857 (Kennedy, J., concurring) (stating that "history and tradition are the starting point, but not in all cases the ending point of the substantive due process inquiry").

206 342 U.S. 165, 172 (1952).

207 *See id.* at 166.

208 367 U.S. 643 (1961).

209 *Rochin*, 342 U.S. at 168-72.

210 *Id.* at 172.

211 *Id.*

212 *Id.*

213 *Lewis*, 523 U.S. at 856 (Rehnquist, C.J., concurring).

214 *Id.*

215 *Id.* at 848-53.

216 *Id.* at 852.

the ends of the tort law's spectrum of culpability."[217] The Court's equation, that shocking conduct equals either malice or deliberate indifferent actions, attempts to harmonize its conscience-shocking standard with prior substantive due process decisions. But it also represents a drastic limitation on substantive due process claims challenging the use of force.

In its harmonizing, the Court ironically looked to Eighth Amendment cases to explain the results of its substantive due process decisions,[218] an approach at odds with its insistence that the language of a particular amendment determines its standard and with its neat, amendment-specific *Graham* rule.[219] The harmonizing interpretative principle it employed was a single factor—whether officials had the luxury to reflect before acting.[220] If they did, then the deliberate indifferent conduct committed was conscience-shocking; if they did not have time to think, then only malicious conduct qualified as conscience-shocking conduct.[221]

Pulling together its deliberate indifference cases, the Court noted that governmental officials have a duty to provide for the well-being of an individual in state "custody."[222] For example, deliberate indifference is shocking when officials fail to meet the serious medical needs of detainees[223] and when officials fail to provide for an involuntarily committed person's basic needs, such as "'food, clothing, shelter, . . . and safety.'"[224] The Court, however, had to bury in a footnote[225] a similar case that had explicitly rejected a deliberate indifference standard—*Youngberg v. Romeo*.[226] *Youngberg* examined the

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217 *Id.* at 848.

218 *Id.* at 849-50.

219 *See infra* Part II.D.

220 *Lewis*, 523 U.S. at 851. The *Lewis* Court stated:

> As the very term "deliberate indifference" implies, the standard is sensibly employed only when actual deliberation is practical, and in the custodial situation of a prison, forethought about an inmate's welfare is not only feasible but obligatory under a regime that incapacitates a prisoner to exercise ordinary responsibility for his own welfare.

Id. (citations omitted).

221 *Id.*

222 *Id.*

223 *See id.* at 849-50. The *Lewis* Court discussed its prior decision in *City of Revere v. Massachusetts General Hospital*, 463 U.S. 239, 244 (1983), which had determined that substantive due process protects pretrial detainees' medical needs at least as broadly as the Eighth Amendment covers prisoners medical needs. *Lewis*, 523 U.S. at 849-50. Prison officials violate the Eighth Amendment when they act with "deliberate indifference to [a prisoner's] serious medical needs." Estelle v. Gamble, 429 U.S. 97, 106 (1976). The *Lewis* Court characterized *City of Revere* as fitting within its shocks-the-conscience standard: such deliberate indifference "is egregious enough to state a substantive due process violation." *Lewis*, 523 U.S. at 849-50.

224 *Lewis*, 523 U.S. at 851 (quoting *DeShaney v. Winnebago Dep't of Soc. Servs.*, 489 U.S. 189, 199-200 (1989)).

225 *Lewis*, 523 U.S. at 852 n.12.

226 457 U.S. 307, 312 n.11 & 325 (1982). In *Youngberg*, the Court stated, "we conclude that the jury was erroneously instructed on the assumption that the proper standard of liability was that of the Eighth Amendment." *Id.* at 325. The error in the instruction was the use of "deliberate indifference" as the standard, which compelled the Court to vacate and remand for a decision under the "professional judgment" standard. *Id.* It explained:

> The "deliberate indifference" standard was adopted by this Court in *Estelle v. Gamble*, 429 U.S. 97, 104 (1976), a case dealing with prisoners' rights to punishment

personal security interests of an involuntarily committed mental patient; the *Youngberg* Court had adopted a balancing test strongly skewed in favor of mental health professionals:

> [T]he decision, if made by a professional,[227] is presumptively valid; liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment.[228]

When the *Lewis* Court cited *Youngberg*, it quoted the professional judgment standard, and implicitly placed *Youngberg* in its "deliberate indifference" category, as applied to persons involuntarily in state custody.[229] Presumably, after *Lewis*, departures from "professional judgment" would now be "conscience-shocking."

In contrast, other types of substantive due process claims, for the *Lewis* Court, require proof of malice.[230] Malice emerged as a requirement for substantive due process claims in which officials did not have time to reflect before acting. This single factor bridged the Court's interpretation of the Eighth Amendment with the substantive due process component of the Fourteenth Amendment. The *Lewis* Court seemed to ignore how much liberty prisoners lose upon conviction, by allowing only the same protection to passenger on a pursued motorcycle. For the *Lewis* Court, a high-speed vehicular chase is analytically similar to a prison riot, at least under the Constitution: only a purpose to cause harm exposes officials to constitutional tort liability.[231]

In describing the substantive due process standard for personal security claims for "nonseized" individuals, the *Lewis* Court has shed its mask and revealed its explicit preference for contextual balancing. The Court previously declared that the text and the history of an amendment clearly indicated a particular personal security standard.[232] In contrast, the *Lewis* decision declared what really matters—the context of the alleged violation, not the language of the Fourteenth Amendment.

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that is not "cruel and unusual" under the Eighth Amendment. Although the District Court did not refer to *Estelle v. Gamble* in charging the jury, it erroneously used the deliberate-indifference standard articulated in that case.

Id. at 312 n.11.

227 The Court also defined a "professional" in this context:

> [A] person competent, whether by education, training, or experience, to make the particular decision at issue. Long-term treatment decisions normally should be made by persons with degrees in medicine or nursing, or with appropriate training in areas such as psychology, physical therapy, or the care and training of the retarded. Of course, day-to-day decisions regarding care—including decisions that must be made without delay—necessarily will be made in many instances by employees without formal training but who are subject to the supervision of qualified persons.

Id. at 323 n.30.

228 *Id.* at 323.

229 *Lewis*, 523 U.S. at 852 n.12.

230 *Id.* at 852-53.

231 *Id.* at 853.

232 *See supra* text accompanying note 179.

The Court's new conscience-shocking standard will have significant doctrinal and litigation effects on people injured by governmental officials. After *Lewis*, constitutional tort litigation seeking to protect an individual's right to personal security will be a strategic game: lawyers will try to pigeon-hole various actions as Fourth Amendment seizures (because of the *Graham* rule) and seek a jury instruction on "reasonableness." If they lose the Fourth Amendment claim, the fallback Fourteenth Amendment provides protection only in the most outrageous cases because the Court's "conscience-shocking" standard is the only other protection available.

III. The Rule of Graham: *Applying the Fourth Amendment to Public School Teachers' Use of Physical Force*

Under the *Graham* rule, when public school officials use physical force to control or discipline students, only one amendment applies.[233] Historically, students have sought to protect their interest in bodily integrity under the Fourteenth Amendment when school officials use physical force to punish them;[234] in contrast, when these same officials search them, students have invoked the Fourth Amendment as the source of constitutional

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233 For a discussion of the *Graham* rule, see *supra* Part II.D.

234 Many federal courts have examined school officials' use of force to punish for students' misconduct. *See, e.g.*, Saylor v. Bd. of Educ., 118 F.3d 507 (6th Cir. 1997). In *Saylor*, the U.S. Court of Appeals for the Sixth Circuit ("Sixth Circuit") assumed that striking a student five times on his buttocks with a paddle for fighting during a class violated both the student's and parents' constitutional rights, but it held that the school officials had qualified immunity because the law was not clearly established at the time of the hitting. *Id.* at 508-10, 516. The teacher had allegedly asked the principal if he wanted to "watch [him] bust [the student's] butt, and school officials latter admitted that the force was 'excessive.'" *Id.* at 511.

The Ninth Circuit in *P.B. v. Koch*, 96 F.3d 1298, 1305 (9th Cir. 1996) held that a school principal did not have qualified immunity for his alleged striking of three students. The principal allegedly hit one student after hearing someone say "Heil Hitler." *Id.* at 1300. Without allowing the student to explain, he hit him "'with the back hand and then the front hand' across the mouth." *Id.* He then grabbed the student's neck and squeezed it. *Id.* The student had bruises for a few days, and he went to the emergency room for treatment. The principal also allegedly struck a second student in the chest when the student failed to be quiet at a basketball game during a special service for a deceased drill teacher. *Id.* A third student alleged that the principal threw him "headfirst into the lockers" after he put back on his head the cap the principal asked him to remove. *Id.*

The Fifth Circuit in *Fee v. Herndon*, 900 F.2d 804, 810 (5th Cir. 1990) granted a principal's motion to dismiss for failure to state a violation of substantive due process. The principal had allegedly hit an emotionally disturbed student's buttocks three times. *Id.* at 806. The student had been disruptive during a class. *Id.* The student alleged that the hitting caused both physical and emotional injury, which resulted in six months in a psychiatric ward. *Id.* at 807. The Fifth Circuit reiterated its lack of interest in reviewing students' constitutional claims that school officials used excessive force:

> We think it a misuse of our judicial power to determine, for example, whether a teacher has acted arbitrarily in paddling a particular child for certain behavior or whether in a particular instance of misconduct five licks would have been a more appropriate punishment than ten licks. We note again the possibility of a civil or criminal action in state court against a teacher who has excessively punished a child.

Id. at 809; *see also* Cunningham v. Beavers, 858 F.2d 269, 271-73 (5th Cir. 1988) (holding that no substantive due process violation had occurred when a school official struck a five-year-old and a

protection.[235]

six-year-old student five times for "snickering in the hall" and in class, despite social service workers' conclusion that the hitting "clearly constituted child abuse"); Woodard v. Los Fresnos Indep. Sch. Dist., 732 F.2d 1243, 1246 (5th Cir. 1984) (holding that no substantive due process violation for school official's paddling a sixteen-year-old student three times for using abusive language to a school bus driver).

The Tenth Circuit in *Garcia* ex rel. *Garcia v. Miera*, 817 F.2d 650, 658 (10th Cir. 1987) held that the students' summary judgment materials were sufficient to preclude granting qualified immunity to school officials. The nine-year-old student alleged that school officials beat her twice: the first time, they held her ankles and hit her with large split board on the front of her legs, causing her to bleed; and the second time, they hit her buttocks, causing them to hurt for three weeks. *Id.*

In *Hall v. Tawney*, 621 F.2d 607, 610 (4th Cir. 1980), the Fourth Circuit held that a student, but not her parents, had stated a claim for a violation of substantive due process. The complaint alleged that despite the parents' notice to school officials that they did not want their daughter subjected to corporal punishment, a teacher nevertheless maliciously and repeatedly hit her, pushed her into a stationery desk, and twisted her arm. *Id.* at 614. The student received multiple injuries and had to stay in the hospital for ten days. *Id.* She received treatment for "traumatic injury to the soft tissue of the left hip and thigh, trauma to the skin and soft issue of the left thigh, and trauma to the soft tissue with ecchyniosis of the left buttock." *Id.* She also alleged that she might always experience severe lower back pain. *Id.*

In *Turley v. Sch. Dist.*, 713 F. Supp. 331, 337 (W.D. Mo. 1989), a federal district court denied a teacher's motion for summary judgment for the substantive due process violation raised by students. The teacher had allegedly entered the classroom and saw students fighting, and she picked up a "plastic baseball bat and, without warning, hit the students on the face, neck, shoulders, and legs." *Id.* at 332.

See generally Waechter v. Sch. Dist. No. 14-030, 773 F. Supp. 1005, 1010, 1012 (W.D. Mich. 1991) (holding that a deceased student stated a violation of substantive due process when a teacher punished him by forcing him to do a "gut run" that led to his death). In *Waechter*, a handicapped, fifth-grade student with known heart problems was allegedly "talking in line with another classmate during recess." *Id.* at 1007. As punishment, the recess supervisor compelled him to run a 350-yard sprint in less than two minutes. *Id.* The student died while running. *Id.*

235 The case law suggests that courts recognize significantly greater Fourth Amendment protections for bodily privacy and security than they do for a student's privacy in objects at school. *See, e.g.*, Jenkins *ex rel.* Hall v. Talladega City Bd. of Educ., 115 F.3d 821, 828-29 (11th Cir. 1997) (Kravitch, J., dissenting) (contending that *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) clearly established that school officials could not strip search two eight-year-old students to find a missing seven dollars; the majority did not determine whether a constitutional violation had occurred because it held that the school officials had qualified immunity for their searches); Konop v. Northwestern Sch. Dist., 26 F. Supp. 2d 1189, 1208 (D.S.D. 1998) (denying school officials' summary judgment motion for students' claim that the strip searches they conducted to find stolen money violated the Fourth Amendment). In *Konop*, the district court stated: "The case law is pervasive that a strip search, the objective of which is to recover money, is illegal absent some reasonable indication that a particular student stole the money." *Konop*, 26 F. Supp. 2d. at 1207. The court added that, even if a limited search would have been appropriate, a strip search was unreasonable because the student had told the school officials that if she had $200 stashed in her bras or panties, it would have been noticeable without a strip search. *Id.*; *see also* Oliver *ex rel.* Hines v. McClung, 919 F. Supp. 1206, 1218 (N.D. Ind. 1995) (denying school officials' qualified immunity defense for strip searches of students to recover stolen money). In *Oliver*, two students had told their gym teacher that $4.50 was missing from the locker room. *Oliver*, 919 F. Supp. at 1211. To find the missing money, school officials searched the students' lockers and book bags. *Id.* After not finding the money, the teachers told the students to remove their bras in order to see if any money would fall out. *Id.*

Even though the courts apply the Fourth Amendment to searches of students' belongings, they have often applied a deferential reasonableness standard. *See, e.g.*, DesRoches v. Caprio, 156 F.3d 571, 577-78 (4th Cir. 1998) (holding that a search of student's backpack for missing

Under the Court's current jurisprudence, with its disdain of substantive due process claims, the constitutionality of school officials' use of force upon students depends upon which amendment of the Constitution doctrinally applies (the *Graham* rule) and logically on the circumstances precipitating the teachers' physical responses.[236] Recent Supreme Court decisions support ap-

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tennis shoes was reasonable because the teacher developed reasonable suspicion by a process of elimination after all other students had granted permission to search). The Fourth Circuit failed to protect the student's Fourth Amendment privacy interest in his backpack by discounting the coercive effect of the school's policy of suspending students for ten days if they refused to consent to searches, *id.* at 573, and allowed the students' (coerced) "permission" to establish reasonable suspicion as to the student who refused to allow the search. The Fourth Circuit feebly explained:

> [W]hile we agree, of course, that *actual* suspension for refusal to consent constitutes such an infringement when the proposed search is unreasonable, we cannot agree that the Fourth Amendment is implicated merely by a demand to search coupled with threats of punishment, where the threats are unsuccessful in bringing about the individual's consent.

Id. at 577. The court admitted that the school officials lacked reasonable suspicion as to the individual student bringing suit until all the other students had "consented" to the search. *Id.* at 577-78.

Similarly, in *Cornfield* ex rel. *Lewis v. School Dist. No. 230*, 991 F.2d 1316, 1324 (7th Cir. 1993), the Seventh Circuit held that a strip search of a student was reasonable under the Fourth Amendment, and in dicta it stated that officials would have qualified immunity even if they had violated the Fourth Amendment. In *Cornfield*, the Seventh Circuit held that school officials had reasonable suspicion to believe that a sixteen-year-old student enrolled in a behavior disorder program was "'crotching drugs'" because he "appeared 'too well-endowed'" and began yelling when asked about whether he was smuggling drugs. *Id.* at 1319. School officials then required him to change from his "street clothes and put on a gym uniform" as they watched. *Id.* Although accepting this search as reasonable, the Seventh Circuit nevertheless recognized that some strip searches would be unreasonable: "a highly intrusive search in response to a minor infraction" and "a nude search of a student by an administrator or teacher of the opposite sex." *Id.* at 1320.

The Ninth Circuit in *Smith v. McGlothlin*, 119 F.3d 786, 788 (9th Cir. 1997) affirmed the dismissal of a student's Fourth Amendment search claim because officials had qualified immunity. In *Smith*, the Ninth Circuit discussed only in dicta the constitutionality of a vice principal's search of a group of students; the vice principal had seen the students with a "cloud of smoke over their heads" and watched them make furtive gestures, suggesting the discarding of "smoking materials." *Id.* at 787. The court suggested that reasonable suspicion was not necessary for the search. *Id.* at 788; *see also* Thompson v. Carthage Sch. Dist., 87 F.3d 979, 980–84 (8th Cir. 1996) (holding that a search of "all male students in grades six to twelve" was reasonable under the Fourth Amendment after a school bus driver reported to the principal that there were "fresh cuts" in the bus seats). The principal ordered students to remove their shoes and socks and to empty their pockets. *Thompson*, 87 F. 3d at 980. The court upheld the search as necessary to further "student safety and school discipline." *Id.* at 983; Brousseau v. Town of Westerly, 11 F. Supp. 2d 177, 180 (D.R.I. 1998) (granting school officials' motion for summary judgment on student's Fourth Amendment claim). In *Brousseau*, the district court held that officials' frisking of students in the cafeteria to find a missing knife used to cut pizza was reasonable. *Brousseau*, 11 F. Supp. 2d at 182. It stated: "The interest of school officials in searching for drugs or weapons, ordinarily is deemed more compelling and of greater urgency than searches for other kinds of contraband." *Id.*

236 Some cases have involved school officials using physical force to control students. *See, e.g.*, London v. Dirs. of the Dewitt Pub. Schs., 194 F.3d 873, 875-76 (8th Cir. 1999) (holding that no violation of substantive due process occurred when a coach forcefully removed student from cafeteria who had engaged in "horseplay" or "scuffling." In response, the student slammed the coach into a table, with the coach later dragging the student on the floor for fifteen feet, causing the student to hit his head on a pole); Wallace v. Batavia Sch. Dist., 68 F.3d 1010, 1014-1016 (7th

plying the protection of the Fourth Amendment, not the substantive due process component of the Fourteenth Amendment, to the use of force by school officials, as well as to searches by school officials.[237]

Students' interest in personal security, whether it is implicated by school officials' using physical force to control or punish them, lies doctrinally near the chasm between the Fourth and Fourteenth Amendments.[238] Nevertheless, a student's interest in bodily integrity, under the Court's modern jurisprudence, should fall within the protections of the Fourth Amendment.

Although students hit with wooden paddles in the 1970s did not question the constitutionality of this practice under the Fourth Amendment, the Supreme Court, in its 1985 decision *New Jersey v. T.L.O.*, applied the Fourth Amendment in the public schools, as it evaluated the constitutionality of a principal's search of a student's purse for cigarettes.[239] Ten years later in *Vernonia School District 47J v. Acton*, the Court also applied the Fourth Amendment to the question of whether school officials acted constitutionally in requiring athletes to submit to mandatory drug testing as a condition of participation in school sports.[240] In applying the Fourth Amendment to these cases, the Court considered three issues: (1) whether school officials were governmental actors subject to the Fourth Amendment;[241] (2) whether their actions constituted a "search" or "seizure" within the meaning of the Fourth Amendment;[242] and (3) if so, whether the conduct was reasonable within the meaning of the Fourth Amendment.[243] The Court's analysis of these issues supports applying the Fourth Amendment to the use of force by school officials.

A. School Officials as Governmental Actors

The seminal case that directly answered the question of whether the Fourth Amendment applies to school teachers was *New Jersey v. T.L.O.* *T.L.O.* questioned whether public school teachers simply act as substitute parents during the school day and thus are private persons not governed by the Fourth Amendment.[244] The *T.L.O.* Court explicitly rejected such a char-

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Cir. 1995) (holding that no constitutional violation under either the Fourth or Fourteenth Amendment occurred for a teacher's grabbing of a student by the arm to escort her out of the room after the student had told another student, "I'm going to kick your ass right here and now"); Webb v. McCullough, 828 F.2d 1151, 1154 (6th Cir. 1987) (holding that a student had alleged a violation of the Fourteenth Amendment by claiming that a principal threw her to the floor and against a wall and slapped her for violating field trip restrictions); Jones v. Witinski, 931 F. Supp. 364, 371 (M.D. Pa. 1996) (holding that there was no substantive due process violation when teacher grabbed student, unintentionally causing student to hit his desk and the blackboard).

237 *See supra* note 235 and accompanying text.

238 The Eighth Amendment cannot apply in this context because the Court has limited the Eighth Amendment to safeguard only the personal security interests of prisoners, not students. *See supra* Part II.B.1.

239 New Jersey v. T.L.O., 469 U.S. 325, 328-33 (1985).

240 Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 646 (1995).

241 *See infra* Part III.A.

242 *See infra* Part III.B.

243 *See infra* Part III.C.

244 *See T.L.O.*, 469 U.S. at 334-37.

acterization and held that teachers are state actors governed by the Fourth Amendment.[245] *Vernonia* also adhered to this view.[246]

In both *T.L.O.* and *Vernonia*, the Court distinguished between parental authority and teaching authority:[247] school officials have both "custodial and tutelary" powers[248] that are not linked to parental authority. In defining school officials' powers, the Court relied solely on modern notions of public education because public education was not in the fabric of our society when the Fourth and Fourteenth Amendments were enacted.[249] Instead, private education was the model, with the private school teacher having the authority over a student only to the degree authorized by the student's parents.[250] With the passage of modern compulsory education laws, however, the Court viewed public school teachers as possessing authority greater than that of parents,[251] if they act "in furtherance of publicly mandated educational and disciplinary policies."[252]

Both decisions also noted that the Court had previously scrutinized the actions of teachers as state actors for alleged violations of procedural due process[253] and the First Amendment.[254] Yet, in *T.L.O.*, the government argued that "the history of the Fourth Amendment indicates that the Amendment was intended to regulate only searches and seizures carried out by law enforcement officers."[255] In response, the Court admitted that the Framers designed the Fourth Amendment to address the "pre-Revolutionary practice of using general warrants or 'writs of assistance' to authorize searches for contraband by officers of the Crown."[256] Nevertheless, it more broadly characterized the "coverage" currently provided by the Fourth Amendment: "The basic purpose of this Amendment, as recognized by countless decisions

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245 *Id.* at 336.

246 *Vernonia*, 515 U.S. at 652-55.

247 *Id.* at 655 ("In *T.L.O.*, we rejected the notion that public schools . . . exercise only parental power over their students, which of course is not subject to constitutional constraints."); *T.L.O.*, 469 U.S. at 336 ("Today's public school officials do not merely exercise authority voluntarily conferred on them by individual parents; rather, they act in furtherance of publicly mandated educational and disciplinary policies.").

248 *Vernonia*, 515 U.S. at 656; *see also T.L.O.*, 469 U.S. at 336.

249 *See T.L.O.*, 469 U.S. at 336 (deciding that the historical concept that school teachers are "private" individuals, acting on behalf of parents, "is in tension with contemporary reality and the teachings of" the Court).

250 *See, e.g.*, Ingraham v. Wright, 430 U.S. 651, 661 (1977) (citing 1 WILLIAM BLACKSTONE, COMMENTARIES *120, *453).

251 *See generally Vernonia*, 515 U.S. at 655; *T.L.O.*, 469 U.S. at 336; *Ingraham*, 430 U.S. at 662.

252 *T.L.O.*, 469 U.S. at 336.

253 *Vernonia*, 515 U.S. at 656 (citing Goss v. Lopez, 419 U.S. 565 (1975), which stated that teachers meet procedural due process requirements when discussing with students misconduct "minutes after it has occurred"); *T.L.O.*, 469 U.S. at 336.

254 *Vernonia*, 515 U.S. at 656 (citing Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988), which discussed school officials' authority to censor publications; Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986), which allowed school officials to limit "offensively lewd and indecent speech" at an assembly; Tinker v. Des Moines Indep. Comm. Sch. Dist., 393 U.S. 503, 506 (1969), which examined school officials' ability to silence personal expression at school).

255 *T.L.O.*, 469 U.S. at 334.

256 *Id.* at 335.

of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials."[257] With the Court's determination that public school teachers were acting as "governmental officials" and not as substitute parents, the Court then applied the Fourth Amendment to teachers who commit searches and seizures as defined by the Fourth Amendment.

B. Seizing a Person: The Court's Fourth Amendment Definitions

Under both the language of the Fourth Amendment and the Court's *Graham* rule, the use of force by public school teachers must constitute a "seizure" of a student for the Fourth Amendment to apply.[258] The Supreme Court has articulated several definitions of what constitutes a Fourth Amendment "seizure" of a person.[259]

Discerning whether a "seizure" has occurred is no easy task. Not only has the Court given several definitions, but it has also employed conflicting approaches to justify its conclusion that a seizure occurred.[260] Although the current Court considers the common law usually to be determinative of whether a seizure or a search was "reasonable" within the meaning of the Fourth Amendment,[261] it has explicitly rejected using the common law as the only means to determine what constitutes a "seizure."[262]

The Court's "seizure" definitions generally fall within two broad categories: (1) governmental officials intentionally using physical force to stop an individual;[263] and (2) officials asserting authority to compel a stop and an

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257 *Id.*

258 The Fourth Amendment safeguards against "unreasonable searches and seizures," and the *Graham* rule limits personal security force claims to scrutiny under the Fourth, Eighth, *or* Fourteenth Amendments. For a discussion of the *Graham* rule, *see infra* Part II.D.

259 *See infra* text accompanying notes 262-265.

260 *See infra* text accompanying notes 263-263.

261 *See, e.g.*, Wyoming v. Houghton, 526 U.S. 295, 299-300 (1999).

262 *See, e.g.*, California v. Hodari D., 499 U.S. 621, 625 n.2 (1991). In *Hodari D.*, the Court declared that it was both expanding and narrowing the protections provided by the common law. It stated, "We have consulted the common law to explain the meaning of seizure—and contrary to the dissent's portrayal, to expand rather than contract that meaning." *Id.* In the same footnote, however, the *Hodari D.* Court noted that it would not apply the common law's protection against unlawful attempted seizures to evaluate whether an officer's attempt to seize a suspect was constitutional. *Id.*

263 Under this category, the narrow seizure definition is whether there was "a governmental termination of freedom of movement through means intentionally applied." Brower v. County of Inyo, 489 U.S. 593, 597 (1989). In *Hodari D*, the Court more broadly defined the use of physical force as a seizure: "To constitute an arrest—the quintessential 'seizure of the person' under our Fourth Amendment jurisprudence—the mere grasping or application of physical force with lawful authority, whether or not it succeeded in subduing the arrestee, was sufficient." *Hodari D.*, 499 U.S. at 624; *see also* County of Sacramento v. Lewis, 523 U.S. 833, 843-44 (1998) (holding that no seizure occurred because officer did not intentionally crash into person, killing him); *Brower*, 489 U.S. at 597 (holding that seizure occurred because officer intentionally established a roadblock designed to stop person, killing him); Tennessee v. Garner, 471 U.S. 1, 7 (1985) (determining that a police shooting of a fleeing felon was a seizure). *See generally Hodari D.*, 499 U.S. at 626 ("The word 'seizure' readily bears the meaning of a laying on of hands or application of physical force to restrain movement, even when it is ultimately unsuccessful.");

individual's compliance with that authority.[264] Both categories include within them the notion of governmental actions limiting a person's liberty, because otherwise the meetings between officials and individuals would be consensual encounters.[265] As the Court recently reiterated, "when an officer, without reasonable suspicion or probable cause, approaches an individual, the individual has the right to ignore the police and go about his business."[266]

The *Graham* Court explicitly left open whether the Fourth Amendment continues "beyond the point at which arrest ends and pretrial detention begins,"[267] a time when a person is not "free."[268]

The first "seizure" category—physical force—evolved from the many cases about police officers.[269] Through the years, the Court has significantly narrowed this definition. Initially, the Court stated that the use of physical force constituted a "seizure."[270] It also stated that even if a person fled after being grabbed, a "seizure" has occurred: "The word 'seizure' readily bears the meaning of a laying on of hands or application of physical force to restrain movement, even when it is ultimately unsuccessful."[271] Nevertheless, for the Court to determine that a Fourth Amendment "seizure" occurred, the force used would have to amount to an "intentional acquisition of physical

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Terry v. Ohio, 392 U.S. 1, 9 n.16 (1968) (stating that a seizure occurs when "the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen").

264 In *Hodari D.*, 499 U.S. at 628, the Supreme Court added compliance with an official's show of authority as a necessary element of this type of seizure. In doing so, it had to interpret its prior seizure cases as only stating one of two requirements for a Fourth Amendment seizure. *See id.* Before *Hodari D.*, the Court had focused on whether "'in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.'" *Id.* (quoting United States v. Mendenhall, 446 U.S. 544, 554 (1980)).

265 *See, e.g.*, Florida v. Bostick, 501 U.S. 429, 436 (1989) (framing the seizure question as "whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter").

266 Illinois v. Wardlow, 528 U.S. 119, 125 (2000) (citing Florida v. Royer, 460 U.S. 491, 498 (1983)). In addition to these broad definitions, the *Graham* decision added a significant gloss to the Court's Fourth Amendment "seizure" definitions: the person subject to the actions above must be a "free citizen." Graham v. Connor, 490 U.S. 386, 395 (1989). In *Graham*, the Court held that "claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' of a *free citizen* should be analyzed under the Fourth Amendment . . . , rather than under the 'substantive due process' approach." *Id.* at 395; *see also id.* at 394 (stating that the force was applied to a "free citizen"); County of Sacramento v. Lewis, 523 U.S. 833, 844-45 (1998) (quoting with approval Pleasant v. Zamieski, 895 F.2d 272, 276 n.2 (6th Cir. 1990), which stated that *Graham* "preserve[s] fourteenth amendment substantive due process analysis for those instances in which a free citizen is denied his or her constitutional right to life through means other than a law enforcement official's arrest, investigatory stop or other seizure"). Nevertheless, one does not know whether the *Graham* Court's reference to a "free citizen" applies only when evaluating the actions of "law enforcement officers," *Graham*, 490 U.S. at 395, rather than other officials, such as school teachers. In dicta, the *Vernonia* Court stated that school officials do not have a substantive due process duty to protect one student from another, even though school officials have "custodial" power. *Vernonia*, 515 U.S. at 655.

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

268 *Id.*

269 *See supra* note 262.

270 *See, e.g.*, Terry v. Ohio, 392 U.S. 1, 9 n.16 (1968).

271 *California v. Hodari D.*, 499 U.S. 621, 626 (1991).

control."[272] As a result of this definition, accidental use of physical force is not a Fourth Amendment "seizure" because it is not an "intentional" act.[273]

The second seizure category—assertion of authority—has also narrowed through the years. Initially, the Court held that when law enforcement officers engage in a "show of authority,"[274] a "seizure" has occurred. Later, the Court added a new requirement: the individual subject to this "show of authority" must comply with it.[275]

These two "seizure" categories are admittedly overly-simplified summaries of the Court's complex "seizure" definitions. Applying these definitions is further complicated by the Court's *Graham* rule. For example, prison officials often "intentionally" apply physical force to control prisoners, but under the *Graham* rule, these actions are governed only by the Eighth Amendment.[276] A brief look at the circumstances in which the Court has applied the Fourth and Fourteenth Amendments shows the difficulty of discerning when the Fourth Amendment applies.

1. The Fourth Amendment: Searches and Seizures by Law Enforcement and School Officials

The Court has applied the Fourth Amendment to personal security claims before,[277] during,[278] and after arrests.[279] In addition, the Court has examined searches by public school officials under the Fourth Amendment.[280] (One of the school cases also involved a Fourth Amendment "seizure" of property which, as in many cases, followed immediately after a Fourth Amendment "search.")[281]

Many decisions address the use of force by law enforcement officials. *Tennessee v. Garner* and *Graham v. Connor* examined the use of physical force during criminal investigations. *Terry v. Ohio* also noted a person's interest in personal security when officers seek to conduct an investigatory stop and frisk.[282] And, after arrest, the Court has also applied the Fourth Amendment to bodily integrity claims. In *Schmerber*, a police officer arrested a driver in an automobile accident while in the hospital.[283] At the officer's request and over the objection of the injured driver, a physician withdrew blood.[284] Even though this search was found to be reasonable,[285] the Court

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272 Brower v. County of Inyo, 489 U.S. 593, 597 (1989).

273 *See* County of Sacramento v. Lewis, 523 U.S. 833, 848 (1998).

274 *Terry*, 392 U.S. at 9 n.16 (stating that a "show of authority" may constitute a seizure).

275 *See Hodari D.*, 499 U.S. at 628-29.

276 *See supra* text accompanying note 298.

277 *See, e.g.*, Graham v. Connor, 490 U.S. 386, 396-99 (1989).

278 *See, e.g.*, Brower v. County of Inyo, 489 U.S. 593, 598-99 (1989); Tennessee v. Garner, 471 U.S. 1, 7 (1985).

279 *See, e.g.*, Winston v. Lee, 470 U.S. 753, 766 (1985); Schmerber v. California, 384 U.S. 757, 771 (1966).

280 *See, e.g.*, Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 652-53 (1995); New Jersey v. T.L.O., 469 U.S. 325, 333-37 (1985).

281 *T.L.O.*, 469 U.S. at 328-29.

282 Terry v. Ohio, 392 U.S. 1, 16-20 (1968).

283 *Schmerber*, 384 U.S. at 758.

284 *Id.* at 758-59.

stated that "[t]he overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State."[286] In *Winston v. Lee*, the state's requested intrusion—compelled surgery to remove a bullet from an arrested suspect—was unwarranted under the Fourth Amendment[287].

In a related area, the Court also has applied the Fourth Amendment to wrongful seizure claims after arrest, even when bodily integrity interests were not involved. In both *Gerstein v. Pugh*[288] and *County of Riverside v. McLaughlin*,[289] the Court considered what process the Fourth Amendment required in order to protect a suspect's Fourth Amendment interest.

In addition to these law enforcement decisions, the Court has also applied the Fourth Amendment to the actions of public school teachers and administrators who conducted searches to discern whether students had violated school rules.[290] The purpose of the initial search was to further the school's interest in maintaining discipline and an effective educational environment. For example, in 1985, in *New Jersey v. T.L.O.*, an assistant vice principal opened the purse of a fourteen-year-old student based on reasonable suspicion that she had violated a school rule by smoking in the bathroom.[291] This search later led to the seizure of drugs and drug paraphernalia.[292] A decade later, in 1995, the Court decided *Vernonia School District 47J v. Acton*, six years after the Court's decision in *Graham v. Connor*. The Court used the Fourth Amendment to examine the constitutionality of the school's mandatory, random urinalysis drug tests for students participating in athletic programs.[293] Both school cases focused on the Fourth Amendment.

Although the Court has applied the Fourth Amendment to the actions of law enforcement and school officials that implicate bodily integrity interests, it has also applied the Fourteenth, not the Fourth, Amendment to personal security claims involving law enforcement officials and of a state-court judge convicted of sexually assaulting women.[294] A brief consideration of these

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285 *Id.* at 772.

286 *Id.* at 767.

287 470 U.S. 759, 767 (1985).

288 420 U.S. 103, 125 (1975) (holding that States "must provide a fair and reliable determination of probable cause as a condition for any significant pretrial restraint of liberty, and this determination must be made by a judicial officer either before or promptly after arrest.").

289 500 U.S. 44, 47 (1991). In *County of Riverside*, the Court attempted to impose a bright-line test as to how prompt a probable cause hearing must be when an officer arrests a person without a warrant. *Id.* at 56-57. The Court stated that a probable cause hearing that occurs within forty-eight hours for a person arrested without a warrant is presumptively reasonable. *See id.* at 56. When that does not happen, the government has the burden of justifying the delay. *Id.* at 57. In addition, even a hearing that occurs within the forty-eight hour period may violate the Fourth Amendment if the delay was unreasonable. *Id.* at 56.

290 *See Vernonia*, 515 U.S. at 652-53; *see also T.L.O.*, 469 U.S. at 329. For a discussion of these cases, see *infra* text accompanying notes 229-50.

291 *T.L.O.*, 469 U.S. at 328.

292 *Id.*

293 Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995).

294 *See infra* text accompanying notes 321-25.

Fourteenth Amendment cases highlights the difficulty of forcing a plaintiff to choose between the Fourth and Fourteenth Amendments.

2. *The Fourteenth Amendment: The Accidental Use of Force, Force During "Custody," and Intentional Force Without Custody*

Under the *Graham* rule, the Fourteenth Amendment serves as a fallback amendment for personal security litigation: it applies only if neither the Fourth nor the Eighth Amendment implicates an individual's interest in personal security.[295] Determining when the Fourteenth Amendment applies does not depend upon *who* used physical force, because the actions of police officers and school officials may implicate either the Fourth or Fourteenth Amendment.[296] The Court's hodgepodge personal security jurisprudence instructs that the Fourteenth Amendment applies in several circumstances where the Fourth does not: (1) when officials accidentally use force to stop a person;[297] (2) when officials use force on or fail to protect individuals in some custodial situations;[298] and (3) when officials intentionally use shocking force

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295 *See supra* text accompanying notes 152-155.

296 In *T.L.O.*, the Court held that even though the Fourth Amendment historically centered on police practices, it also applied to school officials. *See also supra* text accompanying notes 254-257. Similarly, the substantive due process component of the Fourteenth Amendment also applies to police officers, whose actions trigger scrutiny under the Fourth Amendment only if their conduct is a "search" or "seizure" within the meaning of the Fourth Amendment. *T.L.O.*, 469 U.S. at 334-37; *see supra* text accompanying notes 139-143, 191-202.

297 *See* County of Sacramento v. Lewis, 569 U.S. 833, 842-45 (1998); Brower v. County of Inyo, 489 U.S. 593, 595-99 (1989). For a discussion of these cases, see *supra* Part II.E.2.

298 *See, e.g.*, DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 201 (1989) (holding that there is no duty for a state to protect child who was not in custody at the time of beating); Whitley v. Albers, 475 U.S. 312, 327 (1986) (holding that prison officials have no greater duty under the Fourteenth Amendment than they do under the Eighth Amendment to protect a prisoner's interest in personal security during a prison riot); Davidson v. Cannon, 474 U.S. 344 (1986) (finding no duty to protect prisoner from harm caused by another prisoner because the official allegedly acted only negligently); Daniels v. Williams, 474 U.S. 327, 332 (1986) (holding that the state has no duty to protect pretrial detainee from slipping on a pillow on stairs because such negligence does not constitute a Fourteenth Amendment "deprivation"); Youngberg v. Romeo, 457 U.S. 307, 319 (1982) (holding that a state has a duty to involuntarily committed mental patient "to provide minimally adequate or reasonable training to ensure safety and freedom from undue restraint"). The Court's *Graham* rule would require that the Fourteenth Amendment claims raised by prisoners in both *Davidson* and *Whitley* today would fall under only the Eighth Amendment. *See supra* text accompanying notes 145-146. Since the Court had interpreted the Eighth Amendment to have a malice standard for prison riots and discipline and the Fourteenth Amendment as requiring shocking conduct, the *Whitley* Court discerned the Fourteenth Amendment as providing no "extra" protection for the right to personal security:

> We think the 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 in cases such as this one, where the deliberate use of force is challenged as excessive and unjustified. It would indeed be surprising if, in the context of forceful prison security measures, "conduct that shocks the conscience" or "afford[s] brutality the cloak of law," and so violates the Fourteenth Amendment were not also punishment "inconsistent with contemporary standards of decency" and "repugnant to the conscience of mankind" in violation of the Eighth Amendment.

Whitley, 475 U.S. at 312 (citations omitted). For a discussion of the Eighth Amendment personal

in some noncustodial circumstances.[299]

The first category is easy to describe—the accidental use of force. Two decisions—*Brower v. County of Inyo*[300] and *County of Sacramento v. Lewis*[301]—*when read together create a doctrinal line between the Fourth Amendment and the Fourteenth Amendment as to accidental uses of force. The Brower* Court stated that no Fourth Amendment seizure occurs when police officers accidentally use physical force and cause injury.[302] In that situation, according to *Lewis*, the Fourteenth Amendment nevertheless does apply.[303] The *Lewis* Court relied on precedent for its distinction between the Fourth and Fourteenth Amendment.[304] Under its narrowing precedents, an accident, for the Court, was just not a "seizure."[305]

The second category—the use of force during custody—is complex. When "custody" is present, officials sometimes have a duty to protect the confined person from harm, but when a person is not in custody, no duty arises.[306] The famous case of *DeShaney v. Winnebago County*[307] set forth this custodial requirement for the Fourteenth Amendment: "it is the State's affirmative act of restraining the individual's freedom to act on his own behalf—through incarceration, institutionalization, or other similar restraint of personal liberty—which is the 'deprivation of liberty' triggering the protections of the Due Process Clause."[308] Defining what it meant by "custody," the Court noted that "suspects in police custody"[309] are like prisoners: the state has a Fourteenth Amendment duty to provide medical care to the suspects,[310] and the Eighth Amendment creates this same duty with respect to prisoners.[311] This custodial duty safeguards a confined person from harming

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security standard, see *supra* text accompanying notes 144-144; *see generally* Bell v. Wolfish, 441 U.S. 520, 535 (1979) (stating that a pretrial detainee has a Fourteenth Amendment substantive due process protection from "conditions [that] amount to punishment of the detainee").

299 *See, e.g.*, United States v. Lanier, 520 U.S. 259, 261-63 (1997) (discussing the criminal conviction of a state-court judge who had been found guilty of violating the substantive due process rights of women he had sexually assaulted); Collins v. City of Harker Heights, 503 U.S. 115, 128 (1992) (holding that a governmental employer's failure to provide a safe working environment was not "arbitrary, or conscience shocking, in a constitutional sense"). For a discussion of this category of due process violation, see *infra* text accompanying notes 325-329.

300 489 U.S. 593 (1989).

301 569 U.S. 833 (1998).

302 *Brower*, 489 U.S. at 598-99.

303 *Lewis*, 523 U.S. at 842-45; for a discussion of this case, see *supra* Part II.D.2.

304 *Id.* at 843-44 (relying on California v. Hodari D., 499 U.S. 621, 626 (1991) and *Brower*, 489 U.S. at 596-97. For a discussion of these cases, see *infra* text accompanying notes 262-264.

305 *Lewis*, 523 U.S. at 843-44.

306 *See infra* notes 308-308.

307 489 U.S. 189 (1989).

308 *Id.* at 200.

309 *Id.* at 199.

310 *Id.* (citing City of Revere v. Massachusetts, 463 U.S. 239, 244 (1983)); *see also Lewis*, 523 U.S. at 850 (stating that "deliberately indifferent conduct must also be enough to satisfy the fault requirement for due process claims based on the medical needs of someone jailed while awaiting trial").

311 *See DeShaney*, 489 U.S. at 198-99 (citing Estelle v. Gamble, 429 U.S. 97 (1976)).

herself,[312] from other confined persons harming her,[313] and from state officials harming the confined persons.[314]

What the *DeShaney* Court meant by "other similar restraint," however, is unclear. In *Vernonia*, the Court examined the degree of control officials have over students as it evaluated, under the Fourth Amendment, the constitutionality of drug testing some students. In dicta, the *Vernonia* Court mentioned the Fourteenth Amendment, stating that school officials did not have a Fourteenth Amendment "'duty to protect'"[315] students from harming each other. Even though school officials have "custodial and tutelary" powers,[316] they do not have the necessary "degree of control over children as to give rise to a constitutional" duty.[317] School officials thus have "custodial" powers, but students are not in "custody."[318] Perhaps students are "free citizens" as described in *Graham*[319] and subject to Fourth Amendment scrutiny when a "search" or "seizure" occurs.

Similarly, when officials arrest a person, officials clearly have "custody" of the person. Under Supreme Court precedents, such "custody" is a seizure, subject to scrutiny under the Fourth Amendment.[320] But the *Graham* Court also noted in dicta that at some point the Fourteenth Amendment applies to the confined suspect: the Fourteenth Amendment protects the personal security interests of "pretrial detainees" in being free "from excessive force that amounts to punishment."[321] It did note, however, that it had not resolved the following question: "whether the Fourth Amendment continues to provide individuals with protection against deliberate use of excessive force beyond the point at which arrests ends and pretrial detention begins."[322]

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312 *See generally* Youngberg v. Romeo, 457 U.S. 307, 319 (1982) (holding that a violent involuntarily committed person has liberty interests that "require the State to provide minimally adequate or reasonable training to ensure safety and freedom from undue restraint"). The Court has also upheld the involuntarily commitment of individuals dangerous to the public. *See, e.g.*, Kansas v. Hendricks, 521 U.S. 346, 366 (1997) ("While we have upheld state civil commitment statutes that aim both to incapacitate and to treat, . . . we have never held that the Constitution prevents a State from civilly detaining those for whom no treatment is available, but who nevertheless pose a danger to others").

313 *See, e.g., Youngberg*, 457 U.S. at 320.

314 *See, e.g.*, Graham v. Connor, 490 U.S. 386, 395 n.10 (1989) (stating that the Due Process Clause "protects a pretrial detainee from the use of excessive force that amounts to punishment") (citing Bell v. Wolfish, 441 U.S. 520, 535-39 (1979)).

315 Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 655 (1995) (quoting DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 200 (1989)).

316 *Id.*

317 *Id.* In contrast, ten years earlier in *New Jersey v. T.L.O.*, two Justices had characterized this custodial power as creating an "obligation" for school officials to protect both students and teachers from misbehaving students. New Jersey v. T.L.O., 469 U.S. 325, 350 (1985) (Powell, J., concurring) (joined by Justice O'Connor).

318 *Vernonia*, 515 U.S. at 655.

319 *See supra* text accompanying note 312.

320 *See, e.g.*, Graham v. Connor, 490 U.S. 386, 395 (1989) (stating that "*all* claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard.").

321 *Id.* at 395 n.10.

322 *Id.*

Thus, if the purpose of the force was to "punish," then the Fourteenth Amendment applies, according to the Court, but if the force applied was not to punish, then it is unresolved whether the Fourth Amendment may still apply.

The third category—intentional force without custody—provides that egregious conduct by state officials violates the Constitution, even if the force used does not seem to fall easily under any other amendment. The Court used substantive due process to disapprove of state officials' egregious behavior when it decided *Rochin v. California*[323] in 1952, because at that time the Fourth Amendment did not apply to the states.[324]

Similarly, the Court in *Lanier* allowed substantive due process to apply to the egregious conduct of a state-court judge convicted of sexually assaulting "several women in his judicial chambers."[325] The women were not in any sense in "custody," but were harmed by a person abusing his state position of power. For these actions, substantive due process was the proper claim. In upholding the judge's criminal conviction,[326] the Court quoted an instruction the jury used in finding that the judge violated substantive due process.[327] The instruction questions whether the actions were conscience-shocking. With "conscience-shocking" as the substantive due process standard, one can easily discern why under the rule of *Graham* Fourteenth Amendment substantive due process is a fallback claim: if one proves "conscience-shocking" conduct, then the same verdict would occur under the Fourth Amendment or Eighth Amendment, if they applied. If one cannot meet this incredibly high standard, however, the result might be different

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323 342 U.S. 165 (1952).

324 In 1998, the Court noted that "today [*Rochin*] would be treated under the Fourth Amendment." County of Sacramento v. Lewis, 523 U.S. 833, 849 n.9 (1998). In *Rochin*, police officers forcibly entered the suspect's room, questioned him about capsules near his bed, and jumped him when the suspect swallowed them. *Rochin*, 342 U.S. at 166. After the suspect was handcuffed, he was taken to a hospital where a doctor, at the request of police officers, "forced an emetic solution through a tube into [the suspect's] stomach against his will" to recover the two capsules. *Id.*

325 United States v. Lanier, 520 U.S. 259, 261 (1997).

326 At issue was whether a violation of "substantive due process" gave the judge sufficient notice that his actions made him criminally liable under a federal statute. *Id.*

327 *Id.* at 262. The instructions provided as follows:

> Included in the liberty protected by the [Due Process Clause of the] Fourteenth Amendment is the concept of personal bodily integrity and the right to be free of unauthorized and unlawful physical abuse by state intrusion. Thus, this protected right of liberty provides that no person shall be subject to physical or bodily abuse without lawful justification by a state official acting or claiming to act under the color of the laws of any state of the United States when that official's conduct is so demeaning and harmful under all the circumstances as to shock one's consci[ence]. Freedom from such physical abuse includes the right to be free from certain sexually motivated physical assaults and coerced sexual battery. It is not, however, every unjustified touching or grabbing by a state official that constitutes a violation of a person's constitutional rights. The physical abuse must be of a serious substantial nature that involves physical force, mental coercion, bodily injury or emotional damage which is shocking to one's consc[ience].

Id. (quoting Appendix, 186-87). This instruction appears consistent with the Court's recent glosses on substantive due process in *Lewis*. *See infra* Part II.E.2.

under the Fourth or Eighth Amendment than under the Fourteenth. Consequently, the Court's personal security jurisprudence ensures that which amendment applies matters in modern litigation.

The Court's distinctions between the Fourth and Fourteenth Amendment are difficult to comprehend. One would have logically thought that the Fourth Amendment governs the actions of police officers alone. But, in making clear that the type of action is more significant than who performs it, the Court has laid the groundwork for applying the Fourth Amendment to the use of force by school officials.

C. *School Officials' Use of Physical Force as a Fourth Amendment "Seizure"*

When students leave their homes and enter the public schools, they become subject to the authority of school officials, who have both "custodial and tutelary" powers.[328] In exercising these powers, school officials apply physical force to students in two general ways: (1) to stop a student from harming another student or school official; and (2) to punish a student for violating a school rule. When officials use physical force in this manner, their actions implicate the Fourth Amendment because, under the Supreme Court's jurisprudence, their actions are seizures.

But, the Supreme Court has never addressed whether the Fourth Amendment applies to force used against students. Yet, in *Ingraham*, it discussed the bodily integrity interests of students in conjunction with its determination that students were not entitled to a hearing prior to a school official punishing them for their misdeeds in school.[329] The Court described the procedural liberty interests of students; it did not grant review to determine whether corporal punishment violated substantive due process, and it noted that the students did not raise the Fourth Amendment as a basis for recovery.[330]

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328 *See, e.g.*, Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 655 (1995).

329 Ingraham v. Wright, 430 U.S. 651, 673-74 (1977). The Court balanced interests in *Ingraham*, and one could arguably conclude that its analysis here suggests that students would have difficulty meeting either the Fourth Amendment's reasonableness standard or the Fourteenth Amendment's "shocks-the-conscience" standard. The Court, however, decided *Ingraham* in 1977, long before its more detailed personal security jurisprudence.

In 1977, bodily integrity claims—those of criminal suspects, detainees, and students—did not fall within a particular Bill of Rights provision. Instead, the common sense *Glick* factors were a part of most courts' inquiries as to whether the force violated the Constitution. *See* Johnson v. Glick, 481 F.2d. 1028 (2d Cir. 1973). Not until 1985 did the Court specify that uses of deadly force by police officers should be analyzed under the Fourth Amendment. In doing so, the Court also stated that it would assess reasonableness by looking at evolving police practices—not just the common law. Thus, balancing interests today, whether done under the Fourth Amendment's reasonableness standard or the Fourteenth Amendment's "shocks-the-conscience" standard, differs from the Court's balancing in 1977, which lacked important social science data now available in 2000. *See* Urbonya, *supra* note 1. In addition, balancing focuses on a different issue—whether a standard has been violated; it does not address *which* amendment applies.

330 *Ingraham*, 490 U.S. at 660 n.12, 673 n.42.

In determining whether force to control students constitutes a "seizure," one must study what the Court said in *New Jersey v. T.L.O.*[331] and its progeny. In these decisions, the Court easily extended the Fourth Amendment to apply to the actions of school teachers seeking evidence that students had violated school rules. The Court could have looked at these same actions under the Fourteenth Amendment and asked whether the school officials' action implicated the "liberty" interests of students.[332] It did not. Instead, it viewed school officials' searches as invading the privacy interests of students safeguarded by the Fourth Amendment, even when what was at issue was a violation of school rules.

After *T.L.O.*, the Court created the rule of *Graham*: if the Fourth Amendment applies to official actions implicating personal security, then substantive due process does not apply. In these school cases, the Fourth Amendment applied because school officials engaged in "searches," an activity to which the Fourth Amendment usually applies. When school officials use physical force to control students, they "seize" them within the meaning of the Fourth Amendment. Consequently, the Court's well-established, but narrowing, "seizure" doctrines easily apply to uses of force by school officials.

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331 469 U.S. 325 (1985). For a discussion of this case, see *supra* text accompanying notes 244-249.

332 *See* Michael Wells, *Constitutional Torts, Common Law Torts, and Due Process of Law*, 72 CHI.-KENT L. REV. 617, 634-35 (1997). Professor Wells has been a vigorous advocate of applying the Fourteenth Amendment, and not the Fourth Amendment, to actions that implicate an individual's interest in personal security:

> The blunt truth is that the Court in *Garner* and *Graham* significantly extended the range of interests protected by the Fourth Amendment, and did so with virtually no discussion of the step it was taking. There is nothing in the background of the Fourth Amendment, nor in the Fourth Amendment precedents before *Garner*, to support the notion that one of the amendment's aims is to protect the interest in personal security against physical harm.

Id. at 628-29 (footnotes omitted). Professor Wells has criticized applying the Fourth Amendment to the actions of police officers that infringe on a person's interest in personal security. *Id.* at 629-31. Instead, he views the Fourth Amendment as safeguarding a person's interest in privacy. *Id.* at 628. According to Professor Beerman, Professor Wells' standard for government actions covered under substantive due process is quite broad–simply asking "whether there was an abuse of power by the defendant official." Jack M. Beerman, *Common Law Elements of the Section 1983 Action*, 72 CHI.-KENT L. REV. 695, 744 (1997). Although the Supreme Court has stated that arbitrary action is actionable under the substantive due process component of the Fourteenth Amendment, *see supra* text accompanying note 199, Professor Beerman soundly perceives the modern Court's preference against using substantive due process as a basis for a constitutional violation makes such a finding unlikely:

> The Court has expressed extreme reluctance to recognize new claims under substantive due process. . . . It may be, given the Court's resistance to constitutional tort litigation, that an actual substantive due process standard would be extremely difficult to meet and that plaintiffs are better off if they can base their claims on a particular provision of the Bill of Rights.

Id. at 745. Professor Beerman's view of the difficulty of establishing a substantive due process violation was borne out in the Supreme Court's decision rendered soon after his article—*County of Sacramento v. Lewis*. For a discussion of this case, see *supra* Part II.E.2.

1. Force Used to Control Students

When students physically fight or are on the verge of obvious violence, school officials reasonably exercise their custodial and tutelary powers by intervening. When these officials grab students, they seize students within the meaning of the Fourth Amendment because their actions fall within the *Brower* definition of an "intentional acquisition of physical control." Public school officials perform the same type of act that the Court has clearly labeled a seizure when police officers perform it.[333] Both the police officer and school officials use physical force to control their environment. Whether this grabbing violates the Fourth Amendment is a separate inquiry, one that requires defining "reasonableness" in the context of the public schools.

If the grabbing is ineffective and students break away, then only the initial grabbing is a "seizure." As the Court explained in *Hodari D.*, "during the period of fugitivity," there is no continuing "seizure."[334] In addition, compulsory attendance laws do not make students "seized" throughout the day as they attend public school because they may nevertheless attend private schools, where the Fourth Amendment is not implicated because private school teachers are not "governmental" actors under the Court's state-action doctrine. In many respects, public school students are therefore like the "free citizens" referred to in *Graham*. When public school officials use intentional physical force, they effectuate a "seizure" that is neither a classic arrest nor an investigatory stop but a type of the "other 'seizure' of a free citizen" that *Graham* mentioned.

Even though school officials perform acts of policing similar to those done by law enforcement officials, one further distinction is necessary before the use of physical force to control falls under the protection of the Fourth Amendment: the appropriate use of force in schools differs dramatically from the kind of sexual assault claims that have generally been considered under the Fourteenth Amendment. Both actions implicate the kind of "grabbing" that the Fourth Amendment concerns. But, these acts differ in their purpose: in one situation the force used is to control the school learning environment; a school official may simply err in judgment as to the appropriate degree of force. Yet, in the sexual abuse case, any physical contact is wrong from the moment of touching. Lower courts have recognized this distinction by applying the Fourteenth, and not the Fourth, Amendment to the actions of police officers who sexually assault individuals that they have stopped pursuant to their Fourth Amendment powers.[335]

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333 *See infra* text accompanying notes 267-73.

334 California v. Hodari D., 490 U.S. 621, 625 (1991).

335 *See, e.g.*, Rogers v. City of Little Rock, 152 F.3d 790, 795 (8th Cir. 1998) (rejecting the application of the Fourth Amendment to a claim that a police officer raped person stopped for traffic violation, stating "that no amount of force could have been reasonable to achieve [this officer's] purpose" and concluding that his actions were "shocking"); Jones v. Wellham, 104 F.3d 620, 628 (4th Cir. 1997) ("Because the [alleged rape] inflicted did not occur in the course of an attempted arrest or apprehension of one suspected of criminal conduct, . . . the claim was not one of a Fourth Amendment violation, but of the violation of the substantive due process right under the Fourteenth Amendment not to be subjected by anyone acting under color of state law to the wanton infliction of physical harm").

Although Fourth Amendment inquiries are generally "objective" and refrain from examining the motivations of the actor, the *T.L.O.* Court nevertheless looked at the purpose of the school officials' actions in deciding whether the Fourth Amendment applied to searches of students. It stated: "Today's public school officials do not merely exercise authority voluntarily conferred on them by individual parents; rather, they act in furtherance of publicly mandated educational and disciplinary policies."[336] Thus, in using physical force to control students, school officials seek to maintain the educational environment.

School officials thus effect a Fourth Amendment "seizure" when they use physical force to break up a fight or to stop one from happening. These actions are intentional and result in control over the student, who would otherwise be at liberty to leave.

2. Force Used to Punish Students

In contrast, when school officials use physical force to punish students, the context differs. Nevertheless, how one imagines and characterizes the protean interactions between school officials and students does not alter the essential analysis of the Fourth Amendment: when school officials intentionally use physical force to punish students, their actions constitute a Fourth Amendment seizure because the students would not be "free to leave."

Most officials likely would assert that the purpose behind their hitting was to instill discipline and maintain an effective learning environment.[337] School officials therefore intentionally use physical force to acquire control over the struck students. In addition, in most circumstances, students submit to officials' show of authority and receive their physical punishment. The act of hitting in the context of corporal punishment is thus similar to the use of physical force to control disruptive students, except that the need for immediate action is significantly less obvious: students ready to hit each other pose a greater threat to order or than do students who refuse to quit talking during an exam. Nevertheless, the acts performed by school officials are similar.

When officials use physical force to punish students, their actions implicate the Fourth Amendment, despite the Court's dicta in *Graham* that pretrial detainees have a Fourteenth Amendment right to be free from "excessive force that amounts to punishment."[338] The progeny of *Graham* strongly moves away from finding substantive rights in the Due Process Clause of the Fourteenth Amendment.[339] In contrast to the pretrial detainees discussed in *Graham*, students are free to leave after school officials strike them; pretrial detainees still remain confined, subject to the state's continued authority over them. Because physical force used to discipline or punish falls within the Court's ever narrowing "seizure" definitions, students

336 New Jersey v. T.L.O., 469 U.S. 325, 336 (1985).

337 *See, e.g.*, IRWIN A. HYMAN, ET AL., SCHOOL DISCIPLINE AND SCHOOL VIOLENCE: THE TEACHER VARIANCE APPROACH 334-35 (1997) (stating that some teachers resist banning corporal punishment because of their misconception that hitting students controls violence in the schools).

338 *See supra* text accompanying notes 233-235.

339 *See supra* text accompanying notes 234-237.

today may seek protection under the Fourth Amendment's reasonableness standard.

IV. Conclusion

Public school students have an interest in personal security safeguarded by the Fourth Amendment, as incorporated by the Due Process Clause of the Fourteenth Amendment. Historically, most courts have interpreted students' personal security claims to fall under the substantive due process component of the Fourteenth Amendment, which provides nominal protection.[340] In light of modern personal security jurisprudence, this Article advocates applying the Fourth Amendment's reasonableness standard when school officials use physical force that constitutes a Fourth Amendment "seizure." As a result, when school officials grab students to break up fights or use bodily pain to punish students, courts should analyze the resulting constitutional tort claims under the Fourth Amendment.

The difference between the Fourth and Fourteenth Amendment is doctrinally significant because the Supreme Court has created multiple standards for personal security claims depending on the context of the incident challenged. Although the Court has articulated numerous standards to establish a violation of substantive due process, its most recent exegesis of personal security litigation in *County of Sacramento v. Lewis* suggests that students' personal security claims will virtually always fail if they are litigated under substantive due process, and not fail so consistently if litigated under the Fourth Amendment. In *Lewis,* the Court held that only conduct that is egregious—shocking to the conscience—establishes a violation of substantive due process. In contrast, under the Court's Fourth Amendment personal security litigation, a violation occurs if officials used unreasonable force.

Although abstract theory (and logic) would easily support giving significant and equal weight to the right to personal security, no matter whether the right falls under the Fourth, Eighth, or Fourteenth Amendment, the Supreme Court, has nevertheless articulated the *Graham* rule, declaring that only one amendment applies when persons challenge officials' use of physical force. If students are not protected by the Fourth Amendment, then they fall into the deep chasm of the Fourteenth Amendment's conscience-shocking standard, which provides little protection.

The Fourth Amendment and its reasonableness standard properly foster public education by safeguarding students' cherished interest in personal security and protecting schools' ability to provide an educational environment, one free from unreasonable violence from school officials.[341]

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340 *See supra* note 12.

341 *See, e.g.*, Patrick V. Gaffney, *Arguments in Opposition to the Use of Corporal Punishment: A Comprehensive Review of the Literature*, REPORT-150, at 5 (Dept. of Ed., Mar. 17, 1997) (determining that physical punishment "represents a violation of children's rights and a debasement of the primary goals of education"); PAULA M. SHORT, RICK JAY SHORT, CHARLIE BLANTON, RETHINKING STUDENT DISCIPLINE: ALTERNATIVES THAT WORK 86 (1994) (advocating positive reinforcement as the best method to discipline students); CHARLES H. WOLFGANG, SOLVING DISCIPLINE PROBLEMS, 13-264 (1995) (detailing positive approaches to student discipline). *See generally* MYRA C. CHEN, CAMPAIGNS AGAINST CORPORAL PUNISHMENT: PRISON-

ERS, SAILORS, WOMEN, AND CHILDREN IN ANTEBELLUM AMERICA 34 (1984) (noting that "educational leaders angrily condemned teachers who refused to substitute moral suasion for the rod and the birch").