**CIVIL RIGHTS—Claims that Law Enforcement Officials Exercised Excessive Force in the Course of an Arrest, Investigatory Stop, or Other Seizure of a Free Citizen Are Properly Analyzed Under the Fourth Amendment's Reasonableness Standard, Rather than Under a Substantive Due Process Standard—*Graham v. Connor*, 490 U.S. 386 (1989).**

## I. CASE HISTORY OF *GRAHAM V. CONNOR*

### A. *Factual Background*

On November 12, 1984, Dethorne Graham, a diabetic, felt the onset of an insulin reaction.[1] Apparently, Graham could usually treat the reaction by eating or drinking something containing sugar.[2] Graham asked William Berry, a friend, to drive him to a nearby convenience store so he could buy some orange juice to counteract the reaction.[3] Graham was dizzy and sweating when he got into the car.[4]

Berry and Graham drove to the convenience store and Graham went inside.[5] When Graham saw the line of customers waiting, he hit the counter and walked out.[6] Connor, a Charlotte, North Carolina police officer, was in his patrol car in the convenience store parking lot.[7] Seeing the petitioner hastily enter and leave the store, the officer became suspicious that something might be amiss.[8]

Graham told Berry to drive him to a friend's house.[9] Connor followed their car as it left the parking lot.[10] The officer stopped the Berry automobile about one-half mile from the store.[11]

Connor first asked Berry what was wrong with Graham.[12] Berry told the respondent that Graham was suffering from a "sugar reaction."[13] Officer Connor then asked Graham what was wrong with him, and got no

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1. Graham v. Connor, 490 U.S. 386, 388 (1989).
2. *Id.* at 389.
3. *Id.* at 388.
4. Brief for Amicus Curiae State of North Carolina at 2, Graham v. Connor, 490 U.S. 386 (1989) (No. 87-6571).
5. Graham v. Connor, 490 U.S. at 388-89.
6. Brief for Amicus Curiae State of North Carolina at 2, Graham v. Connor, 490 U.S. 386 (1989) (No. 87-6571).
7. *Id.*
8. Graham v. Connor, 490 U.S. at 389.
9. *Id.*
10. *Id.*
11. *Id.*
12. Brief for Amicus Curiae State of North Carolina at 2, Graham v. Connor, 490 U.S. 386 (1989) (No. 87-6571).
13. Graham v. Connor, 490 U.S. at 389.

response.[14] The officer ordered Berry and Graham to wait while he found out what, if anything, happened at the convenience store.[15]

At this point, Graham was, by his own account, slipping into unconsciousness[16] and he only remembered thinking he was not going to sit in the car and wait for Connor to find out nothing had happened.[17] Graham could not remember anything from that moment until he was later handcuffed.[18] It is unclear if Graham was aware of what he was doing.[19] Next, he got out of the Berry auto, ran around it twice, and finally sat down on the curb.[20] Connor called for a back-up, and several other officers arrived.[21] Graham lost consciousness.[22] When he awoke, his hands were cuffed tightly behind his back, and he had been lifted from the curb and laid face down on the hood of Berry's car.[23]

After regaining consciousness, Graham asked the officers to check in his wallet for a card identifying him as a diabetic, but the officers ignored this request.[24] An officer shoved Graham's face down on the car hood.[25] The officers then picked up Graham and threw him head first into the back seat of the patrol car.[26] A friend of Graham's brought him some orange juice, but the police officers did not allow him to have it.[27]

After Connor received a report that nothing had happened at the convenience store, the officers drove Graham home and released him.[28] He collapsed in his yard, and friends took him to the doctor.[29] The events re-

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14. Brief for Amicus Curiae State of North Carolina at 3, Graham v. Connor, 490 U.S. 386 (1989) (No. 87-6571).

15. Graham v. Connor, 490 U.S. at 389. One account states Connor was told in the parking lot by people near the store that the petitioner acted "crazy." Brief for Amicus Curiae State of North Carolina at 2, Graham v. Connor, 490 U.S. 386 (1989) (No. 87-6571).

16. Brief for Amicus Curiae State of North Carolina at 3, Graham v. Connor, 490 U.S. 386 (1989) (No. 87-6571).

17. *Id.*

18. *Id.*

19. Brief for Amicus Curiae United States Dep't of Justice at 3, Graham v. Connor, 490 U.S. 386 (1989) (No. 87-6571). The statement of the facts from the Department of Justice indicated he jumped out of the car because was concerned he was not able to treat his reaction. *Id.*

20. Graham v. Connor, 490 U.S. at 389. Another account, from the State of North Carolina, describes Graham's "sitting down" as actually being "placed" at the curb by Berry and Connor, with the petitioner trying to kick the officer. Brief for Amicus Curiae State of North Carolina at 3, Graham v. Connor, 490 U.S. 386 (1989) (No. 87-6571).

21. Graham v. Connor, 490 U.S. at 389.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. Graham v. City of Charlotte, 827 F.2d 945, 952 (4th Cir. 1987) (Butzner, J., dissenting). The Charlotte police were not at all courteous or sympathetic to Graham's diabetic reaction problems. *Id.*

sulted in Graham sustaining injuries including a broken foot, cuts on his wrists, a bruised forehead, an injured shoulder, and permanent ringing in his ears.[30]

### B. *Federal District Court Conclusion*

Graham brought an action for damages under 42 U.S.C. § 1983[31] against the City of Charlotte and the individual officers for depriving him of his civil rights.[32] The civil rights violation was based on the claim that the defendants used excessive force in detaining the petitioner.[33] The defendants disputed the cause of Graham's injuries claiming they did not inflict any injuries on the plaintiff.[34]

The plaintiff raised additional claims. He alleged the defendants violated his rights under the fourteenth amendment.[35] Additionally, Graham pled a violation of the Rehabilitation Act of 1973 and pendant state law tort claims of assault, false imprisonment, and intentional infliction of mental and emotional distress.[36] At the close of plaintiff's evidence, all of the defendants moved for a directed verdict.[37] The district court granted the defendant's motion.[38]

The district court evaluated the evidence of excessive force with four factors set out in a second circuit case, *Johnson v. Glick*.[39] These factors are:

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30. Graham v. Connor, 490 U.S. at 390.

31. Section 1983 states:

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

42 U.S.C. § 1983 (1989).

32. Graham v. City of Charlotte, 644 F. Supp. 246, 247 (W.D.N.C. 1986).

33. *Id.*

34. *Id.* at 248. The court found no evidence the defendant police inflicted any injury on the plaintiff. *Id.*

35. Graham v. Connor, 490 U.S. at 390.

36. Graham v. City of Charlotte, 644 F. Supp. at 247. The Rehabilitation Act of 1973, 29 U.S.C. §§ 701-796i bans employment discrimination of otherwise qualified handicapped employees of agency programs, or activities receiving federal assistance. *Id.* at § 794. The district court ruled that in "no stretch of the imagination" would the officer's conduct be seen as a violation of that statute. Graham v. City of Charlotte, 644 F. Supp. at 249.

37. Graham v. City of Charlotte, 644 F. Supp. at 247.

38. *Id.* at 249.

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

> (1) The need for . . . force.
> (2) The relationship between the need and the amount of the force that was used.
> (3) The extent of the injury inflicted.
> (4) Whether the force was applied in a good faith effort to maintain and restore discipline or maliciously and sadistically for the very purpose of causing harm.[40]

The court developed these factors to determine whether excessive force is actionable under 42 U.S.C. § 1983.[41] *Glick* arose out of a claim by a pretrial detainee who alleged a guard assaulted him.[42] The court held the rights of the prisoner were grounded in substantive due process, rather than the fourth or eighth amendments.[43] The use of these due process standards by the district court in Graham's excessive force claim provided the issue that eventually reached the Supreme Court of the United States.[44]

Applying the *Glick* factors to the defendant officers' conduct, the district court found the officers applied force in a good faith effort to maintain or restore order.[45] The court pointed out that at the time Graham was restrained, a crowd had gathered, and the best way to avoid a confrontation with the onlookers was to put Graham in the squad car.[46] It found the officers did not apply force maliciously or sadistically for the purpose of causing harm.[47] The court also decided there was no evidence to show the officers injured the plaintiff or exerted excessive force under the circumstances.[48] Finding the plaintiff could not show a deprivation of his civil rights, the court granted the defendant's motion for a directed verdict on all federal and state law claims.[49] The court also granted a directed verdict in favor of the defendants on Graham's state law claims.[50]

### C. *Court of Appeals Conclusion*

The plaintiff appealed to the Court of Appeals for the Fourth Circuit.[51] Graham contended the first three factors in *Glick* were the only applicable considerations.[52] Further, Graham alleged the district court erred in ap-

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40. Graham v. City of Charlotte, 644 F. Supp. at 248.
41. Johnson v. Glick, 481 F.2d at 1033.
42. *Id.* at 1029-30.
43. *Id.* at 1032.
44. Graham v. City of Charlotte, 644 F. Supp. at 248-49.
45. *Id.*
46. *Id.* at 249.
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.*
51. Graham v. City of Charlotte, 827 F.2d 945 (4th Cir. 1987).
52. *Id.* at 948.

plying the fourth *Glick* factor—whether the force used by the officers was applied in a good faith effort to maintain and restore discipline or maliciously or sadistically for the very purpose of causing harm.[53] The court rejected that argument, and a divided panel of the Fourth Circuit affirmed the district court decision.[54] The majority held that a reasonable jury applying the *Glick* factors to the petitioner's evidence could not find the force applied to be constitutionally excessive.[55] The court found the first factor, the need for application of the force, was met because officers testified they saw Graham kicking at Connor when he was lying on the curb.[56] Because the need to remove Graham from the scene, which prompted the use of force, was found to be both necessary and proportionate, the second factor was also resolved in the respondents' favor.[57] Similarly, the court found the evidence that the respondents directly inflicted injury on the petitioner was also lacking.[58] Having found in respondents' favor on the first three factors, the court simply held the officers' actions were reasonable under the circumstances, and by implication found no malicious or sadistic behavior.[59]

The dissenting judge on the panel argued the affirmance of the district court's grant of a directed verdict rested on a mistaken premise.[60] The judge asserted the district court incorrectly applied standards to analyze force applied by officials in an eighth amendment context to Graham, who was neither a prisoner nor a pretrial detainee.[61] He argued the proper constitutional provision implicated by the petitioner's claim was the fourth amendment.[62]

Mr. Graham's status at the time of his detention must be distinguished from other persons who are processed through the criminal justice system. The officers never arrested Graham; therefore, he enjoyed the full complement of constitutional protections available to all free citizens. Two of the constitutional amendments providing protection against egregious conduct by state officers are the fourth, which prohibits an unreasonable seizure of the person,[63] and the fourteenth,[64] which prohibits conduct that

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53. *Id.*
54. *Id.* at 950.
55. *Id.* at 949-50.
56. *Id.* at 949.
57. *Id.*
58. *Id.*
59. *Id.* at 950.
60. *Id.* (Butzner, J., dissenting).
61. *Id.* (Butzner, J., dissenting). The fourth circuit has applied the four-factor test from *Johnson v. Glick* in an eighth amendment context. *See* King v. Blankenship, 636 F.2d 70 (4th Cir. 1980).
62. Graham v. City of Charlotte, 827 F.2d at 951 (Butzner, J., dissenting).
63. U.S. CONST. amend. IV. The fourth amendment provides as follows:
The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants

"shocks the conscience."[65] Both amendments protect the free citizen from the deliberate application of excessive force by police officers. Once an arrest is made, the person becomes a pretrial detainee if he or she cannot post bond or qualify for release under a pretrial detention statute. While the fourteenth amendment still applies to pretrial detainees,[66] the Supreme Court has not resolved whether fourth amendment protection similarly applies.[67] After conviction, the eighth amendment proscription against cruel and unusual punishment[68] provides protection for the prisoner when state officials apply deliberate, excessive force.[69] The dissenting judge from the Fourth Circuit panel was concerned the substantive due process standard of *Glick* was not the proper standard to measure the law enforcement officials' actions against Graham, who was a free citizen, and not a pretrial detainee or prisoner.[70]

The dissent interpreted Supreme Court precedent,[71] and believed it did not mandate that any allegedly malicious, harmful intent of police officers be measured in fourth amendment unreasonable search and seizure cases.[72] The applicable test to measure the scope and conduct of the respondents, the dissent argued, should have been whether the respondents' actions were reasonably related to the circumstances that justified the interference.[73]

### D. *Supreme Court Conclusion*

Graham appealed the case to the Supreme Court on the fourth amendment issue.[74] The United States Supreme Court *held*, vacated and remanded.[75] *All* claims that law enforcement officers have used excessive force in the course of an arrest, investigatory stop, or other seizure of a free

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shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

*Id.*

64. U.S. CONST. amend. XIV, § 1. The fourteenth amendment prohibits state officials from depriving a person "of life, *liberty*, or property, without due process of law." *Id.* (emphasis added).

65. Rochin v. California, 342 U.S. 165, 172 (1952).

66. Bell v. Wolfish, 441 U.S. 520, 535-40 (1979).

67. Graham v. Connor, 490 U.S. 386, 395 n.10 (1989).

68. U.S. CONST. amend. VIII. The eighth amendment provides that: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." *Id.*

69. Whitely v. Albers, 475 U.S. 312, 327 (1979).

70. Graham v. City of Charlotte, 827 F.2d 945, 950-51 (4th Cir. 1987).

71. Terry v. Ohio, 392 U.S. 1 (1968); Tennessee v. Garner, 471 U.S. 1 (1985).

72. Graham v. City of Charlotte, 827 F.2d at 951.

73. *Id.* at 951-52.

74. Graham v. Connor, 490 U.S. at 399 (Blackmun, J., concurring). Graham did not argue the denial of substantive due process under the fourteenth amendment to the high court.

75. *Id.*

citizen are properly analyzed under the fourth amendment and its reasonableness standard, rather than under a substantive due process standard. *Graham v. Connor*, 490 U.S. 386 (1989).[76]

## II. ANALYSIS PRIOR TO *GRAHAM V. CONNOR*

In *Graham*, the Supreme Court was asked to decide what constitutional standard governs a citizen's claim that law enforcement officials used excessive force in making an arrest or other seizure of the person.[77] Prior to this case, a citizen could point to two constitutional provisions that guaranteed a right of personal security—the fourth[78] and the fourteenth amendments.[79] The rights established under these amendments have corollary standards for assessing the propriety of law enforcement officials' conduct.[80] The factors used to analyze the conduct of the officers for the purpose of assessing liability under 42 U.S.C. § 1983 differ under each amendment.[81]

Courts analyzed the propriety of police conduct when excessive force was alleged under the fourth and the fourteenth amendments, using different tests to measure police conduct.[82] One significant difference in the two approaches was the question of whether the officer's conduct was *objectively* reasonable. Objective reasonableness has been interpreted to be implicit in fourth amendment standards.[83] But the fourteenth amendment substantive due process standard to measure police conduct, as characterized in

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76. *Id.* at 395. The Court indicated that "the Due Process Clause protects a *pre-trial detainee* from the use of force that amounts to punishment." *Id.* at 395 n.10.

77. *Id.* at 388.

78. *See supra* notes 63-65 and accompanying text. The fourth amendment was made applicable to the states by the United States Supreme Court's decision in Mapp v. Ohio, 367 U.S. 643 (1961).

79. *See supra* notes 63-65 and accompanying text. The Supreme Court has defined when the conduct of police officers implicates the fourth amendment as "[w]henever an officer restrains the freedom of a person to walk away, he has seized that person." United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975).

80. *See supra* notes 63-65 and accompanying text.

81. *See* Tennessee v. Garner, 471 U.S. 1 (1985). Under the fourth amendment, the analysis of excessive force claims weighs the nature and quality of the intrusion on the individual's interests against the government's interest. *Id.* at 7-8. *Garner* holds seizures of the person are subject to analysis under the reasonableness requirement based on a totality of circumstances known to the officers at the time of the incident. *Id.* at 8-9. In contrast to this standard, under the fourteenth amendment, conduct that "shocks the conscience" violates the substantive norms of due process. Rochin v. California, 342 U.S. 165, 172 (1952).

82. Urbonya, *Problematic Standards of Reasonableness: Qualified Immunity in Section 1983 Actions for a Police Officer's Use of Excessive Force*, 62 TEMP. L.Q. 61, 94-95 (1989) [hereinafter Urbonya].

83. *See* Urbonya, *supra* note 82, at 93.

*Johnson v. Glick*, incorporates consideration of malicious and sadistic use of force by government officials.[84]

The last factor in *Glick*, whether the force was applied in a good faith effort to maintain and restore discipline, or maliciously and sadistically for the very purpose of causing harm[85] involves a subjective component. As a result, "courts have disagreed whether they should apply the factors specified in *Johnson v. Glick*, which was a decision discussing a violation of substantive due process, to claims based on the fourth amendment."[86]

## III. *GRAHAM V. CONNOR* DECISION

### A. *Reasonableness Test*

The Supreme Court first rejected the notion that "the substantive due process"[87] approach can be used indiscriminately to analyze all excessive force claims against either law enforcement or prison officials.[88] The Court criticized this approach because it ignores the specific constitutional provisions that protect citizens from physically abusive government conduct.[89] It stated that the trial court must identify the precise constitutional violation alleged to have been committed by the defendant.[90] In other words, if there is a more specific constitutional right governing the conduct, the analysis begins there rather than in "a generic 'right' to be free from excessive force."[91] The Court suggested that, in most instances, the fourth amendment's protection against unreasonable searches and seizures afforded free citizens or the eighth amendment's ban on cruel and unusual punishment for prisoners will be implicated.[92]

The Court held that all claims alleging excessive force on the part of arresting officers should be analyzed under the fourth amendment's " 'reasonableness' standard, rather than under a 'substantive due process' approach."[93] The fourth amendment provides "an explicit textual source of constitutional protection against . . . physically intrusive governmental conduct."[94] That source, rather than the fourteenth amendment which car-

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84. *Id.*
85. Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973).
86. Urbonya, *supra* note 82, at 94-95.
87. *See supra* note 81.
88. Graham v. Connor, 490 U.S. at 393.
89. *Id.*
90. *Id.* at 394.
91. *Id.* at 393.
92. *Id.* The Court did not answer the question of whether the fourth amendment continues to protect pretrial detainees. *Id.* at 395 n.10.
93. *Id.* at 395.
94. *Id.*

ries a more generalized notion of due process, is the courts' guide in analyzing excessive force claims brought by free citizens.[95]

The Court then provided further guidance. It discussed factors it considered central to a proper analysis of excessive force claims under the "reasonableness" test.[96] Noting the reasonableness test under the fourth amendment is "'not capable of precise definition, or mechanical application,'"[97] the Court stated that some facts to be given careful attention include: a) "the facts and circumstances of each particular case"; b) "the severity of the crime at issue"; c) "whether the suspect poses an immediate threat to the safety of the officers or others"; and d) whether the suspect is "actively resisting arrest or attempting to evade arrest by flight."[98] The Court stated that "[t]he 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight."[99] This view could be seen as subjective rather than objective. The purpose of this view, however, is to limit the universe of appropriate responses that a jury could find the officer should have made; therefore, this view does not remove the objective component of the reasonableness test.[100]

### B. *Objective Component of Reasonableness Test*

The United States Department of Justice, the State of North Carolina, and the American Civil Liberties Union ("ACLU") filed amicus briefs for the Court's consideration. One primary issue in these briefs was whether the *Glick* factors had any value in assessing whether an officer's actions were reasonable under the Supreme Court's formulation of fourth amendment protections.

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95. *Id.*
96. *Id.* at 396.
97. *Id.* (quoting Bell v. Wolfish, 441 U.S. 520, 559 (1979)).
98. *Id.*
99. *Id.*
100. The reasonableness of a particular use of force, viewed from the perspective of a reasonable officer on the scene, seems to be a continuation of Justice Rehnquist's thoughts in the dissenting opinion of Tennessee v. Garner, 471 U.S. 1 (1985). In that case, he indicated the "clarity of hindsight cannot provide the standard for judging the reasonableness of police decisions made in uncertain and often dangerous circumstances." *Id.* at 26. The Chief Justice takes the position in *Graham* that seizures of the person often involve split-second decision making by the officers. Graham v. Connor, 490 U.S. at 396-97. What they observe and what they believe the suspect will do based on those observations are all that the officer has to go on in determining the amount of force needed to restore discipline, or to stop, investigate, and perhaps arrest the person. The court seems to hold the fact finder has to first determine what information the police officer possesses, then objectively evaluate the actions he takes, based on the known information.

Prior to *Graham v. Connor*, circuit courts applying the *Glick*[101] factors to excessive force claims analysis under the fourth amendment required a showing by the plaintiff that the officers acted maliciously or sadistically,[102] or with an intent to inflict harm.[103] Other circuit courts took the position that the reasonableness standard of the fourth amendment measured the objective reasonableness of the officers' actions only, making the subjective intentions of the officers irrelevant.[104] The Fourth Circuit used the final factor in *Glick*, which required Graham to show a malicious and sadistic application of force. Because this required the court to determine the officer's subjective motives,[105] the question presented to the Supreme Court in the amicus briefs was whether malice was a necessary element of excessive force claims under the fourth or fourteenth amendments.[106]

The ACLU and the United States Department of Justice agreed the subjective element of *Glick* was not appropriate in the analysis of excessive force cases.[107] Their position was that "[a]n objectively unreasonable seizure violates the Constitution regardless of an officer's good intent; likewise, an objectively reasonable seizure does not violate the Constitution despite the officer's bad intent."[108] The State of North Carolina in its amicus brief reasoned that the factors in *Glick*, if used only to focus attention on the reason for the use of force, were appropriate.[109] The *Glick* factors had been adopted by the majority of the circuits.[110] The ACLU argued that:

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101. *See supra* notes 39, 41 and accompanying text.

102. Jamieson v. Shaw, 772 F.2d 1205, 1210-11 (5th Cir. 1985); Patzner v. Burkette, 779 F.2d 1353, 1371 (8th Cir. 1985).

103. Martin v. Malhoyt, 830 F.2d 237 (D.C. Cir. 1987). The Fifth Circuit and one panel of the Fourth Circuit determined that all of the *Glick* factors, including whether officials acted maliciously, aid courts in determining what constitutes reasonable conduct. *See* Urbonya, *supra* note 82, at 92-96.

104. *See* Lester v. City of Chicago, 830 F.2d 706, 712-14 (7th Cir. 1987) (subjective inquiry to determine if officer acted with malice incompatible with fourth amendment "objectively reasonable" analysis). A different panel of the Fourth Circuit and the Second, Seventh, and District of Columbia Circuit Courts of Appeals all had determined the application of the *Glick* factors were improper because the *Garner* standard requires a test of objective good faith, while the final factor in *Glick* requires courts to determine officials' subjective good faith. *See* Urbonya, *supra* note 82, at 95.

105. Graham v. City of Charlotte, 827 F.2d 945, 948 (4th Cir. 1987).

106. Brief for Amicus Curiae American Civil Liberties Union at 20, Graham v. Connor, 490 U.S. 386 (1989) (No. 87-6571); Brief for Amicus Curiae United States Department of Justice at 7, Graham v. Connor, 490 U.S. 386 (1989) (No. 87-6571).

107. Brief for Amicus Curiae American Civil Liberties Union, Graham v. Connor, 490 U.S. 386 (1989) (No. 87-6571); Brief for Amicus Curiae United States Department of Justice, Graham v. Connor, 490 U.S. 386 (1989) (No. 87-6571).

108. Lester v. City of Chicago, 830 F.2d at 712.

109. Brief for Amicus Curiae State of North Carolina at 9-12, Graham v. Connor, 490 U.S. 386 (1989) (No. 87-6571).

110. *Id.*

> In short, nothing in the language, history or case law of the Fourth Amendment supports the malice standard adopted by the court below. The wording of the Fourth Amendment prohibits *unreasonable* conduct in searches and seizures. This is an objective standard that the Court can and has applied in a variety of contexts—for example, in judging (a) whether an officer acted reasonably in relying on a warrant not supported by probable cause, (b) whether an officer has a good faith and reasonable belief that his conduct was lawful, thereby affording him the opportunity to assert an affirmative defense, and (c) whether the police applied constitutionally reasonable force in seizing a suspect or citizen at liberty. There is absolutely no reason to create a different rule here.[111]

The Department of Justice argued that whether an officer acts reasonably in making a seizure does not depend on that officer's state of mind.[112] It emphasized the Supreme Court in *Terry v. Ohio*[113] had explicitly held that the facts of a fourth amendment claim be judged against an objective standard,[114] with no consideration of the mens rea of the offending officers.[115] The Department of Justice also argued that using the lower court's malicious and sadistic, or good faith factors would lead to preposterous results.[116] For example, a police officer could use deadly force to arrest a misdemeanant without acting sadistically or maliciously.[117] Under *Glick*, the decedent's estate could not prove the requisite elements to establish liability.[118] An officer could also thoroughly enjoy inflicting injuries on an arrestee even though the amount of force is entirely reasonable.[119] Following *Glick*, however, the actions could be seen as a violation of the fourth amendment.

The Supreme Court apparently agreed and held that the inquiry into excessive force cases is an objective one.[120] The question is whether the officers' actions are "objectively reasonable" based on a totality of the circumstances known to them at the time.[121] The Court stated that "[a]n officer's evil intentions will not make a Fourth Amendment violation out of an

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111. Brief for Amicus Curiae American Civil Liberties Union at 26-27, Graham v. Connor, 490 U.S. 386 (1989) (No. 87-6571) (citations omitted).

112. Brief for Amicus Curiae United States Department of Justice at 7-9, Graham v. Connor, 490 U.S. 386 (1989) (No. 87-6571).

113. Terry v. Ohio, 392 U.S. 1 (1968).

114. Brief for Amicus Curiae United States Department of Justice at 7, Graham v. Connor, 490 U.S. 386 (1989) (No. 87-6571) (quoting Terry v. Ohio, 392 U.S. 1, 12 (1968)).

115. *Id.* at 7 (quoting United States v. Montoya de Hernandez, 473 U.S. 531, 541 (1985)).

116. *Id.* at 8.

117. *Id.*

118. *Id.*

119. *Id.*

120. Graham v. Connor, 490 U.S. at 397.

121. *Id.*

objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional."[122]

The Court concluded the *Glick* factors were "incompatible with a proper Fourth Amendment analysis."[123] The Court stated that evidence of ill will towards the arrestee could be considered but only when the jury is "assessing the credibility of an officer's account of the circumstances that *prompted* the use of force."[124]

### C. *Court Rejects Other Constitutional Amendments*

The State of North Carolina, in its amicus brief, also proposed that the standard used in determining whether force applied by state officials is excessive should be identical under a fourth, fifth, eighth, or fourteenth amendment analysis.[125] The Court rejected this argument, stating that the specific amendments confer different rights that are governed by different standards.[126] The validity of the citizen's claim under 42 U.S.C. § 1983 must "be judged by reference to the specific constitutional standard" that governs the right alleged to be violated.[127]

The Court noted that some courts, including the lower court, seem to assume there is a right of personal security to be free from excessive force that is not grounded in any specific "constitutional provision, but rather in 'basic principles of § 1983 jurisprudence.' "[128] The Supreme Court dispensed with that idea by specifying the method of analysis of excessive force claims filed by free citizens. The specific constitutional provision governing such claims is the fourth amendment,[129] not the due process clause. The fourteenth amendment is not the proper constitutional provision for seeking protection against excessive force applied by law enforcement officials in pre-arrest situations.[130] The Court stated that the "reasonableness"

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122. *Id.* The Supreme Court cited to Scott v. United States, 436 U.S. 128, 137-39 (1978) (citing United States v. Robinson, 414 U.S. 218 (1973); Terry v. Ohio, 392 U.S. 1, 21 (1968)) (focusing on the objective reasonableness of the officer's conduct, eschewing any state of mind factors).

123. *Id.*

124. Graham v. Connor, 490 U.S. at 399 n.12 (emphasis added).

125. Brief for Amicus Curiae State of North Carolina at 5-7, Graham v. Connor, 490 U.S. 386 (1989) (No. 87-6571).

126. Graham v. Connor, 490 U.S. at 393.

127. *Id.* at 394; *see* Tennessee v. Garner, 471 U.S. 1 (1985) (for claims of excessive force under fourth amendment); Whitley v. Alberts, 475 U.S. 312 (1986) (for claim of excessive force under the eighth amendment); Bell v. Wolfish, 441 U.S. 520 (1979) (the due process clause protects a pretrial detainee from excessive force that amounts to punishment; the eighth amendment serves as primary source of substantive protection after conviction).

128. Graham v. Connor, 490 U.S. at 393 (quoting Justice v. Dennis, 834 F.2d 380, 382 (4th Cir. 1987), *vacated*, 490 U.S. 1087 (1989)).

129. *Id.* at 395.

130. *Id.*

standard will be used,[131] and the only question will be whether the officer's actions were "objectively reasonable" in light of a totality of circumstances.[132]

## IV. CONCURRING OPINION

Justice Blackmun, joined by Justices Marshall and Brennan, authored the concurring opinion.[133] Blackmun approved limiting the excessive force inquiry to whether the officers' actions are objectively reasonable in light of the facts and circumstances.[134] However, Justice Blackmun faulted the majority for not limiting their holding only to the fourth amendment issue.[135]

Originally, Graham brought his claim under the due process clause of the fourteenth amendment.[136] During this case's travels through the federal court system, the petitioner dropped the fourteenth amendment claim as a substantive ground for relief.[137] By the time the appeal reached its final stage at the United States Supreme Court, only the fourth amendment claim was at issue.[138] Blackmun indicated the Court should not have decided that the lower courts would have to discontinue analyzing pre-arrest excessive force claims under the fourteenth amendment.[139] Blackmun cautioned the Court that until confronted with the direct question of continued viability of the fourteenth amendment in this type of claim, they should avoid deciding that issue.[140]

## V. IMPLICATIONS OF THE *GRAHAM V. CONNOR* DECISION

The *Graham v. Connor* decision regarding the fourth amendment "objective reasonableness test" is consistent with the standards enunciated in past fourth amendment decisions.[141] The issue whether an arresting officer acts reasonably in making a seizure does not depend on the officer's state of mind.[142]

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131. *Id.*
132. *Id.* at 397.
133. *Id.* at 399 (Blackmun, J., concurring).
134. *Id.* (Blackmun, J., concurring).
135. *Id.* at 399-400 (Blackmun, J., concurring).
136. Brief for Amicus Curiae State of North Carolina at 5, Graham v. Connor, 490 U.S. 386 (1989) (No. 87-6571).
137. *Id.*
138. *Id.*
139. Graham v. Connor, 490 U.S. at 399-400 (Blackmun, J., concurring).
140. *Id.* at 400 (Blackmun, J., concurring).
141. *See supra* note 111 and accompanying text.
142. Graham v. Connor, 490 U.S. at 397; *see supra* notes 113-17 and accompanying text.

By removing the materiality of the defendant's subjective intent, the Court's decision revitalizes summary judgment motions in the excessive force context. Summary judgments are used by government officials for dispensing with insubstantial lawsuits alleging violations of civil rights by their personnel. The removal of a subjective inquiry from the analysis of excessive force claims can lead to the increased use of summary judgments on the merits of these cases, and the area of qualified immunity. Another issue mentioned was the idea that not all injuries incurred by plaintiffs for what is arguably excessive force are even actionable.

### A. *Ordinary Versus Constitutional Tort*

The State of North Carolina argued the factors set out in *Johnson v. Glick* were appropriate in determining if the state officer's conduct rises to a level of a constitutional tort.[143] The Supreme Court recognizes that " '[n]ot every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers,' . . . violates the Fourth Amendment."[144] Similarly, they have stated that "[t]here is, of course, a de minimis level of imposition of which the Constitution is not concerned."[145] The third factor used in *Johnson v. Glick* is the "extent of the injury inflicted."[146] The *Glick* analysis specifically takes this aspect of the plaintiff's section 1983 claim into account; the Supreme Court's decision in *Graham v. Connor* still, ostensibly, takes the extent of harm done to the plaintiff into account. The *Graham* decision, however, does not clarify what constitutes an ordinary or a constitutional tort.[147]

### B. *Summary Judgments*

The application of the *Glick* factors could enable some cases to be taken away from the jury or decided by a motion for summary judgment. One way is to establish that little harm was done to plaintiff, so that the extent of the injury does not reach the "de minimis level . . . with which the

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143. Brief for Amicus Curiae State of North Carolina at 9, Graham v. Connor, 490 U.S. 386 (1989) (No. 87-6571).

144. Graham v. Connor, 490 U.S. at 396 (quoting Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973)).

145. Ingraham v. Wright, 430 U.S. 651, 674 (1977).

146. Johnson v. Glick, 481 F.2d at 1033.

147. *See* Monaghan, *State Law Wrongs, State Law Remedies, and the Fourteenth Amendment*, 86 COLUM. L. REV. 979, 992-93 n.87-89 (1986). The Fifth Circuit has stated that a plaintiff can "prevail on a Constitutional excessive force claim only by proving these three elements: (1) a significant injury, which (2) resulted directly and only from the use of force that was clearly excessive to the need; and the excessiveness of which was (3) objectively unreasonable." Johnson v. Morel, 876 F.2d 477, 480 (5th Cir. 1989).

Constitution is not concerned."[148] Another way is to show there was no evidence that the officer maliciously or sadistically inflicted harm on the citizen. The State of North Carolina argued the objective standard would create a question for the fact finder every time because the reasonableness of the officer's conduct would have to be determined by the jury.[149] The United States Department of Justice, in their amicus brief, however, indicated that an inquiry into an officer's subjective state of mind makes summary judgments very unlikely.[150] Whether this change to an objective standard of reasonableness will decrease the percentage of 42 U.S.C. § 1983 excessive force claims that are disposed of by summary judgment on the merits is a question yet to be answered. Percentages, however, could increase when the affirmative defense of qualified immunity is added to this decision's holding.

### C. *Defense of Qualified Immunity*

Qualified immunity is an affirmative defense for government officials to protect themselves from suits for damages.[151] Officials who perform discretionary functions are not liable if their conduct does not violate a clearly established constitutional or statutory right of which a reasonable person should have known.[152] *Harlow v. Fitzgerald*[153] set forth a current standard for qualified immunity and turned immunity on objectively reasonable conduct, avoiding inquiry into the actor's subjective state of mind.[154] This decision removes the due process clause analysis from the constitutional calculus in these pre-arrest excessive force claims. Courts have agreed that officers who violate the fourteenth amendment may not assert the affirmative defense of qualified immunity.[155]

Because *Graham* held the fourth, not the fourteenth amendment is implicated in actions alleging physical harm that occurs before the arrest, the officer can in all cases assert qualified immunity, and perhaps dispose of the issue short of trial. If an officer's subjective state of mind were implicated in every excessive force claim, as it could be if analyzed under the fourteenth amendment, either party would have difficulty establishing there were no genuine issues of material fact for trial. An objective reasonableness standard in measuring the appropriateness of the use of force

148. Ingraham v. Wright, 430 U.S. at 674.

149. Brief for Amicus Curiae State of North Carolina at 8, Graham v. Connor, 490 U.S. 386 (1989) (No. 87-6571).

150. Brief for Amicus Curiae United States Department of Justice at 11, Graham v. Connor, 490 U.S. 386 (1989) (No. 87-6571).

151. Harlow v. Fitzgerald, 457 U.S. 800, 806-07 (1982).

152. *Id.* at 818.

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

154. *Id.* at 819; *see* Mitchell v. Forsyth, 472 U.S. 511, 517 (1985).

155. Urbonya, *supra* note 82, at 114.

is easier to apply and establish. To this writer, there are greater possibilities for summary judgment under the "objectively reasonable" standard of the *Graham* analysis.

The conduct of an official that is unreasonable under the fourth amendment may nevertheless be "objectively reasonable" for the purpose of qualified immunity.[156] Although the Court in *Graham* did not reach the question of how qualified immunity can be properly applied to excessive force cases under the fourth amendment,[157] it did not preclude the defense from being asserted.[158]

Because qualified immunity is a defense to a charge of unreasonable searches and unreasonable seizures, and because excessive force is a "seizure of the person," qualified immunity can be asserted as a defense in excessive force claims. The constitutional analysis of these section 1983 claims under an objective reasonableness standard should lead to more decisions on qualified immunity short of trial.

## VI. CONCLUSION

The *Graham* decision establishes what constitutional amendment applies to police brutality cases. Before *Graham*, the excessive force could be seen as implicating a fundamental right under substantive due process as in *Rochin v. California*,[159] or a fourth amendment case under *Tennessee v. Garner*,[160] or as interference with a citizen's general liberty under *Parratt v. Taylor*.[161]

The *Graham* decision is supported by past precedent, and is consistent with the existing fourth amendment "reasonableness standard." The decision removes a significant hurdle from a plaintiff's case—it obviates their proving a subjective, bad intent on the part of the offending officers. Finally, the decision clarifies the standard of conduct required of government officials in the course of an investigatory stop, arrest, or other seizure of the person.

A grant of qualified immunity is also dependent on whether a defendant's conduct violates clearly established rights.[162] The decision in *Graham v. Connor* helps to define what police and the citizenry's rights are, and how infringements on those rights are to be evaluated. The decision

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156. *Id.* (citing Anderson v. Creighton, 483 U.S. 635 (1987) (qualified immunity may extend to officers who allegedly violated fourth amendment)).

157. Graham v. Connor, 490 U.S. at 399 n.12.

158. *Id.*

159. Rochin v. California, 342 U.S. 165 (1952).

160. Tennessee v. Garner, 471 U.S. 1 (1985).

161. Parratt v. Taylor, 451 U.S. 527 (1981); Monaghan, *State Law Wrongs, State Law Remedies' and the Fourteenth Amendment*, 86 COLUM. L. REV. at 991 (1986).

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

should have a lasting effect on 42 U.S.C. § 1983 remedies and in the area of qualified immunity.

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