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*Setting Fire to the Devil's Chair:
Using a Uniform Rochin Approach
To Protect Pretrial Detainees*

by
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I: INTRODUCTION

A man sits, tied to a chair.¹ His captors have him restrained; he cannot move his arms or his legs.² He is bound by his wrists, chest, and ankles.³ A mask covers the lower half of his face, just slightly above his mouth.⁴ He has been sprayed with a chemical that makes it difficult to breathe; this has happened not once, or twice, but eight separate times even before his being restrained in the chair.⁵ After being tied to this chair for six long, agonizing hours, he suffered two agonizing days of heart attacks and was ultimately declared brain dead before his life support was removed.⁶

This gruesome account of torture isn't from the latest horror film. Joyce Christie, a sixty-two year old Florida resident, was so brutally killed by chemicals wielded by prison officials that the examining physician has to change his gloves several times during treatment, due to the overwhelming use of the chemical.⁷ Even at the autopsy, the coroner noted that Christie was still covered all over in the brownish-orange tinge of pepper spray.⁸ Despite the fact that the coroner ruled the death a homicide caused by "stress from exposure to pepper spray", not one of the guards responsible for Christie's death were ever charged.⁹ But, Joyce Christie's death by

¹ Radley Balko, *Death in the Devil's Chair: Florida Man's Pepper Death Raises Questions about Jail Abuse*, HUFFINGTON POST (Oct. 10, 2012), http://www.huffingtonpost.com/2012/01/11/jail-abuse-nick-christie-pepper-spray-florida_n_1192412.html.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* Throughout this paper, wherever a prisoner has received similar treatment as Christie, involving being restrained to a chair and exposed to pepper spray for excessive periods of time, the treatment will be referred to as "spray-and-restraint tactics" in light of the fact that prison guards allegedly use these methods (pepper spray and restraint chair) to subdue unruly inmates. *See id.*

⁸ *Id.*

⁹ *Id.* "[I]n fact, none of the men involved with Christie's death were disciplined in any way. Florida State Attorney Stephen Russell declined to press charges." *Id.*

chemical assault isn't the only case of this brutal torture; the practice is becoming more and more common as only partial bans on this practice exist.¹⁰

Basic justice mandates that the government should be barred from the use of pepper spray on restrained pretrial detainees; this is mandated by the substantive due process clause of the Fourteenth Amendment. Under the Fourteenth Amendment, the government may not deprive a person of life or liberty without adequate procedure; however, there are uses of government power against persons that are so unfair that no adequate procedure exists.¹¹ In cases involving malicious and violent infliction of pain, forbidding this cruel practice is the only effective measure to take.¹² This paper will show that the use of pepper spray on restrained pretrial detainees is irrational,¹³ meets the test set forth under the landmark case *Rochin v. California* (“shocks the conscience”),¹⁴ rises to a level in which substantive due process prohibits this act, and a ban on this practice is necessary.¹⁵ In *Rochin*, the Court held in simple terms that egregious, intentional acts performed by government actors are banned by the Fourteenth Amendment.¹⁶ While some courts have already applied *Rochin*'s protective standard to pretrial detainees,¹⁷ *Rochin* justifies a result in all jurisdictions, because its test is the most burdensome.¹⁸

¹⁰ See *infra* Section III.

¹¹ See U.S. Const. amend. XIV sec. 1, cl. 3; *infra* note 27 and accompanying text.

¹² For example, in the case of Joyce Christie, his death at the hands of corrections officials means that Christie's criminal case will no longer be prosecuted; one would be hard pressed to determine any remedy to his family which would be an effective deterrent against subsequent government action. See Balko, *supra* note 1. Exclusion of confessions obtained during this period are another issue, but will not be addressed during this paper. See *Bram v. United States*, 168 U.S. 532, 561-63 (1897) (holding that physical coercion or torture can invalidate a defendant's confessions).

¹³ Balko, *supra* note 1 (quoting police officer David Klinger) (“But never, never [spray] someone who is secured in a restraint chair. It makes no sense at all.”); *Id.* (“Like Klinger, the former police officer, [police trainer Steve] Yerger says the use of pepper spray in conjunction with the chair was particularly over the line.”)

¹⁴ See *Rochin v. California*, 342 U.S. 165, 209-10 (1952) (creating the test).

¹⁵ See *id.*

¹⁶ See *id.* For a more complex and through analysis of *Rochin*, see Subsection II.B.1.

¹⁷ See Tiffany Richie, *A Legal Twilight Zone: From the Fourth to the Fourteenth Amendment, What Constitutional Protection is Afforded a Pretrial Detainee?*, 27 S. ILL. U. L.J. 613, 617-19 (2003).

¹⁸ See, e.g., *Graham v. Connor*, 490 U.S. 386, 399 (1989).

The severity of spray-and-restraint abuse cases meets *Rochin*'s high burden.¹⁹ A key underpinning to whether this burden is met involves the rights of pretrial detainees relative to prisoners; while some courts argue that pretrial detainees receive comparable rights to prisoners,²⁰ current case law and reason overwhelm this minority view in support of greater rights for pretrial detainees.²¹ Courts should swing *Rochin*'s heavy hammer of justice to protect the rights of pretrial detainees.

Part II of this paper will discuss the governing constitutional law regarding this practice, beginning at the broadest point with the Fourteenth Amendment. It will further address the development of Due Process case law and the "shocks the conscience" test. Part II will conclude by focusing on the narrow application of Due Process to the practice of pepper spraying prisoners, as opposed to pretrial detainees, to analogize Eighth Amendment protection as support for the Fourteenth Amendment claims presented here. Part III will offer non-constitutional case law and policy support, including the lack of local clear policies for use of force, the current decisions involving pretrial detainees showing that prosecutors and lower federal courts have not effectively protected citizens from this gruesome practice, and reported instances of abuse of the restraint chairs. Lastly, Part IV will show that a substantive due process argument, if raised, would have legal merit; as such, the federal court system should prohibit the use of pepper sprayings on restrained pretrial detainees, which will eventually lead to state bans on this practice.

¹⁹ See *Richie*, *supra* note 17 at 633 (noting that greater deference is due to government officials under the Fourteenth amendment Due Process than other means of analyzing the rights of pretrial detainees that are inapplicable here). Something thus may fail to be objectively reasonable without malice, but malice would most certainly be required for Fourteenth Amendment analysis of "shocks the conscience." See *id.* at 619 n.46.

²⁰ See *Van Colln v. City of Ventura*, 189 F.R.D 583, 594 (C.D. Cal. 1999); *Frost v. Agnos*, 152 F.3d 1124, 1128 (9th Cir. 1998).

²¹ See, e.g., *Bell v. Wolfish*, 441 U.S. 520, 535 (1979); *County of Riverside v. McLoughlin*, 500 U.S. 44, 57 (1991). The issue of deference for pretrial detainees will be addressed on a per case basis to show how the holding of each case was influenced by this initial weighing of rights. For the final analysis of why pretrial detainees deserve greater rights, see *infra* Section IV.A

II: MECHANISMS FOR PROTECTION EXIST UNDER CURRENT FEDERAL LAW BUT ARE NOT UNIFORMLY UNADOPTED

A. The Eight and Fourteenth Amendments

The Due Process clause of the Fourteenth Amendment states: “[N]or shall any State deprive a person of life, liberty, or property, without due process of law.”²² Within the Due Process clause, two forms of due process exist.²³ Substantive due process determines what interests are protected.²⁴ Procedural due process determines what procedures the government must take before depriving a person of protected interests.²⁵ However, in determining whether a claim sounds in procedural or substantive due process, two factors are key: the remedy sought and the extremity of the deprivation that occurs (such that no procedural remedy makes sense).²⁶ The issues underlying this note are correctly characterized as substantive due process for two reasons: the extremity of the deprivation is one where no procedural remedy makes sense (e.g. providing a prior exam by a doctor prior to spraying for six hours would not make the punishment any less cruel or unjustified) and the remedy being sought is a ban, not the imposition of additional safeguards.²⁷

²² U.S. Const. amend. XIV sec. 1, cl. 3.

²³ ERWIN CHEMERISKY, *CONSTITUTIONAL LAW* 521 (2d. ed, 2005).

²⁴ *Id.*

²⁵ *Id.*

²⁶ “Thus, it is possible to distinguish procedural and substantive due process based on the remedy sought. If the plaintiff is seeking to have a government action declared unconstitutional as violating a constitutional right, substantive due process is involved. But when a person or group is seeking to have government action declared unconstitutional because of the lack of safeguards, such as notice and a hearing, procedural due process is the issue.” *Id.* at 1007.

²⁷ See Don DeLuc, *Michigan Administrative Law*, 10 T.M. COOLEY L. REV. 511, 536 (1991) (affirming the remedy based approach and analyzing a plaintiff’s claim seeking a complete ban, as opposed to additional procedural safeguards, on a government practice as substantive due process); Joseph Pace, *Bankruptcy as Constitutional Property: Using Statutory Entitlement Theory to Abrogate State Sovereign Immunity*, 119 YALE L.J. 1568, 1619-20 (2011) (“[W]here federal law generates the benefit and specifies that only a federal bankruptcy court—not a state agency—may adjust the individual’s enjoyment of that benefit, the state is never acting within its competency by conducting a deprivation. The error rate is one hundred percent. A state may never lawfully collect its debts in defiance of a discharge, or violate the automatic stay, or retain preferential transfers belonging to the estate. In that sense, the deprivation looks like a substantive due process violation: a court hearing a claimant’s challenge would order the state to halt its conduct, not order the state to accord more process.”); Neil B. Stekloff, *Raising Five Eyebrows: Substantive Due Process Review of Punitive Damages Awards After Bmw v. Gore*, 29

Likewise, the Eighth Amendment states: “[N]or shall cruel and unusual punishment be imposed.”²⁸ The Court has demarcated a clear boundary between prisoners and detainees; prisoners serving their sentence are protected by the Eight Amendment while pretrial detainees held in anticipation of trial are protected only by the Fourteenth Amendment.²⁹ As commentators have aptly stated, “[t]he key in determining the appropriate constitutional provision is the inmate’s status, not the nature of the facility.”³⁰

As opposed to prisoners, pretrial detainees should be giving greater protections, because the danger is greater for pretrial detainees to have their liberties unjustly restricted.³¹ Constitutional law grants detainees a right to a probable cause hearing to determine the validity of their arrest and charges, but also holds that detainees may be withheld from a probable cause hearing (also known as *Riverside* hearing due to the case that grants this protection) as long as 48 hours from the time of their arrest.³² Until this time, we cannot be certain if even the reason why a detainee has been arrested is sufficiently grounded in probable cause.³³ It is true that a large number of states grant a reduced window of 24 hours from arrest to a detainee’s first hearing.³⁴ But, even a few hours is sufficient to cause grisly harm where detainees are not adequately protected; it only took six hours for Joyce Christie to enter into the respiratory arrest which

CONN. L. REV. 1797, 1799-800 (1997) (arguing that punitive damages may rise to an extreme level where they violate not only procedural, but also substantive due process).

²⁸ U.S. Const. amend. VIII.

²⁹ IVAN E. BODENSTEINER & ROSALIE BERGER LEVINSON, 1 STATE AND LOCAL GOVERNMENT CIVIL RIGHTS LIABILITY § 1:14 (2d ed. 2012) (citations omitted). “Arrestees and pretrial detainees who are neither protected by the Fourth Amendment nor the Eight Amendment may pursue a substantive due process claim.” *Id.* § 1:16 (citing *Graham v. Connor*, 480 U.S. 386, 395 n.10 (1989)). Bodensteiner and Levinson identify the “shocks the conscience test” as substantive. *Id.* § 1:14 (“[T]he Supreme Court has held that substantive due process protects persons from official conduct it deems egregious and shocking.”).

³⁰ *Id.* §1:14.

³¹ *See County of Riverside v. McLoughlin*, 500 U.S. 44, 57 (1991) (holding that a probable cause hearing is required for all detainees within at least 48 hours under the Constitution).

³² *Id.*

³³ *See id.*

³⁴ *Id.* at 69.

caused his subsequent heart attacks and death once his torture began.³⁵ Likewise, one can also reasonably assume that even those detainees who have been to their *Riverside* hearings, but have not posted bond, would be subject to the same risk of abuse.³⁶ There is no reason to assume that the desire to cause sadistic harm is deterred by the occurrence of a hearing; once a detainee is back in the presence of guards, the potential for harm would logically appear to return.³⁷ Lastly, the status of pretrial detainees, if not for the imprimatur of the criminal justice system, would be most akin to that of invitee under tort law.³⁸ Thus, the highest duty of care would normally be owed to these individuals if not for the fact that their presence was required, as opposed to invited.³⁹

Under the Fourteenth Amendment, pretrial detainees currently have limited means of recourse for excessive force claims.⁴⁰ Across the federal circuits, courts are scattered on which standard to apply to these claims.⁴¹ While some courts have adopted the “shocks the conscience” test, some courts have adopted other tests.⁴² Some courts focus on “whether the force was applied in a good faith effort to maintain or restore discipline, or maliciously and sadistically for

³⁵ Balko, *supra* note 1.

³⁶ *See id.*

³⁷ *See id.*

³⁸ Not all jurisdictions view the status of the entrant as determinative of the duty of care a landowner owes to the entrant. *Modern Status of Rules Conditioning Landowner's Liability Upon Status of Injured Person as Invitee, Licensee, or Trespasser*, 22 A.L.R.4th 294 § 3 (1983). However, some jurisdictions do recognize that the status of the entrant is determinative of the duty of care they are owed. *Id.* § 4. In these jurisdictions, licensees are generally owed the highest duty of care, invitees a lesser duty of care, and trespassers are owed the lowest duty of care. *See id.* Pretrial detainees are closest in form of invitees (assuming the absence of any criminal requirement to remain at the detention center); the state has not only “requested” their presence, but actually taken affirmative steps to ensure that these individuals arrive at and remain at the detention center. *See id.* (citing *Kurti v. Becker*, 54 Conn. App. 335, 338 (1999)).

³⁹ *See id.* § 4.

⁴⁰ Ritchie, *supra* note 17, at 617-19.

⁴¹ “The individual circuits appear to have been very proactive at distinguishing, developing, or narrowing this ‘shocks the conscience’ standard.” *Id.* at 617.

⁴² *Id.*

the very purpose of causing harm.”⁴³ Other courts focus on “whether the officials behaved in a reasonable way in light of the facts and circumstances confronting them.”⁴⁴ Further, other courts have focused on whether “excessive force that amounts to a punishment” or whether the action that occurred was merely a “de minimis” harm.⁴⁵ Finally, other courts have focused objective reasonableness or factors based tests.⁴⁶

Some of those tests have been abrogated by *Graham v. Connor*.⁴⁷ In *Graham*, the Court defined a number of key points to our inquiry. First, the Court rejected the requirement to measure all types due process claims for pretrial detainees under a uniform standard.⁴⁸ The Court created a two-prong analysis for the rights of pretrial detainees.⁴⁹ The Court held that in matters involving unlawful stop or arrest, government actors were required to meet a test of “objective reasonableness.”⁵⁰ This objective, as opposed to subjective, test removes protections that a government actor would normally have; a person can act subjectively correct but still violate an objective standard.⁵¹ By contrast, the heightened substantive due process burden of “shocks the conscience” governs matters where unlawful stop or arrest is not implicated.⁵² In applying the Fourth Amendment standard, the *Graham* court specifically rejected the use of any subjective

⁴³ *Id.* at 617-18 (quoting *Valencia v. Wiggins*, 981 F.2d 1440, 1446 (5th Cir. 1993)); *but see* *Graham v. Connor*, 490 U.S. 386, 399 (1989) (forbidding the use of subjective factors focused on malice where unreasonable stop or seizure is implicated).

⁴⁴ *Ritchie*, *supra* note 17, at 618 (citing *Titran v. Ackman*, 893 F.2d 145, 146 (7th Cir. 1990)).

⁴⁵ *Id.* (citing *Riley v. Dorton*, 115 F.3d 1159, 1166 (4th Cir. 1997)).

⁴⁶ *Id.* at 619-20 (noting the Third Circuit’s reasonableness test and the Second Circuit’s factor test which considers both objective and subjective standards). However, note that the Second Circuit’s test was later rejected in *Graham v. Connor*. *Graham*, 490 U.S. at 399. Currently, the use of subjective factors is allowed under Fourteenth Amendment Analysis, but not Fourth Amendment Analysis as a result of *Graham*. *Ritchie*, *supra* note 17, at 619 n.46.

⁴⁷ *Graham*, 490 U.S. at 399.

⁴⁸ *See id.* at 393.

⁴⁹ *Id.* at 394 (finding protection for detainees in “either the Fourth Amendment’s prohibition against unreasonable seizures of the person, or the Eighth Amendment’s ban on cruel and unusual punishments, which are the two primary sources of constitutional protection against physically abusive governmental conduct.”).

⁵⁰ *See id.* at 393-96.

⁵¹ *See id.*

⁵² *See id.*

factors such as malice on the part of the officers involved.⁵³ However, within the Fourteenth Amendment, malice is still a key component of the inquiry to determine if something “shocks the conscience.”⁵⁴

Graham is significant in several ways relative to the proposal of this paper.⁵⁵ As pretrial detainee cases almost never involve unreasonable seizure of the persons, the Fourth Amendment will not operate to reduce the burden to objective reasonableness for those seeking relief from being unlawfully restrained at a holding facility while being sprayed.⁵⁶ As objective reasonableness does not apply, detainees will have to meet the *Rochin* burden in jurisdictions which offer the bare minimum of Constitutional protections.⁵⁷ However, as this paper will demonstrate, this burden is easily met.⁵⁸

B. The “Shocks the Conscience” Case line

1. Creation of the Doctrine: *Rochin*

In 1952, the Court developed the “shocks the conscience” test in *Rochin v. California*.⁵⁹ In *Rochin*, the defendant was a suspected drug dealer arrested in his own home.⁶⁰ The arresting officers saw two capsules when they entered Rochin’s room (which would later be analyzed and determined to contain morphine), a struggle ensued during which Rochin swallowed the capsules, and ultimately Rochin was restrained and taken to a hospital.⁶¹ At the hospital, a tube was forced into Rochin’s stomach and emetic chemicals were inserted to induce Rochin to expel

⁵³ *Id.* at 399-400.

⁵⁴ Ritchie, *supra* note 17, at 619 n.46.

⁵⁵ *See Graham*, 490 U.S. at 394.

⁵⁶ *See id.*

⁵⁷ *See id.* at 393-96.

⁵⁸ *See infra* Section IV.

⁵⁹ 342 U.S. 165 (1952).

⁶⁰ *Id.* at 166.

⁶¹ *Id.*

the capsules; the brutal procedure was effective in retrieving the capsules.⁶² Rochin argued that the officers had illegally entered his home, unlawfully battered and imprisoned him, and had committed torture upon him.⁶³ The trial court found Rochin guilty of the illegal possession and the appeals court agreed with Rochin's arguments as to the illegal entry, battery, imprisonment and torture, but still affirmed Rochin's sentence.⁶⁴ However, on appeal to the U.S. Supreme Court, the tables turned and the Court reversed in favor of Rochin, concluding that:

This is conduct that shocks the conscience. Illegally breaking into the privacy of the petitioner, the struggle to open his mouth, and remove what was there, the forcible extraction of his stomach's contents- this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and screw to permit of constitutional differentiation.⁶⁵

2. Severe Limitation of the Doctrine: *Daniels*

In 1986, the Court decided *Daniels v. Williams*.⁶⁶ Daniels was a prisoner held in a federal prison in Richmond; he slipped and fell on a pillow left on prison stairs and subsequently damaged his lower back and ankle.⁶⁷ It is worth emphasizing that the Court was extremely hesitant to grant Daniels the same relief they had granted Rochin.⁶⁸ Rather, the Court declined to find that the negligent act of leaving a pillow on prison stairs by one of the guards was sufficient to shock the conscience; in other words, the Court refused to find a cause of action under the Fourteenth Amendment.⁶⁹ In dicta, the Court made strong emphasis in stating that Fourteenth Amendment was not meant to be a bountiful "font of tort law."⁷⁰ While *Rochin* seemingly offered considerable protections for those harmed by government actors, *Daniels* greatly reduced

⁶² *Id.*

⁶³ *Id.* at 167.

⁶⁴ *Id.* at 167.

⁶⁵ *Id.* at 209-10 (emphasis added).

⁶⁶ 474 U.S. 327 (1986).

⁶⁷ *Id.* at 328.

⁶⁸ *See id.* at 335-36.

⁶⁹ *See id.*

⁷⁰ *Id.* at 332 (citing *Paul v. Davis*, 424 U.S. 693, 701 (1976)).

the scope of protection and seemed heavily set against its application except in the most extreme of circumstances.⁷¹

3. Distinguishing the Eighth and Fourteenth Amendments: *Whitley*

Also in 1986, the Court decided *Whitley v. Albers*.⁷² *Whitley* involved a prison guard squad's response to a riot.⁷³ Originally, a prison disturbance broke out when four prisoners were found intoxicated by guards; however, when other prisoners believed that the guards reacted to the drinking with excessive force, a second group of prisoners attacked the guards, took a guard hostage, and began a riot.⁷⁴ Inmate Albers was shot during the riot by prison guards trying to lead an assault to subdue the riot.⁷⁵ It is unclear whether Albers was apart of the riot or merely a bystander; Albers claimed that he had spoken to the assault squad captain and asked for a key to move elderly prisoners from danger.⁷⁶ Albers was shot as he came up a staircase while the riot assault squad captain was in pursuit of another inmate.⁷⁷ As a result of the shooting, Albers suffered severe damage to his left leg and emotional distress.⁷⁸

However, the Court rejected the prisoners' claims under both the Eighth and Fourteenth Amendments; the Court specifically declined to find that the Fourteenth Amendment offered plaintiff broader protections than the Eighth Amendment under these circumstances.⁷⁹ But, it is important to note that the Court rested its decision on the "case involv[ing] prison inmates rather

⁷¹ *See id.*

⁷² 475 U.S. 312 (1986), *rev'd on other grounds*, *Wilkins v Gaddy*, 130 S. Ct. 1175 (2010).

⁷³ *Id.* at 315-16.

⁷⁴ *Id.*

⁷⁵ *Id.* at 316.

⁷⁶ *Id.* at 315.

⁷⁷ *Id.* at 316.

⁷⁸ *Id.* at 317.

⁷⁹ *Id.* at 327 ("It would be indeed 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.'") (internal citations omitted).

than pretrial detainees or persons enjoying unrestricted liberty.”⁸⁰ As such, future cases seeking to apply *Whitley* to pretrial detainees would seem to be due more favorable treatment by the Court.⁸¹ It is also notable that the Court gave considerable weight to the fact that riot was ongoing and entitled the prison guards to deference in light of their reaction to the exigency.⁸²

4. Reaffirming the Doctrine with Limitation: *Lewis*

In 1996, the Court decided *City of Sacramento v. Lewis*.⁸³ In *Lewis*, the plaintiffs sought relief for the death of their son during a police chase.⁸⁴ Lewis was the passenger on a motorcycle operated by his friend Willard; while en route to a disturbance call, a police cruiser operated by Officer Smith saw Willard speeding through a neighborhood and ordered him to slow down.⁸⁵ Instead of stopping, Willard maneuvered between Smith and another’s officer’s cruiser.⁸⁶ A high speed chase, at speeds exceeding 100 miles per hour began; it stretched over 1.3 miles of residential roads, causing several vehicles and bystanders to swerve out of the way.⁸⁷ During the chase, the Court noted that Smith required almost 650 feet of space to stop at this distance, but he followed behind Willard at nearly one-sixth the required distance, approximately 100 feet.⁸⁸ During the chase, the motorcycle tipped over and Willard stepped away; however Lewis did not have a chance to step clear and was struck at nearly 40 mph as a result of Officer Smith following too closely.⁸⁹

The Court took large strides in reaffirming the existence of the shocks the conscience doctrine, going so far as to note its long history and stating: “for half a century now we have

⁸⁰ *Id.*

⁸¹ *See id.*

⁸² *See id.* at 321.

⁸³ 523 U.S. 833 (1998).

⁸⁴ *Id.* at 838.

⁸⁵ *Id.* at 836-37.

⁸⁶ *Id.* at 837.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

spoken of the cognizable level of executive abuse of power that which ‘shocks the conscience’ We first put the test this way in *Rochin v. California*”⁹⁰ In dicta, the Court made strong emphasis on the requirement for “egregious” conduct by government officials.⁹¹ However, the Court declined to find a deprivation of Due Process from the resulting death due to police officer following too closely in his cruiser, and nonchalantly dismissed the issue by noting a clear exigency: “Smith was faced with a course of lawless behavior for which the police were not to blame. They had done nothing to cause Willard’s high-speed driving in the first place, nothing to excuse his flouting of the of the commonly understood law authority to enforce traffic”⁹²

C. Analogous Eighth Amendment Cases

To determine whether the repeated spraying of a restrained pretrial detainee violates the Fourteenth Amendment, we must first examine what is typically acceptable behavior and then measure the level of deviation this practice represents. Eighth Amendment case law as a parallel front of developing law is illustrative, but not controlling in this area. Generally, prison guards are allowed use of pepper spray to subdue unruly inmates; a great number of state courts allow occasional use of pepper spray and reject any arguments in favor of any tentative Eighth Amendment claims from occasional sprayings.⁹³ However, the Eleventh Circuit has recently upheld Eighth Amendment protection against excessive pepper spraying, by holding that prison officials may not pepper spray mentally ill inmates in *Thomas v. Bryant*.⁹⁴ *Thomas* resulted as a result of legal action brought on behalf of several inmates: Jeremiah Thomas, Michael

⁹⁰ *Id.* at 846.

⁹¹ *Id.*

⁹² *Id.* at 855.

⁹³ *See, e.g.,* Scroggins v. Davis, 346 Fed. App’x 504, 506 (2009) (holding that a prison guard’s one-time use of pepper spray to subdue an unruly inmate was distinguishable from prior case law where poorly ventilated cells were sprayed).

⁹⁴ *Thomas v. Bryant*, 614 F.3d 1288, 1304-05 (2010), *reh’g denied*, 409 Fed. App’x 316 (2010).

McKinney, and eight other prisoners.⁹⁵ However, the opinion itself focuses only on the relevant facts as to inmate McKinney.⁹⁶

From 2001 to 2007, McKinney was pepper sprayed about thirty-six times; this represents an average of six pepper sprayings per year.⁹⁷ For example, the opinion provides that McKinney was sprayed approximately six times in 2002.⁹⁸ Similarly, McKinney was pepper sprayed five times in 2003.⁹⁹ The guards used pepper sprayed routinely for various actions by McKinney: failing to remove his arm from the cell's feeding tray, throwing feces, and a platitude of other more minor infractions.¹⁰⁰ The guards performed this action despite knowledge of McKinney's previous suicide attempts and knowledge that McKinley was mentally ill.¹⁰¹

The Court recognized that Eighth Amendment unlawful confinement claims and excessive use of force claims have different standards; namely, that excessive force claims require a plaintiff to prove the *mens rea* of malice or intent to cause harm on the part of the guards.¹⁰² The Court found that the defendant prison did not properly raise this issue of *mens rea* at trial nor preserve the issue for appeal; the Court speculated that had it been raised, that the prisoners would likely have lost.¹⁰³ As the defendant failed to distinguish this argument as an excessive force claim, the Court instead addressed the appeal as a claim of unconstitutional confinement.¹⁰⁴ The Court stated that the relevant test was whether the challenged act was an extreme deprivation violating contemporary standards of decency.¹⁰⁵ The Court noted that "an infliction of pain without 'penological justification' is considered to be unnecessary and

⁹⁵ *Id.* at 1293-94.

⁹⁶ *Id.* at 1296.

⁹⁷ *Id.* at 1299.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 1296-1302.

¹⁰¹ *Id.*

¹⁰² *Id.* at 1304.

¹⁰³ *Id.* at 1304-05.

¹⁰⁴ *Id.* at 1306-07.

¹⁰⁵ *Id.*

wanton.”¹⁰⁶ The Court found that the use of pepper spray on mentally ill inmates objectively meet the definition of “extreme deprivation.”¹⁰⁷

Another case Eighth Amendment case, *Iko v. Shreve*, also shows us that the use of pepper sprayed on restrained individuals is not uncommon.¹⁰⁸ Iko’s death by asphyxiation resulted as a combination of the force of being restrained physically (albeit with handcuffs) and a surprisingly minimal amount of pepper spray.¹⁰⁹ Plaintiff’s expert estimated Iko’s total exposure to a maximum window of 9 to 14 seconds.¹¹⁰ And yet, Iko died as a result of this brief spraying; this should highlights the relevant concern when considering later instances of repeated sprayings over a window of several hours.¹¹¹

Thomas and *Iko* both show us that repeated pepper sprayings on the same day should be treated with extreme deference.¹¹² Cases involving pretrial detainee abuse should cite to this body of case law in support that multiple sprayings, especially while restrained, are extreme.¹¹³ To hold that repeated sprayings are acceptable would controvert the holdings of these cases finding that much smaller amounts of pepper spray without restraints have been found unacceptable in terms of depriving inmates of their rights.¹¹⁴

III- NON-CONSTITUTIONAL CASE LAW AND POLICY SUPPORT

A. Lack of State Level Protections

This section will show that the level of state protections is currently insufficient to protect pretrial detainees, a nation-wide ban on the practice. Subsection III.A.1 focuses on the

¹⁰⁶ *Id.* at 1307 (quoting *Hope v. Pelzer*, 240 F.3d 975, 979 (11th Cir. 2001), *rev’d on other grounds*, 536 U.S. 730 (2002).

¹⁰⁷ *Id.* at 1310.

¹⁰⁸ 535 F.3d 225, 230 (2008).

¹⁰⁹ *Id.* at 230-31.

¹¹⁰ *Id.*

¹¹¹ *See id.*

¹¹² *Thomas*, 614 F.3d at 1307; *Iko*, 535 F.3d at 230-31.

¹¹³ *See Thomas*, 614 F.3d at 1307; *Iko*, 535 F.3d at 230-31.

¹¹⁴ *See Thomas*, 614 F.3d at 1307; *Iko*, 535 F.3d at 230-31.

hodgepodge of intrastate and interstate policies regarding appropriate use of pepper spray to show that no clear standard exists. Subsection III.A.2 examines case law involving pretrial detainees, as opposed to the inmate standards discussed in Section II.C, to show a lack of clear protective standard within the court systems. Lastly, Section III.B focuses on the number of reports of abuse at the state level to show that not only is there a need for a clear standard, but to emphasize the graphic consequences of allowing this practice to continue.

1. Current State Law Enforcement and Corrections Policies are Haphazard and Scattered

First, the number of deaths due to the lack of safeguards when dealing with restrained, pretrial detainees speaks volumes in terms of determining the effectiveness of measures currently in place. The prototypical example of Nick Christie's death in Lee County, Florida, shows the level of discrepancy that can occur within a state itself.¹¹⁵ According to author Radley Balko, Lee County officials violated use-of-force guidelines with regards to their treatment of Christie.¹¹⁶ Despite Lee County's standards, no guidelines exist at the Florida Sheriff's Association.¹¹⁷ Conversely, the state of Florida limits the use of the spray-and-restraint method on juveniles; only mechanical restraints alone are authorized on juveniles.¹¹⁸ This suggests a strong inference that the state is aware of the level of harm this level of force can cause.¹¹⁹ And like Lee County, the Florida Prison System bans this mixed restraint-and-spray procedure as

¹¹⁵ Balko, *supra* note 1.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*; *Restraint - Juvenile Justice Facilities*, DISABILITY RIGHTS http://www.disabilityrightsflorida.org/resources/disability_topic_info/category/restraint_in_florida_-_department_of_juvenile_justice (last visited Jan. 16, 2013) (listing under the Prohibited Procedures "Aerosol or chemical agents, including but not limited to oleoresin capsicum spray").

¹¹⁹ *See* Balko, *supra* note 1.

well.¹²⁰ Christie's case demonstrates that standards within the state of Florida are anything but clear.¹²¹

Examination of other states shows the need for moderation on the part of prison officials for a variety of reasons. For example, in Frederick County, Maryland, almost sixty-three percent of prisoners are subject to restraints are mentally ill prisoners¹²² and yet, pepper spray and restraints are used in combination frequently.¹²³ This is in stark contrast to the Eleventh Circuit's ban on pepper spray use against mentally ill prisoners in *Thomas*.¹²⁴

Some states attempt to offer some protections against harmful use of pepper spray and restraint chairs: the Oklahoma Dept of Corrections has a two hour limit on the use of restraint chairs, the limit stands at four hours for Iowa and Montana, and Texas' limit allows no more than 5 hours per every 24 hour interval.¹²⁵ Yet, states often find that these protections are ineffective; for example, use of restraint chairs has continued in states, such as Utah, that have formally banned their use.¹²⁶ The refusal to follow the ban on these charges suggest a strong preference for use by the guards in light of clear notice that these chairs can, and often, harm detainees.¹²⁷

¹²⁰ *Id.*

¹²¹ *See id.*

¹²² *Id.*; Pam Riguax, *Officers' Goal: To use least force possible*, FREDERICKNEWSPOST.COM (Aug. 11, 2009), http://www.fredericknewspost.com/sections/archives/fnp_display.htm?storyID=100267 (listing the use of pepper spray, restraints and facial masks known as "spit socks" in Maryland).

¹²³ Rigaux, *supra* note 122.

¹²⁴ *Thomas v. Bryant*, 614 F.3d 1288, 1304-05 (2010), *reh'g denied*, 409 Fed. App'x 316 (2010).

¹²⁵ Balko, *supra* note 1

¹²⁶ *Id.* (noting that Utah banned restraint chairs after a prisoner died from being restrained for sixteen hours, but that the practice continued on regardless); *4 Utah Counties still use restraint chair despite ban*, DESERET NEWS (Nov. 27, 1998), <http://www.deseretnews.com/article/665857/4-Utah-counties-still-use-restraint-chair-despite-ban.html> (noting that "most jail bosses defend continued use of the chair.").

¹²⁷ *See 4 Utah Counties still use restraint chair despite ban*, *supra* note 126.

2. Lower Federal Pretrial Detainee Court Cases Highlight a Lack of Uniform Standard or Deference for Pretrial Detainee Status

Before examining the level of protections afforded to pretrial detainees, it is important to examine the Supreme Court's decision in a key case: *Bell v. Wolfish*.¹²⁸ *Bell* involved pretrial Fourteenth Amendment claims raised by pretrial detainees, as opposed to prisoners; *Bell* held that pretrial detainees have the "right to be free from punishment" during their confinement prior to trial.¹²⁹ As such, *Bell* makes two implicit recognitions: 1) that pretrial detainees have not had the same procedural safeguards that inmates have had (e.g. the determination at trial of guilt) and 2) that a higher level of deference is owed to cases in which pretrial detainees are involved.¹³⁰

Some case law extends Fourteenth Amendment protection, albeit it outside the scope of Due Process, to pretrial detainees; one example being *Nasseri v. City of Athens*.¹³¹ Nasseri's facts focus on Nasseri's arrival, while handcuffed, at the relevant prison's booking center.¹³² There, a fight broke out between another detainee and an officer; the detainee was subdued and pepper sprayed.¹³³ Nasseri told the officer to stop beating the other prisoner; the officer retaliated by spraying Nasseri, who was peacefully standing still, directly in the face.¹³⁴ The *Nasseri* court is not alone in seeking to apply protections under a Fourteenth Amendment excessive force theory.¹³⁵ In this sense, the "shocks the conscience" test is merged into the excessive force theory, but this has not been applied in every jurisdiction.¹³⁶

¹²⁸ *Bell v. Wolfish*, 441 U.S. 520 (1979).

¹²⁹ *Id.* at 535.

¹³⁰ *See id.*

¹³¹ 373 Fed. App'x 15 (2010).

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *See, e.g., Fennell v. Gilstrap*, 559 F.3d 1212 (11th Cir. 2009) (quoting *Danley v. Allen*, 540 F.3d 1298, 1307 (11th Cir. 2008) ("A jailors use of force is excessive under the Fourteenth Amendment if it 'shocks the conscience.'"))

¹³⁶ *See Ritchie, supra* note 17, at 617-20.

The application of the shock the conscience doctrine in *Nasseri* leaves room for doubt.¹³⁷ Despite the clear evidence that Nasseri was standing still and attacked for no reason, the Court held that this evidence alone was insufficient for a Fourteenth Amendment excessive force claim.¹³⁸ The Court did consider additional evidence; while all the other inmates were evacuated from the room and allowed to decontaminate, Nasseri was placed in the back of a squad car for approximately one hour without being allowed access to running water or fresh air to decontaminate.¹³⁹ Critically, it was not until this additional evidence was considered until the Court decided to grant Fourteenth Amendment protection to Nasseri, claiming that he had been deprived of his right to be free from excessive force.¹⁴⁰

Likewise, *Moore v. Hoosier* serves as a benchmark as what many courts would consider an acceptable approach to the use of pepper spray.¹⁴¹ The court in *Moore* began by noting an appropriate level of deference for pretrial detainees: “detainees are convicted of no crime for which they are currently punished, [thus] the conditions of their confinement must be justified on the basis of whether the conditions are ‘an incident of some other legitimate government purpose’ such as ensuring the detainee’s presence at trial.”¹⁴²

Moore was arrested for causing a public disturbance while allegedly under the influence of an illegal substance; he was pepper sprayed prior to being placed in a restraining chair.¹⁴³ He was allowed to subsequently decontaminate in a shower, where the prison alleges he continued resisting.¹⁴⁴ The parties dispute over whether Moore continued to resist in the shower; however,

¹³⁷ *Nasseri*, 373 Fed. App’x at 18-19.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 19 (“It is excessive force for a jailer to continue using force against a prisoner who has already been subdued.”).

¹⁴¹ *See generally* *Moore v. Hoosier*, 43 F. Supp. 2d 978 (N.D. Ind. 1998).

¹⁴² *Id.* at 985 (quoting *Moore v. Marketplace Restaurant*, 754 F.2d 1336, 1351 (7th Cir. 1985)).

¹⁴³ *Id.* at 982.

¹⁴⁴ *Id.*

it is undisputed that Hoosier, a guard, beat Moore in the shower.¹⁴⁵ In deciding the case, the court found no issue with the use of the pepper spray in this manner.¹⁴⁶

Lastly, *Von Colln v. County of Ventura* highlights problems with the current body of Fourteenth Amendment law.¹⁴⁷ Von Colln, one of the pretrial detainees, claims that he was tied naked to a restraining chair for five and a half hours, during which he defecated upon himself and was forced to clean up the urine and feces with his bare hands before being allowed to shower.¹⁴⁸ A second plaintiff, Stringer, claims that he was stripped naked and restrained for four hours, and had to sit in his own waste like Von Colln.¹⁴⁹ Another plaintiff, Pratt, alleges he was placed in the restraining chair for seven hours while hooded, but he notes that he was not sprayed prior to the hood being placed upon him.¹⁵⁰ The fourth plaintiff, Lloyd, allegedly was pepper sprayed and placed in a restraining chair without being allowed to decontaminate; the prisoner guards allegedly knew Lloyd to be mentally ill.¹⁵¹

Several motions were filed, including a motion to certify a class due to the number of alleged violations; the district court granted that class certification with regards to an injunction seeking to limit the use of restraining chairs in Ventura County.¹⁵² Critical to our study of the case, the district court did not grant additional protections, as compared to Eighth Amendment inmates, for the pretrial detainees with regards to their claims for injunction.¹⁵³

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 988-89 (finding no issue with the use of the pepper spray, while noting especially the efforts to decontaminate Moore, under a count of false imprisonment).

¹⁴⁷ *Van Colln v. City of Ventura*, 189 F.R.D 583 (C.D. Cal. 1999).

¹⁴⁸ *Id.* at 585-86.

¹⁴⁹ *Id.* at 586.

¹⁵⁰ *Id.* at 586-87.

¹⁵¹ *Id.*

¹⁵² *Id.* at 587 (“Plaintiffs seek injunctive relief in order to prohibit the defendants from using the Pro-strait chair for purposes which it was not intended.”); *Id.* at 594 (“[T]he class is composed of all individuals who have are currently incarcerated, or will be incarcerated during the pendency of this lawsuit in the Ventura County jail, and who are subject to being restrained in the Pro-strait chair in violation of their Eighth Amendment rights.”).

¹⁵³ *Id.* at 594 (“Plaintiffs here are pre-trial detainees who allege violations of their Eighth and Fourteenth Amendment rights. Claims by pre-trial detainees are analyzed under the Fourteenth Amendment Due Process clause

B. Numerous Class Actions, Settlements, Deaths and Injuries have Occurred at the State Level from Use of Restraint Chairs

This section focuses on the use of restraint chairs with malicious intent in a broad sense to support a ban on spray-and-restraint tactics.¹⁵⁴ While not every instance discussed in this section is an exact match with the spray-and-restraint methodology this paper seeks to ban, the instances of abuse are sufficiently as to evidence the harm that guards often seek to inflict, that these type of conduct flagrantly occur, and the need for additional Due Process protection is great.¹⁵⁵

With regards to various types of punishment involving restraint chairs, eleven deaths, numerous injuries, various out-of-court settlements, and class action lawsuits have documented by reporter Anne-Marie Cusac.¹⁵⁶ Cusac's infamous article in Progressive Magazine focused on the improper usage of the chair and the grisly effects to pretrial detainees when prison guards leapt beyond the bounds of their permissible authority.¹⁵⁷

First, Cusac's investigation into restraint chair usage found prevalent abuse of this allegedly protective tool; she first notes that a number of institutions use these devices including state jails and detention centers, federal prison facilities, immigration facilities, the U.S. Marshals Service, and mental health institutions.¹⁵⁸ Cusac provides detailed and numerous

rather than under the Eighth Amendment. See *Bell v. Wolfish*, 441 U.S. 520, 535 n.16 (1979). However, because pre-trial detainees' rights under the Fourteenth Amendment are *comparable to prisoner's rights under the Eight Amendment, courts apply the same standard*. See *Frost v. Agnos*, 152 F.3d 1124, 1128 (9th Cir. 1998).") (emphasis added).

¹⁵⁴ See Balko, *supra* note 1 (for a general description of the exact tactics this paper argues against).

¹⁵⁵ See *id.*

¹⁵⁶ *Id.*; see generally Anne Marie Cusac, *The Devil's Chair*, PROGRESSIVE (April 2000), http://www.progressive.org/mag_cusacchair.

¹⁵⁷ The chair "is being used in an improper--and sometimes sadistic--manner." Cusac, *supra* note 156. Cusac discovered the following methods of usage were common: to restrict non-threatening behavior, to detain children, to detain nude inmates, to detain prisoners for as long as eight days, to require prisoners to testify, to interrogate prisoners, and to "tortur[e]" prisoners who are "hooded, pepper-gassed, beaten, or threatened with electrocution while in the chairs." *Id.*

¹⁵⁸ *Id.*

accounts, demonstrating the frequency of restraint chair related death.¹⁵⁹ On December 20, 1994, Shedrick Brown died as a result of being placed in a restraint chair.¹⁶⁰ Brown first struggled with guards to avoid being placed into the chair and Cusac notes that Brown was restrained for more than four hours before he died.¹⁶¹ Likewise, on April 17, 1995, Carmelo Marrero died as a result of being restrained.¹⁶² Marrero was placed into a restraint chair in an excited state and died; his family received a settlement of nearly \$750,000 to dismiss their claims against the prison system.¹⁶³

In June 1996, Scott Norberg died from being restrained improperly and being “shocked with a stun gun.”¹⁶⁴ Likewise, in 1996, Katalin Zentai died from blood clots after being continuously restrained for more than a day and half.¹⁶⁵ On December 3, 1996 Anderson Tate died while restrained in a chair.¹⁶⁶ Despite the fact that Tate told officers he had ingested a large amount of cocaine, his captors abused and mocked him in lieu of providing medical services.¹⁶⁷

On March 1997, Michael Valent died as a result of being placed in a restraint chair for an excessive period of time.¹⁶⁸ The death of Michael Valent drew national attention after an investigation revealed that he had been restrained naked for sixteen hours in 1998 and died from a subsequent blood clot.¹⁶⁹

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Only the Tip of the Iceberg*?, JAMA NEWS AND MEDICAL PERSPECTIVES, Oct. 28, 1998, available at <http://www.prisonpolicy.org/scans/jama28oct98b.shtml>.

Likewise, during that same March, Daniel Sager died in Osceola County, Florida after being beaten with a towel while restrained to a chair.¹⁷⁰ The severity of the beating is indicated by the fact that Sager's cause of death was injury to his brain stem as a result of the incident.¹⁷¹ Cusac's study of restraint chair deaths continues on into August 30, 1997 with the case of Anthony R. Goins.¹⁷² Goins was pepper sprayed, restrained to a chair, and ignored by officers who paused to clean themselves of the spray.¹⁷³ Likewise, in December 1998, Kenneth Vincent Bishop died at the hands of Pueblo County prison guards while restrained in a chair.¹⁷⁴ Bishop was improperly restrained while under the influence of amphetamines.¹⁷⁵

Cusac goes on to note Demetrius Brown's death on October 30, 1999.¹⁷⁶ Brown died in Jacksonville, Florida after excessive use of a "choke-hold" to place him in a restraint chair.¹⁷⁷ Lastly, Cusac's eleventh case study is the death of James Arthur Livingston on July 6, 1999.¹⁷⁸

Cusac has also written about numerous instances of detainees being abused even where no death resulted.¹⁷⁹ For example, on June 5, 1997, Christopher Stone was restrained to a chair in a room which was twice filled with pepper spray.¹⁸⁰ Notably, the offending officer, Ware, received a fine of less than \$1,000.¹⁸¹ Cusac also notes that in February 1999, a class action lawsuit on behalf of abused pretrial detainees settled against Sacramento County for the amount

¹⁷⁰ Cusac, *supra* note 156.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* (noting a statement by Livingston's attorney that Livingston was restrained for approximately eight hours in Tarrant County, TX, during which he was pepper sprayed and not allowed to decontaminate).

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* It is questionable whether Stone posed any danger at all to Officer Ware as Stone was only arrested for drunk driving, a non-violent offense. *See id.*

¹⁸¹ *Id.*

of \$755,000.¹⁸² The lawsuit “alleged numerous and repeated forms of torture, including mock executions, where guards strapped inmates into a Prostraint [brand] chair and told them they were going to be electrocuted.”¹⁸³ Other instances of abuse reported include beatings, detainees being stripped naked, and guards continuing abuse while ignoring statements by detainees as to heart defects.¹⁸⁴

Notwithstanding Cusac’s detailed study of the field, other cases have been noted across the nation for the past twenty years.¹⁸⁵ Cases of restraint chair abuse have been well noted in Texas.¹⁸⁶ On August 12, 1997, Andrew Sokolinski was pepper sprayed, had a hood thrown over his head, and died after being left unattended for twelve minutes in a restraint chair.¹⁸⁷ Similarly, on August 19, 1999, Bobby Stuart died after allegedly being “beaten, pepper sprayed, and tied down.”¹⁸⁸ In Arizona, due to the high number of lawsuits brought just against one county, Maricopa, a statewide ban on the use of the chairs exists.¹⁸⁹

Likewise, in Harrison County, Indiana, a prison official was fired after using a combined spray-and-restraint tactic, but subsequently reinstated.¹⁹⁰ Similarly, in Harrison County Mississippi, officials were accused of spraying an entire can’s worth of pepper spray into a hood

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ Balko, *supra* note 1

¹⁸⁶ *Id.*; Guy H. Lawrence, *Settlement, new lawsuit raise restraint chair concerns*, CORPUS CHRISTI CALLER (Aug. 14, 2000), http://www.caller2.com/2000/august/14/today/local_ne/1918.html.

¹⁸⁷ Lawrence, *supra* note 186.

¹⁸⁸ *Id.*

¹⁸⁹ Balko, *supra* note 1; Katie McDevett, *Maricopa County Retires Restraint Chairs*, East Valley Tribune (Aug. 22, 2006), http://www.eastvalleytribune.com/article_d9588db0-e661-548d-a9fa-05711e8fdcf9.html.

¹⁹⁰ *WHAS Investigation Learns of Documented Examples of Mistreatment at Ind. Jail*, WHAS (Mar. 31, 2003), <http://www.whas11.com/home/WHAS11-investigation-turns-of-documented-examples-of-mistreatment-at-Ind-jail-96150314.html>.

and placing it over the head of detainee Jesse Lee Williams Jr. before subsequently beating him to death.¹⁹¹

In conclusion, this section shows that the potential for pretrial detainee torment is rife and well noted by the media.¹⁹² Yet, very little has been done to prevent this type of conduct on the part of prison guards.¹⁹³ The need for a uniform due process approach to prevent restraint chair abuse exists and provides support for the premise that spray-and-restraint abuse is prevalent.¹⁹⁴

IV- “SHOCKS THE CONSCIENCE” DUE PROCESS ARGUMENT IS NEEDED AND WOULD SUCCEED

To recapitulate the earlier premises of this paper, the case studies by Cusac and incidents reported above show that the use of restraint chairs has often been against pretrial detainees; there is no reason to assume that the type of abuse would exclude spray-and-restraint abuse.¹⁹⁵ Likewise, Eighth Amendment and post-trial prisoner cases show that pepper spray is being abused on inmates; this supports the idea that pretrial detainees are also facing pepper spray abuse, which likely combines with restraint chair abuse at times.¹⁹⁶ Furthermore, the policies and procedures adopted by facilities and courts, as shown above, vary widely between states.¹⁹⁷ Likewise, standards for protection in pepper spray cases vary.¹⁹⁸ It is true that some courts apply the “shocks the conscience” test¹⁹⁹ or apply it indirectly through Fourteenth Amendment excessive force claims.²⁰⁰ Other courts apply a mix of reasonableness or factors based tests,

¹⁹¹ Balko, *supra* note 1; Radley Balko, *Jesse Williams Jr.*, AGITATOR (Aug. 2, 2006), <http://www.theagitator.com/2006/08/02/jesse-lee-williams-jr/>.

¹⁹² *See supra* Section III.B.

¹⁹³ *See supra* Section III.B.

¹⁹⁴ *See supra* Section III.B.

¹⁹⁵ *See supra* Section III.B.

¹⁹⁶ *See supra* Section III.B.

¹⁹⁷ *See supra* Section II.C.

¹⁹⁸ *See Ritchie, supra* note 17, at 617- 20; *supra* Subsection III.A.2.

¹⁹⁹ *See Ritchie, supra* note 17, at 617- 20; *supra* Subsection III.A.2.

²⁰⁰ *See Ritchie, supra* note 17, at 617- 20; *supra* note 135 and accompanying text.

while sometimes focusing as well on the subjective intent of the prison officials.²⁰¹ As *Graham* notes, the shocks the conscience test is considerably more difficult to meet than reasonableness based tests and requires a showing of malice.²⁰² Despite the mixed standards, the egregious nature of spray-and-restraint cases justify use of *Rochin* for protection of citizens' rights; while *Rochin* is a heavy hammer to wield, justice demands it.²⁰³ Since *Rochin* is the most difficult test to win, it can be used to justify protections against spray-and-restraint tactics in a state where thresholds for protection are even lower.²⁰⁴

A. Legal Arguments for Success under a Uniform "Shocks the Conscience Test"

Of course, *Rochin* provides the key first step in determining whether these incidents violate the principle of the "shocks the conscience test." In applying *Rochin*, it is no stretch to apply a reasonable view of the force used against detainees and conclude spray-and-restraint tactics are "too close to the rack."²⁰⁵ The act of pepper spraying a prisoner multiple instances in the same window of a few hours, while he cannot move or decontaminate, is analogous to forcing one's stomach to be pumped in terms of the raw violence being exerted against an individual.²⁰⁶

Likewise, the act of multiple sprays on a restrained prisoner is distinguishable from *Daniels*.²⁰⁷ The intentional act of pepper spraying a man multiple times within the same session is not the same as the negligent act of placing a pillow upon prison stairs; it is impossible to argue that one can "accidentally" perform such a repeated course of action without intent to

²⁰¹ See *Ritchie*, *supra* note 17, at 617- 20.

²⁰² *Graham v. Connor*, 490 U.S. 386, 393-96 (1989).

²⁰³ See *supra* Section III.B.

²⁰⁴ See *Graham*, 490 U.S. at 393-96.

²⁰⁵ *Rochin v. California*, 342 U.S. 165, 210 (1952).

²⁰⁶ See *id.*

²⁰⁷ See *Daniels v. Williams*, 474 U.S. 327, 335-36 (1986).

cause pain.²⁰⁸ Thus, the Court’s reluctance in *Daniels* to turn the Fourteenth Amendment into a major source of tort law is justified by the difference in *mens rea* in spray-and-restraint cases.²⁰⁹

Although *Lewis* was also unfavorable towards the concept of allowing substantive due process claims, the instance set of facts can be distinguished from *Lewis*. Unlike the pursuit in *Lewis*, courts should be hesitant to pass judgment in spray-and-restraint cases because these cases do not require the same level of snap judgments from officers as compared to a high-speed police chase.²¹⁰ The need for snap judgments is also recognized as lessened by *Whitley*.²¹¹ Once subject is restrained, decisions do not have to be made as quickly as the reaction to the outright riot in *Whitley*.²¹² It is worth repeating that the Court’s deference was greatly tied to the need of prompt response to the dangerous riot in *Whitley* which is absent in the cases we have examined within this paper.²¹³ Thus, prison guards dealing with a restrained individual are due less deference than other government actors in traditional Due Process situations.²¹⁴

The body of Eighth Amendment law cited above also supports the success of a uniform “shocks the conscience” test. In *Thomas*, the Eleventh Circuit, under a claim of confinement conditions, examined whether the guards’ acts violated contemporary standards of decency.²¹⁵ The court held that repeated sprayings constituted an extreme deprivation for the purpose of Eighth Amendment.²¹⁶ A violation of contemporary standards of decency would certainly seem to include anything that “shocks the conscience” logically, if not being overinclusive.²¹⁷ Thus, the court’s holding in *Thomas* supports that being pepper sprayed multiple times in the same day

²⁰⁸ *Id.*

²⁰⁹ *See id.*

²¹⁰ *City of Sacramento v. Lewis*, 523 U.S. 833, 855 (1998).

²¹¹ *See Whitley v. Albers*, 475 U.S. 312, 316 (1986).

²¹² *Id.*

²¹³ *See id.* at 321.

²¹⁴ *See id.*

²¹⁵ *Thomas v. Bryant*, 614 F.3d 1288, 1306 (11th Cir. 2010), *reh’g denied*, 409 Fed. App’x 316 (11th Cir. 2010).

²¹⁶ *See id.*

²¹⁷ *See id.*

is excessive, considering the fact that *Thomas* found multiple sprayings per year excessive without the use of any restraint whatsoever, albeit when applied to mentally ill prisoners.²¹⁸ The procedural issue of *mens rea* is irrelevant here, as the desire to cause harm is evident unlike *Thomas*.²¹⁹

Turning back to *Whitley* for a moment, it is worth noting within the opinion the implicit assumption that special protections are needed for pretrial detainees, due to the lesser form of procedural safeguards they have received considered to Eighth Amendment inmates.²²⁰ The Court's holding in *Bell* that pretrial detainees have the "right to be free from punishment"²²¹ would also seem to be violated by multiple sprayings per day.²²² The reasonable person viewing a guard performing these acts would not have much trouble in concluding that the goal of these multiple sprayings is for the pure sadistic enjoyment of the guards and thus its effect on a pretrial detainee can only be reasonably considered as "punitive" in the legal sense.²²³ In accordance with *Bell* and *Whitley*, lower courts should allow a separate line of case law for pretrial detainees as this distinction has been recognized by the Court.²²⁴

Lastly, lower level court decisions, noted above, also provide considerable support for a uniform "shocks the conscience" test. The court in *Nasseri* would seem to have no problem with this uniform standard as its focus is substantially similar to the excessive force theory it applied.²²⁵ Similarly, the court in *Moore* correctly identified that no legitimate government

²¹⁸ *Id.* at 1299.

²¹⁹ *See id.* at 1304-05.

²²⁰ *See Whitley v. Albers*, 475 U.S. 312, 327 (1986).

²²¹ *Bell v. Wolfish*, 441 U.S. 520, 535 (1979).

²²² *See id.*

²²³ *See id.*

²²⁴ *Whitley*, 475 U.S. at 327.

²²⁵ "It is excessive force for a jailer to continue using force against a prisoner who has already been subdued." *Nasseri v. City of Athens*, 373 Fed. App'x 15, 19 (11th Cir 2010).

purpose is served by pepper spraying restrained prisoners.²²⁶ The *Moore* court also placed considerable emphasis on allowing the detainee to decontaminate.²²⁷ Therefore, pepper spraying a prisoner who is restrained would seem to run afoul of *Moore*'s requirement for decontamination, as numerous instances above have demonstrated that this detainment often lasts for hours.²²⁸ As noted within this section, various cases agree as to the major principles that pretrial detainees are entitled to greater protections than prisoners and that the use of pepper spray on restrained prisoners exceeds the boundaries of the contemporary views of social acceptability.²²⁹

B. Policy Arguments for Adoption of the Shocks the Conscience Protection for Detainees

As the incidents noted above demonstrate, a variety of abuse occurs when restraint chairs are misused: pepper spraying, forced nudity, beating, and many other forms of abuse.²³⁰ These instances are not infrequent, as repeated out-of-court settlements, bans, and class action suits have occurred.²³¹ Given the potential for harm, the need for protection of our citizens is high.²³² This is especially true considering that it may be as long as 48 hours before detainees are given a chance to leave custody at their *Riverside* hearings.²³³ Even a few hours is enough time for prison guards to set into action a course of conduct that can lead to the detainees' eventual demise.²³⁴

²²⁶ *Moore v. Hoosier*, 43 F. Supp.2d 978, 985 (N.D. Ind. 1998).

²²⁷ *Id.* at 988-89.

²²⁸ *See Cusac*, *supra* note 156.

²²⁹ *See supra* Section IV.A.

²³⁰ *See supra* Section III.B.

²³¹ *See supra* Section III.B.

²³² *See Whitley v. Albers*, 475 U.S. 312, 327 (1986) (noting in dicta that pretrial detainees deserve higher level protections); *contra Van Colln v. City of Ventura*, 189 F.R.D 583, 594 (C.D. Cal. 1999) (applying the same level of protection for pretrial detainees).

²³³ *County of Riverside v. McLoughlin*, 500 U.S. 44, 57 (1991).

²³⁴ *See Balko*, *supra* note 1.

This is not to discount the government interest in the safety of corrections officials.²³⁵ Corrections officials do serve a valuable role in our society and they should have the opportunity to maintain order and protect themselves.²³⁶ However, it is highly questionable what harm that restrained detainees pose.²³⁷ It is obvious that there is no threat of battery from a restrained individual; likewise, if biological harm is the threat, then corrections officials are within the lawful bounds of their authority to use spit guards.²³⁸ The addition of pepper spray when combined with restraints that cover the mouth and face serve no purpose but to enhance the pain caused to detainees; trained corrections officials have commented that such additional measures are clearly unnecessary.²³⁹

C. Where Should the Line Be Drawn?

The incidents above demonstrate unequivocally that detainee abuse varies greatly on the facts of each case presented.²⁴⁰ While some might argue that it is obvious that six hours of restrained exposure to pepper spray while restrained is clearly excessive, the question remains as to where the Court should draw the line as far as limiting exposure.

Where a prisoner has already been subdued, the government should be liable for any resulting injury or death resulting from use of spray. Subdued should be defined as “securely restrained within a chair or similar restraint device.” However, this is not to be interpreted to mean that a detainee who is first sprayed may not be subsequently placed into a chair; logically, one can see why increasing levels of restraint are necessary. Prisoners who are sprayed before

²³⁵ The Court has placed considerable emphasis on the interest of government officials and their safety during performance of their duties in previous cases. *See, e.g.*, *Whitley v. Albers*, 475 U.S. 312, 321 (1986); *City of Sacramento v. Lewis*, 523 U.S. 833, 855 (1998).

²³⁶ *See Whitley v. Albers*, 475 U.S. 312, 321 (1986); *City of Sacramento v. Lewis*, 523 U.S. 833, 855 (1998).

²³⁷ *See Balko, supra* note 1 (noting the opinions of several police professionals who can think of no justification for spraying a restrained prisoner).

²³⁸ *See id.*

²³⁹ *See id.*

²⁴⁰ *See, e.g.*, *Nasseri v. City of Athens*, 373 Fed. App'x 15, 19 (11th Cir. 2010).

being restrained should be given the chance to decontaminate as soon as possible.²⁴¹ But once the prisoner is secured, no logical reason exists to continue to cause pain to the prisoner.²⁴² For example, the practice of “hooding”²⁴³ where a prisoner is pepper sprayed and then has his face intentionally covered with a bag or mask to increase the pain dealt has no logical support and should render prison officials liable for severe monetary damages.²⁴⁴

As the previous incidents demonstrate, there are few evidentiary issues with determining what happened during custody, but rather the problem with spray-and-restraint methodology is a problem of making sure proper standards are in place to protect pretrial detainees.²⁴⁵ This “securely restrained” standard is simple and effective enough for use in the field by corrections officials and should prevent any delays in judgment by corrections officials in executing corrective actions. At the same time, it is sufficiently clear to protect the rights of pretrial detainees. And once that ban is in place, it is up to the court system to effectively monitor and patrol the standard, lest prison officials decide, as they have in the past, that they know best as how to handle these issues.²⁴⁶

V. CONCLUSION

The freedom to be free from unwarranted bodily harm is a core freedom in our system of constitutional law.²⁴⁷ Given that pretrial detainees often must experience a long wait before any formal appearance and the reported incidents of abuse, we must ensure their safety.²⁴⁸ The sadism of corrections officials must not be allowed to be a driving force of vigilante justice and

²⁴¹ See *Nasseri v. City of Athens*, 373 Fed. App'x 15, 18-19 (2010); *Moore v. Hoosier*, 43 F. Supp. 2d 978, 982 (N.D. Ind. 1998).

²⁴² See Balko, *supra* note 1.

²⁴³ Lawrence, *supra* note 186.

²⁴⁴ See Balko, *supra* note 1.

²⁴⁵ See Lawrence, *supra* note 186.

²⁴⁶ See *4 Utah Counties still use restraint chair despite ban*, *supra* note 126.

²⁴⁷ *Bell v. Wolfish*, 441 U.S. 520, 535 (1979).

²⁴⁸ *County of Riverside v. McLoughlin*, 500 U.S. 44, 57 (1991).

every pretrial detainee should only face punishment where justice has been fairly served in a court of law.