

America's Most Shocking Standard: When Innocent Parties Are Injured or Killed in High-Speed Pursuits, What Police Conduct Sufficiently "Shocks the Conscience" to Allow Recovery? [*Meals v. City of Memphis*, 493 F.3d 720 (6th Cir. 2007)]

Anna M. Krstulic*

I. INTRODUCTION

On October 5, 2004, in Wichita, Kansas, twenty-nine-year-old Amy Robbins was driving home from work as her husband followed in another vehicle.¹ He watched in horror as Amy proceeded through an intersection and a pickup truck fleeing the police slammed into her at fifty miles per hour.² Her husband reported that he never heard any sirens despite the fact that his windows were open.³ Amy sustained severe injuries and died eight days later.⁴

On November 8, 2007, in Independence, Missouri, seventeen-year-old Chris Cooper was riding his bike across the street when a driver attempting to escape police ran a red light and crashed into him.⁵ The fleeing driver did not slow down, and the police continued pursuit.⁶ Chris's parents lived just blocks away from the accident, and by the time they arrived at the scene, he had already died.⁷ This was the third pur-

* B.A. 1999, Benedictine College; J.D. Candidate 2009, Washburn University School of Law. I am forever grateful to my family, particularly my parents, Josip and Mary Krstulic, and my sisters, Catherine Cheshire and Carol Krstulic, for their never-ending love and support. I am also grateful to Joseph Conigliaro for his love, encouragement, and patience during this time-consuming process. I would like to thank Professors William Rich, Mary Kreiner Ramirez, and Aida Alaka for providing instruction, advice, and encouragement throughout the development of this piece. I also thank the editorial staff of the *Washburn Law Journal*, particularly Matthew Stromberg and David Stucky, for their input and assistance. I dedicate this work to my grandmother who always told me, "Hitch your cart to the stars and go, girl!"

1. David Klepper, *Kansas's Case Questions Who Is Responsible for Injuries in Police Chases*, KAN. CITY STAR, Sept. 8, 2007, at B1; Ron Sylvester, *Police-Chase Lawsuit in Judge's Hands*, WICHITA EAGLE, Apr. 28, 2006, at B1.

2. Klepper, *supra* note 1, at B1; Sylvester, *supra* note 1, at B1.

3. Klepper, *supra* note 1, at B1.

4. Sylvester, *supra* note 1, at B1.

5. KCTV5.com, *Teen Victim's Parents Demand Change*, <http://www.kctv5.com/news/14724119/detail.html> (last visited Apr. 8, 2008).

6. *Id.*

7. *Id.*

suit-related death within eight days in the same city.⁸

Police chases are all too common, and, unfortunately, so are the tragic consequences.⁹ Although “[a] traffic accident constitutes the most common terminating event in an urban pursuit,” sparse data exist on the subject.¹⁰ A 1998 study by the National Highway Traffic Safety Administration—the most frequently cited and comprehensive report available—indicated that police pursuits killed 314 people that year: 2 police officers, 198 fleeing suspects, and 114 innocent bystanders.¹¹ From 1994 through 1998, 1 in 100 pursuits ended fatally, and innocent bystanders comprised 42% of total pursuit-related injuries and deaths.¹² Police officers initiate the majority of these pursuits in response to minor traffic violations.¹³

The Fourteenth Amendment to the United States Constitution guarantees that “[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law.”¹⁴ The United States Supreme Court has recognized that this provision assures procedural fairness and “cover[s] a substantive sphere as well, ‘barring certain government actions regardless of the fairness of the procedures used to implement them.’”¹⁵ Individuals harmed during police chases claim that the pursuing officers violated this substantive due process right.¹⁶ The Supreme

8. *Id.*

9. See generally PursuitWatch.org, <http://www.pursuitwatch.org/news.htm> (last visited Apr. 8, 2008) (collecting pursuit-related news stories throughout the country).

10. John Hill, *High-Speed Police Pursuits: Dangers, Dynamics, and Risk Reduction*, 71 FBI LAW ENFORCEMENT BULLETIN 14 (2002), available at <http://www.fbi.gov/publications/leb/2002/july2002/july02leb.htm>. The fact that there is no mandatory reporting system hampers the National Highway Traffic Safety Administration’s efforts to compile such statistics. *Id.* at 15. Furthermore, police departments frequently determine that a crash occurred immediately after the officers terminated pursuit, so they do not define the crash as pursuit-related. *Id.* at 14. Thus, the number of fatalities may actually be much higher than that reported. See *id.*

11. *Id.* at 15. The National Center for Statistics and Analysis, a division of the National Highway Traffic Safety Administration, provides annual pursuit statistics from 1982 to 2006 upon request. NCSA Publications & Data Requests, <http://www-nrd.nhtsa.dot.gov/CATS/index.aspx> (last visited Apr. 8, 2008). In 2006, 404 people died in pursuit-related crashes: 3 police officers, 268 occupants of chased vehicles, and 122 innocent bystanders. NAT’L CTR. FOR STAT. AND ANALYSIS, FATALITIES IN MOTOR VEHICLE TRAFFIC CRASHES INVOLVING POLICE IN PURSUIT (2006) (on file with National Center for Statistics and Analysis).

12. Hill, *supra* note 10, at 14.

13. *Id.*

14. U.S. CONST. amend. XIV, § 1. Section 1 of the Fourteenth Amendment provides in full: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Id.

15. County of Sacramento v. Lewis, 523 U.S. 833, 840 (1998) (quoting Daniels v. Williams, 474 U.S. 327, 331 (1986)). Procedural due process requires governmental officials to follow fair procedures when depriving citizens of life, liberty, or property and usually entails some kind of hearing before the deprivation. Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992); Zinermon v. Burch, 494 U.S. 113, 127 (1990). Substantive due process protects individual liberty interests against governmental actions without regard to the procedures involved. Collins, 503 U.S. at 125.

16. See Lewis, 523 U.S. at 840. The claim is essentially that the officers’ actions “were an abuse of executive power so clearly unjustified by any legitimate objective of law enforcement as to be

Court has determined that police officers are liable for pursuit-related injuries only if their conduct “shocks the conscience” by evincing an intent to harm the fleeing suspect.¹⁷ Invariably, this standard has made it impossible for bystanders injured during pursuits to obtain relief in federal courts.

This Comment examines the judicial standards applied to pursuit-related claims against police officers in the context of *Meals v. City of Memphis*,¹⁸ a recent United States Court of Appeals for the Second Circuit case involving a high-speed chase with particularly tragic consequences. It analyzes the Supreme Court’s substantive due process jurisprudence and suggests that courts must consider the totality of the circumstances in each case to determine what police conduct—intent to harm or deliberate indifference to life—sufficiently “shocks the conscience.” This Comment recommends that courts limit the intent-to-harm standard to those situations in which officers lacked sufficient time to deliberate. Finally, it advocates courts apply the deliberate indifference standard for cases in which police officers egregiously violate pursuit policies during extended chases, particularly when innocent bystanders allege the pursuit-related harm.

II. CASE DESCRIPTION

On January 18, 2002, Memphis, Tennessee Police Officer Bridgette King was running radar when a vehicle sped past her traveling in the opposite direction.¹⁹ King intended to stop the driver for speeding, so she turned on her blue lights, executed a U-turn, turned off the lights, and followed the vehicle without lights or siren.²⁰ The driver increased his speed, and King responded in kind.²¹ The driver turned onto a busy commercial street, initially entered the opposing lanes of traffic, and then crossed a grass median to get into the correct lanes.²² Neither he nor King stopped at the intersection, but instead traveled through it at an alarming rate of speed.²³

The chase continued until the fleeing driver grazed another vehicle and veered into the opposing lanes of traffic, striking the vehicle carrying James Albert Meals, his son James Harvey Meals, and his eight-

barred by the Fourteenth Amendment.” *Id.*

17. *Id.* at 854.

18. 493 F.3d 720 (6th Cir. 2007).

19. *Id.* at 723.

20. *Id.* The parties disputed whether Officer King pursued the driver; King told another police officer that “she was just running radar, and she was going to attempt to catch up with the guy and make a traffic stop.” *Id.* at 723 nn.2-3. The City’s police pursuit policy required officers to engage lights and siren when in pursuit, but not when merely following a vehicle. *Id.* at 723 n.3.

21. *Id.* at 723.

22. *Id.* at 724.

23. *Id.* Interestingly, the court did not identify the speed of the pursuit. *See id.* This is unusual in comparison to other pursuit cases. *See infra* Part III.B-C.

year-old grandson William Meals.²⁴ The collision killed James Albert and James Harvey Meals as well as the driver attempting to evade King.²⁵ Eight-year-old William suffered a fractured spine that resulted in permanent paraplegia.²⁶

City policy prohibited police pursuits when:

(1) the officer knows that the suspect is wanted only for a traffic violation, a misdemeanor, or a non-violent felony; (2) the officer has failed to obtain supervisory approval within one minute of pursuit origination; (3) the pursuit has reached an unacceptable level, as defined in the policy; and (4) the officer fails to activate audible (siren) and visual (blue lights) signals upon initiation of a pursuit.²⁷

The policy indicated that police officers “must continually question whether the seriousness of the violation reasonably warrants continuation of the pursuit, and that a pursuit must be discontinued when there is a clear danger to the pursuing officers or the public.”²⁸

In state court, on behalf of her husband, James, and son, William, Aundrey Meals sued the City of Memphis, Officer King, and Police Department Director Walter Crews.²⁹ Defendants removed the case to the United States District Court for the Western District of Tennessee pursuant to federal question jurisdiction.³⁰ Meals alleged that King violated her husband’s and son’s Fourteenth Amendment substantive due process rights under 42 U.S.C. § 1983³¹ by engaging in a high-speed pursuit that caused death and injury through deliberate indifference to life.³² Meals accused the City of negligence under state law based on King’s failure to comply with the City’s policy on police pursuits as well as its general failure to train, supervise, and enforce proper implementation of the policy.³³ The City’s improper execution of its policy, she argued, also comprised a constitutional violation.³⁴

The district court initially dismissed all claims against King but later reinstated them based on new evidence and set the case for jury trial.³⁵ King moved the court to dismiss the case or, in the alternative, to

24. *Meals*, 493 F.3d at 723-24.

25. *Id.* at 724.

26. *Id.*

27. *Id.*

28. *Id.* (“As an example, the policy called for discontinuance ‘[w]hen the speeds dangerously exceed normal traffic flow or when pedestrians or vehicular traffic necessitates unsafe maneuvering of the vehicle.’” (alteration in original)).

29. *Id.* Additionally, Meals sued Ford Motor Company, but she apparently dropped this claim when the defendants removed the case to federal court. *See generally id.*

30. *Id.* Federal question jurisdiction refers to the federal courts’ authority, codified in 28 U.S.C. § 1331 (2000), to hear cases that arise under the Constitution and other federal statutes. *Id.*; *see also* *Merrell Dow Pharms., Inc. v. Thompson*, 478 U.S. 804, 807 (1986). Defendants may remove cases brought against them in state court to federal court when the claims against them involve such federal laws. *Thompson*, 478 U.S. at 808.

31. *See infra* note 50.

32. *Meals*, 493 F.3d at 725.

33. *Id.*

34. *Id.*

35. *Id.* at 724-25. The new evidence that prompted the district court to reinstate the claims

grant summary judgment in her favor on the basis of qualified immunity.³⁶ Meals filed a Memorandum in Opposition and attached a copy of the City's pursuit policy, an accident report, and four unsworn witness statements.³⁷ The court partially granted King's motion for summary judgment regarding Meals's state law negligence claim because Meals chose to pursue that claim against the City.³⁸ The court denied King's motion regarding Meals's § 1983 claim because there was sufficient evidence to prove that she violated the City's police pursuit policy.³⁹ The court denied King qualified immunity because "the right to be free from a police pursuit that shocks the conscience is clearly established and . . . a reasonable police officer would know that such action violates that right."⁴⁰

The City also moved the court for summary judgment on the basis of qualified immunity.⁴¹ The court granted in part the City's motion as to Walter Crews but denied the motion regarding Meals's § 1983 claim based upon disputed issues of fact.⁴² The court also denied the City's motion regarding Meals's state law claim for negligence because "the facts were controverted regarding whether it was reasonable for Officer King to initiate and continue the high-speed pursuit . . . and whether her conduct was the proximate cause of the injuries."⁴³ The court found the City not entitled to qualified immunity for the claims regarding its pursuit policy.⁴⁴

King and the City filed interlocutory appeals.⁴⁵ The United States Court of Appeals for the Sixth Circuit reversed the district court's denial of the City's and King's motions for summary judgment.⁴⁶ The Sixth Circuit held that both defendants were entitled to qualified immunity

against King consisted of testimony by Meals's expert on police policy, practice, and procedure. *Id.*

36. *Id.* at 725-26. The Federal Rules of Civil Procedure authorize summary judgment as a method of ensuring the efficient disposition of cases. FED. R. CIV. P. 56; *see also* *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986). A party may move for summary judgment against an opposing party who fails to provide factual support for his claims or defenses. *Celotex Corp.*, 477 U.S. at 327. For a discussion of qualified immunity, *see infra* Part III.A.

37. *Meals*, 493 F.3d at 725-26.

38. *Id.* at 726.

39. *Id.*

40. *Id.*

41. *Id.* at 725.

42. *Id.* Meals and the City introduced conflicting expert testimony regarding pursuit policy, practice, and procedure. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* at 726. The state law claims are not at issue on appeal. *See id.* at 726-27. Federal appellate courts have jurisdiction to hear appeals of all final decisions of district courts. *Behrens v. Pelletier*, 516 U.S. 299, 305 (1996). Interlocutory appeals are exceptions to the final judgment rule, however, in which some prejudgment orders are immediately appealable. *Id.* Prejudgment orders that deny the qualified immunity defense to governmental officials are subject to immediate appeal. *Id.* at 307. In this kind of interlocutory appeal, the appellate courts cannot consider factual disputes and can only evaluate the legal issues involved in the qualified immunity analysis. *Meals*, 493 F.3d at 727. For a discussion of qualified immunity, *see infra* Part III.A.

46. *Meals*, 493 F.3d at 731.

because the facts did not present a constitutional violation.⁴⁷

III. BACKGROUND

In cases involving injuries sustained during police pursuits, plaintiffs commonly rely on § 1983 to invoke Fourteenth Amendment substantive due process and the Fourth Amendment right to freedom from unreasonable seizure.⁴⁸ Section III.A explores the purpose and application of § 1983 to police officers and municipalities. Section III.B discusses the seminal case *County of Sacramento v. Lewis*⁴⁹ and its aftermath to examine the standard of liability for pursuit-related § 1983 claims against these state actors for violations of substantive due process rights. Finally, Section III.C considers the standard of liability for police officers who violate the Fourth Amendment's protection against unreasonable seizure during police pursuits.

A. Purpose of § 1983 and the Role of Qualified Immunity

Section 1983 states in relevant part:

Every person who, under color of any [law] . . . subjects, or causes to be subjected, any citizen . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured . . .⁵⁰

Section 1983 is a broad remedy that seeks to enforce all constitutional rights guaranteed every citizen by imposing civil liability on state actors who deprive persons of those rights.⁵¹ The Supreme Court has indicated that § 1983 is “not itself a source of substantive rights, but a method for vindicating federal rights elsewhere conferred by those parts of the United States Constitution and federal statutes that it describes.”⁵² The statute serves both compensatory and deterrent func-

47. *Id.*

48. Patrick T. O'Connor & William L. Norse, Jr., *Police Pursuits: A Comprehensive Look at the Broad Spectrum of Police Pursuit Liability and Law*, 57 MERCER L. REV. 511, 546 (2006).

49. 523 U.S. 833 (1998).

50. 42 U.S.C. § 1983 (2000). Section 1983 provides in full:

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

Id.

51. See *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 685 n.45 (1978). *Monell* provides an exhaustive analysis of congressional debates over Section 1 of the Civil Rights Act of 1817, the precursor to § 1983. See *id.*

52. *Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979).

tions.⁵³ Section 1983 actions against state actors involve a two-pronged inquiry: “(1) whether the conduct complained of was committed by a person acting under color of state law; and (2) whether this conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States.”⁵⁴

Section 1983 further provides a method of obtaining damages and declaratory or injunctive relief from municipalities that implement unconstitutional policies or regulations.⁵⁵ Municipalities may also be liable for constitutional violations arising out of informal “customs.”⁵⁶ Section 1983 actions against municipalities involve a two-pronged inquiry: “(1) whether plaintiff’s harm was caused by a constitutional violation, and (2) if so, whether the city is responsible for that violation.”⁵⁷ In police-pursuit cases, municipal liability turns on whether the officers committed a constitutional violation during the pursuit.⁵⁸

Courts cannot find municipalities vicariously liable solely for employing a tortfeasor;⁵⁹ rather, municipal liability arises only when state actors’ execution of a policy or custom violates federally protected rights.⁶⁰ For example, the Supreme Court held in *City of Canton v. Ohio*⁶¹ that municipalities could be liable for inadequately training police officers when the failure to train stems from deliberate indifference to individuals’ rights.⁶² The inadequate training must closely relate to the constitutional deprivation so that the deficiency actually causes the injury.⁶³ The officers’ duties must be such that the need for training is obvious, and inadequate training is likely to result in constitutional violations.⁶⁴

Police officers often assert the qualified immunity defense when

53. Jack M. Beermann, *A Critical Approach to Section 1983 with Special Attention to Sources of Law*, 42 STAN. L. REV. 51, 77 (1989).

54. *Parratt v. Taylor*, 451 U.S. 527, 535 (1981), *overruled on other grounds by Daniels v. Williams*, 474 U.S. 327 (1986).

55. *Monell*, 436 U.S. at 690.

56. *Id.* at 690-91.

57. *Collins v. City of Harker Heights*, 503 U.S. 115, 120 (1992).

58. *Trigalet v. City of Tulsa*, 239 F.3d 1150, 1155-56 (10th Cir. 2001).

59. *See Monell*, 436 U.S. at 692.

60. *Collins*, 503 U.S. at 122; *Monell*, 436 U.S. at 694.

61. 489 U.S. 378 (1989).

62. *Id.* at 388. In *City of Canton v. Ohio*, an arrestee asserted a § 1983 claim against the city when police ignored her medical needs while she was in their custody. *Id.* at 381. When the arrestee arrived at the police station, she was incoherent and slumped to the floor multiple times. *Id.* The police did not summon medical attention, and when they released her, she was hospitalized for emotional problems. *Id.* Canton had a regulation that required police officers to seek medical attention for prisoners who are unconscious, semi-conscious, or otherwise unable to explain their conditions. *Id.* at 381 n.2. Because the lower courts had applied a gross negligence standard in evaluating the arrestee’s claim, the Supreme Court remanded the case to the appellate court to apply the deliberate indifference standard. *Id.* at 382-83, 392.

63. *Id.* at 391.

64. *Id.* at 390. For example, municipalities equip police officers with firearms, so the need to train them regarding the constitutional limitations on deadly force is “‘so obvious,’ that failure to do so could properly be characterized as ‘deliberate indifference’ to constitutional rights.” *Id.* at 390 n.10.

confronted with § 1983 claims.⁶⁵ Qualified immunity shields government officials from liability if “their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”⁶⁶ In evaluating the qualified immunity defense in the pursuit context, courts must first determine whether plaintiffs’ allegations demonstrate that police officers violated the plaintiffs’ constitutional rights.⁶⁷ If there are no such violations, courts must grant the officers qualified immunity.⁶⁸ If, on the other hand, the allegations establish that officers did violate constitutional rights, the next inquiry is whether the current state of the law clearly established those rights.⁶⁹ The primary concern of the qualified immunity analysis is that officers may make honest mistakes because it may be difficult for them to determine how legal doctrines apply to the various situations that confront them.⁷⁰ If mistakes are reasonable, officers are entitled to qualified immunity.⁷¹

Several situations arise in which police officers may be liable under § 1983, and different standards guide the courts depending on the alleged constitutional violation.⁷² In cases involving injuries sustained during the course of police pursuits, the rights most commonly invoked under § 1983 are those of Fourteenth Amendment substantive due process and the Fourth Amendment right to freedom from unreasonable seizure.⁷³

B. Substantive Due Process and § 1983

Prior to *Lewis*, federal appellate courts were split over what standard to apply to § 1983 claims against police officers when persons injured during pursuits asserted deprivations of their substantive due process rights.⁷⁴ Several circuits utilized the deliberate indifference standard or gross negligence, while others applied a “shocks the conscience” standard.⁷⁵ The first part of this section examines the Supreme

65. See, e.g., *Meals v. City of Memphis*, 493 F.3d 720, 729 (6th Cir. 2007); *Terrell v. Larson*, 396 F.3d 975, 977 (8th Cir. 2005); *Slusarchuk v. Hoff*, 346 F.3d 1178, 1181 (8th Cir. 2003).

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

67. See *Saucier v. Katz*, 533 U.S. 194, 201 (2001).

68. *Id.*

69. *Id.*

70. *Id.* at 205.

71. *Id.*

72. See *County of Sacramento v. Lewis*, 523 U.S. 833, 843 (1998).

73. *O'Connor & Norse*, *supra* note 48, at 546.

74. *Lewis*, 523 U.S. at 839.

75. *Id.* Compare *Magdziak v. Byrd*, 96 F.3d 1045, 1047-48 (7th Cir. 1996) (noting the differing standards applied to pursuit-related claims of substantive due process violations), *Lewis v. Sacramento County*, 98 F.3d 434, 441 (9th Cir. 1996) (applying the deliberate indifference or reckless disregard standard), *Medina v. City and County of Denver*, 960 F.2d 1493, 1497 (10th Cir. 1992) (same), and *Jones v. Sherrill*, 827 F.2d 1102, 1106 (6th Cir. 1987) (applying the gross negligence standard), with *Evans v. Avery*, 100 F.3d 1033, 1038 (1st Cir. 1996) (applying the shocks the conscience standard), *Fagan v. City of Vineland*, 22 F.3d 1296, 1303 (3d Cir. 1994) (en banc) (same), *Temkin v. Fre-*

Court's analysis of those standards in *Lewis* and its ultimate decision to adopt the "shocks the conscience" standard. The second part explores the outcomes of pursuit cases in the federal appellate courts after *Lewis*.

1. *Lewis*: Defining Conduct That Shocks the Conscience

The Supreme Court announced the standard for substantive due process violations in the context of police pursuits in *Lewis*: "[H]igh-speed chases with no intent to harm suspects physically or to worsen their legal plight do not give rise to liability under the Fourteenth Amendment, redressible by an action under § 1983."⁷⁶ In that case, a police officer was at the scene of a fight when he noticed a speeding motorcycle.⁷⁷ The officer initiated pursuit when the eighteen-year-old motorcyclist ignored his attempts to stop him for speeding.⁷⁸ The chase lasted seventy-five seconds through a residential neighborhood at speeds of up to 100 miles per hour with the officer following at a distance of about 100 feet.⁷⁹ The pursuit ended when the motorcycle tipped over as the driver attempted a sharp turn, knocking off both himself and his sixteen-year-old passenger.⁸⁰ The pursuing officer skidded into the passenger, throwing him seventy feet and causing fatal injuries.⁸¹

The passenger's parents sued the police officer, the county, and the police department under § 1983, alleging that the officer deprived the passenger of his Fourteenth Amendment right to substantive due process.⁸² The district court granted summary judgment to all three defendants, but the United States Court of Appeals for the Ninth Circuit reversed and remanded for trial.⁸³ The Ninth Circuit held that because the officer violated the police department's policy on pursuits, the appropriate standard for liability was whether the officer's conduct exhibited deliberate indifference to life.⁸⁴ The Supreme Court granted certiorari to settle a conflict among federal appellate courts over the proper standard of liability for police officers charged with substantive due process violations in pursuit cases.⁸⁵

In analyzing the substantive due process claim, the Court stated

derick County Comm'rs, 945 F.2d 716, 720 (4th Cir. 1991) (same), *and* Checki v. Webb, 785 F.2d 534, 538 (5th Cir. 1986) (same).

76. *Lewis*, 523 U.S. at 854.

77. *Id.* at 836. The motorcycle carried a driver and a passenger, neither of whom were involved in the fight that initiated the police call. *Id.*

78. *Id.* at 836-37.

79. *Id.* at 837.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* at 837-39.

84. *Id.* at 838.

85. *Id.* at 839; *see supra* note 75.

that it has “emphasized time and again that ‘[t]he touchstone of due process is protection of the individual against arbitrary action of government.’”⁸⁶ The Due Process Clause protects the individual from governmental denials of procedural fairness as well as from governmental abuses of power.⁸⁷ In the context of police action, “only the most egregious official conduct can be said to be ‘arbitrary in the constitutional sense.’”⁸⁸

To determine the appropriate standard for governmental abuse of power in the context of police pursuits, the Court looked to the standard utilized in *Rochin v. California*:⁸⁹ police action violates due process when it “shocks the conscience.”⁹⁰ In *Rochin*, three police officers forcibly entered Antonio Rochin’s home based upon information that he was selling narcotics.⁹¹ A struggle ensued in which the officers attempted to extract capsules that they had seen Rochin put in his mouth.⁹² When that action proved unsuccessful, they arrested him and took him to a hospital where they directed a physician to pump Rochin’s stomach against his will.⁹³ This governmental conduct to obtain evidence “shocked the conscience,” and the Court held that Rochin’s subsequent conviction based upon such evidence violated due process.⁹⁴

The *Lewis* Court interpreted this language as presenting a threshold question in due process challenges to executive action; that is, “whether the behavior of the governmental officer is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience.”⁹⁵ As a result of judicial reluctance to expand due process jurisprudence by imposing liability whenever a governmental official causes harm, the Court analyzes governmental action that “shocks the conscience” on a culpability spectrum of tort liability.⁹⁶ At one end of the spectrum is negligently inflicted harm that does not violate due process because there is no constitutional guarantee that government officials act with due care.⁹⁷

Governmental action at the opposite end of the spectrum—

86. *County of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998) (quoting *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974)) (alteration in original).

87. *Id.* at 845-46.

88. *Id.* at 846 (quoting *Collins v. City of Harker Heights*, 509 U.S. 115, 129 (1992)).

89. 342 U.S. 165 (1952).

90. *Id.* at 172.

91. *Id.* at 166.

92. *Id.*

93. *Id.*

94. *Id.* at 172, 174.

95. *County of Sacramento v. Lewis*, 523 U.S. 833, 847 n.8 (1998).

96. *Id.* at 848. The Supreme Court noted that “executive action challenges raise a particular need to preserve the constitutional proportions of constitutional claims, lest the Constitution be demoted to what we have called a font of tort law.” *Id.* at 847 n.8.

97. *Id.* at 848-49; see also *Daniels v. Williams*, 474 U.S. 327, 332 (1986) (“To hold that injury caused by such conduct is a deprivation within the meaning of the Fourteenth Amendment would trivialize the centuries-old principle of due process of law.”).

“conduct intended to injure in some way unjustifiable by any government interest”—is most likely to constitute a substantive due process violation actionable under § 1983.⁹⁸ There is, however, also a middle range of culpability in which conduct that is less than intentional but more than negligent may “shock the conscience.”⁹⁹ For example, prison officials’ deliberate indifference to prisoners’ serious medical needs is actionable under § 1983 in an Eighth Amendment context.¹⁰⁰ Similarly, the deliberate indifference standard also applies to the substantive due process claims of pretrial detainees injured during the course of arrest.¹⁰¹ The rationale for applying the standard in those situations is that the State has taken those persons into its custody and is thus responsible for their safety and welfare.¹⁰² Deliberate indifference is also the measure of culpability applied to municipalities when the failure to train an employee causes unconstitutional harm.¹⁰³

The *Lewis* Court considered these contexts in which deliberate indifference is the proper standard for analyzing official conduct that “shocks the conscience.” The Court stated that this standard is only appropriate when actual deliberation is possible and noted that police officers often find themselves in situations requiring split-second decisions.¹⁰⁴ The circumstances involved in quelling prison riots, for example, necessitate a much higher standard of culpability—intent to harm—before finding prison officials liable for their use of force.¹⁰⁵ The Court analogized prison riots to high-speed pursuits in which officers must make split-second decisions while balancing law enforcement needs and public safety.¹⁰⁶

Accordingly, the Court held that “only a purpose to cause harm unrelated to the legitimate object of arrest will satisfy the element of arbitrary conduct shocking to the conscience, necessary for a due process violation.”¹⁰⁷ The police officer in *Lewis* did not intend to injure the

98. *Lewis*, 523 U.S. at 849.

99. *Id.*

100. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). The Eighth Amendment’s proscription against cruel and unusual punishment also prohibits “the ‘unnecessary and wanton infliction of pain.’” *Id.* (internal citation omitted). Prison officials’ deliberate indifference to prisoners’ serious injuries or illnesses constitutes such conduct. *Id.* at 105.

101. *City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 243-44 (1983).

102. *DeShaney v. Winnebago County Dep’t of Soc. Servs.*, 489 U.S. 189, 199-200 (1989).

103. *County of Sacramento v. Lewis*, 523 U.S. 833, 850 n.10 (1998); *see also supra* Part III.A.

104. *Id.* at 851-52. “[A] deliberate indifference standard does not adequately capture the importance of . . . competing obligations, or convey the appropriate hesitancy to critique in hindsight decisions necessarily made in haste, under pressure, and frequently without the luxury of second chance.” *Id.* (quoting *Whitley v. Albers*, 475 U.S. 312, 320 (1986)).

105. *Id.* at 852-53; *Whitley*, 475 U.S. at 320-21.

106. *Lewis*, 523 U.S. at 853. “[W]hen unforeseen circumstances demand an officer’s instant judgment, even precipitate recklessness fails to inch close enough to harmful purpose to spark the shock that implicates ‘the large concerns of the governors and the governed.’” *Id.* (quoting *Daniels v. Williams*, 474 U.S. 327, 332 (1986)).

107. *Id.* at 836.

fleeing suspect, thus his conduct did not “shock the conscience.”¹⁰⁸ In a footnote, however, the Court indicated that a person might have a § 1983 claim for deprivation of substantive due process in the pursuit context when officers intentionally misuse their police vehicles.¹⁰⁹

2. Aftermath of *Lewis*

Following *Lewis*, courts facing pursuit-related § 1983 claims of substantive due process violations have applied the intent-to-harm standard indiscriminately. The courts have extended the standard to various situations involving police vehicles and have made it nearly impossible for plaintiffs severely injured or killed in high-speed pursuits to prevail. A survey of subsequent cases is informative to show the disagreements among appellate panels in determining the proper application of the “shocks the conscience” standard.

Exactly one year after *Lewis* in *Onossian v. Block*,¹¹⁰ the Ninth Circuit confronted the question whether the intent-to-harm standard is confined to suspects harmed during high-speed pursuits or whether it applies to innocent bystanders as well.¹¹¹ The court rejected a narrow interpretation of *Lewis* that would confine its applicability to situations involving pursued suspects, stating that “if a police officer is justified in giving chase, that justification insulates the officer from constitutional attack, irrespective of who might be harmed or killed as a consequence of the chase.”¹¹² The court focused on the fleeing driver’s culpability in the situation—the driver’s behavior endangered the public, and the police responded by attempting to remove him from the streets.¹¹³

Judicial reluctance to second-guess police officers’ decisions in pursuit situations is further exhibited in limitations placed upon what official conduct evinces intent to harm.¹¹⁴ For example, violations of police department regulations regarding pursuits might be probative of con-

108. *Id.* at 855.

109. *Id.* at 854 n.13 (citing *Checki v. Webb*, 785 F.2d 534, 538 (5th Cir. 1986)). In *Checki*, police officers pursued a vehicle at high speeds for twenty miles prior to activating their lights and siren in an attempt to pull over the driver. *Checki*, 785 F.2d at 535. The driver did not know that his pursuers were police and did not stop until he reached a roadblock that the police had erected about thirty-one miles from the point at which the pursuit began. *Id.* at 535-36. A question of fact for the jury existed as to whether the police officers intentionally misused their vehicle with malice in a manner that “amounted to an abuse of official power that shocks the conscience.” *Id.* at 538.

110. 175 F.3d 1169 (9th Cir. 1999). In *Onossian*, police officers initiated pursuit when a driver who was speeding and weaving in and out of traffic failed to stop. *Id.* at 1170. The pursuit lasted about 1 minute, officers’ speeds did not exceed 45 miles per hour, and they followed at a distance of about 100 yards. *Id.* In addition, the officers used their lights and sirens while conducting the chase. *Id.* The chase ended when the fleeing driver crashed into an innocent motorist’s vehicle, severely injuring its occupants. *Id.* at 1170-71. The innocent motorist and his passengers sued the police officers and county officials. *Id.* at 1171.

111. *Id.*

112. *Id.*

113. *Id.* at 1172. The officers did not violate the innocent parties’ substantive due process rights because their actions did not “shock the conscience” by evincing intent to harm. *Id.*

114. *See Davis v. Township of Hillside*, 190 F.3d 167, 171 (3d Cir. 1999).

scious disregard for public safety or recklessness but do not meet the *Lewis* standard.¹¹⁵ Furthermore, police officers' deliberate ramming of a fleeing suspect's vehicle to terminate a pursuit does not show intent to harm.¹¹⁶ Such physical contact between fleeing and pursuing vehicles is foreseeable during high-speed pursuits, particularly at the conclusion.¹¹⁷ For liability to attach, official conduct must be "intended to injure in some way *unjustifiable by any government interest*."¹¹⁸

Not all judges, however, are comfortable with such limitations. In a concurring opinion in *Davis v. Township of Hillside*,¹¹⁹ one judge expressed concern with unjustifiably extending *Lewis*.¹²⁰ If police ram a fleeing driver's vehicle to injure or terrorize the driver, liability could still attach.¹²¹ Intent to harm depends upon the totality of the circumstances, and violations of department regulations as well as conflicting testimonies regarding the facts of a pursuit are probative evidence of intent.¹²² There should not be a "high-speed-pursuit" exception to the fundamental obligation of law enforcement officials to respect 'certain decencies of civilized conduct' even when carrying out their official duties."¹²³

Judicial struggles with applying the *Lewis* standard became evident in *Feist v. Simonson*¹²⁴ in which the United States Court of Appeals for the Eighth Circuit found the deliberate indifference standard appropriate in pursuit situations in which police officers have time to deliberate.¹²⁵ The court stated that each case is fact-specific, and courts must

115. *Id.* at 170; *see also* *White v. Polk County*, 207 Fed. Appx. 977, 978-79 (11th Cir. 2006) (holding that a 15-mile chase at speeds of over 100 miles an hour without lights or siren engaged did not "shock the conscience"). In *Davis*, police officers initiated pursuit when a suspicious vehicle they were attempting to investigate sped away. *Davis*, 190 F.3d at 169. Two patrol cars pursued the vehicle with their lights on but without sirens at speeds of up to seventy miles per hour and as close as one car length behind. *Id.* The pursuit ended when one patrol car struck the fleeing driver's vehicle. *Id.* This action caused the driver to hit his head, rendering him unconscious, and his vehicle spun out of control. *Id.* The fleeing driver's car crashed into two innocent motorists' vehicles, one of which hit a pedestrian and caused severe injuries. *Id.* The pedestrian sued the Township, the police officers, and the owners of the other vehicles involved in the collision. *Id.* The officers did not intend to cause harm, so their conduct did not "shock the conscience" to establish a constitutional violation on which to hold the officers and the Township liable. *Id.* at 171.

116. *Id.*

117. *Id.*

118. *Id.* (internal citation omitted).

119. 190 F.3d 167 (3d Cir. 1999).

120. *Id.* at 171 (McKee, J., concurring).

121. *Id.* at 172-73; *see also* *Checki v. Webb*, 785 F.2d 534, 538 (5th Cir. 1986). *Lewis* does not shield police officers from liability if, in the course of effectuating an arrest, they ram a fleeing driver "to 'teach him a lesson' or to 'get even' for subjecting them to the dangers of such a chase." *Davis*, 190 F.3d at 173 (McKee, J., concurring).

122. *Id.* at 174-75. The police officers in *Davis* denied any involvement in the accident that caused the plaintiffs' injuries despite eye witness accounts to the contrary. *Id.* at 175.

123. *Id.* at 173 (internal citation omitted).

124. 222 F.3d 455 (8th Cir. 2000).

125. *Id.* at 462-63. The police officer in *Feist* initiated pursuit of a vehicle that matched the description of a stolen vehicle. *Id.* at 459. The pursuit lasted over 6 minutes at speeds of over 100 miles per hour and covered more than 6 miles, over a mile of which consisted of wrong-way travel down a major interstate. *Id.* at 459-60. The pursuit ended when the fleeing driver crashed into an innocent

analyze the circumstances to determine whether police officers had time to fully consider the consequences of their conduct.¹²⁶ Police officers must continually balance the law-enforcement purposes of high-speed pursuits with the threat to public safety; as time progresses, officers have time to deliberate and assess such considerations.¹²⁷ The deliberate indifference standard is thus proper for cases involving extended pursuits.¹²⁸

Less than a year later, however, the Eighth Circuit overruled *Feist* in *Helseth v. Burch*,¹²⁹ holding that the intent-to-harm standard applies to all § 1983 claims of substantive due process deprivation resulting from high-speed police pursuits.¹³⁰ The court criticized the *Feist* decision for its “fact-intensive, hindsight-oriented approach.”¹³¹ In dissent, one judge argued that *Lewis* did not create a mechanical rule; rather, it required an analysis of the totality of the circumstances in each case, and the *Feist* court did exactly that.¹³² Another dissenter suggested that “*Lewis* rests upon the premise that trained officers are unable to deliberate during the course of a high speed pursuit, no matter its dura-

motorist who died at the scene; the fleeing driver and his passenger were severely injured. *Id.* at 460. Although the police officer who initiated the pursuit followed department protocol, activating lights and siren and contacting dispatch, he also had a documented history of initiating high-speed chases, none of which he terminated voluntarily. *Id.* at 459-60. The innocent motorist’s family sued the police officer. *Id.* at 458. The Eighth Circuit held that the officer was not entitled to qualified immunity because he was deliberately indifferent to the innocent motorist’s substantive due process rights. *Id.* at 465.

126. *Id.* at 463.

127. *Id.* at 464.

128. *Id.*

129. 258 F.3d 867 (8th Cir. 2001).

130. *Id.* at 871. In *Helseth*, a police officer initiated pursuit when a driver sped past him at 111 miles per hour. *Id.* at 869. The officer notified the police dispatcher and engaged his lights and siren. *Id.* A second police officer took over the lead after the chase continued for several miles, and the fleeing driver ran multiple stop signs and red lights at speeds up to eighty miles per hour. *Id.* The lead officer attempted three unsuccessful Pursuit Intervention Tactics (PIT) maneuvers—“in which the officer drives alongside the rear of the fleeing vehicle, turns, and hits the vehicle’s rear end”—to stop the fleeing driver. *Id.* The chase continued for several more minutes, including wrong-way travel on a highway at speeds up to 100 miles per hour and the addition of a third pursuing officer. *Id.* The pursuit ended in a suburb when the fleeing driver crashed into a truck after running a red light. *Id.* The accident left the innocent motorist a quadriplegic, killed his passenger, and seriously injured the speeding driver’s three juvenile passengers. *Id.* The driver attempting to evade police was intoxicated. *Id.* The innocent motorist sued the police officer. *Id.* The officer “had no more intent to harm than that inherent in the high-speed pursuit of any suspected offender,” so his conduct did not “shock the conscience” to establish a substantive due process violation. *Id.* at 872.

131. *Id.* at 871 n.2. Such an approach

eviscerates the holding of *Lewis*. . . and gives too little recognition to the Court’s other bases for that holding—its historical reluctance “to expand the concept of substantive due process,” its explicit reliance on [a case that] adopted the intent-to-harm standard for a two-hour prison riot, its doubt whether “it makes sense to speak of indifference as deliberate in the case [of a] sudden pursuit,” its recognition that police officers confronting high-speed lawlessness are “subject to countervailing [law] enforcement considerations,” its concern that any standard less than intent-to-harm “might cause suspects to flee more often, increasing accidents of the kind which occurred here,” and the belief of at least some Justices that the question of police officer liability for reckless driving during high-speed pursuits should be decided by the elected branches of government.

Id. at 871 (internal citations omitted).

132. *Id.* at 875 (McMillian, J., dissenting).

tion.”¹³³ He also expressed frustration with the inability to assess whether deliberate indifference would be a more appropriate standard for any given case when police officers are trained to and do deliberate in most pursuits.¹³⁴

Analysis of intent to “worsen [a fleeing suspect’s] legal plight”¹³⁵ has also proven difficult if not nearly impossible. The Supreme Court did not explain the meaning or scope of the phrase, but circuit courts have refused to interpret it broadly.¹³⁶ The phrase applies narrowly to situations in which police officers’ motive for pursuit involves reasons other than legitimate law enforcement purposes.¹³⁷

In *Terrell v. Larson*,¹³⁸ the Eighth Circuit extended the *Lewis* intent-to-harm standard to situations involving police officers’ high-speed driving when responding to emergency calls.¹³⁹ The rationale for applying the standard in such cases is that it applies to officers’ split-second decisions, so the issue turns on the officers’ subjective belief that they are responding to an emergency situation.¹⁴⁰ In dissent, one judge argued that the majority’s decision expanded “*Lewis*’s high-speed pursuit rule from its intended purpose of protecting officers forced to make split-second decisions in the *field* to a per se rule that now shields officers even after they have had an actual opportunity to deliberate at the *police station*.”¹⁴¹ *Lewis* requires analysis of the totality of the circumstances to determine whether police officers had time to deliberate.¹⁴² When actual deliberation is possible, “*conduct that is deliberately indif-*

133. *Id.* (Bye, J., dissenting).

134. *Id.* at 876. Officers are trained behaviorally and tactically to process rapidly-evolving events in a deliberate manner. *Id.* at 875 (“*Lewis* suggests that we can’t expect officers to think while they act, a proposition that might offend every well-trained officer in this country.”).

135. *County of Sacramento v. Lewis*, 523 U.S. 833, 854 (1999).

136. *See Slusarchuk v. Hoff*, 346 F.3d 1178, 1183 (8th Cir. 2003) (stating that “every police pursuit is intended to ‘worsen [the] legal plight’ of the suspect by arresting him”) (alteration in original). In *Slusarchuk*, police officers became suspicious when they saw a vehicle lingering at an intersection. *Id.* at 1180. They shined a light into the car, and one of the officers recognized the driver as someone who had “an outstanding probable cause ‘pickup.’” *Id.* They followed him briefly then activated their lights. *Id.* The driver initially acted as though he was going to pull over but then ran several stop signs and increased his speed to sixty miles per hour; at this point, the officers engaged their siren. *Id.* at 1180-81. The pursuit ended when the fleeing driver ran another stop sign and crashed into an innocent motorist’s vehicle at about seventy miles per hour. *Id.* at 1181. The accident rendered the innocent motorist a paraplegic and killed his passenger. *Id.* The innocent motorist and his passenger’s family sued the police officers. *Id.* Because the officers conducted the pursuit to arrest the driver, a legitimate law enforcement objective, they were entitled to qualified immunity. *Id.* at 1183.

137. *Id.*; *see, e.g., Checki v. Webb*, 785 F.2d 534, 535-38 (5th Cir. 1986).

138. 396 F.3d 975 (8th Cir. 2005).

139. *Id.* at 979; *see also Carter v. Simpson*, 328 F.3d 948, 952 (7th Cir. 2003). In *Terrell*, police officers sped to the scene of a domestic disturbance call with lights and siren engaged despite repeated dispatches to cancel. *Terrell*, 396 F.3d at 977. They proceeded through a red light at high speed and crashed into another vehicle, killing the driver. *Id.* The driver’s heirs sued the police officers. *Id.* Because the officers did not intend to harm the driver, they did not violate her substantive due process rights. *Id.* at 980-81.

140. *See Terrell*, 396 F.3d at 980.

141. *Id.* at 981 (Lay, J., dissenting).

142. *Id.* at 982.

ferent may shock the conscience.”¹⁴³ Another dissenter feared that the decision further restricted innocent victims’ ability to recover when police officers’ driving causes harm.¹⁴⁴

Most recently, the Ninth Circuit declined to distinguish between emergency and non-emergency situations in which police officers conduct high-speed pursuits.¹⁴⁵ The court held that the *Lewis* intent-to-harm standard applies to all pursuits, noting that “[h]igh-speed police chases, by their very nature, do not give the officers involved adequate time to deliberate in either deciding to join the chase or how to drive while in pursuit of the fleeing suspect.”¹⁴⁶ One district court has even applied the standard to an officer’s high-speed driving in response to a non-emergency call.¹⁴⁷

C. Excessive Force and § 1983

Persons injured during police pursuits have also asserted that the officers violated their Fourth Amendment right to freedom from unreasonable seizure.¹⁴⁸ In the landmark decision of *Tennessee v. Garner*,¹⁴⁹ the Supreme Court determined that police officers’ use of deadly force to apprehend suspects constitutes a seizure within the meaning of the Fourth Amendment and is thus subject to its reasonableness requirement.¹⁵⁰ *Garner* established the rule that officers may use deadly force to prevent a suspected felon’s escape only when there is “probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.”¹⁵¹ Courts analyze § 1983 claims

143. *Id.*

144. *See id.* at 987 (Heaney, J., dissenting).

145. *Bingue v. Prunchak*, 512 F.3d 1169, 1177 (9th Cir. 2008). In *Bingue*, a police officer attempted to join a police chase in progress on a major interstate when he heard on his radio that police were pursuing the driver of a stolen vehicle. *Id.* at 1171. The officer thought he was close enough to assist, so he activated his emergency lights and entered the interstate. *Id.* Driving at a speed of about 100 miles per hour in an attempt to catch up to the chase, the officer lost control of his vehicle while rounding a curve and broadsided an innocent motorist’s vehicle. *Id.* The motorist sued. *Id.*

146. *Id.* at 1177. Because the officer’s conduct did not evince intent to harm, he was entitled to qualified immunity. *Id.* at 1177-78.

147. *See Leddy v. Township of Lower Merion*, 114 F. Supp. 2d 372, 376 (E.D. Penn. 2000). In *Leddy*, a police officer crashed into another motorist while responding to a dispatch to check on a suspicious vehicle that was parked unoccupied. *Id.* at 374. The accident occurred when the officer sped through a 25 mile per hour zone at over 50 miles per hour and struck a motorist who had just turned onto the street from a parking lot. *Id.* The officer’s “high rate of speed on a crowded roadway may well have been negligent and conceivably reckless, but [could not] be characterized as constitutionally conscience shocking.” *Id.* at 376.

148. O’Connor & Norse, *supra* note 48, at 546. The Fourth Amendment provides in full:

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 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.

U.S. CONST. amend. IV.

149. 471 U.S. 1 (1985).

150. *Id.* at 7.

151. *Id.* at 3. In *Garner*, two police officers responded to a call regarding a break-in at a home. *Id.* One of the officers went behind the house where he heard the back door slam and saw the sus-

of excessive use of force by conducting an objective inquiry: “[T]he question is whether the officers’ actions are ‘objectively reasonable’ in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.”¹⁵²

The Supreme Court first addressed a § 1983 claim of excessive use of force in the context of police pursuits in *Brower v. County of Inyo*.¹⁵³ The Court noted that a Fourth Amendment seizure occurs only when police officers terminate a person’s “freedom of movement *through means intentionally applied*.”¹⁵⁴ For example, a seizure occurs when officers deliberately sideswipe a fleeing vehicle, causing it to crash.¹⁵⁵ No seizure occurs, however, when officers attempting to stop a fleeing suspect actually do stop the suspect by accidentally crashing into him.¹⁵⁶ Thus, a plaintiff alleging a Fourth Amendment violation under § 1983 in this context must show that a seizure occurred when police forcibly stopped the vehicle and, in addition, that police intended the contact.¹⁵⁷

The Supreme Court most recently explored the applicability of Fourth Amendment reasonableness to police pursuits in *Scott v. Harris*.¹⁵⁸ In *Scott*, a police officer terminated a pursuit by deliberately

pect running across the backyard. *Id.* The officer shined his flashlight on the fleeing suspect and saw a young man who appeared unarmed. *Id.* The officer yelled at him to stop, but the suspect started climbing a fence to escape. *Id.* at 4. The officer shot the suspect in the back of his head. *Id.* The suspect, a fifteen-year-old boy, died at the hospital. *Id.* at 3 n.2, 4. He had stolen a purse and ten dollars from the house. *Id.* at 4. The burglary did not justify the officer’s use of deadly force against the unarmed suspect. *Id.* at 21.

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

153. 489 U.S. 593 (1989). In *Brower*, a suspect driving a stolen vehicle died when he crashed into a roadblock set up by the police in an attempt to end a high-speed pursuit that covered about twenty miles. *Id.* at 594. The plaintiffs, heirs of the deceased, alleged that the police set up the roadblock by placing an eighteen-wheel semi trailer across the highway behind a curve. *Id.* The police further concealed the roadblock by leaving it in the dark and positioning a police car just ahead of it with its headlights on so that the fleeing suspect would be blinded as he approached. *Id.*

154. *Id.* at 596-97. The Court held that the accident in *Brower* constituted a seizure and remanded the case for consideration of whether such a seizure was unreasonable. *Id.* at 599-600.

155. *Id.* at 597.

156. *Id.*; *County of Sacramento v. Lewis*, 523 U.S. 833, 844 (1998).

157. *Steen v. Myers*, 486 F.3d 1017, 1022 (7th Cir. 2007). In *Steen*, a police officer saw a young man and woman sitting on a motorcycle. *Id.* at 1019. The officer had a prior history with the man; a few months earlier, the officer had arrested him at gunpoint because he was driving a vehicle similar to one associated with an armed assault. *Id.* The officer had released him upon realizing that he was not the suspected assailant. *Id.* The young man had been afraid of the officer ever since that event. *Id.* The officer suspected that the young man had a suspended license and lacked motorcycle authorization, so he checked his license plate number. *Id.* The man decided to move and parked the motorcycle at another location. *Id.* The officer followed and drove past the youths a few times and parked out of sight to await the status of the man’s license. *Id.* He acquired that information and saw the young man and woman riding past him on the motorcycle; the young man looked at the officer, turned, and sped away. *Id.* The officer engaged his lights and siren and initiated pursuit as a second officer joined. *Id.* The chase reached speeds up to 130 miles per hour and ended within 6 minutes when the motorcycle left the road and crashed. *Id.* The young man died, and his passenger suffered severe injuries. *Id.* at 1019-20. Their families sued the police officers, alleging violations of the youths’ Fourth and Fourteenth Amendment rights. *Id.* at 1020. The United States Court of Appeals for the Seventh Circuit held that no seizure occurred because there was no evidence of a collision between the officers and the fleeing driver, and the officers’ conduct did not “shock the conscience” to establish a substantive due process violation. *Id.* at 1022, 1024.

158. 127 S. Ct. 1769 (2007). The police officer in *Scott* initiated pursuit when a speeding driver failed to pull over in response to the police vehicle’s flashing lights. *Id.* at 1772-73. The chase

ramming a suspect's vehicle.¹⁵⁹ The Court found that this action constituted a seizure, so it analyzed the suspect's claim of excessive use of force under the Fourth Amendment standard of objective reasonableness.¹⁶⁰ The Court viewed the videotape from the officer's dashboard camera to aid its analysis and determined that "[a] police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death."¹⁶¹ Although the suspect only committed a minor traffic violation and did not have a prior criminal record, the Court found *Garner* distinguishable in the pursuit context because it was the suspect's flight that posed the significant risk of harm rather than his "mere being at large."¹⁶² The relevant inquiry thus requires balancing the risk of harm to the suspect against the risk of harm to the public that the officer tried to eliminate.¹⁶³

Concurring with the majority's conclusion, Justices Ginsburg and Breyer noted that the decision did not create a mechanical rule; rather, courts must look at the specific facts of each case in conducting the constitutional inquiry.¹⁶⁴ In dissent, Justice Stevens stated that the question of whether a fleeing suspect's actions warrant deadly force is best left to a jury.¹⁶⁵ He maintained that the majority's mechanical rule conflicts with the case-by-case approach to reasonableness set by *Garner* and other Fourth Amendment jurisprudence.¹⁶⁶

Innocent motorists harmed during police pursuits cannot invoke the reasonableness analysis by alleging a Fourth Amendment violation as the basis for a § 1983 claim—only the fleeing driver has standing to state such a claim.¹⁶⁷ Even when police officers intentionally seize fleeing suspects by using spike strips, any resulting accident that harms innocent bystanders does not implicate the Fourth Amendment.¹⁶⁸ In

reached speeds over eighty-five miles per hour on a two-lane road. *Id.* at 1772. The officer radioed the police department to report the pursuit and the driver's license plate number. *Id.* at 1772-73. Other officers joined the pursuit as the driver entered a mall parking lot and nearly boxed him in, but he escaped by hitting one officer's car. *Id.* at 1773. The driver left the parking lot and returned to a two-lane highway. *Id.* The officer that the driver hit took the lead position in the continuing pursuit. *Id.* He considered attempting a PIT maneuver upon receiving instruction from his supervisor to "[g]o ahead and take him out," but instead rammed the fleeing vehicle, causing it to leave the road and crash. *Id.* (internal citation omitted) (alteration in original). The fleeing driver was rendered a quadriplegic, and he sued the police officers involved in the pursuit for violating his Fourth Amendment rights through their use of excessive force. *Id.*

159. *Id.* at 1776.

160. *Id.*

161. *Id.* at 1778-79.

162. *Id.* at 1777 n.9.

163. *Id.* at 1778.

164. *Id.* at 1779 (Ginsburg, J., concurring); *id.* at 1780 (Breyer, J., concurring).

165. *Id.* at 1784 (Stevens, J., dissenting).

166. *Id.* at 1785.

167. *Slusarchuk v. Hoff*, 346 F.3d 1178, 1182 (8th Cir. 2003).

168. *Bublitz v. Cotney*, 327 F.3d 485, 489 (7th Cir. 2003). The accident in *Bublitz* occurred when

these cases, the officers intended to seize the fleeing suspect, not the innocent motorist.¹⁶⁹

IV. COURT'S DECISION

Aundrey Meals alleged that Officer King violated her husband's and child's Fourteenth Amendment substantive due process rights by causing death and severe injury during the course of a police pursuit.¹⁷⁰ She contended that the district court properly denied qualified immunity to King because King was not carrying out a discretionary function; rather, she intentionally misused her vehicle for reasons unrelated to legitimate law enforcement purposes in violation of department regulations.¹⁷¹

Officer King countered that she did not commit a constitutional violation, and that even if she did, the law was not sufficiently clear so as to inform her that her conduct might be unlawful.¹⁷² She maintained that she was entitled to qualified immunity on Meals's § 1983 claim.¹⁷³ The City's appeal centered upon the district court's denial of qualified immunity to King because if Meals could establish King's liability based upon a constitutional violation, the City might also be liable.¹⁷⁴

The Sixth Circuit considered whether King was entitled to qualified immunity, which would shield her from civil liability for performing a discretionary function as long as her conduct did not involve a constitutional or statutory violation that reasonable officers would have recognized.¹⁷⁵ The Sixth Circuit utilized a three-part test to evaluate the

an armed robber fleeing the police ran over spike strips and his car veered into an innocent motorist's vehicle, killing the motorist's wife and child. *Id.* at 487. The motorist sued the police officers involved for violating his own and his family's Fourth and Fourteenth Amendment rights. *Id.*

169. *Id.* at 489 ("The subsequent collision was instead the accidental and wholly unintended consequence of an act that *happened* to be committed by a government official." (emphasis added)). The Seventh Circuit held that the officers did not violate the innocent motorist's nor his family's Fourth or Fourteenth Amendment rights. *Id.* at 488.

170. *Meals v. City of Memphis*, 493 F.3d 720, 723 (6th Cir. 2007).

171. *Id.* at 728. Meals based this contention upon the court's decision in *Checki*. *Id.* at 728; see also *supra* text accompanying note 109. Additionally, Meals argued that the appellate court lacked jurisdiction to consider her claim against the City on interlocutory appeal. *Meals*, 493 F.3d at 726. Appellate courts can only review interlocutory appeals when a district court has denied summary judgment to government officials based upon their claims of qualified immunity. *Id.* The government officials must premise their appeals upon a failure of the evidence to establish a constitutional violation, and appellate courts may only exercise jurisdiction over those issues linked to the qualified immunity analysis. *Id.* at 727. Because establishing a constitutional violation on the part of Officer King could also establish liability for the City, the Sixth Circuit determined that it had jurisdiction over the City's interlocutory appeal. *Id.*

172. *Id.* at 728.

173. *Id.* King also asserted that the district court erroneously considered unsworn statements and unauthenticated documents in denying her motion for summary judgment. *Id.* Meals had attached a copy of the City's pursuit policy, an accident report, and four unsworn witness statements to her memorandum opposing King's motion for summary judgment. *Id.* at 725-26. The Sixth Circuit agreed with Meals that these statements and documents were properly authenticated for the district court's consideration. *Id.* at 728.

174. *Id.* at 727.

175. *Id.* at 729.

qualified immunity defense:

First we determine whether, based upon the applicable law, the facts viewed in the light most favorable to the plaintiffs show that a constitutional violation has occurred. Second, we consider whether the violation involved a clearly established constitutional right of which a reasonable person would have known. Third, we determine whether the plaintiff has offered sufficient evidence “to indicate that what the official allegedly did was objectively unreasonable in light of the clearly established constitutional rights.”¹⁷⁶

The court stated that *Lewis* clearly established that police officers could violate individuals’ substantive due process rights by causing injury during the course of pursuits.¹⁷⁷ To sustain a § 1983 claim, the officers’ conduct must “shock the conscience” by exhibiting an intent to harm.¹⁷⁸

Meals maintained that the deliberate indifference standard should apply to this case because King had time to deliberate.¹⁷⁹ The court dismissed this argument, reasoning that the *Lewis* intent-to-harm standard applies to all § 1983 claims based upon deprivation of substantive due process rights.¹⁸⁰ Because Meals did not allege that King’s acts were intentional and could not provide any evidence that demonstrated intent to harm, the facts were insufficient to show conduct that shocked the conscience.¹⁸¹

Meals contended that King’s violation of the police department’s pursuit policy raised a question of fact regarding her malice toward the fleeing driver and “intent to worsen his legal plight.”¹⁸² The court disagreed, stating that because King did not intend to harm either the fleeing driver or the innocent victims of the accident, there was no constitutional violation and thus no need to complete the additional steps of the qualified immunity analysis.¹⁸³ As such, King was entitled to qualified immunity, and there was no basis for holding the City liable absent a constitutional violation.¹⁸⁴ The Sixth Circuit concluded that “despite the tragic results stemming from Officer King’s violation of the City’s policy . . . the facts in the present case do not make out a substantive due process violation under *Lewis*.”¹⁸⁵

V. COMMENTARY

A federal appellate court recognized that “*Lewis* establishes a

176. *Id.* (quoting *Williams v. Mehra*, 186 F.3d 685, 691 (6th Cir. 1999) (en banc)).

177. *Id.*

178. *Id.* at 730.

179. *Id.* at 730 n.8.

180. *Id.*

181. *Id.* at 730.

182. *Id.*

183. *Id.*

184. *Id.* at 731.

185. *Id.*

heavy burden for a plaintiff to bear when making a § 1983 claim based on the Fourteenth Amendment.¹⁸⁶ Indeed, *none* of the cases examined herein provided an innocent bystander with a successful federal claim against a police officer or a municipality.¹⁸⁷ If the purpose of § 1983 is to secure the protection of federal rights, and the “fundamental interest in [one’s] own life need not be elaborated upon,”¹⁸⁸ innocent persons harmed during police pursuits should be able to maintain successful claims of constitutional violations, particularly when police officers egregiously violate department regulations during extended pursuits.

This commentary first explores the limitations of the “shocks the conscience” standard as a method of analyzing § 1983 claims involving substantive due process violations. It considers the Supreme Court’s adoption and definition of the standard in the context of high-speed pursuits and argues that the *Lewis* intent-to-harm standard is not a mechanical rule. This commentary examines the suitability of the deliberate indifference standard in finding conduct that “shocks the conscience” and suggests that *Lewis* did not foreclose its proper application in certain situations. Courts must consider the totality of the circumstances in each pursuit case to determine which standard is appropriate. Factors such as egregious violations of police department regulations and lengthy chases that provide opportunities for deliberation justify applying the deliberate indifference standard.

A. The Limitations of the “Shocks the Conscience” Standard As the Test for Liability in the Context of Police Pursuits

Prior to *Lewis*, the case most cited for applying the “shocks the conscience” standard to pursuit-related § 1983 claims of substantive due process violations was *Fagan v. City of Vineland*.¹⁸⁹ Although the United States Court of Appeals for the Third Circuit had routinely used

186. *Steen v. Myers*, 486 F.3d 1017, 1022 (7th Cir. 2007).

187. *See supra* Part III.B-C. The one exception to this statement is *Feist v. Simonson*, 222 F.3d 455 (8th Cir. 2000), overruled one year later by *Helseth v. Burch*, 258 F.3d 867 (8th Cir. 2001). *See supra* notes 124-134 and accompanying text.

188. *Tennessee v. Garner*, 471 U.S. 1, 9 (1985).

189. 22 F.3d 1296 (3d Cir. 1994) (en banc); Geoffrey P. Alpert et al., *The Constitutional Implications of High-Speed Police Pursuits Under a Substantive Due Process Analysis: Homeward Through the Haze*, 27 U. MEM. L. REV. 599, 639 (1997). In *Fagan*, a police officer initiated pursuit when he saw a passenger waving his arms while standing up in a vehicle through an open T-top roof. *Fagan*, 22 F.3d at 1299. The officer engaged his lights as the driver led him through various winding turns within a residential neighborhood at speeds of thirty-five to forty miles an hour. *Id.* After the driver ran several stop signs during the course of this pursuit, the officer contacted police headquarters to inform them of the chase. *Id.* The officer did not engage his siren until the driver ran several additional stop signs and turned off the vehicle’s headlights. *Id.* at 1299-1300. At least three additional officers joined the pursuit once the fleeing driver turned onto a four-lane road. *Id.* at 1300. The driver increased his speed up to eighty miles per hour and ran several red lights as officers pursued him at speeds up to sixty miles per hour. *Id.* The pursuit ended when the driver broadsided a truck; the truck’s occupants and one of the fleeing vehicle’s passengers died in the accident, while two other occupants in the fleeing vehicle suffered debilitating injuries, and its driver sustained only minor injuries. *Id.*

the reckless indifference standard to analyze such claims, it determined in *Fagan* that the Supreme Court's decision in *Collins v. City of Harker Heights*¹⁹⁰ mandated the "shocks the conscience" standard.¹⁹¹ A vigorous dissent by Judge Cowen provides a thorough analysis of the "shocks the conscience" language and its applicability to substantive due process analysis since its genesis in *Rochin*.¹⁹² In asserting that the "shocks the conscience" standard is incompatible with the Supreme Court's substantive due process jurisprudence, his analysis is particularly noteworthy since the *Lewis* Court followed nearly the same line of precedential reasoning to reach the opposite result four years later.¹⁹³

Judge Cowen argued that the Supreme Court has never required the "shocks the conscience" standard for § 1983 actions.¹⁹⁴ The "shocks the conscience" language originated in *Rochin*, a criminal case involving the exclusion of evidence decided before the Fourth Amendment applied to the states.¹⁹⁵ The *Rochin* Court turned to the Due Process Clause of the Fourteenth Amendment because it did not want to overrule precedent that declined to extend the Fourth Amendment exclusionary rule to state criminal cases.¹⁹⁶ The Supreme Court itself criticized this decision just one year later in a plurality opinion that affirmed a state conviction obtained in violation of the Fourth Amendment.¹⁹⁷ Several Justices also harshly criticized the "shocks the conscience" standard.¹⁹⁸ The *Rochin* standard became irrelevant in evidence-exclusion cases when the Supreme Court decided *Mapp v. Ohio*,¹⁹⁹ which held that evidence obtained in violation of the Fourth Amendment's reasonableness requirement is inadmissible in state criminal proceedings.²⁰⁰

Outside the evidence-exclusion context, the applicability of the "shocks the conscience" standard to civil cases involving § 1983 actions

190. 503 U.S. 115 (1992).

191. *Fagan*, 22 F.3d at 1303. The police officers' conduct in *Fagan* did not "shock the conscience" so as to establish a substantive due process violation. *Id.* at 1309.

192. *Id.* at 1309-28 (Cowen, J., dissenting).

193. Compare *id.* (analyzing substantive due process jurisprudence and refuting the "shocks the conscience" standard in the context of police pursuits), with *County of Sacramento v. Lewis*, 523 U.S. 833, 845-54 (1998) (analyzing substantive due process jurisprudence and adopting the "shocks the conscience" standard).

194. *Fagan*, 22 F.3d at 1311 (Cowen, J., dissenting).

195. *Id.*; see also *supra* notes 89-94 and accompanying text.

196. *Fagan*, 22 F.3d at 1317 (Cowen, J., dissenting). The Supreme Court announced the exclusionary rule in *Weeks v. United States*, 232 U.S. 383 (1914), holding that the Fourth Amendment bars the use of evidence obtained by illegal search and seizure in federal prosecutions. *Id.* at 398; *Fagan*, 22 F.3d at 1317 (Cowen, J., dissenting). The Supreme Court later refused to extend the rule to state criminal proceedings in *Wolf v. Colorado*, 338 U.S. 25 (1949). *Id.* at 33; *Fagan*, 22 F.3d at 1317 (Cowen, J., dissenting).

197. *Irvine v. California*, 347 U.S. 128, 133 (1953); *Fagan*, 22 F.3d at 1317 (Cowen, J., dissenting).

198. *Fagan*, 22 F.3d at 1317 (Cowen, J., dissenting).

199. 367 U.S. 643 (1961).

200. *Id.* at 655. Justice Black, concurring in *Mapp*, stated that "[o]nly one thing emerged with complete clarity from the *Irvine* case—that is that seven Justices rejected the 'shock-the-conscience' constitutional standard." *Id.* at 666 (Black, J., concurring).

for police misconduct is questionable.²⁰¹ In *Johnson v. Glick*,²⁰² the Second Circuit relied on *Rochin* to develop a four-factor test for analyzing § 1983 claims involving police officers' use of excessive force.²⁰³ Lower federal courts used the test indiscriminately in such cases until the Supreme Court held that all excessive force claims must be analyzed under the Fourth Amendment's reasonableness standard.²⁰⁴ Judge Cowen noted that "the Supreme Court's decisions in both criminal and civil cases have eliminated the factual basis for the application of the *Rochin* rule: police misconduct in a search and seizure situation."²⁰⁵

The *Lewis* Court sidestepped this issue by determining that the Fourth Amendment did not apply to the § 1983 claim involved in the case because substantive due process analysis was more appropriate.²⁰⁶ Characterizing the issue in that manner allowed the Court to turn to the *Rochin* standard.²⁰⁷ In addition, the decisions in *Fagan* and *Lewis* both cited *Collins* as mandating the "shocks the conscience" standard for evaluating whether executive action violates substantive due process,²⁰⁸ but Judge Cowen argued that such reliance is flawed.²⁰⁹ The *Collins* Court used the phrase only once to characterize the plaintiff's contention,²¹⁰ and it referred to "conscience-shocking" only once conjunctively with "arbitrary" to indicate that conduct that meets either term is sufficient to state a § 1983 claim.²¹¹ If the Court's opinion could be read to

201. *Fagan*, 22 F.3d at 1318 (Cowen, J., dissenting).

202. 481 F.2d 1028 (2d Cir. 1973).

203. *Id.* at 1033. In *Johnson*, a pre-trial detainee asserted a § 1983 claim against a correctional officer for brutality. *Id.* at 1029-30. In analyzing the claim, the Second Circuit stated:

In determining whether the constitutional line has been crossed, a court must look to such factors as the need for the application of force, the relationship between the need and the amount of force that was used, the extent of injury inflicted, and whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.

Id. at 1033.

204. *Graham v. Connor*, 490 U.S. 386, 393-95 (1989).

205. *Fagan*, 22 F.3d at 1318 (Cowen, J., dissenting).

206. *County of Sacramento v. Lewis*, 523 U.S. 833, 844 (1998).

207. *Id.* at 846 ("To this end, for half a century now we have spoken of the cognizable level of executive abuse of power as that which shocks the conscience.")

208. *Fagan*, 22 F.3d at 1303 (majority opinion); *Lewis*, 523 U.S. at 847.

209. *Fagan*, 22 F.3d at 1311 (Cowen, J., dissenting). In *Collins*, an employee in the City's sanitation department died of asphyxia after he entered a manhole to fix a sewer line. *Collins v. City of Harker Heights*, 503 U.S. 115, 117 (1992). His widow sued the City alleging that it violated her husband's substantive due process rights by failing to train employees on the dangers of the work and by not providing safety equipment and safety warnings. *Id.* at 117-18. The Supreme Court held that the Fourteenth Amendment does not obligate municipalities to provide minimal levels of safety in the workplace. *Id.* at 130.

210. *Fagan*, 22 F.3d at 1312 (Cowen, J., dissenting); *Collins*, 503 U.S. at 126. The *Collins* Court stated:

Fairly analyzed, her claim advances two theories: that the Federal Constitution imposes a duty on the city to provide its employees with minimal levels of safety and security in the workplace, or that the city's "deliberate indifference" to Collins' safety was arbitrary government action that must "shock the conscience" of federal judges.

Collins, 503 U.S. at 126.

211. *Fagan*, 22 F.3d at 1312 (Cowen, J., dissenting); *Collins*, 503 U.S. at 128 ("We also are not persuaded that the city's alleged failure to train its employees, or to warn them about known risks of harm, was an omission that can properly be characterized as arbitrary, or conscience shocking, in a

indicate any standard, that standard appears to be “arbitrariness” because the opinion used that word several more times than the “shocks the conscience” language.²¹² Furthermore, the *Collins* Court focused on the fact that municipalities have no constitutional duty to provide a safe workplace, so there was no need to establish a standard for determining when a deprivation of substantive due process rights occurs.²¹³ The conduct at issue was a mere omission rather than an affirmative act of the kind presented in pursuit cases.²¹⁴

An additional problem with the “shocks the conscience” standard is that it defies definition, and thus, it is impractical.²¹⁵ The *Fagan* court acknowledged that it entails an “amorphous and imprecise inquiry.”²¹⁶ Justice Scalia, concurring in the *Lewis* judgment, harshly criticized the majority’s revival of the standard as the method for analyzing arbitrary action.²¹⁷ Particularly disconcerting is the fact that the standard is not that which could “shock the conscience” of a jury— “[b]ecause the conscience-shocking standard is intended to limit substantive due process liability, it is an issue of law for the judge, not a question of fact for the jury.”²¹⁸

The Constitution “*prevent[s]* those hazards that involve the relationship between the governors and the governed, or that are created by exercise of government power.”²¹⁹ High-speed chases are prime examples of such hazardous governmental exercises of power,²²⁰ and the “shocks the conscience” standard serves to shield police officers from liability when they conduct those pursuits arbitrarily or recklessly.²²¹ Despite these compelling arguments that militate against the “shocks the conscience” standard, the Supreme Court adopted it to analyze pursuit-related § 1983 claims involving substantive due process.²²² As such, the *Meals* court correctly relied on *Lewis* to utilize the “shocks the conscience” standard.

constitutional sense.”).

212. *Fagan*, 22 F.3d at 1312 (Cowen, J., dissenting).

213. *Id.* at 1311-12; *Collins*, 503 U.S. at 130.

214. *Fagan*, 22 F.3d. at 1312-14 (Cowen, J., dissenting).

215. *Id.* at 1316.

216. *Id.* at 1308 (majority opinion).

217. *County of Sacramento v. Lewis*, 523 U.S. 833, 861-62 (1998) (Scalia, J., concurring). Justice Scalia pointed to precedent rejecting the “shocks the conscience” standard and stated that, “rather than ask whether the police conduct here at issue shocks my unelected conscience, I would ask whether our Nation has traditionally protected the right respondents assert.” *Id.* at 862.

218. *Terrell v. Larson*, 396 F.3d 975, 981 (8th Cir. 2005).

219. *Fagan*, 22 F.3d at 1321 (Cowen, J., dissenting).

220. *Id.* at 1322.

221. *Id.* at 1319.

222. *Lewis*, 523 U.S. at 836 (majority opinion).

B. The Lewis Standard Is Not a Mechanical Rule: The Practicality of the Deliberate Indifference Standard

The *Lewis* Court held that police conduct must “shock the conscience” by an intent to harm unrelated to legitimate law enforcement purposes in order to establish a substantive due process violation in pursuit cases.²²³ The Court also warned:

Rules of due process are not, however, subject to mechanical application in unfamiliar territory. Deliberate indifference that shocks in one environment may not be so patently egregious in another, and our concern with preserving the constitutional proportions of substantive due process demands an exact analysis of circumstances before any abuse of power is condemned as conscience shocking.²²⁴

Judge McMillian focused on that language in his dissenting opinion in *Helseth* to argue that *Lewis* does not create a mechanical rule.²²⁵ Yet, courts have consistently applied the *Lewis* standard in that fashion, effectively barring innocent bystanders from stating successful claims of constitutional violations.²²⁶

Such mechanical application is significant in light of alarming statistics regarding the number of pursuit-related fatalities.²²⁷ Therefore, the importance of developing a workable standard that will deter police officers from arbitrarily conducting pursuits has never been greater.²²⁸ Officers are well aware of the risks, and when they conduct high-speed chases with reckless indifference to public safety, they abuse their executive power.²²⁹ Reckless or deliberate indifference, “as established when the actor was aware of an obvious risk that was highly probable to lead to serious harm and proceeded in unreasonable disregard of the consequences, is precisely what arbitrariness is about.”²³⁰ The Supreme Court has repeatedly emphasized that the Due Process Clause prohibits such arbitrary exercises of governmental power.²³¹

The *Lewis* Court considered the constitutional contexts in which deliberate indifference is the appropriate standard for analyzing § 1983 claims; the most notable cases involve the Eighth Amendment.²³² The rationale for applying the standard in those cases is that the state has taken such persons into its custody and is thus responsible for their

223. *Id.*

224. *Id.* at 850.

225. *Helseth v. Burch*, 258 F.3d 867, 873-74 (8th Cir. 2001) (McMillian, J., dissenting).

226. *See supra* Part III.B.

227. *See Hill, supra* note 10, at 14; *see also supra* notes 9-13 and accompanying text.

228. *See generally* Alpert et al., *supra* note 189 (arguing that police pursuits must have constitutional restrictions).

229. *Fagan v. City of Vineland*, 22 F.3d 1296, 1322-23 (3d Cir. 1994) (en banc) (Cowen, J., dissenting).

230. *Id.* at 1325.

231. *Id.* at 1321; *County of Sacramento v. Lewis*, 523 U.S. 833, 845-46 (1998).

232. *Lewis*, 523 U.S. at 849-52; *see supra* notes 100-102 and accompanying text.

safety and welfare.²³³ There are other custodial situations, however, in which deliberate indifference does not sufficiently “shock the conscience” to establish a constitutional violation.²³⁴ For example, prison riots entail rapidly evolving circumstances in which officials must make split-second decisions while balancing the competing obligations of restoring order and preventing harm to inmates.²³⁵ Thus, prison officials may only be liable for their use of force in those circumstances if they act maliciously or sadistically with intent to harm.²³⁶

The *Lewis* Court adopted the intent-to-harm standard for police chases by comparing the pursuit situation to prison riots.²³⁷ It is understandable that the Court would accord high deference to prison officials’ decisions when attempting to quell prison riots, but in the context of police pursuits, courts address police officers’ exercise of power against free citizens whose constitutional rights are fully intact.²³⁸ Such deference to officers’ decisions is simply not appropriate when countless innocent persons are at the mercy of officers’ discretion.²³⁹ This is precisely the sort of arbitrary exercise of governmental power that the Constitution regulates.²⁴⁰

The *Lewis* Court declined to apply the deliberate indifference standard in the pursuit context based on the concern that high-speed chases require split-second decisions in rapidly evolving situations.²⁴¹ The Court explicitly stated that the deliberate indifference standard is “sensibly employed only when actual deliberation is practical.”²⁴² Police officers face a basic dilemma in pursuit situations in which they must decide whether criminal apprehension is worth the risks of danger to the public, the suspects involved, and themselves.²⁴³ It is police officers’ mission to protect and to serve their communities.²⁴⁴ They do not fulfill that mission when they endanger public safety by engaging in high-

233. *DeShaney v. Winnebago County Dep’t of Soc. Servs.*, 489 U.S. 189, 199-200 (1989); *Lewis*, 523 U.S. at 851.

234. *Lewis*, 523 U.S. at 852.

235. *Id.*

236. *Id.*

237. *Id.* at 853; *see supra* notes 105-106 and accompanying text.

238. *Cf. Whitley v. Albers*, 475 U.S. 312, 327 (1986) (eschewing substantive due process analysis for a prison inmate’s § 1983 claim that prison officials’ use of force during a riot violated his Eighth and Fourteenth Amendment rights). *Whitley* is the prison riot case from which the *Lewis* Court drew its intent-to-harm standard. *See County of Sacramento v. Lewis*, 523 U.S. 833, 852-53 (1998). The Supreme Court in *Whitley*, however, explicitly limited its holding to the Eighth Amendment prison setting. *Whitley*, 475 U.S. at 327.

239. *See Fagan v. City of Vineland*, 22 F.3d. 1296, 1323 (3d Cir. 1994) (en banc) (Cowen, J., dissenting).

240. *Id.* at 1321.

241. *Lewis*, 523 U.S. at 853.

242. *Id.* at 851.

243. GEOFFREY P. ALPERT, U.S. DEP’T OF JUSTICE, NAT’L INST. OF JUSTICE, *Police Pursuit: Policies and Training, Research in Brief*, at 1 (May 1997), available at <http://www.ncjrs.gov/pdffiles/164831.pdf>.

244. Alpert et al., *supra* note 189, at 661.

speed pursuits based upon traffic violations and nonviolent crimes.²⁴⁵

Furthermore, officers are trained to process rapidly evolving situations deliberately, and department regulations often require officers to make conscious decisions during pursuits.²⁴⁶ Whether the officers had time to deliberate and whether they complied with department regulations should be substantial components of the substantive due process analysis applied to § 1983 claims in the pursuit context. The regulations in *Meals* specifically prohibited pursuits for traffic violations, misdemeanors, or non-violent felonies.²⁴⁷ Additionally, the regulations required police officers to obtain supervisory approval before initiating pursuit and to activate lights and sirens during the chase.²⁴⁸ Officers must discontinue chases “[w]hen the speeds dangerously exceed normal traffic flow or when pedestrians or vehicular traffic necessitates unsafe maneuvering of the vehicle.”²⁴⁹ Officer King blatantly disregarded each of these policies.²⁵⁰

Law enforcement agencies design policies to assist officers with their deliberations during pursuits.²⁵¹ When officers blatantly violate those regulations, the deliberate indifference standard is sensibly employed, particularly in cases involving extended pursuits that provide officers with frequent opportunities to balance legitimate law enforcement goals against the danger to the public.²⁵² In these situations, “deliberate indifference to the rights of innocent motorists and bystanders may very well shock the conscience.”²⁵³ The Sixth Circuit should have considered the length of the pursuit in *Meals* as well as Officer King’s violation of pursuit regulations to determine whether the deliberate indifference standard would have been appropriate.

Furthermore, the deliberate indifference standard is more compatible with innocent bystanders’ § 1983 claims.²⁵⁴ The standard requires proof of deliberate indifference to bystanders’ own constitutional rights rather than requiring bystanders to prove that police officers intended to harm the fleeing suspects whose rights are not at issue.²⁵⁵ In addition, the standard has well-known parameters as opposed to the

245. *Cf. id.* (arguing that police pursuits must have constitutional restrictions).

246. *Helseth v. Burch*, 258 F.3d 867, 875-76 (8th Cir. 2001) (Bye, J., dissenting); *see also Meals v. City of Memphis*, 493 F.3d 720, 724 (2007) (“[T]he policy provided that officers involved in a pursuit must continually question whether the seriousness of the violation reasonably warrants continuation of the pursuit, and that a pursuit must be discontinued when there is a clear danger to the pursuing officers or the public.”).

247. *Meals*, 493 F.3d at 724.

248. *Id.*

249. *Id.* (quoting Joint Appendix at 661, *Meals v. City of Memphis*, 493 F.3d 720 (6th Cir. 2007)).

250. *See id.* at 723-24.

251. *See Helseth*, 258 F.3d at 876 (Bye, J., dissenting).

252. *See id.*; *County of Sacramento v. Lewis*, 523 U.S. 833, 851 (1998).

253. *Helseth*, 258 F.3d at 876 (Bye, J., dissenting).

254. *Id.* at 877.

255. *Id.*

“shocks the conscience” standard.²⁵⁶ Liability would only be imposed on police officers who are aware that their conduct creates unreasonable risks of harm yet do nothing to prevent that harm.²⁵⁷ The dangers of high-speed pursuits are obvious and are addressed in department regulations.²⁵⁸ Deliberate indifference to those regulations can serve as “a proxy for intent and should be sufficient to sustain an action for violating a person’s substantive due process rights.”²⁵⁹

Additionally, fleeing suspects apparently have more constitutional protection than innocent bystanders in police pursuit cases.²⁶⁰ As previously explored, the fleeing suspects harmed during pursuits may bring § 1983 actions for deprivation of Fourteenth Amendment substantive due process as well as for excessive force in violation of the Fourth Amendment.²⁶¹ If innocent bystanders must show police officers’ intent to harm fleeing suspects to establish a substantive due process deprivation, it makes little sense to foreclose them from claiming excessive use of force against those suspects when such force also ultimately causes the bystanders’ injuries.²⁶² In these situations, the Fourth Amendment reasonableness analysis that applies to officers’ excessive use of force against suspects should also apply to innocent bystanders’ § 1983 claims.²⁶³ Judge Cowen warned in his *Fagan* dissent that the adoption of the “shocks the conscience” standard “will have the practical effect of immunizing reckless police conduct from all strictures of the Constitution, so long as no search or seizure occurs.”²⁶⁴ His admonition has come true.

Perhaps there is a policy concern regarding payment of successful § 1983 claims against police officers and cities for pursuit-related injuries and deaths because the known statistics demonstrate high numbers of harmful consequences.²⁶⁵ Applying the deliberate indifference standard to these claims, however, would not necessarily overburden police officers and municipalities because it requires more than mere negligence and only imposes liability on officers who engage in high-speed pursuits

256. Alpert et al., *supra* note 189, at 659.

257. *Id.* at 660.

258. See, e.g., *Meals v. City of Memphis*, 493 F.3d 720, 724 (6th Cir. 2007); *County of Sacramento v. Lewis*, 523 U.S. 833, 838-39 (1998).

259. Alpert et al., *supra* note 189, at 660. “Recklessness contains an important behavioral attribute encompassed by intentional conduct, that is, intentionally taking a perceived risk.” *Fagan v. City of Vineland*, 22 F.3d 1296, 1324 (3d Cir. 1994) (en banc) (Cowen, J., dissenting).

260. See *supra* Part III.B-C.

261. *Id.*

262. See Michael Avery, *Police Chases: More Deadly Than a Speeding Bullet?*, 33 TRIAL 52, 54 (1997) (“High speed pursuits should be subjected to the same scrutiny applied to the use of deadly force.”).

263. See *id.*

264. *Fagan*, 22 F.3d. at 1319 (Cowen, J., dissenting).

265. See *Helseth v. Burch*, 258 F.3d 867, 872 (8th Cir. 2001) (“Society could reasonably decide that an innocent bystander injured during such high-speed police pursuits should be compensated from the public coffers. But that is a legislative decision.”).

without regard for public safety.²⁶⁶ Because each case requires an inquiry into the totality of the circumstances, police officers who follow department regulations—and municipalities that implement them—should not fear liability.²⁶⁷

There is also concern that imposing liability on police officers and/or municipalities in pursuit situations would encourage suspects to flee more frequently.²⁶⁸ Officers would be more likely to terminate dangerous pursuits, so suspects would have an incentive to drive as recklessly as possible to escape.²⁶⁹ Allowing these occasional escapes, however, is worth preventing harm to innocent bystanders, particularly since police officers initiate the majority of pursuits in response to minor traffic violations.²⁷⁰ For example, the fleeing driver in *Meals* was merely speeding.²⁷¹ Such suspects are rarely dangerous criminals but instead “are frightened minor offenders whose flight is caused by the presence or actions of the officers.”²⁷²

Moreover, terminating dangerous pursuits does not necessarily mean that suspects will get away. There are many technologies available that assist police officers with managing pursuits.²⁷³ Officers can use tire deflation devices that force fleeing vehicles to proceed at much slower speeds.²⁷⁴ Many jurisdictions also use helicopters to safely pursue fleeing suspects from the air while advising ground units of suspects’ locations.²⁷⁵ Most suspects will slow down or stop shortly after ground units discontinue pursuit.²⁷⁶ Additionally, officers can utilize the new StarChase system that operates like a dart gun mounted in a patrol car’s grill.²⁷⁷ The system enables officers to fire tracking devices that attach to the rears of fleeing vehicles.²⁷⁸ An electronic monitor enables officers to track suspects using satellite technology, thereby allowing officers to discontinue pursuits.²⁷⁹ The simplest and cheapest method for discontinuing pursuits is for the officers to obtain fleeing vehicles’ license plate numbers that can identify the drivers for later arrests.²⁸⁰ In addition,

266. Alpert et al., *supra* note 189, at 662.

267. *Cf. id.* (arguing that the deliberate indifference standard is easily defined and “well-known to the law”).

268. *County of Sacramento v. Lewis*, 523 U.S. 833, 858 (1998) (Kennedy, J., concurring); *Scott v. Harris*, 127 S. Ct. 1769, 1779 (2007).

269. *Scott*, 127 S. Ct. at 1779.

270. *See Hill*, *supra* note 10, at 15.

271. *Meals v. City of Memphis*, 493 F.3d 720, 723 (6th Cir. 2007).

272. *Avery*, *supra* note 262, at 54.

273. Travis Yates, *Putting an End to Police Pursuits*, POLICE LINK, Feb. 11, 2008, <http://www.policelink.com/training/articles/10405-putting-an-end-to-pursuit-collisions>.

274. *Id.*; *see also supra* note 168.

275. Yates, *supra* note 273.

276. *Id.*

277. Bob Pool, *Police in Pursuit of High Technology*, THE PHILA. ENQUIRER, Nov. 18, 2007, http://www.philly.com/inquirer/world_us/20071118_Police_in_pursuit_of_high_technology_.html.

278. *Id.*

279. *Id.*

280. *Cf.* David J. Stucky, Comment, *The Tenth Circuit’s Obscured Vision: Losing Sight of the*

proper training would enable officers to utilize available technologies to save lives.²⁸¹

The argument that placing constraints upon police pursuits would cause more fleeing suspects to get away is similar to the argument that the exclusionary rule would permit guilty criminals to go free.²⁸² In the evidence-exclusion context, the *Mapp* Court rejected that argument: “The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence.”²⁸³ Allowing police officers to engage in reckless chases that violate pursuit policies and endanger the public disregards citizens’ Fourteenth Amendment substantive due process rights.²⁸⁴

Appellate courts’ mechanical application of the *Lewis* standard has created an insurmountable barrier for innocent bystanders claiming deprivations of their substantive due process rights.²⁸⁵ It is difficult to imagine a scenario in which courts could find that police officers’ pursuit-related conduct exhibited the requisite intent to harm to satisfy the “shocks the conscience” standard.²⁸⁶ Furthermore, because municipal liability depends upon establishing constitutional violations by police officers,²⁸⁷ courts never even reach the failure-to-train analysis on which to hold municipalities liable for inadequately training their officers.²⁸⁸ This provides no incentive for municipalities to train officers on the proper execution of pursuit regulations.²⁸⁹

The Supreme Court should hold police officers responsible for their conduct during pursuits by drawing a bright line when innocent bystanders assert § 1983 claims: officers may be liable when they are deliberately indifferent to persons’ rights to life and personal security through egregious violations of department regulations, especially during extended pursuits that provide opportunities for deliberation.²⁹⁰ It makes particular sense to consider officers’ failure to engage lights and sirens as deliberate indifference that “shocks the conscience,” for it is those warning signs that alert innocent bystanders that an emergency

Importance of Requiring Clearly Visible License Plates, 46 WASHBURN L.J. 633, 634, 639-40 (2007) (discussing the importance of license plate checks).

281. See Yates, *supra* note 273.

282. See *Mapp v. Ohio*, 367 U.S. 643, 659 (1961).

283. *Id.* It seems especially appropriate to consider the argument from the evidence-exclusion context because that is the source of the “shocks the conscience” standard. See *supra* text accompanying note 195.

284. See *Fagan v. City of Vineland*, 22 F.3d 1296, 1323 (3d Cir. 1994) (en banc) (Cowen, J., dissenting).

285. See *supra* note 187 and accompanying text.

286. *Fagan*, 22 F.3d at 1319 (Cowen, J., dissenting).

287. See *supra* note 58 and accompanying text.

288. See *Meals v. City of Memphis*, 493 F.3d 720, 731 (6th Cir. 2007).

289. Interview with William Rich, Professor, Washburn Univ. Sch. of Law, in Topeka, Kan. (Feb. 21, 2008).

290. See Alpert et al., *supra* note 189, at 662.

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situation is amiss, thereby giving notice to move out of harm's way. The deliberate indifference standard would provide a deterrent function and further that purpose of § 1983.²⁹¹ If police officers and municipalities knew that deliberate indifference to pursuit risks could establish a constitutional violation, officers would have an incentive to follow pursuit policies, and municipalities would have a correlative stimulus to train their officers on the proper execution of those policies.²⁹²

VI. CONCLUSION

Given the high statistics of deaths and serious injuries that result from police pursuits, the Supreme Court should revisit the issue of federal liability under § 1983 to define a workable standard.²⁹³ Since both intent to harm and deliberate indifference can “shock the conscience,” courts must evaluate the totality of the circumstances in each case to determine which standard is appropriate.²⁹⁴ Police officers should be held accountable for violating pursuit regulations, and municipalities should be held accountable for failure to train their police officers. The governmental authority that police exercise in conducting pursuits must have clearly defined constitutional limitations.²⁹⁵ As one commentator noted, “[w]hat is shocking is the continued willingness of many officers to engage in unwarranted pursuits in the face of widespread awareness in the police community itself of the likelihood of tragic consequences.”²⁹⁶

291. See *supra* note 53 and accompanying text.

292. Interview with William Rich, *supra* note 289.

293. See Alpert et al., *supra* note 189, at 661.

294. *County of Sacramento v. Lewis*, 523 U.S. 833, 849 (1998).

295. Alpert et al., *supra* note 189, at 661.

296. Avery, *supra* note 262, at 54.