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## County of Sacramento v. Lewis: A Conscience-Shocking Decision Regarding Office Liability in High-Speed Police Pursuits

Erica L. Reilley

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**COUNTY OF SACRAMENTO V. LEWIS: A  
“CONSCIENCE-SHOCKING” DECISION  
REGARDING OFFICER LIABILITY IN HIGH-  
SPEED POLICE PURSUITS**

*We recognize that courts should be hesitant to second-guess government officials when they must make swift decisions regarding public safety. But even swift decisions, if arbitrary, may violate the Fourteenth Amendment.*<sup>1</sup>

I. INTRODUCTION

The television is on as you get ready to go out for the night. In the middle of your program, the local newscaster announces that he or she is bringing you a “Special Report” with live coverage of a police chase in progress. You have observed this scene many times before: the news helicopter flies overhead with cameras aimed at the chaos down below. The black-and-white patrol car, with flashing lights and blaring sirens, follows closely behind a reckless driver who arbitrarily weaves in and out of traffic at frequently obscene speeds—sometimes up to 100 miles per hour—in residential neighborhoods.

The ending is likewise all too familiar: the fleeing suspect enters an intersection on a red light, with the patrol car pursuing, and the suspect’s car then broadsides the vehicle having the right-of-way; or the suspect loses control and careens into a group of innocent pedestrians; or the officer rams into the fleeing car, killing those inside. Whatever the specific circumstances, when all is said and done, someone is lying dead—and the state has had a hand in the fatal outcome.

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1. *Lewis v. Sacramento County*, 98 F.3d 434, 441 (9th Cir. 1996), *rev’d*, 118 S. Ct. 1708 (1998). For clarification, the Ninth Circuit Court of Appeals decision will be referred to as *Lewis I*, while the United States Supreme Court decision will be referred to as *Lewis II*.

Do individuals who have been injured or killed by an officer engaged in a high-speed pursuit have any sort of federal constitutional claim against the officer? According to the United States Supreme Court in *County of Sacramento v. Lewis*,<sup>2</sup> the answer to this question is "no." Rather, 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 the conscience, necessary for a due process violation."<sup>3</sup> In reversing the Ninth Circuit Court of Appeals decision, Justice Souter, writing for a unanimous Court, stated that "when 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.'"<sup>4</sup>

Justice Souter rejected the Ninth Circuit's ruling that the culpability standard for the officer's conduct is one of "deliberate indifference . . . or reckless disregard,"<sup>5</sup> and instead held that "high-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."<sup>6</sup> This decision primarily rested on concern that an "expansive reading of § 1983 and the Due Process Clause would make the Fourteenth Amendment 'a font of tort law to be superimposed upon whatever systems may already be administered by the States.'"<sup>7</sup>

This Note critically examines the Supreme Court's decision defining the standard for officer conduct in high-speed police pursuits as that of "shocks the conscience." Part II recounts a history of substantive due process claims and officer liability under 42 U.S.C. § 1983. Part III provides a factual background for the landmark *Lewis II* case and sets forth the basis for the decision. Part IV analyzes the Court's decision in light of the two standards of culpability available to the Court, along with overriding public policy concerns. Part V

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2. 118 S. Ct. 1708 (1998).

3. *Id.* at 1711-12 (emphasis added).

4. *Id.* at 1720 (citation omitted).

5. *Lewis I*, 98 F.3d at 441.

6. *Lewis II*, 118 S. Ct. at 1720 (emphasis added).

7. Fagan v. City of Vineland, 22 F.3d 1296, 1310 (3d Cir. 1994) (quoting *Daniels v. Williams*, 474 U.S. 327, 332 (1985)); see *Lewis II*, 118 S. Ct. at 1718.

concludes that the shocks the conscience standard gives officers limitless authority to endanger innocent bystanders without providing a satisfactory means of recourse. It further contends that a return to the well-known “deliberate indifference or reckless disregard” standard would continue to provide adequate protection to officers making split-second decisions, while still allowing those who are arbitrarily injured by state action to have some form of valuable recourse.

## II. HISTORICAL FRAMEWORK

### A. *Substantive Due Process*

What then is due process of law? It is nothing tangible or concrete or specific. It is an ‘idea’ or ‘concept,’ a legal fiction, if you please, which is the Court’s most potent weapon in its exercise of judicial review . . . . In the minds of the justices the term ‘due process’ has somehow become an all-inclusive phrase comprehending notions of reasonableness and fairness. It has come to comprise the elements of social justice and liberty—liberty to do and have those things which the justices deem essential to the kind of society they wish to preserve or promote.<sup>8</sup>

Prior to the Civil War, as society became more complex and chaotic, legal scholars and social leaders realized that a balance needed to be struck between an individual’s pursuit of happiness and the government’s responsibility to maintain order and promote the general welfare.<sup>9</sup> Notions of due process were first derived from Chapter 39 of the Magna Carta,<sup>10</sup> wherein the King of England promised that “[n]o free man shall be taken, imprisoned, disseised, outlawed, banished, or in any way destroyed, nor will We proceed against or prosecute him, except by the lawful judgment of his peers

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8. VIRGINIA L. WOOD, *DUE PROCESS OF LAW* 417 (Kennikat Press 1972) (1951).

9. *See* EDWARD KEYNES, *LIBERTY, PROPERTY, AND PRIVACY* 31 (1996).

10. *See generally* HENRY J. ABRAHAM & BARBARA A. PERRY, *FREEDOM AND THE COURT* 94 (7th ed. 1998) (providing a general definition of due process of law and the genesis of the concept).

and by the law of the land.”<sup>11</sup> Based on this legal tradition, the Framers of the Fourteenth Amendment sought to develop broad concepts of fundamental rights that would obligate the government to protect “three core values: life, liberty, and property.”<sup>12</sup> However, complete understanding of what due process encompasses continues to be far from clear. In 1952, the Supreme Court explained that “[d]ue process of law is a summarized constitutional guarantee of respect for those personal immunities which . . . are ‘so rooted in the traditions and conscience of our people as to be ranked fundamental’ or are ‘implicit in the concept of ordered liberty.’”<sup>13</sup> Originally, concepts of due process primarily involved procedure.<sup>14</sup> Only later did

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11. MAGNA CARTA, ch. 39.

12. KEYNES, *supra* note 9, at 10. The Fourteenth Amendment, first introduced by John Bingham on January 12, 1866, guarantees that

[n]o State shall make or enforce any law which shall abridge the privileges and 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.

U.S. CONST. amend. XIV, § 1; *see* KEYNES, *supra* note 9, at 63 (referencing Bingham’s proposed amendment to the Constitution that eventually became the core of section one). The ratification and enactment of the Fourteenth Amendment attempted to forever secure the rights first recognized in the Civil Rights Act of 1866. *See* ABRAHAM & PERRY, *supra* note 10, at 32. The Civil Rights Act of 1866 sought to override the “Black Codes,” which were enacted in the South as a way of keeping blacks in servitude. *See* KEYNES, *supra* note 9, at 49. Republicans feared that once the Democrats obtained control of Congress, they would repeal the Civil Rights Act, thereby rendering an individual’s fundamental rights both vulnerable and unprotected. *See id.* at 69-74. The only way to avoid this result was through an amendment to the Constitution.

13. *Rochin v. California*, 342 U.S. 165, 169 (1952) (citations omitted). In *Rochin*, police officers pumped the defendant’s stomach in order to retrieve evidence of defendant’s drug possession. The officers then admitted the evidence in order to convict the defendant. *See id.* at 166. The Court found that the officers’ conduct violated the defendant’s constitutional rights pursuant to the Due Process Clause. *See id.* at 174. In writing for the majority, Justice Frankfurter concluded “that the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combating crime too energetically. This is conduct that shocks the conscience.” *Id.* at 172.

14. *See* ABRAHAM & PERRY, *supra* note 10, at 103. “Indeed, due process of law . . . was originally . . . interpreted as a *procedural* restriction upon government. It concerned itself, more or less, not with *what* government was doing but *how* it was doing it.” *Id.* These procedural due process protections

the Court begin to recognize that due process also provided a substantive guarantee against arbitrary governmental deprivation of fundamental rights.<sup>15</sup> In the course of exploring this philosophy, the Court initially struck down many laws that interfered with property and economic liberties.<sup>16</sup> This period became known as the *Lochner* Era<sup>17</sup>—a time when the Court invalidated many laws on the basis that they unduly and arbitrarily interfered with these liberties.<sup>18</sup> This approach to individual rights continued into the late 1930s; thereafter, the Court began giving greater deference to the legislature and started upholding laws that under *Lochner* would have been invalidated.<sup>19</sup>

The Court's shift was in large part due to the devastating effects of the Great Depression: fifteen million workers soon became unemployed.<sup>20</sup> Consequently, both individuals and states looked to the federal government for relief.<sup>21</sup> The Court's staunch protection of property and economic liberties flew directly in the face of President

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were most often recognized in criminal cases, where the courts interpreted the Fourteenth Amendment as protecting an accused person's right to be heard by a regularly constituted tribunal of the state, right to counsel, right against self-incrimination, and right to a jury trial. *See id.* at 103-05.

15. *See id.* at 95-96.

16. *See id.* at 8-9.

17. This era was named after the landmark case of *Lochner v. New York*, 198 U.S. 45 (1905). There, the Court struck down a New York law designed to protect the health of bakers by limiting their employment hours to 10 hours per day or 60 hours per week. The Court reasoned that the law violated the Due Process Clause because it constituted "an unreasonable, unnecessary and arbitrary interference with the right of . . . individual[s]" to enter into their own contracts. *Id.* at 56.

18. *See* KEYNES, *supra* note 9, at 118-19.

19. *Nebbia v. New York*, 291 U.S. 502 (1934), embodies the first example of this change. In *Nebbia*, the Court upheld a law designed to aid farmers by setting a minimum sale price for milk. The Court warned that laws should not be invalidated unless they are "palpably in excess of legislative power." *Id.* at 538. Shortly thereafter, in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), the Court upheld a law regulating minimum wages for women and children. An individual's liberty to contract proved critical to the decision. Although the right to contract was clearly a protected right, the Court found that it was not a fundamental right, and, therefore, did not require special judicial protection. *See id.* at 391-92.

20. *See* KEYNES, *supra* note 9, at 129.

21. *See id.*

Franklin Roosevelt's New Deal relief and reform policies.<sup>22</sup> Either the President or the Court had to yield.<sup>23</sup> In the end, the Court relinquished its heightened protection of economic rights, and allowed the emerging welfare state to flourish. Nonetheless, it continued to use *Lochner*-based reasoning to articulate the need for governmental protection over such unenumerated rights<sup>24</sup> as family,<sup>25</sup> marital,<sup>26</sup> and

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22. See *id.* at 130. See also Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1438 (1988) (noting that the New Deal attack on *Lochner*-era jurisprudence was a reaction by those who believed that judicial supervision of administration regulation was, to a large degree, anachronistic).

23. Justice Stone's opinion in *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), forecasted the Court's abandonment of economic liberty protection to Congress and state legislatures when the Court upheld a congressional law barring filled milk from the marketplace. In the infamous footnote number four, Justice Stone clearly indicated that he was "unwilling to extend the principle of presumptive validity to state and federal policies encroaching on other personal liberties." KEYNES, *supra* note 9, at 134. Stone contended that "concepts of preferred rights that . . . [were] indispensable to ordered liberty" and, therefore, laws which impinged on those rights were "inherently suspect and presumptively invalid." *Id.* at 134-35.

24. Unenumerated rights are those not explicitly provided for in the Constitution. The Court first defined unenumerated rights as being protected by the Due Process Clause in *Meyer v. Nebraska*, 262 U.S. 390 (1923), and again two years later in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). In *Meyer*, the Court struck down a Nebraska law that criminalized teaching of German and other languages by reasoning that parents have a protected right in allowing their children to learn foreign languages. See *Meyer*, 262 U.S. at 399-403. In *Pierce*, the Court struck down an Oregon law that forced parents to enroll their children in public rather than private schools. There, the Court reasoned that the law "unreasonably interfere[d] with the liberty of parents . . . [in trying] to direct the upbringing and education of [their] children." *Pierce*, 268 U.S. at 534-35.

Despite the demise of substantive due process starting in the early 1930s, *Griswold v. Connecticut*, 381 U.S. 479 (1965), later revived the Court's protection of personal unenumerated rights. There the Court found that a fundamental "right of privacy" existed under the "penumbras and emanations" of several fundamental constitutional guarantees. See *id.* at 484-86. The dissent argued that the Court cannot create protected rights however it sees fit; rather, the Court's interpretations should limit themselves to a strict and literal reading of the text. See *id.* at 509-10 (Black, J., dissenting).

25. See, e.g., *Zablocki v. Redhail*, 434 U.S. 374 (1978) (invalidating a law prohibiting the marriage of individuals who failed to comply with court-ordered child support arrangements); *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (invalidating a law inhibiting a grandmother's ability to live with her two grandsons in the same house and still receive the same benefits).

reproductive<sup>27</sup> privacy, and the right to choose or refuse medical treatment.<sup>28</sup>

Over the years, society has recognized certain specific rights as being fundamental. One of the most staunchly protected fundamental rights involves an individual's right to be free from arbitrary government action.<sup>29</sup> However, in determining what type of action is "fatally arbitrary" the courts distinguish between claims that involve legislative enactments and those that involve the conduct of a specific government official.<sup>30</sup> Laws that infringe on a fundamental right typically receive a strict standard of review, requiring the state to prove that the law is narrowly tailored to address a compelling state interest.<sup>31</sup> The result of invoking such a stringent standard of review is that most of the laws challenged are ultimately struck down. It is a rare case for a state law to survive strict scrutiny.

Conversely, when executive action—action by a government official—is challenged, courts have historically used a shocks the conscience standard of culpability in determining whether the official's conduct reaches the level of being constitutionally reprehensible.<sup>32</sup>

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26. See, e.g., *Loving v. Virginia*, 388 U.S. 1 (1967) (invalidating a law prohibiting interracial marriages).

27. See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973) (holding that the protected right of personal privacy, first established in *Griswold*, includes a woman's right to decide whether to terminate her pregnancy); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (holding that a requirement that a married woman notify her husband prior to obtaining an abortion is unconstitutional).

28. See, e.g., *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261 (1990) (finding that a competent person has a fundamental right to refuse life-sustaining treatment, but holding that the patient here had no such right because she was incompetent to make such a decision and did not have a "living will"); *Rutherford v. United States*, 438 F. Supp. 1287 (W.D. Okla. 1977) (holding that a law prohibiting use of the drug Laetrile violated a cancer patient's fundamental right of privacy), *aff'd*, 582 F.2d 1234 (10th Cir. 1978), *rev'd on other grounds*, 442 U.S. 544 (1979).

29. *Lewis II*, 118 S. Ct. at 1716.

30. See *id.*

31. See Rosalie B. Levinson, *Protection Against Government Abuse of Power: Has the Court Taken the Substance Out of Substantive Due Process*, 16 U. DAYTON L. REV. 313, 314 (1991).

32. See, e.g., *Whitley v. Albers*, 475 U.S. 312 (1986) (holding that the shooting of a prisoner during the ending of a prison-hostage situation did not shock the conscience); *Rochin v. California*, 342 U.S. 165 (1952) (overturning a conviction where the pumping of a defendant's stomach in order to obtain evidence shocked the conscience).

The shocks the conscience test, however, has not been applied without confusion.

In 1973, Second Circuit Judge Friendly attempted to clarify the meaning of this test in *Johnson v. Glick*.<sup>33</sup> Judge Friendly asserted that in determining "whether the constitutional line has been crossed" by a particular use of force,

[a] court must look to such factors as the need for the application of force, the relationship for the need and the amount of force that was used, the extent of injury inflicted, and whether [the] force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.<sup>34</sup>

These guidelines were cited with approval in *Whitley v. Albers*<sup>35</sup> and *Graham v. Connor*.<sup>36</sup> Moreover, a myriad of other courts have also looked to the *Glick* factors for direction in analyzing substantive due process claims.<sup>37</sup> Nonetheless, despite this apparent following, courts continued to have trouble in coming to formulated conclusions regarding what type of conduct shocks the conscience.<sup>38</sup>

### B. Section 1983: Civil Action for Deprivation of Rights

Individuals can recover for due process violations under 42 U.S.C. § 1983,<sup>39</sup> which provides a cause of action against persons acting under color of state who deprive an individual of a constitutionally protected right to life, liberty or property.

33. 481 F.2d 1028 (2d Cir.), *cert. denied*, 414 U.S. 1033 (1973).

34. *Id.* at 1033.

35. 475 U.S. 312, 320-21 (1986).

36. 490 U.S. 386, 393 (1989).

37. *See, e.g.*, *Wilson v. Northcutt*, 987 F.2d 719 (11th Cir. 1993); *Gilmere v. City of Atlanta*, 774 F.2d 1495 (11th Cir. 1985); *Williams v. Kelly*, 624 F.2d 695 (5th Cir. 1980); *Williams v. Alford*, 647 F. Supp. 1386 (M.D. Ala. 1986); *Spell v. McDaniel*, 591 F. Supp. 1090 (E.D.N.C. 1984).

38. *See Mitchell J. Edlund, Note, In the Heat of the Chase: Determining Substantive Due Process Violations Within the Framework of Police Pursuits When an Innocent Bystander is Injured*, 30 VAL. U. L. REV. 161, 208 n.234 (1995).

39. 42 U.S.C. § 1983 (1982). Section 1983 specifically states that "[e]very person who, under color of [state law], subjects, or causes to be subjected, any citizen . . . to the deprivation of any rights . . . secured by the Constitution and laws, shall be liable to the party injured." *Id.*

Generally, for plaintiffs to prevail on a § 1983 claim, they must show that: (1) the conduct complained of was committed by a person acting under color of state law, and (2) this conduct constituted a deprivation of a constitutionally protected right, privilege, or immunity.<sup>40</sup>

Section 1983 was intended to compensate individuals for their injuries, vindicate constitutional rights, and deter future constitutional violations.<sup>41</sup> In particular, the Court's early opinions in § 1983 actions seemed to suggest the most important goal was that of deterrence.<sup>42</sup> Deterrence was in large part effectuated through damage awards and injunctions.<sup>43</sup> More recently, though, this goal seems to be secondary at best.<sup>44</sup> Indeed, the history of the Court's enforcement of § 1983 claims indicates that the goal of compensation is now most important.<sup>45</sup> Nonetheless, the Court's development of immunities, strict causation requirements, and bars against governmental entity vicarious liability has "ensure[d] that § 1983 will not even be an effective compensatory device."<sup>46</sup> Rather, the Court's concern with federalism issues,<sup>47</sup> government official timidity,<sup>48</sup> and overcrowded court dockets,<sup>49</sup> makes it more unlikely than ever that injunctions and damages will be granted in such cases.

It is important to note that § 1983 does not provide its own substantive right as "it serve[s] only to ensure that an individual ha[s] a cause of action for violations of the Constitution."<sup>50</sup> This means,

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40. See Edlund, *supra* note 38, at 162-63.

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

42. See *id.*

43. See *id.*

44. See *id.*

45. See *id.*

46. *Id.* at 77-78.

47. One way that the Court justifies the strict limitations on § 1983's effectiveness is by arguing that such limitations "avoid[] needless friction between federal courts and state governments." *Id.* at 79.

48. "The Court continually asserts that local officials could not function if they were under a constant threat of liability, or even the threat of having to defend a suit." *Id.* at 83.

49. "[T]he desire to eliminate frivolous cases has moved members of the Court to advocate for strict limits on punitive damages and to expand the reach of the immunities." *Id.* at 84.

50. *Chapman v. Houston Welfare Rts. Org.*, 441 U.S. 600, 617 (1979).

then, that constitutional deprivations only exist for those rights already recognized by the Court. Therefore, it is hard for individuals to state a claim under § 1983 where the Court has not yet analyzed the alleged conduct.

In reality, it is very difficult for individuals to succeed on § 1983 claims. This difficulty is likely a consequence of the apparent hostility the Supreme Court harbors towards these claims.<sup>51</sup> This hostility is often covered by general policy arguments weighing the government's interest in controlling crime and chaos against the individual's interest in being free from arbitrary action.<sup>52</sup> In application, the Court favors the government's interest in controlling crime over individual rights.

In addition to the Court's resistance to maintaining the deterrent effect § 1983 was designed to promote, there also seems to be a societal shift that advocates for more aggressive law enforcement, regardless of the costs.<sup>53</sup> In the quest to bring control over crime, society seems to have lost sight of the individual rights our forefathers knew were essential to an acceptable standard of living.

The United States Supreme Court recently addressed the competing interests of crime control and individual rights in *County of Sacramento v. Lewis*.<sup>54</sup> In particular, the Court addressed what the degree of culpability should be for police officers engaged in high-speed pursuits that result in injury, and oftentimes death, to both suspects and bystanders.<sup>55</sup>

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51. See Beermann, *supra* note 41, at 76.

52. See *id.* ("The Court cloaks its hostility with the standard policy arguments . . . purport[ing] to weigh the value of greater enforcement against the consequences for government that such enforcement entails.").

53. See Mark R. Brown, *Accountability in Government and Section 1983*, 25 U. MICH. J.L. REFORM 53 (1991). "Our modern ethos appears to expect little from public servants while tolerating much disservice. This attitude then reinforces the morality, apparently now shared by government officials, that responsibility only follows deliberate wrongdoing. Anything less, whether an indifferent failure or careless act, is acceptable." *Id.* at 58.

54. 118 S. Ct. 1708 (1998).

55. *Id.* at 1708.

## III. CASE BACKGROUND

A. *Facts*

On May 22, 1990, at about 8:30 p.m., Sacramento County Officers James Everett Smith and Murray Stapp responded to a call to break up a fight.<sup>56</sup> As the officers prepared to leave, Stapp saw a motorcycle approaching at a high speed.<sup>57</sup> The motorcycle was being operated by 18-year-old Brian Willard, with 16-year-old Philip Lewis as a passenger.<sup>58</sup> Officer Stapp turned on his overhead lights, yelled at the boys to stop, and then tried to pen in the motorcycle by using the two patrol cars as boundaries.<sup>59</sup> Ignoring the officer's commands, Willard maneuvered his way between the two cars and sped off.<sup>60</sup>

Officer Smith then put on his emergency overhead lights and sirens, and a high-speed pursuit ensued.<sup>61</sup> The chase lasted approximately seventy-five seconds, covered 1.3 miles of a residential neighborhood, and reached maximum speeds of 100 miles per hour in thirty-mile-per-hour zones.<sup>62</sup> The motorcycle wove in and out of oncoming traffic, causing a few vehicles to swerve off the road.<sup>63</sup>

The chase ended when the boys reached the top of a crest, tried to make a hard left turn, tipped over, and then skidded to a halt.<sup>64</sup> As Officer Smith came to the same crest and saw the motorcycle, he slammed on his brakes but was unable to stop in time. Consequently, he skidded into Lewis, projecting him seventy feet down the road.<sup>65</sup> Lewis suffered massive injuries and was subsequently pronounced dead at the scene.<sup>66</sup>

Philip Lewis's parents filed suit against Sacramento County, the Sacramento County Sheriff's Department, and Officer Smith under

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56. *See id.* at 1712.

57. *See id.*

58. *See id.*

59. *See id.*

60. *See id.*

61. *See id.*

62. *See id.*

63. *See id.*

64. *See id.*

65. *See id.*

66. *See id.*

42 U.S.C. § 1983, alleging a deprivation of their son's Fourteenth Amendment substantive due process right to life.<sup>67</sup>

### B. District Court

In the district court, Judge Burrell granted summary judgment in favor of all defendants.<sup>68</sup> With regard to the claim against Officer Smith, the district court ruled that regardless of any constitutional violation, the officer was entitled to qualified immunity.<sup>69</sup> The court found that the law supporting a Fourteenth Amendment due process right to life and personal security in the context of high-speed police pursuits was unclear and not well-established.<sup>70</sup>

For the claim against the county and sheriff's department, there were facts indicating "that the training procedures were 'not so inherently inadequate' that . . . [they] could be held liable under § 1983."<sup>71</sup> Specifically, the district court found that because the sheriff's department pursuit policy exceeded California's statutory standards and set clear guidelines for when a pursuit was appropriate, the policy was not "deliberately indifferent to Lewis's constitutional rights."<sup>72</sup>

After the district court dismissed all of the claims against the officer and the county, the Lewises appealed.<sup>73</sup>

### C. Ninth Circuit Court of Appeals

Writing for the Court of Appeals for the Ninth Circuit, Judge Pregerson affirmed the district court's grant of summary judgment in favor of Sacramento County and the Sacramento County Sheriff's Department.<sup>74</sup> Judge Pregerson, however, reversed the district

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67. *See id.*

68. *See Lewis I*, 98 F.3d at 437.

69. *See id.* The defense of qualified immunity assures all government officials that they will not be held liable for their conduct except where they violate a clearly established right and the officer could not have reasonably believed his conduct was lawful. *See* Peter H. Doherty, *Qualified Immunity in Police Use of Force Claims*, COLO. LAW., May 1993, at 983, 984.

70. *See Lewis I*, 98 F.3d at 437.

71. *Id.* at 437.

72. *Id.*

73. *See id.*

74. *See id.* at 436.

court's ruling as to Officer Smith's liability, stating that "when a law enforcement officer arbitrarily acts to deprive a person of life and personal security in the course of pursuing his official duties, constitutional due process rights may be implicated."<sup>75</sup> The court further stated that the appropriate standard for officers engaged in high-speed police pursuits is whether they acted with "deliberate indifference to, or reckless disregard for, a person's right to life and personal security."<sup>76</sup>

In coming to this conclusion, the court stated that although the standard of conduct to be applied in the context of police pursuits had not specifically been addressed by the Ninth Circuit, numerous other substantive due process cases decided by the court shed significant light in this area.<sup>77</sup> The court noted that none of the federal circuit courts have required that intentional misconduct be shown to assert a § 1983 action.<sup>78</sup> Similarly, no circuit has found mere negligence sufficient for a due process violation.<sup>79</sup>

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75. *Id.* at 439.

76. *Id.* at 441. In setting the minimum standard of conduct as deliberate indifference or reckless disregard, the court was clear to point out that this standard is limited to the context of high-speed police pursuits, and did not assert that this should be the standard for all substantive due process claims. *See id.*

77. *See id.* at 439. *See also* Foy v. City of Berea, 58 F.3d 227, 232 (6th Cir. 1995) (applying deliberate indifference standard where an officer ordered a passenger and an intoxicated driver to get back in their car and leave the area and the passenger was subsequently killed in an accident); Swofford v. Mandrell, 969 F.2d 547, 549 (7th Cir. 1992) (applying deliberate indifference or reckless disregard standard where sheriff did not rescue pre-trial detainee when sheriff heard detainee's screams resulting from attack and sexual assault by other inmates); Colburn v. Upper Darby Township, 838 F.2d 663, 669 (3d Cir. 1988) (applying deliberate indifference or reckless disregard standard where officer's search and supervision of detainee failed to reveal concealed gun with which the detainee subsequently committed suicide), *cert. denied*, 489 U.S. 1065 (1989); Morales v. New York State Dep't of Corrections, 842 F.2d 27, 30 (2d Cir. 1988) (applying deliberate indifference standard where inmate made officer aware of threats by other inmate but officer failed to take action, resulting in attack on inmate by other inmate); Taylor v. Ledbetter, 818 F.2d 791, 797 (11th Cir. 1987) (applying deliberate indifference standard where state and county officials placed child in foster home where child was subsequently abused by foster parents), *cert. denied*, 489 U.S. 1065 (1989).

78. *See Lewis I*, 98 F.3d at 439 n.5.

79. *See id.*

As part of their claim, the Lewises alleged that the officer's conduct was in violation of the Sacramento County Sheriff's Department General Order, which provides guidelines for all relevant police procedures.<sup>80</sup> With respect to high-speed police pursuits, Sacramento's General Order requires that the police officer consider whether the need for apprehension justifies the pursuit in light of unreasonable hazards to life and property, and demands that a pursuit be discontinued if those hazards outweigh the benefit of apprehension.<sup>81</sup> Considering these mandates, the court found that the pursuit clearly presented unreasonable risks to both the boys on the motorcycle and to innocent bystanders.<sup>82</sup> In light of the original infraction—failing to stop on an officer's command—the court did not find that the need for apprehension outweighed the risks presented and felt that the officers should have discontinued the pursuit.<sup>83</sup>

Additionally, the Ninth Circuit concluded that Officer Smith was not entitled to qualified immunity.<sup>84</sup> The court stated that although there was minimal and unclear case law regarding the specific acts of police officers engaged in high-speed pursuits, other "[c]ases involving law enforcement officers' excessive use of force in the context of unconstitutional seizures were sufficiently analogous to put Smith on notice that . . . he could be liable under § 1983."<sup>85</sup> The court cited *Tennessee v. Garner*<sup>86</sup> for the proposition that use of deadly force is unconstitutional if used to prevent the escape of an apparently non-dangerous felon,<sup>87</sup> and concluded that *Garner* "put Officer Smith on notice that he could not constitutionally stop Lewis with deadly force."<sup>88</sup>

Moreover, the Ninth Circuit determined that the officer's disregard of the General Order amounted to a genuine issue of material

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80. *See id.* at 441-42. The court stated that such a violation was relevant to deciding whether a due process violation had occurred. *See id.* at 442.

81. *See id.*

82. *See id.* "The enormity of the danger to Lewis and Willard and to the general public was readily apparent." *Id.*

83. *See id.*

84. *See id.* at 445.

85. *Id.* at 443.

86. 471 U.S. 1 (1985).

87. *See id.* at 11.

88. *Lewis I*, 98 F.3d at 443.

fact, and accordingly, reversed summary judgment in favor of Officer Smith and remanded the case for trial on that issue.<sup>89</sup>

The Supreme Court granted certiorari<sup>90</sup> based on a deep circuit court split<sup>91</sup> regarding the appropriate standard for judging the officer's conduct, and subsequently reversed the Ninth Circuit Court of Appeals.<sup>92</sup>

#### D. United States Supreme Court

Justice Souter, writing for a unanimous Court,<sup>93</sup> concluded that

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89. *See id.* at 445.

90. *See* County of Sacramento v. Lewis, 520 U.S. 1250 (1997) (granting certiorari).

91. *Compare Lewis I*, 98 F.3d at 441 (“deliberate indifference” or “reckless disregard”); *Foy v. City of Berea*, 58 F.3d 227 (6th Cir. 1995) (same); *Magdziak v. Byrd*, 96 F.3d 1045 (7th Cir. 1996) (same); *McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994) (same); *with Evans v. Avery*, 100 F.3d 1033, 1038 (1st Cir. 1996) (“shocks the conscience”), *cert. denied*, 520 U.S. 1210 (1997); *Fagan v. City of Vineland*, 22 F.3d 1296, 1306-07 (3d Cir. 1994) (en banc) (same); *Temkin v. Frederick County Comm’rs*, 945 F.2d 716, 720 (4th Cir. 1991) (same), *cert. denied*, 502 U.S. 1095 (1992); *Checki v. Webb*, 785 F.2d 534, 538 (5th Cir. 1986) (same); *Williams v. Denver*, 99 F.3d 1009, 1014-15 (10th Cir. 1996) (same).

The Eighth and Second Circuits had yet to definitively determine the standard to be applied to cases involving high-speed police pursuits. Nonetheless, other decisions within those two Circuits indicated a likelihood that they would employ a shocks the conscience standard to analyze such cases. *See, e.g., Roach v. City of Fredericktown*, 882 F.2d 294, 297 (8th Cir. 1989) (finding that where an officer's conduct in a high-speed pursuit did not exemplify gross negligence, it “most certainly [did] not rise to the level of conduct which would sustain a claim under section 1983”); *Kaluczky v. City of White Plains*, 57 F.3d 202, 211 (2d Cir. 1995) (finding that in a harassment case against the city, “[s]ubstantive due process protects against government action that is arbitrary, conscience-shocking, or oppressive in a constitutional sense”); *Rodriguez v. Phillips*, 66 F.3d 470, 477 (2d Cir. 1995) (finding in a § 1983 action brought by a former inmate against prison officials, that excessive force claims would constitute “a deprivation of due process where the government official's conduct ‘shock[ed] the conscience’”) (quoting *Johnson v. Glick*, 481 F.2d 1028, 1032-33 (2d Cir.), *cert. denied*, 414 U.S. 1033 (1973)).

92. *See Lewis II*, 118 S. Ct. at 1721.

93. Chief Justice Rehnquist and Justices O'Connor, Kennedy, Ginsburg, and Breyer joined the opinion of the Court. Chief Justice Rehnquist, Justice Kennedy (joined by Justice O'Connor), and Justice Breyer each filed separate concurrences. Justice Stevens and Justice Scalia—joined by Justice Thomas—filed separate opinions concurring in the judgment.

“[r]egardless [of] whether [Officer] Smith’s behavior offended the reasonableness held up by tort law or the balance struck in law enforcement’s own codes of sound practice, it does not shock the conscience, and [Officer Smith and Sacramento County] are not called upon to answer for it under § 1983.”<sup>94</sup>

In coming to this conclusion, the Court first sought to define the fundamental right alleged to have been violated.<sup>95</sup> The Court rejected the county’s argument that police pursuits are really an officer’s attempt to make a seizure under the Fourth Amendment, and should, therefore, only be analyzed under Fourth Amendment standards.<sup>96</sup> Looking to *California v. Hodari D.*,<sup>97</sup> the Court reiterated that police pursuit of a fleeing suspect does not amount to a Fourth Amendment seizure.<sup>98</sup> The Court explained that a governmentally caused termination of an individual’s freedom constitutes a seizure only when the government *intends* such a result.<sup>99</sup> Where an officer intends to stop a suspect by show of authority—via sirens, flashing lights and continued pursuit—but then stops the suspect by accidentally crashing into him, no seizure has occurred.<sup>100</sup> Consequently, despite the more-specific-provision rule,<sup>101</sup> the Court found the

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94. *Lewis II*, 118 S. Ct. at 1721.

95. *See id.* at 1714 n.5.

96. *See id.* at 1715. A Fourth Amendment analysis requires the application of a reasonableness standard to the officer’s conduct, instead of a substantive due process analysis used to determine the presence of constitutionally prohibited arbitrary governmental action. *See Graham v. Connor*, 490 U.S. 386, 395 (1989).

97. 499 U.S. 621 (1991).

98. *See Lewis II*, 118 S. Ct. at 1715.

The word ‘seizure’ readily bears the meaning of a laying on of hands or application of physical force to restrain movement, even when it is ultimately unsuccessful . . . . It does not remotely apply, however, to the prospect of a policeman yelling ‘Stop, in the name of the law!’ at a fleeing form that continues to flee. That is no seizure.

*Hodari*, 499 U.S. at 626.

99. *See Lewis II*, 118 S. Ct. at 1715 (citing *Brower v. County of Inyo*, 489 U.S. 593, 596-97 (1991)).

100. *See id.* (quoting *Brower v. County of Inyo*, 489 U.S. 593, 597 (1991)).

101. *See id.* (quoting *United States v. Lanier*, 520 U.S. 259, 272 n.7 (1997)). The more-specific-provision rule requires that a constitutional claim covered by a specific provision of the Constitution must be analyzed under the standard applicable to that provision rather than under general notions of substantive due process. *See id.*

Fourth Amendment inapplicable to the Lewises' claim and instead affirmed their right to bring their claim under the Due Process Clause.<sup>102</sup>

The Court then reaffirmed the notion that due process was primarily designed to protect against arbitrary government action.<sup>103</sup> To that end, the Court was careful to make a distinction between challenges against the government in its executive—as opposed to its legislative—capacity, stating that when dealing with executive action “only the most egregious official conduct can be said to be ‘arbitrary’ in the constitutional sense.”<sup>104</sup> Relying on precedent beginning with *Rochin v. California*,<sup>105</sup> the Court stated that government action is only arbitrary in a constitutional sense when it reaches the level of being conscience-shocking.<sup>106</sup> Seriously concerned with the prospect of constitutional law becoming a “font of tort law,” the Court stated that “the Constitution does not guarantee due care on the part of state officials; liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process.”<sup>107</sup>

The Court recognized, however, that in some circumstances something less than conscience-shocking government conduct may be actionable under the Fourteenth Amendment.<sup>108</sup> Specifically, the Court previously held that a prison official's deliberate indifference to the medical needs of prisoners constituted a due process violation.<sup>109</sup> Additionally, the Court held that a municipality's failure to train an employee who caused harm to an individual through unconstitutional conduct should be measured by a deliberate indifference standard.<sup>110</sup> The Court concluded that the “[r]ules of due process are not . . . subject to mechanical application in unfamiliar territory,” and

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102. *See id.*

103. *See id.* at 1716.

104. *Id.* (quoting *Collins v. Harker Heights*, 503 U.S. 115, 129 (1992)).

105. 342 U.S. 165 (1952).

106. *See supra* note 29 and accompanying text.

107. *Lewis II*, 118 S. Ct. at 1718.

108. *See id.*

109. *See id.* (citing *Estelle v. Gamble*, 429 U.S. 97, 104 (1976)).

110. *See id.* at 1718 n.10 (citing *Canton v. Harris*, 489 U.S. 378, 388-89 (1989)).

explained that deliberate indifference or reckless disregard which shocks in one environment may not be so egregious in another.<sup>111</sup>

In looking at the present case, the Court first stated that “[a]s the very term ‘deliberate indifference’ implies, the standard is sensibly employed only when actual deliberation is practical . . . .”<sup>112</sup> Accordingly, the Court questioned whether this standard should even be applied to high-speed pursuit cases. Nevertheless, the Court assumed that it should and then looked for instruction from prison riot cases, where the Court held that deliberate indifference or reckless disregard for prison inmates was not constitutionally shocking.<sup>113</sup> The Court found that prison disturbances present “very real threats” to the prison officials and other inmates, requiring necessary and critical decisions to be made in extreme frenzy and haste.<sup>114</sup> In this situation, the Court felt that the deliberate indifference standard failed to adequately capture important competing interests, which are always so clear in hindsight and critical analysis.<sup>115</sup> Accordingly, in *Whitley v. Albers*,<sup>116</sup> the Court held that a standard much higher than deliberate indifference must be satisfied to hold the prison official liable in such circumstances.<sup>117</sup>

Analogizing the prison official’s conduct in a prison riot to that of a police officer’s conduct in a high-speed pursuit, the Court stated:

Like prison officials facing a riot, the police on an occasion calling for fast action have obligations that tend to tug against each other. Their duty is to restore and maintain lawful order, while not exacerbating disorder more than necessary to do their job . . . . [Accordingly,] a much higher standard of fault than deliberate indifference has to be shown for officer liability.<sup>118</sup>

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111. *Id.* at 1718.

112. *Id.* at 1719.

113. *See id.*

114. *See id.* at 1719-20.

115. *See id.*

116. 475 U.S. 312 (1986).

117. *See id.* (holding that where prison officials must decide on the use of force to maintain prison order, in the face of very real threats from inmates, “a deliberate indifference standard does not adequately capture the importance of such competing obligations”).

118. *Lewis II*, 118 S. Ct. at 1720.

The Court reasoned that consideration for the split-second decisions police officers must make in pursuing the interests of the state to apprehend suspects—as balanced against the interests of individuals to remain free from injury caused by government officials—calls for a finding of liability only where it is shown that the officer intended the harm.<sup>119</sup> The Court considered only this degree of egregious behavior sufficient to shock the conscience and violate an individual's due process rights.

In applying this standard to the *Lewis II* facts, the Court found that “[w]hile prudence would have repressed the reaction, the officer’s instinct was to do his job as a law enforcement officer, not to induce [the riders’] lawlessness, or to terrorize, cause harm, or kill.”<sup>120</sup> The Court then concluded that this conduct did not shock the conscience and, accordingly, reversed the Ninth Circuit holding.

#### IV. ANALYSIS

“[O]ur constitutionalism possesses a viable system of fundamental rights insofar as it can protect the conditions for the flourishing of individual persons against competing claims that may enjoy majority support and may also plausibly be said to rest on recognized public rights (that is, governmental powers).”<sup>121</sup>

The need to have reactive police who are able to intercept criminal activity before it escalates to prohibitively dangerous levels is indeed great. However, it cannot be denied that an individual's right to be free from arbitrary government action is critical. American history is full of illustrations defining this dichotomy; solid traditions have stressed the importance of protecting the individual. However, the *Lewis II* Court clearly chose to protect law enforcement officials while abandoning the rights of the innocent citizen.<sup>122</sup>

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119. See *id.* at 1720. Compare *Checki v. Webb*, 785 F.2d 534, 538 (5th Cir. 1986), in which the court stated that “[w]here a citizen suffers physical injury due to a police officer’s negligent use of his vehicle, no § 1983 claim is stated. It is a different story when a citizen suffers or is seriously threatened with physical injury due to a police officer’s intentional misuse of his vehicle.” (quoted in *Lewis II*, 118 S. Ct. at 1720 n.13).

120. *Lewis II*, 118 S. Ct. at 1721.

121. DANIEL N. HOFFMAN, *OUR ELUSIVE CONSTITUTION* 190 (1997).

122. See Barbara Dority, *More Power, Less Responsibility; U.S. Supreme Court Ruling Expands Police Powers and Decreases Accountability*, THE

A. *What Are We Dealing With?*

Police pursuit officer liability is a highly emotional topic that engages heated debate on both sides of the issue.<sup>123</sup> Individuals clearly have differing views on what the primary role of the police should be.<sup>124</sup> Some believe that the police have a primary duty to apprehend criminals; accordingly, these people advocate for broad police discretion.<sup>125</sup> Others feel that the police too often abuse their discretion and therefore need to be restrained.<sup>126</sup>

In addition to varying public sentiment, a number of judicial trends appear to be affecting recent Supreme Court decisions relating to police liability for citizen injuries.<sup>127</sup> In particular, the Court has shown a reluctance to extend substantive due process rights into new areas,<sup>128</sup> an inclination to grant police more numerous and pervasive powers,<sup>129</sup> and a tendency to require less police accountability.<sup>130</sup> These recent trends, which generally afford less protection to individuals, occur against a backdrop of a long judicial history

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HUMANIST, Sept./Oct. 1998, at 3.

123. See Geoffrey P. Alpert et al., *The Constitutional Implications of High-Speed Police Pursuits Under a Substantive Due Process Analysis: Homeward Through the Haze*, 27 MEM. ST. U. L. REV. 599, 606 (1997).

124. See *id.*

125. See *id.*

126. See *id.*

127. See Dority, *supra* note 122.

128. Emphasis on this reluctance is evidenced in the Supreme Court's and lower federal courts' application of more deferential standards to cases involving state action. Specifically, the courts impose more stringent "state of mind" requirements by distinguishing between government action and government inaction. Consequently, the courts are denying due process claims where government inaction could be labeled arbitrary and capricious, and are clarifying that where the government misconduct implicates a specifically protected right, the more general substantive due process claim will not be heard. See Levinson, *supra* note 31, at 332-43.

129. See *Galas v. McKee*, 801 F.2d 200, 204 (1986):

For us to hold as a matter of constitutional law that police officers are foreclosed from pursuing traffic offenders who disregard their directives to pull over would encourage violators to flee. Moreover, to strip police officers of the authority to pursue traffic violators would not only severely hamper the effective enforcement of the traffic laws, it would also encourage offenders sought to be stopped for traffic offenses, but guilty of more serious crimes, to flee.

*Id.*

130. See *supra* note 69.

recognizing the importance of shielding individuals from governmental abuse and arbitrary action. It is the nature of our legal system that values deemed to be fundamental, as compared to those only considered ordinary, are wholly dependent on the sitting Justices and current national and worldwide events.<sup>131</sup>

One cannot underestimate the importance of protecting one's right to life against arbitrary governmental deprivation. Police pursuits often require officers to make split-second decisions,<sup>132</sup> but it does not necessarily follow that all such decisions are without deliberation. For example, one set of police patrol guidelines directs officers to "approach each intersection with extreme caution, slowing down to avoid an accident with someone who may not hear or heed the warning siren and the approaching police car," and warns that "there may be a time when it is strategically sound judgment to abandon the pursuit."<sup>133</sup>

Despite such guidelines, statistics from twelve southern California police departments<sup>134</sup> indicate that 1957 pursuits occurred in 1995 alone.<sup>135</sup> The vast majority of these pursuits were initiated following relatively minor traffic violations.<sup>136</sup> Approximately eleven percent of these pursuits lasted ten minutes or longer.<sup>137</sup>

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131. "As Learned Hand famously warned us, judicial enforcement of rights cannot guarantee public understanding and support for those rights. Rights may be eroded by public indifference, organized resistance, transformative court appointments, and so forth." HOFFMAN, *supra* note 121, at 189.

132. *See Lewis II*, 118 S. Ct. at 1720.

133. THOMAS F. ADAMS, POLICE PATROL: TACTICS AND TECHNIQUES 238 (1971).

134. These include Bakersfield Police Department, San Bernardino Police Department, Anaheim Police Department, Santa Ana Police Department, Long Beach Police Department, Kern County Sheriff's Department, San Bernardino County Sheriff's Department, Riverside Police Department, Orange County Sheriff's Department, Riverside County Sheriff's Department, Los Angeles County Sheriff's Department, and Los Angeles Police Department. *See AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF SOUTHERN CALIFORNIA, NOT JUST ISOLATED INCIDENTS: THE EPIDEMIC OF POLICE PURSUITS IN SOUTHERN CALIFORNIA 4* (June 1996) [hereinafter ACLU].

135. *See id.* at 5.

136. *See id.* at 9. Minor traffic offenses include, among others, railroad crossing violations, stop sign violations, and speeding. *See id.*

137. *See id.* at tbl. 1-5.

Further, 638 suspects and 299 “other”<sup>138</sup> individuals were injured during these pursuits.<sup>139</sup> The ACLU specifically noted that “[t]here is an imbalance between the dangerous nature of pursuits and the seriousness of offenses charged at the conclusion of pursuits.”<sup>140</sup> In particular, no more than thirteen percent of the pursuits involved individuals suspected of committing a serious violent crime.<sup>141</sup>

Prior to the Supreme Court’s 1998 *Lewis II* decision, there were three potential modes of analysis for determining officer liability in police pursuit cases. Early on, the Supreme Court and lower federal courts rejected the notion that negligent conduct was sufficient to make a due process challenge.<sup>142</sup> This produced a debate regarding which of the two remaining standards of conduct—deliberate indifference or reckless disregard and shocks the conscience—*would* suffice for a due process violation; the circuit courts reached varying conclusions.

## B. *The Pre-Lewis Circuit Court Split*

### 1. “Shocks the conscience”

Although the shocks the conscience standard was first introduced in the Supreme Court’s decision in *Rochin v. California*,<sup>143</sup> the most frequently cited case in support of applying this standard in the context of police pursuits was the Third Circuit decision of *Fagan v.*

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138. “Other” refers to those individuals who were occupants other than the driver-suspect of a pursued vehicle, occupants of other vehicles in the path of the pursuit, and bystanders. *See id.* at 3.

139. *See id.* at tbl. 1-1. The Los Angeles Police Department unequivocally holds the lead in the number of suspects and other individuals injured during a pursuit. Two hundred and ninety-nine suspects were injured of the 638 total number of suspects injured, and 165 other individuals of the total 299 other individuals were injured during pursuit. *See id.* at tbl. 1-1.

140. *Id.* at 16.

141. *See id.*

142. *See Daniels v. Williams*, 474 U.S. 327, 328 (1986) (stating that “the Due Process Clause is simply not implicated by a *negligent* act of an official causing unintended loss of or injury to life, liberty, or property”). *See also Davidson v. Cannon*, 474 U.S. 344 (1986) (holding that negligence by a prison official that resulted in an inmate being assaulted by another inmate did not constitute a due process violation).

143. 342 U.S. 165 (1952).

*City of Vineland (Fagan II)*.<sup>144</sup> In *Fagan II*, the plaintiffs' decedents were killed after being hit by a fleeing suspect's vehicle.<sup>145</sup> Although the majority of the court held that the reckless disregard standard was most appropriate,<sup>146</sup> upon a rehearing en banc, the court determined that in the context of police pursuits, the shocks the conscience test should be applied instead.<sup>147</sup>

The court came to this conclusion by relying heavily on *Collins v. City of Harker Heights*,<sup>148</sup> where the Supreme Court reaffirmed the viability of the shocks the conscience standard in the context of substantive due process.<sup>149</sup> Although *Collins* involved a governmental omission, not a police pursuit, the Third Circuit specifically rejected the notion that *Collins* should be limited to its facts.<sup>150</sup> Instead, the court expanded *Collins* to apply to both government omissions and affirmative acts. Consequently, it held that the shocks the conscience standard was appropriately applied to police pursuits.<sup>151</sup> The court found support for this holding in other court of appeals cases where the shocks the conscience standard was applied to challenges involving affirmative government conduct.<sup>152</sup>

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144. 22 F.3d 1296 (3d Cir. 1994) (en banc). Note that there are two Fagan decisions: *Fagan v. City of Vineland [Fagan I]*, 22 F.3d 1283 (3d Cir. 1994), and *Fagan v. City of Vineland [Fagan II]*, 22 F.3d 1296 (3d Cir. 1994), an en banc opinion in which the court considered only the applicability of the shocks the conscience standard to an officer's individual liability.

145. See *Fagan II*, 22 F.3d at 1300.

146. See *id.* at 1302.

147. See *id.* at 1308-09.

148. 503 U.S. 115 (1992) (denying relief to a plaintiff who sued the city under § 1983 for injuries resulting from a failure to train about known dangers in the workplace).

149. See *Fagan II*, 22 F.3d at 1304.

150. See *id.*

151. See *id.* at 1308-09.

152. See *id.* at 1305. The court cited to a number of cases, including *Feliciano v. City of Cleveland*, 988 F.2d 649, 657 (6th Cir.) (involving subjecting police academy cadets to surprise urinalysis in order to detect drugs), *cert. denied*, 510 U.S. 826 (1993); *Salas v. Carpenter*, 980 F.2d 299, 302-03, 309 (5th Cir. 1992) (involving county sheriff's replacement of trained SWAT and hostage negotiation teams with untrained police officers, resulting in death of hostage); *Oladeinde v. City of Birmingham*, 963 F.2d 1481, 1483, 1486 (11th Cir. 1992) (involving police officials' retaliation against officers for whistleblowing about wrongdoing in the police department), *cert. denied*, 507 U.S. 987 (1993).

Under somewhat similar factual circumstances, the First Circuit, in *Evans v. Avery*,<sup>153</sup> also endorsed the application of the shocks the conscience standard in the police pursuit context. This decision represented an abandonment of the long-standing application of the deliberate indifference or reckless disregard standard. Relying on *Collins*, the court concluded that the shocks the conscience test was appropriately applied in the police pursuit context noting that “[p]olice chases are not only a necessary concomitant of maintaining order in our modern society, but they are also inherently hazardous.”<sup>154</sup> The court reasoned that applying any less stringent standard would detrimentally “hamstring” the police in carrying out their duties.<sup>155</sup>

The Fourth Circuit had likewise adopted the shocks the conscience standard in the police pursuit context. In *Temkin v. Frederick County Commissioners*,<sup>156</sup> the plaintiff was severely injured when both the fleeing suspect’s and the pursuing police vehicles hit her. The chase occurred on a narrow two-lane road, with cars parked on both sides of the street. The vehicles reached speeds of 105 miles per hour. The police vehicle was in such close pursuit that it was unable to stop before colliding with the plaintiff’s vehicle.<sup>157</sup>

In reviewing the plaintiff’s § 1983 claim, the court affirmed the appellate court dismissal of the plaintiff’s claim and held that the officer’s conduct did not “shock the judicial conscience.”<sup>158</sup> Although the court recognized that other circuits applied standards ranging from “gross negligence” to “recklessness” in § 1983 actions not involving police pursuits, the court reasoned that when prior police pursuit cases<sup>159</sup> were considered together with both the shocks the

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153. 100 F.3d 1033 (1st Cir. 1996), *cert. denied*, 520 U.S. 1210 (1997). There, ten-year-old Marie Evans was struck and killed by a vehicle fleeing from the police as she attempted to cross the street. *See id.* at 1035.

154. *Id.* at 1038.

155. *See id.*

156. 945 F.2d 716 (4th Cir. 1991).

157. *See id.* at 718.

158. *Id.* at 723.

159. The court referenced four particular cases. In *Roach v. City of Fredericktown*, 882 F.2d 294 (8th Cir. 1989), the plaintiffs alleged that their substantive due process rights were violated when they were injured in an auto accident with a fleeing suspect. *See id.* at 295-96. The court dismissed the claim pursuant to Federal Rule of Civil Procedure 12(b)(6)—which allows for

conscience test and the “stricter standard” rationale espoused many times by the Supreme Court, the only plausible conclusion was that the shocks the conscience standard should be applied in the police pursuit context.

Finally, the Fifth Circuit also applied the shocks the conscience standard in police pursuit cases. In *Checki v. Webb*,<sup>160</sup> an officer in an unmarked police vehicle followed a civilian for approximately twenty miles without identifying himself as a law enforcement agent.<sup>161</sup> The Fifth Circuit reversed the lower court’s dismissal of the case, stating that “where a police officer uses a police vehicle to terrorize a civilian, and he has done so with malicious abuse of official power shocking to the conscience, a court may conclude that the officers have crossed the ‘constitutional line.’”<sup>162</sup>

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dismissal where the plaintiff fails to state a claim upon which relief may be granted—and concluded that negligent or grossly negligent conduct was insufficient to state a claim under § 1983. *See id.* at 297.

In *Parton v. City of Bentonville*, 901 F. Supp. 1440 (W.D. Ark. 1995), a later case within the same circuit, the court concluded that the shocks the conscience standard should be applied in due process cases:

As the Eighth Circuit has not determined the precise level of culpability that must be shown to prevail on a substantive due process claim, this court now holds that, where innocent civilians are injured in a car accident caused by a high speed police chase, or by any other state actor who is acting in the line of duty and in contravention of the rules of the road, the injured civilian states a due process claim only if the alleged misconduct “shocks the conscience.”

*Id.* at 1443.

In *Cannon v. Taylor*, 782 F.2d 947 (11th Cir. 1986), the plaintiff’s decedent was killed when she was hit by a pursuing police vehicle. Relying on precedent set in *Paul v. Davis*, 424 U.S. 693 (1976), and *Parratt v. Taylor*, 451 U.S. 527 (1981), and recognizing the Supreme Court’s concern with respect to the expansion of due process law, the court ruled that “negligent, or even grossly negligent, operation of a motor vehicle by a policeman acting in the line of duty has no § 1983 cause of action for violation of a federal right,” because these injuries are more suitably redressed under state law. *Cannon*, 782 F.2d at 950.

The Sixth Circuit, in *Jones v. Sherrill*, 827 F.2d 1102 (6th Cir. 1987), and the Fifth Circuit, in *Walton v. Salter*, 547 F.2d 824 (5th Cir. 1976), both dismissed due process claims involving police pursuit cases by concluding that merely negligent conduct was not constitutionally culpable under § 1983.

160. 785 F.2d 534 (5th Cir. 1986).

161. *See id.* at 535.

162. *Id.* at 538.

Although not all circuit courts had addressed police pursuit due process claims, it appears that all but four circuits had or would have adopted the shocks the conscience standard in this context.<sup>163</sup> The remaining four circuits applied the deliberate indifference or reckless disregard standards.<sup>164</sup>

## 2. "Deliberate indifference" or "reckless disregard"

According to the Restatement (Second) of Torts Section 500, deliberate indifference or reckless disregard exists when a person does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.<sup>165</sup>

The case most frequently mentioned in support of the deliberate indifference or reckless disregard standard was *Medina v. City and County of Denver*,<sup>166</sup> decided by the Tenth Circuit Court of Appeals. In *Medina*, a bystander sued under § 1983 after being struck by a fleeing motorist who had been closely pursued by police.<sup>167</sup> The bystander alleged that the police pursuit constituted conduct that was reckless and indifferent to the potential harm that could result from the chase.<sup>168</sup> Although the circuit court affirmed the lower court's dismissal of the claim, the court found that recklessness was sufficient to state a claim under § 1983.<sup>169</sup> The court clearly pointed out, however, that conduct in reckless disregard of a known risk to the

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163. Circuits that appear to adopt this standard include the First, Second, Third, Fourth, Fifth, Eighth, and Tenth Circuits. *See supra* note 91.

164. Those Circuits include the Sixth, Seventh, Ninth, and Eleventh Circuits. *See supra* note 91.

165. RESTATEMENT (SECOND) OF TORTS § 500 (1965). Under the Model Penal Code, recklessness is defined as the conscious disregard of "a substantial and unjustifiable risk." MODEL PENAL CODE § 2.02(2)(c) (1962).

166. 960 F.2d 1493 (10th Cir. 1992).

167. *See id.* at 1494.

168. *See id.* at 1496.

169. *See id.*

public at large was not sufficient to state a claim.<sup>170</sup> Instead, the plaintiff must show that the defendant's conduct was in some way directed toward the plaintiff.<sup>171</sup> This can be established by proving that the plaintiff was "closely and immediately tied to the perceived substantial risk."<sup>172</sup>

Although the Tenth Circuit's more recent decision in *Williams v. City and County of Denver*<sup>173</sup> shed some doubt on whether the deliberate indifference or reckless disregard standard would continue to be applied to police pursuit cases,<sup>174</sup> the *Medina* opinion continued to carry great significance due to the specific test developed for application in the police pursuit context.<sup>175</sup>

The Sixth and Seventh Circuits likewise adopted the deliberate indifference or reckless disregard standard. In the Sixth Circuit opinion in *Spears v. City of Louisville*,<sup>176</sup> the court reviewed *Nishiyama v. Dickson County, Tenn.*,<sup>177</sup> where the court stated that "to state a claim against state officials for a due process violation under § 1983, a plaintiff must show that the officials acted unreasonably and

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170. *See id.*

171. *See id.*

172. *Id.*

173. 99 F.3d 1009 (10th Cir. 1996).

174. In a non-pursuit situation, the court declined to follow the deliberate indifference or reckless disregard standard, and instead held that "a plaintiff must do more than show that the government actor intentionally or recklessly caused injury to the plaintiff by abusing or misusing government power. That is, the plaintiff must demonstrate a degree of outrageousness and a magnitude of potential or actual harm that is truly conscience shocking." *Id.* at 1015.

175. The *Medina* court stated that to aid in the determination of whether an officer's conduct can be considered sufficiently directed towards a third party, the following factors should be analyzed: (1) whether the plaintiff is a member of a limited and specifically definable group, (2) whether the defendant's conduct specifically put that group of people at substantial risk of serious, immediate and proximate harm, (3) whether the risk was obvious or known, and (4) whether the defendant acted recklessly in conscious disregard of that risk. *See Medina*, 960 F.2d at 1496.

176. 27 F.3d 567, No. 93-5921, 1994 WL 262054 (6th Cir. June 14, 1994). *Spears* involved a situation where a motorcyclist being pursued by the police was killed when the motorcycle collided with a truck. *See id.* at \*1. The father of the motorcyclist brought a § 1983 action against the police department alleging a violation of his son's substantive due process rights. *See id.*

177. 814 F.2d 277 (6th Cir. 1987) (en banc) (police pursuit ending in death of innocent third party).

intentionally with disregard of a known risk.”<sup>178</sup> The *Spears* court found these statements controlling and continued to apply the reckless disregard standard. And in *Magdziak v. Byrd*,<sup>179</sup> it appeared that the Seventh Circuit would also apply the reckless disregard standard.<sup>180</sup> There, a bystander was killed in an accident that occurred during an officer’s high-speed pursuit of a suspect.<sup>181</sup> The deceased’s estate alleged that the officer’s failure to activate his lights or sirens constituted culpable conduct.<sup>182</sup> Nonetheless, the court determined that the officer was entitled to qualified immunity as other cases indicated that the officer had not violated any clearly established constitutional right.<sup>183</sup>

The Ninth Circuit clearly advocated the deliberate indifference or reckless disregard standard as being more appropriate than the shocks the conscience test.<sup>184</sup> The court was first confronted with this question in *L.W. v. Grubbs (Grubbs II)*.<sup>185</sup> *Grubbs II* involved a non-pursuit case where a prison inmate attempted to rape and assault the plaintiff, a registered nurse at the correctional facility.<sup>186</sup> The

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178. *Spears*, 1994 WL 262054, at \*2 (citing *Nishiyama v. Dickson County*, 814 F.2d 277, 282 (6th Cir. 1987) (en banc)).

179. 96 F.3d 1045 (7th Cir. 1996).

180. The likelihood of extending the reckless indifference standard to the police pursuit context was further illustrated in *Hill v. Shobe*, 93 F.3d 418 (7th Cir. 1996), a non-pursuit case where the court held that

[f]or a defendant to be reckless in a constitutional sense, he must be criminally reckless . . . . [I]t is not enough to show that a state actor should have known of the danger his actions created. Rather, a plaintiff must demonstrate that the defendant had actual knowledge of impending harm which he consciously refused to prevent.

*Id.* at 421. The court’s statement clearly represented a rejection of the mere negligence standard but strongly suggested that liability will be imposed for conduct which is deliberately indifferent, or criminally reckless.

181. See *Magdziak*, 96 F.3d at 1046.

182. See *id.*

183. See *id.* at 1048. The defense of qualified immunity protects government officials from liability where “their conduct does not violate clearly established . . . rights of which a reasonable person would have known.” *Id.* at 1047 (quoting *Behrens v. Peletier*, 516 U.S. 299, 305 (1996)).

184. See *supra* Part III.C.

185. 92 F.3d 894 (9th Cir. 1996). Note that there are two *Grubbs* decisions: *L.W. v. Grubbs (Grubbs I)*, 974 F.2d 119 (9th Cir. 1992), and *L.W. v. Grubbs (Grubbs II)*, 92 F.3d 894 (9th Cir. 1996).

186. See *Grubbs II*, 92 F.3d at 895-96.

plaintiff filed a § 1983 action claiming that her due process rights were violated by the institution's failure to protect her from a known danger.<sup>187</sup> The defendant subsequently appealed the plaintiff's favorable verdict.<sup>188</sup>

In determining the appropriate standard of culpability, the Ninth Circuit stated:

This Court has been consistent on at least one point: We have not deviated from the principle that deliberate indifference on the part of the responsible official, to the safety of employees in the presence of known danger, created by official conduct, is sufficient to establish a due process violation.<sup>189</sup>

Accordingly, the court rejected the notion that negligence alone was sufficient to state a § 1983 cause of action. The court did not require, however, that the government official's conduct shock the conscience. In an attempt to define deliberately indifferent conduct, the court endorsed the First Circuit's explanation: "While this mental state can aptly be described as "recklessness," it is recklessness not in the tort-law sense but in the appreciably stricter criminal-law sense, requiring actual knowledge [or wilful [sic] blindness] of impending harm, easily preventable."<sup>190</sup> This case provided the Ninth Circuit with strong support for maintaining an advocacy of the reckless indifference standard in subsequent police pursuit cases.<sup>191</sup>

Although the Eleventh Circuit appeared to have adopted the shocks the conscience test in the police pursuit context,<sup>192</sup> its rejection of this standard in the more recent *McKinney v. Pate*<sup>193</sup> decision, albeit a non-pursuit case, suggests that the circuit may have found the deliberate indifference or reckless disregard standard to be more appropriate.<sup>194</sup>

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187. See *Grubbs I*, 974 F.2d at 120.

188. See *Grubbs II*, 92 F.3d at 895.

189. *Id.* at 896 (citing *Grubbs I*, 974 F.2d at 122-23; *Wood v. Ostrander*, 879 F.2d 583, 588 (9th Cir. 1989)).

190. *Id.* at 899-900 (alteration in original) (quoting *Manarite v. City of Springfield*, 957 F.2d 953, 956 (1st Cir. 1992)).

191. See *supra* Part III.C.

192. See *supra* note 159 and accompanying text.

193. 20 F.3d 1550 (11th Cir. 1994).

194. See *id.* at 1556 n.7.

### C. Appropriateness of the Reckless Indifference Standard

“A recklessness standard affords an appropriate level of deterrence without unduly burdening local governments or the federal courts with having to respond to and manage an onslaught of what are essentially common law tort cases.”<sup>195</sup>

#### 1. The deliberate indifference or reckless disregard standard complements the goals of substantive due process

It is traditionally understood that substantive due process is designed to protect individuals from government action in both its legislative and executive capacities.<sup>196</sup> However, the *Lewis II* Court was clear in emphasizing that standards of liability depend upon which branch of government is engaged in the action.<sup>197</sup> This distinction can be justified by the underlying principle that substantive due process is most appropriately applied when used to protect the individual against systematic governmental invasion.<sup>198</sup> This principle is buttressed by the Court's concern that constitutional law may become a font of tort law if due process rights are expanded too far.<sup>199</sup>

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195. Brief for Respondents at 16-17, *County of Sacramento v. Lewis*, 118 S. Ct. 1708 (1998) (No. 96-1337).

196. See ABRAHAM & PERRY, *supra* note 10, at 93-95. See also *Lewis II*, 118 S. Ct. at 1724 n.2 (Scalia, J., dissenting).

197. See *Lewis II*, 118 S. Ct. at 1716.

198. See Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 327 (1993) (“Increasingly, due process law aims less to correct individual injustices than to structure and maintain a regime in which courts ensure that governmental lawbreaking does not reach intolerable levels; this latter ambition is more clearly implicated in challenges to rules and legislation than in individual tort actions.”) (footnotes omitted).

199. See *Lewis II*, 118 S. Ct. at 1718. See also Fallon, *supra* note 198, at 365 (“Acknowledging the impracticality of aspiring to correct every individual injustice, due process frequently satisfies itself with efforts to promote the socially tolerable systemic effects.”); J. Michael McGuinness & Lisa A. McGuinness Parlagraeco, *The Reemergence of Substantive Due Process as a Constitutional Tort: Theory, Proof, and Damages*, 24 NEW ENG. L. REV. 1129, 1152 (1989) (“While a single incident may certainly suffice to shock the conscience, perhaps the test is more appropriately applied to a course of governmental conduct.”); Christina Brooks Whitman, *Emphasizing the Constitutional in Constitutional Torts*, 72 CHI.-KENT L. REV. 661, 690 (1997) (“[W]hat is special about constitutional law, and distinguishes it from tort, is its concern with institutional power, and therefore with systemic injustice.”) (footnote

This distinction results in different standards of review being applied to executive and legislative action. In cases dealing with abusive executive conduct, the Court has repeatedly held that only the most egregious behavior will be considered a constitutional violation.<sup>200</sup>

Although the Court's concern is valid and deeply rooted, it fails to maintain sight of the forest for the trees: injuries resulting from high-speed police pursuits are not isolated and individual situations. Although they involve individual people and individual officers, police pursuits represent a systematic approach to policing that too often needlessly endangers the lives of right-deserving suspects and, more unfortunately, unwitting bystanders.<sup>201</sup> Obviously the need for police to maintain a peaceful society is overwhelming, and it is not at all suggested by this Note that these kinds of pursuits should not continue. However, it is not unreasonable to recognize that just as the notion of police pursuits is a systematic means to achieving a systematic goal—apprehension of lawbreakers—the adverse consequences of these pursuits pose a systematic danger, requiring that such exercises of governmental power be restrained.

Additionally, the Court undermines its own focus on systematic invasions when it pronounces that liability is dependent on the *individual's* state of mind.<sup>202</sup> In fact, as some commentators have emphasized:

Certain intrusive practices that threaten personal injury or personal dignity . . . might be quite consistent with an official's honest effort to do the job efficiently and effectively. An official's neutral, or even admirable, mental state ought not, in itself, be an insurmountable barrier to the claim that the Constitution has been violated.<sup>203</sup>

More specifically, a finding of a constitutional violation should not require a showing that the officer intended to harm the victim. Rather, such findings should be permitted regardless of any sort of intent. Indeed, the Court would have been more consistent with its

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omitted).

200. See *supra* note 32 and accompanying text.

201. See *supra* notes 135-42 and accompanying text.

202. See *Lewis II*, 118 S. Ct. at 1720.

203. Whitman, *supra* note 199, at 686.

own rationale if it instead required an analysis of the institutional choices beyond the intent of the individual officer.<sup>204</sup>

In particular, if the goal of substantive due process is only to remedy systematic invasions, there is no point in looking at an individual's state of mind because the individual does not properly represent the systematic structure of law enforcement. The fact that high-speed pursuits are a commonplace tool of law enforcement clearly implicates a systematic structure that could be analyzed according to its policy and apart from the circumstances of the individual case.<sup>205</sup>

Although it is certainly possible that high-speed pursuit tragedies are the product of an individual officer's judgment, these decisions are more largely encompassed by the overreaching policy regarding the activity. If too many pursuits end up in needless injuries to either suspects or bystanders, the policy must be flawed in some way—regardless of how it measures up to state guidelines—which then deserves closer analysis and reconsideration.

An illustration from the City of Baltimore exemplifies this point.<sup>206</sup> The Baltimore police department had long rejected the proposition that injury and death resulting from police pursuits were necessary consequences of effective law enforcement.<sup>207</sup> Instead, the department enforced a policy that strictly limited a police officer's ability to initiate pursuit.<sup>208</sup> According to a police department spokesperson, results from implementing the stricter policy were excellent.<sup>209</sup> The spokesperson made reference to the utility of new communications technology that allowed police to apprehend criminals without creating dangerous situations through pursuit.<sup>210</sup>

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204. See *The Supreme Court, 1997 Term: Leading Cases*, 112 HARV. L. REV. 122, 200 (1998).

205. See Whitman, *supra* note 199, at 691.

206. See Frank Kuznik, *Macho Mayhem*, WASH. POST, May 19, 1991, at W20.

207. See *id.*

208. See *id.*

209. See *id.* “We still give out plenty of moving violation tickets and catch our suspects just like everybody else—we just don’t chase them at high speeds through the city.” *Id.* (quoting the spokesperson).

210. See *id.* The Baltimore policy included radioing to the dispatcher when a suspected criminal was located and requesting a road block. This practice enables a virtually guaranteed apprehension, without endangering the public. See *id.*

Assuming the department policy is considered “sufficient”—meaning it meets those guidelines instituted by the state—cities would never be motivated to make the sort of aggressive changes made by the City of Baltimore if officers could only be liable where it is shown that they intended to harm the victim. It is plausible for there to exist a “sufficient” department policy, with an officer who has no intent to harm, and there may still be a constitutional violation. As such, “there should be mechanisms for articulating and reinforcing constitutional limits on government behavior that do not depend on the existence of a ‘bad actor’ with a malicious state of mind.”<sup>211</sup>

2. The deliberate indifference or reckless disregard standard provides a sufficient degree of deterrence

The Supreme Court has continually rejected arguments that mere negligence constitutes culpable conduct under the Fourteenth Amendment—and rightfully so. In *Daniels v. Williams*<sup>212</sup> and *Davidson v. Cannon*,<sup>213</sup> the Court thoughtfully explained why merely negligent acts do not rise to the level of conduct that the Due Process Clause was designed to remedy. Specifically, the Court reasoned that in order for there to be a deprivation of constitutional proportions, the plaintiff must show there was “an affirmative abuse of power.”<sup>214</sup> In both cases, the Court concluded that the government conduct did not rise to this level.

Implicit in the Court’s reasoning was the notion that plaintiffs should not be able to bring constitutional claims against government officials for injuries resulting from conduct that was not uniquely

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211. Whitman, *supra* note 199, at 690.

212. 474 U.S. 327 (1986). In *Daniels*, an inmate slipped on a pillow which a deputy sheriff had negligently left on a stairway. *See id.* at 328. The inmate brought a § 1983 action in federal court claiming that the sheriff had deprived him of his interest in being free from bodily injury. *See Daniels v. Williams*, 720 F.2d 792, 794 (4th Cir. 1983), *reh’g granted*, 748 F.2d 229 (1984) (en banc).

213. 474 U.S. 344 (1986). In *Davidson*, a prisoner was attacked by another inmate after notifying prison officials that this inmate had threatened him with physical force. *See id.* at 345-46. The prisoner argued that the officers’ failure to take any reasonable steps to prevent the injury constituted a violation of due process. *See id.* at 346.

214. *Daniels*, 474 U.S. at 330 (quoting *Parratt v. Taylor*, 451 U.S. 527, 548-49 (1981) (Powell, J., concurring)).

governmental. Accordingly, in *Daniels*, the Court appropriately rejected a due process claim for injury to a prisoner resulting from a negligently placed pillow because the pillow could have been placed there not only by a deputy sheriff, but also by a housekeeper, another inmate, or a myriad of other people. More precisely, the act of negligently placing the pillow did not represent a uniquely governmental act.<sup>215</sup>

Importantly, the present scenario is distinguishable from the *Daniels* case in one crucial respect. Here, *only* the government has the authority to initiate and maintain a high-speed pursuit.<sup>216</sup> While it is possible for an ordinary citizen to drive erratically and at high-speeds, state tort law provides a sufficient remedy for these situations. In contrast, when there is a police officer behind the wheel of the pursuing vehicle, the dynamics of the situation shift dramatically. Government presence often has, to say the least, an intimidating effect on almost everyone around. For example, where an ordinary citizen driving in a fast and erratic manner may prompt other drivers to move aside, a police-driven patrol car may cause the pursued individual to make irrational driving choices, often regardless of the alleged violation.<sup>217</sup> In this way, the vehicle altercation resulting from a police pursuit is “uniquely governmental” in that its effect is tremendously different from the seemingly similar altercation involving an ordinary citizen.<sup>218</sup> Accordingly, whenever an officer decides to initiate a pursuit against what is likely to be considered more prudent judgment, an abuse of power has occurred.<sup>219</sup>

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215. *See id.* at 332-33.

216. As Judge Cowen points out in his dissent in *Fagan*, “[i]n pursuing fleeing suspects, police offices [sic] are engaged in an activity that is uniquely governmental in nature . . . . This is governmental conduct which private citizens generally cannot engage in.” *Fagan v. City of Vineland*, 22 F.3d 1296, 1322 (3d Cir. 1994).

217. The vast majority of police pursuits are the result of a routine traffic stop gone awry. *See* ACLU, *supra* note 134, at 9.

218. The Supreme Court’s and other lower federal courts’ conclusion that an auto accident involving a government official does not rise to the level of a constitutional violation, is not persuasive here. In dicta, the *Parratt* Court merely reiterated that injuries which could be caused by any citizen, and which are not unique to governmental power, are not actionable injuries. *See Parratt*, 451 U.S. at 544.

219. Despite the *Lewis II* Court’s focus on the officer’s intent, “[t]he good

In *Lewis II*, the Court found the deliberate indifference or reckless disregard standard<sup>220</sup> inappropriate in the police pursuit context by reasoning that the split-second decisions officers are required to make in such circumstances leave no time for deliberation.<sup>221</sup> Accordingly, one cannot be found to be *deliberately* indifferent where there was no opportunity to deliberate. However, if we accept the idea that substantive due process is designed to redress systematic, institutional wrongs, one can hardly argue that injuries resulting from police pursuits are unforeseen circumstances; statistics clearly illustrate that such injury is something which can be anticipated.<sup>222</sup>

The reckless disregard standard not only provides significant deterrence, but courts can also easily apply it. The value of choosing the reckless disregard standard is supported by a history of precedent involving judicial interpretation of its parameters in case law.<sup>223</sup> As compared to the shocks the conscience standard, where “the measure of what is conscience-shocking is no calibrated yard stick,”<sup>224</sup> the reckless disregard standard is clearly defined.

### 3. Flaws with the shocks the conscience test

“[A] ‘shocks the conscience’ test spurns bright lines. It spurns rules. It is a vague standard . . . inviting all decisionmakers to consult their sensibilities rather than objective circumstances.”<sup>225</sup>

One widely held criticism of the *Lewis II* Court’s ruling is that the shocks the conscience standard is “too subjective and vague to provide any . . . [meaningful] guidance for lower federal courts.”<sup>226</sup> In fact, both Supreme Court and lower federal court opinions have

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faith of the official seems more relevant to the question of whether he or she should be personally held liable for damages . . . than to whether the Constitution has been infringed.” Whitman, *supra* note 199, at 686.

220. For clarification, the terms “reckless disregard” and “deliberate indifference” are used interchangeably to refer to the same standard of culpability.

221. See *Lewis II*, 118 S. Ct. at 1719.

222. See ACLU, *supra* note 134, at 9 (five of the twelve departments studied had a consistently large number of high-speed pursuit collisions, “defined as in excess of 30%”).

223. See Edlund, *supra* note 38, at 212.

224. *Lewis II*, 118 S. Ct. at 1717.

225. *Gumz v. Morrisette*, 772 F.2d 1395, 1407 (7th Cir. 1985) (Easterbrook, J., concurring).

226. Edlund, *supra* note 38, at 207.

acknowledged the ambiguous nature of this test.<sup>227</sup> Contrary to an objective standard, the shocks the conscience standard “make[s] the rule turn not on the Constitution but on the idiosyncrasies of the judges who [preside].”<sup>228</sup> In the end, an individual’s ability to evaluate his or her claim involves nothing but guesswork as it is impossible to tell just how egregious the conduct must be in order to have a claim worth fighting for.<sup>229</sup>

In justifying the application of a shocks the conscience test, the Supreme Court relied heavily on the benchmark created in *Rochin v. California*.<sup>230</sup> There, the Court held that a due process violation is established where the executive conduct shocks the conscience.<sup>231</sup> However, the Court’s heavy reliance on *Rochin* and its progeny is questionable.

Some commentators argue that looking to *Rochin* for any guidance in the police-pursuit context is “misplaced.”<sup>232</sup> They contend that an accurate analogy between *Rochin* and *Lewis II* cannot be made due to the drastically different facts. As previously stated,

227. See *Lewis II*, 118 S. Ct. 1717 (“[T]he measure of what is conscience shocking is no calibrated yard stick . . .”); *Rochin*, 342 U.S. at 175 (Black, J., concurring) (describing the shocks the conscience test as being a “nebulous standard”); *Fagan II*, 22 F.3d at 1308 (“[W]e are aware of the amorphous and imprecise inquiry that the ‘shocks the conscience’ test entails . . .”); *Metcalf v. Long*, 615 F. Supp. 1108, 1120 (D. Del. 1985) (“Such a ‘vague and discretionary’ standard is not easily utilized.”).

228. *Rochin*, 342 U.S. at 179 (Douglas, J., concurring).

229. See *Fagan II*, 22 F.3d at 1320 (Cowen, J., dissenting). Commenting on how the majority of the Court failed to define the shocks the conscience standard, Judge Cowen states that neither the Court nor the Defendants—the City of Vineland—could imagine a police pursuit situation where this standard would be satisfied. See *id.* at 1319. Moreover, “[i]t thus appears that the Constitution does not constrain police officers when conducting a high-speed car chase.” *Id.* See also Brief for The Association of Trial Lawyers of America [hereinafter ATLA Brief] at 11, *County of Sacramento v. Lewis*, 118 S. Ct. 1708 (1998)(No. 96-1337). ATLA looks to *Temkin v. Frederick County Commissioners*, 945 F.2d 716 (4th Cir. 1991), to illustrate that where the court concludes that a genuine issue of material fact does not exist under the facts of that case, it is hard to see how this standard would ever be satisfied. See ATLA Brief at 14-15 (No. 96-1337). For a discussion of the facts and holding in *Temkin*, see *supra* notes 157-59 and accompanying text.

230. 342 U.S. 165 (1952).

231. See *id.* at 172-73.

232. See Donald A. Dripps, *Does Police Pursuit Shock the Conscience?*, TRIAL, Aug. 1998, at 66-67.

*Rochin* involved a warrantless midnight entry, without probable cause, which culminated in pumping the suspect's stomach to retrieve a narcotics capsule.<sup>233</sup> To analogize these two cases is to misunderstand the main issue in *Rochin*. Unlike the *Lewis II* case, *Rochin* was not concerned with whether the police conduct itself reached a level so egregious as to violate due process.<sup>234</sup> Instead, the main issue in *Rochin* was whether due process required the exclusion of the evidence obtained under the Fourth Amendment, in addition to damages for a Fourteenth Amendment violation.<sup>235</sup>

Third Circuit Court Judge Cowen's dissent<sup>236</sup> in *Fagan v. City of Vineland*<sup>237</sup> illustrates the Supreme Court's error in its reliance on *Rochin*. Judge Cowen questioned whether the *Rochin* shocks the conscience test was even exportable to the civil context.<sup>238</sup> Moreover, he presented considerable support that even if it was, it had become a dead letter.<sup>239</sup> Nevertheless, assuming neither of these arguments renders the Court's application of *Rochin* in police pursuit cases fatal, Judge Cowen strongly argued that the court has mistakenly turned the shocks the conscience test into a "necessity test" rather than maintaining it as the "sufficiency test" it was designed to be.<sup>240</sup> Judge Cowen argues that the Supreme Court's holding in *Rochin* intended only to state that conduct which shocks the conscience renders evidence inadmissible; "[i]t never held that only that kind of conduct suffices or is *required* in order to exclude evidence."<sup>241</sup> This distinction, therefore, militates against the adoption of the shocks the conscience standard for any due process claim as this standard is not

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233. *See id.* at 67.

234. *See id.*

235. *See id.*

236. Three other justices joined Judge Cowen's dissent: Justices Becker, Scirica, and Lewis.

237. 22 F.3d 1296, 1309 (3d Cir. 1994). For a discussion of the facts and holding in *Fagan II*, *see supra* notes 144-52 and accompanying text.

238. *See Fagan II*, 22 F.3d at 1310 (Cowen, J., dissenting).

239. *See id.* at 1311, 1316-18.

240. *See id.* at 1318. To elaborate, Judge Cowen asserts that the *Rochin* Court never concluded that conscience-shocking conduct was required, or *necessary*, to allege a due process violation. *See id.* Rather, the Court merely concluded that conduct that shocks the conscience is certainly *sufficient* to state such a claim. *See id.*

241. *Id.*

meant to be a threshold requirement to a finding of liability. Rather, conduct that can be labeled as conscience-shocking should be emphasized only to illustrate what *may* constitute a violation.<sup>242</sup>

Indeed, lower federal court judges have recognized the necessity for clarification of the shocks the conscience test. Specifically, in *Johnson v. Glick*,<sup>243</sup> Circuit Court Judge Friendly set forth a four-factor test in an attempt to provide guidelines for what type of conduct would shock the conscience.<sup>244</sup> Despite this attempt to clear the murky waters, lower courts continue to encounter difficulty in applying this test, as exemplified by their inconsistent conclusions.<sup>245</sup>

Presenting an even more unnerving possibility, the Court's decision gives police unbridled discretion and authority without realizing the ramifications of such a grant of power: "You get a 25-year-old person with his hot blood and adrenaline going, and even though we train our people otherwise, he wants to chase."<sup>246</sup> A common result is that an overzealous officer pursues whatever he can, ignoring the innocent people that may get swept into his path.

The *Lewis II* Court suggested that plaintiffs would satisfy the shocks the conscience standard only if they could prove that the officer intended to harm the victim.<sup>247</sup> It is unlikely that such an intent to harm will ever be proven as it is impossible for a plaintiff to get inside the officer's mind.<sup>248</sup> Moreover, any circumstantial evidence used to prove intent will more likely demonstrate the officer's intent to carry out his law enforcement duties and will fail to illustrate his actual intent with respect to the pursued suspect and other bystanders. In the heat of the moment—when a suspect is fleeing, the

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242. *See id.*

243. 481 F.2d 1028 (2d Cir. 1973), *cert. denied*, 414 U.S. 1033 (1973).

244. The four factors include:

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

*Id.* at 1033.

245. *See Edlund, supra* note 38, at 207-08.

246. Kuznik, *supra* note 206, at W20.

247. *See Lewis II*, 118 S. Ct. at 1718.

248. *See* Martin A. Schwartz, *The Decision on Police Pursuit*, N.Y.L.J., Oct. 20, 1998, at 3.

officer's overhead lights are on and the sirens are blaring, and the officer has the power of the law behind him—it is at this point where dangerous decisions may be made and horrible consequences may result.

In response to the general concern of having constitutional law become a font of tort law, the Court suggested that actions similar to the Lewises' would be more appropriately brought under state tort law.<sup>249</sup> On its face, this solution may seem to solve the problem, but the Court failed to look more closely to determine whether this remedy would in reality redress the wrong. Section 1983 was enacted to provide a remedy for constitutional deprivations. However, § 1983 only enforces already existing federally protected rights and fails to create any new ones.<sup>250</sup> Specifically, the enactment of this legislation signified Congress's intent to provide plaintiffs with access to federal court to secure redress for wrongs that state courts did not adequately address.<sup>251</sup> Indeed, state court use of post-deprivation procedures and immunity principles often denies plaintiffs any meaningful avenue of recourse.<sup>252</sup> Moreover, assuming a state court does review a plaintiff's case, state tort recovery caps and limitations<sup>253</sup> often result in unsatisfactory compensation.

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249. See *Lewis II*, 118 S. Ct. at 1721 n.14.

250. See Travis N. Jensen, Note, *Cooling the Hot Pursuit: Toward a Categorical Approach*, 73 IND. L.J. 1277, 1283 (1998).

251. See *Monroe v. Pape*, 365 U.S. 167, 174-76 (1961).

It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies.

*Id.* at 180.

252. See Jensen, *supra* note 250, at 1289-90.

253. See, e.g., ALA. CODE § 11-93-2 (1994); MINN. STAT. ANN. § 466.04 (West Supp. 1999); N.M. STAT. ANN. § 41-4-19 (Michie 1998); TEX. CIV. PRAC. & REM. CODE ANN. § 101.023 (West 1997 & Supp. 1999). Traditionally, governmental immunity provided an incentive for people to enter public service and perform their duties in good faith without fear of personal liability. See *Sheuer v. Rhodes*, 416 U.S. 232 (1974).

In exercising the functions of his office, [a government official], keeping within the limits of his authority, should not be under an apprehension that . . . his official conduct may . . . become the subject of

## V. CONCLUSION

The Court's decision in *County of Sacramento v. Lewis* has effectively rendered plaintiffs with no means of recourse for their injuries. Moreover, the Court handed down its controversial decision despite extensive case law consistently applying the reckless disregard or deliberate indifference standard, and criticizing the ambiguity of the shocks the conscience test. This holding was primarily based on what appears to be an over-inflated fear that such actions would rapidly demote constitutional law to a font of tort law.

The Court's decision clearly fails to take into account the recurrent and systematic nature of the police pursuit problem by maintaining that any sort of restriction would hamper effective law enforcement efforts. The *Lewis II* decision is, indeed, an unfortunate roadblock in plaintiffs' attempts to redress their constitutional wrongs. Despite good faith efforts to interpret the shocks the conscience test, the problem still remains that "some judges have demonstrated that they are so inured to injuries caused by overzealous policing that their consciences are virtually shockproof."<sup>254</sup> It is obvious that in today's society, crimes are more violent, more egregious and more outrageous than ever. Although this may be the case, certain examples of conduct that may not shock one's particular conscience should nonetheless be outlawed.<sup>255</sup>

Because the shocks the conscience standard is replete with so many flaws, it seems illogical and unreasonable that the Court would choose to adopt this standard instead of one with a long history of consistent application and interpretation: the reckless disregard or deliberate indifference standard. This standard is stringent enough to protect government officials against liability for injuries caused by ordinary, non-"uniquely governmental" acts so as to avoid turning

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inquiry . . . . It would seriously cripple the proper and effective administration of public affairs . . . if he were subjected to any such restraint.

*Id.* at 242 (quoting *Spalding v. Vilas*, 161 U.S. 483, 498 (1896)). State imposed caps on liability relate to the same underlying purpose and also release taxpayers from any undue burden resulting from government negligence. See Jensen, *supra* note 250, at 1290.

254. Michael Avery, *Police Chases: More Deadly Than a Speeding Bullet?*, TRIAL, Dec. 1997, at 52, 53.

255. See Dripps, *supra* note 232, at 67.

constitutional law into a font of tort law. At the same time, it provides additional deterrence to officials who may forget or ignore the rights of those they govern. One can only hope that the Court will realize the ramifications of its holding before too many innocent people are killed by officers who get carried away in the heat of the chase.

*Erica L. Reilley\**

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