THE SUPREME COURT ADOPTS THE “SHOCKS THE CONSCIENCE” STANDARD IN THE CONTEXT OF VEHICULAR POLICE PURSUITs IN COUNTY OF SACRAMENTO V. LEWIS

INTRODUCTION

Law enforcement officers routinely use their cruisers to pursue individuals who disobey the law and fail to stop when so signaled. To police officers, the pursuit of suspects is both a necessary and instinctual response to lawless behavior. At times, a police pursuit may result in the injury or death of the driver/pursuee, a passenger, or an innocent pedestrian. Individuals injured as a result of a police pursuit generally seek relief from the law enforcement officers and municipalities involved under 42 U.S.C. § 1983 (“section 1983”) to enforce the substantive component of the Fourteenth Amendment’s Due Process Clause. These section 1983 proceedings have caused uncertainty for the circuit courts, as they have struggled to determine what standard of culpability to apply in a claim for damages in the context of a police pursuit based upon substantive due process.

Recently, in County of Sacramento v. Lewis, the United States Supreme Court held that the appropriate standard in assessing a section 1983 claim in the context of a police pursuit is the “shocks the conscience” standard. In Lewis, sixteen-year-old Philip Lewis was a passenger on the back of a motorcycle that was being pursued by the police for failure to stop when so requested. For seventy-five seconds the motorcycle was pursued by Sacramento County Sheriff’s Deputy James Everett Smith. The pursuit ended when the motorcycle tipped over and Deputy Smith’s patrol car, traveling at a speed of forty miles per hour, skidded into Lewis and propelled him approximately sev-
enty feet down the street.10 Lewis was killed as a result.11 His parents filed suit against Sacramento County, the Sacramento County Sheriff's Department, and Deputy Smith under section 1983, alleging a violation of Lewis's Fourteenth Amendment substantive due process rights.12 The Supreme Court ultimately adopted the "shocks the conscience" standard, holding that Deputy Smith's conduct did not measure up to that standard, and thus Deputy Smith was not liable under section 1983.13

This Note will first review the facts and holding of Lewis.14 This Note will then examine the origin of section 1983 and the defense of qualified immunity.15 This Note will then explore why police pursuits are properly analyzed in the context of substantive due process, as opposed to the Fourth Amendment's search and seizure provision.16 Next, this Note will examine the development of the "shocks the conscience" standard and the split among the circuit courts in deciding whether to adopt the "shocks the conscience" standard or a lower standard in the context of a police pursuit.17 Further, this Note will analyze the Supreme Court's decision in Lewis and commend the Court for: (1) examining this case in the framework of substantive due process; and (2) adopting the "shocks the conscience" standard in the context of police pursuits.18 Finally, this Note will examine the difference in the analytical approaches taken by the Supreme Court and the district court.19

FACTS AND HOLDING

On May 22, 1990, at approximately 8:30 p.m., Sacramento County Sheriff's Deputy James Everett Smith and Sacramento Police Officer Murray Stapp responded to a call regarding a fight that was in progress.20 Upon completing the call, both officers returned to their respective patrol cars.21 As the officers prepared to leave the scene, Officer Stapp observed a motorcycle approaching him at a high rate of

10. Id.
12. Lewis, 118 S. Ct. at 1712.
13. Id. at 1720-21.
14. See infra notes 20-116 and accompanying text.
15. See infra notes 120-97 and accompanying text.
16. See infra notes 198-290 and accompanying text.
17. See infra notes 293-436 and accompanying text.
18. See infra notes 449-517 and accompanying text.
19. See infra notes 518-33 and accompanying text.
21. Lewis, 98 F.3d at 436.
speed.22 Brian Willard was driving the motorcycle with his passenger Phillip Lewis, who actually owned the motorcycle.23 Both boys were minors, as Willard was eighteen and Lewis was sixteen.24 Neither Willard nor Lewis was involved in the fighting incident that had incited the call to the officers.25

In an attempt to stop the motorcycle, Officer Stapp activated his cruiser's emergency lights and yelled at the boys to halt.26 Additionally, Officer Stapp drove his patrol car closer to Deputy Smith's in an attempt to block the path of the motorcycle.27 Instead of stopping, Willard slowed down, maneuvered the motorcycle between the two patrol cars, and then sped away.28 At this time, Deputy Smith turned on his cruiser's siren and emergency lights and quickly made a three-point turn to pursue the motorcycle.29

The high-speed pursuit, which occurred in a residential neighborhood, lasted approximately seventy-five seconds and covered 1.3 miles.30 The vehicles, averaging speeds of sixty miles per hour, at one point reached speeds as high as 100 miles per hour.31 During the chase, the motorcycle zigzagged in and out of the oncoming lanes of traffic, forcing a bicyclist and at least two cars to veer off the road.32 The chase continued through three ninety-degree left turns and four stop lights.33 Deputy Smith continued to pursue the motorcycle, following as close as 100 feet.34 Deputy Smith, at the speed he was traveling, required 650 feet to stop in order to avoid hitting the motorcycle.35

The pursuit ended with the motorcycle tipping over as Willard lost control when he unsuccessfully tried to make a sharp left turn.36 Although Deputy Smith slammed on his brakes, he was unable to stop and crashed into the motorcycle.37 Deputy Smith's patrol car skidded 147 feet and hit Lewis at approximately forty miles per hour, causing

24. Lewis, 118 S. Ct. at 1712; Lewis, 98 F.3d at 436.
25. Lewis, 118 S. Ct. at 1712.
26. Id.
27. Lewis, 98 F.3d at 436.
28. Id.
29. Petitioner's Brief at 5, Lewis (No. 96-1337).
30. Lewis, 118 S. Ct. at 1712.
31. Lewis, 98 F.3d at 436.
32. Lewis, 118 S. Ct. at 1712.
33. Lewis, 98 F.3d at 436.
34. Id. at 436-37. At this speed, Deputy Smith's stopping distance was beyond the purview of his headlights. Id. at 437.
35. Lewis, 98 F.3d at 437.
36. Lewis, 118 S. Ct. at 1712.
37. Lewis, 98 F.3d at 437.
Lewis to propel about seventy feet down the street. Willard, who moved out of the way in time, was not hit by Deputy Smith's patrol car. Lewis, however, suffered extensive injuries and was pronounced dead at the scene.

**PROCEDURAL HISTORY**

On March 11, 1991, Thomas and Teri Lewis, the parents of Philip Lewis and the representatives of his estate, filed suit in the Sacramento County Superior Court against Sacramento County, the Sacramento County Sheriff's Department ("Department"), and Deputy Smith, alleging two causes of action. First, the Lewises alleged a deprivation of Philip's due process rights under the Fourteenth Amendment in violation of 42 U.S.C. § 1983 ("section 1983"). Second, under California law, the Lewises alleged a cause of action for wrongful death. On April 24, 1991, the suit was removed, at the request of Sacramento County, the Department, and Deputy Smith, to the United States District Court for the Eastern District of California.

On November 11, 1992, Sacramento County, the Department, and Deputy Smith moved for summary judgment. The district court awarded summary judgment to Sacramento County and the Department on the section 1983 claim. The court reasoned that the training procedures of Sacramento County and the Department were "not so inherently inadequate" to warrant liability under section 1983. The court further reasoned that the pursuit policy of the Department was not "deliberately indifferent" to the constitutional rights of Lewis. The court did not substantively consider the state law cause

38. Id.
39. Lewis, 118 S. Ct. at 1712.
40. Lewis, 98 F.3d at 437.
41. Petitioner's Brief at 7, Lewis (No. 96-1337); Lewis, 98 F.3d at 434, 437.
42. Lewis, 98 F.3d at 437. Section 1983 provides in pertinent part:
Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.
43. Lewis, 98 F.3d at 437.
44. Petitioner's Brief at 7, Lewis (No. 96-1337). The suit was removed based on federal question jurisdiction. Lewis, 98 F.3d at 437.
45. Petitioner's Brief at 7, Lewis (No. 96-1337).
46. Lewis, 98 F.3d at 437.
47. Id. The court opined that the high-speed driving training that Deputy Smith received, although not equivalent to training in pursuits, overlapped to a certain degree. Id.
48. Lewis, 96 F.3d at 437.
of action against Sacramento County and the Department, but instead dismissed those claims without prejudice.49

Addressing the claims against Deputy Smith, the court first assumed that Deputy Smith had violated Lewis's Fourteenth Amendment due process rights.50 The court stated, however, that "the law regarding Lewis's Fourteenth Amendment right to life and personal security was not clearly established."51 Thus, the court reasoned that even if Deputy Smith violated the Constitution, he was entitled to the defense of qualified immunity on the section 1983 claim.52 The district court also awarded summary judgment in favor of Deputy Smith regarding the state wrongful death cause of action.53 The court reasoned that Deputy Smith was immune from personal liability pursuant to section 17004 of the California Vehicle Code.54

THE NINTH CIRCUIT'S HOLDING

The Lewises appealed the decision of the district court to the United States Court of Appeals for the Ninth Circuit, arguing that Deputy Smith, Sacramento County, and the Department deprived Lewis of his constitutional rights under the Fourteenth Amendment, and thus summary judgment was improper.55 The Ninth Circuit held that the appropriate standard of conduct to apply to law enforcement officers in the context of high-speed vehicular pursuits was "deliberate indifference" or "reckless disregard" for an individual's right to life and liberty.56 In examining the conduct of Deputy Smith, the Ninth Circuit held that a genuine issue of material fact still remained as to whether Deputy Smith acted with "deliberate indifference to" or "in reckless disregard of" Lewis's rights to personal security and life under the Due Process Clause of the Fourteenth Amendment.57

49. Id.
50. Id. The court made this assumption without deciding whether Deputy Smith violated the constitutional rights of Lewis. Id.
51. Lewis, 98 F.3d at 437.
52. Lewis, 118 S. Ct. at 1712. See infra notes 164-97 and accompanying text for a discussion on qualified immunity.
53. Lewis, 98 F.3d at 437.
54. Id. Section 17004 of the California Vehicle Code provides:
A public employee is not liable for civil damages on account of personal injury to or death of any person or damage to property resulting from the operation, in the line of duty, of an authorized emergency vehicle while responding to an emergency call or when in the immediate pursuit of an actual or suspected violator of the law, or when responding to but not upon returning from a fire alarm or other emergency call.
CAL. VEHICLE CODE § 17004 (West 1971).
55. Lewis, 98 F.3d at 434, 437-38.
56. Id. at 441.
57. Id. at 442.
The Ninth Circuit next addressed whether Deputy Smith was entitled to qualified immunity. To make such a determination, the court opined that two questions must be answered: (1) was the law governing Deputy Smith's conduct clearly established?; and (2) would a reasonable officer have known that his action was unlawful? First, the Ninth Circuit determined that the law regarding law enforcement liability for injury resulting from a high-speed pursuit was clearly established. Thus, the court reasoned that Deputy Smith had notice that he may be sued if he violated an individual's due process rights under the Fourteenth Amendment during a police pursuit. Second, the Ninth Circuit declared that a reasonable officer in Deputy Smith's situation would know that his conduct, if egregious, may result in liability. Hence, the Ninth Circuit reversed Deputy Smith's grant of summary judgment, reasoning that a genuine issue of material fact existed as to whether the conduct of Deputy Smith violated Lewis's constitutional rights.

The Ninth Circuit further held that the district court properly granted summary judgment to both Sacramento County and the Department. In so holding, the Ninth Circuit reasoned that the Lewises failed to establish that the procedures of the Department were "deliberately indifferent."

THE SUPREME COURT'S HOLDING

The Lewises appealed the decision of the Ninth Circuit to the United States Supreme Court, which granted certiorari to resolve a conflict among the circuit courts over the standard of liability applicable to law enforcement officers when assessing substantive due process violations in pursuit cases. On appeal, the Supreme Court

58. Id. at 442-43.
59. Id. at 443.
60. Id. at 445. The Ninth Circuit relied upon two Supreme Court cases to make this determination. Id. at 443-44. See, Brower v. County of Inyo, 489 U.S. 593 (1989) (holding that a law enforcement officer's deadly use of force in using a roadblock during a high-speed pursuit may lead to liability under section 1983); Tennessee v. Garner, 471 U.S. 1 (1985) (holding that an officer may not use deadly force unless he has "probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others"). The Ninth Circuit also held that the following cases made it clear that a law enforcement officer may be held liable if he acts "sufficiently egregious:" Roach v. City of Fredericktown, 882 F.2d 294 (8th Cir. 1989); Jones v. Sherrell, 827 F.2d 1102 (6th Cir. 1987); Checki v. Webb, 785 F.2d 534 (5th Cir. 1986). Lewis, 98 F.3d at 444-45.
61. Lewis, 98 F.3d at 445.
62. Id.
63. Id.
64. Id. at 446.
65. Id.
66. Lewis, 118 S. Ct. at 1713.
reversed the decision of the Ninth Circuit, holding that "deliberate indifference" was not a high enough standard to warrant liability under the Constitution.\textsuperscript{67} The Court further held that the appropriate standard in assessing a section 1983 claim in the context of a police pursuit was the "shocks the conscience" standard.\textsuperscript{68} Thus, the Court concluded that Deputy Smith's conduct did not satisfy this standard.\textsuperscript{69}

The Court began its analysis with a brief overview of its prior interpretations of the Fourteenth Amendment's Due Process Clause, which states: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."\textsuperscript{70} In examining the Due Process Clause, the Court concluded that the Clause was broad enough to encompass substantive rights as well as fair process.\textsuperscript{71} The Court further noted that the Due Process Clause was "intended to prevent government officials 'from abusing [their] power, or employing it as an instrument of oppression.'"\textsuperscript{72}

The Court next addressed why it was appropriate to analyze police pursuits under substantive due process.\textsuperscript{73} The Court explained that if a constitutional claim regarding an abuse of power by the government was not covered by a specific provision of the Constitution, a substantive due process analysis would be proper.\textsuperscript{74} In the present case, the Court determined that the police pursuit was not "covered by" the Fourth Amendment: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."\textsuperscript{75} The Court opined that neither a search nor a seizure took place.\textsuperscript{76} The Court explained that a Fourth Amendment seizure occurs only when the government intentionally terminates an individual's freedom of movement.\textsuperscript{77} Thus, the Court concluded that no seizure occurs where a law enforcement officer merely attempts to stop a fleeing suspect by continued pursuit.\textsuperscript{78}

The Court next discussed the core concept of due process: "protection against arbitrary action."\textsuperscript{79} The Court noted that "only the most egregious official conduct can be said to be 'arbitrary in the constitu-

\textsuperscript{67} Id. at 1713, 1719.
\textsuperscript{68} Id. at 1721.
\textsuperscript{69} Id.
\textsuperscript{70} Id. at 1713-14; U.S. CONST. amend. XIV, § 1.
\textsuperscript{71} Lewis, 118 S. Ct. at 1713.
\textsuperscript{72} Id. at 1713-14 (quoting DeShaney v. Winnebago County Dep't of Soc. Serv., 489 U.S. 189, 196 (1989)).
\textsuperscript{73} Id. at 1715-16.
\textsuperscript{74} Id. at 1715.
\textsuperscript{75} Id.; U.S. CONST. amend. IV.
\textsuperscript{76} Lewis, 118 S. Ct. at 1715.
\textsuperscript{77} Id.
\textsuperscript{78} Id.
\textsuperscript{79} Id. at 1716.
tional sense." Over the years, the Court has held that such conduct must be deemed to "shock the conscience." According to the Court, such a high standard is warranted because the Fourteenth Amendment is not meant to be a "font of tort law" that imposes liability every time someone having governmental authority causes harm.

Finally, the Court adopted the "shocks the conscience" standard in the context of a police pursuit, and held that Deputy Smith's conduct did not meet this standard. In so holding, the Court stated that Deputy Smith's actions were not malicious. Instead, the Court opined that Deputy Smith was acting on instinct to perform his job, which was to stop lawless behavior. Thus, the Court reversed the decision of the Ninth Circuit.

Concurring Opinions

Chief Justice William Rehnquist concurred, agreeing with the majority that the constitutional question at issue was one of substantive due process. Chief Justice Rehnquist stated that "shocks the conscience" was the correct standard to apply when attempting to establish a Fourteenth Amendment substantive due process violation in police pursuit cases. However, Chief Justice Rehnquist noted that this standard was not met in the facts presented to the Court.

Justice Anthony Kennedy, joined by Justice Sandra Day O'Connor, also concurred, analyzing the standard of conduct of law enforcement officers required by the Constitution to protect against the accidental taking of an individual's life in the context of a police pursuit. Justice Kennedy asserted that the "shocks the conscience" test connotates both a subjective and objective inquiry. The subjective inquiry, according to Justice Kennedy, begins with an examination of history, tradition, and precedent to ascertain if the conduct in question is in conformity therewith. In moving to the objective in-

80. Id. (quoting Collins v. City of Harker Heights, 503 U.S. 115, 129 (1992)).
81. Id. at 1717.
82. Id. at 1717-18.
83. Id. at 1721.
84. Id.
85. Id.
86. Id.
87. Id. (Rehnquist, J., concurring). Specifically, Chief Justice Rehnquist stated the question as: "Whether, in a police pursuit case, the legal standard of conduct necessary to establish a violation of substantive due process . . . is 'shocks the conscience' . . . or 'deliberate indifference' or 'reckless disregard.'" Id. (Rehnquist, J., concurring).
88. Lewis, 118 S. Ct. at 1721 (Rehnquist, J., concurring).
89. Id. (Rehnquist, J., concurring).
90. Id. at 1721-22 (Kennedy, J., concurring).
91. Id. at 1722 (Kennedy, J., concurring).
92. Id. (Kennedy, J., concurring).
quiry, Justice Kennedy explained that the necessity of law enforcement leaves room for the latitude and discretion of police officers.\textsuperscript{93} Justice Kennedy further explained that police, absent an intent to injure, may at their discretion engage in the pursuit of an individual who disobeys the law, even if the chase is deemed dangerous.\textsuperscript{94} The real danger, which may even increase the number of flights, noted Justice Kennedy, would be to proclaim that it is acceptable to ignore and flee the police and then sue for any resulting injuries.\textsuperscript{95} Thus, according to Justice Kennedy, when applying the subjective-objective test, no due process violation occurs when a suspect is unintentionally injured as a result of the suspect's disobedience and failure to stop when so ordered.\textsuperscript{96}

Justice Stephen Breyer also concurred, stating that lower courts should have flexibility, where appropriate, to decide section 1983 claims solely on the basis of qualified immunity.\textsuperscript{97} Justice Breyer further stated that such flexibility would prevent lower courts from having to "wrestle" with "difficult or poorly presented" constitutional issues.\textsuperscript{98}

Justice John Paul Stevens concurred in the judgment only, stating that, based on \textit{Siegert v. Gilley},\textsuperscript{99} a court is compelled to first address the constitutional question.\textsuperscript{100} When the constitutional question is difficult and unresolved, however, Justice Stevens argued that the court should avoid "unnecessary adjudication of [the] constitutional question[ ]."\textsuperscript{101} In analyzing the present case, Justice Stevens explained that because the pertinent law was not clearly established in 1990, the judgment of the district court should be reinstated.\textsuperscript{102} Justice Stevens further stated that, in his opinion, Deputy Smith was entitled to qualified immunity.\textsuperscript{103}

Justice Antonin Scalia, with Justice Clarence Thomas, also concurred in the judgment.\textsuperscript{104} Justice Scalia first noted that any change

\textsuperscript{93} \textit{Id.} (Kennedy, J., concurring). Justice Kennedy noted that law enforcement officers must still acknowledge "the primacy of the interest in life which the State, by the Fourteenth Amendment, is bound to respect." \textit{Id.} (Kennedy, J., concurring).

\textsuperscript{94} \textit{Lewis}, 118 S. Ct. at 1722. (Kennedy, J., concurring).

\textsuperscript{95} \textit{Id.} (Kennedy, J., concurring).

\textsuperscript{96} \textit{Id.} (Kennedy, J., concurring); see supra notes 91-95 and accompanying text.

\textsuperscript{97} \textit{Lewis}, 118 S. Ct. at 1722-23 (Breyer, J., concurring) (citing \textit{Siegert v. Gilley}, 500 U.S. 226, 235 (1991)).

\textsuperscript{98} \textit{Id.} (Breyer, J., concurring) (citing \textit{Siegert}, 500 U.S. at 235).


\textsuperscript{100} \textit{Id.} (Kennedy, J., concurring).

\textsuperscript{101} \textit{Id.} (Kennedy, J., concurring); see supra notes 91-95 and accompanying text.

\textsuperscript{102} \textit{Lewis}, 118 S. Ct. at 1722-23 (Breyer, J., concurring) (citing \textit{Siegert v. Gilley}, 500 U.S. 226, 235 (1991)).

\textsuperscript{103} \textit{Id.} (Kennedy, J., concurring).

\textsuperscript{104} \textit{Id.} (Kennedy, J., concurring).
in the Court's jurisprudence was due to a passage of time, not changes in the Court's membership. Justice Scalia relied on Justice Souter's concurring opinion in Washington v. Glucksberg, which rejected the "shocks the conscience" test. Justice Scalia reasoned that under the Glucksberg decision, the proper inquiry was whether the rights asserted by the Lewises have been traditionally protected, not whether Deputy Smith's conduct "shocked the conscience." This analysis, according to Justice Scalia, would initiate a "careful description" of the Fourteenth Amendment right asserted. Justice Scalia noted that there was no textual or historical support for the right asserted by the Lewises. Justice Scalia then noted that there was no precedential support for a substantive due process right to be free from reckless police conduct during an automobile chase.

Justice Scalia also stated that the Fourteenth Amendment should not be a basis for tort law, reasoning that if the people of California so desire, they can change the current state of tort law in California. Justice Scalia further reasoned that we cannot have judicial governance.

Finally, Justice Scalia would have reversed the decision of the Ninth Circuit. Justice Scalia argued that this reversal would not stem from a failure to "shock the conscience" of the Court. Rather, Justice Scalia would have based reversal on the dearth of textual or historical support for the due process claim.

BACKGROUND

Accidents ensuing from vehicular police pursuits, at times, result in civil litigation against law enforcement officers and municipalities. Individuals injured as a result of such accidents have typically

105. Id. (Scalia, J., concurring).
107. Lewis, 118 S. Ct. at 1724 (Scalia, J., concurring).
108. Id. (Scalia, J., concurring) (citing Washington v. Glucksberg, 117 S. Ct. 2258 (1997)).
109. Id. (Scalia, J., concurring).
110. Id. (Scalia, J., concurring). Justice Scalia further stated that he would "decline to fashion a new due process right out of thin air." Id. (Scalia, J., concurring) (quoting Carlisle v. United States, 517 U.S. 416 (1996)).
111. Lewis, 118 S. Ct. at 1724 (Scalia, J., concurring).
112. Id. at 1725 (Scalia, J., concurring).
113. Id. at 1726 (Scalia, J., concurring).
114. Id. (Scalia, J., concurring).
115. Id. (Scalia, J., concurring).
116. Id. (Scalia, J., concurring).
sought relief under 42 U.S.C. § 1983 ("section 1983") to enforce the substantive component of the Fourteenth Amendment's Due Process Clause.\textsuperscript{118} Law enforcement officers and local municipalities often seek protection from civil liability with a defense of qualified immunity.\textsuperscript{119}

\section*{Origin of 42 U.S.C. § 1983 and the Defense of Qualified Immunity}

In 1871, the statute known today as 42 U.S.C. § 1983 was enacted as part of the Ku Klux Klan Act.\textsuperscript{120} Section 1983 was enacted "to address the failure of certain states to enforce their laws with an even hand."\textsuperscript{121} In adopting section 1983, Congress provided individuals with a remedy for constitutional deprivations caused by persons acting under the authority of state law.\textsuperscript{122} In 1961, in \textit{Monroe v. Pape},\textsuperscript{123} the Supreme Court interpreted section 1983 to apply only to "persons," a designation from which municipalities were excluded.\textsuperscript{124} In \textit{Monroe}, James Monroe alleged a violation of section 1979 of the Civil Rights Act ("section 1979") against Chicago police officers and the City of Chicago, filing suit in the United States District Court for the Northern District of Illinois, Eastern Division.\textsuperscript{125} Monroe claimed that thirteen Chicago police officers broke into his home and forced him to stand naked in the living room while the officers ransacked the house.\textsuperscript{126} Monroe also claimed that he was subsequently taken to a Chicago police station for interrogation, where he was detained for ten hours without the opportunity to call an attorney.\textsuperscript{127} The district

\begin{itemize}
\item \textsuperscript{118} Edlund, 30 \textit{Val. U. L. Rev.} at 161-62.
\item \textsuperscript{119} See infra notes 164-97 and accompanying text.
\item \textsuperscript{121} Edlund, 30 \textit{Val. U. L. Rev.} at 169.
\item \textsuperscript{122} Shapiro, 22 \textit{U. Mich. J.L. Reform} at 249. Section 1983 provides in pertinent part:
\begin{quote}
Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.
\end{quote}
\item 123. 365 U.S. 167 (1961).
\item 125. Monroe, 365 U.S. at 167, 170. It should also be noted that section 1979 is known today as 42 U.S.C. § 1983.
\item 126. Monroe, 365 U.S. at 169.
\item 127. \textit{Id.}.
\end{itemize}
court dismissed the complaint on the ground that the complaint failed to state a cause of action under section 1979.128

Monroe appealed the judgment of the district court to the United States Court of Appeals for the Seventh Circuit, arguing that the actions of the Chicago police officers gave rise to a cause of action under section 1979.129 The Seventh Circuit affirmed the decision of the district court, holding that the alleged misconduct of the officers did not give rise to a proper cause of action under section 1979.130 Monroe appealed the decision of the circuit court to the United States Supreme Court, which granted certiorari to consider whether, in enacting section 1979, Congress intended to provide a remedy to individuals deprived of constitutional rights as a result of an official's abuse of authority.131

On appeal, the Supreme Court affirmed the decision of the circuit court with respect to the City of Chicago, but reversed with respect to the officers.132 Justice William Douglas, writing for the majority, reasoned that the federal remedy was meant to supplement any remedy available in state court.133 Thus, opined Justice Douglas, the fact that Illinois law prohibited unreasonable searches and seizures did not prevent Monroe from filing suit in federal court against the officers.134 In looking at the intent of Congress, the Court further held that section 1979 was not applicable to municipalities, because "Congress did not undertake to bring municipal corporations within the ambit of section 1979."135

In 1978, however, in Monell v. Department of Social Services of the City of New York,136 the Supreme Court expanded the scope of section 1983 and held that the statute did indeed apply to municipalities.137 In Monell, a group of female employees brought a section 1983 claim in the United States District Court for the Southern District of New York against the Department of Social Services ("Department") and its Commissioner, the Board of Education ("Board") and its Chancellor, and New York City and its Mayor to challenge the policy requiring pregnant women to take unpaid maternity leave before it became

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128. Id. at 170.
130. Monroe, 272 F.2d at 366.
132. Id. at 192.
133. Id. at 168, 183.
134. Id. at 183.
135. Id. at 187.
medically necessary to take such a leave. The district court held that the policies complained of were unconstitutional; however, the court denied the employees' request for backpay. The court reasoned that Monroe conferred immunity on municipalities; thus, because New York City would ultimately be liable for the damages, the claim for backpay must be denied.

The employees appealed the decision of the district court to the United States Court of Appeals for the Second Circuit, arguing that the district court erred in its denial of damages. The Second Circuit rejected the employees' argument and held that, because the damages would ultimately have to be paid by New York City, even the action against the individual officials had to be dismissed. The employees appealed the decision of the circuit court to the United States Supreme Court, which granted certiorari to consider whether government officials and school boards are considered "persons" within the meaning of section 1983.

On appeal, the Supreme Court reversed the decision of the circuit court, holding that Congress did intend local government units and municipalities to be included under the breadth of section 1983. However, the Court narrowed its holding as it stated that municipalities may not be held liable under section 1983 on a respondeat superior theory. The Court reasoned that the government as an entity may be found liable under section 1983 only when a policy or custom executed by the government causes harm.

The Supreme Court has also held that in certain circumstances a municipality may be held liable under section 1983 for a failure to train its employees. In City of Canton v. Harris, Geraldine Harris brought a section 1983 claim, inter alia, against Canton City ("City") in the United States District Court for the Northern District of

138. Monell, 436 U.S. at 660-61. Pregnant employees were forced to take unpaid leaves of absence while they were still medically able to perform their job functions. Monell v. Department of Soc. Serv. of the City of N.Y., 532 F.2d 259, 260 (2d Cir. 1976), rev'd, 436 U.S. 658 (1978).

139. Id.

140. Id.

141. Id.

142. Id. In so holding, the Second Circuit stated that the Board was not a "person" under section 1983, because it performed an essential government function. Id. The Second Circuit further opined that under section 1983 the individual defendants were "persons." Id.

143. Monell, 436 U.S. at 662.

144. Id. at 690. The Court made this determination after re-examining the debates on the Civil Rights Act of 1871. Id. at 665-89.

145. Monell, 436 U.S. at 691.

146. Id. at 694.


Ohio for the failure of Canton police officers to provide her with medical attention while she was in custody.\textsuperscript{149} While in custody, Harris was incoherent and lying on the floor, but no one helped her.\textsuperscript{150} The shift commanders had the discretion to determine whether a detainee required medical attention, yet such a determination was impossible because the shift commanders had no training beyond basic first aid.\textsuperscript{151} The jury returned a verdict in favor of Harris on the section 1983 claim against the City.\textsuperscript{152}

The City appealed the jury verdict to the United States Court of Appeals for the Sixth Circuit.\textsuperscript{153} The Sixth Circuit reversed and remanded the case for a new trial because of the jury instructions, which might have misled the jury into thinking it could hold the City liable on a theory of respondeat superior.\textsuperscript{154} The Sixth Circuit declared that a municipality might be held liable for a failure to train its police officers if the plaintiff successfully proves that the municipality acted "recklessly, intentionally, or with gross negligence."\textsuperscript{155} The City appealed the decision of the circuit court to the United States Supreme Court, which granted certiorari to consider whether municipality liability was broadened beyond the scope of section 1983.\textsuperscript{156}

On appeal, the Supreme Court vacated the decision of the circuit court and remanded the case for further proceedings consistent with its opinion.\textsuperscript{157} Justice Byron White, writing for the majority, rejected the contention that only claims involving unconstitutional policies and customs were actionable under section 1983.\textsuperscript{158} Hence, Justice White held that under limited circumstances a municipality may be liable under section 1983 for a "failure to train."\textsuperscript{159} Such liability will attach to a municipality, opined Justice White, only when a failure to train is deemed "deliberately indifferent" to the rights of individuals with whom police officers come into contact.\textsuperscript{160} Justice White stated that the unsatisfactory training of a police officer was not alone sufficient to impute liability to the City.\textsuperscript{161} Justice White also stated that courts must consider whether other factors may have caused the officer's

\begin{footnotesize}
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\item \textsuperscript{149} City of Canton v. Harris, 489 U.S. 378, 381 (1989).
\item \textsuperscript{150} Harris, 489 U.S. at 381.
\item \textsuperscript{151} Id. at 381-82.
\item \textsuperscript{152} Id. at 382.
\item \textsuperscript{153} Id.
\item \textsuperscript{154} Id. at 383.
\item \textsuperscript{155} Id. at 382.
\item \textsuperscript{156} Id. at 383.
\item \textsuperscript{157} Id. at 383.
\item \textsuperscript{158} Id. at 380, 387.
\item \textsuperscript{159} Id. at 387.
\item \textsuperscript{160} Id. at 388.
\item \textsuperscript{161} Id. at 390-91.
\end{itemize}
\end{footnotesize}
According to Justice White, the alleged deficiency in a training program must be proximately related to the alleged injury.163

Because courts have held that law enforcement officers and municipalities may be liable for civil damages, the Supreme Court has created a defense of qualified immunity to enable officers to perform their duties in good faith without fear of liability.164 The formative case for immunity from damages under section 1983 is Pierson v. Ray.165 In Pierson, a group of fifteen white and black Episcopal clergymen were arrested for attempting to use segregated facilities at a bus terminal.166 The clergymen were convicted by a municipal police justice ("Justice") of violating a section of the Mississippi Code.167 The clergymen appealed the conviction to the county court, and the case was dismissed.168 Subsequently, the clergymen brought an action in the United States District Court for the Southern District of Mississippi under section 1 of the Civil Rights Act of 1871, now 42 U.S.C. § 1983, against the arresting police officers ("Officers") and the Justice for false arrest and imprisonment.169 A jury verdict was returned in favor of the Officers and the Justice.170

The clergymen appealed the jury verdict to the United States Court of Appeals for the Fifth Circuit.171 On appeal to the Fifth Circuit, the jury verdict was affirmed in part and reversed and remanded in part.172 First, the Fifth Circuit affirmed the district court and held that the Justice was immune from liability.173 Second, in following the decision of Monroe, the Fifth Circuit reversed the district court and held that the Officers might be found liable under section 1983 for an arrest that was unconstitutional, even if the Officers had probable cause and acted in good faith.174 Furthermore, the Fifth Circuit, declaring that the trial judge permitted cross-examination on prejudicial

162. Id. One example of "other factors" is negligent administration of a sound program. Id. at 391.
163. Harris, 489 U.S. at 391.
165. 386 U.S. 547 (1967).
167. Pierson, 386 U.S. at 549. The statute violated was section 2087.5 of the Mississippi Code, which is a misdemeanor provision prohibiting congregation in public places in situations that may breach the peace. Id.
169. Id.
170. Id.
171. Id.
172. Id. at 550-51.
173. Id. at 550.
174. Id. at 550-51.
and irrelevant matters, reversed and remanded for a new trial the section 1983 claim against the Officers.\textsuperscript{175}

During the new trial, the district court held that the clergymen were not entitled to recover if it was established that they expected to be arrested in Mississippi.\textsuperscript{176} The court reasoned that such an act constituted consent to the arrest.\textsuperscript{177} The clergymen appealed to the Supreme Court of the United States, which granted certiorari to consider several issues: (1) may a judge be held liable under section 1983 for a conviction later found to be unconstitutional?; (2) may the clergymen be denied recovery against the Officers if they expected to be arrested?; and (3) may the Officers assert as a defense to section 1983 good faith and probable cause?\textsuperscript{178}

On appeal, the Supreme Court first held that the Justice was properly granted immunity under section 1983, reasoning that judges should be free to perform their functions without fear of any possible consequences.\textsuperscript{179} Next, the Court held that the clergymen were not prohibited from seeking damages under section 1983, even if they anticipated the arrest.\textsuperscript{180} The Court reasoned that the clergymen's act of using the waiting area at the bus terminal in a peaceful manner did not disqualify them from seeking recovery under section 1983.\textsuperscript{181} Finally, the Court held that the Officers had a defense of probable cause and good faith available to them under section 1983, because the validity of such a defense was an issue for the jury to determine.\textsuperscript{182} Hence, the case was remanded to the trial court to be re-tried.\textsuperscript{183}

The United States Supreme Court redefined the affirmative defense of "good faith and reasonable belief" in \textit{Harlow v. Fitzgerald}.\textsuperscript{184} In \textit{Harlow}, the Supreme Court held that government officials who perform discretionary functions are generally shielded from liability for civil damages as long as their conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."\textsuperscript{185} Specifically, Ernest Fitzgerald alleged that he was unlawfully discharged from the Department of the Air Force and filed suit in the United States District Court for the District of Colum-

\textsuperscript{175} Id. at 551.
\textsuperscript{176} Id.
\textsuperscript{177} Id. Under the "principle of volenti non fit injuria, he who consents to a wrong cannot be injured." Id.
\textsuperscript{178} \textit{Pierson}, 386 U.S. at 551-52.
\textsuperscript{179} Id. at 553-54 (quotations omitted).
\textsuperscript{180} Id. at 558.
\textsuperscript{181} Id.
\textsuperscript{182} Id. at 557.
\textsuperscript{183} Id. at 558.
bia for civil damages against Bryce Harlow and Alexander Butterfield, two senior White House aides ("Senior Aides"). The district court denied the motion of the Senior Aides for summary judgment, finding that there was a genuine issue of material fact. The district court also held that the Senior Aides were not entitled to a defense of absolute immunity.

The Senior Aides appealed the decision of the district court to the Court of Appeals for the District of Columbia, arguing that they were entitled to assert the defense of absolute immunity. The circuit court dismissed the appeal without issuing an opinion. The Senior Aides then appealed to the United States Supreme Court, which granted certiorari to determine the availability of immunity to the Senior Aides.

On appeal, the Supreme Court vacated the judgment of the circuit court and remanded the case to the district court for further consideration. The Court held that qualified immunity was available to government officials in certain circumstances. The Court stated that the defense would fail if an official acted with malicious intent to deprive an individual of a constitutional right. The Court further stated that in determining whether a defense of qualified immunity is available, a court must first determine the applicable law and then determine if that law was clearly established. If the law was not clearly established at the time of the occurrence, opined the Court, an official cannot be said to have known that the conduct was forbidden. On the other hand, the Court stated that if the law was clearly established, the defense of qualified immunity should fail because a reasonable official should know the law controlled his conduct.

186. Harlow, 457 U.S. at 800, 802.
187. Id. at 805-06.
188. Id. at 806.
189. Id.
190. Id.
191. Id.
192. Id. at 820.
193. Id. at 818-19.
194. Id. at 815.
195. Id. at 818.
196. Id.
197. Id. at 818-19.
POLICE PURSUITS ANALYZED IN THE CONTEXT OF SUBSTANTIVE DUE PROCESS AND SEARCH AND SEIZURE

A. FOURTEENTH AMENDMENT SUBSTANTIVE DUE PROCESS

The Fourteenth Amendment provides, in part, that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law." 198 The Supreme Court has held on numerous occasions that in addition to fair process, the Fourteenth Amendment also encompasses a substantive realm. 199 In Daniels v. Williams, 200 the Supreme Court held that the Due Process Clause prohibits certain government actions "regardless of the fairness of the procedures used to implement them." 201 In Daniels, Roy Daniels, a prisoner at a jail in Richmond, Virginia, alleged a deprivation of liberty under the Due Process Clause and sued Deputy Sheriff Andrew Williams in the United States District Court for the Eastern District of Virginia. 202 Daniels claimed he slipped and fell on a pillow that was negligently left on a prison staircase by Deputy Williams and sought to recover damages for his injuries. 203 The district court granted summary judgment to Deputy Williams because Daniels failed to state a cause of action. 204

Daniels appealed the decision of the district court to the United States Court of Appeals for the Fourth Circuit, arguing that the "Virginia doctrine of sovereign immunity denies him an adequate post deprivation remedy." 205 A panel of the Fourth Circuit affirmed the holding of the district court, as did the entire court on rehearing en banc, stating that negligent infliction of bodily harm "does not constitute a deprivation of any interest protected by the Due Process Clause." 206 Daniels then appealed to the United States Supreme Court, which granted certiorari to consider what level of tortious conduct by state actors warrants liability under the Constitution. 207

On appeal, the Supreme Court affirmed the decision of the circuit court, holding that under the Due Process Clause, the word "deprive" suggests more than mere negligence. 208 The Court reasoned that it did not wish to open the door for individuals to bring lawsuits when

199. See infra notes 201-38 and accompanying text.
203. Id. at 328.
205. Daniels, 720 F.2d at 794.
206. Daniels, 474 U.S. at 328.
207. Id.
208. Id. at 329-30.
there has been "no affirmative abuse of power." Thus, the Court stated that when a government official causes injury to life, liberty, or property, the injured party may seek compensation under the Constitution, but not when the official's conduct is merely negligent.

Once again, in *Davidson v. Cannon*, the Supreme Court interpreted the Due Process Clause, holding that the Clause does not guarantee due care on behalf of state officials. In *Davidson*, prisoner Robert Davidson alleged that prison officials violated his Eighth and Fourteenth Amendment rights in their failure to protect him from a fellow prisoner, and filed suit against the prison officials in the United States District Court for the District of New Jersey. Davidson wrote a letter to prison officials alerting the officials that he believed a fellow prisoner was going to attack him. Subsequently, the other prisoner attacked Davidson with a fork, inflicting many wounds and breaking his nose. The district court held that Davidson failed to establish a claim under the Eighth Amendment, which protects prisoners from "cruel and unusual punishment." The court did, however, find in favor of Davidson on his Fourteenth Amendment claim, holding that Davidson suffered a deprivation without due process. The court reasoned that because the prison officials "negligently failed to take reasonable steps to protect [Davidson], and that he was injured as a result," Davidson was deprived of his "liberty interest in personal security."

The prison officials appealed the decision of the district court to the United States Court of Appeals for the Third Circuit, arguing that the district court erred in finding them negligent. The Third Circuit reversed, holding that the negligence of the prison officials did not amount to a "deprivation" under the Due Process Clause. Davidson appealed the decision of the circuit court to the United States Supreme Court, which granted certiorari.

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209. *Id.* at 330.
210. *Id.* at 333.
211. 474 U.S. 344 (1986).
212. *Davidson v. Cannon*, 474 U.S. 344, 348 (1986); see *supra* notes 201-10 and accompanying text.
214. *Id.* at 345-46.
215. *Id.* at 346.
216. *Id.*; U.S. Const. amend. VIII. The district court reasoned that the officials "did not act with deliberate or callous indifference" to Davidson's needs. *Id.*
218. *Id.*
219. *Id.*
220. *Id.* at 346-47.
221. *Id.* at 347.
On appeal, the Supreme Court affirmed the decision of the circuit court, holding that the lack of care on the part of the prison officials did not reach the type of abusive government conduct meant to be protected under the Due Process Clause. The Court reasoned that "the guarantee of due process has never been understood to mean that the State must guarantee due care on the part of its officials." Rather, opined the Court, the Due Process Clause was meant to bar abusive governmental power and acts of oppression.

The Supreme Court limited the use of a substantive due process analysis in Graham v. Connor, holding that a substantive due process analysis is not appropriate when a specific constitutional provision "provides an explicit textual source of constitutional protection against . . . physically intrusive governmental conduct." In Graham, Dethorne Graham sought damages against Charlotte, North Carolina police officers under section 1983 in the United States District Court for the Western District of North Carolina. Graham, a diabetic who was feeling the onset of an insulin reaction, asked a friend, William Berry, to drive him to a local convenience store to purchase some orange juice with the intent to counteract the reaction. Upon seeing the long line at the store, Graham rushed out and asked Berry to take him to a friend's house instead. A Charlotte police officer, who became suspicious upon seeing Graham hurry into and out of the convenience store, followed the car and made a stop to investigate. Graham's friend unsuccessfully attempted to explain Graham's condition to the officer. Other officers were called to the scene and Graham suffered multiple injuries before the encounter was over. The district court granted a directed verdict to the officers, reasoning that the officers used force that was "appropriate under the circumstances."

222. Id. at 347-48.
223. Id. at 348.
224. Id.
228. Id. at 388.
229. Id. at 388-89.
230. Id. at 389.
231. Id.
232. Id. at 389-90. Upon witnessing Graham exit the car and run around it, the officer's believed him to be intoxicated. Id. at 389. Graham was handcuffed, shoved face-down against the hood of the car, and subsequently thrown headfirst into a police car. Id. As a result of the encounter, Graham sustained a broken foot, a bruised forehead, an injured shoulder, and cuts on his wrists. Id.
233. Graham, 490 U.S. at 390-91. The district court considered the following factors in making its ruling: (1) the need for the force; (2) the relationship between the amount of force and the need for the force; (3) the breadth of the injuries; and (4) whether the
Graham appealed the decision of the district court to the United States Court of Appeals for the Fourth Circuit, arguing, inter alia, that: (1) there was sufficient evidence for the jury to consider the issue of whether the force used by the officers was unreasonable under the Constitution; and (2) the district court failed to apply the correct legal standard in assessing the evidence offered to support the claim of excessive force. 234 The Fourth Circuit affirmed, holding that a reasonable jury could not find that the force applied by the officers was excessive under the Constitution.235 Graham then appealed to the United States Supreme Court, which granted certiorari to determine the appropriate constitutional standard to apply in cases involving claims of excessive force.236

On appeal, the Supreme Court reversed the decision of the circuit court, holding that claims involving a law enforcement officer's use of excessive force in the context of an investigatory stop, an arrest, or other "seizure" of an individual are properly analyzed under the Fourth Amendment, not the Fourteenth Amendment's substantive due process provision.237 Thus, the Court vacated the judgment of the circuit court and remanded the case to the circuit court for reconsideration under the Fourth Amendment.238

B. FOURTH AMENDMENT SEARCH AND SEIZURE

The Fourth Amendment applies to searches and seizures and states the following: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the places to be searched, and the persons or things to be seized."239 Determining when a "seizure" takes place has always proven to be a difficult task.240

In Terry v. Ohio,241 the United States Supreme Court held that under the Fourth Amendment a seizure occurs each time an individ-

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236. Id. at 388, 392.
237. Id. at 395.
238. Id. at 399.
239. U.S. CONST. amend. IV.
ual's freedom of movement is curtailed by a law enforcement officer, even outside the context of a custodial arrest.242 In Terry, John Terry filed a motion to suppress in the Court of Common Pleas of Cuyahoga County, Ohio, after being arrested and charged with carrying a concealed weapon.243 Terry was standing on a street corner with another individual, Richard Chilton, while Cleveland Police Detective Martin McFadden was patrolling the downtown area.244 Detective McFadden began to watch the two individuals because they “didn’t look right to [him] at the time.”245 Terry and Chilton took turns doing what Detective McFadden believed was “casing a job, a stick-up.”246 Detective McFadden approached the men and asked for their names.247 When the men mumbled their responses, Detective McFadden grabbed Terry and patted down the exterior of his clothing.248 Feeling a pistol in the pocket of Terry’s overcoat, Detective McFadden removed the coat and pulled out a .38-caliber revolver.249 Terry was then taken to the police station where he was formally charged with carrying a concealed weapon.250 The trial court denied the motion to suppress the weapon and subsequently convicted Terry, reasoning that the “frisk” was essential for the proper performance of an officer’s investigatory duties.251

Terry appealed the conviction to the Court of Appeals for the Eighth Judicial District, Cuyahoga County, arguing that the district court erred in not sustaining his motion to suppress.252 The circuit court affirmed Terry’s conviction, holding that the frisk for weapons was valid under the circumstances.253 The court reasoned that under the circumstances, it was logical for the officer to presume that Terry was armed and dangerous.254 Terry then appealed to the Supreme Court of Ohio, which dismissed the appeal, stating that no “substantial constitutional question” was involved.255 Terry next appealed to the United States Supreme Court, which granted certiorari to con-

243. Terry, 392 U.S. at 2, 7.
244. Id. at 5.
245. Id.
246. Id. at 6.
247. Id. at 6-7.
248. Id. at 7.
249. Id.
250. Id.
251. Id. at 8.
252. Id.
254. Terry, 214 N.E.2d at 121.
255. Terry, 392 U.S. at 8.
sider whether admitting the revolver into evidence violated Terry's Fourth Amendment rights. 256

On appeal, the Supreme Court affirmed the conviction, holding that the search was a reasonable one under the Fourth Amendment, and thus the weapon seized may properly be introduced against the person from whom it was taken. 257 Chief Justice Earl Warren, writing for the majority, stated that whenever a law enforcement officer accosts an individual and restrains the individual's movement, the officer has "seized" that person. 258 Thus, opined the Court, the next step is to determine if the search and seizure was reasonable. 259 Such an inquiry, explained the Court, is twofold: (1) was the officer's action justified at its inception?; and (2) was the action taken reasonably related in scope to the factors which justified the intervention in the first place? 260 In making such a determination, the Court recognized that an officer is entitled to draw reasonable inferences from the circumstances in light of the officer's experience. 261 Thus, the Court held that when an officer observes conduct that the officer deems unusual and chooses to frisk an individual, such activity constitutes a Fourth Amendment search and any evidence taken is considered "seized." 262

The Supreme Court once again attempted to define when a "seizure" occurs in Brower v. County of Inyo, 263 holding that a violation of the Fourth Amendment requires "an intentional acquisition of physical control." 264 In Brower, the heirs of decedent, William James Caldwell Brower, brought a section 1983 action in the United States District Court for the Eastern District of California against police officers, alleging a violation of the Fourth Amendment. 265 Brower was killed when, after being pursued by police officers for approximately twenty miles, the stolen car he was driving crashed into a police roadblock. 266 The district court, upon a motion by the officers, dismissed the complaint. 267 The court reasoned that in light of the circumstances, the officers' establishment of a roadblock was not unreasonable. 268

256. Id.
257. Id. at 31.
258. Id. at 4, 16.
259. Id. at 19.
260. Id. at 19-20.
261. Id. at 27.
262. Id. at 30-31.
264. Brower v. County of Inyo, 489 U.S. 593, 596, on remand, 884 F.2d 1316 (9th Cir. 1989); see supra notes 242-62 and accompanying text.
266. Id.
267. Id. The complaint was dismissed for the heirs' failure to state a claim. Id.
The heirs of Brower appealed the decision of the district court to the United States Court of Appeals for the Ninth Circuit, arguing that the district court erred in finding for the officers.\textsuperscript{269} The Ninth Circuit affirmed, finding that no "seizure" had occurred.\textsuperscript{270} The heirs then appealed to the United States Supreme Court, which granted certiorari to resolve a conflict among the circuit courts regarding whether a Fourth Amendment "seizure" occurred when a roadblock was established by law enforcement officers.\textsuperscript{271}

On appeal, the Supreme Court reversed the decision of the circuit court and remanded the case to the district court for consideration of whether the claim was properly dismissed in light of the present decision.\textsuperscript{272} The Court considered the question of when a Fourth Amendment seizure occurs, and held that such a seizure occurs only when a government actor intentionally terminates an individual's freedom of movement.\textsuperscript{273} Justice Antonin Scalia, writing for the majority, asserted that a roadblock is a "significant show[ing] of authority to induce a voluntary stop."\textsuperscript{274} Additionally, Justice Scalia reasoned that the function of a roadblock is to produce a stop via physical impact in the absence of voluntary compliance.\textsuperscript{275} Thus, the Court held that a roadblock did constitute a "seizure" under the Fourth Amendment.\textsuperscript{276}

In examining whether a "seizure" occurred in the context of a police pursuit, the Supreme Court held in \textit{California v. Hodari D.}\textsuperscript{277} that a police pursuit in an attempt to apprehend a person did not constitute a seizure under the Fourth Amendment.\textsuperscript{278} In \textit{Hodari D.}, Hodari was running from the police when he threw away what was later determined to be a small rock of crack cocaine.\textsuperscript{279} In a juvenile proceeding, Hodari brought a motion in the Superior Court of Alameda County to suppress evidence of the rock of cocaine.\textsuperscript{280} The court denied the motion to suppress without opinion, and Hodari appealed to the California Court of Appeal.\textsuperscript{281}

\begin{itemize}
\item \textsuperscript{269} \textit{Id.}
\item \textsuperscript{270} \textit{Id.}
\item \textsuperscript{271} \textit{Id.} The conflict was between the Court of Appeals for the Ninth Circuit in the case at hand and the Court of Appeals for the Fifth Circuit in \textit{Jamieson v. Shaw}, 772 F.2d 1205 (1985). \textit{Id.} at 594-95.
\item \textsuperscript{272} \textit{Brower}, 489 U.S. at 599-600.
\item \textsuperscript{273} \textit{Id.} at 596-97.
\item \textsuperscript{274} \textit{Id.} at 594, 598.
\item \textsuperscript{275} \textit{Id.} at 598.
\item \textsuperscript{276} \textit{Id.} at 599.
\item \textsuperscript{277} 499 U.S. 621 (1991).
\item \textsuperscript{279} \textit{Hodari D.}, 499 U.S. at 623.
\item \textsuperscript{280} \textit{Id.} at 623-24.
\item \textsuperscript{281} \textit{Id.} at 623.
\end{itemize}
The California Court of Appeal reversed, ruling that: (1) Hodari was “seized” when he saw the officer chasing him; (2) under the Fourth Amendment, the seizure was unreasonable; and (3) the rock of crack cocaine must be suppressed as the fruit of the unlawful seizure. The court reasoned that the act of the officer chasing Hodari constituted a detention, because the officer intended to curtail Hodari’s freedom of movement by catching up with him and stopping him. Moreover, the court reasoned that the officer did not have reasonable cause to detain Hodari. Further, because the evidence was obtained as a direct result of the illegal detention, the court concluded that the evidence was inadmissible. The State appealed to the United States Supreme Court, which granted certiorari to consider if Hodari was “seized” under the Fourth Amendment at the time he dropped the rock.

On appeal, the Supreme Court reversed the decision of the California Court of Appeal, holding that the rock of cocaine abandoned while Hodari was running was not the “fruit of a seizure,” and thus the motion to exclude the evidence was properly denied. Justice Antonin Scalia, writing for the majority, reasoned that a “seizure” necessitates some type of physical restraint to stop movement. A seizure, declared Justice Scalia, does not occur when an officer yells “Stop!” at a fleeing suspect. Hence, the Court determined that mere pursuit of a suspect does not constitute a “seizure” within the meaning of the Fourth Amendment.

Levels of Culpability Law Enforcement Officers May Be Held To When Pursuing Suspects

Over the past decade, the circuit courts have struggled to determine what level of culpability should apply in the context of police pursuit cases brought under the Due Process Clause of the Fourteenth Amendment. Most circuits have adopted one of the following three standards in determining whether a law enforcement officer’s conduct

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282. Id.
284. Hodari D., 265 Cal. Rptr. at 84-85.
285. Id. at 85-86.
286. Hodari D., 499 U.S. at 623.
287. Id. at 629.
288. Id. at 622, 626.
289. Id. at 626.
290. Id. at 629.
may constitute a substantive due process violation: (1) "gross negligence;" (2) "reckless or deliberate indifference;" or (3) "shocks the conscience." 292

A. Development of the "Shocks the Conscience" Standard

The "shocks the conscience" standard originated in the United States Supreme Court's decision in *Rochin v. California.* 293 In *Rochin,* Antonio Richard Rochin was charged with "possessing 'a preparation of morphine'" in violation of the California Health and Safety Code, and was subsequently convicted in the Superior Court of Los Angeles County. 294 Specifically, three Los Angeles County deputy sheriffs went to the home in which Rochin, who was suspected of selling narcotics, resided. 295 The deputy sheriffs entered the unlocked home and proceeded to Rochin's room, where they forced open the door. 296 When Rochin put two capsules in his mouth, the deputies jumped on him and tried, unsuccessfully, to extract the capsules. 297 The deputies handcuffed Rochin and took him to a hospital, where he had his stomach pumped against his will. 298 As a result, two capsules containing morphine were found. 299 Based on the evidence presented at trial, the superior court convicted Rochin of possession. 300

Rochin appealed his conviction to the District Court of Appeals for the Second Appellate District of the State of California, which affirmed the conviction, despite a finding that the deputies were guilty of numerous crimes. 301 The Supreme Court of California denied Rochin's petition for a hearing. 302 Thus, Rochin appealed his conviction to the United States Supreme Court, which granted certiorari to consider the limitations the Fourteenth Amendment's Due Process Clause imposes on the "conduct of criminal proceedings by the States." 303

293. 342 U.S. 165 (1952).
296. *Id.*
297. *Id.* Rochin swallowed the capsules after the deputies asked him: "Whose stuff is this?" *Id.*
298. *Rochin,* 342 U.S. at 166.
299. *Id.*
300. *Id.* Rochin was subsequently sentenced to sixty days in jail. *Id.*
301. *Rochin,* 342 U.S. at 166-67. The court found the officers were guilty of "unlawfully breaking into and entering [Rochin's] room and were guilty of unlawfully assaulting and battering [Rochin] while in the room, and were guilty of unlawfully assaulting, battering, torturing and falsely imprisoning [Rochin] at the ... hospital." *Id.*
303. *Id.* at 168.
On appeal, the Supreme Court reversed Rochin’s conviction, holding that the conviction was obtained by methods that “offend” the Due Process Clause and conduct that “shocks the conscience.”

Justice Felix Frankfurter, writing for the majority, recognized the responsibilities that the states bear for the enforcement of criminal laws; however, Justice Frankfurter declared that the Court too has a responsibility. The Court, Justice Frankfurter explained, must exercise judgment upon the whole course of a proceeding which results in a conviction to determine whether the proceeding offends those notions of fairness and decency that express the concept of justice.

In doing so, the Court held that the proceedings in which the conviction of Rochin was obtained “do more than offend some fastidious squeamishness or private sentimentalism about combating crime too energetically.” This, the Court stated, is conduct that “shocks the conscience.” Because the conduct was deemed to “shock the conscience,” the Court held that it violated the Due Process Clause of the Fourteenth Amendment.

In Breithaupt v. Abram, the Supreme Court applied the standard set forth in Rochin and reaffirmed the holding that conduct deemed to “shock the conscience” would violate substantive due process. In Breithaupt, Paul Breithaupt was involved in a collision with another car in which three individuals were killed while driving on New Mexico highways. Consequently, Breithaupt was charged with involuntary manslaughter. At the scene of the accident, a near-empty pint of whiskey was found in the glove compartment of Breithaupt’s pickup truck. Breithaupt, who was unconscious, was taken to the emergency room where the smell of liquor was detected on his breath. At the request of a patrolman, an attending physician took a sample of Breithaupt’s blood while he was still unconscious. A laboratory analysis revealed that the blood contained...
approximately .17% alcohol. Breithaupt was subsequently convicted of involuntary manslaughter.

Breithaupt, although failing to appeal his conviction, filed a petition for a writ of habeas corpus to the Supreme Court of New Mexico. The court denied the writ, stating that after researching precedent it failed to find a violation of due process. Breithaupt argued that his conviction, which was based on an involuntary blood test, deprived him of his liberty guaranteed by the Fourteenth Amendment's Due Process Clause. Breithaupt appealed his conviction to the United States Supreme Court, which granted certiorari to consider whether the Due Process Clause necessitates that the conviction be invalidated.

On appeal, the Supreme Court affirmed the conviction, holding that a blood test taken by a skilled physician is not such conduct that "shocks the conscience." Justice Tom Clark, writing for the majority, reasoned that "the absence of conscious consent, without more, does not necessarily render the taking [of a sample of blood] a violation of a constitutional right." The Court further rationalized its decision in stating that blood tests are routine in our everyday lives. Moreover, the Court justified its opinion as an attempt to deter the increasing "slaughter on our highways" due to intoxicated drivers. Chief Justice Earl Warren, along with Justices Hugo Black and William Douglas, dissented, arguing that the essential elements of the case at hand and Rochin were the same, and thus the results should be the same.

Recently, in Collins v. City of Harker Heights, the Supreme Court once again applied the "shocks the conscience" standard that was adopted in Rochin. In Collins, the widow of Larry Collins, an employee of the sanitation department for the City of Harker Heights, Texas ("City"), brought a section 1983 action in the United States District Court for the Western District of Texas, alleging that the City failed to adequately train its employees on the hazards of working in

318. Id.
319. Id.
322. Id.
323. Id. at 436-37, 440.
324. Id. at 433, 435.
325. Id. at 436.
326. Id. at 439-40.
327. Id. at 440 (Warren, J., dissenting).
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manholes and sewer lines. Collins entered a manhole to unplug a sewer line and subsequently died of asphyxia. The district court dismissed the complaint, reasoning that the widow failed to allege a constitutional violation.

The widow appealed the decision of the district court to the United States Court of Appeals for the Fifth Circuit, arguing that the district court erred in dismissing her complaint. On appeal, the Fifth Circuit affirmed the district court's decision. Subsequently, the United States Supreme Court granted certiorari to decide if section 1983 provides a remedy when a municipal employee is fatally injured during the course of employment because the city failed to train or warn the employee about known hazards.

On appeal, the Supreme Court affirmed the decision of the circuit court, holding that the Due Process Clause does not impose a duty upon municipalities to "provide certain minimal levels of safety and security in the workplace;" thus, a failure to warn was not "arbitrary in the constitutional sense." Justice John Paul Stevens, writing for the majority, stated that two issues must be considered when analyzing a section 1983 claim that has been asserted against a municipality: (1) whether a constitutional violation caused the plaintiff's harm; and (2) if so, whether the city is accountable for the violation. Noting that the widow's claim rested solely on the Fourteenth Amendment's Due Process Clause, the Court declared that the Clause did not support her claim. In so stating, the Court reasoned that the Due Process Clause was intended to prevent the government "from abusing [its] power, or employing it as an instrument of oppression." The Court further reasoned that the City's failure to train employees on possible hazards was not "conscience shocking."

In Johnson v. Glick, the Second Circuit also analyzed the "shocks the conscience" test and recognized that while the test is not

331. Id. at 117.
332. Id. at 118.
333. Id.
334. Id. The Fifth Circuit did not determine if the City violated the constitutional rights of the decedent; rather, the circuit court denied recovery because there was no "abuse of governmental power." Id.
336. Id. at 130.
337. Id. at 117, 120.
338. Id. at 125-26.
339. Id. at 126 (citing DeShaney v. Winnebago County Dep't of Soc. Serv., 489 U.S. 189, 196 (1986)).
340. Id. at 128.
341. 481 F.2d 1028 (2d Cir. 1973).
capable of precise definition, it "at least points the way." In Johnson, a detainee who was being held at the House of Detention during his trial brought a section 1983 complaint in the United States District Court for the Southern District of New York against a correction officer and the Warden. The detainee alleged that he was merely following directions when a correction officer hurried him into a holding cell, struck him on the head and threatened to kill him. The district court dismissed the complaint for "failure to state a claim on which relief can be granted."

The detainee appealed the decision of the district court to the United States Court of Appeals for the Second Circuit, arguing that the district court erred in dismissing his complaint. The Second Circuit reversed with respect to the correction officer and affirmed with respect to the Warden. Circuit Judge Henry Friendly, writing for the majority, began his analysis by stating that although the detainee did not have a cause of action under the Eighth Amendment, the detainee could seek protection under the Due Process Clause. In examining the "shocks the conscience" test as set forth in Rochin, Judge Friendly noted that not every pushing or shoving incident, even if later deemed unnecessary, violates the constitutional rights of a prisoner. Despite this position, Judge Friendly did believe that the detainee's complaint stated a valid claim against the correction officer. Circuit Judge Leonard Moore dissented, arguing that the court "open[ed] the proverbial Pandora's box" by encouraging all prisoners to file civil rights actions every time they feel a guard has been unnecessarily harsh.

B. Split Among the Circuits

In 1987, in Jones v. Sherrill, the Sixth Circuit adopted the "gross negligence" standard in the context of a high-speed police pursuit in violation of section 1983. In Jones, Janice Jones, wife of the decedent, brought a section 1983 action against Charles Sherrill and
others in the United States District Court for the Middle District of Tennessee.\textsuperscript{354} Specifically, two White House, Tennessee police officers were in pursuit of Sherrill — who had just that day been furloughed from the Nashville and Davidson County Metropolitan Jail — for a traffic offense when Sherrill's vehicle cut across the center line of a highway, colliding with and killing Audie Gaston Jones.\textsuperscript{355} The district court dismissed the action against Sherrill, reasoning that "Sherrill was not acting 'under color of law'" as required by section 1983.\textsuperscript{356} The court also granted the officials' motion to dismiss, holding that only Sherrill was the proximate cause of the deprivation alleged by Jones.\textsuperscript{357}

Jones appealed the decision of the district court to the United States Court of Appeals for the Sixth Circuit.\textsuperscript{358} Jones argued that the officers drove in a "negligent, careless and wanton manner and with reckless disregard for the public," conduct which proximately caused her husband's death.\textsuperscript{359} Jones further argued that the city failed to adequately train and supervise its officers for the pursuit of suspects, conduct that amounts to "gross negligence" and "deliberate indifference" to the public's safety.\textsuperscript{360} The Sixth Circuit affirmed, holding that Jones's complaint failed to state a cause of action for violation of her husband's constitutional rights.\textsuperscript{361} The Sixth Circuit declared that the government's conduct of pursuing Sherrill did not "rise to the level of gross negligence and outrageous conduct necessary to sustain a section 1983 claim."\textsuperscript{362}

In contrast, the Fourth Circuit, in Temkin v. Frederick County Commissioners,\textsuperscript{363} applied the "shocks the conscience" standard in the context of claims involving police pursuits under the Due Process Clause.\textsuperscript{364} In Temkin, Sharon Temkin was seriously injured as a result of a police pursuit and consequently brought a section 1983 action in the United States District Court for the District of Maryland.

\textsuperscript{354} Jones, 827 F.2d at 1102-03. Jones also filed suit against the following: two police officers involved in the pursuit, the Mayor of White House, White House City, the Sheriff of Nashville and Davidson County, the Sheriff's Department employee responsible for furloughing Sherrill, and the Metropolitan Government of Nashville and Davidson County. \textit{Id.} at 1103 n.1.

\textsuperscript{355} Jones, 827 F.2d at 1103.

\textsuperscript{356} \textit{Id.}

\textsuperscript{357} \textit{Id.}

\textsuperscript{358} \textit{Id.}

\textsuperscript{359} \textit{Id.} at 1104. Jones alleged that the officers closely followed her husband at speeds up to 135 m.p.h. \textit{Id.}

\textsuperscript{360} Jones, 827 F.2d at 1104.

\textsuperscript{361} \textit{Id.} at 1107.

\textsuperscript{362} \textit{Id.} at 1106.

\textsuperscript{363} 945 F.2d 716 (4th Cir. 1991).

\textsuperscript{364} Temkin v. Frederick County Comm'rs, 945 F.2d 716, 723 (4th Cir. 1991); see \textit{supra} notes 353-62 and accompanying text.
against Deputy Sheriff Glen Selby and the Frederick County Commissioners ("Commissioners"). More specifically, Deputy Selby was in pursuit of a vehicle when the pursued vehicle lost control and struck Temkin's car. Deputy Selby's cruiser, unable to brake in time, skidded out of control and also struck Temkin's car. As a result of the collision with Deputy Selby, Temkin suffered serious and permanent injuries. The district court found for Deputy Selby and the Commissioners, granting them both summary judgment.

Temkin appealed the decision of the district court to the United States Court of Appeals for the Fourth Circuit, arguing that the district court erred in granting Deputy Selby's and the Commissioners' motions for summary judgment. Temkin further argued that the district court erred in adopting the "shocks the conscience" standard for violations of substantive due process. The Fourth Circuit affirmed, holding that the "shocks the conscience" standard was the appropriate standard to apply. The Fourth Circuit stated that Deputy Selby's conduct, while disturbing, did not reach the level of conduct deemed to "shock the conscience." The Fourth Circuit further declared that because Deputy Selby's conduct was not deemed a constitutional violation, a "claim of inadequate training" could not be brought against the supervisory authority, the Commissioners. The court reasoned that under section 1983, a claim based on inadequate training could not be sustained against a supervisory authority without a finding that the individual being supervised violated the Constitution. Thus, the Fourth Circuit concluded that summary judgment was also proper for the Commissioners.

Similar to Temkin, in Fagan v. City of Vineland, the Third Circuit held that the appropriate standard to apply in determining whether a law enforcement officer's conduct violated the Fourteenth Amendment in a section 1983 action is the "shocks the conscience" standard.
In Fagan, Michael Fagan was killed as a result of a police chase and Sarah E. Fagan, the administratrix of the estate of Michael Fagan, brought a section 1983 action against the police officers involved in the pursuit, the police chief and the City of Fagan ("City") in the United States District Court for the District of New Jersey. Specifically, three individuals were injured and three individuals were killed when an automobile, which was being pursued by the police, ran a red light and crashed into another vehicle. Police Officer David Tesoroni began to follow a white Camaro after he noticed one of the occupants stand up through the Camaro's open T-top. Officer Tesoroni, who was later joined by three fellow officers, continued to follow the Camaro as it failed to stop at numerous stop signs and turned off its headlights. The Camaro reached speeds as high as eighty miles per hour, eventually running a red light and crashing into a pickup truck, killing both occupants of the truck, Christopher Duke and Michael Fagan. The district court granted summary judgment in favor of the police officers, the police chief, and the City. The district court reasoned that while the officers may have demonstrated poor judgment, poor judgment alone is not a due process violation. The court further reasoned that the appropriate standard to evaluate law enforcement officers' conduct is the "shocks the conscience" standard.

Fagan and the other plaintiffs appealed the decision of the district court to the United States Court of Appeals for the Third Circuit, arguing that the district court erred in applying the "shocks the conscience" standard to substantive due process claims under the Fourteenth Amendment. The Third Circuit affirmed, holding that the "shocks the conscience" standard is the appropriate one by which to judge the conduct of police officers under the Fourteenth Amendment.

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378. Fagan v. City of Vineland, 22 F.3d 1296, 1303 (3d Cir. 1994); see supra notes 364-76 and accompanying text.
379. Fagan, 22 F.3d at 1300-01. Fagan also sued Town Liquors, under New Jersey law, for negligence in selling alcohol to a minor. Id. at 1301.
380. Fagan, 22 F.3d at 1300.
381. Id. at 1299.
382. Id. at 1299-1300.
383. Id. at 1300. A passenger in the Camaro was also killed. Id. Additionally, the driver of the Camaro and two other passengers were injured. Id.
384. Fagan, 22 F.3d at 1301.
385. Id. at 1308-09.
386. Id. at 1303.
387. Id. at 1301-02.
388. Id. at 1308-09. The Third Circuit relied on the Supreme Court's decision in Collins v. City of Harker Heights, 503 U.S. 115 (1992), for this conclusion. Id. at 1303-04.
standard, also recognized that the standard was vague and imprecise.\(^3\)\(^8\)\(^9\)

Similarly, in *Evans v. Avery*,\(^3\)\(^9\)\(^0\) the First Circuit held that in police pursuits the requisite standard to violate substantive due process is "shocks the conscience."\(^3\)\(^9\)\(^1\) In *Evans*, Marie Evans was struck by an automobile that was being pursued by City of Boston Police Officers Terrace Avery and John J. Greene, and Evans subsequently sued both the officers and the City of Boston ("City") under section 1983 in the United States District Court for the District of Massachusetts.\(^3\)\(^9\)\(^2\) The officers, who were chasing the automobile because they saw the occupants throw a paper bag out the window and then saw them place small items inside their mouths, followed the suspects through a residential neighborhood, travelling at speeds up to fifty miles per hour.\(^3\)\(^9\)\(^3\) The pursuit, which lasted less than two minutes, ended when the automobile driven by the suspects struck and injured Evans, a ten-year-old girl.\(^3\)\(^9\)\(^4\) The City moved for and was granted summary judgment based on the fact that Evans had failed to provide sufficient evidence proving that a policy or custom of the City amounted to "deliberate indifference."\(^3\)\(^9\)\(^5\) The court, determining that Evans had not offered sufficient evidence against the officers, granted judgment to the officers as a matter of law.\(^3\)\(^9\)\(^6\)

Evans appealed the decision of the district court to the United States Court of Appeals for the First Circuit, arguing that the district court erred: (1) in granting summary judgment for the City; (2) in directing a verdict to the officers; and (3) in applying the wrong legal standard.\(^3\)\(^9\)\(^7\) The First Circuit affirmed, holding that Evans's constitutional rights were not violated.\(^3\)\(^9\)\(^8\) In so holding, the First Circuit adopted the "shocks the conscience" standard to determine whether an officer's conduct during a pursuit violated an individual's substantive due process rights under the Fourteenth Amendment.\(^3\)\(^9\)\(^9\) The court reasoned that the conduct of the officers in *Evans* did not "shock the conscience," because the chase lasted under two minutes, the speed of the automobiles did not exceed fifty miles per hour, and the officers

\(^{389}\) *Fagan*, 22 F. 3d at 1303-04.

\(^{390}\) 100 F. 3d 1033 (1st Cir. 1996).

\(^{391}\) *Evans v. Avery*, 100 F. 3d 1033, 1038 (1st Cir. 1996).

\(^{392}\) *Evans*, 100 F. 3d at 1033-36.

\(^{393}\) Id. at 1035.

\(^{394}\) Id. at 1035.

\(^{395}\) Id. at 1036, 1039.

\(^{396}\) Id. at 1039, 1041.

\(^{397}\) Id. at 1038.
had good reason to believe the suspects were involved in drugs.\textsuperscript{400} The court further reasoned that, while inherently dangerous, police pursuits are necessary to maintain order in society.\textsuperscript{401} Thus, according to the First Circuit, only conduct deemed "shocking to the conscience" warrants liability under the Fourteenth Amendment.\textsuperscript{402}

In \textit{Mays v. City of East St. Louis}\textsuperscript{403} the Seventh Circuit implicitly embraced the "shocks the conscience" standard in the framework of a section 1983 claim involving a police pursuit.\textsuperscript{404} In \textit{Mays}, victims of a police pursuit brought a section 1983 claim in the United States District Court for the Southern District of Illinois against Officer Leland Cherry and the City of East St. Louis ("City").\textsuperscript{405} Specifically, a vehicle driven by Victor Lee Burries illegally made a U-turn in East St. Louis.\textsuperscript{406} After observing this infraction, Officer Cherry turned on his cruiser's emergency lights and siren and drove behind Burries in an attempt to stop the vehicle.\textsuperscript{407} Burries, refusing to stop, accelerated to a high rate of speed, drove through red lights, and swerved in and out of lanes of traffic.\textsuperscript{408} Officer Cherry continued to pursue Burries until Burries's vehicle came to a halt after it became airborne at a railroad crossing and crashed into a cement barrier.\textsuperscript{409} Of the nine passengers in Burries's vehicle, one died and several others were injured as a result of the crash.\textsuperscript{410} The injured passengers claimed that, under the Fifth Amendment, they were deprived of liberty without due process, arguing that a trivial offense, such as a U-turn, did not justify a high-speed police chase.\textsuperscript{411} The district court entered judgment for both Officer Cherry and the City.\textsuperscript{412} The district court judge reasoned that under the "shocks the conscience" test, the events of the case at hand failed to "make his conscience tingle."\textsuperscript{413}

The injured passengers appealed the decision of the district court to the United States Court of Appeals for the Seventh Circuit, arguing that the district court erred in entering a judgment for the officer and
The Seventh Circuit affirmed, holding that no constitutional provision had been violated. The Seventh Circuit found that passengers in a vehicle do not have a legal right to protection by police officers allowing criminals to escape. The Seventh Circuit also found that if police officers are forbidden from pursuing suspects, more suspects will be encouraged to flee. Such an occurrence, reasoned the court, will also create a risk to passengers and bystanders. In the case at hand, the Seventh Circuit found that the passengers in Burries's vehicle were injured as a result of Burries's criminal behavior, a behavior that Officer Cherry tried to stop. Thus, Officer Cherry's conduct did not violate the Constitution in the view of the court.

Similarly, in Williams v. Denver, City and County of, the Tenth Circuit found that in police pursuits the requisite standard to violate substantive due process is "shocks the conscience." In Williams, Michael Farr, a Denver police officer, struck and killed Randy Bartel with his patrol car. Specifically, on June 4, 1989, at approximately 4:00 a.m., Officer Farr responded to a call to provide back-up for a fellow officer during the arrest of an auto thief. Officer Farr, traveling sixty miles per hour in a thirty-five mile per hour speed zone, activated his cruiser's overhead lights, but failed to turn on the siren. Officer Farr failed to slow down as he ran a red light and broad-sided Bartel's car, which was traveling through the intersection at approximately twenty miles per hour on the green light. Bartel died as a result of the injuries he sustained. Subsequently, Colleen Williams, the personal representative of Bartel's estate, brought a section 1983 claim against Officer Farr, the City and County of Denver, the Denver Police Department, the Denver Police Chief, the Denver Manager of Safety, and the Denver Civil Service Division in the United States District Court for the District of Colorado. The district court

414. Id. at 999.
415. Id. at 1004-05.
416. Id. at 1003.
417. Id.
418. Id.
419. Id. at 1004.
420. Id.
421. 99 F.3d 1009 (10th Cir. 1996).
422. Williams v. Denver, City and County of, 99 F.3d 1009, 1015 (10th Cir. 1996), reh'g en banc, 153 F.3d 730 (10th Cir. 1998).
423. Williams, 99 F.3d at 1012.
424. Id. at 1012. The requesting officer did not request an emergency response. Id.
425. Williams, 99 F.3d at 1012.
426. Id.
427. Id.
428. Id. at 1009, 1012-13.
found for the defendants and granted them summary judgment on all of the claims. The district court reasoned that because the “law governing the claims . . . was not clearly established at the time of the collision,” Officer Farr and the other officials were entitled to qualified immunity. The court further ruled that Officer Farr’s conduct was not unconstitutional, and therefore, the claim against the City of Denver (“City”) based on its failure to train or supervise must fail.

Williams appealed the decision of the district court to the United States Court of Appeals for the Tenth Circuit, arguing that the district court erred in holding that the law was not clearly established with respect to her claim. The Tenth Circuit affirmed in part and reversed in part, holding that: (1) Officer Farr’s conduct may be viewed as “shocking to the conscience;” (2) Officer Farr and the other officials were entitled to qualified immunity; and (3) the City may be liable for its own conduct, even if it is determined that Officer Farr did not violate the Constitution. In examining the “shocks the conscience” standard, the Tenth Circuit reasoned that the standard requires “a high level of outrageousness.” Upon examining Officer Farr’s conduct, as well as his background, the Tenth Circuit reasoned that his conduct was a danger to those in his path, and thus unjustified. However, the Tenth Circuit affirmed the grant of immunity to Officer Farr and the other officials, reasoning that the law regarding police pursuits was not “clearly established” at the time of the pursuit.

ANALYSIS

In County of Sacramento v. Lewis, the United States Supreme Court held that a claim brought under 42 U.S.C. § 1983 (“section 1983”) involving the pursuit of an individual by law enforcement officers is properly analyzed in the context of substantive due process. In so holding, the Court reasoned that a law enforcement officer’s mere pursuit of a suspect was not encompassed by the Fourth Amendment. The Supreme Court further determined that the ap-
appropriate standard to apply in assessing a section 1983 claim in the context of a vehicular police pursuit is the "shocks the conscience" standard. In doing so, the Court rejected the Ninth Circuit's determination that "deliberate indifference" or "reckless disregard" is the appropriate standard to apply in such cases.

The Supreme Court correctly analyzed the Lewis' claim in Lewis in a substantive due process framework, because there existed no explicit constitutional provision covering their claim for damages for the death of their son. More specifically, the pursuit of an individual is not considered a "search and seizure" within the meaning of the Fourth Amendment. The Court was also justified in adopting the standard of "shocks the conscience" in the context of police pursuits. Such a high standard is warranted for the following reasons: (1) the Fourteenth Amendment is not meant to be a "font of tort law;" and (2) the pursuit of suspects is necessary to maintain order in society. In addition, the Supreme Court employed a different analytical strategy than did the district court. In determining that no constitutional deprivation had been alleged in Lewis, the Court deemed it unnecessary to determine whether Deputy Smith was entitled to qualified immunity. The district court, on the other hand, assumed that a substantive due process violation occurred and then looked at the defense of qualified immunity.

Police Pursuits Are Properly Analyzed in the Context of the Substantive Component of the Fourteenth Amendment's Due Process Clause

The Fourteenth Amendment provides, in pertinent part, that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law." The Due Process Clause of the Fourteenth Amendment has been expanded to encompass a substantive realm in order to protect individuals from government officials who

440. Id. at 1720-21.
441. Compare id. (declaring that the appropriate standard to apply in assessing a section 1983 claim in police pursuit cases is the "shocks the conscience" standard), with Lewis v. Sacramento County, 98 F.3d 434, 441 (1996) (determining that "deliberate indifference" or "reckless disregard" is the appropriate standard to apply in police pursuit cases brought under section 1983).
442. See infra notes 449-71 and accompanying text.
443. See infra notes 454-69 and accompanying text.
444. See infra notes 472-517 and accompanying text.
445. See infra notes 498-517 and accompanying text.
446. See infra notes 518-33 and accompanying text.
447. See infra notes 526-30 and accompanying text.
448. Lewis, 98 F.3d at 442-45.
may abuse their power.\textsuperscript{450} While the Court has expanded the Due Process Clause, such an expansion is warranted only when a claim cannot be brought under a specific provision of the Constitution.\textsuperscript{451} One critic of the Court's expansion of the Due Process Clause is Circuit Judge Frank Easterbrook, who has stated that "substantive due process" is an oxymoron.\textsuperscript{452}

In \textit{Lewis}, the Court stated that a substantive due process analysis would be appropriate only if the Lewis' claim was not "covered by" the Fourth Amendment.\textsuperscript{453} The Fourth Amendment applies to searches and seizures and states the following: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the places to be searched, and the persons or things to be seized."\textsuperscript{454} Through numerous decisions, the Supreme Court has attempted to establish what is necessary for a Fourth Amendment "seizure."\textsuperscript{455}

The Supreme Court held in \textit{Terry v. Ohio}\textsuperscript{456} that a seizure may occur outside the setting of a formal custodial arrest.\textsuperscript{457} With respect to the setting of a police pursuit, the Supreme Court in \textit{Brower v. County of Inyo}\textsuperscript{458} held that the use of a roadblock to stop a fleeing suspect constituted a Fourth Amendment "seizure."\textsuperscript{459} In so holding, the Court reasoned that a violation of the Fourth Amendment required "an intentional acquisition of physical control."\textsuperscript{460} Years later, in \textit{California v. Hodari D.},\textsuperscript{461} the Supreme Court held that a police pursuit in an attempt to apprehend an individual does not constitute a

\begin{itemize}
\item \textsuperscript{450} See Daniels v. Williams, 474 U.S. 327, 331 (1986) (stating that the Due Process Clause "bar[s] certain government actions regardless of the fairness of the procedures used to implement them"); Davidson v. Cannon, 474 U.S. 344, 348 (1986) (holding that the Due Process Clause was intended to prevent government officials "from abusing governmental power, or employing it as an instrument of oppression").
\item \textsuperscript{451} See Graham v. Connor, 490 U.S. 386, 395 (1989) (holding that if an Amendment of the Constitution "provides an explicit textual source of constitutional protection against . . . physically intrusive governmental conduct, that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing [the] claim[1]").
\item \textsuperscript{452} Mays v. City of E. St. Louis, 123 F.3d 999, 1001 (7th Cir. 1997), cert. denied, 118 S. Ct. 2059 (1998).
\item \textsuperscript{453} Lewis, 118 S. Ct. at 1715.
\item \textsuperscript{454} U.S. CONST. amend. IV.
\item \textsuperscript{455} See supra notes 239-90 and accompanying text.
\item \textsuperscript{456} 392 U.S. 1 (1968).
\item \textsuperscript{457} Terry v. Ohio, 392 U.S. 1, 16 (1968).
\item \textsuperscript{458} 489 U.S. 593 (1989).
\item \textsuperscript{459} Brower v. County of Inyo, 489 U.S. 593, 599, on remand, 884 F.2d 1316 (9th Cir. 1989).
\item \textsuperscript{460} Brower, 489 U.S. at 596.
\item \textsuperscript{461} 499 U.S. 621 (1991).
\end{itemize}
"seizure" under the Fourth Amendment. In so holding, the Court reasoned that a "seizure" necessitated some type of physical restraint to stop movement, and that such restraint is not present in the pursuit of an individual.

In examining the holdings of Brower and Hodari D., the Court in Lewis followed precedent in holding that the case was not "covered by" the Fourth Amendment. In Lewis, the motorcycle on which Lewis was a passenger came to a stop as Willard, the driver, lost control when attempting to make a sharp left turn. Therefore, the halt of the vehicle was due to the driver and not a result of an affirmative act of the police. Although stopping the motorcycle was the goal of Deputy Smith's pursuit, the fact that the motorcycle crashed as a result of the pursuit does not necessarily mean a "seizure" occurred within the meaning of the Fourth Amendment. A Fourth Amendment seizure, the Court has held, requires an intentional restriction of movement and such intent is not present with the mere pursuit of an individual. Because Lewis and the motorcycle he was riding on stopped due to the reckless driving of the driver, and not as the result of an affirmative or intentional act of the police, Lewis was not "seized." Thus, a claim stemming from an alleged deprivation of a Fourth Amendment right must fail. Furthermore, because the Lewis' claim was not "covered by" the Fourth Amendment, the Court properly analyzed the topic case in a substantive due process framework.

THE SUPREME COURT CORRECTLY ADOPTED THE "SHOCKS THE CONSCIENCE" STANDARD

Until the Supreme Court's decision in Lewis, the circuit courts have been split when determining what standard of culpability is necessary to "trigger" the substantive component of the Fourteenth

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463. Hodari D., 499 U.S. at 626.
464. Lewis, 118 S. Ct. at 1715. See Hodari D., 499 U.S. at 629 (holding that a pursued suspect does not become "seized" until he is actually stopped).
465. Lewis, 118 S. Ct. at 1712.
466. Compare id. (involving a driver who lost control of his motorcycle while failing to complete a sharp turn), with Brower, 489 U.S 593, 594 (concerning a driver fleeing the police who stopped after crashing into a roadblock set up by the police).
467. See Brower, 489 U.S. at 596-97 (holding that "a Fourth Amendment seizure does not occur . . . whenever there is a governmentally caused and governmentally desired termination of an individual's freedom of movement").
468. See supra notes 264-90 and accompanying text.
469. See supra notes 239-90 and accompanying text.
470. See supra notes 239-90 and accompanying text.
471. See supra note 453 and accompanying text.
Amendment’s Due Process Clause. Specifically, in the context of a police pursuit, courts have typically adopted one of the following standards: (1) "gross negligence;" (2) "reckless or deliberate indifference;" or (3) "shocks the conscience." The Court’s decision in Lewis, however, makes it clear that the appropriate standard to apply is the "shocks the conscience" standard.

A. STRUGGLE OVER WHAT STANDARD TO APPLY IN POLICE PURSUITS

While most of the circuit courts have agreed that section 1983 claims involving police pursuits are properly analyzed under substantive due process, the courts have applied inconsistent standards of proof when determining the level of culpability to apply. For instance, in Jones v. Sherrill, the Sixth Circuit adopted the "gross negligence" standard in the context of a high-speed police pursuit in violation of section 1983. In adopting this standard, the Sixth Circuit stated that "we must ensure that gross negligence is something more than simple negligence." Unlike the Sixth Circuit, the Ninth Circuit held that the appropriate standard of conduct to apply to law enforcement officers in the context of high-speed vehicular pursuits is "deliberate indifference" or "reckless disregard" for an individual’s right to life and liberty. Dissimilarly, the First, Third, Fourth, Seventh and Tenth Circuits have adopted the "shocks the conscience" standard in the context of claims involving vehicular police pursuits brought under the Fourteenth Amendment. The Supreme Court, in Lewis, also embraced the "shocks the conscience" standard, and in doing so should dispel any uncertainty the circuit courts may have had when determining what standard of culpability to apply to law enforcement officers involved in vehicular pursuits.

474. Lewis, 118 S. Ct. at 1721.
476. 827 F.2d 1102 (6th Cir. 1987).
477. See supra notes 353-62 and accompanying text.
479. Compare Jones, 827 F.2d at 1106 (adopting the “gross negligence” standard in the context of police pursuit claims brought under section 1983), with Lewis, 96 F.3d at 441 (holding that the appropriate standard in which to assess section 1983 claims involving police pursuits is the “deliberate indifference” or “reckless disregard” standard).
480. See supra notes 364-436 and accompanying text.
481. Lewis, 118 S. Ct. at 1721.
B. DEVELOPMENT OF "SHOCKS THE CONSCIENCE"

The "shocks the conscience" standard finds its origin in the United States Supreme Court's decision in *Rochin v. California.* In *Rochin*, the Supreme Court held that police conduct which consisted of forcing an individual to have his stomach pumped against his will was both offensive and shocking to the conscience. The Court further found that such conduct, if deemed to "shock the conscience," violated the Due Process Clause of the Fourteenth Amendment.

Since the Court's decision in *Rochin*, the Court has continued to apply the "shocks the conscience" standard in varying contexts. For example, the Court has held that taking a blood sample from an individual while the individual was unconscious did not "shock the conscience." Another example of the Court's application of the "shocks the conscience" standard can be found in *Collins v. City of Harker Heights.* In *Collins*, the Court held that a city's failure to warn its employees about the hazards of working in manholes and sewer lines was not "conscience shocking." In *Lewis*, the Court once again applied the "shocks the conscience" test, this time in the context of vehicular police pursuits. In *Lewis*, the Court held that a law enforcement officer's pursuit of suspects for failure to stop when so requested — which subsequently resulted in the death of one of the suspects — did not "shock the conscience."

Although the Court has often embraced the "shocks the conscience" standard, it has failed to articulate the precise factors for determining when conduct by state actors, like police officers, rises to the level considered to be shocking to the conscience. Thus, even when adopting the "shocks the conscience" standard, courts have struggled with its application. For instance, in *Fagan v. City of Vineland*, the Third Circuit adopted the "shocks the conscience" standard in the context of police pursuits. The court, however, stated that such a standard warranted an "amorphous and imprecise inquiry." Also
noting the imprecision of the standard was Circuit Judge Henry Friendly, in \textit{Johnson v. Glick},\textsuperscript{496} who stated that "[w]hile the Rochin test . . . is not one that can be applied by a computer, it at least points the way."\textsuperscript{497}

C. \textsc{Rationalization for "Shocks the Conscience"}

The Supreme Court was correct in adopting the high standard of "shocks the conscience" in the context of police pursuits.\textsuperscript{498} This conclusion stems from two basic principles: (1) the Fourteenth Amendment is not meant to be a "font of tort law," and (2) the pursuit of suspects is necessary to maintain order in society.\textsuperscript{499}

In \textit{Lewis}, Justice David Souter, writing for the majority, reiterated the notion that the Fourteenth Amendment is not meant to be a "font of tort law."\textsuperscript{500} The Court previously held, in \textit{Daniels v. Williams},\textsuperscript{501} that under the Due Process Clause the word "deprive" suggests more than mere negligence.\textsuperscript{502} The Court has also held that the Due Process Clause does not guarantee due care on behalf of State officials.\textsuperscript{503}

Justice Antonin Scalia, joined by Justice Clarence Thomas, filed a concurring opinion in \textit{Lewis} and raised the following point: "Willard [the driver of the motorcycle] 'deprived' Lewis of his life."\textsuperscript{504} Admittedly, it was Deputy Smith's cruiser that ran over Lewis; however, Willard dumped Lewis in the path of the cruiser by failing to complete a sharp left turn while recklessly driving at a high rate of speed.\textsuperscript{505} Justice Scalia further noted that Willard also had the option to stop the motorcycle when so requested, and therefore avoid the pursuit and the resulting tragedy.\textsuperscript{506} Thus, Willard, as driver of the pursued motorcycle, "deprived" Lewis of his life just as much, if not more, as Deputy Smith was alleged to have done.\textsuperscript{507}

The pursuit of suspects, although dangerous, is necessary to maintain order in society.\textsuperscript{508} Admittedly, the inherent risk to passen-

\begin{itemize}
\item \textsuperscript{496} 481 F.2d 1028 (2d Cir. 1973).
\item \textsuperscript{497} \textit{Johnson v. Glick}, 481 F.2d 1028, 1029, 1033 (2d Cir. 1973).
\item \textsuperscript{498} See \textit{infra} notes 499-517 and accompanying text.
\item \textsuperscript{499} See \textit{infra} notes 500-17 and accompanying text.
\item \textsuperscript{500} \textit{Lewis}, 118 S. Ct. at 1711, 1717-18 (citing Paul v. Davis, 424 U.S. 693, 701 (1976)).
\item \textsuperscript{501} 474 U.S. 327 (1986).
\item \textsuperscript{502} \textit{Daniels v. Williams}, 474 U.S. 327, 330 (1986).
\item \textsuperscript{503} \textit{Davidson v. Cannon}, 474 U.S. 344, 348 (1986).
\item \textsuperscript{504} \textit{Lewis}, 118 S. Ct. at 1723, 1725 (Scalia, J., concurring).
\item \textsuperscript{505} \textit{Id.} at 1725 (Scalia, J., concurring).
\item \textsuperscript{506} \textit{Id.} (Scalia, J., concurring).
\item \textsuperscript{507} \textit{Id.} (Scalia, J., concurring).
\item \textsuperscript{508} Evans v. Avery, 100 F.3d 1033, 1038 (1st Cir. 1996).
\end{itemize}
gers and innocent bystanders must be considered; however, if police fail to pursue suspects, more suspects will be encouraged to flee. The mere suggestion that a suspect may ignore a law enforcement officer's command to stop and then sue for damages sustained in an ensuing pursuit will cause suspects to flee more often, increasing accidents of the nature which occurred in Lewis. Further, as Circuit Judge Easterbrook stated in Mays v. City of East St. Louis: "This nation's social and legal traditions do not give passengers a legal right... to have police officers protect them by letting criminals escape."

It has been suggested that law enforcement officers use other means, such as helicopters, small airplanes, or spike belts, to apprehend those drivers who fail to stop when so requested. Law enforcement officers, however, are often confronted with situations in which they must make split-second decisions, and there may not always be time to call in a helicopter or a plane.

Moreover, if the citizens of California prefer a system that holds law enforcement officers liable for negligent or reckless driving during a high-speed pursuit of an individual, they have the option of creating such a system. The citizens may change the tort law of California in accordance with the customary lawmaking process for the State. Therefore, it is improper to rely upon the Court for a solution.

Distinguishing the Analytical Approaches Employed by the District Court and the Supreme Court

The United States District Court for the Eastern District of California, in analyzing the section 1983 claim in Lewis, assumed without deciding that Deputy Smith violated Lewis's Fourteenth Amendment right under the substantive component of the Due Process Clause. The Supreme Court, on the other hand, first determined whether the

509. Mays, 123 F.3d at 1003.
510. Lewis, 118 S. Ct. at 1721-22 (Kennedy, J., concurring).
511. 123 F.3d 999 (7th Cir. 1997).
514. See generally Lewis, 118 S. Ct. at 1720 (declaring that police officers are often involved in "circumstances that are tense, uncertain, and rapidly evolving") (quoting Graham v. Connor, 490 U.S. 386, 397 (1989)); see supra note 513 and accompanying text.
515. Lewis, 118 S. Ct. at 1725 (Scalia, J., concurring).
516. Id. (Scalia, J., concurring).
517. Id. at 1726 (Scalia, J., concurring).
518. Id. at 1714 n.5.
Lewises alleged a deprivation of a constitutional right. After determining that the conduct of Deputy Smith failed to warrant liability under the Fourteenth Amendment, the Court did not find it necessary to determine if Deputy Smith was entitled to qualified immunity for the section 1983 claim.

After the district court assumed that Deputy Smith had violated Lewis's due process rights under the Fourteenth Amendment, the court went on to consider the defense of qualified immunity. In doing so, the court reasoned that, at the time of the pursuit, the law regarding Lewis's Fourteenth Amendment due process rights were not clearly established. Thus, the court granted Deputy Smith summary judgment based on qualified immunity. The district court also considered the claims against Sacramento County and the Sacramento County Sheriff's Department ("Department"). Although the United States Supreme Court has held that municipalities may be held liable under section 1983, the district court determined that Sacramento County and the Department were not liable in this case.

The Supreme Court analyzed Lewis differently than did the district court, because the Court determined that the first question to address was whether there was a constitutional deprivation. Only if the first question is answered in the affirmative, the Court explained, should the issue of qualified immunity be addressed. Hence, the Court first addressed whether the Lewises alleged a deprivation of their son's Fourteenth Amendment rights. The Court held that a high-speed pursuit with no intent to harm does not war-

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519. Id.
520. See generally id. at 1720-21 (omitting analysis of whether Deputy Smith was entitled to qualified immunity upon determining that Deputy Smith's conduct failed to warrant liability under section 1983).
521. Lewis, 98 F.3d at 437. See Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (holding that the defense of qualified immunity is only available if the law governing an officer's conduct was not clearly established at the time of the occurrence); Pierson v. Ray, 386 U.S. 547, 557 (1967) (holding that officers may have a defense available to them under section 1983).
522. Lewis, 98 F.3d at 437.
523. See supra notes 52, 164-97 and accompanying text.
524. Lewis, 98 F.3d at 437.
525. See supra notes 45-49 and accompanying text. See also City of Canton v. Harris, 489 U.S. 378, 380 (1989) (holding that under limited circumstances a municipality may be liable under section 1983 for a "failure to train"); Monell v. Department of Soc. Serv. of the City of N.Y., 436 U.S. 658, 694 (1978) (holding that municipalities were to be included under the breadth of section 1983 when a policy or custom executed by the municipality caused harm); Monroe v. Pape, 365 U.S. 167, 183 (1961) (holding that section 1983 was intended to provide a remedy to individuals deprived of constitutional rights due to an official's abuse of power).
526. Lewis, 118 S. Ct. at 1714 n.5.
527. Id.
528. Id. at 1714 n.5, 1714-21.
rant liability under the Fourteenth Amendment. In so holding, the Court did not address whether Deputy Smith was entitled to qualified immunity.

Justice Stephen Breyer, in his concurring opinion, expressed that, in certain circumstances, lower courts should have the flexibility to decide section 1983 claims on the basis of qualified immunity in order to avoid struggling with difficult or poorly presented constitutional issues. Justice John Paul Stevens, who concurred in the judgment of the Court, opined that when the constitutional question is unclear, courts should "avoid the unnecessary adjudication of constitutional questions." However, in Lewis, the Court has made it clear that in any action brought under section 1983, the first issue to consider is whether a constitutional deprivation exists; only then may the affirmative defense of qualified immunity be considered.

CONCLUSION

In County of Sacramento v. Lewis, the United States Supreme Court held that the appropriate standard in assessing a 42 U.S.C. § 1983 ("section 1983") claim in the context of a police pursuit is the "shocks the conscience" standard. In so holding, the Supreme Court rejected the Ninth Circuit's determination that "deliberate indifference" or "reckless disregard" is the appropriate standard to apply. The Court also held that claims brought under section 1983 involving the mere pursuit of a suspect are properly analyzed within the framework of substantive due process.

The Court was justified in adopting the high standard of "shocks the conscience" in the context of vehicular police pursuits. First, the Constitution, or more specifically, the Fourteenth Amendment, is not meant to be a "font of tort law." The Fourteenth Amendment is

529. Id. at 1720.
530. See generally Lewis, 118 S. Ct. at 1721 (omitting any discussion of qualified immunity).
531. Id. at 1722-23 (Breyer, J., concurring) (citing Siegert v. Gilley, 500 U.S. 226, 235 (1991)).
532. Id. at 1723 (Stevens, J., concurring).
533. Id. at 1714 n.5.
536. Compare Lewis, 118 S. Ct. at 1720-21 (declaring that the appropriate standard to apply in assessing a section 1983 claim in police pursuit cases is the "shocks the conscience" standard), with Lewis v. Sacramento County, 98 F.3d 434, 441 (9th Cir. 1996) (determining that "deliberate indifference" or "reckless disregard" is the appropriate standard to apply in police pursuit cases brought under section 1983).
537. Lewis, 118 S. Ct. at 1715.
538. See supra notes 482-517 and accompanying text.
539. See supra notes 500-07 and accompanying text.
meant to protect individuals from an affirmative abuse of governmental power. Second, law enforcement officers are faced with a most necessary and difficult duty — the duty to protect the public. This duty must allow law enforcement officers the discretion to do their job, which often means making split-second decisions. These decisions, however, are not made lightly. Officers reach these decisions on the basis of extensive training and experience.

Moreover, the Court's decision in Lewis should clarify that, when faced with a section 1983 claim, a court must first determine whether a constitutional deprivation has been alleged. Only upon a finding of a constitutional deprivation may a court consider the defense of qualified immunity.

Further, the Court's adaptation of the "shocks the conscience" standard is most likely to be met with criticism. This is not because the Court "revived" the Rochin standard, but because the Court has yet to fully define what is necessary to "shock the conscience." However, a complete explanation of what may shock one's conscience is nearly impossible, because this will depend on the facts and circumstances of each individual case. What we have learned, however, is that the "shocks the conscience" standard necessitates conduct that is more than negligent and more than "recklessly indifferent."

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540. See supra notes 508-17 and accompanying text.
541. See supra notes 526-33 and accompanying text.