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In Pursuit of a Modern Standard: The Constitutional Proportions of Collateral Harm From Pursuits and Police High-Speed Driving

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IN PURSUIT OF A MODERN STANDARD: THE CONSTITUTIONAL PROPORTIONS OF COLLATERAL HARM FROM PURSUITS AND POLICE HIGH-SPEED DRIVING

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ABSTRACT

Police chases and high-speed driving are common practices that pose a substantial amount of harm and are often unjustified. The benefits of such chases are questionable, and rapid police action at all costs is often unnecessary. When bystanders are injured as a result of police high-speed driving, there are few avenues to have their rights vindicated, and federal court cases require plaintiffs to meet an almost impossible burden. However, under the United States Supreme Court case of *County of Sacramento v. Lewis*, a plaintiff can put forth evidence that their substantive due process right to life under the Fourteenth Amendment was violated as a result of a police officer's actions during a chase that resulted in harm. Liability depends on a plaintiff's ability to show that the police officer's actions "shocked the conscience." In the police high-speed driving context, an officer's conduct shocks the conscience if the officer acted with the intent to bring about the harm that he caused. Such results are hardly ever the result of intentional action, but a blatant disregard of the risks. While most federal circuit courts follow this standard, some allow for the finding of liability on the less burdensome standard of recklessness.

In the Eighth Circuit, if the officer believed he was responding to an emergency and causes harm, the Plaintiff would have to show that the officer intended to bring about the harm that resulted. The intent to harm standard would apply regardless of the objective circumstances, so long as the officer believed he was acting in an emergency. The latitude police have on our nation's roadways and the deference they are given in our society warrants a reconsideration of what standards should apply and when. This Note argues that the potential harm caused by high-speed police driving is significant and often unjustified. While the current legal standards allow for some

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avenues of recourse for victims, they are limited and require a high burden of proof. It is necessary to re-evaluate and establish more reasonable standards for police conduct during high-speed pursuits to ensure public safety and prevent unnecessary harm.

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I. INTRODUCTION

Engaging in high-speed pursuits has been a largely unquestioned policy of police departments throughout the United States for decades.[1] In fact, one could argue that high-speed chases involving police have become woven into the pop-culture fabric of the country as a common theme incorporated in movies and television. However, pop-culture hardly captures the reality of high-speed police driving and chases, and the unfortunate real-world consequences often produced as a result. Surprisingly, the tactic has not been significantly scrutinized and there exists no national data on risky high-speed driving and pursuits, their characteristics, and their overall costs and benefits.[2] This lack of scrutiny also applies to how the courts examine claims by

[1] GEOFFREY P. ALPERT & CYNTHIA LUM, POLICE PURSUIT DRIVING: POLICY AND RESEARCH 13–27 (2014).

[2] *Id.* at 13.

innocent third parties seriously hurt or killed as a result of an officer's decision—for whatever reason—to engage in high-speed driving.[3]

The legal liability of a police officer whose high-speed chase causes harm to a bystander is a murky area. The Eighth Circuit has recently addressed the issue in *Braun v. Burke*.[4] In that tragic case, Arkansas State Police Trooper Brian Burke was investigating a hit-and-run incident along the highway whereupon he saw a vehicle traveling at ninety to ninety-five miles per hour in a fifty-five mile-per-hour zone and decided to pursue it.[5] Without his emergency lights or siren activated, Trooper Burke reached speeds of more than 110 miles per hour during the length of the eight-mile chase.[6] The chase ended when Trooper Burke, unable to stop his vehicle, collided with the car of Cassandra Braun as she crossed into the officer's lane.[7] Braun was killed as a result.[8]

After the suit was brought to federal court (under 42 U.S.C § 1983 for a violation of substantive due process),[9] the case ultimately reached the Court of Appeals for the Eighth Circuit.[10] In holding that the district court properly granted summary judgment in favor of Trooper Burke, the Eighth Circuit concluded that Trooper Burke's conduct did not amount to "conscience-shocking" behavior and that he lacked the requisite intent to harm.[11] The court stated that, in some instances, a lesser standard of deliberate indifference could be applied to find liability, but only if it is found that there was time for the officer's deliberation.[12] The Eighth Circuit found there was not.[13] However, the court did not distinguish between chasing a suspect and when an officer believes he is responding to "other types of emergencies."[14] Simply put, the

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3 *Id.* at 14.

4 *See generally* Braun v. Burke, 983 F.3d 999 (8th Cir. 2020).

5 *Id.* at 1001.

6 *Id.*

7 *Id.* at 1001–02.

8 *Id.* at 1002.

9 *Id.* Following major Supreme Court decisions such as Monroe v. Pape, 365 U.S. 167 (1961) and Monell v. Dep't of Soc. Servs. of N.Y., 436 U.S. 658 (1978), a major surge in litigation followed under 42 U.S.C. § 1983; however, courts responded by applying inconsistent standards, and by the early 2000s, the courts were contradicting each other, muddying the area of law further for lawyers and legal scholars. ALPERT & LUM, *supra* note 1, at 14. *See also* MICHAEL G. COLLINS, SECTION 1983 LITIGATION IN A NUTSHELL 5 (5th ed. 2016).

10 *Braun*, 983 F.3d at 1000.

11 *Id.* The court emphasized how such a standard applied when an officer was in an "emergency" or was in "rapidly evolving, fluid, and dangerous situations." *Id.* at 1002.

12 *Id*.

13 *Id.*

14 *Id.*

Braun decision essentially made it more difficult to find constitutional liability for harm caused to innocent bystanders during police chases.

This Note will argue that the Eighth Circuit's decision in *Braun* sets a dangerous precedent that has the effect of unjustly insulating police officers from liability when plaintiffs are harmed in police chases. Moreover, the Eighth Circuit was wrong to find the intent to harm standard applied to all police high-speed driving. The intent to harm standard is based on the subjective belief of the officer and does not consider whether the officer had time to deliberate.[15] If anything, Eighth Circuit should clarify a standard that falls more in line with how other circuits examine the issue. This Note will posit that, even though there are courts that are fairer in how they analyze the consequences of high-speed driving to uninvolved third parties, the framework is incompatible with the modern understanding of policing in the United States.[16] Finally, this Note will then propose its own standard as a means of resolving this incompatibility.

This Note will begin by discussing the background of the issue and the state of law in this area. Part II will examine the *Braun* decision as it was decided by the Eighth Circuit and expound upon the problems furthered by the opinion.[17] Part III introduces the idea that the circumstances which catalyze police high-speed driving should be legally significant.[18] Thus, there is a reasonable alternative to the insulating constitutional liability framework espoused in *County of Sacramento v. Lewis*.[19] Lastly, Part IV will articulate a new standard to be applied.[20]

A. Police Chases: A Ubiquitous Practice

The dominance of the patrol car as a fixture in police departments helped to foster the expectation of faster responses to act.[21] However, in the early days of law enforcement's reliance on vehicles, little attention was given to police pursuits or their consequences.[22] Police officers were told to chase the suspect at all costs, and success in apprehension provided excitement even when resulting in property damage and crashes, or injury and death to innocent bystanders.[23] Fast forward to the latter part of

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15 *Id.* at 1002–03

16 *See, e.g.*, Sauers v. Borough of Nesquehoning, 905 F.3d 711, 717–18 (3d Cir. 2018) (concluding that deliberate indifference applied after using objective factors to find that deliberate indifference applied); Dean v. McKinney, 976 F.3d 407 (4th Cir. 2020) (considering objective factors apart from the officer's subjective belief to find that deliberate indifference applied). *See also* ALPERT & LUM, *supra* note 1, at 2.

17 *See infra* Part II.

18 *See infra* Part III.

19 County of Sacramento v. Lewis, 523 U.S. 833, 848 (1998).

20 *See infra* Part IV.

21 ALPERT & LUM, *supra* note 1, at 10.

22 *Id.* at 4.

23 *Id.*

the twentieth century, when modern policing led to a dramatic increase in the use of police vehicles.[24] Since the 1990s, there have been fundamental shifts regarding expectations of police proactivity and crime prevention.[25] Traffic stops and drug interdictions are prevalent examples of activities in which law enforcement and our country's roads and highways coalesce.

Traffic stops particularly are the most common form of interaction between police and citizens.[26] On average, there are more than 50,000 drivers pulled over each day.[27] A consequence of this frequent type of interaction can be an unpredictable chase. It is often the case that a chase arises because an officer is attempting to stop a driver for a minor traffic violation.[28] For example, *The Plain Dealer*, a major newspaper in Cleveland, Ohio, analyzed data from chases that occurred in East Cleveland over the first 120 days of 2021.[29] Out of 105 chases, at least 72 of them arose from attempts to pull a driver over for tinted windows, license plate violations, and minor traffic infractions including speeding and running a red light.[30]

For the most part, for police purposes, the increased use of vehicles has provided positive benefits.[31] Nevertheless, an important question remains: Do the benefits from policing the roads outweigh the negative outcomes that come with it? If there is one thing to be certain of, it is that police chases are dangerous for all involved and those in the wrong place at the wrong time.[32] The National Highway Traffic Safety Administration collects data on police pursuit-related fatalities which showed that at

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[24] "Proactive policing," or the normative objective of police to catch criminals and prevent crime (as opposed to protection and public safety), may affect contentions such as the frequency in which individuals flee police and are pursued; it may change the reason, environment, and context by which pursuits are initiated, and this, in turn, may affect the likelihood of accidents—especially when there is more uncertainty as to what an officer may face (as is the case in these situations). DR. CYNTHIA LUM & GEORGE FACHNER, POLICE PURSUITS IN AN AGE OF INNOVATION AND REFORM: THE IACP POLICE PURSUIT DATABASE 8–11 (2008).

[25] *Id.*

[26] THE STANFORD OPEN POLICING PROJECT, https://openpolicing.stanford.edu/findings/ (last visited Apr. 19, 2023).

[27] *Id.*

[28] Adam Ferrise, *Fastest police chase hit 121 miles per hour and other key numbers: East Cleveland Police Chases*, The Plain Dealer (Apr. 19, 2023, 10:00 AM), https://www.cleveland.com/metro/2021/09/fastest-police-chase-hit-121-miles-per-hour-and-other-key-numbers-east-cleveland-police-chases.html.

[29] *Id.*

[30] *Id.*

[31] LUM & FACHNER, *supra* note 24, at 7.

[32] Approximately thirty percent of pursuit-related deaths, in data assessed by the National Highway Traffic Safety Administration's Fatality Analysis Reporting System, are innocent bystanders. ALPERT & LUM, *supra* note 1, at 9.

least one person will die every day in a police pursuit.[33] A *USA Today* article reported that thousands of people have been killed in police chases since 1979.[34] Interestingly, officers themselves are very likely to be killed or injured from vehicular related accidents.[35] In fact, vehicular-related accidents are the most likely cause of on-duty police deaths.[36]

Nevertheless, despite the known risks and the high probability of an outcome of injury or death to all involved, liability for a constitutional violation is unlikely to follow a chase gone wrong.[37] Causes of action for injury or death related to a police chase or high-speed driving are also brought in state and federal court.[38] In both venues, the standards are vague, and few fact patterns would prove successful for a plaintiff.[39] This is especially so when filing under 42 U.S.C § 1983 for allegations of constitutional deprivations under the Fourteenth Amendment after *Lewis*.[40]

B. County of Sacramento v. Lewis*: What "Shocks the Conscience?*"

Generally, the *Lewis* case is the controlling authority on § 1983 violations in the context of highspeed police driving and pursuits. *Lewis* asserts that there could be a violation of one's substantive due process right to life under the Fourteenth Amendment in a high-speed chase when an officer's conduct was so egregious that it could be regarded as "conscience shocking."[41] In that case, a sheriff driving at high

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33 *Id.*

34 Thomas Frank, *High-speed Police Chases Have Killed Thousands of Innocent Bystanders*, USA TODAY (July 30, 2015, 5:56 PM), https://www.usatoday.com/story/news/2015/07/30/police-pursuits-fatal-injuries/30187827/. California, for example, chased 14,628 motorists from 2007 to 2014, which resulted in 4,052 crashes, 2,198 injuries, and 103 deaths. *Id.*

35 LUM & FACHNER, *supra* note 24, at 7. Between 1987 and 2006, there were 2,623 police officers killed in the course of duty, and 968 of those deaths—approximately thirty-seven percent—were vehicle-related accidents. *Id*.

36 *Id.*

37 ALPERT & LUM, *supra* note 1, at 15.

38 *Id.* at 13.

39 *Id.* at 24. Although this Note focuses on liability under the Fourteenth Amendment, it is important to understand that most claims with the goal of holding an officer accountable are filed in state court under categories of: "(1) negligence; (2) recklessness; (3) gross negligence; (4) willful and wanton conduct; (5) hybrid of negligence and gross negligence; (6) discretionary immunity with limited exceptions; and (7) written policy immunity." Patrick T. O'Connor & William L. Norse Jr., *Police Pursuits: A Comprehensive Look at the Broad Spectrum of Police Pursuit Liability and Law*, 57 MERCER L. REV. 511, 516 (2006).

40 ALPERT & LUM, *supra* note 1, at 16. *See also* Cnty. of Sacramento v. Lewis, 523 U.S. 833, 837 n.1 (1998) Respondents also brought claims under state law and the district court dismissed and found the officer immune from tort liability under a state statute granting immunity to officers acting in the line of duty. *Id.*

41 Cnty. of Sacramento v. Lewis, 523 U.S. 833, 847 (1988). The vague "shocks the conscience" test, used for determining whether executive action amounts to a violation of one's

speeds pursued two teenage passengers on a motorcycle.[42] Within seventy-five seconds of the high-speed chase, the motorcycle tipped over as the driver made a left-hand turn.[43] The officer, close behind and unable to stop the vehicle in time, ran over one of the passengers, killing him. [44]

The district court granted summary judgment for the officer on the claim of violating the respondent's right to life under the Fourteenth Amendment's substantive due process clause.[45] The Court of Appeals for the Ninth Circuit reversed, holding that the level of fault to be applied should be deliberate indifference to a person's right to life.[46] Given that there were facts suggesting the officer disregarded the department's rule on police pursuits, a finding that deliberate indifference applies might aid in resolving an issue of material fact.[47] Nevertheless, The Supreme Court of the United States reversed.[48]

The Court concluded that the officer was not liable because, in the context of high-speed pursuits, behavior that is conscience shocking requires an officer to act with the intent to cause harm unrelated to the legitimate object of the arrest.[49] The Court determined the officer did not have such intent.[50] However, the Court left open the possibility that when actual deliberation is practical, the lower deliberate indifference standard may also shock the conscience. [51]

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substantive due process under the Fourteenth Amendment, derives from the case of *Rochin*. Rochin v. California, 342 U.S. 165, 172 (1952). In *Rochin*, the Court considered the forced extraction of an alleged offender's stomach contents in order to obtain evidence to be conduct that "shocks the conscience." *Id.* Although courts dutifully impose this standard on pursuit cases, it is worth noting how the concurrence in *Lewis* thought that "[t]he phrase has the unfortunate connotation of a standard laden with subjective assessments. In that respect, it must be viewed with considerable skepticism." *Lewis*, 523 U.S. at 857 (Kennedy, J., concurring).

42 *Lewis*, 523 U.S. at 836–37.

43 *Id.* at 837.

44 *Id.*

45 *Id.*

46 *Id.* at 838.

47 *Id.* The rule required officers to "consider whether the seriousness of the offense warrants a chase at speeds in excess of the posted limit." *Id.*

48 *Id*. at 855.

49 *Id*. at 854.

50 *Id*. at 854.

51 *Id.* The culpability standard of "deliberate indifference" is vaguely interpreted and is applied as such—as is thematic throughout these cases. *Id.* The Court expressly declares that "[r]ules of due process are not, however, subject to mechanical application in unfamiliar territory. Deliberate indifference that shocks in one environment may not be so patently egregious in another . . . ." *Id.* at 850. This standard may apply in narrow circumstances when a court considers there to have been, inter alia, an absence of the necessity to act "in haste, under pressure, and frequently without the luxury of a second chance." *Id.* at 852. Some jurisdictions have relegated the "intent to harm" standard to categorically apply to alleged substantive due

Underlying the Court's use of this language is the notion that not merely any unreasonable executive abuses of power would suffice, but egregious and arbitrary action.[52] This decision, because of its restrictive interpretation of egregious official conduct, is viewed by some to have "essentially closed the door on successful allegations of constitutional deprivations of actions resulting from a police pursuit under the Fourteenth Amendment."[53] However, the federal circuit courts vary in deciding whether and when to apply the dominant intent to harm standard, or the standard of deliberate indifference as articulated in *Lewis*. As a result, some circuits are more favorable for plaintiffs than others.[54]

C. The U.S. Courts of Appeals After the Lewis *Decision*

Since *Lewis*, the circuit courts will apply the intent to harm standard in police chase scenarios unless there was adequate time for deliberation.[55] In application, for constitutional liability to be found, inadvertent harm as a result of conduct during a chase requires an officer to act more than recklessly.[56] Where the circuit courts tend to differ is with respect to what a court defers to in deciding whether to apply the more

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process violations arising from police pursuits. *See* Bingue v. Prunchark, 512 F.3d 1169, 1177 (9th Cir. 2008) ("[H]igh-speed police chases, by their very nature, do not give the officers involved adequate time to deliberate in either deciding to join the chase or how to drive while in pursuit of the fleeing suspect.").

[52] *Lewis*, 523 U.S. at 846.

[53] ALPERT & LUM, *supra* note 1, at 16.

[54] This Note, in order to focus the analysis, defers for another day a discussion on the application of the Fourth Amendment. By and large, injury or death to third parties as a result of high-speed driving or pursuits are not considered to be seizures under the Fourth Amendment.

> [A] Fourth Amendment seizure does not occur whenever there is a governmentally caused termination of an individual's freedom of movement (the innocent passerby), nor even whenever there is a governmentally caused and governmentally *desired* termination of an individual's freedom of movement (the fleeing felon), but only when there is governmental termination of freedom of movement *through means intentionally applied*.

Lewis, 523 U.S. at 846 (quoting Brower v. County of Inyo, 489 U.S. 593, 596–97 (1989)). Both the Supreme Court and the federal circuit courts apply a Fourth Amendment excessive force analysis in pursuit cases "when a patrol car has been affirmatively used as a weapon to assist in the detention of the fleeing suspect." O'Connor & Norse Jr., *supra* note 39, at 550. *See, e.g.*, Evans v. Avery, 100 F.3d 1033, 1036 (1st Cir. 1996) (finding the inadvertent death of a bystander hit by the car of a fleeing suspect was not a seizure within the meaning of the Fourth Amendment but could be considered as a potential substantive due process violation). Given this interpretation, the majority of cases involved in this analysis do not amount to a seizure, as they lack the element of means intentionally applied to prevent that individual's freedom of movement.

[55] *See Lewis*, 523 U.S. at 854.

[56] *Id.* Courts performing a substantive due process analysis sternly posit that "[n]egligence is never enough" for conduct to be conscience shocking. Braun v. Burke, 983 F.3d 999, 1002 (8th Cir. 2020).

insulating intent to harm standard or the lesser standard of deliberate indifference.[57] In other words, the question generally becomes: When may an officer be considered to have had "time to deliberate" in the context of police high-speed driving?

In answering this question, recently decided cases from different U.S. circuit courts provide examples of a more reasonable application of *Lewis*. In those cases, the circuit courts examine the specific facts and circumstances before deciding whether the officer's conduct shocked the conscience under intent to harm or deliberate indifference.[58] In *Dean v. McKinney*, the officer was on patrol when he received a radio request for assistance with a traffic stop that was subsequently canceled two minutes later and regarded as a nonemergency.[59] While proceeding to the situation at a high speed, the officer lost control of his vehicle and struck another car head-on, severely injuring the driver.[60] Although the officer contended he was responding to what he believed to be an emergency,[61] the court, utilizing the higher standard and looking at the entirety of the situation, found that intent to harm did not apply and that he was deliberately indifferent.[62]

In a somewhat analogous case, the court in *Sauers v. Borough of Nesquehoning* analyzed a chase initiated by an officer after witnessing a driver commit a simple traffic offense.[63] Driving at high speeds on a two-lane road, the officer lost control of his vehicle and crashed into the plaintiff's car, injuring him and killing his wife.[64] The court here examined what amounts to "conscience shocking" behavior under a spectrum given "how much time a police officer has to make a decision."[65] The court found Sauers sufficiently pled that the officer's conduct was conscience shocking under their state-created danger doctrine.[66] In finding that this standard applied and

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57 *Compare Braun*, 983 F.3d at 1002, *with* Sauers v. Borough of Nesquehoning, 905 F.3d 711, 717–18 (3d Cir. 2018).

58 *See, e.g.*, *Sauers*, 905 F.3d 711, 712 (3d Cir. 2018); *see also* Dean v. McKinney, 976 F.3d 407, 419 (4th Cir. 2020).

59 *Dean*, 976 F.3d at 411–12.

60 *Id.* at 412.

61 *Id.* at 414.

62 *Id.* at 416.

63 Sauers v. Borough of Nesquehoning, 905 F.3d 711, 715 (3d Cir. 2018).

64 *Id.*

65 *Id.* at 717.

66 *Id.* at 718. This court's state created danger theory of liability requires four elements: (1) the harm ultimately caused foreseeable and fairly direct; (2) a state actor acted with a degree of culpability that shocks the conscience; (3) Plaintiff was a foreseeable victim of the defendant's acts or a member of a discrete class subject to such potential harm; and (4) a state actor affirmatively used his or her authority in a way that created a danger, rendering citizens more vulnerable than had the state not acted at all. *Id.* at 717. Regardless of Plaintiff's pleadings, because the right was not clearly established in May of 2014 for purposes of qualified immunity, there was no liability. *Id.* at 718–19.

was conscience-shocking, the court found the officer had time to relate what was occurring to the neighboring police department.[67] This was not an emergency, the court noted, as he did not have to "make a split-second decision 'in haste' and 'under pressure.'"[68]

The cases of *Dean* and *Sauers* are mostly outliers when examining federal appellate decisions. There are few instances where the courts affirmed the application of deliberate indifference to an officer's conduct, let alone found that the officer acted with the higher standard of intent to harm.[69] In cases where the officer engaged in a chase, the courts are more inclined to judge the officer's conduct under the intent to harm standard.[70] A typical example of a chase permutation case resulting unfavorably for a plaintiff would be a case like *Jones v. Byrnes* from the Sixth Circuit.[71]

In *Jones*, officers received a dispatch call reporting an armed robbery at a 7-Eleven.[72] As they approached the 7-Eleven, they saw a Ford Taurus traveling at high speeds, which they suspected to be a getaway car.[73] After failing to pull over, the officers engaged in a pursuit that ended after six miles when the driver, after extinguishing the vehicle's headlights and running a red light, collided with Jones's car killing him.[74] Given the lack of evidence that the officer acted with the intent to cause harm, the court held their actions did not shock the conscience.[75] Although this may be a more reasonable outcome due to the seriousness of the crime, that same framework translates to cases like *Ellis v. Ogden City* and *White v. Polk County*, out of the Tenth and Eleventh Circuits, respectively.

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67 *Id.* at 718.

68 *Id.*

69 *See id.* at 717; Dean v. McKinney, 976 F.3d 407, 416 (4th Cir. 2020). *See also* Browder v. City of Albuquerque, 787 F.3d 1076, 1081–83 (10th Cir. 2015). *Browder* is a case so egregious as there were no plausible grounds of justification for the officer's actions. *Id.* The officer, after his shift and in response to no emergency, entered his police cruiser and sped through eleven intersections over eight miles. *Id.* at 1077. He ultimately collided with another vehicle, killing its occupant. *Id.* The court held that there was enough conduct alleged to reasonably find the officer acted with conscience-shocking deliberate indifference. *Id.* at 1083.

70 *Id.* at 1080. A premise articulated in the *Lewis* case, discussed to a large degree in this Note, is that the chase scenario may preclude the examining of an officer's conduct under the standards of recklessness or deliberate indifference. *See, e.g.*, Davis v. Township of Hillside, 190 F.3d 167, 175 (3d Cir. 1999) ("Because such circumstances, requiring a balancing of the need to stop a suspect's flight from the law against the threat a high-speed chase posts to others, 'demand an officer's instant judgment, even precipitate recklessness fails to [suffice for Due Process liability.]'").

71 Jones v. Byrnes, 585 F.3d 971, 973 (6th Cir. 2009).

72 *Id.*

73 *Id.*

74 *Id.* at 973–74.

75 *Id.* at 978.

In *Ellis*, officers were conducting a stakeout in a known gang member area where they began to follow, and then chase, Eddie Bustos.[76] The chase ended when Bustos, who throughout the chase was driving into oncoming traffic, struck a car driven by Philemon Ellis, leading to Ellis's death.[77] One of the officers knew where Bustos lived and could have waited at that address to arrest him for any crimes he may have committed, but they continued to pursue—even after the officers were ordered to disengage from the pursuit.[78] Applying the intent to harm standard, the court did not find the conduct here to shock the conscience and affirmed the dismissal.[79]

Even in cases where the officer was not chasing someone but was responding to some other emergency, the results are similar for uninvolved third parties hurt in furtherance of those activities.[80] For example, in *Carter v. Simpson*, the intent to harm standard was applied and not met when an officer, driving fast in the opposite direction of traffic while responding to a call of a reported death, collided with the plaintiff.[81] Likewise, the Tenth Circuit case of *Green v. Post* had a similar result.[82] In *Green*, the court applied the intent to harm standard to the acts of an officer who sped straight through an intersection without his siren or lights, leading to a collision with Willis Green's vehicle.[83] The officer was merely attempting to catch up to a vehicle

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[76] Ellis v. Ogden City, 589 F.3d 1099, 1100 (10th Cir. 2009).

[77] *Id.* at 1100–01.

[78] *Id.*

[79] *Id.* at 1105. Similarly, *White v. Polk* is an Eleventh Circuit case with an identical outcome, where there was no intent to harm found in the actions of an officer who pursued a car at over 100 miles per hour without using sirens or lights, which he mistook to be stolen. White v. Polk County, 207 Fed. App'x. 977, 979 (11th Cir. 2006). After fifteen miles, the car being chased by the unmarked patrol vehicle failed to navigate a curve and crashed, killing the passenger. *Id.* at 978.

[80] This Note examines chase and non-chase high-speed driving scenarios analogously because, historically, the courts have extended the "shocks the conscience" principle to official action in high-stress scenarios from police engaging in the stomach-pumping of someone who swallowed evidence, to the conduct of prison guards during a prison riot, and to police officers in a shoot-out. *See infra* Subpart III.C. It is also important to show the breadth of conduct, examined in similar ways, that should not be "without constitutional limitations" as such exercise of governmental authority "should have clearly defined constitutional restrictions given the high probability of death or serious bodily injury." Geoffrey P. Alpert et al., *The Constitutional Implications of High-Speed Police Pursuits Under a substantive Due Process Analysis: Homeward Through the Haze*, 27 U. Mem. L. Rev. 599, 661 (1997).

[81] Carter v. Simpson, 328 F.3d 948, 949, 952 (7th Cir. 2003).

[82] Green v. Post, 574 F.3d 1294, 1309 (10th Cir. 2009).

[83] *Id.* at 1296, 1309.

suspected of driving away from a gas station without paying for thirty dollars' worth of gas.[84] *Green* held the intent to harm standard was not met.[85]

Unfortunately, the framework as followed by the U.S. circuit courts excludes questionable state conduct from liability or scrutiny, leaving no one to answer for reckless abuses of authority. Although generally not expressed within the rationale of the cases, implicit within them is the ideology that officers should have a blank check to act without impunity, regardless of the circumstances. Before expounding upon the faults of the *Braun v. Burke* decision, the next Part focuses on the application of *Lewis* in the Eighth Circuit particularly, using examples of cases that raise the bar even higher for plaintiffs.

D. The Bounds of County of Sacramento v. Lewis*: The Eighth Circuit Court of Appeals*

The standards of culpability espoused in *Lewis* are applied somewhat differently in the Eighth Circuit. The Eighth Circuit, after *Lewis*, followed an approach where they were more likely to apply the intent to harm standard to all high-speed driving under the guise that there was an emergency.[86] One of the first cases to apply *Lewis* in the Eighth Circuit was *Helseth v. Burch*.[87] The court here applied the intent to harm standard to high-speed chases aimed at catching a suspected offender, regardless of whether the circumstances afforded time to deliberate.[88] In *Helseth*, officers witnessed a speeding car and chased it at high speeds for several miles until it crashed into another car, killing one passenger and injuring others.[89] Since there was no evidence alluding to an intent to cause the harm that occurred, the court found there was no substantive due process violation.[90]

In *Helseth*, the Eighth Circuit reviewed a chase incident just as the other circuits do. Four years later, however, the Eighth Circuit extended the intent to harm framework to non-chase scenarios, such as in *Terrel v. Larson.* The Eighth Circuit did so regardless of *Terrel*'s facts indicating there was time for the officer to deliberate.[91] In *Terrel,* deputy sheriffs were on duty and eating in a restaurant at around 10:00 PM when they were notified via radio that a woman had locked herself in a bathroom threatening to harm her three-year-old child.[92] Although Deputy Larson radioed in the affirmative that they would provide back-up, another deputy responded, advising

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[84] *Id.* at 1296.

[85] *Id.* at 1309.

[86] Helseth v. Burch 258 F.3d 867, 870 (8th Cir. 2001).

[87] *Id.* at 868.

[88] *Id.* at 871.

[89] *Id.* at 869.

[90] *Id.* at 872.

[91] *See* Terrel v. Larson, 396 F.3d 975, 976 (8th Cir. 2005).

[92] *Id.*

Larson that they could cancel.[93] Nevertheless, Larson continued towards the location of the alleged emergency.[94]

During this time, as Larson was entering an intersection at which the stop light was turning red, Larson's car collided with Talena Terrel's car, resulting in the death of an occupant.[95] The court ultimately found the intent to harm standard was applicable but that it could not be met.[96] In doing so, the court considered this to be an emergency where there was no time for calm deliberation, precluding the application of any lower standard.[97] Consequentially, the court based this conclusion solely on the officer's subjective belief that they were responding to an emergency. [98]

The decision in *Terrel* expanded the intent to harm standard of *Lewis* to supposedly rapidly evolving and dangerous situations which preclude the ability to deliberate.[99] This expanded *Lewis's* holding in two respects. First, intent to harm applies to "other types of emergencies" aside from high-speed pursuits of a fleeing suspect.[100] Secondly, whether the situation constituted an emergency, justifying the application of the higher standard of intent to harm, turns on the subjective belief of an officer.[101] *Terrel* arguably prevents any inquiry into whether a situation was objectively an

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[93] *Id.*

[94] *Id.*

[95] *Id.*

[96] *Id.* at 979. The court, in concluding that the intent to harm standard is essentially applicable *per se*, is concerned with the panel majority's decision that "threatens to deter police officers from deciding to respond to emergency calls, thereby increasing the risk of harm to citizens caught up in these crises." *Id.*

[97] *Id.* at 981. The "emergency" element, adding another dimension to the substantive due process analysis, is reinforced further when this court alludes to other circuits that have also "applied the *Lewis* intent-to-harm standard to 'those myriad situations involving law enforcement and government workers deployed in emergency situations.'" *Id.* at 979. *See also* Carter v. Simpson, 328 F.3d 948, 952 (7th Cir. 2003) (applying intent to harm to the acts of an officer in driving recklessly in response to a reported death).

[98] Terrel v. Larson, 396 F.3d 975, 980 (8th Cir. 2005). What is considered an "emergency," precluding the application of deliberate indifference, is a loosely defined concept throughout these high-speed driving cases. The courts that follow this framework seem to imply that an emergency is essentially what the officer deems it to be, and in disregard of factors alluding to the contrary. In doing so, the court here ignores entirely the fact that officer Larson did not have to respond, but instead volunteered to provide back-up. *Id.* Further alluding to there being a lack of an emergency was that one reason Larson did not cancel when it was suggested to him to do so was his desire to give the rookie deputy who accompanied him "some good experience handling that type of call." *Id.* Alternatively, a characterization of an "emergency" situation could be acting in the absence of the capacity to make unhurried judgments, which arguably was not the case here. *Id.* Unfortunately, excluded in this framework is any sort of test to determine whether the situation "was reasonably regarded as an emergency." *Id.* at 979.

[99] Sitzes v. City of W. Memphis Ark., 606 F.3d 461, 467 (8th Cir. 2010).

[100] *Id.*

[101] *Id.*

emergency or even whether there may have been time to deliberate and act otherwise. It is even the express intent of *Terrel* to "insulate police officers from liability when they believe they are responding to an emergency call."[102]

More recently, the case of *Stitzes v. City of W. Memphis Ark.* furthered this unjust framework.[103] In that analogous case, an officer responded to a 911 call by a man reporting that two people claiming to be Wal-Mart security officers had assaulted and stolen fifty-five dollars from him in the parking lot.[104] On residential streets, the officer traveled at eighty to ninety miles per hour opposite the flow of traffic, allegedly without his emergency lights or sirens activated.[105] As the officer entered an intersection, he collided with a car driven by Sitzes, killing her and severely injuring her passenger.[106]

In affirming the application of the intent to harm standard, which could not be met, the Eighth Circuit deferred to the officer's subjective belief that he was responding to an emergency at the Wal-Mart.[107] Moreover, the court found that an inquiry into the objective reasonableness of the officer's belief was prevented by *Terrel*, deeming such situations to warrant insulation from liability.[108] In other words, an officer's self-serving statement that he believed he was responding to an emergency may be all that is required to apply the intent to harm standard.

II. A TRAGIC CASE WITH A TRAGIC RESULT

A. The Braun v. Burke *Decision*

The *Braun* decision exemplifies the shortcomings in the varying interpretations of what conduct "shocks the conscience," and the resulting unjust outcomes. On October 10, 2016, as alluded to in the introduction, Trooper Burke was investigating a hit-and-run incident.[109] While there, he witnessed an SUV speed past him with its hazard lights flashing.[110] Under the belief that "the SUV posed a serious risk to the motoring public, thus creating a dangerous situation," Trooper Burke responded by engaging in a chase reaching speeds of more than 110 miles per hour.[111] Eight miles from where Trooper Burke initiated the pursuit, Cassandra Braun was a passenger in a car driving

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102 *Id.* at 469.

103 *Id.* at 468.

104 *Id.* at 464.

105 *Id.*

106 *Id.* at 464–65.

107 *Id.* at 468.

108 *Id.*

109 Braun v. Burke, 983 F.3d 999, 1001 (8th Cir. 2020).

110 *Id.*

111 *Id.*

from the opposite direction on the same highway.[112] As Braun's car made a left turn entering Trooper Burke's lane, unable to stop his car in time, the two cars crashed resulting in Braun's death and serious injuries to the Trooper Burke.[113]

The mother of Cassandra Braun filed suit under 42 U.S.C. § 1983, arguing that Trooper Burke violated Braun's substantive due process right to life under the Fourteenth Amendment.[114] As discussed in the context of the Supreme Court decision of *Lewis*, the court contends that such a claim against an officer requires conduct that was so egregious it "shock[ed] the contemporary conscience."[115] In the context of police chases, an officer is presumably in a rapidly evolving and dangerous situation—thus, the court requires a plaintiff to show an officer intended to harm the victim.[116] Although Braun argues the deliberate indifference standard should apply, the court ultimately rejects this.[117]

In lieu of determining which standard to apply, the Eighth Circuit iterates in its discussion that Trooper Burke was not chasing a suspect; rather, he was responding to an emergency he witnessed.[118] For purposes of applying either of the two standards, the court belies having a clear distinction among the circumstances resulting in high-speed driving.[119] Instead, in the Eighth Circuit, intent to harm would be applied when an officer believes he is not only pursuing a suspect but is responding to "another type of emergency."[120]

The Eighth Circuit in the case above equates responding to any so-called emergencies to situations where "unforeseen circumstances demand an officer's instant judgment . . . ."[121] This framework is significant because an officer can claim he was subjectively confronted with an emergency and have his conduct evaluated under the insurmountable intent to harm standard, regardless of the objective veracity

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112 *Id.*

113 *Id.* at 1001–02. The facts indicate that Trooper Burke initially activated his emergency lights and sirens, but then he turned them off roughly twenty seconds later. *Id.* at 1001.

114 *Id.* at 1002. A claim as such is couched in the language of the Fourteenth Amendment in how "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ." U.S. CONST. amend. XIV, § 1.

115 *Braun*, 983 F.3d at 1002.

116 *Id.*

117 *Id.* at 1002–03.

118 *Id.* at 1002. Alluding to the potential lack of an emergency in this situation may be the fact that the officer turned his lights and sirens off, and that this was "a hunt for a suspect whose whereabouts were unclear," as it was some two minutes after the driver sped past him when he entered his car and began his attempt to catch up to the driver. *Id.* at 1001, 1005.

119 *See id.* at 1005–06.

120 *Id.* at 1004.

121 *Id.* Throughout these cases, an officer's response to an emergency is considered a circumstance where decisions are "made in haste." *Id.*

of the claim.[122] Thus, Trooper Burke's affidavit stated that he believed the driver's speeding to be an emergency posing "a serious risk to the motoring public," necessitating the pursuit.[123] Given the precedent followed in the Eighth Circuit, the intent to harm standard was triggered and the plaintiff was unable to meet that standard.[124]

B. The Problem: The Exclusion of Unjustifiable Conduct from the Lewis *Framework*

The contrast in approaches—from the Third and Fourth Circuits to the Eighth Circuit in *Braun*—all relate a common theme. When high-speed driving in any manner goes wrong, rather than legitimately scrutinizing an officer's engagement in the practice, the courts seem to rationalize having wide-reaching protection in the fantasy that an officer is unable to act otherwise in a rapidly evolving situation.[125] Or, even if he could have, it is contended that there is a societal interest in deferring to an officer's judgment in such a situation, requiring them to be shielded from liability.[126]

The *Lewis* framework as it is applied leaves egregious conduct out of the scope of § 1983, putting material claims of arbitrary state action in the realm of tort law.[127] In so doing, the courts hinder § 1983 as a plausible avenue for plaintiffs seeking to hold an officer accountable for causing death or severe injury through their driving.[128] Furthermore, these decisions nullify an avenue to vindicate one's substantive due process right to life under the Fourteenth Amendment in a particularly prescient area.[129] A departure from the current approach is necessary because applying intent

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[122] *See id.*

[123] *Id.* at 1002.

[124] *Id.* at 1003.

[125] Sauers v. Borough of Nesquehoning, 905 F.3d 711, 723 (3d Cir. 2018); Sitzes v. City of W. Memphis Ark., 606 F.3d 461, 467 (8th Cir. 2010); *Braun*, 983 F.3d at 1002.

[126] Police officers are afforded broad protection "in the service of a legitimate governmental objective." Davis v. Township of Hillside, 190 F.3d 167, 171, 173 (3d. Cir. 1999) (concluding that the deliberate ramming of the pursued vehicle was not conscience shocking because the driver's actions were "instantaneous and so, by necessity, was the officers' response"). The idea of strong deference to government officers acting in furtherance of their duties, and the reluctance of courts to change course, is reflected in the use of the "shocks the conscience" framework in other like situations. *See infra* Subpart III.C.

[127] County of Sacramento v. Lewis, 523 U.S. 833, 834 (1998).

[128] *See id.*

[129] Unreasonable behavior and decisions by law enforcement should not be left unanswered as a matter of constitutional interpretation. Courts should adhere to the following statement espoused in *Rochin*:

> The faculties of the Due Process Clause may be indefinite and vague, but the mode of their ascertainment is not self-willed. In each case 'due process of law' requires an evaluation based on disinterested inquiry pursued in the spirit of science, on a balanced order of facts exactly and fairly stated, on the detached consideration of

to harm broadly to all instances of high-speed driving or chases, regardless of a reasonable necessity, is incompatible with a contemporary understanding of policing.[130]

The courts should holistically consider how a high-speed driving scenario arises when to deciding to hold a plaintiff to the highest burden. As shown by the cases herein, not all situations warrant a limitless response. The judicial policymaking here should not further the latitude police have on the streets. It should not be the case that an officer's belief that he was responding to any so-called emergency is all it takes to relieve him of liability.[131] Although there are federal courts—unlike the Eighth Circuit—that have fairer and more objective methods of applying intent to harm or deliberate indifference, the distinction is nebulous, and the standards are capriciously applied.[132] Moreover, this is exacerbated by the vagueness of what constitutes time for deliberation, an emergency, and when a situation is rapidly evolving so as to preclude the capacity to deliberate.[133] The next Part begins to address why a new method of distinguishing between justified and non-justified high-speed driving scenarios—which result in injury to a third party—is necessary.

III. SUBSTANTIVE DUE PROCESS AND *LEWIS*: VINDICATING RIGHTS OR HINDERING ACCOUNTABILITY?

The common framework used throughout the circuit courts is vastly under inclusive, ignoring the reality of policing in America and the often unjust deference given to officers in unreasonable circumstances.[134] To recognize this is not to

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> conflicting claims, on a judgment not ad hoc and episodic but duly mindful of reconciling the needs both of continuity and of change in a progressive society.

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

130 Despite the reluctance to expand due process protections to these volatile situations, nevertheless, "[p]olicing is a uniquely governmental activity and a power reserved only to the state. The primary police mission is to protect the public. When police officers engage in pursuits, they are exercising governmental authority that affects persons in close proximity to the pursuit route." Alpert et al., *supra* note 80, at 661.

131 *See* Terrel v. Larson, 396 F.3d 975, 980 (8th Cir. 2005) (applying intent to harm as a matter of law because the officer involved believed there to be an emergency).

132 Alluded to here is the circuit split regarding a lack of uniformity among the circuits in deciding which standard to apply, and when. *See, e.g.*, Dean v. McKinney, 976 F.3d 407, 414 (4th Cir. 2020) (examining the totality of the circumstances to determine there was no emergency); Browder v. City of Albuquerque, 787 F.3d 1076, 1081 (10th Cir. 2015).

133 *See, e.g.*, Braun v. Burke, 983 F.3d 999, 1001 (8th Cir. 2020).

134 LUM & FACHNER, *supra* note 24 at 9 ("This move towards a more proactive orientation is directly relevant to police pursuits, as they have changed the meaning, use, and performance measures of vehicular use in ways that could potentially affect the frequency and outcomes of pursuits. In this environment, there is a greater demand for officers to use their vehicles in more proactive situations that are not initiated by a 911 call, which in turn could have a number of effects and consequences. A move towards more proactive schemes could increase the frequency of pursuits, change the reason and nature of pursuits, change the location or type of

undermine the risks taken by police officers in truly dangerous situations, but to reconcile with what should be the appropriate response, and when.[135] This is especially pertinent given that these encounters by default pose risk to the public and the officer.[136] This Part will look at both chase and non-chase high-speed driving instances to show how the application of *Lewis* fails to distinguish truly unjust responses of police.

Contrary to the outdated categorization followed by the federal courts, there is a better way to constitutionally analyze a high-speed driving fact pattern. This is in contrast to inquiring as to simply whether "actual deliberation is practical,"[137] or, by imposing the intent to harm standard when the officer believes there to be an emergency—whether or not there truly is one.[138] There are differences in all instances of high-speed driving—whether in pursuit of a suspect or in response to some sort of emergency—that warrants more current standards and ways of applying them. Given these differences, the application of a more or less insulating standard should not ignore relevant circumstantial nuances.

A. The Shortcomings of Lewis *When Inadvertent Harm Results from a Police Chase*

When an officer becomes engaged in a high-speed chase, and a third party is harmed, the circuit courts tend to affirm the application of the intent to harm standard.[139] Contrary to the theme of this Note, there are clear situations where that standard is warranted—but the courts should be cautious to apply that deferential

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place that pursuits occur in, increase the potential for racial profiling, or place officers at greater risk of injury and accident.").

135 Better judgment as to the appropriate response in a given situation is necessary when "there is no such thing as a trivial pursuit, and pursuit driving should be considered the most deadly weapon in a police officer's arsenal." ALPERT & LUM, *supra* note 1, at 7.

136 *Id. See also* LYNN LANGTON, US DEP'T OF JUST., POLICE BEHAVIOR DURING TRAFFIC AND STREET STOPS 1, 3 (2011). ("In 2011, over 62.9 million U.S. residents age 16 or older, or 26% of the population, had one or more contacts with police during the prior 12 months. For about half (49%) of persons experiencing contact with police, the most recent contact was involuntary or police-initiated. In 2011, 86% of persons involved in traffic stops during their most recent contact with police and 66% of persons involved in street stops (i.e., stopped in public but not in a moving vehicle) believed that the police both behaved properly and treated them with respect during the contact." Also relevant to the frequency in occurrences of traffic stop interactions is how "[t]raffic stops were a more common form of police contact than street stops in 2011. About 10% of the 212.3 million U.S. drivers age 16 or older were stopped while operating a motor vehicle during their most recent contact with police.").

137 *Braun*, 983 F.3d at 1002.

138 *See* Sitzes v. City of W. Memphis Ark., 606 F.3d 461, 467 (8th Cir. 2010).

139 *See* Onossian v. Block, 175 F.3d 1169, 1170–72 (9th Cir. 1999) (finding no conscience shocking behavior in a chase where the driver did not pull over at the behest of an officer, and then crashed, resulting in harm to bystanders).

standard in every case arising from a police chase.[140] Although there is a myriad of situations in which the exigency of the circumstances requires an officer to act in disregard of risks, it is not, nor should it be, default in every chase.

It would be unrealistic, in some situations, to not expect an officer to engage in a pursuit of a fleeing suspect that has allegedly committed a serious crime. The *Jones* case may be one of those cases, as it would be challenging to argue that chasing suspected armed robbers fails to tilt "the balance much further towards continuing a dangerous chase."[141] Alternatively, an attempt to make a traffic stop of a driver posing a danger—which leads to a chase where a third party is hurt—may warrant the application of the intent to harm standard. Perhaps *Onossian v. Block* was such a case, where these exact circumstances transpired within less than a minute.[142]

However, the court in *Jones* purports that chasing armed robber suspects "tilts the balance much further towards continuing a dangerous chase than does chasing transgressors of traffic laws."[143] This alludes to the important question of whether the *Lewis* standard should apply in the same way to incidences arising from all forms of high-speed driving.[144] This Note argues the answer is no. In many poorly decided cases, the exigency of a situation fails to truly necessitate how the officer responded.[145]

Although pre-*Lewis,* the Fourth Circuit decided *Temkin v. Frederick County Comm'rs*—a chase scenario that occurred after Officer Selby observed a car at a Texaco gas station "spinning its wheels" as it left.[146] As the resulting chase progressed at high speeds down a narrow, two-lane highway, the officer was made aware that someone had stolen seventeen dollars worth of gas from the Texaco gas station.[147] The pursued vehicle, at some point, failed to navigate a curve and lost control, whereupon it crashed with the car driven by Sharon Temkin.[148] As a result, Temkin

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140 *See, e.g.*, Neal v. St. Louis Cnty. Bd. of Police Comm'rs, 217 F.3d 955, 956–59 (8th Cir. 2000) (finding the officer did not act with the intent to harm so as to shock the conscience, when, in the face of gunfire, he accidentally shot and killed his fellow officer in an attempt to protect him from the suspect).

141 Jones v. Byrnes, 585 F.3d 971, 978 (6th Cir. 2009).

142 *Onossian*, 175 F.3d at 1170. In this case, the deputy officers witnessed a driver driving a vehicle erratically and recklessly. *Id.* They attempted to pull the driver over but, three or four seconds into his attempt to elude the officers, the driver crashed into an uninvolved vehicle, severely injuring its occupants. *Id.*

143 *Jones*, 585 F.3d at 978.

144 *See* Cnty. of Sacramento v. Lewis, 523 U.S. 833, 833 (1998).

145 *See, e.g*, Temkin v. Frederick Cnty. Comm'rs, 945 F.2d 716, 717–18 (4th Cir. 1991).

146 *Id.* at 718.

147 *Id.*

148 *Id.*

suffered permanent injuries.[149] The court applied the shock the conscience standard, but held that that it could not be met.[150]

Another similarly tragic case is *Meals*, where an officer, in violation of department policy, drove at high speeds in pursuit of a vehicle she intended to stop for speeding.[151] As the chase continued on a busy street, the pursued vehicle entered an intersection and then crossed over into the oncoming lane, where it collided head-on with the car driven by James Meals.[152] The two passengers in Meal's car and the speeding driver were killed as a result, while another was permanently injured.[153] The Sixth Circuit found that the lack of facts alluding to an intent to harm by the officer failed to amount to a substantive due process violation under *Lewis*.[154]

B. Lewis*, Police High-Speed Driving Generally, and Collateral Harm*

Like some of the aforementioned cases, there are particular facts not given the sufficient weight that should perhaps eschew applying the intent to harm standard when an officer's conduct is reviewed. Even in cases where an officer is speeding for whatever reason and there is no true emergency, nor an active chase of a suspect or offender, the framework is applied in the same way.[155] In these cases especially, there arguably were no exigencies under the circumstances tipping the scales towards continuing high-speed driving.[156]

Many of these unfortunate situations have already been introduced in this Note. Several involve an officer's unreasonable driving to a location after merely being made

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[149] *Id.*

[150] *Id.* at 723. As mentioned in the text, although pre-*Lewis*, this case exemplifies a situation where the due process analysis seemed to ignore how:

> 1) the chase continued for a significant period of time over a ten mile area; 2) the chase continued at a very high rate of speed; 3) the chase was initiated because of a minor violation; 4) the police already had, at a minimum, a partial identification of the license plate of the suspect vehicle; and 5) the chase violated General Order #204 because Selby failed to maintain radio contact with his supervisor throughout.

Id. Dr. Geoffrey Alpert, who is cited to throughout this Note, said, in an expert deposition testimony, that "Selby's conduct was 'reckless,' totally irresponsible, and 'wanton.'" *Id.*

[151] Meals v. City of Memphis, 493 F.3d 720, 723 (6th Cir. 2007). The city had a policy addressing restrictions on police vehicle pursuits which the officer had allegedly disregarded. *Id.* at 724. Some provisions of the policy included the prohibition of pursuits when: the officer knows the suspect is wanted only for a traffic violation, a misdemeanor or a non-violent felony; and, when the officer fails to get approval or the pursuit has reached an "unacceptable level, as defined in the policy." *Id.* The policy also called for discontinuance of a chase when the officer may be able to perceive that the seriousness does not or no longer warrants its continuation. *Id.*

[152] *Id.*

[153] *Id.*

[154] *Id.* at 731.

[155] *See* Terrel v. Larson, 396 F.3d 975, 976–81 (8th Cir. 2005).

[156] *Id.* at 977.

aware of the commission of a minor crime or of a relatively insignificant situation.[157] For example, *Temkin* involved an officer, who, after having been alerted to the taking of a small amount of money, felt obliged to speed and drive recklessly to the scene of the crime.[158]

Often the exigency of a situation, or rather, a belief that the circumstances required immediate action, was undermined by factors such as the lack of use of sirens and lights, the availability of other officers, undue duration of the chase, and acting contrary to department policy, among other things.[159] Nevertheless, even where an officer was merely attempting to catch up to an ongoing chase and caused harm or death, the Ninth Circuit was apprehensive to apply deliberate indifference, let alone find the officer actually intended to cause harm.[160]

C. The Outdated Analogy of Chases to Shootouts and Prison Riots

It is worth noting that the *Lewis* framework is applied in other circumstances in which officers face potential danger. For alleged constitutional violations, the same framework for police high-speed driving is applied in the context of officers acting during a prison riot.[161] Likewise, the courts have extended the application of *Lewis* to when an officer is confronted with gunfire.[162] It was the *Lewis* decision, in likening claims arising from chase situations to prison riots, that enunciated a rejection of "midlevel" culpability standards[163] when "unforeseen circumstances demand an officer's instant judgment."[164] Ultimately, this Note rejects belying finding whether

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157 *See, e.g.*, Sitzes v. City of W. Memphis Ark., 606 F.3d 461, 467 (8th Cir. 2010); Carter v. Simpson 328 F.3d 948, 948–49 (7th Cir. 2003) (finding no liability for an officer who collided with a bystander vehicle as he drove fast and recklessly to the scene of a reported death).

158 Temkin v. Frederick Cnty. Comm'rs, 945 F.2d 716, 717–18 (4th Cir. 1991).

159 *See, e.g.*, Meals v. City of Memphis, 493 F.3d 720, 723 (6th Cir. 2007); Green v. Post, 574 F.3d 1294, 1296 (10th Cir. 2009).

160 Bingue v. Prunchak, 512 F.3d 1169, 1177 (9th Cir. 2008). The officer in this case heard radio traffic discussing the pursuit of a stolen vehicle. *Id.* at 1171. Believing he was close enough to catch up to the vehicle, he decided to attempt to do so. *Id.* As he was still a mile behind the chase (which lasted one-hour and covered 90 miles), he lost control of his car and collided with a bystander vehicle. *Id.* Though there were no serious injuries, the officer was relieved of liability under the intent to harm standard given that this was an emergency. *Id.* at 1177. Despite evidence to the contrary, the court acknowledged how "Prunchak's decision to join the pursuit may have been ill-advised and his execution may have been careless." *Id.*

161 *See generally* Whitley v. Albers, 475 U.S. 312, 327 (1986) (determining that, in the context of forceful prison security measures, there can be no liability under the Fourteenth Amendment for acts that are less than intentional).

162 Neal v. St. Louis County Bd. of Police Comm'rs, 217 F.3d 955, 956–59 (8th Cir. 2000) (applying the Lewis framework to the acts of an officer in a shootout who caused an unintended death).

163 County of Sacramento v. Lewis, 523 U.S. 833, 853–54 (1998).

164 *Id.*

an exigency truly justified a reckless response, and falsely equating situations where an officer may or may not have been able to act otherwise.

Constitutional claims arising from prison riots or scenarios where police confront gunfire are distinguishable from incidences arising from high-speed driving. The *Lewis* court says: "Like prison officials facing a riot, the police on an occasion calling for fast action have obligations that tend to tug against each other."[165] The emphasis here should be on the phrase "on an occasion,"[166] because is the occasion of a prison riot as frequent as police high-speed driving and chases? Arguably, no, as prison riots are relatively rare events, but there were an estimated 68,000 vehicle pursuits in 2012.[167] This is unlike police chases, which are frequent.[168]

Likewise, the same reasoning translates to police action when confronting gunfire and a third party is harmed.[169] However, confronting gunfire and quelling a prison riot should not be analogies the courts look to in determining whether official conduct on the roadways "shocks the conscience."[170] This is because it is not, nor should it be, as simple as considering an officer engaged in high-speed driving to be generally precluded from adequate deliberation.[171] An officer's confronting of gunfire or quelling of a prison riot are relatively narrow situations when compared with the scope and latitude of police activity on the roads.[172]

When police engage in high-speed driving in a pursuit and inadvertent harm occurs, the dangerousness of the situation can sometimes be exacerbated by the officer.[173] Often, an officer engages in high-speed driving in response to something

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165 *Id.*

166 *Id.*

167 BRIAN REAVES, U.S. DEP'T OF JUST., POLICE VEHICLE PURSUITS, 2012–2013, 1 (2017).

168 Frank, *supra* note 34. "At least 11,506 people, including 6,300 fleeing suspects, were killed in police chases from 1979 through 2013, most recent year for which NHTSA records are available." *Id.*

169 Neal v. St. Louis County Bd. of Police Comm'rs, 217 F.3d 955, 956–59 (8th Cir. 2000). Empirically, shootouts are not infrequent occurrences; however, alluding to the scope of officer activity on the roads is how over 50% of law enforcement officer deaths from 1987-2006 involved such activity (36.9% included automobile, motorcycle, and aircraft accidents; 8.9% were attributed to being accidentally struck by vehicles; 7.2% occurred during felony and non-felony traffic stops). LUM & FACHNER, *supra* note 24, at 7.

170 *See* Meals v. City of Memphis, 493 F.3d 720, 723–24 (6th Cir. 2007). Perhaps department policies requiring officers to consider the risks in continuing a chase or not, among other things, suggests there should not be a presumption of an officer being unable to weigh the costs and benefits of their actions.

171 *See, e.g.*, *id.* at 723.

172 Frank, *supra* note 34. In California alone, the California Highway Patrol chased 14,628 motorists between 2007-2014. 4,052 of these chases resulted in crashes, leading 2,198 injuries and 103 deaths. *Id.*

173 *Id.* ("The number of innocent bystanders killed is impossible to pinpoint because hundreds of NHTSA's records fail to show whether a victim was killed in a car fleeing police or in a car that happened to be hit during a chase. Analyzing each fatal crash, USA TODAY

that presented no true exigency, which generally cannot be said when getting shot at.[174] By default, the public roadways are always affected, whereas quelling a riot is limited to the prison.[175] Ultimately, the increased reliance on patrol cars and trends toward greater proactivity in policing, and underlying concerns of racial profiling, should allow for a broader scope of conduct that amounts to being conscience shocking.[176]

The complexities underlying chases and high-speed driving should not be undermined by a capricious application of two standards, which are essentially two sides of the same coin. When the court finds intent to harm to apply in these situations, pleading sufficient facts to allege the officer intended to cause the harm that resulted is practically nonexistent.[177] Even though some courts may look at a situation more objectively to decide that deliberate indifference applies (or does not apply), this "lesser" standard in its application has barely covered truly unjustified conduct.[178] Therefore, Part IV will propose a new way of not only determining which standard to apply in a given situation but will introduce a new standard of recklessness to encompass conduct not worthy of insulation from accountability.

IV. THE FUTURE OF § 1983 AND POLICE CONDUCT ON THE ROADS

A. Proposal: A More Modern Standard

An officer who caused harm, as a result of a chase or highspeed driving, should not be categorically precluded from liability because he is acting in an allegedly dangerous situation. Nonetheless, some scenarios would necessitate the continuing of a chase or high-speed driving, rightfully warranting the review of an officer's conduct under the intent to harm standard.[179] However, there needs to be a practical balancing of the facts, rather than merely concluding that there was no time for deliberation, or broadly applying intent to harm to all police responses regardless of the circumstances.[180]

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determined that at least 2,456 bystanders were killed, although the death toll could be as high as 2,750."). An officer engaging in a chase could worsen an already tense situation for a driver by, for example, initiating a chase in an unmarked car. White v. Polk Cnty., 207 Fed. App'x. 977, 978 (11th Cir. 2006).

174 Dean v. McKinney, 976 F.3d 407, 414 (4th Cir. 2020).

175 *See, e.g.*, *id.*

176 ALPERT & LUM, *supra* note 1, at 3. "Traffic enforcement as a law enforcement tool has taken on new meanings, dimensions, and proactive uses due to innovations and changes in police deployment and the move towards more preventative policing strategies by law enforcement." *Id.*

177 *See* Sauers v. Borough of Nesquehoning, 905 F.3d 711, 712 (3d Cir. 2018).

178 *See id.*

179 *See, e.g.*, Jones v. Byrnes, 585 F.3d 971, 978 (6th Cir. 2009).

180 Terrel v. Larson, 396 F.3d 975, 976–81 (8th Cir. 2005); *see* Sitzes v. City of W. Memphis Ark., 606 F.3d 461, 467 (8th Cir. 2010); *see also* Alpert et al., *supra* note 80, at 661 ("[S]ociety's

A new way by which the courts could decide whether to apply a higher level of culpability versus a lower level to an officer's conduct is through this Note's proposed proportional exigency test. First, the overarching question is: Whether the exigencies of a situation were sufficient for an officer's conduct to be evaluated under a standard presuming that the officer could not have acted otherwise; or, whether the actions were done under circumstances suggesting a less hyper-pressurized environment.[181] If it is the former, it may be fair to apply a standard such as intent to harm. However, if it is the latter, the officer's actions should be evaluated under a new standard, displacing the unutilized standard of deliberate indifference.

B. The Exigency Test: A Balancing of the Risks

The court, in making this determination, should answer this question under this Note's proposed proportional exigency test, by asking: Whether how an officer responded to some event, under the circumstances, was disproportionate to the situation presented? By no means an easy task, but a balancing of factors can help make this determination. Although one factor on its own should not determine the application of one standard or the other, some should be given more weight depending on the specific circumstance.

One factor to consider is the nature of the crime or stimulus that the officer sought to address. Cases already discussed in this Note illustrate high-speed driving situations where how the officer responded was disproportionate to the crime or emergency being addressed.[182] Perhaps reckless driving in response to an alert of someone stealing $17.00 worth of gas would not tilt the scales toward applying a higher level of culpability.[183] Likewise, cases where someone was injured as a result of a high-speed chase for a traffic violation,[184] or from swerving through traffic to arrive at the location of a reported death, should not be considered under a the intent to harm standard.[185]

The next factor would require evaluating whether a reasonable officer would have acted in the same manner.[186] It could also be valuable to inquire whether a reasonable

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need for immediate apprehension of a suspect must be weighed against the risk the pursuit poses to members of the public in close proximity to the pursuit route.").

181 *Sauers*, 905 F.3d at 714–18. In *Sauers*, the court applied a culpability standard depending on three categories of culpability "depending on how much time a police officer has to make a decision." *Id.* at 714. "In one category are actions taken in a hyperpressurized environment." *Id.* In this category, the acts of an officer "will not be held to shock the conscience unless the officer has 'an intent to cause harm.'" *Id.* The latter two categories include actions undertaken with "hurried deliberation" and "unhurried judgments," for which conduct done with a lesser degree of culpability than intent to harm may suffice for liability. *Id.*

182 *See id.* at 178.

183 Temkin v. Frederick Cnty. Comm'rs, 945 F.2d 716, 717 (4th Cir. 1991).

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

185 Carter v. Simpson, 328 F.3d 948, 949 (7th Cir. 2003).

186 Sitzes v. City of W. Memphis Ark., 606 F.3d 461, 467 (8th Cir. 2010). In *Sitzes,* the court, to the dismay of the dissent, did not give consideration to the fact that in evidence was testimony

officer would, in such a situation, believe they would have been unable to adequately weigh the costs and benefits of their actions. Additionally, an important consideration could be if a reasonable alternative to address the issue was available. This factor could be coupled with, for example, the presence or existence of other responding officers.[187] Especially if other officers were responding to the situation, and were in fact closer, given that it was not something observed by an officer, but in response to something he or she was alerted to.[188]

The final tier of factors, which add weight in favor of an officer's response being disproportionate, could be the breaking of department policy.[189] It may also suffice to consider whether, from the same facts, the plaintiff received a favorable judgment against the officer in state court. Lastly, the court should take into consideration any precautions taken before or during high-speed driving.[190] After consideration of these factors, and a court determines that the response was disproportionate to the exigency of the situation such that the officer was acting in a less hyper-pressurized environment, the court shall then allow for a claim of Unreasonable Creation of Danger Under the Color of Law. The claim created by this Note, described further below, will provide a more equitable avenue towards accountability.

C. Unreasonable Creation of Danger Under the Color of Law

Upon a balancing of the above factors to determine that the officer was operating in a less hyper-pressurized environment, Unreasonable Creation of Danger Under the Color of Law could be used in place of *Lewis's* deliberate indifference standard. The crux of this claim is to determine whether the conduct is so inexcusable under the circumstances that it violates the Constitution.[191] Some aspects of this standard and the above balancing are derived from Third Circuit precedent and the analysis in *Sauers*.[192] Although the proposal and prerequisite balancing will differ in application, the objective "to protect individuals against dangers that the government itself creates"[193] is the same.

In deciding whether the conduct amounts to an unreasonable creation of danger, the court will evaluate several factors. An officer unreasonably creates a danger under

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of other officers admitting that "they would never have driven in the manner that Officer Wright did." *Id.*

187 *See, e.g.*, Terrel v. Larson, 396 F.3d 975, 977 (8th Cir. 2005).

188 *Id.*

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

190 *See, e.g.*, White v. Polk County, 207 Fed. App'x. 977, 978 (11th Cir. 2006). In *White,* an officer in an unmarked police car chased an 18-year-old driver without activating his lights or sirens for fifteen miles, resulting in a crash that killed a teenage passenger. *Id.* at 977–78. The officer was not liable as there was nothing to suggest the officer intended to cause the harm that resulted. *Id.* at 979.

191 *See, e.g.*, *id.* at 978–79.

192 Sauers v. Borough of Nesquehoning, 905 F.3d 711, 717 (3d Cir. 2018).

193 *Id.*

the color of law when, first, the officer was operating in furtherance or within the scope of his duties. Then, it must be established that there was a substantial risk of harm that the officer unreasonably disregarded, considered from the perspective of an objectively reasonable officer. Next, the court should inquire whether the disregarding of that risk was attributable to the harm or death caused, and whether such result was foreseeable. Finally, it is necessary to leave room for the possibility that the officer, under the circumstances as he believed them, would not have been able to act otherwise. This subjective element and its reasonableness must be considered in light of any objective factors alluding to the contrary. Naturally, there will be an overlap with this element and the factors which add weight, under the above balancing, to applying the new standard. Some factors not discussed above may include, inter alia: the undue length of a chase,[194] if there was animosity underlying the officer's actions,[195] and a history of similar reckless behavior or acting contrary to department policy.[196]

V. CONCLUSION

In its effect, the application of *Lewis* systematically deprives plaintiffs of success with plausible claims in federal court, who have been harmed by arbitrary state action. Although there are some instances of plaintiff success under the framework, its lack of substance is incompatible with the prevalence of police chases.[197] The legislative history of 42 U.S.C. § 1983 purports to show that Congress sought to give victims of alleged constitutional violations a federal remedy irrespective of the availability of remedies in state court.[198] This was done in order to bypass the potential inadequacies and hostility of state courts and to not be bound by vague state laws,[199] which, ultimately, are insufficient in this area.

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194 *See, e.g.*, Bingue v. Prunchak, 512 F.3d 1169, 1177 (9th Cir. 2008) (the chase lasted for one hour and spanned for one 90 miles); O'Connor & Norse Jr., *supra* note 39 at 530 (discussing a Mississippi Supreme Court case which looked to ten factors to support a finding of reckless disregard in the context of police pursuits, such as "(1) length of chase; (2) type of neighborhood; (3) characteristics of the streets; (4) the presence of vehicular or pedestrian traffic; (5) weather conditions and visibility; (6) the seriousness of the offense for which the police are pursuing the suspect; (7) whether the officer proceeded with sirens and blue lights; (8) whether the officer had available alternatives which would lead to the apprehension of the suspect besides pursuit; (9) the existence of a policy which prohibits pursuit under the circumstances; and (10) the officer's rate of speed in comparison to the posted speed limit.").

195 *See, e.g.*, Graves v. Thomas, 450 F.3d 1215, 1218–20 (10th Cir. 2006). The officer involved had a reputation for zealous enforcement of traffic laws and, specifically, would harass teenagers by following them with his headlights off and engage them in chases. *Id.* at 1218–19. Although the chief had warned the officer not to do this, his decision to engage in this behavior contributed to the death of a young man. *Id.* at 1219.

196 *See id.* at 1218–19.

197 *See generally* REAVES, *supra* note 167, at 1.

198 COLLINS, MICHAEL G., SECTION 1983 LITIGATION IN A NUTSHELL 5–17 (5th ed. 2016).

199 *Id.*

The constitutional dimension of harm caused by unjustified state action should not be undermined by falling under the purview of state tort law, which is inadequate for vindicating violations of substantive due process.[200] Therefore, the federal forum should not be hostile to these claims by having impractical standards. Contrary arguments may include that state tort law is in fact sufficient for such claims, or that the role of a police officer necessitates being given such deference—even in the grey areas.[201] Ultimately, this broad protection, which insulates unreasonable conduct from scrutiny, ignores the reality that police engaged in high-speed driving are not always precluded from making less reckless choices.

It is too simplistic to merely suggest that the Fourteenth Amendment is not "a font of tort law."[202] The court in *Lewis*, and others, claiming that they are "preserving the constitutional proportions of substantive due process,"[203] are favoring this fiction while leaving true constitutional violations unanswered. Particularly, the Eighth Circuit in *Braun* and other decisions by the various circuits have exacerbated this problem.[204] The deference given to officers, under the often inaccurate belief that there was an emergency, allows for too much discretion in the manner in which they drive. Therefore, the U.S. Supreme Court and the U.S. Courts of Appeals should adopt this Note's framework.

Although it is clearly difficult to balance the cost and benefits, imposing liability when things go wrong should not merely start with a finding that it was the conscious purpose of the officer to cause harm. Conduct in the high-speed driving context has seldom been found to be conscience shocking under the deliberate indifference standard.[205] And yet, there are virtually no like scenarios where intent to harm was even found to apply (let alone met). This type of arbitrary conduct does not amount to a tort to be dealt with in state court given the latitude and discretion police have on the roads. The Courts must fashion a less deferential standard that allows an officer's conduct to be judged objectively, considering a balancing of the risks and circumstances an officer confronts. The latitude police have when operating on the

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200 *Id.* at 244–45. Underlying attorney fees aspect of being successful under § 1983 is acknowledged in the legislative history, suggesting that "such prevailing plaintiffs act as a 'private attorneys general' in vindicating important public law norms that benefit not the individual litigant, but society at large." *Id.* at 244.

201 *See* County of Sacramento v. Lewis, 523 U.S. 833, 848–49 (1998).

202 *Id.* at 848–50.

203 *Id.*

204 Braun v. Burke, 983 F.3d 999, 1002–03 (8th Cir. 2020); Bingue v. Prunchak, 512 F.3d 1169, 1176–77 (9th Cir. 2007); Dean v. McKinney, 976 F.3d 407, 413, 415–17 (4th Cir. 2020).

205 *See* Carter v. Simpson, 328 F.3d 948, 952 (7th Cir. 2003) (finding that the officer's actions did not "shock the conscience" under the deliberate indifference standard because he did not intend to cause harm); Green v. Post, 574 F.3d 1294, 1303–04 (10th Cir. 2009) (finding that the officer's actions did not meet the deliberate indifference standard because it was not "truly conscience shocking"). *See also* White v. Pol County, 207 Fed. Appx. 977, 979 n.5 (11th Cir. 2006) (refusing to apply deliberate indifference standard and did not find that the officer's conduct shocked the conscience).

roads requires a reconsideration of the current framework, or for Congress to act in providing a cause of action for those who have been or will be harmed.