

Fall 1995

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Recommended Citation

Mitchell J. Edlund, *In the Heat of the Chase: Determining Substantive Due Process Violations Within the Framework of Police Pursuits When an Innocent Bystander is Injured*, 30 Val. U. L. Rev. 161 (1995).

Available at: <https://scholar.valpo.edu/vulr/vol30/iss1/4>

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IN THE HEAT OF THE CHASE: DETERMINING SUBSTANTIVE DUE PROCESS VIOLATIONS WITHIN THE FRAMEWORK OF POLICE PURSUITS WHEN AN INNOCENT BYSTANDER IS INJURED

*The Due Process Clause, "like its forebear in the Magna Carta . . . was 'intended to secure the individual from the arbitrary exercise of the powers of government'"*¹

I. INTRODUCTION

As sirens shriek and lights flash, the police chase the suspect's vehicle through crowded and narrow city streets at an excessive rate of speed. During the chase, the suspect miscalculates a turn in the road which ends the chase in a ghastly and bloody crash, killing an innocent bystander. This catastrophic scene not only occurs in movies and on television, but it also ensues on our nation's streets and highways, resulting in hundreds of fatalities annually.²

These accidents have led to an increase in litigation against police officers and municipalities.³ Individuals harmed as a result of such police pursuits have

1. *Daniels v. Williams*, 474 U.S. 327, 331 (1986) (quoting *Bank of Columbia v. Okely*, 17 U.S. (4 Wheat.) 235, 244 (1819)).

2. One study reports that 45% of high speed pursuits end in property damage, 23% cause personal injury, and 34% result in an accident. See Geoffrey P. Alpert & Roger G. Dunham, *Policing Hot Pursuits: The Discovery of Aleatory Elements*, 80 J. CRIM. L. & CRIMINOLOGY 521, 528 (1989). Additionally, it has been estimated that between 50,000 and 500,000 high speed pursuits take place each year in the United States. See generally, E. FENNESSY, U.S. DEP'T OF TRANSP., A STUDY OF THE PROBLEM OF HOT PURSUIT BY THE POLICE (1970). See also *Jones v. Chieffo*, 833 F. Supp. 498, 509 (E.D. Pa. 1993) (providing evidence that in the City of Philadelphia, 2.10 pursuits occur per day; 32% of pursuits result in some type of accident; 3% of the accidents involve injuries to innocent persons; 1% involve death; and 21% of the accidents involve the pursued automobile and an innocent bystander).

3. See, e.g., *Fagan v. City of Vineland*, 22 F.3d 1296 (3d Cir. 1994); *Medina v. City and County of Denver*, 960 F.2d 1493 (10th Cir. 1992); *Temkin v. Frederick County Comm'rs*, 945 F.2d 716 (4th Cir. 1991); *Jones v. Sherrill*, 827 F.2d 1102 (6th Cir. 1987); *Nishiyama v. Dickson County, Tenn.*, 814 F.2d 277 (6th Cir. 1987); *Cannon v. Taylor*, 782 F.2d 947 (11th Cir. 1986); *Checki v. Webb*, 785 F.2d 534 (5th Cir. 1985); *Walton v. Salter*, 547 F.2d 824 (5th Cir. 1976); *Carroll v. Borough of State College*, 854 F. Supp. 1184 (M.D. Pa. 1994); *Frye v. Town of Akron*, 759 F. Supp. 1320 (N.D. Ind. 1991); *Britt v. Little Rock Police Dep't*, 721 F. Supp. 189 (E.D. Ark. 1989). For a discussion of trends in lawsuits against police based upon portions of the International Association of Chiefs of Police Survey, see W. Schmidt, *Recent Developments in Police Civil Liability*, 4 J. POLICE SCI. & ADMIN. 197 (1976).

generally sought relief against police officers and municipalities under 42 U.S.C. § 1983⁴ to enforce the substantive component of the Due Process Clause. The objective of § 1983 is to provide a remedy for constitutional deprivations caused by state actors or by operation of state law.⁵ As a result, § 1983 authorizes a court to grant relief when an individual is deprived of federal statutory or constitutional rights, including the rights⁶ of life, liberty,⁷ or property, in

4. Civil Rights Act of 1871, Ch. 22 § 1, 17 Stat. 13 (1871) (codified as amended at 42 U.S.C. § 1983 (1988)) [hereinafter 42 U.S.C. § 1983, or § 1983]. Congress enacted this provision on April 20, 1871, and entitled it as "An act to enforce the provisions of the Fourteenth Amendment to the Constitution of the United States, and for other purposes." The statute reads as follows:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Id. Section 1983 addresses constitutional infringements by individuals acting under color of state law. See *Parratt v. Taylor*, 451 U.S. 527, 535 (1981). Although the statute does not apply to unconstitutional acts under color of federal law, an aggrieved plaintiff may nonetheless institute a cause of action against federal actors. See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971).

5. See *Monrøe v. Pape*, 365 U.S. 167 (1961).

6. The scope and analysis of this note is limited to violations of substantive due process preserved under the Fourteenth Amendment to the United States Constitution. The Due Process Clause provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. To prevail in a case brought under § 1983 for violations of the Due Process Clause, the aggrieved plaintiff must show the following: (1) that the defendant acted under color of state law, *Monroe v. Pape*, 365 U.S. 167, 172-87 (1961); (2) that a protected property interest or a liberty interest was at risk, *Board of Regents v. Roth*, 408 U.S. 564, 570-78 (1972); *Paul v. Davis*, 424 U.S. 693 (1976); (3) that the defendant had a duty of care toward the plaintiff, *Collins v. City of Harker Heights*, 503 U.S. 115, 123-30 (1989), *DeShaney v. Winnebago County Dept. of Social Serv.*, 489 U.S. 189, 195-203 (1989); and (4) that the deprivation occurred within the meaning of the Due Process Clause, *Daniels v. Williams*, 474 U.S. 327, 329-33 (1986).

7. The concept of "liberty" acts as the primary limitation on the states with respect to individual rights; however, it remains a rather arduous task to precisely define a "liberty" interest. See Rosalie B. Levinson, *Protection Against Government Abuse of Power: Has the Court Taken the Substance Out of Substantive Due Process*, 16 U. DAYTON L. REV. 313, 315 (1991). The Supreme Court, in *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), proposed this definition of "liberty":

While this Court has not attempted to define with exactness the liberty . . . guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized . . . as essential to the ordinary pursuit of happiness . . .

Id. See generally Henry P. Monaghan, *Of Liberty and Property*, 62 CORNELL L. REV. 405 (1977). Cf. Levinson, *supra*, at 315 (observing that, although the Court has "broadly defined the term 'liberty' to 'embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free

violation of the Fourteenth Amendment, by a state or local official or other person who acted under color of state law.⁸ Historically, the Substantive Due Process Clause has been used to challenge egregious deprivations of property

to use them in all lawful ways,' federal courts are rather reluctant to adhere to this expansive interpretation.") (quoting *Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897)). See also JOHN E. NOWAK ET AL., *CONSTITUTIONAL LAW* 459 (3d ed. 1986) (noting that the specific definition of "liberty" cannot be ascribed because it encompasses any form of freedom of action or choice which is bestowed constitutional recognition by the Court).

8. A person acts "under color of state law" when exercising power "possessed by virtue of state law and made possible only because the wrongdoer is clothed with authority of state law." *United States v. Classic*, 313 U.S. 299, 326 (1941). See also *Screws v. United States*, 325 U.S. 91, 111 (1945). See, e.g., *Rivera v. LaPorte*, 896 F.2d 691, 696 (2d Cir. 1990); *Lusby v. T.G. & Y. Stores, Inc.*, 749 F.2d 1423, 1429-30 (10th Cir. 1984), *cert. denied*, 474 U.S. 818 (1985) (finding that an off-duty policeman working as a private security guard acts "under color of state law" if he identifies himself as a police officer, or if a statute requires officers to engage in law enforcement activities 24 hours a day); *Keller v. District of Columbia*, 809 F. Supp. 432, 437 (E.D. Va. 1993) (noting that the act of making an arrest, by means of a marked police uniform and badge and a firearm issued by the state, is an act performed under color of state law regardless of whether the state official had the actual jurisdiction to make the arrest); *Revene v. Charles County Comm'r*, 882 F.2d 870, 873 (4th Cir. 1989) (asserting that an off-duty officer who is compelled by law to be on duty 24 hours a day acts "under color of state law" if the officer acts according to his established authority).

But see *Bonsignore v. City of New York*, 683 F.2d 635, 638 (2d Cir. 1982) (stating that an off-duty officer who shot his wife "in the ambit of [his] personal pursuits" rather than under his actual duty did not act "under color of state law"); *Gibson v. City of Chicago*, 910 F.2d 1510, 1516 (7th Cir. 1990) (asserting that the actions of police officers, executed while on duty and in uniform, are not conducted "under color of state law" unless these actions are in some manner related to the performance of official duties); *Long v. Mercer County*, 795 F. Supp. 873, 875-76 (C.D. Ill. 1992) (holding that a government official charged with committing sexual abuse during the course of performing his duties did not act under color of law, absent a showing that the abuse was in some manner related to performance of defendant's duties); *cf.* *Malone v. County of Suffolk*, 968 F.2d 1480, 1483 (2d Cir. 1992) (holding that by bringing a § 1983 action, plaintiff all but conceded to the fact that the officer acted "under color of state law"). See also *United States v. Tarpley*, 945 F.2d 806, 809 (5th Cir. 1991), *cert. denied*, 504 U.S. 917 (1992) (holding that the "under color of state law" inquiry does not turn on the duty status of officers or on whether they acted for personal reasons; rather, the plaintiff's verdict was upheld where the officer identified himself as a policeman, used a police weapon, invoked official authority, summoned another officer and used a squad car); *Cassady v. Tackett*, 938 F.2d 693, 695 (6th Cir. 1991) (noting that the county jailer's use of force in the jail against a public official was under color of state law because the jailer had the authority to carry a gun in the jail).

The Fourteenth Amendment's state action requirement and § 1983's "under color of state law" requirement have been thought, for all pragmatic purposes, to be the same. *United States v. Price*, 383 U.S. 787, 794 n.7 (1966). In *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 152 (1978), the Court implied that a § 1983 plaintiff must separately establish both state action and color of state law. However, in *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936-37 (1982), the Court held that when the challenged conduct constitutes state action, the conduct also constitutes color of state law. *Id.*

and liberty, whether executed by legislative or administrative enactments, or by the misconduct of government officials.⁹

Additionally, it is significant to note that § 1983 provides a vehicle for enforcing federal rights, but does not create any new substantive rights.¹⁰ As a result, the Supreme Court has consistently held that a § 1983 claim requires only a showing that an action taken "under color of state law" caused a deprivation of a constitutionally protected right, privilege, or immunity.¹¹ Thus, to prevail on a cause of action under § 1983, an aggrieved plaintiff must show: (1) that the conduct complained of was committed by a person acting under color of state law;¹² and (2) that this conduct deprived the plaintiff of a right, privilege, or immunity secured by the United States Constitution or the laws of the United States.¹³ Although § 1983 itself does not impose any state

9. See *Daniels v. Williams*, 474 U.S. 327, 331 (1986) (noting that the substantive aspect of the Due Process Clause is used to "[p]revent governmental power from being 'used for purposes of oppression'" (quoting *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 277 (1856)). Essentially, substantive due process prevents the government from interfering with an individual's liberty or property based on arbitrary or vindictive purposes. See, e.g., *Foucha v. Louisiana*, 504 U.S. 71, 80, (1992) (asserting that "the Due Process Clause . . . bars certain arbitrary, wrongful government actions").

10. Since § 1983 does not establish any substantive rights, a plaintiff need only prove all the elements of the underlying constitutional right. See *Daniels v. Williams*, 474 U.S. 327, 329-30 (1986). See also *Monroe v. Pape*, 365 U.S. 167, 187 (1961) (stating that the Court refused to interpret a specific intent requirement into § 1983); *Parratt v. Taylor*, 451 U.S. 527, 534 (1981) (noting that § 1983 has never been found by this Court to contain a state of mind requirement). In fact, the *Parratt* Court quoted Justice Douglas' famous "background of tort liability" language and determined that:

[I]n any § 1983 action the initial inquiry must focus on whether the two essential elements to a § 1983 action are present: (1) whether the conduct complained of was committed by a person acting under color of state law; and (2) whether this conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States.

Id. at 535. Thus, the *Parratt* Court decisively determined that a prima facie case under § 1983 requires only that the conduct be committed under color of state law and that such conduct caused a constitutional violation. *But see Daniels v. Williams*, 474 U.S. 327, 330-31 (1986) (holding that negligent conduct cannot constitute a deprivation of due process).

11. See *Daniels v. Williams*, 474 U.S. 327, 330 (1986); *Parratt v. Taylor*, 451 U.S. 527, 534-39 (1981); *Gomez v. Toledo*, 446 U.S. 635, 640 (1980); *Baker v. McCollan*, 443 U.S. 137, 140 (1979); *Monroe v. Pape*, 365 U.S. 167, 171 (1961).

12. See *Monroe v. Pape*, 365 U.S. 167, 171 (1961). See also *supra* note 8 and accompanying text for a discussion on the meaning of the term "under color of state law."

13. *Parratt*, 451 U.S. at 535; *Daniels*, 474 U.S. at 330. It is more accurate, however, to view a § 1983 claim for relief as imposing four separate requirements: (1) a violation of a right protected by the federal Constitution, (2) proximately caused (3) by the conduct of a person (4) who acted under color of state law, statute, ordinance, or regulation. See MARTIN A. SCHWARTZ & JOHN E. KIRKLIN, SECTION 1983 LITIGATION: CLAIMS, DEFENSES, AND FEES § 1.4 (2d ed. 1991).

of mind requirement,¹⁴ the underlying constitutional right alleged may encompass such a requirement.¹⁵ One such area where the state of mind inquiry becomes relevant is when the constitutional deprivation concerns governmental misconduct implicating the Due Process Clause of the Fourteenth Amendment.¹⁶ In fact, the Supreme Court has ruled that such a Fourteenth Amendment deprivation must flow from conduct amounting to more than mere negligence.¹⁷ However, the Supreme Court has specifically left open the question of whether intentional conduct is necessary, or whether something less, such as gross negligence¹⁸ or recklessness,¹⁹ is sufficient to invoke the

14. On a number of occasions, the Supreme Court has reaffirmed that since § 1983 does not contain a state of mind requirement independent of that necessary to state a violation of the underlying constitutional right, the plaintiff need only prove a violation of the underlying constitutional right. *Daniels v. Williams*, 474 U.S. 327, 329-30 (1986). See also ROSALIE B. LEVINSON & IVAN E. BODENSTEINER, *CIVIL RIGHTS LEGISLATION AND LITIGATION II-45* (1994) (noting that since § 1983 does not establish any substantive protections, "plaintiffs must plead all of the elements of the underlying constitutional or federal statutory right they seek to enforce"); *Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979); *Shillingford v. Holmes*, 634 F.2d 263, 265 (5th Cir. 1981) (declaring that "[s]ection 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law.>").

15. See *Daniels v. Williams*, 474 U.S. 327 (1986). In *Daniels*, the Court noted that "in any given § 1983 suit, the plaintiff must still prove a violation of the underlying constitutional right; and depending on the right, merely negligent conduct may not be enough to state a claim." *Id.* at 330. Additionally, the appropriate culpability level of a governmental official emerges from the Court's interpretation of the Fourteenth Amendment. It is important to note that as an interpreter, the Supreme Court undertakes a dual role. See Susanah M. Mead, *Evolution of the 'Species of Tort Liability' Created by 42 U.S.C. § 1983: Can Constitutional Tort be Saved From Extinction?*, 55 *FORDHAM L. REV.* 1, 13-14 (1986). On one hand, as a statutory interpreter, the Court examines and evaluates the variety of tort liability created by Congress in § 1983. *Id.* In this role, the Court has never deviated from its position that § 1983 contains no independent state of mind requirement. See, e.g., *Daniels v. Williams*, 474 U.S. 327, 329-30 (1986); *Parratt v. Taylor*, 451 U.S. 527, 534 (1981); *Monroe v. Pape*, 365 U.S. 167, 187 (1961). On the other hand, as constitutional interpreter, the Court has the power to mold the future of constitutional torts by the development of constitutional doctrine. Mead, *supra*, at 13-14. As a constitutional interpreter, the Court has demonstrated that state of mind may play an integral part in the resolution of whether a constitutional violation has occurred. See *Daniels*, 474 U.S. at 329-32; *Estelle v. Gamble*, 429 U.S. 97, 106 (1976).

16. See *Daniels v. Williams*, 474 U.S. 327, 334 (1986).

17. See *Daniels*, 474 U.S. at 334 n.3.

18. Prosser and Keeton have attempted to define the term "gross negligence." W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* § 31-32, at 169-85 (5th ed. 1984). Although there appears to be no generally accepted meaning of what type of conduct constitutes gross negligence, the authors suggest that when a court uses the term, it probably indicates "more than ordinary inadvertence or inattention, but less perhaps than conscious indifference to the consequences." *Id.* at 212.

19. In defining recklessness, Prosser and Keeton stated that courts use willful and wanton as synonyms for recklessness. Further, recklessness implies that "the actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow, and which is usually accompanied by a conscious indifference to the consequences." *Id.* at 213.

protections of the Due Process Clause.²⁰

Consequently, although lower courts are aware of the notion that mere negligence will not rise to the level of a due process violation,²¹ they have struggled to determine precisely what level of culpability is necessary to trigger the substantive component of the Due Process Clause when a deprivation involves governmental misconduct.²² In light of the Supreme Court's holding that mere negligence is insufficient, most circuit courts have posited that an official's reckless or deliberate indifference may give rise to a due process claim.²³ However, a few circuit courts have held that gross negligence may rise to the level of a substantive due process violation.²⁴

20. *Daniels v. Williams*, 474 U.S. 327, 334 n.3 (1986). Today, this question remains unanswered. See *DeShaney v. Winnebago County Dep't of Social Serv.*, 489 U.S. 189, 198 n.10 (1989). But see *Daniels*, 474 U.S. at 341 (Stevens, J., dissenting in part) ("The harm . . . is the same whether [the injury is inflicted] negligently, recklessly, or intentionally In each instance, the prisoner is [being 'deprived' of] an aspect of liberty as the result, in part, of a form of state action.").

In *Daniels*, the Court failed to enunciate a real reason for its conclusion that due process requires more than simple negligence. Instead, the Court spoke of the abuses of power and fundamental fairness, never explicitly demonstrating why negligence could not be an abuse, or why it could not be unfair. *Id.* at 331-32. Furthermore, the *Daniels* Court concluded that:

Far from an abuse of power, lack of due care suggests no more than a failure to measure up to the conduct of a reasonable person. To hold that injury caused by such conduct is a deprivation within the meaning of the Fourteenth Amendment would trivialize the centuries-old principle of due process of law.

Id.

21. See *Temkin v. Frederick County Comm'rs*, 945 F.2d 716, 719 (4th Cir. 1991) (recognizing that mere negligence is not sufficient to "make out a claim under section 1983 and the Due Process Clause"); *Britt v. Little Rock Police Dep't*, 721 F. Supp. 189, 193 (E.D. Ark. 1989) (observing that the negligence of state actors will not support a § 1983 cause of action); *Nishiyama v. Dickson County, Tenn.*, 814 F.2d 277, 281-82 (6th Cir. 1986) (same).

22. See *Levinson, supra note 7*, at 336 (noting that although most lower courts are in agreement that assertions of gross negligence are insufficient to trigger a due process violation, there remains some question as to whether reckless conduct can rise to the level of a due process violation).

23. See, e.g., *Nicaragua v. Reagan*, 859 F.2d 929, 949 (D.C. Cir. 1988) (noting that "some reckless acts may constitute due process violations while others may not"); *Harris v. Maynard*, 843 F.2d 414, 416 (10th Cir. 1988) (declaring that wanton or obdurate disregard or deliberate indifference may give rise to a due process claim); *Archie v. City of Racine*, 847 F.2d 1211, 1219 (7th Cir. 1988) (en banc) (noting that the fire department dispatcher's refusal to send a rescue squad after two requests by telephone was not reckless in the constitutional sense to support a section 1983 action); *Germany v. Vance*, 868 F.2d 9, 11, 18 (1st Cir. 1989); *Torres Ramirez v. Bermudez Garcia*, 898 F.2d 224, 227 (1st Cir. 1990); *Bass v. Jackson*, 790 F.2d 260, 262-63 (2d Cir. 1986); *White v. Rochford*, 592 F.2d 381, 385 (7th Cir. 1979); *Wood v. Ostrander*, 851 F.2d 1212, 1214-15 (9th Cir. 1988), modified on reh'g, 879 F.2d 583 (9th Cir. 1989).

24. See, e.g., *Jones v. Sherrill*, 827 F.2d 1102, 1106 (6th Cir. 1987) (holding that governmental conduct in pursuing Sherrill did not constitute "gross negligence" necessary to sustain a § 1983 action); *Nishiyama v. Dickson County, Tenn.*, 814 F.2d 277, 282 (6th Cir. 1987); *Colburn v. Upper Darby Township*, 838 F.2d 663, 668 & n.3 (3d Cir. 1988); *Vinson v. Campbell County Fiscal Court*, 820 F.2d 194, 199-200 (6th Cir. 1987); *Metzger v. Osbeck*, 841 F.2d 518, 520 n.1

Particularly, the lower federal courts are split regarding the appropriate standard to apply in police pursuit cases where an innocent bystander is injured by police officers.²⁵ While some lower federal courts have applied a "shocks the conscience" standard, delineated by the Supreme Court in *Rochin v. California*,²⁶ to determine whether police conduct is actionable under substantive due process, other courts have employed a recklessness or gross negligence standard.²⁷ Today, there is much confusion in the lower federal courts regarding the application of substantive due process principles in police pursuit cases. As a result of this confusion, as well as with the dramatic increase of § 1983 litigation,²⁸ the issue of what culpability level is necessary to cause a deprivation of an interest protected by the Substantive Due Process Clause is ripe for debate.

(3d Cir. 1988). Cf. *Roach v. City of Fredericktown*, 882 F.2d 294, 297 (8th Cir. 1989) (stating that in police pursuit cases gross negligence is insufficient to rise to the level of a constitutional deprivation); *Cannon v. Taylor*, 782 F.2d 947, 950 (11th Cir. 1986); *Archie v. City of Racine*, 847 F.2d 1211, 1220 (7th Cir. 1988) (asserting that reckless conduct "is a proxy for intent; 'gross negligence' is not"); *Myers v. Morris*, 810 F.2d 1437, 1468 (8th Cir.), *cert. denied*, 484 U.S. 828 (1987).

25. Numerous federal circuit courts have applied the "shocks the conscience" standard when confronted with substantive due process challenges involving affirmative governmental conduct such as police pursuit situations. See, e.g., *Fagan v. City of Vineland*, 22 F.3d 1296, 1308-09 (3d Cir. 1994); *Temkin v. Frederick County Comm'rs*, 945 F.2d 716, 720 (4th Cir. 1991); *Newell v. Brown*, 981 F.2d 880, 886 (6th Cir. 1992), *cert. denied*, 114 S. Ct. 127 (1993); *Feliciano v. City of Cleveland*, 988 F.2d 649, 657 (6th Cir.), *cert. denied*, 114 S. Ct. 90 (1993); *Salas v. Carpenter*, 980 F.2d 299, 302-03, 309 (5th Cir. 1992); *Reese v. Kennedy*, 865 F.2d 186, 187-88 (8th Cir. 1989).

However, in cases involving police pursuits, other federal circuits and lower courts have applied "recklessness" as the standard to determine whether a constitutional deprivation occurred. See, e.g., *Medina v. City and County of Denver*, 960 F.2d 1493, 1496 (10th Cir. 1992) (applying the recklessness standard to police pursuits); *Nishiyama v. Dickson County, Tenn.*, 814 F.2d 277, 282 (6th Cir. 1987); *Medeiros v. Town of South Kingstown*, 821 F. Supp. 823, 827 (D.R.I. 1993) (holding that to succeed on a substantive due process claim, the plaintiff must prove that the police officer acted with "reckless or callous indifference" to the plaintiff's constitutional rights).

26. 342 U.S. 165 (1952). In *Rochin*, the Court held that the Due Process Clause excluded the admission of evidence at a criminal trial that had been obtained by forcibly pumping the defendant's stomach. *Id.* at 172-73. The Court concluded that this police conduct was so egregious as to "shock[] the conscience, [and] offend those canons of decency and fairness which express the notions of justice of English-speaking persons even toward those charged with the most heinous offenses." *Id.* at 169, 172 (quoting *Malinski v. New York*, 324 U.S. 401, 417 (1945)).

27. See *infra* notes 197-211 and accompanying text.

28. See *Patsy v. Board of Regents*, 457 U.S. 496 (1986). In his dissent in *Patsy*, Justice Powell stated:

There has been a year-by-year increase in [§ 1983] suits since the mid-1960's. The increase in fiscal 1981 over fiscal 1980 was some 26%, resulting in a total of 15,639 such suits filed in 1981 as compared with 12,397 in 1980. The 1981 total constituted over 8.6% of the total federal district court civil docket.

Id. at 534 (Powell, J., dissenting).

This Note will examine the issue of what level of culpability is necessary to invoke the protections of the Due Process Clause in police pursuit cases.²⁹ Because most claims by aggrieved plaintiffs in pursuit cases are brought under 42 U.S.C. § 1983, a brief history of § 1983 is provided in Section II of this Note.³⁰ Additionally, since many aggrieved plaintiffs not only bring a cause of action against the individual officer, but also against the municipality, this Section addresses municipal liability under § 1983 for failure to train officers,³¹ as well as the qualified immunity defense used by police officers.³² Section III discusses the origins of substantive due process and its application to governmental misconduct.³³ Section IV surveys several lower federal court decisions that have resulted in confusion due to the different levels of culpability these courts utilize to state a cause of action under the substantive component of the Due Process Clause.³⁴ Finally, Section V of this Note proposes an analysis to assist courts in determining the appropriate standard to apply in police pursuit cases when a plaintiff brings a § 1983 action alleging a substantive due process violation.³⁵ This Note proposes the standard of "deliberate indifference" as the culpability level necessary to constitute a violation of substantive due process within the framework of police pursuits.³⁶

II. HISTORY AND EMERGENCE OF 42 U.S.C. § 1983 AND ITS APPLICATION TO MUNICIPAL LIABILITY

A. Legislative History

In 1868, the Fourteenth Amendment to the United States Constitution was

29. The author recognizes that a § 1983 cause of action requires a showing that an action taken under color of state law has resulted in a deprivation of a constitutionally protected right. However, the scope of this note is limited to the issue of what level of culpability is needed to show a deprivation of the underlying constitutional or federal right. Whereas some authors believe that this state-of-mind issue should be analyzed under § 1983, the author of this note advocates the proposition that the actionability of a police officer's conduct must be determined pursuant to Fourteenth Amendment jurisprudence, not § 1983. The rationale is that the Supreme Court, through its interpretation of the legislative history of § 1983, has held that § 1983 does not have a state of mind requirement independent of the culpability level necessary to state a violation of the underlying constitutional right. See *Daniels v. Williams*, 474 U.S. 327, 329-30 (1986). Thus, the determination of whether governmental conduct is actionable emerges through the courts' interpretation of the Substantive Due Process Clause, not through the interpretation of § 1983.

30. See *infra* notes 37-48 and accompanying text.

31. See *infra* notes 52-77 and accompanying text.

32. See *infra* notes 79-87 and accompanying text.

33. See *infra* notes 90-151 and accompanying text.

34. See *infra* notes 167-211 and accompanying text.

35. See *infra* notes 219-307 and accompanying text.

36. See *infra* notes 257-307 and accompanying text.

adopted by Congress.³⁷ Pursuant to its newly acquired powers under the Fourteenth Amendment, Congress enacted section 1 of the Civil Rights Act of 1871, which is now § 1983.³⁸ It is abundantly clear that § 1983 was adopted to address the failure of certain states to enforce their laws with an even hand.³⁹ Indeed, Congress adopted § 1983 “because, by reason of prejudice, passion, neglect, intolerance, or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies.”⁴⁰ Thus, § 1983 was enacted to establish a federal remedy that

37. See U.S. CONST. amend. XIV. See also *supra* note 6 and accompanying text.

38. The Civil Rights Act of 1871, ch. 22, 17 Stat. 13 (1871) (codified at 42 U.S.C. § 1983 (1988)), had plentiful debate on both ends of the continuum. Representative Samuel Shellaburger, who chaired a select committee, stated that there could be no doubt of the right of Congress to enact the proposed legislation:

And how can there be a doubt about a question like that? To say in our Constitution that all our people in the States shall be United States citizens, and also citizens of the States; to add this as a curative, new and additional part of the instrument, and in it to say that State laws shall not be made or enforced to abridge the rights of United States citizens nor the States deny protection of these rights under law, and that Congress may enforce these provisions securing these rights, and then to say that Congress can do no such thing as make any law so enforcing these rights, nor open the United States courts to enforce any such laws, but must leave all the protection and law-making to the very States which are denying the protection, is plainly and grossly absurd.

CONG. GLOBE, 42d Cong., 1st Sess., at 68 (1871) [hereinafter GLOBE]. Furthermore, as with most significant pieces of legislation, there was clamorous opposition to the bill. Opposition responses ranged from cries of partisan politics, and an attempt to destroy the Democratic party in the South, to denials that Klan violence still existed or was beyond the control of the states. See, e.g., GLOBE, *supra* at 74-77. One of the most vocal opponents was Representative Michael Kerr of Indiana. Rep. Kerr stated:

This section gives to any person who may have been injured in any of his rights, privileges, or immunities of person or property, a civil action for damages against the wrongdoer in the Federal courts. The offense committed against him may be the common violations of the municipal law of his State. It may give rise to numerous vexatious and outrageous prosecutions, inspired by mere mercenary considerations, prosecuted in a spirit of plunder, aided by the crimes of perjury and subordination of perjury, more reckless and dangerous to society than the alleged offenses out of which the cause of action may have arisen. It is a covert attempt to transfer another large portion of jurisdiction from the State tribunals, to which it of right belongs, to those of the United States. It is neither authorized nor expedient, and it is not calculated to bring peace, order, or domestic content or prosperity to the disturbed society of the South. The contrary will certainly be its effect.

GLOBE, *supra*, at 50.

39. *Monroe v. Pape*, 365 U.S. 167, 175-76 (1961); *District of Columbia v. Carter*, 409 U.S. 418, 426 (1973). See also Comment, *Actionability of Negligence Under Section 1983 and the Eighth Amendment*, 127 U. PA. L. REV. 533, 549 (1978).

40. *Monroe*, 365 U.S. at 180. In the legislative history of § 1983, Representative Lowe stated that “local administrations have been found inadequate and unwilling to apply the proper corrective [and] [c]ombinations . . .” *Id.*

Undoubtedly, the 1871 Congress distrusted the fact-finding abilities of the state courts. See

protects people from unconstitutional acts that occur under color of law, regardless of whether the acts are legislative, judicial, or executive.⁴¹ However, Congress did not set forth the specific level of culpability required to state a claim under § 1983.⁴²

Facing Congressional silence on this particular issue, the Supreme Court, in interpreting § 1983, stated that it should be read against the background of tort liability.⁴³ Yet, because § 1983 is not explicit in its provisions, it has been

Allen v. McCurry, 449 U.S. 90, 98-99 (1980) (noting that "the debates [regarding the Civil Rights Act of 1871] show that one strong motive behind [the Act's] enactment was grave congressional concern that the state courts had been deficient in protecting federal rights"). Because the 1871 Congress distrusted state enforcement authorities, the Supreme Court has frequently relied on these factors to interpret § 1983 in a manner that accentuates the independent and uniquely federal nature of the § 1983 remedy. See, e.g., Felder v. Casey, 487 U.S. 131 (1988) (asserting that the state-of-notice claim rules do not apply to § 1983 claims); Monroe v. Pape, 365 U.S. 167 (1961) (espousing the view that the federal § 1983 remedy is independent of state judicial remedies).

41. Wilson v. Garcia, 471 U.S. 261, 278 (1985); Mitchum v. Foster, 407 U.S. 225, 238-39, 242 (1972); SHELDON H. NAHMUD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION § 1.03 (2d ed. 1986). See also Monroe v. Pape, 365 U.S. 167, 173-74 (1961). In *Monroe*, the Court expressed three purposes of the Ku Klux Klan Act: (1) to "override certain kinds of state laws;" (2) to afford a remedy where there was an inadequate state law; (3) to establish a federal remedy where the state remedy, although adequate in theory, was not available in practice. *Id.* See *supra* note 8 and accompanying text (discussing what constitutes "under color of state law").

42. Although Representative Shellaburger, the sponsor of the original bill, did not mention any state of mind requirement for § 1, the concern about liability without fault was at least suggested by two opponents of the bill in the House. See Mead, *supra* note 15, at 17 n.87.

Representative Whithorne of Tennessee forewarned what he considered the dangers of this section to a state employee who acts without fault:

It will be noted that by the first section suits may be instituted without regard to amount or character of claim by any person within the limits of the United States who conceives that he has been deprived of any right, privilege, or immunity secured him by the Constitution of the United States, under color of any law, statute, ordinance, regulation, custom, or usage of any State. That is to say, that if a police officer of the city of Richmond or New York should find a drunken negro or white man upon the streets with a loaded pistol flourishing it, . . . and by virtue of any ordinance, law, or usage, either of city or State, he takes it away, the officer may be sued, because the right to bear arms is secured by the Constitution, and such suit brought in distant and expensive tribunals.

GLOBE, *supra* note 38, at 337.

Regardless of these concerns that state officials could be held liable for any act under color of state law which violated a constitutional right, the House and Senate passed § 1 without including a state of mind requirement.

43. Monroe v. Pape, 365 U.S. 167, 187 (1961). See also Daniels v. Williams, 474 U.S. 327 (1986). Unquestionably, the state of mind inquiry emerges from the underlying constitutional right that is being alleged. Thus, in any § 1983 action, a "plaintiff must still prove a violation of the underlying constitutional right . . ." *Id.* at 330.

subject to an abundance of conflicting judicial interpretations and debate.⁴⁴ Additionally, as a result of the Supreme Court's restricted interpretations,⁴⁵ only a paltry amount of cases were brought under § 1983 in the first five decades following its enactment.⁴⁶ The statute lay dormant for the ninety years following its promulgation until 1961 when the Court, in *Monroe v. Pape*,⁴⁷ first recognized the broad reach of § 1983's protection.⁴⁸

44. See SCHWARTZ & KIRKLIN, *supra* note 13, at 12 (noting that the "Court's broad interpretations of Section 1983 have generated considerable controversy"). For example, Justice Powell stated in *Parratt v. Taylor*, 451 U.S. 527, 554 (1981) (Powell, J., concurring), that § 1983 "already has burst its historical bounds." *Id.* Another court asserted that § 1983 represents an "example of the sort of corruption to which the statute is now subject . . . , [and] mock[s] the purposes for which this critical piece of legislation was intended." *Kostiuk v. Town of Riverhead*, 570 F. Supp. 603, 605 (E.D.N.Y. 1983).

Moreover, because of § 1983's ambiguous provisions, the Court has interpreted § 1983 to incorporate such issues as municipal liability, *see Monell v. Department of Social Serv.*, 436 U.S. 658 (1978), punitive damages, *see Smith v. Wade*, 461 U.S. 30 (1983), absolute immunity, *see Pulliam v. Allen*, 466 U.S. 522 (1984), and qualified immunity, *see Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

45. *See Civil Rights Cases*, 109 U.S. 3 (1883). *See also NAHMOD, supra* note 41, at § 2.02. The reasons for the dormancy of § 1983 for 90 years can be attributed to the narrow application of state action doctrine, the restrictive interpretation of the Fourteenth Amendment's privileges and immunities clause, and the Court's unwillingness to thoroughly incorporate the provisions within the Bill of Rights. *Id.*

46. *See Note, Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1161 n.139 (1977) (noting that only 21 cases were brought under § 1983 between 1871 and 1920). Furthermore, in the Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873), the Court interpreted the Fourteenth Amendment's Privilege and Immunities Clause to include only those rights analogous to the existence of national government, thereby eliminating most civil rights from its purview. *Id.* at 78-80.

47. 365 U.S. 167 (1961).

48. In *Monroe*, the plaintiffs sought damages under § 1983 alleging Fourteenth Amendment violations, and under a respondeat superior theory against the city of Chicago. *Id.* at 168-70. The officers allegedly entered the plaintiff's home without warning and forced the occupants to stand naked while the entire home was ransacked. *Id.* at 169. The plaintiff was then arrested, but later released without being charged. *Id.* In *Monroe*, the Court increased the scope of § 1983 litigation regarding the actions of government officials, but also briefly flirted with the concept of municipal liability. *Id.* at 190-91. Additionally, the *Monroe* Court stated that the plaintiff need not first exhaust state judicial remedies before proceeding in a federal forum with a § 1983 claim. *Id.* at 183.

Furthermore, the Court held that the intent of Congress in 1871 was to establish a cause of action for persons deprived of their constitutional rights by a government official's abuse of power. *Id.* at 172. After examining the Act's legislative history, Justice Douglas, writing for the majority, stated that one reason for the enactment of § 1983 was to provide a remedy in federal court to ensure that the enjoyment of rights guaranteed under the Fourteenth Amendment was not denied by the prejudice, passion, and neglect of state law. *Id.* at 180. The Court further established that the federal remedy provided by § 1983 "is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." *Id.* at 183. Moreover, the Court stated that § 1983 "should be read against the background of tort liability." *Id.* at 187. Unfortunately, Justice Douglas failed to explain how this "background of tort liability" should be used in § 1983 litigation.

A civil rights action for a police officer's misconduct during a pursuit may be brought against the police officer in both the officer's official and individual capacity, or against the municipality itself.⁴⁹ However, since most police officers do not have the financial capacity to satisfy a sizeable judgment, a damage action solely against the officer in his individual capacity may be fruitless, unless the municipality indemnifies the officer.⁵⁰ Consequently, a judgment that is enforceable directly against the municipality is more likely to be satisfied.⁵¹

B. Evolution of § 1983 and Municipal Liability Based on Inadequate Training, Supervision, or Discipline

Overturing its previous decision in *Monroe*, the Supreme Court, in *Monell v. Department of Social Services*,⁵² held that municipalities are "persons" under § 1983 and, therefore, are accountable under the Act.⁵³ *Monell*, however, qualified municipal liability by cautioning that such liability should only attach

49. See e.g., *Monell v. Department of Social Servs. of New York*, 436 U.S. 658 (1978); *Fagan v. City of Vineland*, 22 F.3d 1296 (3d Cir. 1994); *Medina v. City and Cty. of Denver*, 960 F.2d 1493 (10th Cir. 1992).

50. See NAHMOD *supra* note 41, at 57 (discussing the types of fees and damages that may be awarded against individual and governmental defendants).

51. It should be noted that the Eleventh Amendment prohibits federal damage suits against a state. However, this amendment is not applicable to municipalities and, therefore, is not a bar against them. See *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 70 (1989) (holding that a state is not a "person" as the term is used in § 1983); CONST. amend. XI. See also *Monell v. New York City Dep't. of Social Servs.*, 436 U.S. 658, 694-95 (1978) (determining that a municipality can be found liable under § 1983 only where the municipality itself causes the constitutional violation); *City of Canton v. Harris*, 489 U.S. 378, 388 (1989) (holding that municipal liability under § 1983 may be based upon a municipal entity's deliberately indifferent training policies which were the direct cause of the violation of the plaintiff's federally protected rights).

52. 436 U.S. 658 (1978). In *Monell*, certain female employees of the New York Department of Social Services contested an institutional policy that required all pregnant employees to take unpaid maternity leave before it was medically necessary. *Id.* at 660-61. The Court in *Monell* engrossed itself in an in-depth analysis of the legislative history of § 1983 to determine why the decision in *Monroe* was misplaced. The concern of the *Monroe* Court was that municipalities might be required to create police forces or pay immeasurable damages. *Monell*, 436 U.S. at 673. However, the Court did not contemplate that such a rejection meant that Congress repudiated the concept of municipal liability, only that members of Congress envisioned liability for the acts of municipalities as opposed to the acts of their private citizens. *Id.* at 665-67. See generally George D. Brown, *Municipal Liability Under Section 1983 and the Ambiguities of Burger Court Federalism: A Comment on City of Oklahoma City v. Tuttle and Pembaur v. City of Cincinnati-The Official Policy Cases*, 27 B.C. L. REV. 883 (1986).

53. *Monell*, 436 U.S. at 690. *Monell* partially overruled *Monroe v. Pape*, 336 U.S. 167 (1961), which had held that municipalities were not persons subject to suit under § 1983.

where a municipal "policy or custom"⁵⁴ somehow "causes"⁵⁵ the violation of the plaintiff's federally protected rights.⁵⁶ In fact, the Court limited municipal liability by holding that liability does not attach to a municipality "solely because it employs a tortfeasor."⁵⁷ Thus, the Court rejected the proposition that a municipality could be held liable under § 1983 pursuant to a theory of respondeat superior.⁵⁸ Unfortunately, the Supreme Court has failed to delineate the precise scope of municipal liability,⁵⁹ notwithstanding the fact that after *Monell*, the Court was presented with the opportunity.⁶⁰

54. Although the term "policy" has no exact definition, its existence is vital to the issue of municipal liability. See Larry Kramer & Alan O. Sykes, *Municipal Liability Under Section 1983: A Legal and Economic Analysis*, 1987 SUP. CT. REV. 249, 253-54 (noting that the term policy is merely a legal conclusion regarding those activities of municipal actors that should be vicariously ascribed to the municipality for purposes of § 1983).

55. Additionally, "cause" was never specifically defined by the Court in *Monell*. See *Oklahoma City v. Tuttle*, 471 U.S. 808, 823 (1985). See generally, Mark R. Brown, *Correlating Municipal Liability and Official Immunity Under Section 1983*, 1989 U. ILL. L. REV. 625 (1989).

56. *Monell v. Department of Social Servs.*, 436 U.S. 658, 694 (1978). The Court also stated that it "attempted only to sketch so much of the Section 1983 cause of action against a local government as is apparent from the history of the 1871 Act and . . . prior cases." *Id.* at 695.

57. *Id.* at 691.

58. *Id.* The Court concluded that a municipality can only be "held liable [where] action pursuant to official municipal policy of some nature caused a constitutional tort." *Id.* Additionally, the Court noted that a municipality may be liable in certain circumstances for a "governmental 'custom' even though such a custom has not received formal approval through the body's official decision making channels." *Id.* at 690-91 (relying on *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970)).

In essence, what the Supreme Court's decision in *Monell* did was to relieve a municipal entity of liability when an employee violates a federal right, thereby limiting the municipality's liability to the entity's own wrongs. See SCHWARTZ & KIRKLIN, *supra* note 13, § 7.4. Since municipalities are only artificial and can only act through their employees, the effect of the Court's holding seemed to cloak municipalities with absolute immunity. *Id.*

59. Although the Court in *Monell* did in fact define municipal wrongs, it left other questions unresolved regarding the meaning of municipal custom and policy and the situations in which their enforcement would warrant the imposition of municipal liability. As a result, the *Monell* Court refused to address "what the full contours . . . may be," leaving "further development of this action to another day." *Monell*, 436 U.S. at 695.

60. See *Oklahoma City v. Tuttle*, 471 U.S. 808, 812-14 (1985) (holding that a single act of police misconduct was insufficient to justify a finding by the jury that the municipality had a policy of inadequately training its police force); *Pembaur v. Cincinnati*, 475 U.S. 469, 481 (1986) (holding that the municipality could only be found liable where the wrongdoer "possesse[d] final authority to establish municipal policy with respect to the action ordered"); *City of St. Louis v. Praprotnik*, 485 U.S. 112, 128 (1988) (holding that a "city cannot be held liable under § 1983 unless [the plaintiff] proved the existence of an unconstitutional municipal policy"). See also George D. Brown, *supra* note 52, at 884 (stating that "it is not an exaggeration to say that no one knows what 'official policy' is.").

By rejecting the well-settled common law tort doctrine of respondeat superior,⁶¹ the Supreme Court failed to build upon other familiar common law tort principles, such as causation and damages.⁶² *Monell* was a relatively simple case because the municipality had adopted a policy that was facially unconstitutional.⁶³ However, most cities do not ratify policies that are overtly unconstitutional.⁶⁴ Rather, the more conventional case, such as the police pursuit situation, arises where the constitutional deprivation occurs from the application of otherwise valid policies.⁶⁵ In police pursuit cases where an innocent bystander is injured by police conduct, the illegality results from the application of the otherwise legal training techniques, and not from an actual municipal policy of injuring innocent bystanders.⁶⁶

In *City of Canton v. Harris*,⁶⁷ the Court addressed a municipality's liability under § 1983 for constitutional deprivations caused by the city's failure to adequately train its police force. The Court repudiated the City of Canton's argument that municipal liability can be imposed only in circumstances where the challenged policy is itself unconstitutional.⁶⁸ The Court concluded that there are limited situations where an allegation of a failure to train can form the

61. The term respondeat superior has been interpreted to mean "that a master is liable in certain cases for the wrongful acts of his servant, and a principal for those of his agent." See BLACK'S LAW DICTIONARY 1311-12 (6th ed. 1990).

62. See NAHMUD, *supra* note 41, § 6.07, at 350.

63. See *Monell v. Department of Social Servs.*, 436 U.S. 658, 661 n.2 (1978). The constitutional violation in *Monell* involved an expressly adopted policy requiring municipal employees to take unpaid maternity leave. *Id.*

64. See, e.g., *Spell v. McDaniel*, 824 F.2d 1380, 1388 (4th Cir. 1987) (declaring that in practice, unconstitutional policies are rare, or at least rarely surface in litigation in this realm).

65. See *Frye v. Town of Akron*, 759 F. Supp. 1320, 1325 (N.D. Ind. 1991) (stating that the evidence suggested a complete failure to train police officers in high speed pursuits); *City of Miami v. Harris*, 490 So. 2d 69 (Fla. Dist. Ct. App. 1985) (recognizing a policy for high speed chases); *Molton v. City of Cleveland*, 839 F.2d 240 (6th Cir. 1988) (observing that the city was liable for the inadequate training of its police force).

66. See *supra* note 65 and accompanying text discussing lower federal court decision regarding a municipality's failure to adequately train.

67. 489 U.S. 378 (1989). In *City of Canton*, the plaintiff claimed a violation of her due process right to receive necessary medical care while in the custody of police. *Id.* at 381. The plaintiff alleged a claim of municipal liability for this violation based on a theory of grossly inadequate training. *Id.* at 381. Additionally, the plaintiff presented evidence of a municipal regulation that established a policy of giving shift commanders complete discretion to make decisions as to whether prisoners were in need of medical care. *Id.* at 381-82. This was accompanied by evidence that shift commanders received no training or guidelines to assist them in making these determinations. *Id.* at 382.

68. *City of Canton*, 489 U.S. at 387.

basis for liability under § 1983.⁶⁹ In defining these limited circumstances, the Court reasoned that a city can be held liable only where the failure to train constitutes a deliberate indifference “to the rights of persons with whom the police come into contact.”⁷⁰ Additionally, a municipality can be held liable for a failure to train only where the deficiency in training actually caused the violation.⁷¹ In reaching its conclusion, the Court demonstrated that fault was necessary to avoid exposing “municipalities to unprecedented liability.”⁷² Consequently, the Court required a fault element to avoid placing “de facto respondeat superior liability on municipalities.”⁷³

However, the Court cautioned that the deliberate indifference standard had nothing to do with the culpability level required to establish the underlying constitutional wrong.⁷⁴ Instead, the deliberate indifference standard relates to what is needed to show that the municipal policy is the “moving force” behind the constitutional violation.⁷⁵ Thus, in a § 1983 action, it appears that a

69. *Id.* *But see* *Mitchell v. Aluisi*, 872 F.2d 577, 580 (4th Cir. 1989). In *Mitchell*, the court espoused the view that *City of Canton* precludes municipal liability completely where the claim is merely one “that state procedures were inadequate.” *Id.* at 580. Therefore, it appears that pursuant to *Mitchell*, a municipal policy’s inadequacy can never comprise municipal liability.

70. *City of Canton*, 489 U.S. at 388. To recover under a failure to train theory, the plaintiff must demonstrate that: (1) the failure to train amounted to a deliberate indifference to the rights of persons with whom the police come into contact; and (2) that the municipality’s policy actually caused a constitutional injury. *Id.* at 389-90.

71. *City of Canton v. Harris*, 489 U.S. 378, 388, 391-92 (1989). Although the Court requires some degree of fault, the technicalities are still unclear. Despite stating deliberate indifference as the degree of culpability needed under *City of Canton*, ambiguity still exists as to exactly what the fault standard encompasses. Justice O’Connor was willing to recognize that municipal liability for a failure to train might be established:

“[W]here it can be shown that policymakers were aware of, and acquiesced in, a pattern of constitutional violations involving the exercise of police discretion, . . . [which] could put the municipality on notice that its officers confront the particular situations on a regular basis, and that they often react in a manner contrary to constitutional requirements.”

Id. at 397 (O’Connor, J., concurring in part and dissenting in part). Furthermore, lower courts have assumed the task of determining what fault standard encompasses “deliberate indifference.” *See Jones v. Chieffo*, 833 F. Supp. 498, 510 (E.D. Pa. 1993) (“[T]o make out a claim of deliberate indifference, plaintiffs must show that a municipality’s policymakers were put on notice, whether actually or constructively, of the need for a different policy, before they can be found to be deliberately indifferent to that need.”).

72. *City of Canton v. Harris*, 489 U.S. 378, 391-92 (1989).

73. *Id.* at 392.

74. *Id.* at 389 n.8.

75. *Id.* at 379. On remand, the Court made it apparent that the plaintiff would have to identify a particular deficiency in the training program and that the identified deficiency was the actual cause of the plaintiff’s constitutional injury. *Id.* at 391. It simply would not be enough to prove that a particular officer was inadequately trained, nor that there was negligent administration of an otherwise adequate program, nor that the officer’s actions that caused the injury could have been avoided by more thorough training. *Id.* Indeed, federal courts are not to become involved “in an

municipality can escape liability if the plaintiff fails to meet the threshold requirement of proving that the officer inflicted constitutional harm.⁷⁶ Still, in light of the Court's decision in *City of Canton*, lower federal courts remain uncertain as to the level of culpability regarding the recognition of inadequate training claims.⁷⁷

endless exercise of second-guessing municipal employee—training programs.” *Id.* at 392.

76. See *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986) (per curiam) (explaining that damages could not be granted against a municipality when the jury determines that the officer did not cause any constitutional harm). *But see* *Carroll v. Borough of State College*, 854 F. Supp. 1184, 1195 (M.D. Pa. 1994) (holding that a municipality may be independently liable for violating the plaintiff's constitutional rights, even in the absence of any constitutional wrongs inflicted on behalf of the officer).

77. Many claims of inadequate training are asserted, but only a few are able to satisfy the arduous *City of Canton* “deliberate indifference” and “direct cause” requirements. For decisions rejecting inadequate training claims under *City of Canton*, see *Evans v. City of Marlin*, 986 F.2d 104, 108 (5th Cir. 1993) (holding that a city's failure to train police personnel to detect suicide impulses does not give rise to a constitutional deprivation where detainee in a suicide case did not manifest any signs that the detainee was a danger to herself); *Rhynne v. Henderson County*, 973 F.2d 386, 393 (5th Cir. 1992) (noting that the record was insufficient to support a jury question regarding the inadequate training of the jail staff in a suicide prevention); *Gordon v. Kidd*, 971 F.2d 1087, 1097 (4th Cir. 1992) (asserting that in a detainee suicide case no deficiencies in training were shown); *Smith v. City of Joliet*, 965 F.2d 235, 237 (7th Cir. 1992) (declaring that the plaintiff's evidence was “woefully inadequate”); *Medina v. City and Cty. of Denver*, 960 F.2d 1493, 1500 (10th Cir. 1992) (noting that “[f]or purposes of defeating the [city's] summary judgment motion, the [plaintiff's] evidence was inadequate as a matter of law”); *Barber v. City of Salem*, 953 F.2d 232, 240 (6th Cir. 1992) (contending that “where no constitutional violation exists for failure to take special precautions [against a detainee's suicide], none exists for failure to promulgate policies and to better train personnel to detect and deter jail suicides.”); *Ting v. United States*, 927 F.2d 1504, 1512 (9th Cir. 1991) (maintaining that “the agents received highly specialized and extensive training in arrest and SWAT procedures. The fact [that] the agents may not have been trained in every conceivable hostile arrest scenario . . . would not render their training ‘inadequate’”); *Dwares v. City of New York*, 985 F.2d 94, 100-01 (2d Cir. 1993).

For decisions sustaining training claims under *City of Canton*, see *Simmons v. City of Philadelphia*, 947 F.2d 1042, 1074 (3d Cir. 1991) (holding that “the record contains sufficient evidence to support a section 1983 verdict against the City based on plaintiff's . . . theory that the City violated [the plaintiff's] rights through a deliberately indifferent failure to train officers responsible for intoxicated detainees in suicide detection and prevention.”), *cert. denied*, 503 U.S. 985 (1992); *Davis v. Mason County*, 927 F.2d 1473, 1483 (9th Cir. 1991) (recognizing that although the deputy sheriffs “may have had some training in the use of force, they received no training in the constitutional limits of the use of force. [The] deprivation of plaintiffs' Fourth Amendment rights was a direct consequence of the inadequacy of the training the deputies received.”); *Andujar v. Boston*, 760 F. Supp. 238, 242 (D. Mass. 1991) (noting that the plaintiff sufficiently pleaded the claim of inadequate training); *Frye v. Town of Akron*, 759 F. Supp. 1320, 1325 (N.D. Ind. 1991) (stating that there were sufficient allegations of complete failure to train police officers regarding “high speed pursuits”); *Walker v. City of New York*, 974 F.2d 293 (2d Cir. 1992); *Jones v. Thompson*, 818 F. Supp. 1263 (S.D. Ind. 1993); *Waechter v. School District*, 773 F. Supp. 1005 (W.D. Mich. 1991); *Doe v. Calumet City*, 754 F. Supp. 1211 (N.D. Ill. 1990).

Because municipal liability, especially for isolated accidents arising out of high-speed pursuits, is so difficult to establish under *City of Canton*, the most commonly litigated § 1983 claim in police pursuit cases involves the injured bystander who seeks to impose personal monetary liability on an individual police officer.⁷⁸ However, government employees, including police officers, who act in a tortious manner are often entitled to some form of immunity for their actions.⁷⁹ In the context of § 1983 litigation, the Supreme Court has held that immunity can be either absolute or qualified, depending on the function being performed.⁸⁰ While absolute immunity depends solely on an official's special functions,⁸¹ qualified immunity is not only dependent upon status, but also upon the conditions of the case.⁸² With respect to pursuit situations, a police officer may be able to defeat personal liability by alleging a defense of qualified immunity.⁸³

Under qualified immunity, state and local officials who perform their executive and administrative functions without violating clearly established laws are protected against § 1983 monetary liability in their personal capacities.⁸⁴

78. The "great preponderance" of § 1983 actions name individual officers as defendants. HENRY M. HART & HERBERT WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 1249 (3d ed. 1988).

79. See generally W. PAGE KEETON ET AL., *supra* note 18, at § 132.

80. *Cleavinger v. Saxner*, 474 U.S. 193, 201 (1985) (declaring that "immunity analysis rests on functional categories, not on the status of the defendant.").

81. See *Cleavinger*, 474 U.S. at 201 (stating that "[a]bsolute immunity flows not from rank or title or 'location within the Government,' but from the nature of the responsibilities of the individual official."). Generally, absolute immunity has been extended to legislators, prosecutors, and judges. See, e.g., *Tenney v. Brandhove*, 341 U.S. 367 (1951) (recognizing absolute immunity for state legislators); *Imbler v. Pachtman*, 424 U.S. 409 (1976) (noting absolute immunity for prosecutors); *Stump v. Sparkman*, 435 U.S. 349 (1978) (identifying the defense of absolute immunity for judges). The Supreme Court has also extended absolute immunity to certain officials in the executive branch. These include federal prosecutors and similar officials, see *Butz v. Economou*, 438 U.S. 478, 509-12 (1978); executive officers engaged in adjudicative functions, *id.* at 513-17; and the President of the United States, see *Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982).

82. See *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (holding that government officials are protected 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"). Furthermore, whether a government official's tortious conduct is afforded immunity turns on a nebulous distinction between discretionary and ministerial acts. If the act is discretionary, then the government official is immunized. See W. PAGE KEETON ET AL., *supra* note 18, at 1059-60.

83. See *Anderson v. Creighton*, 483 U.S. 635, 638-41 (1987) (applying the doctrine of qualified immunity to a suit against a law enforcement officer in his individual capacity); *Medina v. City and County of Denver*, 960 F.2d 1493, 1497 (10th Cir. 1992).

84. See *Buckley v. Fitzsimmons*, 113 S. Ct. 2606, 2613 (1993); *Harlow v. Fitzsimmons*, 457 U.S. 800, 807 (1982); *Butz v. Economou*, 438 U.S. 478, 508 (1978).

The current doctrine of qualified immunity originated in *Harlow v. Fitzgerald*.⁸⁵ In *Harlow*, the Court held that governmental officials executing discretionary functions generally are protected from liability for civil damages so long as their "conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."⁸⁶ However, a determination that a governmental official is entitled to qualified immunity will not preclude an action against the municipality.⁸⁷

In short, the legislative history reveals that § 1983 enforces the Constitution and does not encompass any substantive rights.⁸⁸ Moreover, Congress did not intend the Civil Rights Act to include a state of mind requirement independent of that necessary to state a violation of the underlying constitutional right.⁸⁹ Thus, in any § 1983 claim, the aggrieved plaintiff must prove the requisite culpability level for the particular constitutional right in order to show a deprivation of that right. Since the constitutional right at issue within the framework of police pursuits is substantive due process, the next section will explore the actionability of governmental misconduct within the framework of substantive due process.

85. 457 U.S. 800 (1982). In *Harlow*, a governmental employee brought a damage action against several elite Presidential aides for the deprivation of his constitutional rights. *Id.* The suit was brought pursuant to the Court's decision in *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), rather than § 1983, because it was brought against federal government officials.

86. *Harlow*, 457 U.S. at 818. Even though the Court was dealing with a claim brought against federal agents, the Court's holding is not confined to only those situations. *Id.* Clearly, the policies underlying the opinion appear to be equally applicable to state officials as well.

87. There is no qualified immunity available to a municipality or other similar governmental employers or policymaking individuals sued in their "official capacity" under 42 U.S.C. § 1983. *Owen v. City of Independence, Mo.*, 445 U.S. 622, 638-39 (1980). See also *Ross v. Neff*, 905 F.2d 1349, 1354 (10th Cir. 1986) (noting that an individual officer had qualified immunity for an improper arrest on Indian land, but the county was still liable for its policy of allowing such arrests).

88. See *Barker v. McCollan*, 443 U.S. 137, 144 n.3 (1979); *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 617-18 (1979) (holding that § 1983 does not protect against anything, rather it merely provides a remedy); LEVINSON & BODENSTEINER *supra* note 14, at II-45.

89. See *Daniels v. Williams*, 474 U.S. 327, 330 (1986); *Parratt v. Taylor*, 451 U.S. 527, 534-35 (1981).

III. SUBSTANTIVE DUE PROCESS ANALYSIS

A. *Origins of Substantive Due Process and the Incorporation of the Bill of Rights*

Substantive due process is a nebulous doctrine that subsists in confusion.⁹⁰ Essentially, the Due Process Clause gives rise to three distinct types of claims: violations of provisions incorporated in the Bill of Rights,⁹¹ violations of the substantive component of the Due Process Clause;⁹² and violations of the

90. See, e.g., Edward L. Rubin, *Due Process and the Administrative State*, 72 CAL. L. REV. 1044, 1044-46 (1984) (observing the substantive due process doctrine's "descent into uncertainty"); Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 309 (1993) (noting that the "concept of substantive due process introduces further tensions, ambiguities, and ambivalence").

91. The rights incorporated by due process and made applicable to the states consist of the Bill of Rights, excluding the Second Amendment right to bear arms, the Third Amendment, the grand jury and civil jury trial rights, the Ninth Amendment, and the Tenth Amendment. See Craig W. Hillwig, *Giving Property All the Process that Is Due: A "Fundamental" Misunderstanding About Due Process*, 41 CATH. U. L. REV. 703, 711 (1992). Thus, the rights that are incorporated through the Due Process Clause are substantive, such as first amendment rights. See, e.g., *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (recognizing freedom of speech); *Near v. Minnesota*, 283 U.S. 697, 707 (1931) (identifying the right to freedom of the press). Additionally, these incorporated rights include rights that are procedural in nature as well, such as the criminal due process rights contained in the Fourth, Fifth, Sixth, and Eighth Amendments. See, e.g., *Duncan v. Louisiana*, 391 U.S. 145, 148-49 (1968) (establishing the right to a criminal trial by jury); *Malloy v. Hogan*, 378 U.S. 1, 6 (1964) (noting a defendant's right against self-incrimination). The standard for determining whether the Constitution incorporates a right is if the right "is fundamental to the American scheme of justice." *Duncan*, 391 U.S. at 148-49. See generally NOWAK ET AL., *supra* note 7, at § 11.6 (discussing the incorporation of the Bill of Rights).

92. Substantive due process includes the right to privacy. See, e.g., *Zablocki v. Redhail*, 434 U.S. 374, 387 (1978) (recognizing the right of marriage); *Moore v. City of East Cleveland*, 431 U.S. 494, 501-06 (1977) (establishing the right to order one's familial affairs); *Roe v. Wade*, 410 U.S. 113, 153-55 (1973) (identifying a woman's right to have an abortion). Furthermore, the right to receive certain minimum levels of medical treatment has also been recognized as a right of substantive due process. See *Revere v. Massachusetts Gen. Hosp.*, 463 U.S. 239, 244 (1983); *Youngberg v. Romeo*, 457 U.S. 307, 314-25 (1982).

Other privacy rights include the right to possess and use contraceptives, *Carey v. Population Servs. Int'l*, 431 U.S. 678, 685 (1977); the right to send one's child to a parochial school, *Pierce v. Society of Sisters*, 268 U.S. 510, 518 (1925); the right to have a child study a foreign language, *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923); the right to cohabit with one's relatives, *Moore v. City of East Cleveland*, 431 U.S. 494, 501-06 (1977); and the right not to be sterilized, *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (although *Skinner* is an Equal Protection case, it identified a fundamental right which also applies to substantive due process).

Additionally, even where fundamental rights are not implicated, the Due Process Clause substantively protects against arbitrary government action. See *Meyer v. Nebraska*, 262 U.S. 390, 399-400 (1923); *Rochin v. California*, 342 U.S. 165, 172-73 (1952). Substantive due process also ensures fundamental fairness, see *TXO Prod. Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711 (1993), and guards against all arbitrary abuses of power. See, e.g., *Youngberg v. Romeo*, 457 U.S. 307, 315 (1982) (holding that those committed to state mental institutions have a "historic liberty

Procedural Due Process Clause.⁹³ Originally, the Due Process Clause

interest" in personal security that is protected by the substantive component of the Due Process Clause); *Washington v. Harper*, 494 U.S. 210, 227 (1990) (recognizing a liberty interest in avoiding the unwanted administration of antipsychotic drugs); *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926) (holding that the plaintiffs could establish a substantive due process violation if the government action affecting real property was "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare").

93. *Zinermon v. Burch*, 494 U.S. 113, 125 (1990). Primarily, the function of the Procedural Due Process Clause is to "minimize the risk of erroneous decisions" by ensuring that government proceeds in a way that protects the faithful implementation of its laws. See *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 442 U.S. 1, 13 (1979); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 661-62 (2d ed. 1988). Procedural due process guarantees that a fair decision-making process exists before the government undertakes a particular action which directly impairs a person's right to life, liberty, or property. See NOWAK ET AL., *supra* note 7, at 453. See also *Hudson v. Palmer*, 468 U.S. 517, 533 (1984), *Parratt v. Taylor*, 451 U.S. 527, 536-37 (1981); *Mathews v. Eldridge*, 424 U.S. 319, 349 (1976); *Fuentes v. Shevin*, 407 U.S. 67, 96 (1972); *Goldberg v. Kelly*, 397 U.S. 254, 260-61 (1970). Additionally, two models of procedural due process exist: pre-deprivation and post-deprivation due process. See Thadd Llauro, Comment, *Civil Rights-42 U.S.C. § 1983-The Actionability of a Negligent Deprivation of a Liberty Interest in Light of Daniels and Davidson*, 69 MARQ. L. REV. 599, 626 (1986) (noting that the "concept of due process incorporates notions of fair notice and warning").

Generally, for procedural due process causes of action, a two-step inquiry is involved: (a) does the plaintiff have a liberty or property interest; and (b) if so, what process is due? NOWAK ET AL., *supra* note 7, at 453-83 (examining this two-step process). For instance, when an individual asserts a procedural due process claim for a violation of a liberty interest, that individual must allege that the government unlawfully interfered with a protected liberty interest by failing to provide adequate procedural safeguards. See *Augustine v. Doe*, 740 F.2d 322, 327 (5th Cir. 1984). Once this liberty interest is identified, what process is due depends upon the outcome of a balancing test delineated in *Mathews v. Eldridge*, 424 U.S. 319 (1976). The factors to balance include: (1) the private interest affected, (2) the risk of erroneous deprivation and the value of additional safeguards, and (3) the government's interest, including the fiscal and administrative burden on the government in providing the procedure demanded. *Id.* at 335. Currently, all courts must apply the *Mathews* balancing test to determine the type of procedures that the Due Process Clause demands when government action deprives an individual of a constitutionally protected liberty or property interest. See generally Daniel S. Feder, *From Parratt to Zinermon: Authorization, Adequacy, and Immunity in a Systemic Analysis of State Procedure*, 11 CARDOZO L. REV. 831, 845-46 (1990) (noting that although "accuracy of decision making is the primary goal of [procedural due] process, the degree of accuracy that a system is required to provide will be qualified by the burden of providing it").

Although not specifically delineated by the Supreme Court, two subcategories of due process exist. As recognized in *Goldberg v. Kelly*, 397 U.S. 254 (1970), there is a "regularized deprivation" branch and a "random and unauthorized conduct" branch, as established in *Parratt* and *Hudson*. *Id.* at 260-61. Under the "random and unauthorized" branch, when a "random and unauthorized" action deprives an individual of a liberty or property interest, the state will be constitutionally liable to the individual unless that state provides an adequate remedy. *Parratt v. Taylor*, 451 U.S. 527, 541-42 (1981). Clearly, if an action by a government official is "random and unauthorized," then the state cannot provide a meaningful hearing before the deprivation takes place because the state cannot foresee exactly when such a loss will occur. Thus, if the action is "random and unauthorized," the state must provide an adequate post-deprivation remedy. *Parratt*, 451 U.S. at 541-44. Where the adequate post-deprivation remedy exists in state law, the requirements of due process are satisfied; if no such remedy exists, then the deprivation will be unconstitutional. *Id.* (citing *Bonner v. Coughlin*, 517 F.2d 1311 (7th Cir. 1975), *modified*, 545 F.2d

contained in the Fourteenth Amendment did not have a substantive component.⁹⁴ The clause addressed only procedures used by the government to deprive persons of life, liberty, or property, and not the substantive reasonableness of such deprivations.⁹⁵

In fact, substantive due process did not exist until the 1890s, when the Supreme Court held that the Due Process Clause demands that violations of life, liberty, or property be substantively reasonable.⁹⁶ Substantive due process rights provide plaintiffs with a broad residual theory to challenge the root of

565 (1976) (en banc), *cert. denied*, 435 U.S. 932 (1978)); *Hudson v. Palmer*, 468 U.S. 517, 533 (1984) (observing that a deprivation of liberty or property is not cognizable under § 1983 when a state's post-deprivation remedies are adequate to protect a victim's procedural due process rights).

94. It must be noted that the Constitution contains two Due Process Clauses. U.S. CONST. amends. V, XIV. The Fourteenth Amendment Due Process Clause, which restricts state and local governments, states that "No state shall . . . deprive any person of life, liberty, or property without due process of law." On the other hand, the Fifth Amendment Due Process Clause, which restricts the federal government, provides that "No person shall . . . be deprived of life, liberty, or property, without due process of law."

95. Some commentators continue to advocate that the authors of the Fourteenth Amendment did not intend to incorporate a substantive component into the amendment. See JOHN HART ELY, *DEMOCRACY AND DISTRUST* 18 (1978):

It is a bit embarrassing to suggest that a text is informative when so many, for so long, have found it to be only evocative, . . . but there is simply no avoiding the fact that the word that follows "due" is "process." No evidence exists that "process" meant something different a century ago from what it is now—in fact as I've indicated the historical record runs somewhat the other way—and it should take more than an occasional aberrational use to establish that those who ratified the Fourteenth Amendment had an eccentric divination in mind . . . Familiarity breeds inattention, and we apparently need periodic reminding that "substantive due process" is a contradiction in terms—sort of like green pastel redness.

Id. (citations omitted).

96. *Allgeyer v. Louisiana*, 165 U.S. 578, 591 (1897) (stating that a state ban on marine insurance policies by out-of-state companies violates substantive due process). *Allgeyer* was the first Supreme Court decision to use substantive due process to strike down a state statute. See also *Lochner v. New York*, 198 U.S. 45 (1905) (using substantive due process to invalidate state economic assessments that it found to be severely restrictive of an individual's liberty to contract).

Substantive due process in the economic realm has been largely discredited because the Supreme Court has elevated economic rights over personal rights, see *Duke Power Co. v. Carolina Envtl. Study*, 438 U.S. 59, 84 (1978), and has essentially ignored the inequality in bargaining power between employers and employees. See *Bishop v. Wood*, 426 U.S. 341, 350 (1976) (stating that the Due Process Clause of the Fourteenth Amendment is not a guarantee against incorrect or ill advised personnel decisions). However, the core concepts of substantive due process, as a guarantor against arbitrary, capricious abuses of government power, have never been rejected. See *Daniels v. Williams*, 474 U.S. 327, 331 (1986) (noting that the guarantee of due process has been applied to deliberate decisions of government officials to deprive a person of life, liberty, or property); *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) ("the Due Process Clause . . . bars certain arbitrary, wrongful government actions"); *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1985) ("[t]he question . . . is whether . . . the defendant acted arbitrarily.").

governmental conduct.⁹⁷ Additionally, the Fourteenth Amendment is the vehicle by which most of the Bill of Rights have been "incorporated" and made applicable to the states.⁹⁸ As to incorporated rights, substantive due process violations are analyzed as a deprivation of the explicit right, and not as a deprivation of substantive due process.⁹⁹ In addition to the fundamental guarantees contained in the Bill of Rights, however, the Due Process Clause has been the source of other rights which the Supreme Court has found to be fundamental.¹⁰⁰ Here, the substantive component of the Due Process Clause

97. See VINCENT R. FONTANA, *MUNICIPAL LIABILITY: LAW AND PRACTICE* § 4.8 (1990).

98. See *Zinermon v. Burch*, 494 U.S. 113, 125 (1990). There have been two main contrasting views espoused by members of the Supreme Court on the incorporation issue: the selective incorporation/fundamental rights approach and the total incorporation approach. See generally Louis Henkin, "Selective Incorporation" in the Fourteenth Amendment, 73 *YALE L.J.* 74 (1963). However, this distinction is beyond the scope of this note. The original incorporation case was *Gitlow v. New York*, 268 U.S. 652 (1925), where the Court found that the free speech clause of the First Amendment was applicable to the states by the Due Process Clause. *Id.* at 664. Through the years, there has been a steady process of judicial incorporation of the Bill of Rights, with a few exceptions, into the Fourteenth Amendment, thereby deeming such rights as applicable to the states. Moreover, the Court incorporates into the Fourteenth Amendment any guarantee which is "fundamental in the context of the [judicial] processes maintained by the American states." *Duncan v. Louisiana*, 391 U.S. 145, 149-50 n.14 (1968). Other courts have articulated the incorporation standard as "basic in our system of jurisprudence," *In re Oliver*, 333 U.S. 257, 273 (1948), and "implicit in the concept of ordered liberty." *Palko v. Connecticut*, 302 U.S. 319, 325 (1937). See also Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 *CAL. L. REV.* 929 (1965).

Today, all of the provisions of the First Amendment concerning freedoms of religion, see *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (free exercise clause), *Everson v. Board of Education*, 330 U.S. 1 (1947) (establishment clause), speech, see *Gitlow v. New York*, 268 U.S. 652 (1925), press, see *Near v. Minnesota*, 283 U.S. 697 (1931), assembly, see *DeJonge v. Oregon*, 299 U.S. 353 (1937), and petition, see *Bridges v. California*, 314 U.S. 252 (1941), have been deemed applicable to the states. See *NOWAK ET AL.*, *supra* note 7, at 385. In fact, of the first ten amendments, only a few amendments have not been incorporated by the Fourteenth Amendment. These amendments include: the Second Amendment right to bear arms, see *Quilici v. Village of Morton Grove*, 695 F.2d 261 (7th Cir. 1982) (holding that a city is free to totally ban the possession of firearms within its borders because the Second Amendment does not apply to the states through the Due Process Clause of the Fourteenth Amendment), *cert. denied* 464 U.S. 863 (1983). *Cf.* *United States v. Cruikshank*, 92 U.S. (2 Otto) 542 (1875); *Presser v. Illinois*, 116 U.S. 252 (1886); the Fifth Amendment grand jury clause, see *Hurtado v. California*, 110 U.S. 516 (1884); and the Seventh Amendment right to jury trials in civil cases. See *Minneapolis & St. Louis R. Co. v. Bombolis*, 241 U.S. 211 (1916).

99. *Graham v. Connor*, 490 U.S. 386, 393-94 (1989) (holding that a § 1983 suit based on a police brutality claim should have been framed as a Fourth Amendment "seizure," rather than a substantive due process violation based on brutal, malicious conduct).

100. See *Gilmere v. Atlanta*, 774 F.2d 1495, 1499-1500 (11th Cir. 1985); *Brown v. Brienen*, 722 F.2d 360, 366 (7th Cir. 1983). The Supreme Court in *Moore v. East Cleveland*, 431 U.S. 494 (1977), discussed the fact that a number of protections of substantive due process are not set forth explicitly:

Due Process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this

creates certain rights that are not explicitly contained in the Bill of Rights.¹⁰¹

Court's decision it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society.

Id. at 501-02 (citing *Poe v. Ullman*, 367 U.S. 497, 542-43 (1961)).

101. These non-explicit rights, established in the liberty clause of the Fourteenth Amendment, have been categorized as "fundamental rights" and are afforded the highest level of constitutional protection. See *NOWAK ET AL.*, *supra* note 7, at 367 (noting that fundamental rights are those rights which are identified by the Court as having a value essential to individual liberty in our society). Such fundamental rights include: the right to vote, see *Carrington v. Rash*, 380 U.S. 89 (1965), the right to interstate travel, see *Shapiro v. Thompson*, 394 U.S. 618 (1969), and the right to fairness in the criminal process. See *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Pointer v. Texas*, 380 U.S. 400 (1965). Although the fundamental nature of the right to fairness in the criminal process has not been the subject of specific litigation in the Court, the Court has at least implicitly recognized this right. See, e.g., *Douglas v. California*, 372 U.S. 353 (1963) (recognizing the right to counsel during the first appeal); *Mayer v. Chicago*, 404 U.S. 189 (1971) (acknowledging the right to a transcript in misdemeanor appeals); *Bounds v. Smith*, 430 U.S. 817 (1977) (identifying the right to legal materials and access to the courts). The right to procedural fairness is not explicit, but this right is implied in decisions concerning procedural due process rights. See, e.g., *Youngberg v. Romeo*, 457 U.S. 307, 321 n.28 (1982); *Santosky v. Kramer*, 455 U.S. 745, 747-48 (1982) (holding that parental rights can only be terminated if the state shows evidence of parental unfitness by "clear and convincing evidence").

Finally, there is a fundamental right to privacy which includes numerous versions of freedom of choice in matters relating to an individual's personal life. This right to privacy has been held to include rights to freedom of choice in marital decisions. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965) (identifying the right to marital privacy); *Boddie v. Connecticut*, 401 U.S. 371 (1971); *Loving v. Virginia*, 388 U.S. 1 (1967); *Moore v. East Cleveland*, 431 U.S. 494 (1977). The Court has also recognized the right of child bearing. See, e.g., *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977) (noting the right to purchase contraceptives); *Roe v. Wade*, 410 U.S. 959 (1973) (recognizing the right to terminate a pregnancy); *Skinner v. Oklahoma*, 316 U.S. 535 (1952) (noting the right of sterilization). Finally, privacy rights include the right to raise children. See, e.g., *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

In addition to a fundamental liberty interest, certain "garden variety" liberty interests also exist. These include the right to contract, the right to carry on interstate commerce, the right to own property, the right to gain useful knowledge, the right to engage in life's useful occupations, the right to worship God, and the right to be free from arbitrary action at the hands of government officials. See *Bullard v. Valentine*, 592 F. Supp. 774, 776 (E.D. Tenn. 1984). Furthermore, outside the privacy context, a number of non-privacy applications of substantive due process also exist, mainly in the areas of economic regulation. See, e.g., *Allgeyer v. Louisiana*, 165 U.S. 578 (1897) (invalidating economic legislation found to be unduly restrictive on liberty); *Duke Power Co. v. Carolina Env'tl. Study*, 438 U.S. 59 (1978) (recognizing that substantive due process imposes limitations on the legislative branch of government by prohibiting the legislature from passing arbitrary and capricious statutes that unduly interfere with an individual's rights).

However, non-privacy applications of substantive due process have also occurred in excessive force cases (for prisoners, pretrial detainees, and mental patients), in academic decisions, and in the area of public employment. Potentially, the substantive due process doctrine is applicable to numerous, if not most, forms of governmental acts which deprive a person of life, liberty, and property. See, e.g., *United States v. Lutrell*, 889 F.2d 806, 813 (9th Cir. 1989) (noting possible substantive due process violations where, without reasonable grounds, police tempt law-abiding citizens with an opportunity to engage in criminal conduct). *But see Rosa R. v. Connelly*, 889 F.2d

Most notably, however, where fundamental rights are not implicated, the breadth of substantive due process still endures as an available theory to combat arbitrary governmental conduct.¹⁰²

B. Scrutiny Rules

In analyzing Supreme Court decisions, a two-tiered categorical scheme emerges to reflect the realities of substantive due process analysis. Within this two-tiered framework, government intrusions on "fundamental" rights are subject to strict scrutiny.¹⁰³ Strict scrutiny review requires the government to demonstrate a compelling government interest and that the regulation used is no more restrictive on these fundamental rights than is necessary.¹⁰⁴ Conversely, violations of non-fundamental rights have been scrutinized to determine whether the violations are rationally related to legitimate government purposes.¹⁰⁵ To

435, 439 (2d Cir. 1989) (rejecting a substantive due process challenge to a student's suspension from high school under a rational basis test); *United States v. Fox*, 889 F.2d 357, 359-63 (1st Cir. 1989) (entertaining but ultimately rejecting substantive due process attacks on federal sentencing guidelines); *Reese v. Kennedy*, 865 F.2d 186, 187-88 (8th Cir. 1989) (rejecting a substantive due process challenge to eviction from private homes under a "shocks the conscience" test).

102. See *Daniels v. Williams*, 474 U.S. 327, 331 (1986) (holding that substantive due process precludes arbitrary government action regardless of the procedures used to implement them). Furthermore, some courts require that the plaintiff first identify a liberty or property interest before triggering the guarantee against arbitrary government action. See *Levinson*, *supra* note 7, at 315 (noting that a property or liberty interest must first be identified because the due process clause maintains that "[n]o state . . . shall deprive any person of life, liberty, or property without due process of law") (citing U.S. CONST. amend. XIV, § 1). See also *Griffith v. Johnston*, 899 F.2d 1427, 1435 (5th Cir. 1990) (asserting that "[i]n order to state a cause of action for violation of the Due Process Clause . . . [plaintiffs] must show that they asserted a recognized 'liberty or property' interest within the purview of the Fourteenth Amendment . . ."); *Gutzwiller v. Fenik*, 860 F.2d 1317, 1328 (6th Cir. 1988) (espousing the view that a liberty or property interest must be impaired before the substantive component of the due process clause is triggered); *Honore v. Douglas*, 833 F.2d 565, 568 (5th Cir. 1987) (declaring that in order to trigger the substantive due process clause, an aggrieved plaintiff must first establish that the government arbitrarily and capriciously deprived them of a protected property interest); *Spence v. Zimmerman*, 873 F.2d 256, 258 (11th Cir. 1989) (establishing that a plaintiff must show a federally protected property interest and that the government stripped that interest by arbitrary and capricious means).

103. See *Levinson*, *supra* note 7, at 314.

104. *Id.* See also *Roe v. Wade*, 410 U.S. 113, 155 (1973); *Foucha v. Louisiana*, 504 U.S. 71, 115 (1992) (Thomas, J., dissenting); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 684-91 (1977). Cf. *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978) (noting that "critical examination" is ordered under the Equal Protection Clause when legislation encroaches on a fundamental right).

105. See, e.g., *Kelley v. Johnson*, 425 U.S. 238, 247 (1976); *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 730 (1984); *Schweiker v. Wilson*, 450 U.S. 221, 234 (1981); *United States Dept. of Agric. v. Moreno*, 413 U.S. 528, 534 (1973). See also Robert Bennett, "Mere" Rationality in Constitutional Law: *Judicial Review and Democratic Theory*, 67 CAL. L. REV. 1049, 1049, 1054-55 (1979) (discussing the numerous formulas used to signify the "rationality" requirement); Scott Bice, *Rationality Analysis in Constitutional Law*, 65 MINN. L. REV. 1, 30-31 (1980)

fully comprehend the doctrine of substantive due process, it is essential to distinguish between substantive due process challenges to rules and legislation on the one hand and challenges to allegedly tortious governmental conduct on the other.¹⁰⁶

In the context of rules and legislation, substantive due process analysis may be more diverse than the simple distinction between "strict scrutiny" and "rational basis."¹⁰⁷ For example, the Supreme Court has implied that state laws that do not unduly burden "core liberty" interests should be sustained.¹⁰⁸ Additionally, comparable complexity emerges for legislation which affects non-fundamental rights.¹⁰⁹ Under the traditional doctrine, legislation affecting non-fundamental liberty and property rights need only have a rational basis to escape invalidation by the courts.¹¹⁰ The rational basis test reflects the principle that legislation must aspire to promote legitimate government objectives,¹¹¹ and that government must pursue its goals by reasonable means.¹¹² Generally, the rational basis test is not demanding, and the degree of deference given to the government is high,¹¹³ especially when the challenged legislation regulates

106. See, e.g., Fallon, *supra* note 90, at 315-29.

107. See Note, *The Supreme Court-Leading Cases*, 106 HARV. L. REV. 163, 210-20 (1992) (maintaining that "the Court has neither adhered in practice to its formal framework for analyzing substantive due process claims nor applied a coherent standard of scrutiny in its departures").

108. See *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2819-21 (1992) (noting that as long as pre-viability abortions are not flatly forbidden, incidental restrictions do not trigger strict scrutiny but are subject to an "undue burden" analysis). In *Casey*, the Court is careful not to characterize abortion as a fundamental right; instead, the Court calls abortion a "core liberty" interest. *Id.*

109. See Fallon, *supra* note 90, at 315.

110. See *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 730 (1981); *Schweiker v. Wilson*, 450 U.S. 221, 234 (1981); *Kelley v. Johnson*, 425 U.S. 238, 247 (1976); *United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973).

111. See, e.g., *Hampton v. Mow Sun Wong*, 426 U.S. 88, 103 (1976); Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1713-14 (1984) (stating that the "Court has made clear . . . that the government must be able to invoke some public value that the classification at issue can be said to serve").

112. See, e.g., *Schweiker*, 450 U.S. 221 (espousing the view that the "pertinent inquiry is whether [the challenged provision] advances legitimate legislative goals in a rational fashion").

113. The high degree of deference that is given to the government is due to the difficulty of enforcing the requirement that legislation reflect public purposes. See generally, DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* (1991) (noting that there are deep conceptual difficulties involved in identifying the "purposes" of multi-member legislative bodies against which the rationality of means is to be measured). Occasionally, the Supreme Court forgoes the effort to determine the "legislative purpose" and accepts any rationale advanced by the state. See, e.g., *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980) (asserting that "[w]here, as here, there are plausible reasons for Congress' action, our inquiry is at an end"); *Flemming v. Nestor*, 363 U.S. 603, 612 (1960) (finding it "constitutionally irrelevant" whether the reasoning "in fact underlay the legislative decision").

economic relations in the private sector.¹¹⁴ Furthermore, the burden of proof is on the challenger, who must demonstrate that the law is totally arbitrary and capricious, a standard which has never been met since the demise of *Lochner v. New York*.¹¹⁵

In the context of unauthorized official acts, the Supreme Court has applied substantive due process rules to administrative actions not explicitly sanctioned by statute.¹¹⁶ For instance, in *Youngberg v. Romeo*,¹¹⁷ the Court held that decisions made by state officials regarding the treatment of mentally handicapped individuals will violate substantive due process if such decisions constitute a "substantial departure from accepted professional judgement."¹¹⁸ Similarly, the Court in *Schwartz v. Board of Bar Examiners*¹¹⁹ found a substantive due process violation when state officials denied an applicant admission to the bar without articulating any basis for their finding.¹²⁰ Nevertheless, no recognized framework has materialized for identifying when relatively isolated governmental actions offend substantive due process, primarily concerning non-fundamental

114. See *Pension Benefit Guar. Corp.*, 467 U.S. at 279 (declaring that "strong deference [is] accorded legislation in the field of national economic policy"); Hans A. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 207-13 (1976) (expressing the view that deference to governmental legislation is high because there are conceptual difficulties involved in recognizing the "purposes" of multi-member legislative bodies against which the rationality standard is to be measured).

115. 198 U.S. 45 (1905). In *Lochner*, the Court determined that the "right to contract" was protected by the substantive component of the Due Process Clause from arbitrary state legislation. *Id.* at 53. Essentially, the Court determined that the state's interest, such as paternalism and the redistribution of wealth, were not valid state interests; and consequently held that due process was violated. *Id.* at 57. See also Levinson, *supra* note 7, at 321 (recognizing that "the Supreme Court has not invalidated a statute on substantive due process grounds where only economic rights are implicated since the *Lochner* period") (citing G. DUNTHORP, CONSTITUTIONAL LAW 472 (11th ed. 1985)).

116. Basically, substantive due process prohibits the government from interfering with our liberty and property interests for reasons that are arbitrary or malicious. Originally, this limitation was acknowledged with regard to legislative enactments. See, e.g., *Meyer v. Nebraska*, 262 U.S. 390, 399-400 (1923) (invalidating a state statute which forbade children from being instructed in a foreign language). Subsequently, the doctrine has been employed to protect against arbitrary and egregious action by the executive branch. See *Rochin v. California*, 342 U.S. 165 (1952); *Youngberg v. Romeo*, 457 U.S. 307, 323 (1982) (holding that decisions made by state officials concerning the treatment of mentally incompetent individuals will be found to violate substantive due process only if such decisions constitute a "substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment").

117. 457 U.S. 307 (1982).

118. *Id.* at 323. See also *Kelley v. Johnson*, 425 U.S. 238, 247-48 (1976) (holding that substantive due process is not violated by a prohibition concerning the dress code of police officers, although "the citizenry at large has some sort of liberty interest in matters of personal appearance").

119. 353 U.S. 232 (1957).

120. *Id.* at 239.

liberty interests.¹²¹ Thus, it is not clear whether the Supreme Court considers the distinction between fundamental rights and non-fundamental rights applicable in this context.

On one view, the Court has determined that government action that shocks the conscience violates due process only when it deprives an individual of a fundamental right.¹²² However, the Court has never stated this specifically.¹²³ It is unclear, for example, whether government action shocks the conscience when it tramples upon a non-fundamental right, such as police pursuit situations where an innocent bystander is injured. This confusion regarding the distinction between fundamental and non-fundamental rights, and what standards applies to each, lends credence for the adoption of a more objective standard which has been developed and molded within the framework of substantive due process jurisprudence. Thus, the deliberate indifference standard proposed by this Note will not only alleviate the confusion in the courts, but will provide doctrinal uniformity for substantive due process applications within the context of police pursuits.¹²⁴

Additionally, regarding non-fundamental liberty interests, the Supreme Court has never articulated the proper breadth of a constitutional violation under

121. In cases involving what the Court has classified non-fundamental liberty and property interests, the most accepted formulation implies that officials must not participate in "arbitrary" conduct. See, e.g., *Daniels v. Williams*, 474 U.S. 327, 331 (1986) (observing that the "Due Process Clause . . . was 'intended to secure the individual from the arbitrary exercise of the powers of government'" (quoting *Hurtado v. California*, 110 U.S. 516 (1884); *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1985) (noting that the "question . . . is whether . . . [the defendant] acted arbitrarily . . ."). Nonetheless, the Supreme Court has certainly not held that all arbitrary official conduct violates the Constitution. *Ewing*, 474 U.S. at 226. In fact, one recent case suggests that conduct could be arbitrary in a "constitutional sense" only if it shocked the conscience. See *Collins v. City of Harker Heights*, 112 S. Ct. 1061, 1069-70 (1992). The Court has not implemented such a narrow view in the past, and has upheld substantive due process actions without applying the "shocks the conscience" standard. See *Riggins v. Nevada*, 112 S. Ct. 1810, 1814-16 (1992); *Foucha v. Louisiana*, 112 S. Ct. 1780, 1785-87 (1992). In both of these cases, the Court's substantive due process analysis avoided specific characterization of either the fundamental nature of the interest involved or the standard of review applied.

122. See *Rochin v. California*, 342 U.S. 165, 172 (1952). See also *Collins v. Harker Heights*, 112 S. Ct. 1061, 1069-70 (1992) (quoting the *Rochin* standard as the test of constitutionality under the Due Process Clause).

123. See Henry P. Monaghan, *State Law Wrongs, State Law Remedies, and the Fourteenth Amendment*, 86 COLUM. L. REV. 979, 991 & n.83 (1986) (proposing the question of whether "excessive use of force by police officers constitute[s] a fundamental right case," according to *Rochin*).

124. See *infra* notes 257-307 and accompanying text (discussing the deliberate indifference standard).

the Fourteenth Amendment in the context of police pursuit claims.¹²⁵ More importantly, the Court has never determined a culpable state of mind requirement for all violations of the Due Process Clause, especially for the substantive component of the Due Process Clause.¹²⁶ In other words, the issue is under what circumstances should an injury inflicted by a government official rise to the level of a constitutional violation?¹²⁷ In fact, the Court has labored to produce a doctrinal basis to trigger the protections of substantive due process for arbitrary acts of government officials, and to exclude from the realm of constitutional torts due process claims traditionally governed by common law doctrine.¹²⁸ Ensuing Supreme Court cases confused the lower federal courts'

125. See *supra* note 122-23 and accompanying text. Essentially, any life, liberty, or property interest that the government restricts by law or takes away by an arbitrary action constitutes a constitutional violation because the government was never bestowed constitutional authority to pass such legislation or commit such an act. See NOWAK ET AL., *supra* note 7, at 418. More generally, substantive due process violations comprise those acts by state officials that are prohibited "regardless of the procedures used to implement them." *Daniels v. Williams*, 474 U.S. 327, 331 (1986). Therefore, because the substantive component of the Due Process Clause prevents governmental power from being used for purposes of oppression, a substantive due process claim brought by an injured third party in a police pursuit situation will undoubtedly allege that the government's conduct is inherently impermissible and arbitrary notwithstanding the procedures used to implement these actions. See *Daniels v. Williams*, 474 U.S. 327, 331 (1986); *Madden v. City of Meriden*, 602 F. Supp. 1160, 1166 (D. Conn. 1985); *Ramos v. Gallo*, 596 F. Supp. 833, 837 (D. Mass. 1984).

126. Although the Supreme Court has dealt with the issue, the Court has only stated that the conduct of government officials that amounts to "mere negligence" does not violate the Due Process Clause, because a violation of life, liberty, or property amounts to more than a "mere lack of due care by a state official." *Daniels*, 474 U.S. at 330-31, 334.

127. The term "constitutional tort" characterizes any action for damages for a deprivation of constitutional rights against state and local defendants, normally under 42 U.S.C. § 1983. See Marshall Shapo, *Constitutional Tort: Monroe v. Pape and the Frontiers Beyond*, 60 NW. U. L. REV. 277, 323-24 (1965), for the introduction of the term "constitutional tort." It has subsequently been adopted by the Supreme Court as the descriptive term for cases brought under § 1983. See *Monell v. Department of Social Serv.*, 436 U.S. 658, 691 (1978); William Burnham, *Separating Constitutional and Common Law Torts: A Critique and a Proposed Constitutional Theory of Duty*, 73 MINN. L. REV. 515, 515 n.2 (1989). However, it is outside the scope of this note to define the appropriate boundary between all the harms inflicted by government actors that amount to constitutional violations and harms that constitute ordinary torts. The only importance that the concept of constitutional torts has on this note is to help determine a culpable state of mind requirement for police officers who injure innocent parties while engaged in pursuit of an alleged offender. Although state legislatures and common law courts can alter or restrict a cause of action arising under state statutes or common law, they cannot invalidate a plaintiff's right to recover constitutional tort damages. See generally, Michael Wells & Thomas E. Eaton, *Substantive Due Process and The Scope of Constitutional Torts*, 18 GA. L. REV. 201 (1984).

128. Since the Supreme Court has undoubtedly held that § 1983 contains no state of mind requirement independent of that necessary to state a violation of the underlying constitutional right, it is important that a culpability level be determined. See *Daniels v. Williams*, 474 U.S. 327, 329-30 (1986). See also *Davidson v. Cannon*, 474 U.S. 344, 348 (1986) (holding that, whether substantive or procedural, the protections of the substantive component of the Due Process Clause will be triggered by lack of due care by government officials).

understanding of the appropriate reach of substantive due process and the state of mind necessary to trigger the protections of substantive due process.¹²⁹

C. Actionability of Governmental Misconduct Under the Fourteenth Amendment: The Scope of Constitutional Torts

In the law enforcement framework, where many liberty interests are implicated, the original test to determine whether there was a violation of substantive due process was whether the government actor's conduct shocked the conscience of the court.¹³⁰ This test was first enunciated in *Rochin v. California*.¹³¹ In *Rochin*, the Supreme Court held that the pumping of a suspect's stomach to acquire evidence violated the substantive component of the Due Process Clause because it shocked the conscience, or constituted such brutal force as to "offend even hardened sensibilities."¹³² The Court determined that this type of conduct violated the individual's right to personal security.¹³³ Thus, the Court found that the government's interest in obtaining incriminating

129. See, e.g., *Parratt v. Taylor*, 451 U.S. 327 (1981); *Daniels v. Williams*, 474 U.S. 327 (1986); *Paul v. Davis*, 424 U.S. 693, 701 (1976) (noting a concern that the Fourteenth Amendment would become "a font of tort law to be superimposed upon whatever systems may already be administered by the states"). See also David L. Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 HARV. L. REV. 293, 322-28 (1976), for a persuasive criticism of the *Paul* Court's decision.

130. See, e.g., *Carroll v. Borough of State College*, 854 F. Supp. 1184, 1195 (M.D. Penn. 1994); *Temkin v. Frederick County Comm'rs*, 945 F.2d 716, 723 (4th Cir. 1991); *Madden v. City of Meriden*, 602 F. Supp. 1160, 1166 (D. Conn. 1985); *Ramos v. Gallo*, 596 F. Supp. 833, 837 (D. Mass. 1984).

131. 342 U.S. 165, 172-73 (1952). In *Rochin*, police officers used force in compelling an individual to swallow an emetic in order to make the individual regurgitate incriminating evidence. *Id.* at 166. However, this decision provided little direction in determining when an official's use of force was sufficiently outrageous as to constitute a constitutional violation. See *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973) (articulating factors to aid courts in determining when force violated an individual's constitutional right to personal security).

132. *Rochin*, 342 U.S. at 172. The Court described this right as one of personal security. *Id.* In determining that the conduct under consideration "shock[ed] the conscience," the Court used its own foundational conscience to ascertain the constitutionality of the conduct. Apparently, the Court relied on social norms to determine what constituted egregious conduct, because the Court stated that the Due Process Clause protects those interests that are "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Id.* at 169 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)). This procedure is analogous to the analysis the Court used to decide whether a right contained in the Bill of Rights was fundamental and was incorporated by the Due Process Clause of the Fourteenth Amendment. See, e.g., *Rochin*, 342 U.S. at 169 (stating that the conduct "offend[s] those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses") (quoting *Malinski v. New York*, 324 U.S. 401, 416-17 (1945)).

133. See *Rochin v. California*, 342 U.S. 165, 174 (1952).

evidence did not outweigh the individual's interest in bodily integrity.¹³⁴ Although the language in *Rochin* has been cited in several Supreme Court and lower federal court decisions,¹³⁵ it has provided little guidance in determining precisely when government officials' misconduct violates an individual's liberty interest, constituting a violation of the Due Process Clause.¹³⁶

In cases related to the Procedural Due Process Clause, the Supreme Court has held that the protections of the Due Process Clause are not invoked by a lack of due care, whether procedural or substantive.¹³⁷ Therefore, these cases stand for the proposition that negligent acts by governmental officials do not invoke the protections of the substantive component of the Due Process Clause. In *Daniels v. Williams*¹³⁸ and *Davidson v. Cannon*,¹³⁹ the Supreme Court breathed new life into the theory of substantive due process by reaffirming the fundamental idea that the Due Process Clause embraces a substantive component which enjoins arbitrary governmental actions, regardless of the fairness of the

134. *Rochin*, 342 U.S. at 171-74 (considering society's interests, which "push in opposite directions").

135. Numerous courts of appeals have applied the "shocks the conscience" standard when presented with substantive due process challenges. See *Fagan v. City of Vineland*, 22 F.3d 1296, 1303 (3d Cir. 1994); *Feliciano v. City of Cleveland*, 988 F.2d 649, 657 (6th Cir.), cert. denied, 114 S. Ct. 90 (1993); *Newell v. Brown*, 981 F.2d 880, 886 (6th Cir. 1992), cert. denied, 114 S. Ct. 127 (1993); *Salas v. Carpenter*, 980 F.2d 299, 309 (5th Cir. 1992); *Oladeinde v. City of Birmingham*, 963 F.2d 1481, 1486 (11th Cir. 1992), cert. denied, 113 S. Ct. 1586 (1993); *Cannon v. Taylor*, 782 F.2d 947, 950 (11th Cir. 1986); *Checki v. Webb*, 785 F.2d 534, 538 (5th Cir. 1986) (applying "shocks the conscience" standard to police pursuit cases); *Searles v. Southeastern Pa. Transp. Auth.*, 990 F.2d 789, 794 (3d Cir. 1993). See also *United States v. Salerno*, 481 U.S. 739, 746 (1987) (noting that substantive due process precludes government officials from participating in conduct that "shocks the conscience"); *Whitley v. Albers*, 475 U.S. 312 (1986); *Collins v. City of Harker Heights*, 112 S. Ct. 1061, 1070 (1992) (holding that the "city's alleged failure to train its employees, or to warn them about known risks of harm, was an omission that can properly be characterized as arbitrary, or conscience-shocking in a constitutional sense").

136. See *Fagan*, 22 F.3d at 1308 (declaring that the "shocks the conscience" test is "amorphous and imprecise"); *Rochin v. California*, 342 U.S. 165, 172 (1952) (referring to the "shock the conscience" standard as "indefinite and vague"). Calling for the dismantling of the test, Justice Scalia stated: "If the system that has been in place for 200 years (and remains widely approved) 'shocks' the dissenters' consciences . . . perhaps they should doubt the calibration of their consciences, or, better still, the usefulness of 'conscience-shocking' as a legal test." *Herrera v. Collins*, 113 S. Ct. 853, 875 (1993) (Scalia, J., concurring). See also *Boddie v. Connecticut*, 401 U.S. 371, 393 (1971) (asserting that "[w]ith a 'shocks the conscience' test of constitutionality, citizens must guess what is the law, guess what a majority of nine judges will believe fair and reasonable"); *Rochin*, 342 U.S. 179 (concluding that *Rochin's* holding "is to make the rule turn not on the Constitution but on the idiosyncrasies of the judges who sit here") (Douglas, J., concurring).

137. See *Davidson v. Cannon*, 474 U.S. 344, 347 (1986).

138. 474 U.S. 327 (1986).

139. 474 U.S. 344 (1986).

procedures used to implement them.¹⁴⁰ In *Daniels*,¹⁴¹ the Supreme Court

140. *Daniels*, 474 U.S. at 331. However, before *Daniels*, the Supreme Court addressed the actionability of government official misconduct in *Parratt v. Taylor*, 451 U.S. 527 (1981). *Parratt* was one of the Supreme Court's first efforts to address the culpability level necessary to trigger the protections of the due process clause. In *Parratt*, an inmate at the Nebraska Penal and Correctional Complex ordered a hobby kit, valued at \$23.50, by mail. *Id.* at 530. After delivery, the kit was negligently lost by prison officials, and the prisoner filed a § 1983 action for damages. *Id.* The prisoner's claim was simple and straight forward; he asserted that he had been deprived of property without due process in violation of the Fourteenth Amendment. *Id.* In an opinion by Justice Rehnquist, the Court first addressed the question of whether negligence was actionable under § 1983. *Parratt*, 451 U.S. at 532-34. The Court ruled that although § 1983 does not require scienter, the state of mind is relevant to the underlying constitutional violation asserted through § 1983. *Id.* at 534. These parts of the opinion are sound. See generally Sheldon H. Nahmod, *Section 1983 and the "Background" of Tort Liability*, 50 IND. L.J. 5 (1974). The Court held that the plaintiff's loss, though only negligently caused, was a deprivation of property, which implicated the Due Process Clause. *Parratt*, 451 U.S. at 534-36, 543.

For years following the *Parratt* decision, lower courts contested whether the Court intended that § 1983 would provide a remedy that was a result of simple negligence. Thus, most courts concluded that simple negligence would not support certain § 1983 claims because there was an absence of an underlying constitutional violation. See *Hull v. City of Duncanville*, 678 F.2d 582, 584 (5th Cir. 1982) (finding that simple negligence was not enough to support a § 1983 action); *Mills v. Smith*, 565 F.2d 336, 340 n.2 (8th Cir. 1981) (same). But see *Easton v. City of Boulder*, 776 F.2d 1441, 1447 (10th Cir. 1985) (citing *Parratt* for the proposition that negligence will satisfy a claim under § 1983); *Kidd v. O'Neil*, 774 F.2d 1252, 1256 (4th Cir. 1985) (same); *Lowe v. Letsinger*, 772 F.2d 308, 314 (7th Cir. 1985) (same).

Nevertheless, the Court ultimately concluded that the defendants' conduct did not amount to a violation of the Due Process Clause because an adequate tort remedy existed under state law to seek redress. *Parratt v. Taylor*, 451 U.S. 527, 543 (1981). (noting that the state of Nebraska provided respondent with a means under which he could have sought redress for the violation). Thus, the plaintiff failed to show that the deprivation was without due process. *Id.* at 544.

The Court concluded that the remedies that were provided by the state could have compensated the respondent for the loss he suffered; and therefore held "that they [were] sufficient to satisfy the requirements of due process." *Id.* In his concurring opinion, Justice Powell was of the view that negligent acts could not constitute deprivations within the meaning of the Due Process Clause; instead, only intentional acts could violate due process. *Id.* at 550 (Powell, J., dissenting). Eventually, this view captured a majority of the Court. See *Daniels v. Williams*, 474 U.S. 327, 329-31 (1986).

Parratt is a source of confusion and has been subject to much debate. See, e.g., Monaghan, *supra* note 123, at 979 (noting that "*Parratt v. Taylor* is among the most puzzling Supreme Court decisions of the last decade, and lower federal courts have been thrown into considerable confusion in their efforts to implement it"). While the *Parratt* Court characterized the inmate's complaint as one involving procedural due process, it appears that the inmate was not challenging the absence of some type of hearing relating to the loss of his property. Instead, the inmate was arguing that the officials should not have lost his property at all. Thus, *Parratt* encompassed a challenge to the fact of the property loss, not to the lack of procedures. See Sheldon H. Nahmod, *Due Process, State Remedies, and Section 1983*, 34 KAN. L. REV. 217, 226 (1985). See also Burnham, *supra* note 127, at 521-22 (noting that the *Parratt* Court "reasoned that prior notice and hearing are impossible when random and unauthorized governmental action, whether intentional or negligent, causes losses of liberty, or property") (citing *Hudson v. Palmer*, 468 U.S. 517 (1984)). As a result, there can be no constitutional violation unless there is an absence of an adequate state remedy. *Hudson*, 468

held that the Due Process Clause is not implicated by a *negligent* act of a government official.¹⁴² However, the Court specifically left unanswered the

U.S. at 532-33; *Palmer*, 451 U.S. at 541-42.

Still, *Parratt* stands for the proposition that a negligent deprivation of a person's property by government officials constitutes a violation of due process. *Parratt v. Taylor*, 451 U.S. 527, 536, 543 (1981). See Levinson, *supra* note 7, at 333 (espousing the view that the *Parratt* Court redefined the claim from a substantive due process claim to a procedural due process claim). Professor Levinson further states that a procedural violation claim is absurd when an inmate asserts that he had a right to a hearing before his property was negligently lost. *Id.* See also Burnham, *supra* note 127, at 521 n.30 (asserting that *Parratt* changed what would have been substantive due process claims into procedural due process claims, leaving to substantive due process only those violations that "were so outrageous that no amount of process would cure them").

Viewing *Parratt* as a procedural due process case, the issue was whether Nebraska's provision of a post-deprivation remedy for the inmate's loss defeated his claim of a procedural violation. Previous due process cases had established that, subject to limited exemptions, the state was obligated to provide a hearing before it worked a deprivation of property. *Parratt*, 451 U.S. at 540. In *Parratt*, however, the Court reasoned that because the negligent act of the state official was random and unauthorized, the State could not accurately predict when the loss would occur; therefore, it "is difficult to conceive how the State could provide a meaningful hearing before the deprivation takes place." *Id.* at 541. Thus, the Court reasoned that where a state actor works an unauthorized deprivation, the lack of pre-deprivation process will not inevitably render a deprivation unconstitutional. See *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 436 (1982) (noting that a deprivation must be unauthorized in order for post-deprivation remedies to be relevant under *Parratt*). However, where an unauthorized action deprives a person of her property, the state will be constitutionally liable to the property owner unless the state provides an adequate remedy. *Parratt*, 452 U.S. at 541-42. As a result, it appears that the key to *Parratt* is the established state procedure/random, unauthorized acts dichotomy, rather than the intentional/negligent distinction.

There has been much debate regarding the question of whether *Parratt* involved a substantive due process claim or a procedural due process claim. This debate, although provocative, remains outside the scope of this note.

141. 474 U.S. 327 (1986). In *Daniels*, an inmate slipped on a pillow which a deputy sheriff negligently left on a stairway. *Id.* at 328. The inmate brought a § 1983 action in federal court, alleging that he had been deprived of a liberty interest in freedom from bodily injury in violation of due process of law. *Daniels v. Williams*, 720 F.2d 792, 794 (4th Cir. 1983), *reh'g granted*, 748 F.2d 229 (1984) (en banc).

142. *Daniels*, 474 U.S. at 328 (concluding that the "Due Process Clause is simply not implicated by a negligent act of an official causing unintended loss of or injury to life, liberty, or property"). The Court's rationale was the fear of making the Fourteenth Amendment "a font of tort law." *Id.* at 332 (quoting *Paul v. Davis*, 424 U.S. 693, 701 (1976)).

Concentrating on cases alleging a bare Fourteenth Amendment violation instead of a claim of injury within a specific guarantee of the Bill of Rights, the Court has attempted to distinguish between conduct that only gives rise to a common law tort claim and conduct that gives rise to a constitutional tort claim under § 1983. See, e.g., *Davidson v. Cannon*, 474 U.S. 344, 346-48 (1986) (noting that a prisoner's procedural due process claim was insufficient because negligence cannot give rise to a constitutional deprivation); *Paul*, 424 U.S. at 699-701 (1976) (observing that defamation by a police chief did not deprive plaintiff of a liberty interest protected by the Due Process Clause). One of the Court's approaches to distinguish between constitutional torts and common law tort claims has been to examine the claimed injury and to deny that it is an interest protected by the Fourteenth Amendment. See *Paul*, 424 U.S. at 699-701, 710-12 (concluding that not all torts committed by state officials rise to the level of constitutional tort). Another approach

question of whether something less than intentional conduct was necessary, or whether conduct such as recklessness or gross negligence is enough to invoke the protections of the Due Process Clause.¹⁴³

In the companion case of *Davidson v. Cannon*,¹⁴⁴ the Court stated that the official's failure to exercise reasonable care caused a serious injury, but this lack of care did not approach the type of invidious government conduct that would invoke the protections of the Due Process Clause.¹⁴⁵ The Court emphasized that the word "deprive"¹⁴⁶ means more than simple negligence, it demands that plaintiffs show "an affirmative abuse of power."¹⁴⁷ To support his narrow definition of deprivation, Justice Rehnquist considered the history of the Due Process Clause.¹⁴⁸ He stated that in analyzing history, the "guarantee of due process has been applied to deliberate decisions of government officials to deprive a person of life, liberty, or property."¹⁴⁹ Moreover, he noted that history indicates that the Due Process Clause protects individuals from the

used by the Supreme Court to restrict the reach of the Fourteenth Amendment has been to find the existence of a right protected by the Fourteenth Amendment, but to conclude that due process was provided. See, e.g., *Ingraham v. Wright*, 430 U.S. 651, 682-83 (1977) (recognizing that students had a constitutionally protected liberty interest in freedom from unjustified invasions of their bodily security, but finding that the availability of state remedies satisfied the due process requirement).

143. *Daniels v. Williams*, 474 U.S. 327, 334 n.3 (1986). In *Daniels*, the Court gave no real reason for its conclusion that due process demands more than simple negligence. Instead, the Court spoke of abuses of power and fundamental fairness, never convincingly explaining why negligence could not be an abuse, or why it could not be unfair. *Id.* at 331-32. Justices Brennan, Blackmun, and Marshall took the position that, under a few circumstances, gross negligence, recklessness, or deliberate indifference can give rise to a due process claim. *Davidson v. Cannon*, 474 U.S. 344, 349 (1986) (Brennan, J., dissenting); *Id.* at 356-58 (Blackmun & Marshall, J.J., dissenting). Today, this question remains unanswered. See *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 198 n.10 (1989).

144. 474 U.S. 344 (1986). In *Davidson*, a prisoner was attacked by another inmate after notifying prison officials that this inmate had threatened him with physical force. *Id.* at 345-46. *Davidson* argued that the prison officials' failure to take reasonable steps to protect him from injury deprived him of his "liberty interest in personal security." *Id.* at 346.

145. *Davidson*, 474 U.S. at 347-48.

146. Concurring in both *Daniels* and *Davidson*, Justice Stevens disagreed with the majority on the issue of what is a deprivation. Justice Stevens embraced the view that "deprivation" identified the victim's infringement or loss, not the actor's state of mind. *Daniels v. Williams*, 474 U.S. 327, 341 (1986) (Stevens, J., concurring in judgment in *Daniels* and *Davidson*). According to Stevens, the harm to the prisoner was the same regardless of whether "a pillow is left on a stair negligently, recklessly, or intentionally." *Id.*

147. *Id.* at 330 (quoting *Parratt v. Taylor*, 451 U.S. 527, 548-49 (1981) (Powell, J., concurring)). In his dissent, Justice Brennan espoused the belief that negligence should not be actionable, however, the facts in *Davidson* sufficiently established recklessness or deliberate indifference which establishes a cause of action. *Id.* at 349 (Brennan, J., dissenting).

148. *Daniels v. Williams*, 474 U.S. 327, 331 (1986).

149. *Id.* (citations omitted).

arbitrary exercise of governmental powers.¹⁵⁰ Thus, without an affirmative abuse of power by a government official, a plaintiff should not have a federal forum.¹⁵¹

Daniels and *Davidson* make it clear that negligent conduct cannot cause a deprivation of an interest protected by the Due Process Clause, regardless of the severity of the injuries.¹⁵² Additionally, the Court in *Davidson* interpreted *Daniels* as holding that negligent conduct cannot violate either procedural due process or substantive due process.¹⁵³ Since *Daniels* and *Davidson* determined only that the Due Process Clause does not encompass negligent governmental conduct,¹⁵⁴ these decisions inevitably leave open a number of important questions, such as what other types of governmental conduct will rise to the level of a constitutional violation.¹⁵⁵ In addition to the Due Process Clause, the Court left open the likelihood that there are other constitutional provisions

150. *Id.*

151. *Id.* at 330 (quoting *Parratt v. Taylor*, 451 U.S. 527, 548-49 (1981) (Powell, J., concurring)). However, some courts have held that the Due Process Clause protects against "negative" liberty deprivations based on a right to be left alone, not "positive" liberty deprivations, based on the right to receive protective services. *See, e.g., Walker v. Rowe*, 791 F.2d 507, 510 (7th Cir. 1986) (noting that the Bill of Rights is "a charter of negative liberties") (citing *Bowers v. DeVito*, 686 F.2d 616 (7th Cir. 1982)).

152. *Daniels*, 474 U.S. at 328; *Davidson v. Cannon*, 474 U.S. 344, 347-48 (1986).

153. *Davidson*, 474 U.S. at 348 (asserting that the "protections of the Due Process Clause, whether procedural or substantive, are just not triggered by lack of due care by prison officials"). In *Daniels*, Justice Rehnquist mentioned that the Due Process Clause not only required procedural fairness, but also guarded against oppressive conduct. *Daniels*, 474 U.S. at 331 (citing *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 277 (1856) (discussing due process under the Fifth Amendment)).

154. *Daniels v. Williams*, 474 U.S. 327, 328 (1986). According to *Daniels* and *Davidson*, if the contested conduct is intentional, it is "not necessary for the district court to make any other state of mind finding." *Sourbeer v. Robinson*, 791 F.2d 1094, 1105 (3d Cir. 1986). "We know of no authority for the proposition that an intentional deprivation of life, liberty or property does not give rise to a due process violation because the failure to provide due process was without fault." *Id.*

It must be noted that the no-negligence rule delineated in *Daniels* and *Davidson* does not impose a scienter or other culpability requirement nullifying the professional judgment standard delineated in *Youngberg v. Romeo*, 457 U.S. 307 (1987), which is utilized to determine the constitutional rights of involuntarily committed mental patients. *Estate of Conners v. O'Connor*, 846 F.2d 1205 (9th Cir. 1988), *cert. denied*, 489 U.S. 1065 (1989). Conversely, the Fifth Circuit concluded that the no-negligence due process rule applies to claims asserted by involuntarily committed mental patients because there is no "*Youngberg* exception to *Daniels*." *Feagley v. Waddill*, 868 F.2d 1437, 1440 (5th Cir. 1989).

155. The *Daniels* Court failed to resolve whether "something less than intentional conduct," was necessary, or whether recklessness, gross negligence, or deliberate indifference was enough to invoke the protections of due process. *Daniels*, 474 U.S. at 334 n.3. Refuting Petitioner's argument that culpability levels such as willful, wanton, and gross negligence are subtle distinctions that even puzzle scholars, the Court noted that the difference between negligence and intent is "abundantly clear;" and therefore, declined to "trivialize the Due Process Clause in an effort to simplify constitutional litigation." *Id.* at 335.

that may be violated by a government official's lack of care.¹⁵⁶ Not surprisingly, these cases have generated an abundance of important lower court litigation regarding the culpability of governmental misconduct.¹⁵⁷ Most notably, however, in the lower federal courts, abusive police misconduct in the area of police pursuits has invoked a tide of substantive due process claims, particularly where no specific provision of the Bill of Rights is applicable.¹⁵⁸ Specifically, in pursuit cases, lower federal courts are assiduously struggling to determine the culpability level necessary to invoke the protections of the substantive component of the Due Process Clause.

IV. SUBSTANTIVE DUE PROCESS IN THE LOWER FEDERAL COURTS: THE ACTIONABILITY OF POLICE MISCONDUCT IN PURSUIT CASES

A. *The Shocks the Conscience Standard*

Routinely, police officers use their vehicles to pursue individuals who flee when the police signal them to stop. All too often, these pursuits end only when drivers, passengers, or other innocent bystanders are either severely injured or killed.¹⁵⁹ When these injured parties seek compensation for the harm caused by the pursuit, they claim that the police officers violated their liberty interests protected under the Due Process Clause of the Fourteenth Amendment.¹⁶⁰ Yet, the Supreme Court has never precisely articulated factors for determining when acts by police officers or other government officials rise to the level of a

156. *Daniels*, 474 U.S. at 334.

157. The majority of lower courts have taken the position that *Daniels* and *Davidson* require that there be an "element of deliberateness in directing misconduct toward the plaintiff" before the Due Process Clause is invoked. *See, e.g., Torres Ramirez v. Bermudez Garcia*, 898 F.2d 224, 227 (1st Cir. 1990) (recognizing a recklessness or callous indifference standard); *Harris v. Maynard*, 843 F.2d 414, 416 (10th Cir. 1988) (observing the standard of wanton or obdurate disregard or deliberate indifference); *Nicaragua v. Reagan*, 859 F.2d 929, 949 (D.C. Cir. 1988) (holding that "some reckless acts may constitute due process violations while others may not"). *But see* *Washington v. District of Columbia*, 802 F.2d 1478, 1481 (D.C. Cir. 1986) (asserting that recklessness is not enough). *See also Archuleta v. McShan*, 897 F.2d 495, 498 (10th Cir. 1990). The *Archuleta* court noted that mere callousness or excessive zeal which amounts to an abuse of official power may not be enough to establish liability for a due process claim in the absence of the requisite scienter. *Id.* Therefore, a bystander who witnessed police action but was not himself subjected to that action cannot assert the kind of deliberate deprivation of rights needed to support a due process claim. *Id.*

158. *See infra* notes 159-211 and accompanying text.

159. *See supra* note 2 and accompanying text (providing statistics regarding police pursuits).

160. *See, e.g., Roach v. City of Fredericktown*, 882 F.2d 294, 296-97 (8th Cir. 1989); *Jones v. Sherrill*, 827 F.2d 1102, 1106-07 (6th Cir. 1987); *Cannon v. Taylor*, 782 F.2d 947, 948 (11th Cir. 1986); *Britt v. Little Rock Police Dep't*, 721 F. Supp. 189, 192-95 (E.D. Ark. 1989). Typically, these actions are brought under 42 U.S.C. § 1983. However, it is axiomatic that § 1983 "is not itself a source of substantive rights, but a method for vindicating federal rights elsewhere conferred." *See Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979).

substantive due process violation.¹⁶¹ In fact, the lower federal courts are divided regarding the appropriate culpability level necessary to trigger the substantive component of the Due Process Clause.¹⁶² When considering police pursuits where an innocent bystander is injured, lower federal courts have applied numerous tests to determine whether the officer's conduct violated the bystander's substantive due process rights.¹⁶³ Regularly, these courts have applied standards such as shocks the conscience,¹⁶⁴ recklessness,¹⁶⁵ and gross negligence.¹⁶⁶ An examination of these cases will demonstrate how the lower federal courts have attempted to resolve this complex area of substantive due process jurisprudence.

161. See, e.g., *Daniels v. Davidson*, 474 U.S. 327, 334 n.3 (1986) (reserving the question of "whether something less than intentional conduct, such as recklessness or 'gross negligence,' is enough to trigger the protections of the Due Process Clause").

However, in contrast to claims brought under the Fourteenth Amendment, the Supreme Court has articulated factors for personal security claims brought under the Fourth Amendment, *Graham v. Connor*, 490 U.S. 386, 395 (1989) (noting that "all claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach"), and the Eighth Amendment, *Estelle v. Gamble*, 429 U.S. 97, 106 (1976) (holding that if prison officials showed "deliberate indifference" to an inmate's medical needs, such indifference would offend "evolving standards of decency" contrary to the Eighth Amendment). Currently, substantive due process challenges to the deliberate use of excessive force can only occur in cases involving the treatment of pretrial detainees. See *Graham*, 490 U.S. at 395 n.10 (concluding that it is apparent "that the Due Process Clause protects a pretrial detainee from the use of excessive force that amounts to punishment").

Additionally, until the Supreme Court's decision in *Graham v. Connor*, various circuit court opinions applied the "shocks the conscience" standard to excessive force claims. See, e.g., *Justice v. Dennis*, 834 F.2d 380 (4th Cir. 1987) (en banc); *Hinojosa v. City of Terrell*, 834 F.2d 1223 (5th Cir. 1988); *Trujillo v. Goodman*, 825 F.2d 1453 (10th Cir. 1987); *Robison v. Via*, 821 F.2d 913 (2d Cir. 1987); *Lynch v. Cannatella*, 810 F.2d 1363 (5th Cir. 1987); *Gaut v. Sunn*, 810 F.2d 923 (9th Cir. 1987); *Burton v. Livingston*, 791 F.2d 97 (8th Cir. 1986); *Leslie v. Ingram*, 786 F.2d 1533 (11th Cir. 1986); *Fernandez v. Leonard*, 784 F.2d 1209 (1st Cir. 1986); *Owens v. Atlanta*, 780 F.2d 1564 (11th Cir. 1986); *Griffin v. Hilke*, 804 F.2d 1052 (8th Cir. 1986); *New v. Minneapolis*, 792 F.2d 724 (8th Cir. 1986); *Rutherford v. City of Berkeley*, 780 F.2d 1444 (9th Cir. 1986); *Patzner v. Burkett*, 779 F.2d 1363 (8th Cir. 1985); *Fundiller v. Cooper City*, 777 F.2d 1436 (11th Cir. 1985). See also *United States v. Salerno*, 481 U.S. 739, 746 (1987) (recognizing that "substantive due process prevents the government from engaging in conduct that 'shocks the conscience' . . ."). See generally R. Wilson Freyermuth, *Rethinking Excessive Force*, 1987 DUKE L.J. 692.

162. See *supra* note 25 and accompanying text (noting cases demonstrating the split in the federal circuits).

163. See *supra* notes 23-25 and accompanying text (discussing the various standards lower federal courts have used to determine whether governmental conduct rises to the level of a substantive due process violation).

164. See *Fagan v. City of Vineland*, 22 F.3d 1296, 1303 (3d Cir. 1994) (en banc).

165. See *Medina v. City and County of Denver*, 960 F.2d 1493, 1496 (10th Cir. 1992).

166. See *Jones v. Sherrill*, 827 F.2d 1102, 1106 (6th Cir. 1987).

Recently, in *Fagan v. City of Vineland*,¹⁶⁷ the Third Circuit, en banc, addressed the question of when the conduct of police officers or other government employees violates the substantive component of the Due Process Clause in police pursuit cases.¹⁶⁸ On rehearing, the *Fagan* court held that due process would be violated only if the pursuing officer's conduct "amounts to an abuse of official power that shocks the conscience."¹⁶⁹ Although the court was cognizant of the undefined and ambiguous inquiry that the shocks the conscience test entails, the court concluded that it was bound to follow such a standard¹⁷⁰ because it was unanimously reaffirmed by the Supreme Court in *Collins v. City of Harker Heights*.¹⁷¹ Furthermore, in defining the narrow reach of its holding, the court stressed that the application of the reckless disregard standard, which the court had uniformly applied in the past for determining substantive

167. 22 F.3d 1296 (3d Cir. 1994) (en banc). *Fagan* involved a high speed police chase that resulted in a collision between a vehicle driven by the suspect and a vehicle driven by an innocent passerby. *Id.* at 1300. As a result of the collision, innocent bystanders were killed. *Id.* Subsequently, the plaintiffs brought a damage action under 42 U.S.C. § 1983 alleging that various Vineland police officers violated their substantive due process rights by recklessly conducting a high speed pursuit in violation of the Attorney General's guidelines. *Id.* at 1301.

168. *Fagan*, 22 F.3d at 1303. Earlier, the original panel of *Fagan* was divided on the issue of the standard for liability under section 1983 for substantive due process violations in police pursuit cases. The majority held that the applicable standard is whether the police officers acted with a "reckless indifference" to public safety. *Id.* at 1302. On the other hand, the dissent took the position that substantive due process is violated only by conduct that "shocks the conscience." *Id.*

169. *Id.* at 1303 (citing *Collins v. City of Harker Heights*, 112 S. Ct. 1061, 1069 (1992)). See also *Temkin v. Frederick County Comm'rs*, 945 F.2d 716, 720 (4th Cir. 1991), cert. denied, 112 S. Ct. 1172 (1992); *Checki v. Webb*, 785 F.2d 534, 538 (5th Cir. 1986). The *Fagan* court noted that the "shocks the conscience" test applies to situations where the government official's conduct was an affirmative act and where the injury was caused by the governmental actor's omission. *Fagan*, 22 F.3d at 1304.

170. *Fagan v. City of Vineland*, 22 F.3d 1296, 1306 (3d Cir. 1994) (recognizing that the standard of reckless indifference is not a sufficient basis upon which to hold police officers liable for a police pursuit under the Due Process Clause). See also *Herrera v. Collins*, 113 S. Ct. 853, 876, 878-79 (1993) (recognizing that the execution of an innocent defendant is conduct that is more shocking than stomach pumping in *Rochin*) (Blackmun, J., dissenting).

171. 112 S. Ct. 1061 (1992). In *Collins*, the widow of a city sanitation worker who died of asphyxia argued that the city violated her husband's substantive due process rights. Specifically, she alleged that the city violated the Due Process Clause by exposing her husband to unreasonable risks, manifesting deliberate indifference to his safety, failing to train its employees about the dangers of working in sewer lines and manholes, not providing safety equipment at job sites, and not providing safety warnings. *Id.* at 1063. In finding that there was no due process violation, the Supreme Court stressed that *Collins*'s "claim is analogous to a fairly typical state law tort claim" and that it had "previously rejected claims that the Due Process Clause should be interpreted to impose federal duties that are analogous to those traditionally imposed by state tort law." *Id.* at 1070. The Court declared that substantive due process principles are implicated only by actions or omissions "that can properly be characterized as arbitrary, or conscience-shocking, in a constitutional sense." *Id.*

due process violations,¹⁷² was limited to cases where the victim was in custody.¹⁷³ Undoubtedly, the court was hesitant to expand the concept of substantive due process to police pursuit cases because of the Supreme Court's repeated warnings against liberal interpretations of the Due Process Clause.¹⁷⁴ Thus, in the Third Circuit, *Fagan* stands for the proposition that the shocks the conscience standard is the constitutional touchstone against which substantive due process violations in police pursuit cases should be measured.¹⁷⁵

Conversely, the dissent in *Fagan* contended that reckless indifference is the appropriate standard for determining substantive due process violations in police pursuit cases.¹⁷⁶ In reaching its conclusion, the dissent argued that the majority's reliance on the shocks the conscience standard delineated in *Collins v. City of Harker Heights* was misplaced.¹⁷⁷ The dissent noted that the *Collins*

172. *Fagan*, 22 F.3d at 1303 (stating that "with the exception of one recent case, the opinions of this court have routinely used reckless indifference as the standard by which the courts should determine whether the conduct of police or other governmental employees violates the Due Process Clause of the Constitution").

173. *Id.* at 1306 (noting that although it could be said "that the judicial conscience is shocked by a governmental employee's reckless disregard of the constitutional rights of an individual in custody, [custody cases] are not analogous . . . to the police pursuit cases"). Moreover, the *Fagan* court observed that the application of the "reckless indifference" standard is not applicable because it is "grounded in tort law, not in constitutional principles." *Id.* at 1306-07. See also *Temkin v. Frederick County Comm'rs*, 945 F.2d 716, 721 (4th Cir. 1991) (asserting that "the standard of care owed in the context of incarceration is of limited value [in police pursuit cases]"). But see *Medina v. City & County of Denver*, 960 F.2d 1493, 1496 (10th Cir. 1992) (relying on a custody case when adopting the "reckless intent" standard for police pursuit cases) (relying on *Harris v. Maynard*, 843 F.2d 414, 416 (10th Cir. 1988)); *Fallon*, *supra* note 90, at 324 (espousing the view that "no agreed framework has emerged for identifying when relatively isolated official acts offend substantive due process, [although] [t]he Court has established that conscience-shocking violates due process").

174. *Fagan v. City of Vineland*, 22 F.3d 1296, 1306 n.6 (3d Cir. 1994) (declaring that the *Fagan* court "cannot ignore the Supreme Court's repeated warnings against an overly generous interpretation of the substantive component of the Due Process Clause") (citing *Collins v. City of Harker Heights*, 112 S. Ct. 1061, 1068 (1992)); *Albright v. Oliver*, 114 S. Ct. 807, 812 (1994). See also *Wroblewski v. City of Washburn*, 965 F.2d 452, 457 (7th Cir. 1992) (noting that "[t]he Supreme Court has insisted upon caution and restraint in courts' application of substantive due process").

175. *Fagan*, 22 F.3d at 1304. See, e.g., *Foucha v. Louisiana*, 112 S. Ct. 1780, 1809 (1992) (Thomas, J., dissenting); *Herrera v. Collins*, 113 S. Ct. 853, 879 (1993) (Blackmun, J., dissenting).

176. *Fagan*, 22 F.3d at 1309, (Cowen, J., dissenting, joined by Becker, Scirica, and Lewis) (disagreeing with the proposition that the "conscience-shocking" conduct is the only conduct that constitutes an unconstitutional deprivation . . .). Additionally, the dissent acknowledged that conduct that "shocks the conscience" more than satisfies any constitutional standard "whereby a deprivation can be found," but also adhered to the belief that "reckless indifference" is the appropriate standard in police pursuit cases. *Id.* at 1309.

177. *Id.* at 1311-12 (noting that the focus of *Collins* "on the lack of a constitutional duty on the part of the city . . . for without such a duty there cannot be a claim under § 1983 against the city for a violation of substantive due process"). Moreover, the dissent argued that *Collins* did not "establish a 'shocks the conscience' test; but instead, repudiated the proposition that "the Federal

decision referred to the phrase “shocks the conscience” only once, and when the phrase was used, the Court combined it with the word “arbitrary.”¹⁷⁸ Thus, *Collins* indicates that conscience-shocking conduct or arbitrary conduct would be enough to trigger the protections of the Due Process Clause.¹⁷⁹ Ostensibly, the dissent declared that the *Collins* holding was narrowly defined to include only those situations where the government’s conduct constituted an omission instead of a deliberate action.¹⁸⁰

The dissent’s treatment of *Collins* suggests that not all unauthorized deprivations of liberty and property by governmental officials constitute a substantive due process violation.¹⁸¹ Rather, only those deprivations in which the duties of care created by the Due Process Clause are breached constitute a substantive due process violation.¹⁸² Further, the dissent declared that the Supreme Court has never applied the shocks the conscience test in a § 1983

Constitution imposes a duty on the city to provide its employees with minimal levels of safety in the work place.” *Id.* at 1311. See also *D.R. and L.R. v. Middle Bucks Area Vocational Technical Sch.*, 972 F.2d 1364, 1377 (3d Cir. 1992) (noting that after *Collins*, the Third Circuit stated that “in *DeShaney* the Supreme Court rejected the ‘shock the conscience’ test of *Rochin* . . .”). Additionally, the dissent claimed that “[w]hile it is clear conduct that ‘shocks the conscience’ satisfies the ‘intentional conduct’ standard endorsed by the Supreme Court,” to make this conduct a necessary standard would, in certain circumstances, compel more than “intentional conduct.” See *Fagan*, 22 F.3d at 1319 (Cowen, J., dissenting).

178. See *Fagan*, 22 F.3d at 1312. See also *Collins v. City of Harker Heights*, 112 S. Ct. 1061, 1070 (1992) (noting “that the city’s alleged failure to train its employees, or to warn them about known risks of harm, was an omission that can[not] properly be characterized as arbitrary, or conscience-shocking, in a constitutional sense”).

179. *Fagan*, 22 F.3d at 1312. (emphasis added).

180. *Id.* at 1312 (concluding that “the *Collins* Court characterized the city’s conduct as a mere omission”) (Cowen, J., dissenting). In addition, the Third Circuit, in *Searles v. Southeastern Pa. Transp. Auth.*, 990 F.2d 789 (3d Cir. 1993), used the “shocks the conscience” test to reject the plaintiffs’ argument that the “Constitution imposes a duty on a municipal transit authority to provide its passengers with minimal levels of safety and security” *Id.* at 792. Thus, the *Collins* and *Searles* decisions support the dissent’s argument that the “shocks the conscience” standard is limited to situations where harm is caused by governmental omission.

However, the majority rejected any attempt to limit the reach of *Collins* to only circumstances where the government’s conduct constituted an omission. *Fagan*, 22 F.3d at 1304 (concluding that when the Supreme Court proclaimed the “shocks the conscience” standard, it intended no distinction between the application of the test to “situations where the government officials’ affirmative act is the direct cause of the constitutional harm and those where the harm is caused by governmental omission”).

181. See *Fagan v. City of Vineland*, 22 F.3d 1296, 1314 (3d Cir. 1994) (Cowen, J., dissenting).

182. *Id.* at 1314 (contending that in the absence of a constitutional duty on the part of governmental employees, “there was no need to establish any test for the appropriate standard of care”). See also *Burnham*, *supra* note 127, at 548-54.

action.¹⁸³ Still, what remains unclear is whether the shocks the conscience standard is applicable to § 1983 actions, and whether such a standard is confined only to those situations where the government has failed to take action.¹⁸⁴

In addition to *Fagan*, other federal circuits and lower courts have held that in police pursuit cases, substantive due process principles are implicated only by conduct that shocks the conscience.¹⁸⁵ For instance, in *Temkin v. Frederick County Commissioners*,¹⁸⁶ the court held that the plaintiff's due process claim, which alleged that the car she was driving was struck by the vehicles of a fleeing suspect and the pursuing officer, was governed by the shocks the conscience test.¹⁸⁷ The court characterized the officer's conduct as "disturbing and lacking in judgment," but falling short of conscience-shocking.¹⁸⁸ Justifying its application of the shocks the conscience standard, the court relied

183. *Fagan*, 22 F.3d at 1311 (noting that there exists "no precedent for any 'shocks the conscience' test in a § 1983 case for the Supreme Court to pay homage . . ."). The dissent observed that if the "shocks the conscience" standard has any remaining viability, it should be limited to "criminal cases where the exclusion of evidence is at issue." *Id.* at 1316. Furthermore, the "shocks the conscience" test was rejected in "cases that most closely resembled the facts of the *Rochin* case." *Id.* (citing *Mapp v. Ohio*, 367 U.S. 643 (1961); *Graham v. Connor*, 490 U.S. 386 (1989)). In determining that the "shocks the conscience" standard was inapplicable, the dissent espoused the view that the phrase was first employed in *Rochin* in 1952, before the "Fourth Amendment was incorporated into the Fourteenth Amendment." *Fagan*, 22 F.3d at 1311 (citing *Mapp v. Ohio*, 367 U.S. 643 (1961)).

184. See *Collins v. City of Harker Heights*, 112 S. Ct. 1061, 1070 (1992) (holding that the Court is "not persuaded that the city's alleged failure to train its employees, or to warn them about known risks of harm, was an omission that can properly be characterized as arbitrary, or conscience-shocking, in a constitutional sense").

185. See, e.g., *Temkin v. Frederick County Comm'rs.*, 945 F.2d 716, 720 (4th Cir. 1991); *Checki v. Webb*, 785 F.2d 534, 538 (5th Cir. 1986); *Carroll v. Borough of State College*, 854 F. Supp. 1184, 1195 (M.D. Penn. 1994). For applications of the "shocks the conscience" standard outside the framework of police pursuit cases, see *Feliciano v. City of Cleveland*, 988 F.2d 649, 657 (6th Cir. 1993) (subjecting police academy cadets to a surprise urinalysis test), *cert. denied*, 114 S. Ct. 90 (1993); *Coleman v. Wirtz*, 745 F. Supp. 434, 443 (N.D. Ohio 1990); *Reese v. Kennedy*, 865 F.2d 186, 187-88 (8th Cir. 1989) (involving police officers' forced eviction of the plaintiff from her home).

186. 945 F.2d 716 (4th Cir. 1991). In *Temkin*, a police officer who observed a car spinning its wheels as it left a gas station pursued the vehicle with its lights and sirens activated. *Id.* at 718. Although the officer was informed during the course of the ensuing pursuit that the driver had only stolen \$17.00 worth of gas, the pursuit reached speeds ranging from 65 to 105 miles per hour over "a narrow, two-lane highway traversing an area of varying population," which ended when both drivers lost control over their vehicles, causing "severe and permanent injuries" to an innocent bystander. *Id.*

187. *Id.* at 720. The *Temkin* court noted that although the Fourth Circuit had not embraced the "shocks the conscience" standard in the past, it had adopted such a test in another context. *Id.* at 721 (citing *Weller v. Department of Social Serv.*, 901 F.2d 387, 391 (4th Cir. 1990) (holding that an agency's act of removing an abused child from his father's home "does not shock the conscience . . .").

188. *Id.* at 723.

on other circuit courts which had scrutinized the substantive due process issue in police pursuit cases.¹⁸⁹ Additionally, while the *Temkin* court adopted a shocks the conscience standard for police pursuit situations, it retained the deliberate indifference standard for custody cases.¹⁹⁰ Apparently, the court was persuaded by dicta contained in earlier Supreme Court cases¹⁹¹ which stated that cases involving automobile accidents would not invoke the Due Process Clause merely because one of the drivers is a government official.¹⁹² Similarly, in *Checki v. Webb*,¹⁹³ the Fifth Circuit stated that the action of an unmarked police car in tailgating a driver who had accelerated to speeds in excess of one hundred miles per hour in response to the officer's approach did not alone raise any substantive due process claims.¹⁹⁴ However, the court declined to grant the defendant police officers summary judgment because after the car was finally stopped, one of the pursuing officers struck the bystander with his revolver.¹⁹⁵ In its application of the shocks the conscience standard,

189. See, e.g., *Cannon v. Taylor*, 782 F.2d 947, 950 (11th Cir. 1986) (holding that negligent or even grossly negligent conduct is not enough to constitute a cause of action for a violation of a federal right); *Roach v. City of Fredericktown*, 882 F.2d 294, 297 (8th Cir. 1989) (holding that the pursuing officer's "conduct does not rise to the level of gross negligence and, therefore, most certainly does not rise to the level of conduct which would sustain a claim under section 1983"); *Jones v. Sherrill*, 827 F.2d 1102, 1106 (6th Cir. 1987) (holding that the police officers' conduct in pursuing the suspect did not rise to the level of gross negligence or outrageous conduct necessary to sustain a § 1983 claim); *Walton v. Salter*, 547 F.2d 824, 825 (5th Cir. 1976) (holding that an isolated act of negligence, even if willful and wanton, failed to state a § 1983 claim). In a somewhat cursory fashion, the *Temkin* court assiduously adhered to the conclusion that *Cannon*, *Roach*, *Jones*, and *Walton*, considered together, stand for the proposition that the "shocks the conscience" standard should be applied to "'chase cases' involving the police." See *Temkin*, 945 F.2d at 723. Undoubtedly, the *Temkin* court's treatment of these cases justified its adoption of a standard higher than "recklessness" or "gross negligence." Cf. *Fagan v. City of Vineland*, 22 F.3d 1296, 1327 (3d Cir. 1994) (stating that *Cannon* and *Roach* "have held that gross negligence is not sufficient" to trigger the protections of the Due Process Clause).

190. *Temkin*, 945 F.2d at 721 (noting that the "deliberate indifference" standard is limited to incarceration cases).

191. See *Parratt v. Taylor*, 451 U.S. 527 (1981). See also *infra* note 281 and accompanying text. See also *Paul v. Davis*, 424 U.S. 693, 701 (1976) (stating that under a broad view of life, liberty, and property, the Fourteenth Amendment would become "a font of tort law to be superimposed upon whatever systems may already be administered by the States"). Thus, the fear that automobile accidents will become a constitutional issue is a recurring concern of the Court. See *Wells & Eaton*, *supra* note 127.

192. See *Temkin v. Frederick County Comm'rs.*, 945 F.2d 716, 722 (4th Cir. 1991) (citing *Parratt v. Taylor*, 451 U.S. 527, 544 (1981) (asserting that a party who is "involved in nothing more than an automobile accident with a state official" has no constitutional cause of action); *Paul v. Davis*, 424 U.S. 693, 698 (1976) (declaring that "survivors of an innocent bystander . . . negligently killed by a sheriff driving a government vehicle" have no constitutional claim).

193. 785 F.2d 534 (5th Cir. 1986).

194. *Checki*, 785 F.2d at 538 (noting that "where a police officer uses a police vehicle to terrorize a civilian, and he has done so with malicious abuse of official power shocking to the conscience, a court may conclude that the officers have crossed the 'constitutional line'").

195. *Id.* at 536.

the court reasoned that a police officer's conduct rises to the level of a constitutional violation when the officer terrorizes a civilian in a malicious manner.¹⁹⁶

B. The Recklessness Standard

Other lower federal courts have held that either recklessness or gross negligence is sufficient to invoke the protections of the Due Process Clause.¹⁹⁷ In *Medina v. City and County of Denver*,¹⁹⁸ for example, the court ruled that where the police act recklessly in a high speed chase and injure or kill the suspect or a third party bystander, a cause of action exists for deprivation of the innocent bystander's liberty interest protected under the Due Process Clause.¹⁹⁹ The court ruled that reckless intent does not require that the actor intended to harm a particular individual.²⁰⁰ Rather, it is sufficient that the actor was aware of a known or obvious risk that was so great that it was highly probable

196. *Id.* at 538 (noting that a "[f]actual development . . . could lead to a jury question whether [the] car-chasing actions were 'inspired by malice . . . so that it amounted to an abuse of official power that shocks the conscience'").

197. Most circuit courts take the position that recklessness or deliberate indifference may give rise to a due process claim. See, e.g., *Wood v. Ostrander*, 851 F.2d 1212, 1214-15 (9th Cir. 1988); *Germany v. Vance*, 868 F.2d 9, 17-18 (1st Cir. 1989); *Torres Ramirez v. Bermudez Garcia*, 898 F.2d 224, 227 (1st Cir. 1990); *Baas v. Jackson*, 790 F.2d 260, 262-63 (2d Cir. 1986); *Davidson v. O'Lone*, 752 F.2d 817, 828 (3d Cir. 1984), *aff'd*, 474 U.S. 344 (1986); *White v. Rochford*, 592 F.2d 381, 385 (7th Cir. 1979); *Archie v. City of Racine*, 847 F.2d 1211, 1218, 1226 (7th Cir. 1988); *Medeiros v. Town of South Kingstown*, 821 F. Supp. 823, 827 (D.R.I. 1993); *Britt v. Little Rock Police Dep't*, 721 F. Supp. 189, 192 (E.D. Ark. 1989); *Frye v. Town of Akron*, 759 F. Supp. 1320, 1324-25 (N.D. Ind. 1991). Additionally, other circuits have taken the position that even gross negligence may serve as the basis of a due process violation. See, e.g., *Jones v. Sherrill*, 827 F.2d 1102, 1106 (6th Cir. 1987); *Hammond v. County of Madera*, 859 F.2d 797, 803 (9th Cir. 1988); *Fargo v. City of San Juan Bautista*, 857 F.2d 638, 641 (9th Cir. 1988); *Metzger v. Osbeck*, 841 F.2d 518, 520 n.1 (3d Cir. 1988); *Vinson v. Campbell County Fiscal Ct.*, 820 F.2d 194, 199-200 (6th Cir. 1987); *Colburn v. Upper Darby Township*, 838 F.2d 663, 668 & n.3 (3d Cir. 1988); *Nishiyama v. Dickson County, Tenn.*, 814 F.2d 277, 282 (6th Cir. 1987). However, two circuit courts of appeal have held that "gross negligence" is not sufficient, but they have not indicated whether recklessness would suffice. See, e.g., *Roach v. City of Fredericktown*, 882 F.2d 294, 297 (8th Cir. 1989); *Cannon v. Taylor*, 782 F.2d 947, 950 (11th Cir. 1986).

198. 960 F.2d 1493 (10th Cir. 1992). In *Medina*, an innocent bystander, who was riding a bicycle, brought an action under 42 U.S.C. § 1983 against the City and County of Denver, and several Denver police officers for injuries that occurred when the bystander was hit by a suspected felon during a high speed automobile chase. *Id.* at 1494.

199. *Medina*, 960 F.2d at 1495-96. See also *Apodaca v. Rio Arriba County Sheriff's Dep't*, 905 F.2d 1445, 1446-47 n.3 (10th Cir. 1990) (stating that "reckless conduct in police pursuit cases must involve true indifference to the risks created").

200. *Medina v. City & County of Denver*, 960 F.2d 1493, 1496 (10th Cir. 1992) (stating that the plaintiff does not need to show that the governmental actor intended him harm, only that reckless conduct "must be directed toward the plaintiff").

that serious harm would follow.²⁰¹

The court concluded that reckless conduct could be considered directed toward a plaintiff if: (1) the plaintiff belongs to a definable group; (2) the government's conduct places members of that group in substantial risk of serious harm; (3) the risk was prominent; and (4) the governmental actor acted in reckless disregard of that risk.²⁰² Additionally, the *Medina* court stated in dicta that police liability in such cases will be "relatively rare."²⁰³ However, an officer may be found liable if the suspect's conduct can be "directly and immediately" linked to the officer's conduct, and if the officer's pursuit of the suspect was unreasonable under the circumstances.²⁰⁴

C. The Gross Negligence Standard

In *Jones v. Sherrill*,²⁰⁵ where police officers' pursuit of a fleeing suspect ended in the death of an innocent bystander, the court applied what it called a gross negligence test.²⁰⁶ The court found that the facts were insufficient to charge police officers with outrageous or arbitrary conduct because the officers' intent in initiating the chase was to insure public safety.²⁰⁷ While gross negligence is not easy to define,²⁰⁸ the court reasoned that a person may be

201. *Id.* (noting that an act is reckless "when the actor does not care whether the other person lives or dies, despite knowing that there is a significant risk of death" or grievous bodily harm). See also *Ross v. United States*, 910 F.2d 1422, 1433 (7th Cir. 1990) (holding that "intent is not always required to establish a due process violation; our precedents have accepted recklessness as a proxy for actual intent").

202. *Medina*, 960 F.2d at 1496 (citing *Nishiyama v. Dickson County Tenn.*, 814 F.2d 277, 282 (6th Cir. 1987)). See also RESTATEMENT (SECOND) OF TORTS § 500 stating that "reckless indifference" exists when a person acts:

[I]n reckless disregard of the safety of another if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.

Id.

203. See *Medina*, 960 F.2d at 1499.

204. *Id.*

205. 827 F.2d 1102 (6th Cir. 1987). In *Jones*, police officers observed the defendant's automobile being driven in an unsafe manner. *Id.* at 1103. When the police tried to stop the vehicle, Sherrill fled, initiating a pursuit involving speeds up to 135 miles per hour in city traffic. *Id.* at 1104. The chase ended when Sherrill's car crossed the center line and collided with Jones' car, causing Jones' death. *Id.*

206. *Id.* at 1106 (asserting that "[n]egligence does not become 'gross' just by saying so . . . [W]e must ensure that gross negligence is something more than simple negligence . . .").

207. *Id.* (holding that the government conduct in pursuing Sherrill did not rise to the level of gross negligence and "outrageous conduct . . . which can state a . . . claim . . .").

208. See *Nishiyama v. Dickson County, Tenn.*, 814 F.2d 277, 282 (6th Cir. 1987) (acknowledging that the phrase "'gross negligence' evades easy definition").

liable if "he intentionally does something unreasonable with disregard to a known risk or a risk so obvious that he must be assumed to have been aware of it, and of a magnitude such that it is highly probable that harm will follow."²⁰⁹ This same standard is reflected in the Eleventh Circuit's due process analysis in *Cannon v. Taylor*.²¹⁰ In *Cannon*, the court held that an individual injured in an automobile accident which was caused by the negligent or grossly negligent conduct of a police officer did not violate a federal constitutional right.²¹¹

Unfortunately, adding to the lower courts' difficulty in ascertaining the appropriate culpability level needed to invoke the protections of the Due Process Clause, is the courts' struggle to distinguish between gross negligence and recklessness.²¹² Clearly, the malleable quality of these terms has spawned criticism among many who see gross negligence as enhanced negligence.²¹³ The rationale that emerges is that the line between these two terms ought not to be drawn if it cannot be patrolled.²¹⁴ Additionally, the distinction between negligence and gross negligence does not adequately respond to the functions of the Due Process Clause.²¹⁵ Therefore, because of the subtle distinction between negligence and gross negligence, courts have had trouble discerning the difference between recklessness and negligence.²¹⁶

Once a substantive due process theory is recognized within the context of police pursuit cases, detailed proof is essential to avoid the higher standards for summary judgment and directed verdict typically applied in constitutional law cases. However, substantive due process standards have been poorly defined,

209. *Jones*, 827 F.2d at 1106 (citing *Nishiyama*, 814 F.2d at 282).

210. 782 F.2d 947 (11th Cir. 1986). In *Cannon*, the plaintiff was killed when a police vehicle, responding to a disturbance call, collided with her car. *Id.* at 948. As a result, the plaintiff's personal representative brought a damage action under 42 U.S.C. § 1983 against the officer alleging that the officer deprived the plaintiff of life without due process of law. *Id.*

211. *Cannon*, 782 F.2d at 950.

212. See *Nishiyama*, 814 F.2d at 282. (expressing that a person acts negligently if he "intentionally does something unreasonable with disregard to a known risk . . .").

213. See *Archie v. City of Racine*, 847 F.2d 1211, 1219 (7th Cir. 1988); *Wilson v. Brett*, 152 Eng. Rep. 737, 739. (1843).

214. See *Stanulonis v. Marzec*, 649 F. Supp. 1536, 1543 (D. Conn. 1986) (noting that the distinction between negligence, gross negligence, and recklessness is the difference between "a fool, a damned fool, and a God-damned fool").

215. See *Daniels v. Williams*, 474 U.S. 327, 331, 334 n.3 (1986) (observing that the Due Process Clause is designed to control the abuses of governmental power, and on that account does not reach negligence, but does proscribe intentional conduct).

216. See, e.g., *Wilson v. Beebe*, 743 F.2d 342, 350 (6th Cir. 1984) (finding that an officer was negligent for having his pistol cocked while trying to handcuff a suspect, stating that this action indicated a "reckless disregard for the rights of the suspect . . ."), *vacated*, 770 F.2d 578 (6th Cir. 1985) (en banc). But see *Britt v. Little Rock Police Dep't*, 721 F. Supp. 189, 193 (E.D. Ark. 1989) (stating that "[r]ecklessness is a proxy for intent, 'gross negligence' is not"); RESTATEMENT (SECOND) OF TORTS § 500 cmt. g (1965) (contrasting negligence and recklessness).

which is perhaps the leading criticism of the doctrine.²¹⁷ Indeed, the development of a more concrete standard has been retarded in the Supreme Court by the Court's continued refusal to confront the issue directly.²¹⁸ Although lower federal courts have not avoided the problem, their efforts to deal with the issue are hindered by the Supreme Court's lack of guidance. The lower courts' standards in constitutional tort cases are as vague as the shocks the conscience standard. As noted above, many of the courts that recognize or apply substantive due process principles do so with little or no genuine analysis, especially in police pursuit cases where an innocent bystander is injured. Therefore, the need for a more concrete and uniform standard is essential to alleviate the confusion in the lower federal courts regarding the appropriate standard to apply to determine substantive due process violations involving police pursuit situations.

V. PROPOSAL TO RECTIFY THE QUAGMIRE OF FOURTEENTH AMENDMENT JURISPRUDENCE REGARDING POLICE PURSUIT CASES

In the framework of police pursuit situations, police misconduct can best be kept within constitutional norms by maintaining one clear, objective standard of liability. A balance between an individual's federally protected rights and the public's interest in effective law enforcement would be most successfully reached by establishing a standard based on the extensive body of existing Fourteenth Amendment case law.²¹⁹ The need for a concrete Fourteenth Amendment standard is shown by the confusion within the lower federal courts and the less than enthusiastic regard many jurists have for substantive due process analysis.²²⁰ Additionally, consistency in the application of one

217. See, e.g., *Fagan v. City of Vineland*, 22 F.3d 1296, 1306 (3d Cir. 1994) (conceding the fact that there is "scarce authority in case law and little academic writing that attempts to reconcile the 'shocks the conscience' test with the reckless disregard/gross negligence inquiry").

218. The reluctance of the Supreme Court to confront the issue of what level of culpability is needed to rise to the level of a constitutional violation is seen by the Court's liberal use of terminology in *Collins v. City of Harker Heights*, 503 U.S. 115, 128 (1992) (failing to characterize the city's failure to warn its employees of danger as "arbitrary, or conscience-shocking").

219. See *supra* notes 67-77 and accompanying text (discussing the deliberate indifference standard used by the Supreme Court to gauge municipal liability for failing to adequately train its agents).

220. See, e.g., *Gumz v. Morrisette*, 772 F.2d 1395 (7th Cir. 1985) (Easterbrook, J., concurring), cert. denied, 475 U.S. 1123 (1986), overruled by *Lester v. City of Chicago*, 830 F.2d 706 (7th Cir. 1987). In *Gumz*, Judge Easterbrook attacked the rise of substantive due process, asserting that:

Because substantive due process has always been so dependent on the personal feelings of the Justices; because it has no pedigree other than a trail of defunct, little-mourned, and sometimes (as in *Dred Scott*) pernicious doctrines; and because there is no need to conjure up a constitutional doctrine when there is an [a]mendment directed to this

standard is furthered by favoring an objective state of mind inquiry over a subjective inquiry. Police misconduct can be evaluated more efficiently by removing the uncertainty that ensues from inquiring into a police officer's subjective motivations. Such a uniform standard would also occasion the least disruption and contribute most to doctrinal uniformity.

As stated before, in *Daniels v. Williams* and *Davidson v. Cannon*, the Supreme Court held that *negligent* conduct cannot constitute a deprivation of due process.²²¹ The Court reasoned that the word "deprive" connotes more than negligence and also noted that due process is not implicated when there has been no affirmative abuse of power.²²² Yet, the Court indicated that it would consider *intentional* conduct resulting in a loss to be a deprivation and hinted that something less, such as gross negligence,²²³ or recklessness might suffice.²²⁴ Additionally, the Court in *Davidson* underscored the breadth of its holding, observing that negligent conduct, whether procedural or substantive, does not trigger the protections of the Due Process Clause.²²⁵ It is clear that intentional misconduct by a governmental official can constitute a violation of a right protected by the substantive component of the Due Process Clause, but mere negligence does not.²²⁶ The question remains whether the protections of due process are triggered by grossly negligent or reckless conduct. Thus, the highest culpability level that an innocent bystander must prove in order to invoke

specific subject, we should not employ substantive due process here. Substantive due process is a shorthand for judicial privilege to condemn things that the judges do not like or cannot understand.

Id. at 1406.

221. *Daniels v. Williams*, 474 U.S. 327, 328 (1986) (emphasis added); *Davidson v. Cannon*, 474 U.S. 344, 347 (1986).

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

223. The Eighth Circuit, however, has interpreted *Daniels* as holding that gross negligence is not actionable under the Fourteenth Amendment, even though the Supreme Court left this question open. *Myers v. Morris*, 810 F.2d 1437, 1468-69 (8th Cir. 1987), *cert. denied*, 484 U.S. 828 (1987). *See also Jones v. Sherrill*, 827 F.2d 1102, 1106 (6th Cir. 1987) (holding that gross negligence is not sufficient to trigger the protections of the Due Process Clause); *Cannon v. Taylor*, 782 F.2d 947, 950 (11th Cir. 1986).

224. *See Daniels*, 474 U.S. at 334 n.3 ("[A]ccordingly, this case affords us no occasion to consider whether something less than intentional conduct, such as recklessness or 'gross negligence,' is enough to trigger the protections of the Due Process Clause."). *See also Davidson*, 474 U.S. at 349 (Brennan, J., dissenting) ("I do believe, however, that official conduct which causes personal injury due to recklessness or deliberate indifference, does not deprive the victim of liberty within the meaning of the Fourteenth Amendment.").

225. *Davidson*, 474 U.S. at 348.

226. *Daniels v. Williams*, 474 U.S. at 334 n.3 (1986); *Wilson v. Beebe*, 770 F.2d 578, 586 (6th Cir. 1985) (en banc) (concluding that substantive due process requires intentional conduct). *Cf. Parratt*, 451 U.S. at 534 (expressing that "[n]othing in the language of section 1983 or its legislative history limits the statute solely to intentional deprivations of constitutional rights.").

the principles of substantive due process is that the officer acted with some form of intent.²²⁷ In light of the Supreme Court's decisions in *Daniels* and *Davidson*, and the lower federal courts' confusion regarding this issue, this Note proposes the standard of "deliberate indifference" as the minimum standard to determine whether a police officer has violated an innocent bystander's substantive due process rights. In order to better understand the rationale for choosing the deliberate indifference standard, the impracticability of the other tests must first be examined.

A. Rejecting Shocks the Conscience and Gross Negligence as Standards for Analyzing Substantive Due Process Violations in Police Pursuit Cases

Although many lower federal courts have adopted the shocks the conscience standard in determining substantive due process violations in police pursuit situations, the standard has several drawbacks. First, the shocks the conscience standard articulated in *Rochin v. California*²²⁸ is too subjective and vague to provide any real guidance for lower federal courts.²²⁹ Unlike an objective standard, the shocks the conscience test looks to the subjective state of mind of the relevant government official.²³⁰ In fact, even courts that have applied the shocks the conscience standard are aware of the "amorphous and imprecise inquiry" that the test requires.²³¹ For instance, Judge Friendly of the Second Circuit Court of Appeals attempted in *Johnson v. Glick*²³² to clarify

227. After all, without the requisite mental state possessed by police officers in pursuit situations, there would not exist a means to make a constitutional issue out of an ordinary state-law tort cause of action.

228. 342 U.S. 165 (1952). See also *supra* notes 131-36 and accompanying text (discussing *Rochin*).

229. See Randolph J. Haines, Note, *Reputation, Stigma and Section 1983: The Lessons of Paul v. Davis*, 30 STAN. L. REV. 191, 197 & n.46 (1977); Schiller v. Strangis, 540 F. Supp. 605, 616 (D. Mass. 1982).

230. *Graham v. Connor*, 490 U.S. 386, 387 (1989).

231. See, e.g., *Fagan v. City of Vineland*, 22 F.3d 1296, 1308 (3d Cir. 1994). See also *Rochin*, 342 U.S. at 179 (Douglas, J., concurring) (stating that the *Rochin* holding "is to make the rule turn not on the Constitution but on the idiosyncrasies of the judges who sit here."); *Irvine v. California*, 347 U.S. 128, 133 (1954) (criticizing *Rochin* for failing to analyze the case in terms of search and seizure and thus, declining to follow it).

232. 481 F.2d 1028 (2d Cir. 1973), cert. denied, 414 U.S. 1033 (1973). In *Glick*, the plaintiff sought to use his claim of substantive due process as a means to assert a § 1983 personal security claim. The plaintiff alleged that prior to and during his felony trial he had been held in state facilities where he was injured when an official, without provocation, struck him with his fist. *Id.* at 1029. Although *Glick* involved an unlawful force claim, as opposed to an action brought by an injured bystander in a police pursuit case alleging a deprivation of a bystander's liberty interest, the decision is demonstrative of the lower courts' difficulty in ascertaining and understanding the *Rochin* Court's "shocks the conscience" test.

the scope of *Rochin's* shocks the conscience standard.²³³ Still, lower courts have failed to apply the *Glick* factors in a uniform manner; thus, indicating the difficulty of the Court's shocks the conscience test.²³⁴

Second, the Supreme Court has precluded the application of the shocks the conscience standard in factual circumstances similar to those where it arose: criminal cases where the issue is the exclusion of evidence.²³⁵ Consequently, *Rochin* no longer has any relevance in factual situations analogous to those in *Rochin* itself. Instead, it remains as a source from which courts quote the catch phrase "shocks the conscience."

Third, because the *Rochin* Court did not examine the minimum culpability level needed for the application of its holding, the shocks the conscience test appears only to be a sufficient and not a necessary test.²³⁶ The Supreme Court has held that intentional conduct that causes a deprivation of a federally

233. *Id.* at 1032-33 (noting that the "shocks the conscience" test in *Rochin* set a standard that needed greater definition). Judge Friendly set forth the following factors to aid in defining the type of force needed to give rise to a constitutional tort based on substantive due process:

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

Id. at 1033.

234. Even though all courts have looked to the *Glick* factors for direction in examining unlawful force claims, the courts have not been consistent in examining substantive due process claims. *See, e.g.,* *Gilmere v. City of Atlanta*, 774 F.2d 1495, 1500-01 (11th Cir. 1985); *Davis v. Forrest*, 768 F.2d 257, 258 (8th Cir. 1985); *McRorie v. Shimoda*, 795 F.2d 780, 785 (9th Cir. 1986). Today, however, it appears as though unlawful force cases should be analyzed under the reasonableness test of the Fourth Amendment, not under a substantive due process approach. *See Graham*, 490 U.S. at 393-94. Still, this line of cases exemplifies the lower courts' struggle to understand *Rochin's* "shocks the conscience" test.

235. The "shocks the conscience" standard was repudiated in cases that are akin to the facts in *Rochin*. *See e.g.,* *Mapp v. Ohio*, 367 U.S. 643, 666 (1961) (Black, J., concurring) (noting that "seven Justices rejected the 'shock-the-conscience' constitutional standard . . ."); *Graham*, 490 U.S. at 393-94 (rejecting the application of the "shocks the conscience" standard to Fourth Amendment claims). The *Graham* Court specifically held that all Fourth Amendment claims should be analyzed under "its 'reasonableness' standard, rather than under a 'substantive due process' approach." *Id.* at 395. *See also* *Albright v. Oliver*, 114 S. Ct. 807, 810-14 (1994) (following the holding in *Graham*). *See also* *Fagan*, 22 F.3d at 1311 (Cowen, J., dissenting) (asserting that "[t]he Supreme Court has never established a 'shocks the conscience' test in a § 1983 action" because *Rochin* was decided before the Fourth Amendment was incorporated into the Fourteenth Amendment) (citing *Mapp v. Ohio*, 367 U.S. 643 (1961)).

236. *See Rochin v. California*, 342 U.S. 165, 169-74 (1952). The *Rochin* Court only stated that conduct which "shocks the conscience" renders evidence inadmissible. *Id.* Thus, the Court never held that only conduct that "shocks the conscience" suffices or is demanded to exclude certain evidence. *Id.*

protected right constitutes a due process violation.²³⁷ As a result, while it is obvious that conduct that shocks the conscience satisfies the intentional conduct standard delineated in *Daniels*, to make the shocks the conscience standard a necessary standard would presumably require more than intentional conduct. All of these factors, when combined, militate against the adoption of the shocks the conscience standard. Indeed, the difficulty remains for lower federal courts to determine what constitutes actionable conduct under *Rochin's* shocks the conscience test, which has unquestionably caused these courts to employ several different standards in substantive due process claims.

In addition to the shocks the conscience standard, gross negligence is also inappropriate as a standard to determine substantive due process violations within the context of police pursuits. The gross negligence standard adopted by some lower federal courts is unsuitable because it, like the shocks the conscience standard evades lucid definition.²³⁸ Moreover, negligence does not become "gross" just by stating so. Courts have asserted that if they are to make any sense of the distinction between negligence and gross negligence, they must guarantee that gross negligence rise to the level of something more than mere negligence.²³⁹ Despite many attempts, most commentators have come to the conclusion that there is no generally accepted definition of what constitutes gross negligence.²⁴⁰ Additionally, such a standard does not conform to the functions of the Due Process Clause. That is, since gross negligence is not a proxy for intent, grossly negligent conduct by a police officer is not enough to trigger the protections of the substantive component of the Due Process Clause.²⁴¹

To resolve the question left open by the lower federal courts concerning the culpability level necessary to show a substantive due process violation in police pursuit situations, we must look to the Supreme Court's interpretation of the Due Process Clause for direction. This Note concludes that the fundamental formulation in determining a violation under the Due Process Clause is whether a police officer's conduct during a chase constitutes an arbitrary exercise of governmental power. This Note proposes that an officer's deliberate indifference toward the safety of innocent bystanders in conducting a high speed car chase constitutes an arbitrary exercise of governmental power and therefore,

237. See *Daniels v. Williams*, 474 U.S. 327, 331 (1986).

238. See *Archie v. City of Racine*, 847 F.2d 1211, 1219 (7th Cir. 1988) (maintaining that the line between negligence and gross negligence cannot be 'policed' and thus is not "worth drawing in constitutional law").

239. See *Jones v. Sherrill*, 827 F.2d 1102, 1106 (6th Cir. 1987).

240. See W. PAGE KEETON ET AL., *supra* note 18, § 34, at 212 (noting that gross negligence signifies "more than ordinary inadvertence or inattention, but less perhaps than conscious indifference to the consequences").

241. See *Daniels v. Williams*, 474 U.S. 327, 334 n.3 (1986) (noting that intentional conduct is enough to rise to the level of a due process violation).

a substantive due process violation.

B. Duty Not to Act in an Arbitrary Manner

Historically, the protections of due process have been “applied to deliberate decisions of government officials to deprive a person of life, liberty, or property.”²⁴² In cases involving non-fundamental liberty or property interests, such as a bystander injured in a police pursuit situation, the Supreme Court has suggested that governmental officials must not engage in arbitrary conduct.²⁴³ Thus, the touchstone of the Due Process Clause is to secure the individual from the arbitrary exercise of governmental power,²⁴⁴ and many courts have emphasized this principle on a consistent basis.²⁴⁵ This suggests that arbitrary not only encompasses factors of fairness,²⁴⁶ but also abuses of power.²⁴⁷ Furthermore, substantive due process is not an insurance plan aimed at reimbursing people injured by the arbitrary acts of government officials.²⁴⁸ Rather, it emerges to preclude the particular hazards that involve the relationship between the governors and the governed.²⁴⁹

In essence, the substantive component of the Due Process Clause should be recognized as charging government officials with a general duty to perform

242. See *Daniels* 474 U.S. at 331.

243. See, e.g., *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1985) (noting that the proper inquiry is whether the defendant “acted arbitrarily . . .”).

244. See, e.g., *Daniels*, 474 U.S. at 331 (quotation marks omitted); *Hurtado v. California*, 110 U.S. 516, 527 (1884); *Bank of Columbia v. Okely*, 4 Wheat. (17 U.S.) 235, 244 (1819). See also *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974) (declaring that the “touchstone of due process is protection of the individual against [the] arbitrary action of government”) (quoting *Dent v. West Virginia*, 129 U.S. 114, 123 (1889)).

245. See, e.g., *Foucha v. Louisiana*, 112 S. Ct. 1780, 1785 (1992) (noting that “the Due Process Clause . . . bars certain arbitrary, wrongful governmental actions”); *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1985); *Harrah v. Independent School Dist. v. Martin*, 440 U.S. 194, 199 (1978). See also *supra* notes 116-23 and accompanying text.

246. In the context of procedural due process, the fairness concern is that the government will not deprive individuals of their substantive rights without first providing procedural safeguards for preventing or correcting the error. Thus, the government acts “arbitrarily” within the procedural due process framework when it permits an unacceptably high risk of erroneous governmental actions concluding in deprivations that will go unchecked. See *Mathews v. Eldridge*, 424 U.S. 319, 343-47 (1976); *Fuentes v. Shevin*, 407 U.S. 67, 80-81 (1972).

247. See *Daniels v. Williams*, 474 U.S. 327, 330 (1986).

248. See *Fagan v. City of Vineland*, 22 F.3d 1296, 1322 (3d Cir. 1994) (Cowen, J., dissenting).

249. See, e.g., *Estelle v. Gamble*, 429 U.S. 97 (1976) (involving a criminal custody case). Here, the governor-governed relationship was apparent because the state is holding a particular suspect in custody. However, this same relationship arises in other situations as well. For instance, it is difficult to imagine a prisoner confined to a cell as being more defenseless against a fellow inmate’s attack than an innocent citizen is to protect himself against a police vehicle speeding down upon him at 90 miles per hour. See *Fagan*, 22 F.3d at 1322 (Cowen, J., dissenting).

rationally, or not in an arbitrary fashion.²⁵⁰ Unquestionably, police officers who are involved in chase situations have a duty to the general public not to act in an arbitrary manner.²⁵¹ Consequently, if a police officer conducts a high-speed pursuit with a deliberate indifference to an innocent bystander's safety and thereby causes injury or death, the officer is engaging in oppressive and arbitrary conduct. This type of conduct should be prohibited by the doctrine of substantive due process. Yet, the issue remains regarding what level of culpability courts should apply to determine whether the officer's conduct rises to the level of a substantive due process violation.

As a preliminary matter, before deliberately indifferent conduct can constitute a constitutional deprivation, the deprivation must meet two requirements to determine whether the state action requirement has been met.²⁵² First, the loss must be caused by a governmental official who holds a position of authority over the injured party.²⁵³ Second, the loss must occur as a result of the governmental official exercising power over the injured party.²⁵⁴ Obviously, a police officer's duty to enforce the laws of the state and to ensure that citizens follow these laws constitutes a position of authority. A police officer exercises governmental power when pursuing a fleeing suspect. Therefore, police officers, in pursuing suspects, meet the state action requirement because they are engaged in an activity that is distinctively governmental in nature.²⁵⁵

Recognizing that police officers engaged in a high speed pursuit have a duty not to act in an arbitrary manner, what type of conduct constitutes a violation

250. See *Fagan*, 22 F.3d at 1321 (Cowen, J., dissenting) (citing *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1985)); *Daniels v. Williams*, 474 U.S. 327, 331 (1986).

251. *Daniels*, 474 U.S. at 331.

252. The Supreme Court has consistently held that a cause of action under § 1983 compels only a showing that a governmental action taken under color of law has resulted in a deprivation of a constitutionally protected right, privilege, or immunity. See *Daniels*, 474 U.S. at 330; *Gomez v. Toledo*, 446 U.S. 635, 640 (1980); *Monroe v. Pape*, 365 U.S. 167, 171 (1961). The requirement that the challenged conduct must constitute both color of law and state action arises from § 1983's "color of law" limitation and from the state action language contained in the Fourteenth Amendment itself. See 42 U.S.C. § 1983 (1988) and U.S. CONST. amend. XIV, § 1. However, according to the Supreme Court, for all practical purposes "color of law" and state action are the same where Fourteenth Amendment violations are implicated. See *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 935-37 (1982); *Adickes v. Kress & Co.*, 398 U.S. 144, 173-74 (1970).

253. See *Fagan v. City of Vineland*, 22 F.3d 1296, 1322 (3d Cir. 1994) (Cowen, J., dissenting); *Lugar*, 457 U.S. at 935-37.

254. *Fagan*, 22 F.3d at 1322 (Cowen, J., dissenting).

255. See *supra* note 8 and accompanying text (discussing § 1983's "color of state law" requirement). But see *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 157-64 (1978) (limiting state action by private parties to certain public functions that have traditionally been reserved to the government).

of this duty? Certainly, the lower federal courts have labored to ascertain precisely what type of police conduct against an innocent bystander will rise to the level of a substantive due process violation. The Supreme Court has repeatedly recognized that the Due Process Clause applies only to *deliberate* deprivations of life, liberty, and property.²⁵⁶ As a result, this Note advocates deliberate indifference as the standard to evaluate whether a police pursuit resulting in deaths or injuries to innocent bystanders violates substantive due process.

C. *The Standard of Deliberate Indifference*

The value of choosing the standard of deliberate indifference is that the Supreme Court has developed a body of case law interpreting these words, unlike the shocks the conscience or gross negligence standards. In fact, selecting a deliberate indifference standard is further supported by the fact that it is the standard the Supreme Court utilizes to gauge the liability of municipalities.²⁵⁷ Within the framework of the Fourteenth Amendment, a municipality can be liable for a failure to train its employees when the municipality's failure to train shows a "deliberate indifference to the rights of its inhabitants."²⁵⁸ To meet the deliberate indifference standard, the failure

256. See *Daniels v. Williams*, 474 U.S. 327, 331 (1986) (asserting that the guarantee of due process has historically been applied to "deliberate decisions of government officials to deprive a person of life, liberty or property"); *Davidson v. Cannon*, 474 U.S. 344, 347 (1986); *City of Canton v. Harris*, 489 U.S. 378, 389 (1989).

257. See *City of Canton* 489 U.S. 378, 388 (1989) (adopting the standard of "deliberate indifference" as the culpability level necessary to establish § 1983 liability of a municipality based upon a claim that the municipality's failure to train police officers caused a violation of a constitutional right of a person subject to police action). See also *supra* notes 67-77 and accompanying text (discussing the *City of Canton* decision). The deliberate indifference standard has also been used to determine the liability of individual supervisors. See *Doe v. Taylor Indep. School Dist.*, 15 F.3d 443, 452-54 (5th Cir. 1994) (involving the sexual molestation of a student by a public school teacher).

258. *City of Canton*, 489 U.S. at 389 (noting that "only where a failure to train reflects a 'deliberate' or 'conscious' choice by a municipality . . . can a city be liable for such a failure under § 1983"). In addition to claims arising under the Fourteenth Amendment, the standard of deliberate indifference has been held by the Supreme Court to be sufficient to state a claim for violations of the Eighth Amendment. See *Estelle v. Gamble*, 429 U.S. 97, 104 (1976); *Whitley v. Albers*, 475 U.S. 312, 319 (1986).

However, in *Farmer v. Brennan*, 114 S. Ct. 1970 (1994), the Supreme Court held that the "deliberate indifference" standard, within the framework of the Eighth Amendment, is a subjective test. *Id.* at 1984 (holding that a prison official may be held liable under the Eighth Amendment "only if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it"). Undoubtedly, the Eighth Amendment's subjective "deliberate indifference" test cannot be applied to a Fourteenth Amendment claim brought by an innocent bystander because it would be untenable to hold an innocent person, who was injured by a police officer, to the same standard as a convicted criminal alleging injuries caused by prison officials.

to train must reflect a conscious or deliberate choice made by policymakers.²⁵⁹ Moreover, for liability to attach, the identified deficiency in the city's training program must be the "moving force" behind the violation of the constitutional right.²⁶⁰ Specifically, the deliberate indifference standard was utilized by the Supreme Court as a means to ensure that civil rights actions against municipalities attain a certain level of significance before those entities are required to defend themselves at trial.²⁶¹

Frequently, the term deliberate indifference has been described as a conscious or deliberate choice.²⁶² The term has also included actions labelled as willful, wanton, and reckless in tort law.²⁶³ Indeed, the Supreme Court has noted that the meaning of the term deliberate indifference entails more than negligence and something less than acts or omissions for the sole purpose of causing harm.²⁶⁴ Generally, courts have recognized that deliberate indifference is ordinarily linked with recklessness.²⁶⁵ An act is reckless when it reflects a wanton or obdurate disregard or complete indifference to a risk, for

259. See *City of Canton*, 489 U.S. at 389.

260. *Id.* at 388-89.

261. *Id.* at 391-92.

262. See *Id.* at 396 (upholding the obvious[ness] test and noting that liability is appropriate when policymakers are "on actual or constructive notice" of the need to train) (O'Connor, J., concurring in part and dissenting in part). See also *Abbott v. City of Crocker, Mo.*, 30 F.3d 994, 999 (8th Cir. 1994); *Alexander v. City and County of San Francisco*, 29 F.3d 1355, 1367-68 (9th Cir. 1994); *Chew v. Gates*, 27 F.3d 1432, 1445 (9th Cir. 1994).

263. *W. PAGE KEETON ET AL.*, *supra* note 18 § 34, at 213. Moreover, the "willful," "wanton," or "reckless" standard applies when an "actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow." *Id.* See also *Bordanaro v. McLeod*, 871 F.2d 1151, 1164 (1st Cir. 1989) (upholding a jury instruction that deliberate indifference can be shown by "a deliberate choice to follow a course of action or non-action which, in effect translates as 'we don't give a damn . . .'"); *Willis v. Bell*, 726 F. Supp. 1118, 1122 n.14 (N.D. Ill. 1989) (maintaining that deliberate indifference regularly has been treated as permissibly creating an inference of intent).

264. *Farmer v. Brennan*, 114 S. Ct. 1970, 1978 (1994) (quoting *Whitley v. Albers*, 475 U.S. 312, 319 (1986)). The Restatement effectively differentiates intent, recklessness, and negligence as follows: All consequences which the actor desires to bring about are intended. However, intent is not limited to consequences which are desired. If the actor knows that the consequences are certain, or substantially certain, to result from this act, and still goes ahead, he is treated by the law as if he had in fact desired to produce that result. As the probability that certain consequences will follow decreases, and becomes less than substantial certainty, the actor's conduct loses the character of intent, and becomes mere recklessness. Further, as the probability decreases, and amounts only to a risk that the result will follow, it becomes ordinary negligence. See RESTATEMENT (SECOND) OF TORTS § 8A cmt. b (1965).

265. See, e.g., *LaMarca v. Turner*, 995 F.2d 1526, 1535 (11th Cir. 1993); *Manarite v. City of Springfield*, 957 F.2d 953, 957 (1st Cir. 1992); *Redman v. County of San Diego*, 942 F.2d 1435, 1443 (9th Cir. 1991); *Miltier v. Beorn*, 896 F.2d 848, 851-52 (4th Cir. 1990); *Martin v. White*, 742 F.2d 469, 474 (8th Cir. 1984). See also *City of Springfield v. Kibbe*, 480 U.S. 257, 269 (1987) (O'Connor, J., dissenting).

instance "when the actor does not care whether the other person lives or dies, despite knowing that there is a significant risk of death" or grievous bodily injury.²⁶⁶ Accordingly, it is fair to say that acting with deliberate indifference to a substantial risk of serious harm to an innocent bystander is the equivalent to acting with reckless disregard or with reckless indifference to that risk.²⁶⁷ Although it may be difficult to discern what type of conduct all of these terms entail, several branches of the law overflow with "nice distinctions that may be troublesome but have been thought nonetheless necessary . . ."²⁶⁸

Therefore, this Note proposes that the standard of liability under § 1983 for a substantive due process violation in a police pursuit case is whether the pursuing officer acted with a deliberate indifference to public safety. Under the Fourteenth Amendment, a police officer acts with deliberate indifference *if he was aware of a known or obvious risk that was so great that it was highly probable that serious harm would follow, and he proceeded in conscious and unreasonable disregard of the consequences.*²⁶⁹ To establish deliberate

266. *Archie v. City of Racine*, 847 F.2d 1211, 1219 (7th Cir. 1988) (en banc), cert. denied, 489 U.S. 1065 (1989); *Apodaca v. Rio Arriba County Sheriff's Dep't*, 905 F.2d 1445, 1446-47 n.3 (10th Cir. 1990) (stating that conduct in police pursuit cases must involve true indifference to risks created).

267. The *deliberate indifference* standard of fault adopted by this note is analogous to *reckless disregard of safety*, which is well defined in tort law:

The actor's conduct is in reckless disregard of the safety of another if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such a risk is substantially greater than that which is necessary to make his conduct negligent.

RESTATEMENT (SECOND) OF TORTS § 500 (1965).

268. *Daniels v. Williams*, 474 U.S. 327, 334-35 (1986) (citing OLIVER W. HOLMES, THE COMMON LAW 3 (1923) that "the difference between one end of the spectrum—negligence—and the other—intent—is abundantly clear.").

269. See *Medina v. City and County of Denver*, 960 F.2d 1493, 1496 (10th Cir. 1992); *Parkway Garage, Inc. v. City of Philadelphia*, 5 F.3d 685, 692-93 (3d Cir. 1993). Additionally, it should be noted that the "deliberate indifference" standard proposed by this Note is an objective standard. See *Williamson v. McKenna*, 354 P.2d 56, 70 (Or. 1960) (noting that the typical "expressions such as 'reckless disregard,' 'reckless state of mind,' 'conscious indifference,' 'conscious choice of action,' are not to be taken to mean that there must be proof that defendant actually had such a state of mind; such expressions are appropriate to describe the hypothetical state of mind of the hypothetical reasonable man who, faced with the dangerous situation, nevertheless elected to encounter it.").

In the lower federal courts, the reckless indifference standard has also been applied to custody cases. See, e.g., *Colburn v. Upper Darby Twp.*, 946 F.2d 1017, 1024 (3d Cir. 1991); *Williams v. Borough of West Chester, Pa.*, 891 F.2d 458, 464 (3d Cir. 1989); *Harris v. Maynard*, 843 F.2d 414, 416 (10th Cir. 1988) (holding that "wanton or obdurate disregard of or deliberate indifference to the prisoner's right to life as a condition of confinement is a substantive constitutional deprivation whether it falls under the due process clause or the Eighth Amendment."); *Morales v. New York State Dep't of Corrections*, 842 F.2d 27, 30 (2d Cir. 1988) (asserting that "a state prison guard's deliberate indifference to the consequences of his conduct for those under his control and dependent

indifference, a plaintiff must allege and prove that the defendants either had actual knowledge of a substantial risk or had knowledge of facts that would indicate this risk to any reasonable person.²⁷⁰ Obviously, the risk and disastrous consequences are heightened in a police pursuit situation where the life and safety of the public within the vicinity of the chase are endangered by the deliberate indifference of police conduct.

The concerns that have been voiced against the use of the deliberate indifference standard can be easily answered. First, the deliberate indifference standard advanced by this Note is not being used for the same *purpose* as it is used to impose liability on a municipality.²⁷¹ In fact, the Supreme Court has determined that the deliberate indifference standard adopted for failure to train claims is not affected by the culpability level that a plaintiff must demonstrate in order to prove a violation of the underlying constitutional right.²⁷² Therefore, it is logical to assume that while deliberate indifference functions to ensure that the individual police officer does not act in an arbitrary and capricious manner toward an innocent bystander, the term was applied in the *City of Canton* case for an altogether different purpose. In *City of Canton*, deliberate indifference is the threshold for holding a city liable for the constitutional torts committed by its inadequately trained police officers.²⁷³ Needless to say, considerable conceptual difficulty would accompany any search for the objective state of mind of a governmental entity, as distinguished from that of an individual police officer.²⁷⁴ On a more elementary level, the standard adopted by the Court in *City of Canton* applies to the deliberate indifference of a city toward the training of its agents. On the other hand, the standard applied to an individual officer reflects the other's deliberate indifference toward the safety of an innocent bystander.

upon him may support a claim under § 1983."); *Taylor v. Ledbetter*, 818 F.2d 791, 797 (11th Cir. 1987) (noting that a defendant may be held liable under § 1983 if it is shown that the defendant "exhibited deliberate indifference to a known injury, a known risk, or a specific duty . . .").

270. See *Doe v. New York City Dep't of Social Servs.*, 649 F.2d 134, 141 (2d Cir. 1981), *cert. denied*, 464 U.S. 864 (1983); *Estelle v. Gamble*, 429 U.S. 97, 104-06 (1976).

271. The deliberate indifference standard has been embraced by the Supreme Court in *City of Canton v. Harris*, 489 U.S. 378 (1989) to determine municipal liability for failing to adequately train its agents. *Id.* at 388. See also *supra* notes 257-70 and accompanying text.

272. See *City of Canton*, 489 U.S. at 389 n.8 (recognizing that the municipal fault requirement "does not turn upon the degree of fault (if any) that a plaintiff must show to make out an underlying . . . constitutional violation.").

273. See *Collins v. Harker Heights*, 503 U.S. 115, 122 (1992).

274. See, e.g., *City of Canton*, 489 U.S. at 389 (stating that "[o]nly where a failure to train reflects a 'deliberate' or 'conscious' choice by a municipality . . . can a city be liable . . .") (emphasis added).

Second, a finding of individual liability on behalf of the police officer will not impose vicarious liability on a city.²⁷⁵ The Supreme Court has determined that a city can be held liable for a policy of failing to train police officers only if that specific policy causes a violation of the plaintiff's constitutional rights.²⁷⁶ Clearly, a city cannot be held liable in connection with a Fourteenth Amendment claim, on a failure to train theory, unless one of the pursuing officers is found liable on the underlying substantive claim.²⁷⁷ Moreover, even if the individual police officer is found liable, the plaintiff still must show that: (1) the city's failure to train amounted to a deliberate indifference to the rights of persons with whom the police come in contact;²⁷⁸ and (2) that the city's policy was the "moving force"²⁷⁹ behind the constitutional injury.²⁸⁰

275. See *Monell v. Department of Social Servs.*, 436 U.S. 658, 694 (1978) (declaring that a municipality cannot be held liable solely because it employs a tortfeasor and therefore, no respondeat superior liability can exist under § 1983).

276. See *City of Canton*, 489 U.S. at 388-89.

277. See *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986) (per curiam) (holding that damages could not be awarded against a municipality "when in fact the jury has concluded that the officer inflicted no constitutional harm.").

278. See *Vukadinovich v. Zentz*, 995 F.2d 750, 755 (7th Cir. 1993) (observing that since plaintiff has not shown that the city was "deliberately indifferent" to constitutional rights of its citizens or that it haphazardly dismissed meritorious citizen complaints, the city cannot be held liable where a jury returns a verdict in favor of its police officers, even though mechanisms were in place to investigate citizen complaints); *Abbott v. City of Crocker, Mo.*, 30 F.3d 994, 999 (8th Cir. 1994) (noting that since the city operated under the mistaken belief regarding its authority outside city limits, there was no showing that the city acted with "deliberate indifference" or made a conscious choice to violate plaintiff's civil rights); *Alexander v. City and County of San Francisco*, 29 F.3d 1355, 1367-68 (9th Cir. 1994) (holding that as a means to establish that the city's failure to train demonstrates deliberate indifference, an aggrieved plaintiff must allege a program wide inadequacy; failure to train a single officer or to demonstrate that inadequacy was the result of a deliberate or conscious choice); *Chew v. Gates*, 27 F.3d 1432, 1445 (9th Cir. 1994) (recognizing that where a city provides police officers with potentially dangerous animals and evidence is established that those animals inflict harm in numerous cases where they are utilized, failure to employ a departmental policy regulating their use constitutes a deliberate indifference to constitutional rights for which municipal liability may be assessed).

279. See *Tilson v. Forrest City Police Dep't.*, 28 F.3d 802, 808 (8th Cir. 1994) (holding that a showing of evidence that the police department knew an arrestee had been incarcerated and neither the police chief nor the department had declared any written procedures to guide criminal investigations did not establish liability on behalf of the city because the plaintiff failed to prove that a departmental custom or policy was the "moving force" behind the incarceration); *Searcy v. City of Dayton*, 38 F.3d 282, 287 (6th Cir. 1994) (finding that although the city failed to investigate, the city was not liable because there was no evidence demonstrating a failure to investigate was the "moving force" behind the shooting of the plaintiffs); *Jones v. City of Carlisle, Ky.*, 3 F.3d 945, 950 (6th Cir. 1993) (finding that a city policy of not training police officers to report to the driver's license authority motorists involved in accidents that were caused by epileptic seizures was not the "moving force" behind the plaintiff's injuries); *Fernandez v. Leonard*, 963 F.2d 459, 468 (1st Cir. 1992) (stating that because the plaintiff failed to prove that the city's failure to provide hostage training to its police force was the moving force behind the constitutional violation, there was no liability on the part of the city).

280. See *City of Canton v. Harris*, 489 U.S. 378, 389-90 (1989).

Thus, cities are insulated from liability unless these two requirements are met, regardless of the fact that an officer is found liable on the underlying substantive claim.

Third, although the Supreme Court and lower federal courts have stated that claims involving automobile accidents do not rise to the level of a constitutional violation merely because one of the drivers is a government official,²⁸¹ this argument is not valid, especially within the context of police pursuits. It is obvious that the Supreme Court, in dicta, was merely reiterating, by way of example, that ordinary state torts committed by government officials do not violate the Constitution. However, high-speed pursuits conducted with deliberate indifference which result in injury are not comparable to the average automobile accident. Instead, these high-speed pursuits entail an abuse of police powers that are uniquely bestowed upon a police officer and which entail grave risks when exercised. Indeed, a high-speed pursuit is definitely not equivalent to the act of an ordinary citizen travelling to work in a leisurely manner. Moreover, the innocent bystander who happens to be walking or driving near the route of the high-speed chase is often defenseless. Accordingly, it is likely that a high-speed chase conducted with deliberate indifference does rise to the level of a constitutional deprivation. Therefore, recognizing such a cause of action based on a police officer's deliberate indifference will not "make of the Fourteenth Amendment a font of tort law."²⁸²

Finally, the adoption of a clearly objective test such as deliberate indifference will not only provide doctrinal uniformity, but will also ensure that insubstantial claims do not proceed to trial. Unlike an objective standard, a subjective standard requires a factual determination that seldom can be resolved on summary judgment.²⁸³ Additionally, a subjective standard necessitates an immense amount of discovery and the deposing of numerous government officials.²⁸⁴ Obviously, these inquiries can interfere with effective government.²⁸⁵ An objective standard will tend to shield government officials from the dangers of trial distractions, allow them to perform their discretionary functions, and encourage able people to enter public service.²⁸⁶ Ultimately,

281. See, e.g., *Parratt v. Taylor*, 451 U.S. 527, 544 (1981) (noting that a "party who is involved in nothing more than an automobile accident with a state official" has no constitutional claim); *Paul v. Davis*, 424 U.S. 693, 698 (1976) (stating that "survivors of an innocent bystander . . . negligently killed by a sheriff driving a government vehicle" have no constitutional claim); *Temkin v. Frederick County Comm'rs.*, 945 F.2d 716, 720 (4th Cir. 1991). However, it must be noted that this language is dicta, and the Supreme Court has never explicitly addressed this issue:

282. *Paul v. Davis*, 424 U.S. 693, 701 (1976).

283. See *Harlow v. Fitzgerald*, 457 U.S. 800, 816 (1982).

284. See *Id.* at 817.

285. *Id.*

286. *Id.* at 816.

an objective standard will provide government officials, such as police officers, with the ability to reasonably anticipate when their conduct may subject them to liability for damages.²⁸⁷ Therefore, an objective deliberate indifference standard grants protection to all police officers, except those who knowingly violate the law.²⁸⁸

In order to illustrate the effectiveness and validity of the deliberate indifference standard, this Note will reconsider the facts of *Fagan v. City of Vineland*.²⁸⁹ The injured bystanders in the *Fagan* scenario will seek compensation for their injuries. The injured bystanders will most likely seek redress under § 1983 because such a claim will allow the bystanders to bring the suit into federal court and to recover attorney fees.²⁹⁰ Therefore, the issue is whether the police officers in *Fagan* violated the bystanders' substantive due process rights.

D. Application of the Deliberate Indifference Standard

In *Fagan*, a chase ensued when a Vineland police officer observed a Camaro with a passenger standing up through the open T-top roof.²⁹¹ During the chase through residential neighborhoods, the pursuing police vehicles ran several red lights and reached speeds of up to sixty miles per hour.²⁹² The chase ended when, in an attempt to evade the Vineland police officers, the Camaro crashed into the innocent bystanders' vehicle, killing both passengers.²⁹³ As a result, the estates of the innocent bystanders brought an action under § 1983, alleging that the police officers violated the bystanders' Fourteenth Amendment substantive due process rights. Additionally, the Attorney General's pursuit guidelines stated that high-speed chases are seldom appropriate for non-hazardous violations or for completed minor traffic violations.²⁹⁴

287. *Davis v. Scherer*, 468 U.S. 183, 195 (1984).

288. *See Malley v. Briggs*, 475 U.S. 335, 341 (1986).

289. 22 F.3d 1296 (3d Cir. 1994). *See also supra* notes 167-83 and accompanying text (discussing the *Fagan* decision).

290. *See* 28 U.S.C. §§ 1331, 1343(a)(3) (1988) (furnishing federal jurisdiction); 42 U.S.C. § 1988 (1988) (allowing a prevailing party to recover attorney fees). *See also* *Texas State Teachers Ass'n v. Garland Indep. School Dist.*, 489 U.S. 782, 782-83 (1989) (discussing "prevailing party" status).

291. *See Fagan*, 22 F.3d at 1299.

292. *Id.* at 1300. The fleeing Camaro reached speeds up to 80 miles per hour. *Id.*

293. *Id.*

294. *See Fagan v. City of Vineland*, 22 F.3d 1296, 1300 & n.1 (3d Cir. 1994) (identifying the City's guidelines governing high-speed motor vehicle pursuits).

Analyzing the factual transaction of the case, a court must first determine whether the bystanders meet the requirements of § 1983. To sustain a § 1983 action, the plaintiff must show: (1) that the conduct complained of was committed by a police officer acting under color of state law; and (2) that the conduct deprived the plaintiff of his constitutional or statutory rights.²⁹⁵ In considering the first prong of the test, it is not disputed that in chasing the suspect, the police officers were acting under color of state law.²⁹⁶ As for the second prong, a court must consider whether the police officers' conduct caused a deprivation of the plaintiffs' constitutional rights. Thus, the court's analysis must start by identifying the specific constitutional right allegedly violated by the police officers. Since § 1983 does not contain a state of mind inquiry, the plaintiff need only prove a violation of the underlying constitutional right.²⁹⁷ Here, the bystanders based their claim on the substantive component of the Due Process Clause of the Fourteenth Amendment.²⁹⁸ Specifically, the bystanders alleged that the police officers deprived them of life and liberty without due process of law. The Supreme Court has held that due process is not implicated by the negligent act of a police officer causing an unintended loss of life, liberty, or property.²⁹⁹ Thus, this Note proposes that a court should measure the officers' conduct during such a police chase against the deliberate indifference standard. Next, the court must ascertain whether the officer's conduct, in chasing the suspect through residential neighborhoods at a high rate of speed, showed a deliberate indifference to the innocent bystanders' safety.

To recover under the deliberate indifference standard proposed by this Note, the bystanders must show that the police officers had actual knowledge of a substantial risk, or had knowledge of facts that would lead a reasonable person to observe that risk.³⁰⁰ In other words, the bystanders must prove that the police officers did not care whether the innocent bystanders lived or died, or that the police officers were completely indifferent to the possibility that the bystanders could be injured.³⁰¹ Additionally, in determining whether the decision of the Vineland police officers to initiate or continue the pursuit constituted deliberate indifference, the court should weigh the risk of injury to

295. See *supra* notes 11-13 and accompanying text.

296. See *supra* notes 252-55 (discussing the state action requirement).

297. See *Daniels v. Williams*, 474 U.S. 327, 329-30 (1986).

298. See *Daniels*, 474 U.S. at 331 (noting that substantive due process bars certain government actions in order to prevent governmental power from being used for oppressive purposes).

299. *Id.* at 330-31.

300. See *supra* note 269 (noting that a police officer acts with "deliberate indifference" if he is aware of a known or obvious risk which is so great that it is highly probable that serious harm will follow, and he proceeds in conscious and unreasonable disregard of the consequences).

301. The term "deliberate indifference" has been characterized as a "conscious" or "deliberate choice," and has included actions classified as willful, wanton, and reckless. See W. PAGE KEETON ET AL., *supra* note 18, at 213.

the innocent bystander against the interest in apprehending suspects.³⁰² "Factors relevant to that determination include: the speed and area of pursuit, weather and road conditions, the presence or absence of pedestrians and other traffic, alternative methods of apprehension, applicable police regulations, and the danger posed to the public by the suspect being pursued."³⁰³

The application of the deliberate indifference standard to the facts in *Fagan* tends to show a disregard for the innocent bystanders' safety. First, the Vineland police officers failed to follow the pursuit guidelines when they engaged in a high-speed pursuit of an offender of a minor traffic violation.³⁰⁴ Second, the guidelines instructed officers to exercise caution in residential neighborhoods.³⁰⁵ Furthermore, it may be inferred that the police officers' actions in chasing the suspect caused the suspect to gain speed by doubling the number of pursuing vehicles.³⁰⁶ Although the police pursuit guidelines are not dispositive, it is still possible for the police officers to conduct a pursuit with deliberate indifference independent of whether they followed the pursuit guidelines. Additionally, the chase occurred on a residential street, and the chase involved high speeds in excess of eighty miles per hour with repeated running of stop lights and stop signs. Further, the dangerousness of such conduct to the people along the chase route was known or obvious, the injured bystander was lawfully using the street, and the police directly caused the suspect to run a red light and crash into the innocent bystander.³⁰⁷

Viewing the facts in a light most favorable to the plaintiffs, the Vineland police officers, by initiating and maintaining a reckless car chase without regard for the life and safety of citizens, vividly establish a deliberately indifferent exercise of governmental power. Here, due to the officers' actions of chasing the suspect through narrow city streets at an excessive rate of speed, the Vineland police officers had knowledge of facts that would indicate a substantial risk to a reasonable person. Accordingly, instead of being defeated on a summary judgment motion, the plaintiffs have at least presented enough facts to proceed to trial.

302. See *Haynes v. Hamilton County*, 883 S.W.2d 606, 611 (Tenn. 1994).

303. *Id.*

304. See *Fagan v. City of Vineland*, 22 F.3d 1296, 1300 n.1 (3d Cir. 1994).

305. *Id.* It should be noted that a violation of state law is not a per se violation of the federal standard of deliberate indifference adopted by this note, although it is a relevant factor to assessing deliberate indifference.

306. *Id.*

307. See *Fagan v. City of Vineland*, 22 F.3d 1296, 1299-1300 (3d Cir. 1994).

VI. CONCLUSION

Alarmed by the increase in high-speed pursuits that are killing hundreds of people every year, police departments around the country, as well as state and federal law makers, are clamping down on wild, Hollywood style pursuits that regularly involve caravans of speeding police vehicles. However, without the adoption of a uniform standard to be applied to police pursuit situations, not only will injured innocent bystanders similarly situated receive different treatment from the courts, but law enforcement officials will also have difficulty in tailoring their conduct so as to carry out their duties to the optimal extent without incurring liabilities. Allowing deliberate indifferent conduct to state a claim in a police pursuit case under the Due Process Clause will serve the purpose of preventing arbitrary exercise of government power. Unlike the shocks the conscience or gross negligence standard, the value of choosing deliberate indifference is that the Supreme Court has developed a body of case law interpreting this phrase. Further, the adoption of such an explicit standard provides police officers with the ability to reasonably foresee when their conduct may subject them to liability. Such an objective standard will assist lower federal courts with their substantive due process analysis, especially within the framework of police pursuits. By adopting the deliberate indifference standard, the polestar principle of public safety will prevail and the paramount duty to protect the public will not be thrown to the winds in the heat of the chase.

Mitchell J. Edlund

