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CONSTITUTIONAL RIGHTS OF BYSTANDERS IN THE WAR ON CRIME

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> [W]itnesses . . . saw a Merrionette Park police officer shoot at a fleeing car but gun down an innocent bystander instead . . . .[1]
>
> [T]he Philadelphia neighborhood [was] where 270 people were left homeless last week in the fire that followed the police confrontation with the radical group MOVE . . . .[2]
>
> Statewide, 18 people were killed and 937 injured last year in car crashes resulting from 6,385 pursuits by law enforcement agencies, according to the California Highway Patrol.[3]
>
> [T]he Branch Davidian compound burned to the ground, leaving an estimated 17 children among the dead . . . .[4]

Police efforts to combat crime can have tragic consequences for bystanders caught in the middle. A tragic outcome does not necessarily mean the police response was improper. A suspect's criminal conduct might have been dangerous already. The result might have been worse if the officers had responded differently or not at all. Even with the best response, a suspect's flight or resistance may magnify the danger and be an obvious cause of all the harm. Despite these caveats, some tragedies also raise doubts about either the wisdom or the execution of the police response. Some bystanders may have a tort claim under state law that imposes liability for police negligence[5] or even absolute liability,[6] but in other states bystanders have little chance of winning a tort action against either an officer or police department.[7] The question answered in this article is whether a police response can violate the constitutional rights of bystanders and create a federal civil rights claim under 42 U.S.C. § 1983 (section 1983).

This question and answer are important well beyond their specific focus. The circuit courts assumed that substantive due process would provide the answer and have spent a decade trying to define the standard for determining whether there is a substantive due process claim.[8] In a parallel development the circuit courts

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1. Jerry Shnay, *Chicagoland*, CHICAGO TRIB., Nov. 15, 1990, at 22.
2. *What's News Worldwide*, WALL ST. J., May 24, 1985, at 1.
3. Yvonne Chiu, *Police Chief Defends Deadly Case*, SACRAMENTO BEE, April 9, 1997, at A1.
4. Gustav Niebuhr & Pierre Thomas, *Abuse Allegations Unproven; Koresh Was Investigated In Texas, California*, WASHINGTON POST, April 25, 1993, at A1.
5. *See, e.g.*, City of Pinellas Park v. Brown, 604 So. 2d 1222 (Fla. 1992).
6. *See, e.g.*, NEB. REV. STAT. § 13-911 (Cum. Supp. 1996); *see also* Stewart v. City of Omaha, 494 N.W.2d 130 (Neb. 1993).
7. *See, e.g.*, Billester v. City of Corona, 32 Cal. Rptr. 2d 121 (Ct. App. 1994); Bryant v. County of Los Angeles, 32 Cal. Rptr. 2d 285 (Ct. App. 1994); Dickens v. Horner, 611 A.2d 693 (Pa. 1992); McLenahan v. Lawhorne, 849 S.W.2d 773 (Tenn. Ct. App. 1992).
8. *See, e.g.*, Boveri v. Town of Saugus, 113 F.3d 4 (1st Cir. 1997); Evans v. Avery, 100 F.3d 1033 (1st Cir. 1996); Magdziak v. Byrd, 96 F.3d 1045 (7th Cir. 1996); Fagan v. City of Vineland, 22 F.3d 1296 (3d Cir. 1994);

assumed that some targets of a police response should have a similar substantive due process claim if they are injured.[9] In both types of cases a common denominator was often that the police were involved in a high speed pursuit at the time either the bystander or a target was injured. *Lewis v. Sacramento County*,[10] a case in which a death occurred during a pursuit, provides the context for the Supreme Court's first review of the substantive due process answer. The primary issue has been described as a choice of the standard for this claim:

> (1) In police pursuit case, is legal standard of conduct necessary to establish violation of substantive due process under Fourteenth Amendment "shocks the conscience" test, as determined by this court in *Collins v. Harker Heights*, 503 U.S. 115 (1992) and other circuit court cases, or is standard "deliberate indifference" or "reckless disregard," as determined by the Ninth Circuit in this case?[11]

It might appear that the stage is set for the Court to resolve a conflict among the circuit courts on a question they have properly framed and thoroughly explored. That appearance is false on both counts.

The real lesson of the circuit courts' struggle to find an answer for bystander rights in the mysteries of substantive due process is that they spent the whole time looking in the wrong place. Their task was not easy, because they had to construct an answer that would fill gaps left by the Supreme Court in opinions that gave ambiguous signals to the circuit courts or left important issues unresolved. However, the results now in hand make it clear that substantive due process is not the answer that will be most consistent with section 1983 jurisprudence. A primary reason is that the circuit courts have ignored the Supreme Court's emphasis on organizing constitutional rights under an explicit textual source.[12] A better answer for the rights of anyone injured by a police officer's response to a crime could have been based on the Fourth Amendment, but the circuit courts too readily assumed this foundation was not available. Therefore, the Supreme Court should decline the invitation in *Lewis* to pick a winner among the labels for a substantive due process violation. The Court should instead use the circuit courts' search for bystander rights as a case study of how constitutional doctrine evolved based on the outline it sketched but left incomplete in its earlier decisions. From this case study, the Court can learn where and how it should more fully define the sources and scope of the constitutional rights that can be enforced in section 1983 litigation.

Webber v. Mefford, 43 F.3d 1340 (10th Cir. 1994); Medina v. City of Denver, 960 F.2d 1493 (10th Cir. 1992); Rucker v. Harford County, 946 F.2d 278 (4th Cir. 1991); Temkin v. Frederick County Comm'rs, 945 F.2d 716 (4th Cir. 1991); Jones v. Sherrill, 827 F.2d 1102 (6th Cir. 1987). *See generally* Alpert, Clark & Smith, *The Constitutional Implications of High-Speed Police Pursuits Under a Substantive Due Process Analysis: Homeward Through the Haze*, 27 U. MEM. L. REV. 599 (1997).

9. *See, e.g.*, Bella v. Chamberlain, 24 F.3d 1251 (10th Cir. 1994); Wilson v. Northcutt, 987 F.2d 719 (11th Cir. 1993).

10. 98 F.3d 434 (9th Cir. 1996), *cert. granted*, 117 S. Ct. 2406 (1997).

11. Petition for Certiorari, Lewis v. Sacramento County, 65 U.S.L.W. 3650 (U.S. Feb. 19, 1997) (No. 96-1337).

12. *See* Albright v. Oliver, 510 U.S. 266, 273 (1994) (quoting Graham v. Connor, 490 U.S. 386, 395 (1989)); *id.* at 281 (Ginsburg, J., concurring); *id.* at 288-89 (Souter, J., concurring in the judgment).

In order to bring out the story of the circuit courts' search for bystander rights it is necessary both to step back to describe the overall picture that is lost when issues are examined in isolation and to trace the threads of interrelated bodies of doctrine. Part I of this Article summarizes the setting in which the circuit courts searched for bystander rights. Part II describes how the circuit court decisions found their substantive due process answer for bystanders and extended it to some other targets of a police response. Part III first describes the Supreme Court's development of the Fourth Amendment right against excessive force and then explores how ambiguities and gaps in the Court's decisions became apparent in the search for bystander rights. Part IV examines how radically some circuit courts reconstructed their substantive due process answer when it did not seem to provide an adequate foundation for addressing a police department's duty to train and supervise its officers. Part V suggests what lessons can be learned from the circuit courts' exploration of substantive due process, while Part VI sketches the opportunity *Lewis* now provides to apply those lessons.

I. A SUMMARY REVIEW OF THE CIRCUIT COURTS' ANSWERS

A. Suspects and Bystanders

The only two elements of a section 1983 claim are that the defendant acted "under color of state law" and "deprive[d] another of rights protected by the Constitution."[13] The color of state law element was present in all the cases, so the disputed issue became whether bystanders have any rights protected by the Constitution. There was little chance that injured bystanders might find any constitutional right until the Supreme Court held that criminal suspects could recover damages from the police under section 1983.

Three decisions held that police officers violate the Fourth Amendment rights of suspects when they respond with excessive force. In *Tennessee v. Garner*[14] the Court held that officers violate the Fourth Amendment if they use unreasonable force in trying to detain or arrest a suspect. The decision allowed the survivor of a fleeing suspect shot by an officer to recover damages for the constitutional violation in a section 1983 civil rights action. In *Brower v. County of Inyo*[15] the Court held that this Fourth Amendment right protects suspects fleeing from a police pursuit. In *Graham v. Connor*[16] it held that the Fourth Amendment protects a suspect from all excessive force, whether deadly or nondeadly. However, no Supreme Court decision has addressed how the Constitution protects bystanders, or whether bystanders have any constitutional rights at all.

Shortly after the Supreme Court established that suspects have a Fourth Amendment right, circuit courts began to consider whether bystanders injured by a police response would also have a constitutional claim. Several circuit court decisions suggested bystanders injured during a high speed police pursuit could sue

13. Collins v. Harker Heights, 503 U.S. 115, 120 (1992).
14. 471 U.S. 1 (1985).
15. 489 U.S. 593 (1989).
16. 490 U.S. 386 (1989).

the officers under section 1983 by asserting a substantive due process right under the Fourteenth Amendment. These early decisions described two different standards for the substantive due process right. The Third,[17] Fourth[18] and Sixth[19] Circuits assumed there would be a violation of substantive due process if the officer's conduct "shocks the conscience" of the court. The Tenth Circuit concluded a violation of substantive due process occurred when an officer acted with "reckless indifference" to the risk of injuring bystanders.[20] In later decisions the conscience shocking standard became the norm as the Tenth Circuit tried to adopt that position,[21] the First Circuit adopted it explicitly,[22] and the Seventh Circuit adopted it implicitly.[23]

However, these circuit court decisions did not mean success for injured bystanders. To the contrary, any hope that bystanders could recover damages from the police for a substantive due process violation had to be tempered by the uniform result of every case. No bystander plaintiff recovered damages in any of the cases under either standard for a substantive due process claim. A summary judgment for defendants was sustained even in a case where a bystander was severely injured by police conduct that an expert witness testified was "'reckless,' 'totally irresponsible,' and 'wanton'" and that the court labeled as "disturbing and lacking in judgment."[24] In reality substantive due process provided bystanders with not even a fraction of the right that could be asserted under the Fourth Amendment by a suspect who triggered a police response.

One short explanation for the difference between the constitutional rights of bystanders and suspects is timing. By the time bystander claims reached the circuit courts, the Supreme Court was well along in its effort to set limits on the scope of section 1983 claims. Supreme Court decisions made it clear that section 1983 does not provide a remedy for every wrong committed by a government worker,[25] and that "'it is not itself a source of substantive rights,' but merely provides 'a method for vindicating federal rights elsewhere conferred.'"[26] Suspects had the advantage of better timing, because their Fourth Amendment rights were central to some of the decisions that set those limits. *Graham v. Connor*[27] was a landmark case on limits with its holding that section 1983 did not create a generic claim for excessive force[28] while it further defined the Fourth Amendment right of suspects established

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

18. *See* Rucker v. Harford County, 946 F.2d 278, 281 (4th Cir. 1991); *see also* Temkin v. Frederick County Comm'rs, 945 F.2d 716 (4th Cir. 1991).

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

20. *See* Webber v. Mefford, 43 F.3d 1340, 1343 (10th Cir. 1994); *see, e.g.*, Medina v. City of Denver, 960 F.2d 1493, 1496 (10th Cir. 1992).

21. *See* Williams v. City of Denver, 99 F.3d 1009 (10th Cir. 1996), *vacated and reh'g en banc granted*, March 3, 1997, as noted in Rowe v. City of Marlow, Nos. 96-6144, 96-6229, 1997 WL 353001, at *5 n.7 (10th Cir. June 26, 1997).

22. *See* Evans v. Avery, 100 F.3d 1033, 1038 (1st Cir. 1996).

23. *See* Magdziak v. Byrd, 96 F.3d 1045, 1048 (7th Cir. 1996).

24. *Temkin*, 945 F.2d at 723.

25. *See* Collins v. Harker Heights, 503 U.S. 115, 123 (1992).

26. Albright v. Oliver, 510 U.S. 266, 271 (1994) (quoting Baker v. McCollan, 443 U.S. 137, 144 n.3 (1979)).

27. 490 U.S. 386 (1989).

28. *See id.* at 393-94.

four years earlier in *Garner*.[29] *Brower v. County of Inyo*[30] was a case that held that the Fourth Amendment right protected fleeing suspects, and a case that emphasized that the Fourth Amendment would not protect suspects unless they were actually "seized" by the police. In contrast, no Supreme Court opinion even suggested where bystanders might find the specific constitutional right the Court would require to sustain a section 1983 claim.

The sequence and holdings of the Court's decisions made it appear that substantive due process was the strongest possible candidate that might provide a constitutional right for bystanders. However, there were reasons to doubt the viability of a claim based on substantive due process from the start. The Court had held that substantive due process did not provide the specific constitutional right that would protect either victims of third party violence[31] or injured city workers.[32] The Court opinions stated an express caution against developing constitutional rights under the substantive due process standard where the "guideposts for responsible decisionmaking . . . are scarce and open-ended"[33] and advised that constitutional rights should be based on an explicit textual source when one is available.[34] In this setting it is not surprising that the circuit court decisions compromised by neither following nor explicitly rejecting the Court's caution to avoid substantive due process and its advice to rely on an explicit textual source. Instead, the circuit court decisions created a symbolic constitutional right by suggesting that a substantive due process claim is possible but at the same time setting the standard higher than any plaintiff could prove.

B. The Impact of Lewis v. Sacramento County[35]

The Ninth Circuit demonstrated that the substantive due process right could become more than symbolic by doing no more than reversing a summary judgment for the defendants in *Lewis*.[36] The opinion reviewed what other circuit courts had held in pursuit cases and characterized its main task as defining the standard of conduct for law enforcement officers "in the context of high-speed vehicular pursuits."[37] While the Ninth Circuit defined its standard as "deliberate indifference or reckless disregard"[38] instead of "shocks the conscience," the label is less important than the result. By allowing a plaintiff to go to trial against an officer who was pursuing too fast with little visibility and no good reason for starting a pursuit at all, the decision showed the potential power of the substantive due process claim. If other judges are more often shocked by a high speed pursuit or permit juries to decide if an officer was deliberately indifferent, bystander claims could lead to very close scrutiny of police operations.

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29. *See id.* at 395.
30. 489 U.S. 593 (1989).
31. *See* DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 195 (1989).
32. *See Collins*, 503 U.S. at 126.
33. *Id.* at 125.
34. *See id.*
35. 98 F.3d 434 (9th Cir. 1996), *cert. granted*, 117 S. Ct. 2406 (1997).
36. *See id.* at 439.
37. *Id.*
38. *Id.* at 441.

The possibility that substantive due process claims might reach trial has magnified the complexity of the constitutional limits facing police officers and police departments. Since the officers cannot know in advance who might be injured by their response, they must anticipate that each response might be judged under either the Fourth Amendment or substantive due process, or both. If a vehicle or building contains both suspects and others not suspected of any crime, two distinct and not necessarily consistent constitutional rights will only complicate the choice of a proper response. A police department's leaders must now take into account that every officer's response to criminal activity could harm either suspects or bystanders. As a result, they must also assume that each policy decision regarding training or supervision might later be judged according to two distinct and not necessarily consistent bodies of law. Each decision may be judged under the Fourth Amendment if a suspect is harmed by excessive force and under the substantive due process clause of the Fourteenth Amendment if a bystander is harmed.

The facts in *Lewis* illustrate how selecting the applicable constitutional right can become complicated. The victim in *Lewis* was a passenger on a motorcycle being pursued by the officer.[39] The passenger was not a complete bystander, but neither was he suspected of any crime at the start of the pursuit nor was he guilty of the traffic violations committed by the driver during the pursuit; still, the circumstances made him a target of the officer's pursuit.[40] The Ninth Circuit was one of a number of circuits that had concluded that a target of a pursuit could not assert a Fourth Amendment claim under *Brower* if the harm at the end of the pursuit did not match the facts of that case.[41] However, the circuit courts had paired that interpretation of *Brower* with a holding that such targets could assert the substantive due process right found in the bystander cases because "in the non-seizure, non-prisoner context, the substantive due process right to be free from excessive force is alive and well."[42] That precedent allowed the plaintiff in *Lewis* to assert a substantive due process claim instead of a Fourth Amendment claim. Of course the outcome that determined which claim would apply was unknown at the start of the pursuit.

The Ninth Circuit did not consider whether a conflict might develop between the rules that would be used to evaluate a police response under either substantive due process or the Fourth Amendment. There would be little chance of a conflict if the courts had continued to reject all substantive due process claims, but a decision like *Lewis* was only a matter of time. Other recent decisions on closely related issues had suggested the potential scope of the substantive due process claim. The Tenth Circuit's conscience was shocked when an officer who was not engaged in any pursuit or emergency trip ran a red light on a major Denver boulevard with no siren and crashed into another car.[43] The conscience of a trial judge in the same circuit was shocked when an officer allowed a suspect to wrestle away his gun and shoot

39. *See id.* at 436.

40. *See id.* at 437.

41. *See, e.g.*, Cole v. Bone, 993 F.2d 1328, 1332-33 (8th Cir. 1993); Rosado v. Deters, 5 F.3d 119, 123 (5th Cir. 1993); Campbell v. White, 916 F.2d 421 (7th Cir. 1990).

42. Rodriguez v. Phillips, 66 F.3d 470, 477 (2d Cir. 1995).

43. *See* Williams v. City of Denver, 99 F.3d 1009 (10th Cir. 1996).

a third person trying to assist the officer.[44] That judge candidly admitted that the finding of a substantive due process violation rested on "idiosyncratic" judgment under an "amorphous and subjective standard [that] easily lends itself to result-oriented decisions,"[45] a description that emphasizes how even the most rigorous measure of substantive due process can be open-ended in practice.

C. *Substantive Due Process and Police Department Liability*

A critical test of the foundation for any basic doctrine comes when it must be extended to address additional issues. For injured bystanders, a major new issue will be whether they can assert a claim under section 1983 against the police department. A local entity like a city or its police department is not liable under tort principles for constitutional violations committed by its employees, but it will be liable if the violation is caused by an official policy that is the product of deliberate indifference to constitutional rights.[46] For a suspect, the Fourth Amendment right to be free from excessive force means that a police department has some duty to train, supervise, and equip its officers to perform their job within constitutional limits.[47] If bystanders have only a substantive due process right to be free from conduct that shocks the conscience of the court, it may be impossible for a department to be deliberately indifferent to such a slight duty. Training intended to protect the officer or to avoid violating the Fourth Amendment rights of suspects would have enough of an incidental effect to keep the department from being deliberately indifferent to bystanders, even if that training ignored a substantial known risk to bystanders.

In one of the leading decisions on a city's constitutional duty to bystanders, the Third Circuit did not follow this logic to its conclusion. Its en banc holding that a bystander can establish a substantive due process violation only if the police response shocks the judicial conscience was expressly limited to the claim against the individual officers.[48] The en banc court left intact a panel holding that the same facts supported a viable claim against the city.[49] Because the panel was bound by the holding that the plaintiffs could not prove that the individual officers had committed a constitutional violation, it concluded that the city could be liable if the deliberate indifference of its policymakers "caused the officers to conduct the pursuit in an unsafe manner."[50] The effect of this holding created a constitutional duty to prevent city employees from causing harm that is not a constitutional violation. That result appears to conflict with the Supreme Court's position in cases such as *Collins* and *DeShaney* that an action that imposes or ignores risk does not create section 1983 liability unless the action violates a constitutional right.[51] As a

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44. *See* Radecki v. Barela, 945 F. Supp. 226 (D.N.M. 1996).

45. *Id.* at 230.

46. *See* City of Canton v. Harris, 489 U.S. 378 (1989); *see also* Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978).

47. *See* Zuchel v. City of Denver, 997 F.2d 730, 737-38 (10th Cir. 1993).

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

49. *See* Fagan v. City of Vineland, 22 F.3d 1283 (3d Cir. 1994) (panel decision).

50. *Id.* at 1292.

51. *See* Collins v. Harker Heights, 503 U.S. 115, 126 (1992); DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 195 (1989).

result, the message that a police department should train its officers to respect the rights of the public rests on an unstable foundation.

There are other indications that defining the rights of bystanders under substantive due process will be inconsistent with core ideas of section 1983 doctrine. Examples in the circuit court decisions suggested that substantive due process would protect bystanders injured by an officer's "abuse of official power"[52] or "'oppressive' abuse of governmental power"[53] or "arbitrary use of government power."[54] That effort to emphasize the limited scope of this claim appears directly contrary to the Court's holding in *Collins* that firmly rejected the argument that an "abuse of government power" should be an element of a section 1983 claim.[55] The Court there reaffirmed that section 1983 "does not draw any distinction between abusive and nonabusive federal violations."[56] Other circuit court opinions have suggested that the mental state of the officer will be an important element of the conduct that will shock the judicial conscience,[57] and used examples such as "shooting into a crowd at close range"[58] or "engag[ing] in a reckless and dangerous joy-ride for no good reason."[59] What the circuit courts have not discussed is how they would reconcile the evil intent they seem to expect with the Court's conclusion in *Graham* that malice should not be an element of a constitutional claim for excessive force unless the plaintiff is a convicted criminal.[60]

D. The Fourth Amendment as an Alternative

It has always been clear that the circuit courts invoked substantive due process because they assumed *Brower* had made a Fourth Amendment claim unavailable,[61] but the assumption that bystanders and other targets of a police response are excluded from Fourth Amendment protection has never been fully tested. While the *Brower* opinion gave close attention to whether the particular facts fit a precise definition of when a suspect is literally "seized" by the police,[62] there are other ways the Fourth Amendment could be a foundation for section 1983 claims. An alternative model is provided by the body of doctrine that defines the constitutional rights of prison and jail inmates against excessive force. Arrestees are protected against excessive force during arrest by the Fourth Amendment and convicted prisoners are protected by the Eighth Amendment, but neither Amendment provides an explicit right for a person detained in jail between the arrest and conviction.[63] The Supreme Court has filled that gap by recognizing that detainees in jail have a Fourteenth Amendment right that is at least as protective as a convicted prisoner's

52. *Fagan*, 22 F.3d at 1303.
53. *Rucker*, 946 F.2d at 282 (quoting Daniels v. Williams, 474 U.S. 327, 331 (1986)).
54. Jones v. Sherrill, 827 F.2d 1102, 1107 (6th Cir. 1987).
55. *See Collins*, 503 U.S. at 119.
56. *Id.*
57. *See Fagan*, 22 F.3d at 1307.
58. *Rucker*, 946 F.2d at 282.
59. *Jones*, 827 F.2d at 1107.
60. *See* Graham v. Connor, 490 U.S. 386, 398-99 (1989).
61. *See, e.g.*, Cole v. Bone, 993 F.2d 1328, 1332-33 (8th Cir. 1993); Rosado v. Deters, 5 F.3d 119, 123 (5th Cir. 1993); Campbell v. White, 916 F.2d 421 (7th Cir. 1990).
62. *See* Brower v. County of Inyo, 489 U.S. 593, 595-96 (1989).
63. *See* Graham v. Connor, 490 U.S. 386, 395 n.10 (1989).

Eighth Amendment right.[64] This application ensures that Eighth Amendment doctrine will provide the anchor and structure of a textual right the Court has so often emphasized.

There is one major obstacle to using the Fourth Amendment in a similar manner to define the rights of bystanders. The circuit courts have interpreted *Brower* as limiting the protection of the Fourth Amendment to such a narrow class of suspects and such a restricted set of facts that there do not appear to be any Fourth Amendment rights that could protect bystanders. That is the same interpretation the Ninth Circuit noted in *Lewis* to explain why there was no Fourth Amendment claim even though a target of a police pursuit was killed by the pursuing officer.[65] However, the use of substantive due process to fill the space not covered by *Brower* gave short shrift to *Graham*. It is by no means clear that this interpretation is either proper or in error, because the Supreme Court has never addressed the proper balance between *Brower* and *Graham*. It is also clear that striking a different balance to give greater weight to *Graham* and less to *Brower* would allow the courts to use the Fourth Amendment as the explicit textual foundation for bystander rights. Whether the Court should coordinate *Brower* and *Graham* this way cannot be answered by seeking quotations to prove that the result is either compelled or forbidden. Rather the test should be whether using the Fourth Amendment as the foundation for bystander rights will allow for more coherent doctrine.

Defining bystander rights under the Fourth Amendment, not literally but following the model for detainees under the Eighth Amendment, would define the constitutional claim against the police officer and police department in a manner that would fit well with the rest of section 1983 doctrine. Defining bystander rights under the Fourth Amendment when they are injured by a police effort to make a seizure would not create a generalized substitute for actions under state tort law. It would not conflict with *DeShaney* because it would not extend to all victims of third party violence. A Fourth Amendment basis would not create a claim that is inconsistent with *Collins* because it would not extend to victims of every city department; it would leave tort law to govern other traditionally tortious conduct. At the same time, a Fourth Amendment claim would eliminate the distinctions that can appear so arbitrary when a single police response is judged under two distinct constitutional rights. A Fourth Amendment foundation does not mean that injured bystanders will always recover damages, nor does it mean that the police cannot pursue suspects and attempt to arrest criminals. It only includes bystanders within the protection of the constitutional text that police officers and their departments must already consider when they use force to combat crime.

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64. *See* Revere v. Massachusetts Gen. Hosp., 463 U.S. 239, 244-45 (1983). *See also* Collins v. Harker Heights, 503 U.S. 115, 127 (1992); DeShaney v. Winnebago County Dep't. of Soc. Servs., 489 U.S. 189, 199 (1989).

65. *See* Lewis v. Sacramento County, 98 F.3d 434, 438 n.3 (9th Cir. 1996).

II. BYSTANDER PROTECTION UNDER SUBSTANTIVE DUE PROCESS

A. The Path to a Substantive Due Process Claim

The real surprise is not that injured bystanders have so often failed when they have asserted a substantive due process claim, but that any court has suggested bystanders are protected by a constitutional right at all. The first mention of bystander rights in a Supreme Court opinion was clearly adverse to any constitutional right, as that opinion used an injury to a bystander to illustrate rights that were outside the zone of constitutional protection. This inauspicious start came in *Paul v. Davis*,[66] a case that rejected a section 1983 claim by a plaintiff who had been the target of a police flyer warning merchants of known shoplifters.[67] Justice Rehnquist's majority opinion declared that section 1983 should not permit a claim for "every legally cognizable injury" by a state actor and held that the plaintiff's only remedy was state defamation law.[68] His examples of other injuries that would not create constitutional claims were "an innocent bystander mistakenly shot by a policeman or negligently killed by a sheriff driving a government vehicle."[69] These particular examples were dictum, but they gave bystanders the added burden of trying to find a viable constitutional right in the face of a strong suggestion that they had none.

The negative comments of *Paul* were reaffirmed thirteen years later in *Brower v. County of Inyo*.[70] Once again the facts did not involve an injured bystander. The plaintiff was the survivor of a fleeing driver who had been killed by a police roadblock. Justice Scalia's majority opinion held that a fleeing driver had a Fourth Amendment claim, but emphasized that violation of the Fourth Amendment "requires an intentional acquisition of physical control" because otherwise there is no unconstitutional seizure.[71] His discussion illustrated when pursuit of a suspect creates a seizure, excluding cases where the officer does not intend to control a suspect and cases where the officer has not been able to stop the suspect.[72] His analysis included only cases where the officer both intends to stop the suspect and actually does stop the suspect in the intended way. To further emphasize that a seizure had to be intended, Justice Scalia used an illustration: "Thus, if a parked and unoccupied police car slips its brake and pins a passerby against a wall, it is likely that a tort has occurred, but not a violation of the Fourth Amendment."[73] By emphasizing that suspects cannot invoke the Fourth Amendment until actually seized, and that someone not the target of a police response only has a tort claim, the Court's examples in *Brower* also appeared to place bystanders outside the protection of the Fourth Amendment.

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66. 424 U.S. 693 (1976).
67. *See id.* at 695.
68. *See id.* at 699.
69. *Id.* at 698.
70. 489 U.S. 593 (1989).
71. *Id.* at 595-96.
72. *See id.*
73. *Id.* at 596.

Bystanders apparently assumed that they should work around *Brower's* definition of a seizure, so they sought a constitutional right outside the Fourth Amendment. Before *Brower*, they might have based their claim on the excessive force theory found in Judge Friendly's opinion in *Johnson v. Glick*.[74] While that was a suit by a prisoner, the theory was more widely applied. However, the Court undercut that possibility in the course of addressing the rights of suspects in *Graham*.[75] As Chief Justice Rehnquist recounted the history, between 1973 and 1989 many lower federal courts assumed that *Johnson* supported "a generic 'right' to be free from excessive force, grounded not in any particular provision but rather in 'basic principles of section 1983 jurisprudence.'"[76] *Graham* explicitly rejected "this notion that all excessive force claims brought under section 1983 are governed by a single generic standard."[77] Instead, in most instances an excessive force claim will be governed by either the Eighth Amendment or the Fourth Amendment, as "the two primary sources of constitutional protection against physically abusive government conduct."[78] While *Graham* clarified which doctrine would govern the most typical excessive force claims, it was silent about the applicable doctrine when the excessive force is not governed by either the Eighth or Fourth Amendment.

Other Supreme Court decisions appeared to negate another source of constitutional protection for bystanders before it could be considered. In *DeShaney* the Court held that due process does not require the state to protect the public from injuries caused by third parties.[79] Chief Justice Rehnquist's opinion acknowledged that specific constitutional provisions such as the Eighth Amendment impose a duty to protect persons in state custody, but concluded that Social Services had no duty to protect Joshua DeShaney from his own father because he was not in state custody.[80] In *Collins*, the Court applied *DeShaney* to a section 1983 claim arising out of the death of a city employee, again holding that substantive due process does not create a general duty to provide safety or security.[81] Justice Stevens' opinion noted that due process imposed some duty to protect certain groups such as pretrial detainees, persons in mental institutions, convicted felons, and persons under arrest, but rejected the argument that a city employee could be considered deprived of liberty.[82]

Because bystanders are neither in custody nor deprived of liberty before being injured, *DeShaney* and *Collins* warned bystanders they would not be likely to succeed if they argued that the police have a duty to protect all bystanders. As a result, injured bystanders assumed they had to find a substantive due process theory not yet rejected by the Court. In *Collins*, the Court assumed a substantive due process claim might be viable when it considered whether the city's conduct toward

74. 481 F.2d 1028, *cert. denied*, 414 U.S. 1033 (1973).
75. Graham v. O'Connor, 490 U.S. 386, 387 (1989).
76. *Id.* at 393.
77. *Id.*
78. *Id.* at 394.
79. *See* DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189 (1989).
80. *See id.* at 195.
81. *See* Collins v. City of Harker Heights, 503 U.S. 115 (1992).
82. *See id.* at 127-28.

its employees was "arbitrary, or conscience shocking, in a constitutional sense."[83] The assumption did not have to be tested, because the Court held there was no constitutional violation under any standard.[84] The opinion declared that the Court was not shocked by an injury to a city employee who still had a "fairly typical state tort law claim" so that any federal duties imposed under due process would be analogous to those generally governed by state law.[85] This mention of the conscience shocking branch of substantive due process confirms that the Court has not yet completely rejected it, but the lack of any supporting precedent is a reminder that it has never been found sufficient to support a claim.

The Court's later decision in *Albright v. Oliver*[86] suggests that the more significant part of *Collins* is not the mention of the conscience shocking standard, but rather the unanimity behind the explanation that "the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchart[ ]ed area are scarce and open-ended."[87] The plaintiff in *Albright* asserted that a police officer had subjected him to criminal prosecution without probable cause.[88] The narrow question was whether the plaintiff could pursue a substantive due process claim on those facts. The Court's 7-2 answer, that he could not, took five opinions to support the result and one dissenting opinion. Chief Justice Rehnquist's opinion for a four-judge plurality stressed the *Collins* observation, and held that the plaintiff did not have a substantive due process claim because the Fourth Amendment provides "an explicit textual source of constitutional protection."[89] Concurring opinions by Justices Scalia, Ginsburg and Souter agreed that substantive due process could not be used to supplement or duplicate explicit provisions.[90] Other opinions in *Albright* approached the issues differently, but did not question the caution in *Collins* against substantive due process.[91]

B. The Conscience Shocking Standard

The conscience shocking standard for substantive due process was developed most thoroughly in *Fagan v. City of Vineland*, a case heard twice by the Third Circuit, first by a panel[92] and again on a rehearing en banc.[93] This case began in 1988 with an early morning police pursuit of a traffic offender.[94] The offense was minor—allowing a passenger to stand up through a Camaro's open T-top roof while the car was moving on a city street. The officer's intended response was minor—a warning to the driver for "allowing his passenger to ride on parts not intended

83. *Id.* at 128.
84. *See id.* at 130.
85. *Id.* at 128.
86. 510 U.S. 266 (1994).
87. *Id.* at 271-72.
88. *See id.*
89. *Id.* at 273.
90. *See id.* at 275 (Scalia, J.); 276 (Ginsburg, J.); 286 (Souter, J.).
91. *See id.* at 281 (Kennedy & Thomas, JJ.); 291 (Stevens & Blackmun, JJ.).
92. *See* 1993 WL 290386 (3d Cir., Aug. 5, 1993), *opinion vacated* 5 F.3d 649 (3d. Cir. 1993).
93. *See* Fagan v. City of Vineland, 22 F.3d 1296 (3d Cir. 1994).
94. *Id.* at 1299-1300.

for."[95] However, the driver did not stop, so the officer pursued. The offenses increased when the fleeing driver turned his lights off, drove at speeds up to 70-80 miles per hour on city streets, ran several red lights, and sped past officers who tried to stop him. Three other police officers assisted the original officer by trying to stop the suspect and by joining in parts of the pursuit; some officers pursued at speeds up to 50-60 miles per hour. When the suspect ran a red light at a major intersection in the city, his Camaro crashed broadside into a pickup truck. Both occupants of the pickup and one passenger in the Camaro were killed. Two other passengers in the Camaro were seriously injured. The fleeing driver was an intoxicated 20 year old male with a blood alcohol level of .12%. The driver suffered minor injuries; eventually he was convicted of three counts of manslaughter.[96]

The survivors and the relatives and estates of those who died filed five consolidated actions in federal court against the city and the police officers.[97] The civil rights claims under section 1983 asserted both a Fourth Amendment claim and a substantive due process claim. In 1991 the trial judge granted a defense motion for summary judgment on the Fourth Amendment claim, holding there was no claim as a matter of law because none of the victims in either the Camaro or the pickup had been "seized" by the pursuing officers.[98] The trial judge denied the defense motion for summary judgment on the substantive due process claim.[99] The defendants argued that the plaintiffs could not assert a substantive due process claim, asserting that plaintiffs had no constitutional claim other than their Fourth Amendment claim.[100] However, the trial judge rejected this "all or nothing" interpretation and concluded that a substantive due process claim could still be asserted even if bystanders could not assert a Fourth Amendment claim for the use of excessive force.[101] While plaintiffs might have thought this denial of summary judgment meant they could take their substantive due process claim to trial, that did not happen.

In 1992 after the case was transferred to a different trial judge, the defendants filed a second motion for summary judgment. The second judge concluded that the original ruling had decided only a question of law about the possibility of a substantive due process claim and not whether there was any evidence in support of that claim.[102] After reviewing case law from outside the Third Circuit, the trial judge concluded that "in cases involving police pursuits, most courts have applied something akin to the shocks-the-conscience test."[103] The judge reviewed the depositions of both the police officers and plaintiff's expert to determine if the evidence described a police behavior that was "outrageous" or "offends a sense of

95. *Id.* at 1299. The facts regarding *Fagan* may be found at *id.* at 1299-1300.

96. *See* State v. Pindale, 592 A.2d 300 (N.J. Super. A.D. 1991), 652 A.2d 237 (N.J. Super. A.D.), *cert. denied*, 663 A.2d 1357 (N.J. 1995).

97. *See* Fagan v. Town of Vineland, 804 F. Supp. 591 (D.N.J. 1992).

98. *See id.* at 596.

99. *See id.*

100. *See id.*

101. *See id.*

102. *See id.* at 600.

103. *Id.* at 601.

justice."[104] The trial judge suggested that the officers "may have shown poor judgment," but interpreted the testimony of plaintiff's expert as proving no more than "the officers thought through their actions, but came to the wrong conclusion under the police pursuit guidelines."[105] At most, the judge concluded, the officers might have made a wrong decision but no jury would be able to find their conduct shocking or outrageous.[106] Therefore, the trial judge granted the defense motion for summary judgment on the substantive due process claim.

On appeal the plaintiffs argued that the standard for a substantive due process claim should be recklessness instead of the more stringent "shocks the conscience" test.[107] Plaintiffs did not appeal the rejection of their Fourth Amendment claim.[108] It also appears that the only dispute was the proper standard for a substantive due process claim, with the existence of that claim not even contested. With the issues reduced to a single question of the proper standard, a three judge panel in 1993 reversed the grant of summary judgment.[109] The majority opinion by Judge Cowen held that the plaintiff's claim should be considered under the reckless indifference to public safety standard for a substantive due process claim.[110] Chief Judge Sloviter's dissenting opinion argued that a reckless indifference standard was grounded in tort law instead of any specific constitutional right; she argued that the proper standard for a substantive due process claim was "an abuse of official power that 'shocks the conscience.'"[111] Within a month, the split among the members of the 1993 panel was mooted when the opinion was vacated by a vote for rehearing en banc.[112]

In 1994 the same two judges wrote new opinions repeating their same positions, but the votes and result were different. The full court split 8-4, with Chief Judge Sloviter this time writing a majority opinion that held that a substantive due process claim must be measured by the "shocks the conscience" standard.[113] Using that standard, the majority affirmed the grant of summary judgment on the claims against the police officers.[114] The majority suggested several reasons for its conclusion that reckless indifference was not the standard for substantive due process: 1) the Supreme Court mentioned only the "shocks the conscience" standard in *Collins*;[115] 2) the standard had been applied by numerous courts of appeals to other kinds of police use of force;[116] 3) a standard based exclusively on intent would improperly convert common law torts into due process claims;[117] and

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104. *Id.* at 603.
105. *Id.* at 603-05.
106. *See id.*
107. *Fagan*, 22 F.3d at 1301.
108. *See id.*
109. *See id.* at 1302.
110. *See* Fagan v. City of Vineland, No. 90-00310, 1993 WL 290386, at *14 (3d Cir., Aug. 5, 1993), *vacated* 5 F.3d 647 (1993).
111. *Id.* at *21.
112. *See* Fagan v. City of Vineland, 5 F.3d 647 (3d. Cir. 1993).
113. *See Fagan*, 22 F.3d at 1302.
114. *See id.*
115. *Id.* at 1303.
116. *See id.* at 1305.
117. *See id.* at 1305-07.

4) the Supreme Court gave repeated warnings against an "overly generous" interpretation of substantive due process.[118]

With the reversal in outcome, Judge Cowen's majority opinion for the original panel was recast as a lengthy dissenting opinion from the en banc decision. Once again he concluded that reckless indifference to public safety should be a sufficient standard for bystander claims.[119] He argued at length that the "shocks the conscience" test was inappropriate and impractical.[120] He reiterated that reckless indifference was considered a sufficiently arbitrary exercise of governmental power to support other civil rights claims such as those asserted by prisoners under the Eighth Amendment.[121] Lastly, he argued that other courts had used the reckless indifference standard in various contexts.[122] As in his panel opinion, he neither mentioned a Fourth Amendment claim nor disagreed with Chief Judge Sloviter's conclusion that a bystander could have a substantive due process claim.

As the Third Circuit noted, earlier decisions from the Fourth and Sixth Circuits had reached the same conclusion on similar facts.[123] In the Fourth Circuit case the officer pursued a suspect who stole $17 worth of gas and sped from 65 to 105 miles per hour on a narrow road until the suspect lost control on a curve and both the suspect and officer crashed into another car.[124] The driver of the other car was severely injured. The Fourth Circuit explicitly adopted the "shocks the conscience" standard and affirmed the defense motion for summary judgment because the officer's conduct, while "disturbing and lacking in judgment" did not shock the judicial conscience.[125] In the Sixth Circuit case, a driver who had been involved in a property damage accident was pursued for nine miles at 120 to 135 miles per hour.[126] The pursuit ended when the suspect crossed the center line and collided with another car.[127] The Sixth Circuit analyzed the substantive due process claim under a gross negligence standard,[128] but rejected the claim because the police response was not "outrageous conduct or arbitrary use of government power."[129]

One good measure of the conscience shocking standard for substantive due process is the record of its application. The Fourth Circuit discussed its standard again in a case in which a bystander was shot and killed by one of three police officers who fired over a dozen shots at a suspect's car.[130] The appellate court affirmed the entry of summary judgment for the defendant with an opinion that emphasized that a plaintiff would have to prove that the police conduct was "arbitrary and irrational", "unjustified by any circumstance or governmental

118. *See id.* at 1306 n.6.
119. *See id.* at 1309 (Cowen, J., dissenting).
120. *Id.* at 1316, 1319-20 (Cowen, J., dissenting).
121. *See id.* at 1323-25 (Cowen, J., dissenting).
122. *See id.* at 1326 (Cowen, J., dissenting).
123. *See id.* at 1307-08.
124. *See* Temkin v. Frederick County Comm'rs, 945 F.2d 716 (4th Cir. 1991).
125. *Id.* at 723.
126. *See* Jones v. Sherrill, 827 F.2d 1102 (6th Cir. 1987).
127. *See id.* at 1104.
128. *See id.* at 1106.
129. *Id.* at 1107.
130. *See* Rucker v. Harford County, 946 F.2d 278 (4th Cir. 1991).

interest", "literally incapable of avoidance",[131] and that it amounted to a "brutal and inhumane abuse of official power".[132]

Two other circuits have also suggested that a bystander could establish a substantive due process violation under the conscience shocking standard but likewise found the evidence insufficient. The First Circuit affirmed the entry of judgment as a matter of law in favor of police officer defendants who had been pursuing suspected drug sellers at high speeds through the crowded streets of Boston before the drug sellers ran down a ten-year-old girl trying to cross the street.[133] The court asked if the conduct shocked the conscience and found that the defendant's conduct did not even present a "close call" in comparison to other pursuits that had not shocked the conscience in other circuits.[134] A year later the First Circuit again affirmed the entry of summary judgment for defendants because the "mixed signals" that a pursuit was improper were not enough to show that the police conduct shocked the conscience.[135] The Seventh Circuit did not explicitly identify a standard in affirming the dismissal of a complaint that alleged that a bystander was killed in a collision that was terminated after a three mile chase, at 120 miles per hour, by an officer who failed to use his siren or warning lights or call his supervisor on the radio.[136] In concluding that the plaintiff could not prove the chase was unconstitutional because the federal courts had never found an officer liable for an improper pursuit,[137] the Seventh Circuit opinion implicitly adopted the conscience shocking standard.

C. Recklessness as a Variation on the Standard

The Tenth Circuit provided an alternative definition of the standard for a substantive due process claim in *Medina v. Denver*.[138] It concluded that an allegation of reckless intent would suffice to allege a claim against the officers.[139] Once again the police were involved in a high speed pursuit. The bystander was a bicyclist who was injured when a suspect being chased by the Denver police lost control of a stolen car.[140] In deciding whether the defendants were entitled to summary judgment, both the trial judge and appellate court accepted plaintiff's allegations regarding the police response as true.[141] The police conduct described by the court included: a pursuit on a busy residential street during rush hour at speeds of over 60 miles per hour while repeatedly running lights and stop signs; improper radio communication with the dispatcher; deliberate disregard of a

131. *Id.* at 281.
132. *Id.* (quoting *Temkin*, 945 F.2d at 720).
133. *See* Evans v. Avery, 100 F.3d 1033 (1st Cir. 1996).
134. *See id.* at 1039.
135. *See* Boveri v. Town of Saugus, 113 F.3d 4, 8 (1st Cir. 1997).
136. *See* Magdziak v. Byrd, 96 F.3d 1045 (7th Cir. 1996).
137. *See id.* at 1048.
138. 960 F.2d 1493 (10th Cir. 1992).
139. *See id.* at 1496.
140. *See id.* at 1494.
141. *See id.*

supervisory order to stop the pursuit; and two police cars coming from opposite directions forced the suspect to turn into a bicyclist.[142]

The trial court entered summary judgment for all defendants on the ground that the police conduct was not directed toward the bicyclist. On appeal, the plaintiff abandoned any reliance on the Fourth Amendment, trying to steer clear of *Brower's* apparent negation of any Fourth Amendment claim by a bystander.[143] The Tenth Circuit assumed that the bystander's injuries established a due process violation by a government official, and focused on whether the police conduct had to be directed at the injured bystander. The Denver police officers championed the trial court's reasoning that the conduct had to be directed at the particular victim, while the bystander argued that such particularized harm was not required.[144] The Tenth Circuit rejected the argument that a police response would violate the Constitution only when directed at the particular plaintiff. Instead, they held that "reckless intent may violate section 1983" if the conduct creates a substantial risk to a limited and definable group that included the plaintiff.[145] The court also set the standard for recklessness very high, requiring "wanton or obdurate disregard or complete indifference" to a "substantial risk" of death or injury.[146]

The Tenth Circuit did not decide if a bystander such as a bicyclist could be included in the limited and definable group placed at risk by a high speed pursuit, nor did it decide if plaintiff's evidence was sufficient to prove reckless intent. It declared that the allegations were adequate to survive a summary judgment motion, but gave the issue no more attention because it affirmed the summary judgment on qualified immunity grounds because the constitutional right had not been clearly established at the time of the chase.[147]

A later Tenth Circuit decision suggested that bystanders would be no more likely to succeed under the recklessness standard than under the conscience shocking standard. In *Webber v. Mefford*[148] the bystanders were in a vehicle struck by a fleeing suspect who veered into oncoming traffic.[149] The plaintiffs did not argue that the pursuit itself was reckless, arguing instead that the officer was recklessly indifferent in the way he confronted the sleeping suspect and allowed him to flee at high speed.[150] On appeal from the trial court's grant of defendant's motion for summary judgment, the appellate court thrice emphasized the difficulty of proving reckless indifference—"wanton or obdurate disregard",[151] "true indifference to risks",[152] and "conscious acceptance of a known, serious risk."[153] At most the court suggested the officer was negligent. The plaintiff's argument that the officer could

142. *See id.* at 1497.
143. *See id.* at 1495 n.3.
144. *See id.* at 1496.
145. *Id.* at 1496.
146. *Id.*
147. *See id.*
148. 43 F.3d 1340 (10th Cir. 1994).
149. *See id.* at 1342.
150. *See id.*
151. *Id.* at 1343 (quoting Medina v. Denver, 960 F.2d 1493, 1496 (10th Cir. 1992)).
152. *Id.* (summarizing Apodaca v. Rio Arriba County Sheriff's Dept., 905 F.2d 1445, 1446-47 n.3 (10th Cir. 1990)).
153. *Id.* (quoting Archuleta v. McShan, 897 F.2d 495, 499 (10th Cir. 1990)).

have taken precautions was summarily dismissed as "criticisms made in hindsight that are not grounded in the realities of law enforcement."[154]

In a recent decision on a related issue the Tenth Circuit moved into agreement with the other circuits by holding that a substantive due process violation requires both reckless intent by the officer and conduct that shocks the conscience. In *Williams v. Denver*[155] the bystander was a driver who was broadsided by a police officer speeding at 60 miles per hour in a 35 miles per hour zone on a major boulevard at 4:00 a.m. with warning lights but no siren.[156] There was no emergency and the officer was not pursuing a suspect.[157] He was responding to a nonemergency request from another officer for backup assistance to arrest a car thief.[158] The panel agreed unanimously that a substantive due process claim requires conduct that shocks the conscience.[159] The majority also concluded that the evidence supported the inference that the officer was "speeding for speeding's sake"[160] and that such conduct could be both reckless and shocking to the conscience because it was unjustified.[161] That finding did not permit the plaintiff to overcome the officer's motion for summary judgment.[162] The majority affirmed the summary judgment for the officers on qualified immunity grounds.[163]

The third member of the panel in *Williams* disagreed only with the suggestion that the officer's conduct could have been found to shock the conscience, arguing that the officer's driving was no worse than reckless and that the precedent did not allow recovery for reckless driving under section 1983.[164] The dissenting opinion's summary of the cases accurately reflects the typical response of federal judges to bystander claims.

> [M]y survey of the case law reveals that courts very rarely find that the operation of a police vehicle in the performance of official duties shocks the conscience in the constitutional sense. The majority does not even attempt to cite cases where the court has found such conduct to be conscience-shocking. I have provided a partial list of cases where courts have specifically found such conduct is *not* conscience-shocking. The reason for this is obvious: courts demand a very high level of culpability before they will conclude that police performing their duties, albeit negligently, carelessly, or recklessly, have violated the substantive due process clause of the constitution.[165]

The position of the Tenth Circuit took another twist in 1997 when the court vacated its decision in *Williams* and granted rehearing en banc.[166] A later

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154. *Webber*, 43 F.3d at 1344.

155. 99 F.3d 1009 (10th Cir. 1996), *vacated and reh'g en banc granted*, March 3, 1997, as noted in Rowe v. City of Marlow, Nos. 96-6144, 96-6229, 1997 WL 353001, at *5 n.7 (10th Cir. June 26, 1997).

156. *See id.* at 1012.

157. *See id.*

158. *See id.*

159. *See id.*

160. *Id.*

161. *See id.*

162. *See id.* at 1021.

163. *See id.*

164. *See id.* at 1023 (Anderson, J., dissenting).

165. *Id.* at 1025 (Anderson, J., dissenting).

166. *See* No. 94-1190, *vacated and reh'g en banc granted*, March 3, 1997 (10th Cir.) (unpublished).

unpublished opinion noted that the Supreme Court had granted certiorari "to address the legal standard of conduct necessary to establish a substantive due process violation in a police pursuit case" and described the Tenth Circuit as following the "deliberate or reckless intent" standard of its earlier cases.[167]

D. Substantive Due Process as a Symbolic Right

Constitutional claims by bystanders against police officers are still new and fairly infrequent, so the substantive due process right suggested in the circuit court decisions should be evaluated as a work in progress and not the final answer. In that light, it is important that the results to date not obscure the consistent message that bystanders deserve constitutional protection. While the positive message for bystanders was further muted by the examples used to illustrate how rarely any bystander might prove a constitutional violation, the circuit courts were constrained in their choice of examples by what they saw as the limits of substantive due process. The substantive due process claim could not appear to be readily available to every injured bystander, because a generalized excessive force claim had been rejected in *Graham*. In addition, each example of a constitutional claim had to be distinguished from the "fairly typical state-law tort claim" that creates no liability under section 1983.[168]

The difficulty of the task explains why the examples suggested there would be a constitutional violation in cases in which an officer intentionally engages in improper conduct by using the "police vehicle to terrorize a civilian . . . with malicious abuse of official power"[169] or "directs his actions toward the bystander."[170] Those are contrasted with the suggestion there would be no violation if the officer's intent was to "protect public safety."[171] In *Williams* the court explicitly raised the Tenth Circuit's standard from recklessness to conscience shocking. It also insisted that the officer's state of mind was important because "conduct which poses an imminent risk of serious harm and which is motivated by an improper purpose is unquestionably more likely to shock the conscience than the same actions done for legitimate reasons."[172] However, by insisting that the officer's malice or intentional abuse is an element of a viable claim and excluding any claim if the officer acts in good faith, the examples were out of synch with the Court's section 1983 doctrine before the ink was dry.

The circuit court opinions failed to examine whether the subjective element of the officer's bad intent was consistent with the Court's previous position that there is no state of mind requirement independent of the underlying constitutional right.[173] In *Collins*, the Court explicitly held that section 1983 "does not draw any distinction between abusive and non-abusive federal violations."[174] Including a

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167. Rowe v. City of Marlow, No. 96-6144, 96-6229, 1997 WL 353001, at *5 n.7 (10th Cir. June 26, 1997).
168. Collins v. Harker Heights, 503 U.S. 115, 128 (1992).
169. *Fagan*, 22 F.3d at 1308 (quoting Checki v. Webb, 785 F.2d 534, 538 (5th Cir. 1986)).
170. Webber v. Mefford, 43 F.3d 1340, 1343 (10th Cir. 1994).
171. Jones v. Sherrill, 827 F.2d 1102, 1106-07 (6th Cir. 1987).
172. Williams v. Denver, 99 F.3d 1009, 1017 n.8 (10th Cir. 1996).
173. *See* Farmer v. Brennan, 511 U.S. 825, 841 (1994); Daniels v. Williams, 474 U.S. 327, 330 (1986).
174. *Collins*, 503 U.S. at 119.

subjective element leaves bystanders with less constitutional protection than suspects who do not have to prove bad intent for a Fourth Amendment claim.[175] Requiring that the officer's intent be an element of the claim leaves bystanders with the same protection as convicted criminals. In cases involving the use of force in a prison to enforce discipline, an Eighth Amendment claim brought by the prisoner requires proof that the guards acted "maliciously and sadistically for the very purpose of causing harm."[176] In *Graham* the Court held that this higher standard was proper for a section 1983 plaintiff who had been convicted of a crime, but that it was out of place for a suspect who had not been convicted.[177] It seems incongruous to require bystanders to meet the same malice standard as convicted prisoners, when bystanders are neither convicted nor suspected. In fact, requiring bystanders to prove the kind of malice described by the circuit courts in their examples would make their proof of a prima facie case so onerous that the defense of qualified immunity would be almost superfluous.

One other consequence of requiring that the officer's bad intent be an element of the substantive due process claim is that it shrinks the class protected by this right to a handful or even none. Even if the officer has the kind of bad intent described in the circuit court examples, the victim will have no claim unless the officer takes some action that causes harm. The most likely action would be an arrest, a search, or a seizure, but a victim of those actions will have an explicit Fourth Amendment claim and will no longer be a bystander. For example, a recent Fifth Circuit decision held that the Fourth Amendment governed a claim that a deputy sheriff "violently and without cause" jerked a suspect's ten year old daughter out of her chair and dragged her out of the room.[178] A Sixth Circuit decision held there was a Fourth Amendment claim where a bystander was detained by the police for four hours without cause while they prepared to arrest a suspect.[179] A Pennsylvania district court recognized a Fourth Amendment claim when an officer intentionally shot a burglary victim after mistaking the victim for the suspect.[180]

Thus, the only class of bystanders that appears eligible for protection under the conscience shocking standard of substantive due process would be those bystanders harmed without being arrested, seized, stopped, or searched by an officer who acted in bad faith without intending to protect public safety. The absence of actual cases with those facts provides evidence that the circuit courts described a substantive due process right that is vanishingly narrow.

E. Substantive Due Process in the Ninth Circuit

The facts of *Lewis* are an important ingredient in comparing the Ninth Circuit analysis with the consensus interpretation of the other circuits. The incident that gave rise to the pursuit in this case began shortly after two police officers in

175. *See* Graham v. Connor, 490 U.S. 386, 397-99 (1989).
176. Farmer v. Brennan, 511 U.S. 825, 835 (1994) (citations omitted).
177. *See Graham*, 490 U.S. at 397-98.
178. *See* Ikerd v. Blair, 101 F.3d 430, 435 (5th Cir. 1996).
179. *See* Centanni v. Eight Unknown Officers, 15 F.3d 587, 592 (6th Cir. 1994).
180. *See* Spera v. Lee, 728 F. Supp. 366, 368 (E.D. Pa. 1990).

Sacramento County, James Smith and Murray Stapp, responded to a call one evening about a fight.[181] As the two officers returned to their patrol cars, Smith saw Stapp turn on his overhead lights and yell something at two boys riding a motorcycle.[182] The motorcycle driver did not stop; instead, he drove slowly between the two police cars and accelerated.[183] As Smith watched this scenario, he knew the boys were not involved in the fight, he did not hear what Stapp said to them, and he did not know why Stapp yelled at the boys. Instead of asking, Smith pursued the motorcycle through a residential area for over a mile at speeds up to 100 miles per hour through four stop lights. Then the motorcycle went over a crest in the road and skidded to a halt when the driver tried a hard left turn. Deputy Smith came over the crest at a speed of at least 65 miles per hour and saw the motorcycle and passenger too late to stop. The patrol car skidded 147 feet before hitting the passenger at 40 miles per hour. The passenger was thrown 70 feet down the road and died at the scene.

The personal representatives of the passenger's estate sued both the pursuing deputy and his department under section 1983 and California law, but the only claim remaining for the Supreme Court's review is the substantive due process claim against the deputy. The officer moved for summary judgment on the ground of qualified immunity, arguing that the substantive due process limits on a police pursuit had not been clearly established at the time of incident. In order to overcome the qualified immunity defense, the plaintiff had to show both that the right did exist and that it had already become clearly established at the time of the pursuit.[184] The trial judge did not decide if the right existed at all, but decided that in any event it had not been clearly established at the time of the pursuit, and on that basis granted summary judgment for the deputy.[185] On appeal, the Ninth Circuit decided both that the substantive due process right did protect someone injured in a police pursuit and that the right had been clearly established six years earlier at the time of the pursuit.[186]

The holding in *Lewis* is not based on any specific Supreme Court precedent. Instead, the opinion started with the proposition that "constitutional due process rights may be implicated" when "a law enforcement officer arbitrarily acts to deprive a person of life."[187] It then blended a number of Supreme Court cases, Ninth Circuit precedent on various kinds of section 1983 claims against police officers, and the decisions in pursuit cases from other circuits to support the conclusion that there was clearly a substantive due process claim. The opinion then proceeded to its prime topic of identifying the standard of conduct for measuring liability under substantive due process. It again blended a number of cases in support of the conclusion that the standard for a substantive due process claim in a pursuit case is "deliberate indifference or reckless disregard" to life.[188] Finally,

181. *See* Lewis v. Sacramento County, 98 F.3d 434, 436 (9th Cir. 1996), *cert. granted*, 117 S. Ct. 2406 (1997).
182. *See id.*
183. *See id.* The facts in *Lewis* may be found at *id.* at 436-37.
184. *See id.*
185. *See id.*
186. *See id.* at 443-45.
187. *Id.* at 439.
188. *Id.* at 441.

the opinion held that the plaintiff had enough evidence to create a triable issue of fact under that standard and reversed the grant of summary judgment.

While the *Lewis* standard is explicitly more favorable for plaintiffs than the conscience shocking standard, the difference in labels does not necessarily mean the results will always vary in application. The various circuit courts might still reach similar conclusions on the same facts. For example, the First Circuit found no substantive due process violation under the conscience shocking standard in two cases—one where the officers were pursuing an apparent drug dealer[189] and another where they suspected a driver leaving the scene of a disturbance was intoxicated.[190] In contrast, the Ninth Circuit held that there could be a substantive due process violation under the reckless disregard standard when the officer knew of no crime committed by the boys on a motorcycle and pursued them only because they fled.[191] Perhaps the First Circuit would find that the facts in *Lewis* did shock the court's conscience, while the Ninth Circuit would find that pursuing a drug seller or drunk driver did not show reckless disregard of the lives of bystanders.

Bystander plaintiffs may be encouraged by the *Lewis* analysis even though the victim was more involved in the criminal activity than the typical bystander who is another driver or a pedestrian. The opinion did not limit the protection of its substantive due process right to suspects or other targets being chased by the police. It also included the "enormity of the danger" to the driver, passenger, and the general public among the reasons that plaintiff's evidence was sufficient to defeat the motion for summary judgment.[192] In two unpublished opinions, a different Ninth Circuit panel applied *Lewis* to claims by bystanders injured in police pursuits.[193] The First Circuit considered *Lewis* as relevant precedent on bystander claims before rejecting its holding.[194]

The First Circuit's commentary on *Lewis* identified the two most difficult issues framed by the competing standards for substantive due process when it suggested that the Ninth Circuit both misread the Supreme Court's decisions and was not sufficiently concerned about the problems of law enforcement.[195] Those issues are most difficult because the Supreme Court has not yet provided an answer and its opinions can be employed to support different conclusions. For example, while the circuit courts that adopted the conscience shocking standard were correct that the Court has been reluctant to expand the substantive due process right, opinions from other circuits were equally correct that the Court had not flatly negated evolution of the substantive due process right.[196] While the other circuit courts assumed that the Court's reminders about the pressure on officers to make "split-second

189. *See* Evans v. Avery, 100 F.3d 1033, 1041 (1st Cir. 1996), *cert. denied*, 117 S. Ct. 1693 (1997).

190. *See* Bovieri v. Town of Saugus, 113 F.3d 4, 6 (1st Cir. 1997).

191. *See Lewis*, 98 F.3d at 443.

192. *See id.*

193. *See* Onossian v. Block, No. 95-55837, 103 F.3d 140 (table), 1996 WL 717312 (9th Cir. Dec. 9, 1996) (unpublished); Torres v. Bonilla, No. 95-55875, 103 F.3d 141 (table), 1996 WL 717313 (9th Cir. Dec. 9, 1996) (unpublished).

194. *See Evans*, 100 F.3d at 1037-38.

195. *See id.* at 1038 n.4.

196. *See, e.g.*, Rodriguez v. Phillips, 66 F.3d 470, 476-77 (2d Cir. 1995).

judgments"[197] meant they should rarely find that conduct shocks their conscience, the Ninth Circuit was equally correct that the Court has held that officers can be liable for arbitrary conduct based on swift decisions.[198] The debate could go on in circles if it is limited to substantive due process precedents. The next section examines how the Court's Fourth Amendment precedent provides a different perspective and a different way to impose a structure on the question.

III. THE FOURTH AMENDMENT RIGHT

A. *Evolution of the Excessive Force Claim*

The three Supreme Court decisions that established that suspects are protected by the Fourth Amendment were actually the second stage in the evolution of a suspect's constitutional right to be free from police use of excessive force during an arrest. Each stage was the result of a different assumption about the character of a civil rights claim. In the first stage, the federal courts assumed that section 1983 had created a variety of tort liability; hence the actions were labeled as constitutional tort claims.[199] During this stage the lower federal courts often decided excessive force claims without identifying a specific constitutional provision; instead they assumed that liability for wrongful conduct could be based on the substantive due process doctrine.[200] As a result, the constitutional standard was identical whether the force was used by an arresting police officer or by a prison guard. The Supreme Court neither affirmed nor rejected the lower court development of this first stage; the Court itself sometimes assumed that victims of excessive force could sue the police under section 1983 without specifying which constitutional provision supported the claim.[201] The second stage began when the Supreme Court gave increased emphasis to identifying an explicit textual basis for any constitutional claim.

1. The Constitutional Tort Claim Stage

In the first stage, when all excessive force claims were considered to be more a variety of tort claims than an action to enforce an explicit constitutional provision, the elements of an excessive force claim were based on a four factor test developed by Judge Friendly in the Second Circuit. In *Johnson v. Glick*,[202] he considered a claim by a pretrial detainee that a guard had used excessive force. Judge Friendly concluded that the Eighth Amendment did not apply, because a detainee can not be subject to punishment.[203] He also noted that the conduct did not fit the specific command of the Fourth Amendment.[204] Instead, he found constitutional protection

197. Graham v. Connor, 490 U.S. 386, 397 (1989).
198. *See, e.g.*, Brower v. County of Inyo, 489 U.S. 593 (1989); Tennessee v. Garner, 471 U.S. 1 (1985).
199. *See* Marshal S. Shapo, *Constitutional Tort:* Monroe v. Pape *and the Frontiers Beyond*, 60 N.W. U. L. REV. 277, 323-24 (1965).
200. *See id.* at 297-319.
201. *See* Jones v. Hildebrant, 432 U.S. 183, 189-90 n.1 (1977) (White, Brennan & Marshall, JJ., dissenting).
202. 481 F.2d 1028 (2d Cir.), *cert. denied*, 414 U.S. 1033 (1973).
203. *See id.* at 1030-32.
204. *See id.* at 1032.

against physically abusive governmental conduct under substantive due process, labeling the abuse a deprivation of liberty under the Fourteenth Amendment. In order to establish a structure for identifying an unconstitutional use of force, *Johnson* provided four factors:

> 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.[205]

As Justice Rehnquist described the history of this first stage, following *Johnson v. Glick*, "the vast majority of lower federal courts . . . applied its four-part 'substantive due process' test indiscriminately to all excessive force claims. . . [because they] assume[d] . . . there is a generic 'right' to be free from excessive force, grounded . . . in 'basic principles of § 1983 jurisprudence.'"[206] However, even as the substantive due process claim of excessive force was taking shape in the lower courts after 1973, the Court as early as 1976 was laying the foundation for its demise with several cases that emphasized that section 1983 cannot alone be the source of substantive rights.[207]

2. The Specific Constitutional Right Stage

In 1985 the second stage began in *Garner*.[208] The Supreme Court held that using deadly force to seize a suspect could violate the Fourth Amendment. This section 1983 case began after a police officer shot and killed a fleeing burglary suspect to prevent him from climbing a fence and escaping into the night.[209] The complaint asserted several constitutional claims, including a Fourteenth Amendment claim, but the Court discussed only the Fourth Amendment claim.[210] *Garner* made clear that a Fourth Amendment claim could be based on the manner in which the seizure was made and that it was not limited to whether the police had probable cause for the seizure. The Court further held that it would be constitutionally unreasonable to use deadly force to prevent the escape of all felony suspects without regard to the particular circumstances.[211] Instead, reasonableness required balancing the governmental interests in effective law enforcement against competing reasons to avoid deadly force, such as preserving the suspect's life and permitting judicial determination of guilt and punishment.[212] As a result, the Court held that it would be constitutional to use deadly force to prevent an escape if a suspect presented a threat of serious physical harm, but not if there was no immediate threat to the officer or others.[213]

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205. 481 F.2d at 1033.
206. Graham v. Connor, 490 U.S. 386, 393 (1989) (quoting Justice v. Dennis, 834 F.2d 380, 382 (4th Cir. 1987)).
207. *See* Paul v. Davis, 424 U.S. 693 (1976).
208. Tennessee v. Garner, 471 U.S. 1 (1985).
209. *See id.* at 3-4.
210. *See id.* at 5, 8.
211. *See id.* at 11.
212. *See id.* at 9-10.
213. *See id.* at 11.

While *Garner* provided a foundation for a Fourth Amendment excessive force claim, that step alone did not reduce the scope of the generic claim of excessive force as a constitutional tort. That was true as well when *Brower* extended the Fourth Amendment claim to different facts but did not mention substantive due process.[214] *Brower* was brought after a fleeing driver was killed in a crash at a police roadblock. The Ninth Circuit held that there was no Fourth Amendment claim because the driver was never seized.[215] Justice Scalia's majority opinion rejected that reasoning as inconsistent with *Garner*, because in both cases the suspect's flight was halted by the police use of force.[216] Much of his opinion then described outer boundaries on the Fourth Amendment claim with an extended discussion of why there would be no "seizure" in a variety of other factual circumstances. *Brower* included a brief reminder that a viable Fourth Amendment claim would also require proof that the seizure was unreasonable and a proximate cause of the injury.[217] The Court then remanded the case to allow the trial court to consider whether the facts established an "unreasonable" seizure.[218] Four Justices filed a concurring opinion because they did not want to endorse the suggested outcome on facts not before the Court.[219]

During that same term the Court's decision in *Graham v. Connor*[220] confirmed that the generic excessive force claim of the first stage had been replaced by the new doctrine of the second stage. By the time *Graham* was decided the second stage was already well under way in prisoner excessive force cases. In *Whitley v. Albers*[221] three years earlier the Court held that substantive due process did not provide any additional protection for convicted prisoners beyond the Eighth Amendment claim. In *Graham* the Court held that substantive due process doctrine likewise should not govern a claim of excessive force against a police officer, because the Fourth Amendment provided an explicit textual constitutional standard.

The opinion in *Graham* made explicit the second stage of the Court's structure of constitutional doctrine. First, it explained that there was no "single generic standard" for all excessive force claims, because the first step required a court "to isolate the precise constitutional violation."[222] As a result, claims by prisoners would be governed by Eighth Amendment doctrine, while Fourth Amendment doctrine would govern claims of unreasonable seizures.[223] Second, it explained that a substantive due process claim was inapplicable where the government conduct was governed by a specific constitutional standard.[224]

> Where, as here, the excessive force claim arises in the context of an arrest or investigatory stop of a free citizen, it is most properly characterized as one

214. *See* Brower v. County of Inyo, 489 U.S. 593 (1989).
215. *See* Brower v. County of Inyo, 817 F.2d 540 (9th Cir. 1987).
216. *See Brower*, 489 U.S. at 595-96.
217. *See id.* at 599.
218. *See id.* at 600.
219. *See id.* (Stevens, Brennan, Marshall & Blackmun, JJ., concurring).
220. 490 U.S. 386 (1989).
221. 475 U.S. 312 (1986).
222. *Graham*, 490 U.S. at 393-94.
223. *See id.* at 394.
224. *See id.* at 394-95.

> invoking the protections of the Fourth Amendment . . . . Today, we make explicit what was implicit in *Garner's* analysis, and hold 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. Because the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion of "substantive due process," must be the guide for analyzing these claims.[225]

This explicit division between an Eighth Amendment claim and a Fourth Amendment claim meant a new trial for Graham, because the lower court requirement of proof that the officers acted with malice had brought an element of an Eighth Amendment claim into a Fourth Amendment case.[226] The Court reiterated that an inquiry into an officer's subjective state of mind was proper in an Eighth Amendment case, but rejected such an inquiry under the Fourth Amendment. Instead, the "Fourth Amendment inquiry is one of 'objective reasonableness' under the circumstances."[227] Therefore, the Court remanded the case to allow the lower courts to determine whether the evidence was sufficient to show that the use of force during the stop might have been objectively unreasonable in light of the circumstances confronting the officers.[228] The Court emphasized that the plaintiff would have a difficult task because reasonableness "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight."[229] The test of reasonableness must also "embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving."[230] At the same time, that emphasis confirmed that a suspect could establish a constitutional violation if the evidence established an objectively unreasonable use of force.

3. Extrapolating Beyond the Known Rules

The factual settings in *Garner*, *Brower*, and *Graham* had certain elements in common. In each case the force used by the police was contemporaneous with their apprehension of the target of the force. The deadly force killed Garner and Brower and the nondeadly force was used when Graham was tackled and placed in the police car. In each case the person who died or was injured was the target of the force used by the police, and in each case the officers intended to use the particular force that harmed the suspect. Those common elements also mean that the three cases do not provide a complete answer when a case presents different facts. Of particular interest here is a case where a person is injured by "excessive force . . .

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225. *Id.*
226. *See id.* at 397-98.
227. *Id.* at 399.
228. *See id.*
229. *Id.* at 396.
230. *Id.* at 396-97.

in the context of an arrest"[231] but the force is not contemporaneous, or the injured person is not the target of the force. *Graham* mandated analysis under the Fourth Amendment but *Brower* seems to say that that cannot be; judging the claim under substantive due process does not conflict with *Brower* but does seem to ignore *Graham*.

The circuit court opinions have followed a consistent path in holding that a plaintiff can assert a substantive due process claim when the facts present a different pattern from the Court's three cases. This approach reconciles *Brower* and *Graham* by giving greater weight to *Brower* and its definition of a seizure, but it does so at the expense of *Graham*. Determining whether this is the correct way to extrapolate the doctrinal structure requires a closer look at the foundation provided by *Garner*, *Brower* and *Graham*.

B. The Themes of Graham and Brower

1. *Graham*

The primary focus of Chief Justice Rehnquist's majority opinion in *Graham* is the affirmation that there can be no single generic standard for all excessive force claims, because a section 1983 claim must be based on a specific constitutional right. He suggested that "in most instances" excessive force claims will involve either the Fourth Amendment's limits on the force used when making arrests or the Eighth Amendment's ban on cruel and unusual punishment of prisoners.[232] On the particular facts of *Graham*, the Court concluded that the Fourth Amendment was applicable because plaintiff's claim arose "in the context of an arrest or investigatory stop"[233] or, alternatively phrased, "in the course of an arrest, investigatory stop, or other 'seizure'."[234]

The *Graham* opinion did not describe whether there was any difference between the "context" or "course" of an arrest and offered no definition of the outer boundaries of either word. One clue that the Court did not intend to adopt a literal interpretation of those words can be found in a footnote that defined "seizure". The Chief Justice noted that the Court's cases had not established how long the Fourth Amendment protection continued after the arrest ended and pretrial detention began.[235] He conceded that the Court would not answer that question in *Graham*, but at the same time declared that the arrested prisoner's constitutional protection did not abruptly end when either the course or context of the arrest came to an end.[236] He explained that a pretrial detainee is still protected from excessive force while held in jail.[237] Even though the end of the arrest situation also ends the Fourth Amendment protection, the Due Process Clause constrains a jailer's use of

231. *Id.* at 394.
232. *See id.*
233. *Id.*
234. *Id.* at 395.
235. *See Graham*, 490 U.S. at 395 n.10.
236. *See id.*
237. *See id.*

excessive force as well.[238] Finally, he noted that due process would not be the source of protection from excessive force for a convicted prisoner, because that use of due process would be redundant of the protection provided by the Eighth Amendment.[239]

The footnote discussion of the excessive force claim by a pretrial detainee illustrates one notable example in which the Court has made use of the express text to organize a coherent body of doctrine that extends beyond the literal language of the constitutional text. As many courts have noted, it would be anomalous if a pretrial detainee had no constitutional rights or fewer rights than someone already convicted of a crime. The convicted inmate is incarcerated as a form of punishment, while the detainee is incarcerated to insure attendance at trial. It would also be impractical to define their right against excessive force differently, at least in cases where disciplinary force is used against a jail population that includes both detainees and convicted prisoners. The consensus on the best organizational structure for excessive force claims by pretrial detainees eliminates any gap between the end of the Fourth Amendment arrest situation and the Eighth Amendment situation by using an analogy. Pretrial detainees are protected from excessive force by a due process right that is equivalent to the Eighth Amendment right that protects convicted prisoners. That standard provides jailers, detainees, and judges with a coherent body of doctrine, and ensures that jailers are governed by a single body of constitutional rules as they enforce discipline.

Decisions since *Graham* have emphasized both that substantive due process is not a substitute for an explicit textual source of constitutional protection, and that an injured plaintiff can recover if an explicit provision governs the "particular sort of government behavior"[240] that causes the injury. In *Collins* the Court rejected the effort to use substantive due process as the foundation for a right to safe working conditions for municipal employees.[241] At the same time, it noted that city employees were protected by the First Amendment if a dangerous assignment was retaliation for political speech, and protected by the Equal Protection Clause if the assignment was based on gender.[242] In *Albright v. Oliver*[243] the Court refused to make substantive due process the foundation for a suspect's right to be free from a groundless criminal prosecution. Various majority opinions did not agree on whether the plaintiff might have a Fourth Amendment claim or a Fifth Amendment claim but they did not doubt that plaintiff could assert such a claim if one fit the facts of the particular case. Similarly, the opinion in *Sandin v. Connor*[244] that narrowed the procedural due process protection of inmates with a new standard for a liberty interest included a footnote reminder that explicit rights such as the First and Eighth Amendments and Equal Protection would still support a claim.[245]

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238. *See id.*
239. *See id.*
240. Albright v. Oliver, 510 U.S. 266, 273 (1994).
241. *See* Collins v. Harker Heights, 503 U.S. 115 (1992).
242. *See id.* at 119.
243. 510 U.S. 266 (1994).
244. 515 U.S. 472 (1995).
245. *See id.* at 487 n.11.

The structure of constitutional rights outlined by these decisions is interstitial, leaving state tort law as the only remedy for most harm caused by a state actor and a civil rights action as the remedy only when the specific conduct is governed by an explicit constitutional provision. *Collins* is one example, with its reminder that city employees could assert a First Amendment right if they were punished because of their speech but that otherwise the same harm would not alone support a substantive due process claim.[246] *Sandin* is another example, with the same reminder that an inmate could have a First Amendment claim even if the harm would not alone be a liberty deprivation.[247] For bystander claims, the motivation for the police conduct could provide a similar boundary, since police actions to apprehend a criminal are subject to the Fourth Amendment but equally harmful conduct for a different purpose is not. The only opinion from a circuit court to suggest such an approach did not start a trend.[248] Instead, *Brower*—or a certain interpretation of *Brower*—has deflected bystanders away from using the explicit source of the Fourth Amendment.

2. *Brower*

Brower held that a roadblock could be a Fourth Amendment violation, even though the suspect crashed during his flight.[249] On this the Court was unanimous. Justice Scalia's majority opinion also declared that an injured person would not have a Fourth Amendment claim if injured by "the accidental effects of otherwise lawful government conduct."[250] *Brower*'s theme that a Fourth Amendment claim requires a seizure was emphasized by examples presented to show why its holding would not provide a Fourth Amendment claim to every suspect injured during a pursuit nor to everyone injured by a police officer. First, there would be no constitutional claim if a police car "slips its brake and pins a passerby."[251] Second, there would be no constitutional claim even if that passerby was a fleeing felon "running away from two pursuing constables."[252] Third, there would be no constitutional claim if a fleeing driver "unexpectedly loses control of his car and crashes."[253] Each example was presented to illustrate that the Fourth Amendment requires "intentional acquisition of physical control"[254] "through means intentionally applied."[255] The four Justices who declined to join Justice Scalia's proposition that a Fourth Amendment violation "requires an intentional acquisition of physical control"[256] did not specifically discuss any of his examples.[257]

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246. *See Collins*, 503 U.S. at 121-22.
247. *See* 515 U.S. at 487 n.11.
248. *See* Roach v. City of Fredericktown, 882 F.2d 294, 296-97 (8th Cir. 1989).
249. *See Brower*, 489 U.S. at 599-600 (1989).
250. *Id.* at 596.
251. *Id.*
252. *Id.*
253. *Id.* at 595.
254. *Id.* at 596.
255. *Id.* at 597.
256. *Id.* at 596.
257. *Id.* at 600 (Stevens, Brennan, Marshall & Blackmun, JJ., concurring).

Justice Scalia provided further commentary on *Brower* two years later in *California v. Hodari D.*[258] The facts were different since *Hodari D.* was a criminal case and the Fourth Amendment issue was raised on a motion to suppress evidence as the fruit of an unconstitutional search, but Justice Scalia's majority opinion made use of *Brower*. Hodari's troubles started when he spotted an officer looking for suspicious activity; he fled before the officer was close enough to grab him or what he was holding.[259] Hodari threw down an object as he was running away.[260] The police retrieved it and found it was cocaine.[261] Although the State conceded on appeal that the officer had no grounds to stop Hodari,[262] the Court held that was not important because the officer did not seize the contraband. Instead, the Court held that the contraband had been abandoned before Hodari was apprehended.[263] Justice Scalia's opinion declared that a Fourth Amendment seizure does not occur during a chase, since fleeing suspects are not submitting to the police attempt to stop them.[264] Holding that not even a suspect like Hodari can assert that the police violated the Fourth Amendment during a pursuit seems to leave little hope that a bystander could do so.

However, other themes in these opinions may not always pull together as the facts change. While Hodari could not show a Fourth Amendment violation, the Fourth Amendment still governs what an officer may do during a pursuit. The comment in *Hodari* that *Brower* "did not even consider the possibility that a seizure could have occurred during the course of the chase"[265] stops short of declaring that the Fourth Amendment does not apply, and does so for good reason. The Court in *Brower* would have reached the opposite result if the Fourth Amendment does not apply during the course of a pursuit. The roadblock in *Brower* was set up during the pursuit, at a time when the suspect's flight showed he had not yet been seized.[266] Even *Garner* would have been decided differently if the Fourth Amendment does not apply during a pursuit. As Justice Stevens argued in his dissent in *Hodari*, *Garner* held that unreasonable use of deadly force against a fleeing suspect violates the Fourth Amendment.[267] If the officer's shot violated a constitutional right in *Garner*, the Fourth Amendment had to apply when the officer fired the shot and before the officer could know whether the bullet would be effective.[268] The lesson Justice Stevens drew from *Garner* was neither rejected nor countered in Justice Scalia's opinion, but the holding of *Brower* on its facts confirms that the unconstitutional police action can precede the seizure.

An example discussed in both *Brower* and *Hodari* further illustrates that the Fourth Amendment does apply during the pursuit. This common example focused

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258. 499 U.S. 621 (1991).
259. *See id.* at 622-23.
260. *See id.* at 623.
261. *See id.*
262. *See id.*
263. *See id.* at 629.
264. *See id.* at 626-27.
265. *Id.* at 628.
266. *See Brower*, 489 U.S. at 594.
267. *See Hodari D.*, 499 U.S. at 644 (Stevens & Marshall, JJ., dissenting).
268. *See id.*

on the Court's much earlier decision in *Hester v. United States*.[269] In *Hester*, the Court held that there was no seizure when a revenue agent took possession of moonshine containers dropped by a suspect during a pursuit.[270] However, in *Brower* Justice Scalia declared that two facts would have meant a different result in *Hester* because there would have been a seizure; first, if the agent had shouted "Stop and give us those bottles, in the name of the law!" and second, if "the defendant and his accomplice had complied."[271] Again, of course, the officer can control only the decision to demand the contraband, not the suspect's decision to ignore it or comply. If the suspect's compliance means there is a Fourth Amendment violation if it turns out the officer had no probable cause to demand its surrender, the action that violated the Fourth Amendment took place during the pursuit.

The declaration in *Brower* that the police must intend to assert control to meet the definition of seizure is illustrated by a limited range of examples. Justice Scalia emphasized that a plaintiff did not have to prove that the officer intentionally caused the injury in order to have a Fourth Amendment claim. He declared that there could be a seizure even if the officers did not want the driver to crash, because "we do not think it practicable to conduct such an inquiry into subjective intent."[272] In other examples, he declared that it would "draw too fine a line" to say "that one is not seized who has been stopped by the accidental discharge of a gun with which he was meant only to be bludgeoned, or by a bullet in the heart that was meant only for the leg."[273] While this made clear that subjective intent is not required, it still did not clarify what would suffice to show what the concurring Justices labeled as the "concept of objective intent."[274] For that, it is useful to look at some parameters in the *Brower* examples.

Two parameters that sort out the *Brower* examples are whether the Fourth Amendment governed the intentional action and whether that action was the cause of the injury. The first and second examples—no Fourth Amendment claim when a runaway police car "slips its brake and pins a passerby against a wall,"[275] even if the passerby is a suspect being pursued by two constables—depend on an unstated assumption that the officer who parked the car did not expect the brakes to fail. The conduct of parking a police car is intentional but not governed by the Fourth Amendment. Pursuing a suspect to make an arrest is intentional conduct governed by the Fourth Amendment, but the example assumes that the pursuer did not release the brake. The third example where there was no seizure—"flashing lights and continuing pursuit"[276]—included a stated assumption that "the suspect unexpectedly loses control of his car."[277] While the pursuit would be governed by the Fourth Amendment, the example assumed the pursuit was not the cause of the crash. This third example was compared with the situation of a fleeing car sideswiped by a

269. 265 U.S. 57 (1924).
270. *See id.* at 58.
271. *Brower*, 489 U.S. at 597.
272. *Id.*
273. *Id.* at 598-99.
274. *Id.* at 600 (Stevens, Brennan, Marshall, & Blackmun, JJ., concurring).
275. *Id.* at 596.
276. *Id.* at 597.
277. *See id.* at 595.

police cruiser, where intentional conduct described as "producing the crash" would be both governed by the Fourth Amendment and the cause of the injury.[278]

None of the *Brower* examples involved (i) intentional action governed by the Fourth Amendment, such as an attempt to make a seizure, that (ii) caused an event that was not subjectively intended but was objectively foreseeable, such as a collision, that (iii) harmed a person who was not the intended target of the action, such as a bystander. The example of an injured bystander highlights that there are two parts to the statement in *Brower* that the Fourth Amendment does not address the "accidental effects"[279] of "otherwise lawful"[280] police actions, and that *Brower* did not fully mark either the boundary between accidental and intended effects or the boundary between lawful and constitutionally unreasonable government conduct.

C. *Recalibrating Graham and Brower*

The holdings of *Brower* and *Graham* are not in conflict. The conflict arises when the holdings are applied to new facts. The circuit court decisions reconciled the Court's opinions by giving primary weight to *Brower*'s definition of a seizure and lesser weight to *Graham*'s preference for analysis under explicit constitutional language. The alternative would strike the balance exactly opposite by giving greater weight to *Graham* and lesser weight to *Brower*. This alternative would make the critical time the beginning of the police response rather than the end. Thus, "all claims that law enforcement officers have used excessive force" would be analyzed under the Fourth Amendment alone in any case in which the officers intended to make "an arrest, investigatory stop, or other 'seizure' of a free citizen."[281] This alternative would also be consistent with the Court's application of the Fourth Amendment to a civil seizure that involved the "same sort of governmental conduct" as a criminal search,[282] and its refusal to apply the Fourth Amendment to a civil seizure that was "beyond the traditional meaning" of a search and seizure.[283]

The holding in part III of *Collins* that substantive due process is not a substitute for an explicit constitutional provision is an important message but not the only one in that case. Equally important was the Court's rejection in part I of *Collins* of the Fifth Circuit's holding that an "abuse of governmental power" was a necessary element under section 1983,[284] and the Court's conclusion that an abuse of power is neither a necessary nor a sufficient condition for a claim under the statute.[285] *Collins* involved a claim that the death of a city employee at an unsafe job site was caused by inadequate training and equipment.[286] The Court held that the fact that a government employee caused the harm would not suffice to establish liability

278. *Id.* at 597.
279. *Id.* at 596.
280. *Id.*
281. Graham v. Connor, 490 U.S. 386, 395 (1989).
282. Soldal v. Cook County, 506 U.S. 56, 70 (1992).
283. United States v. James Daniel Good Real Property, 510 U.S. 43, 52 (1993).
284. Collins v. City of Harker Heights, 916 F.2d 284, 287-88 (5th Cir. 1990), *aff'd*, 503 U.S. 115 (1992).
285. *See Collins*, 503 U.S. at 119.
286. *See id.* at 115.

under section 1983 unless there was also a violation of a constitutional right.[287] The opinion suggested that an employee would have a First Amendment claim if the employee was sent on a particularly dangerous assignment in retaliation for protected speech,[288] and that an employee would also have an Equal Protection claim if given that assignment based on gender.[289] The opinion also suggested a citzen would have the same claim if a city employee injured them for one of those reasons.[290]

In part III of *Collins* the Court stated it was not persuaded that the city's failure to train or warn its employees was conscience shocking under a substantive due process theory, and described plaintiff's claim as a typical tort claim under state law.[291] The combination of parts I and III of *Collins* reaffirmed that an important distinction between conduct actionable under section 1983 and conduct actionable only under tort law is whether the particular conduct is governed by specific constitutional language. An injured bystander would have no claim under section 1983 if injured by an officer's negligent driving during routine patrol, just as a city employee has no claim under section 1983 if injured after being routinely assigned to perform a dangerous task. However, a city employee would have a section 1983 claim if he or she were assigned to a dangerous task in retaliation for protected speech, because the supervisor's decision to retaliate violates the First Amendment. Under the same principle, an injured motorist would have a claim under section 1983 if the injury was caused by an officer's use of excessive force in violation of the Fourth Amendment.

Fourth Amendment doctrine could provide factual standards to measure the wisdom and execution of a police response. Whether the victims are suspects, targets, or bystanders, the test would be "one of 'objective reasonableness' under the circumstances."[292] Under the objective reasonableness test, there would be no conflict between the Fourth Amendment and substantive due process limits on police use of force. There would be no need to anticipate the many ways the substantive due process claim could diverge from the rest of section 1983 doctrine. However, bystanders would face a difficult burden of proof because qualified immunity protects officers against suit unless the plaintiff proves the officer was "plainly incompetent" or "knowingly violate[d] the law."[293] However, the importance of the Fourth Amendment right is not limited to damage claims against individual officers. Of equal or greater importance is the duty of police departments to select, train, equip, and supervise their officers to properly respond and not violate the constitutional rights of suspects or the public, a topic examined in the next section.

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287. *See id.*
288. *See id.*
289. *See id.*
290. *See id.* at 119-20.
291. *See id.* at 128.
292. Graham v. Connor, 490 U.S. 386, 399 (1989).
293. Hunter v. Bryant, 502 U.S. 224, 228 (1991) (quoting Malley v. Briggs, 475 U.S. 335, 341 (1986)).

IV. POLICE DEPARTMENT LIABILITY TO BYSTANDERS

The first round of circuit court opinions involved section 1983 suits by bystanders against individual officers. As bystanders widened the list of defendants, the circuits have recently considered claims by injured bystanders against the employers of the officers. Injured bystanders seeking damages from the city or a police department must prove the two elements of a deprivation of a constitutional right and action under color of state law. They must also prove that the injury was caused by the entity's official policy or custom.[294] None of the cases has involved the unlikely scenario of an explicit police department policy of injuring bystanders. However, an entity will also be liable if its policymakers were deliberately indifferent to the constitutional rights of the people its police officers would encounter in their service.[295] Some circuit court decisions have suggested that bystanders can recover damages from an entity under this deliberate indifference standard even if their evidence is insufficient to establish a substantive due process violation by the officer. Their conclusion provides another reason to reexamine the original assumption that bystander rights should be based on substantive due process.

A. Basic Doctrine on Entity Liability

Monroe v. Pape[296] marks the modern revival of section 1983 litigation, but only for claims against individual officers.[297] It did not permit a claim to be asserted against the City of Chicago.[298] Seventeen years later in *Monell v. Department of Social Services*.[299] municipalities lost their immunity when the Court held that the governmental entity employing a state actor could be liable under section 1983 when the "execution of a government's policy or custom . . . inflicts the injury."[300] *Monell* itself did not have to define how to identify the kind of policy that would create liability because the rule challenged by plaintiffs had concededly been the official policy of New York City. However, the Court did explicitly declare that "a local government may not be sued under section 1983 for an injury inflicted solely by its employees or agents,"[301] and held that the tort theory of respondeat superior was not available to plaintiffs.

The Supreme Court began to explore alternative theories of liability in *Oklahoma City v. Tuttle*,[302] in which a plaintiff alleged that a city policy had caused the officer to shoot an unarmed robbery suspect.[303] The plaintiff did not claim that the city had a rule instructing its officers to shoot unarmed robbery suspects. Instead, the plaintiff claimed that the city's inadequate training or supervision of the officer caused the shooting. The jury instructions stipulated that the jury could infer

294. *See* Monell v. Department of Soc. Servs., 436 U.S. 658 (1978).
295. *See* City of Canton v. Harris, 489 U.S. 378 (1989).
296. 365 U.S. 167 (1961).
297. *See id.* at 171-87.
298. *See id.* at 187-92.
299. 436 U.S. 658 (1978).
300. *Id.* at 694.
301. *Id.*
302. 471 U.S. 808 (1985).
303. *See id.* at 822. The facts in *Tuttle* may be found at *id.* at 808-13.

inadequate training or supervision from one incident of excessive force. The jury did so and returned a plaintiff's verdict for $1,500,000. The Supreme Court held that the jury instructions were erroneous, because permitting the jury to find an unconstitutional policy on the basis of a single incident would destroy *Monell*'s holding that entity liability must be based on an official policy. While the opinion expressed doubt that a city could have a "policy" of "inadequate training," it did not reject the possibility.[304] Instead, it required more direct proof that the city deliberately chose an inadequate policy.

The standard for holding an entity liable for failing to train its employees was further refined in *Canton v. Harris*.[305] In *Canton*, the plaintiff had been arrested and held in custody for about an hour without receiving medical treatment after she slumped to the floor during processing.[306] The evidence showed that the shift commander at the jail could have called for medical assistance, but he had not received any special training on when to do so. The Court held that the jury verdict for the plaintiff had to be set aside because the jury instructions did not properly define the standard for liability. The Court held that inadequate training would create liability under section 1983 only if the failure to train amounted to "deliberate indifference to the rights of persons with whom the police come into contact."[307] The Court specifically rejected the city's argument that it should limit liability to cases in which a policy was unconstitutional on its face and the contrary argument that it should impose liability whenever a valid policy was applied in an unconstitutional manner.[308]

Canton focused on the standard that should be used to test the fault of those who made the policy for the entity, but the opinion makes clear that the deliberate indifference phrase is only a partial description of what a plaintiff must prove. The opinion stressed, more than once, that the standard requires conduct that was deliberately indifferent to the plaintiff's constitutional rights. The need for training was described as depending on whether failure to train would likely "result in the violation of constitutional rights,"[309] or whether the police "so often violate constitutional rights" that the need for training is obvious.[310] *Canton* did not mention that there could be entity liability under section 1983 if the policymakers were deliberately indifferent to tortious injuries that were not caused by a constitutional violation.

The requirement that a plaintiff must prove deliberate indifference to the plaintiff's constitutional right was essential to keep *Canton* consistent with the Court's opinion a week earlier in *DeShaney v. Winnebago County Department of Social Services*.[311] *DeShaney* held that a plaintiff could not recover damages under section 1983 for injuries from private violence if the government did not have a constitutional duty to provide protection against that violence. Even if "the State

304. *See id.* at 823.
305. 489 U.S. 378 (1989).
306. *See id.* at 380. The facts in *Canton* may be found at *id.* at 378-83.
307. *Id.* at 388.
308. *See id.* at 386-87.
309. *Id.* at 390.
310. *Id.* at 390 n.10.
311. 489 U.S. 189 (1989).

may have been aware of the dangers," there was no duty to protect a child who was not in state custody.[312] The Court's opinion did not need to address the state of mind issue at all. If knowingly allowing someone to be injured by private violence does not create liability without a separate constitutional duty of protection, then the less culpable standard of deliberate indifference to a risk of injury from private conduct will not create a constitutional violation.

Both the language and result in *Collins* further emphasize that deliberate indifference alone will not suffice without a constitutional violation. The language of *Collins* emphasized that *Canton* had assumed the existence of a constitutional right to medical care while in police custody in order to focus on the issue of municipal responsibility.[313] The *Collins* opinion was explicit that it "did not suggest that all harm-causing municipal policies are actionable under § 1983, or that all such policies are unconstitutional."[314] The lengthy exploration of substantive due process was necessary because the plaintiff could not identify any other constitutional duty for which the city might have been deliberately indifferent. While state tort law established the city's duty to train its employees or warn them of dangers, it did not create a constitutional duty.[315] The opinion never discussed what the city policymakers knew or ignored when they defined the city's training policy. Without a constitutional duty there was no need to ask if there was deliberate indifference because there still would not be a basis for holding the entity liable.

The Court's recent decision on the proper interpretation of deliberate indifference under the Eighth Amendment illustrates the need to use care with the same phrase when addressing entity liability. Under the Eighth Amendment, the deliberate indifference standard is an element of a prisoner's claim for damages caused by inhumane conditions of confinement or inadequate medical care.[316] In *Farmer v. Brennan*[317] the Court clearly rejected any application of *Canton*'s interpretation of the same words to the Eighth Amendment context.[318] However, the opinion then quoted both the *Collins* reference to "constitutional torts committed by its inadequately trained agents"[319] and, summarized *Canton* as "permitting liability when a municipality disregards 'obvious' needs."[320] If that latter summary were accurate, it would broaden the *Canton* rule tremendously by going far beyond constitutional rights. The discussion of entity liability was dictum because the opinion in *Farmer* focussed on the different application of the same language under the Eighth Amendment test. Rather than a new interpretation of *Canton*, the *Farmer* opinion is evidence of how easy it is to misdescribe the *Canton* holding.

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312. *Id.* at 201.
313. *See* Collins v. Harker Heights, 503 U.S. 115, 122-23 (1992).
314. *Id.* at 123.
315. *See id.*
316. *See* Helling v. McKinney, 509 U.S. 25, 30 (1993).
317. 511 U.S. 825 (1994).
318. *See id.* at 840-41.
319. *Id.* at 841.
320. *Id.*

Bryan County v. Brown[321] is the most recent example of how even the Supreme Court may not always summarize *Canton* accurately. The issue in *Bryan County* was whether the County could be liable for injuries a deputy inflicted in making an arrest using excessive force.[322] The plaintiff alleged that the sheriff had hired the deputy without an adequate investigation. The county stipulated that the sheriff was the sheriff's department policymaker but argued that the error in hiring the deputy was not caused by county policy. To distinguish *Canton* the majority explained why there might be a difference between an inadequate training program and a faulty hiring process for a single deputy:

> If a program does not prevent *constitutional violations*, municipal decisionmakers may eventually be put on notice that a new program is called for. Their continued adherence to an approach that they know or should know has failed to prevent *tortious conduct* by employees may establish the conscious disregard for the consequences of their action—the "deliberate indifference"— necessary to trigger municipal liability. ("It could . . . be that the police, in exercising their discretion, so often violate *constitutional rights* that the need for further training must have been plainly obvious to the city policymakers") . . . In addition, the existence of a pattern of *tortious conduct* by inadequately trained employees may show that the lack of proper training . . . is the "moving force" behind the plaintiff's injury.[323]

The opinion noted as well that the "Court of Appeals also posited that Sheriff Moore's decision reflected indifference to 'the public's welfare.'"[324] However, when the majority opinion moved to the application of the deliberate indifference test, the intermingling of "tortious conduct" and "constitutional rights" came to an end and the public welfare did not remain on the table as an element.[325] The opinion is clear:

> A plaintiff must demonstrate that a municipal decision reflects deliberate indifference to the risk that a violation of a particular *constitutional* or statutory right will follow the decision.[326]
>
> . . .
>
> The fact that Burns had pleaded guilty to traffic offenses and other misdemeanors may well have made him an extremely poor candidate for reserve deputy. Had Sheriff Moore fully reviewed Burns' record, he might have come to precisely that conclusion. But unless he would necessarily have reached that decision because Burns' use of excessive force would have been a plainly obvious consequence of the hiring decision, Sheriff Moore's inadequate scrutiny of Burns' record cannot constitute "deliberate indifference" to respondent's *federally protected right* to be free from a use of excessive force.[327]

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321. 117 S. Ct. 1382 (1997).
322. The facts in *Bryan County* may be found at *id.* at 1382-88.
323. *Id.* at 1390 (emphasis added).
324. *Id.* at 1392.
325. *See id.*
326. *Id.* (emphasis added).
327. *Id.* at 1393 (emphasis added) (emphasis omitted).

Justice Souter argued in his dissenting opinion that the majority had gone too far by requiring that the risk of a particular constitutional violation be plainly obvious and by being so skeptical of plaintiff's proof. However, his opinion likewise assumed that liability required deliberate indifference to the "substantial risk of a constitutional violation,"[328] and concluded that there was evidence of the sheriff's "contempt for constitutional obligations."[329] Justice Breyer in his dissent argued that the Court should reexamine the rule of *Monell* and *Canton* and abandon the effort to define municipal liability under the policy test,[330] but his opinion did not suggest that a municipality would be liable without a constitutional violation.

B. Departmental Liability under Substantive Due Process

Both the Third Circuit and the Tenth Circuit have tried to define the elements of a sufficient claim by a bystander against the police department in a way that cannot be described as a straightforward combination of deliberate indifference to the substantive due process rights of bystanders. In each case, the circuit court opinion made a simple change in the standard by requiring deliberate indifference to something other than a constitutional right. For convenience, this section describes entity liability as department liability. Perhaps, in most cases, that is a misnomer because the local police department is actually an administrative unit of government rather than a separate entity with capacity to be sued, but that is a technical issue. The focus in each case will always be on the policy decisions made by the departmental leadership.

1. Departmental Liability in the Third Circuit

The Third Circuit's definition of a sufficient claim against a city can be described as either an incorrect application of the holding in *Canton* or an outright revision of that holding. The original panel opinion had held that the standard of liability for a bystander's claim against the individual officer is "whether a pursuing police officer acted with a reckless indifference to public safety."[331] The original panel had reversed the trial judge's grant of summary judgment for the officers, because the trial judge had erred by using the "shocks the conscience" standard.[332] The original panel opinion had also reversed the trial judge's grant of summary judgment for the city, which had been based on the finding that the officers had not violated the plaintiff's constitutional rights.[333] Since the reversal of the summary judgment on the claim against the officers reopened the possibility that the plaintiff could show a constitutional violation, it would have been appropriate to reverse the summary judgment for the city as well. However, besides doing that, the original panel opinion reached another issue that might have arisen on remand.

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328. *Id.* at 1396 (Souter, Stevens & Breyer, JJ., dissenting).
329. *Id.* at 1400.
330. *Id.* at 1401 (Breyer, Stevens & Ginsburg, JJ., dissenting).
331. Fagan v. City of Vineland, No. 90-00310, 1993 WL 290386, at *12 (3d Cir., Aug. 5, 1993), *vacated* 5 F.3d 647 (1993).
332. *See id.* at *13.
333. *See id.* at *1.

As the original panel opinion stated the issue, it addressed "whether a municipality can be held independently liable under section 1983 in a police pursuit case if none of the pursuing officers are liable."[334] The opinion described an example of a situation in which an untrained officer used force that would be found excessive if the officer acted with reckless indifference, but the untrained officer did not know that the actual response was so dangerous.[335] Under the same facts a city could have acted with deliberate indifference, if its policymakers knew of the danger but chose a policy of inadequate training regarding that particular response.[336] The different factors are time and knowledge. The claim against the officer depends on what the officer knew at the time of the encounter and the claim against the city depends on what the department leaders knew about the likelihood and risks of such encounters at the time they made the department's policy. The original panel opinion declined to resolve how "reckless indifference" and "deliberate indifference" might differ,[337] but it did emphasize that on remand "the district court must still consider whether the City violated the plaintiffs' constitutional rights independently of any individual officer's liability."[338]

The en banc opinion noted that the full court review was limited to the question of the appropriate standard for deciding whether a pursuit violated substantive due process.[339] On that issue the en banc court's rejection of the reckless indifference standard and adoption of the "shocks the conscience" standard changed the outcome for the claims against the officers. The en banc court was not shocked by the conduct of any of the officers, so the summary judgment for the officers was affirmed. The en banc court did no more with the original panel's decision on the claim against the city, and allowed the original panel opinion to be "edited to conform to the new in banc result."[340] Since the panel opinion had reversed the denial of summary judgment and held that there could be a claim against the city, the en banc opinion supports the panel holding that a city can be liable for failing to provide adequate training for its officers, even if the officers' actual conduct did not shock the conscience of the court.

In its second opinion, the panel again affirmed that a plaintiff might be able to prove that the city had violated the Constitution even though none of the individual officers had done so.[341] Once again the opinion distinguished the improperly trained officer who escaped liability out of ignorance of the danger from a city that should be liable if its policymakers knew of the danger but refused to provide training.[342] However, the en banc holding that bystanders are protected only by a substantive due process right against conduct that "shocks the conscience" made it well nigh impossible for a city's training policy to be the result of deliberate indifference to such a limited constitutional right. The language of the en banc opinion had

334. *Id.* at *14.
335. *See id.* at *16.
336. *See id.*
337. *Id.* at *15 n.8.
338. *Id.* at *17.
339. *See* Fagan v. City of Vineland, 22 F.3d 1296, 1302 (3d Cir. 1994) (en banc).
340. *Id.*
341. *See* Fagan v. City of Vineland, 22 F.3d 1283, 1292 (3d Cir. 1994) (panel decision).
342. *See id.*

suggested a substantive due process violation would involve "malicious abuse of official power"[343] or "outrageous conduct"[344] or "arbitrary use of government power."[345] In contrast, there would be no constitutional claim where the injury was "incidental and unintended consequence of official action."[346] A training program that prepared officers to refrain from acting in a malicious, outrageous, or arbitrary manner would not have to consider the dangers of responses the officers might elect to make in good faith, even when the department knew that the unintended consequences of certain responses were much more dangerous than the untrained officer would know.

The panel in its second opinion included the element of deliberate indifference, but its principal declaration of the claim against the city did not require deliberate indifference toward the constitutional rights of bystanders:

> The City is liable under section 1983 if its policymakers, acting with deliberate indifference, implemented a policy of inadequate training and thereby caused the officers to conduct the pursuit in an unsafe manner and deprive the plaintiffs of life or liberty. . . .[347]
>
> We hold that a municipality can be liable under section 1983 and the Fourteenth Amendment for a failure to train its police officers with respect to high-speed automobile chases, even if no individual officer participating in the chase violated the Constitution.[348]

While there is also one reference in the opinion to "a city policy reflecting the city policymakers' deliberate indifference to constitutional rights,"[349] the entire context of the opinion suggests that the court was defining a substantive due process claim for deliberate indifference to the danger of pursuit, not deliberate indifference to the constitutional right against conduct that shocks the conscience of the court. In principle, it can be argued that the Third Circuit is not clearly wrong. As a question of precedent it must be admitted that the Supreme Court has not closed the roll of viable substantive due process claims. In reality, such a claim would be completely contrary to the Court's often repeated cautions against defining new substantive due process rights and in direct conflict with *Canton*'s holding that a plaintiff can recover under section 1983 if policymakers are deliberately indifferent to the constitutional rights of those its employees will encounter. Most seriously, it parses *Canton*'s holding into an incomplete and partial standard by omitting any mention of the subject toward which the policymakers must have been deliberately indifferent.

In the end, the Third Circuit's version of municipal liability did not help the plaintiffs enough to make a difference at trial. The jury returned a defense verdict, one day after the plaintiffs declined a settlement offer of more than $1.6 million.[350]

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343. *Fagan*, 22 F.3d at 1308 (en banc) (quoting Checki v. Webb, 785 F.2d 534, 538 (5th Cir. 1986)).
344. *Id.* (quoting Jones v. Sherrill, 827 F.2d 1102, 1107 (6th Cir. 1987)).
345. *Id.*
346. *Id.* at 1307 (quoting Rhodes v. Robinson, 612 F.2d 766, 772 (3d Cir. 1979)).
347. *Fagan*, 22 F.3d at 1292 (panel decision).
348. *Id.* at 1294.
349. *Id.* at 1292.
350. *See* NEW JERSEY L.J., June 19, 1995, at 39. *See also* THE NATIONAL L.J., March 4, 1996, at A22-23.

2. Departmental Liability in the Tenth Circuit

A more recent decision of the Tenth Circuit used a similar approach in defining entity liability. In *Williams v. Denver*[351] a motorist was hit and killed by a police officer who was responding to a nonemergency call for assistance.[352] The cause of the collision was bad driving by the officer, who decided to "speed against a red light through an intersection on a major boulevard in Denver without slowing down or activating his siren in non-emergency circumstances."[353] Those facts differed from a typical pursuit case like *Fagan* because no suspect was involved in any way with the collision, but the Tenth Circuit addressed the same question of defining entity liability when the plaintiff asserts a substantive due process claim against the officer.

The court set the stage for its discussion of the city's liability by holding that there was enough evidence to support a substantive due process claim against the individual officer because his bad driving "could be viewed as reckless and conscience-shocking."[354] The court then held that this result required reversing the city's summary judgment on the plaintiff's claim that it failed to train the officer.[355] The discussion began with a quotation from *Canton*:

> The Supreme Court has held that a City is liable on a "failure to train" claim when "the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policy makers of the city can reasonably be said to have been deliberately indifferent to the need."[9][356]
>
> 9. The Court made clear in *City of Canton* that a City is liable for its deliberate indifference to the unconstitutional conduct of its employees regardless of the degree of fault a plaintiff must show to establish the underlying claim of constitutional violation.[357]

The court then briefly discussed only the evidence that might have made the need for training obvious—a poor driving record when the officer was hired, poor driving after the officer was hired, and a common practice by City officers of responding improperly to emergency calls[358]—and reversed. A key issue framed by the quotation from *Canton* was left untouched, with no discussion of whether the failure to train was likely to result in a constitutional violation. By allowing that issue to drop away without mention, the opinion laid the groundwork for finding entity liability when the need to train is made obvious because of the risk of injury alone.

The precedential value of *Williams* was undercut when the Tenth Circuit vacated the panel opinion and granted rehearing en banc.[359] It is not clear if the reason was

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351. 99 F.3d 1009 (10th Cir. 1996).
352. *See id.* at 1012.
353. *Id.* at 1017.
354. *Id.*
355. *See id.* at 1018.
356. *Id.*
357. *Williams*, 99 F.3d at 1018 n.9.
358. *See id.* at 1018.
359. *See* Williams v. City of Denver, 99 F.3d 1009 (10th Cir. 1996), *vacated and reh'g en banc granted*, March 3, 1997, as noted in Rowe v. City of Marlow, Nos. 96-6144, 96-6229, 1997 WL 353001, at *5 n.7 (10th Cir.

the panel's adoption of the conscience shocking standard, its application of the conscience shocking standard to the conduct of the officer, or its reversal of the summary judgment for the City on the failure to train claim. The dissenting opinion from the panel decision objected only to its discussion of the claim against the officer.[360]

C. *Where was the Detour?*

The endpoint of this reconstruction of the substantive due process standard by the Third and Tenth Circuits stands out in stark contrast with the basic tenet that section 1983 liability depends on the department's deliberate indifference to constitutional rights. There were several key decision points on the path to this endpoint—the assumption that bystander rights should be based on substantive due process, the conclusion that the substantive due process standard should be defined as conduct that "shocks the conscience," and the assumption that bystanders should have a section 1983 claim if the police department policymakers knew but did not care that officers in the department were not prepared to respond to criminal activity without creating greater dangers. The remaining question is which decision or decisions led to the wrong conclusion.

The last decision on the path does not appear to be the reason for the detour. The doctrine derived from *Monell* and *Canton*, that the department can be liable if its policymaking leadership was deliberately indifferent to the constitutional violations committed by untrained or unsupervised officers, is still good law. Justices Breyer and Ginsburg have now joined Justice Stevens in arguing for reexamination of *Monell's* basic distinction, but they have emphasized expansion of municipal liability and not contraction.[361] Other circuit courts have declined to follow the lead of the Third Circuit, but they have done so because they thought "the *Fagan* panel ignored . . . the requirement that the plaintiff's harm be caused by a constitutional violation,"[362] not because they saw any reason to doubt that deliberate indifference is a required element.

The second decision on the path is one apparent reason for the detour. The conscience shocking standard had been described as so difficult to meet that combining deliberate indifference with that standard would seem to impose no duty at all on the policymakers. In contrast, the *Lewis* opinion shows that a different decision at this point could have avoided producing that empty set. The Ninth Circuit's decision to define the standard as deliberate indifference or reckless disregard for life produced a combination that would produce some meaningful content for the duty of the policymakers. In *Lewis* itself the factual record undercut the plaintiff's case because the department had a training program and a pursuit policy, but the court suggested it might not have affirmed the defense summary judgment if plaintiff had evidence of a "program-wide inadequacy in training."[363] An additional indication that the *Lewis* standard could produce a workable measure

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June 26, 1997).

360. *See Williams*, 99 F.3d at 1021-25 (Anderson, J., dissenting in part).

361. *See* Bryan County v. Brown, 117 S. Ct. 1382, 1401-04 (Breyer, Stevens & Ginsburg, JJ., dissenting).

362. Evans v. Avery, 100 F.3d 1033, 1040 (1st Cir. 1996), *cert. denied*, 117 S. Ct. 1693.

363. Lewis v. Sacramento County, 98 F.3d 434, 447 (9th Cir. 1996), *cert. granted*, 117 S. Ct. 2406 (1997).

for judging the decisions of policymakers is the similarity to *Canton* itself, where the underlying constitutional right was the Eighth Amendment right to medical treatment that is violated when a jailer shows deliberate indifference to serious medical needs.[364] However, the possibility that the *Lewis* standard would provide a measure for entity liability does not necessarily mean that the second decision point was the root cause of the detour.

The first decision on the path is also a possible reason for the detour, because the problem in defining the basis for entity liability may be only the initial example of a more general flaw in any effort to define bystander rights under substantive due process. The very nature of the uncharted scope of substantive due process that made it seem so available for bystander rights may also explain why bystanders have fared so badly under it. The absence of an organized body of precedent under a specific textual right leads to ad hoc decisions that ignore the guidance to be gained on closely related issues. The next section sketches some of the differences a Fourth Amendment foundation could make in order to illustrate why the root cause of the detour should be identified as the choice of substantive due process as the starting point.

V. WHAT A DIFFERENCE THE FOUNDATION MAKES

A. Meeting the Emphasis on the Foundation

The 1997 decision in *United States v. Lanier*[365] provides a current reminder of the Supreme Court's continued emphasis on the importance of building the structure of constitutional rights on a solid foundation. In this case the Court reviewed the criminal conviction of a Tennessee judge who had been charged with violating the constitutional rights of five women by various acts of sexual assault.[366] The jury instructions had defined sexual assault as being a constitutional crime when the conduct was "so demeaning and harmful under all the circumstances as to shock one's consci[ence]."[367] The Sixth Circuit had reversed the conviction on the ground that a constitutional right could not be used to support a criminal conviction unless the right had been clearly established by Supreme Court decisions in a factually similar case.[368] The Supreme Court rejected this interpretation as too narrow and held that the constitutional right could be established by lower court decisions as well, and that fair warning could come from earlier decisions that were not always factually identical.[369] The Court then remanded the case to the Sixth Circuit.[370]

The *Lanier* opinion did not directly address one difficult task it left for the Sixth Circuit on remand. The prior Sixth Circuit decision was explicitly limited to the theory that the offense should be "defined as 'interference with bodily integrity that

364. *See* City of Canton v. Harris, 489 U.S. 378, 388-89 n.8 (1989).
365. 117 S. Ct. 1219 (1997).
366. *See id.* at 1222.
367. *Id.* at 1223.
368. *See* United States v. Lanier, 73 F.3d 1380, 1393 (6th Cir. 1996), *vacated*, 117 S. Ct. 1219 (1997).
369. *See Lanier*, 117 S. Ct. at 1226-27.
370. *See id.* at 1228.

shocks the conscience of the court and the jury.'"[371] However, the Supreme Court's unanimous opinion did not discuss whether there actually is a substantive due process right or whether the conscience shocking standard provides the proper measure. The only guidance the Court provided was a concluding footnote that expressly rejected certain arguments about *DeShaney* and *Graham*:

> [A]lthough [*Deshaney*] generally limits the constitutional duty of officials to protect against assault by private parties to cases where the victim is in custody, *DeShaney* does not hold . . . that there is no constitutional right to be free from assault committed by state officials themselves outside of a custodial setting. . . . [*Graham*] does not hold that all constitutional claims relating to physically abusive government conduct must arise under the Fourth or Eighth Amendments; rather, *Graham* simply requires that if a constitutional claim is covered by a specific constitutional provision, such as the Fourth or Eighth Amendment, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process.[372]

The importance of this footnote extends beyond the tacit confirmation that the Court has not yet declared the scope of the substantive due process right to be exhausted. A more important message of this footnote becomes clearer if it is read in light of the oral argument.[373] The questions from the Justices explored whether different outcomes might make "every arrest . . . a Federal case,"[374] or make "any physical tort committed by a State agent in the course of his employment . . . a constitutional violation,"[375] or whether "any violent assault by a public official, any at all, against a free person as opposed to someone who is in custody"[376] would violate a constitutional right. The questions at oral argument were consistent with the Court's earlier cautions that substantive due process rights are disfavored because they cannot be well defined and lack clear outer boundaries. The footnote is also a reminder that the lower courts may not need to invoke substantive due process if they read the Court's decisions carefully and do not overlook how explicit rights can provide a foundation.

The same emphasis on building an initial foundation supports using the Fourth Amendment to define the constitutional rights of bystanders. The basic standard for measuring whether the force is excessive was already developed by the decisions in *Garner*, *Graham*, and *Brower*. The context in which the excessive force standard applies was defined in *Graham* as including "the course of an arrest, investigatory stop, or other 'seizure'".[377] Using that standard for bystanders would not expand the constitutional limits on the police. In fact, it would cut the number of limits in half by making all decisions about the appropriate amount of force to use in a response subject to only the Fourth Amendment instead of both the Fourth

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371. *Lanier*, 73 F.3d at 1384.
372. *Lanier*, 117 S. Ct. at 1228 n.7.
373. *See* United States Supreme Court Official Transcript, United States v. Lanier, 117 S. Ct. 1219 (1997) (No. 95-1717), 1997 WL 7587.
374. *Id.* at 9.
375. *Id.* at 16.
376. *Id.* at 28.
377. Graham v. Connor, 490 U.S. 386, 395 (1989).

Amendment and substantive due process. The Court has emphasized that multiple sources of constitutional rights are possible where each is based on an "explicit textual source" and that there is no reason to pick which of two explicit sources is "dominant."[378] However, substantive due process is not based on an explicit textual source. The "more generalized notion" of substantive due process has not been used by the Court when an explicit textual source "targeted the same sort of governmental conduct."[379]

The wide variation in state tort law on police liability to injured bystanders cuts both ways on the question of the constitutional rights of bystanders. The fact that many states have tort standards at least as favorable to bystanders suggests that the constitutional claim will be unnecessary in some states.[380] The rapidly growing body of state tort decisions is evidence that state courts and legislatures have not ignored the issue, even if they have reached differing conclusions on the best policy.[381] On the other hand, the tort law variance for bystander victims resembles the situation for the use of deadly force the Court considered in *Garner*.[382] Using a Fourth Amendment foundation would have the same effect for bystanders as *Garner* had for suspects by establishing the constitutional right as a minimum standard of protection for bystanders in every state. Just as for suspects, it would be only a minimum. States would still be free to provide greater compensation through tort law or to protect police officers and departments from any further liability.

A Fourth Amendment foundation would make more evident the constitutional implications of some police practices. A subtle theme that has accompanied the search for a substantive due process answer has been that the courts must choose between constitutional rights for bystanders or effective law enforcement and that it is not possible to have both. The Sixth Circuit opinion in *Galas v. McKee*[383] has both typified the judicial response to the substantive due process claim and been one of the baseline decisions in its development. The *Galas* decision has always carried added authority as precedent on this topic because Justice Scalia used the *Galas* result in his *Brower* opinion to illustrate his statement that there is no unconstitutional seizure when a pursued suspect "unexpectedly loses control of his car and crashes."[384] The apparent imprimatur of this pedigree may explain why the circuits have so often assumed that a substantive due process claim requires a police response more shocking than the facts in *Galas*.

In *Galas*, the seriously injured plaintiff was the fleeing driver, not a bystander. At the time of the chase he was 13 years old. The chase started when an officer saw him speeding at 65-70 miles per hour; the chase reached over 100 miles per hour

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378. United States v. James Daniel Good Real Property, 510 U.S. 43, 49-50 (1993); Soldal v. Cook County, 506 U.S. 56, 70 (1992).

379. *Soldal*, 506 U.S. at 70.

380. *See, e.g.*, City of Pinellas Park v. Brown, 604 So. 2d 1222 (Fla. 1992); Boyer v. State, 594 A.2d 121 (Md. Ct. App. 1991); Jones v. Ahlberg, 489 N.W.2d 576 (N.D. 1992); Cavanaugh v. Andrade, 550 N.W.2d 103 (Wis. 1996).

381. *See, e.g.*, Morris v. Leaf, 534 N.W.2d 388 (Iowa 1995); Pletan v. Gaines, 494 N.W.2d 38 (Minn. 1992); Tice v. Cramer, 627 A.2d 1090 (N.J. 1993); Colby v. Boyden, 400 S.E.2d 184 (Va. 1991).

382. Tennessee v. Garner, 471 U.S. 1 (1985).

383. 801 F.2d 200 (6th Cir. 1986).

384. Brower v. County of Inyo, 489 U.S. 593, 595-97 (1989).

and continued until it ended with a wreck. On appeal, the Sixth Circuit divided the question into two parts in order to apply the holding in *Garner* and stated two conclusions—that there was no seizure because the suspect was fleeing until he disabled himself, and that the pursuit was reasonable.[385] The holding that the pursuit was reasonable did not depend on any facts specific to the actual case, but rather on a declaration about a proposition of law: "[W]e conclude that the use of high-speed pursuits by police officers is not an unreasonable method of seizing traffic violators."[386]

This declaration that pursuit is not unreasonable became embedded in the substantive due process standard for bystander claims. The Sixth Circuit in *Jones v. Sherrill*[387] declared that the *Galas* holding that "high-speed pursuit is a constitutionally permissible method of apprehending traffic offenders" was equally applicable to a case involving the constitutional rights of "an innocent bystander."[388] Other circuit courts used *Jones* as a comparator when they presented examples of conduct that did not shock the conscience and declared that the facts of the case before the court were not as bad as in those other cases.[389] That in turn explains why later courts have confidently declared that police chases are "a necessary concomitant of maintaining order in our modern society."[390] In the unstructured and formless world of substantive due process, the lower courts found no other standard. The courts feared that any liability could "hamstring the police in their performance of vital duties"[391] and concluded that the judiciary should not intrude in law enforcement decisions.

The focus on substantive due process obscured the significance of the Supreme Court's response to very similar arguments in Fourth Amendment cases. Before *Garner*, a suspect did not have a constitutional right to be free from excessive force; there could be no civil rights claim even if the officer used deadly force to stop a fleeing suspect who was not dangerous. In *Garner*, the defendants argued that the Court should not recognize a constitutional right, because "overall violence will be reduced by encouraging the peaceful submission of suspects who know that they may be shot if they flee."[392] The Court was not persuaded by this argument and did not leave the decision to use deadly force entirely to the police officer's discretion. Capturing a suspect at all costs was constitutionally unreasonable. It was "unfortunate" if some suspects escaped,[393] but the chance of that happening did not always justify deadly force.

At the same time, *Garner* did not specifically forbid the use of deadly force. The Court did not attempt to declare a global rule either forbidding all deadly force or

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385. *See Galas*, 801 F.2d at 202-03.
386. *Id.* at 203.
387. 827 F.2d 1102 (6th Cir. 1987).
388. *Id.* at 1106.
389. *See, e.g.*, Temkin v. Frederick County Comm'rs, 945 F.2d 716, 722 (4th Cir. 1991) (citing *Jones*); Fagan v. City of Vineland, 22 F.3d 1296, 1307-08 (3d Cir. 1994) (citing *Temkin* and *Jones*); Evans v. Avery, 100 F.3d 1033, 1038-39 (1st Cir. 1996) (citing *Fagan* and *Jones*).
390. *Evans*, 100 F.3d at 1038.
391. *Id.*
392. Tennessee v. Garner, 471 U.S. 1, 9 (1985).
393. *Id.* at 11.

permitting it without the possibility of judicial review. The conditions for the use of deadly force were factual—the nature of the crime, the presence of a weapon, the threat to the officer or others, the alternatives to prevent escape, and the feasibility of a warning.[394] When the Court held that there could be a Fourth Amendment violation if the police used a roadblock to stop a fleeing driver, the opinion likewise emphasized the need to examine the "character" and "circumstances" of the actual roadblock.[395]

The whole body of circuit court decisions on bystander rights is notable for scarcely mentioning that there might be a factual dispute for trial about the wisdom or the execution of the police response. One early district court opinion reflects the general tenor with its assertion that "a pursuit is not deadly force" and, while fleeing felons cannot always be shot, that does not mean that it is "unreasonable to try to catch every one of them."[396] This attitude may be all but inevitable since the dominant fact in every case will be the wrongdoing of the suspect. The suspect's conduct will so clearly be a but-for cause of the tragedy that the officer's response will appear to be at least a good faith attempt to enforce the law. The judicial frustration with the suspect's criminal conduct then leads the court to assign all fault to the suspect and none to the officers. An explicit Fourth Amendment foundation would provide a foundation for addressing whether the response was excessive, even when the police were acting in good faith to combat crime or apprehend a suspect.

B. The Foundation and Departmental Liability

Most of the circuit court opinions apply the substantive due process standard with a consistent judicial acceptance of pursuit as so "necessary" that the courts should almost never question the way the police struck "the balance between law enforcement and risk to public safety."[397] What has been notably missing from these opinions is the recognition of the inevitability of danger to bystanders during pursuit. The wisdom of pursuit has been examined in critical studies[398] and debated in law enforcement literature.[399] Various reasons for imposing greater controls on individual officers during a pursuit have been examined.[400] Alternatives to pursuit

394. *See id.* at 11-12.

395. Brower v. County of Inyo, 489 U.S. 593, 599 (1989).

396. Britt v. Little Rock Police Dept., 721 F. Supp. 189, 195 (E.D. Ark. 1989).

397. Evans v. Avery, 100 F.3d 1033, 1038 (1st Cir. 1996).

398. *See* THE ACLU FOUNDATION OF SOUTHERN CALIFORNIA, NOT JUST ISOLATED INCIDENTS: THE EPIDEMIC OF POLICE PURSUITS IN SOUTHERN CALIFORNIA (1996); Michael T. Charles et al., *Police Pursuit in Pursuit of Policy: The Pursuit Issue, Legal and Literature Review, and an Empirical Study* (Apr. 1992) (sponsored by AAA Foundation for Traffic Safety).

399. *See, e.g.*, Tim Grimmond et al., *Police Pursuits*, POLICE CHIEF, July 1993, at 43; Maurice J. Hannigan, *The Viability of Police Pursuits*, POLICE CHIEF, Feb. 1992, at 46; Earl R. Morris, *Modifying Pursuit Behavior*, 62 FBI L. ENFORCEMENT BULL. 1 (1993); John Whetsel & J.W. Bennett, *Pursuits: A Deadly Force Issue*, POLICE CHIEF, Feb. 1992, at 30.

400. *See* Michael Charles & David Falcone, *Illinois Police Officer's Opinions on Police Pursuit Issues*, 11 AM. J. POLICE 69 (No. 3, 1992); Robert J. Homant et al., *Sensation Seeking as a Factor in Police Pursuit*, 20 CRIM. JUST. & BEHAV. 293 (1993); Daniel B. Kennedy et al., *A Comparative Analysis of Police Vehicle Pursuit Policies*, 9 JUST. Q. 227 (No. 2, 1992); I. Gayle Shuman & Thomas D. Kennedy, *Police Pursuit Policies: What is Missing?*, 2 AM J. POLICE 21 (1989).

that have been proposed and tested include better tactics for intercepting suspects[401] and better equipment, such as tire puncture devices.[402] Some police departments have added extensive training programs in pursuit driving.[403] One legislative proposal in Congress sought a federal solution to the dangers of pursuit.[404] States such as California have tried to reduce the dangers of pursuit by making the city's adoption of a pursuit policy a necessary condition for immunity,[405] and by requiring that police officers be trained about whether and how to pursue.[406] There has also been research on the use of deadly force,[407] efforts to improve the quality of police training in the use of deadly force,[408] and efforts to study how the choice of bullet type affects the safety of all concerned.[409]

While the literature does support the circuit court recognition that an officer must often decide how to respond both "quickly and while under considerable pressure,"[410] it does not support the circuit court focus on only the immediate moment of the response. An earlier point at which the possible constitutional claim might make a difference may be when the department makes the policy decisions that influence the officer's response on the scene. That includes training the officer on whether and how to respond, establishing a communications system so an officer is not expected to make decisions that should be made by a supervisor, choosing the kind of equipment provided to the officer, and investing in other useful forms of assistance. A single officer with no training and no way to obtain assistance may see flight as a personal challenge that must be met by nothing short of apprehension at all costs. An officer with training might avoid the pursuit with a different response or might be better able to recognize that a particular pursuit is unwise. An officer with more equipment might be able to avoid a pursuit; a supervisor might make a more balanced decision; and a department with more officers or resources might be able to respond more effectively and more safely.[411]

Recognition that a response might be different if an officer or department had more resources or used their resources in a different way does not mean that every

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401. *See, e.g.*, Clyde Eisenberg & Cynthia Fitzpatrick, *An Alternative to Police Pursuits*, 65 FBI L. ENFORCEMENT BULL. 16 (1996); *The Precision Immobilization Technique*, 61 FBI L. ENFORCEMENT BULL. 8 (1992); Tim Grant, *Deputies Try Stealthier Car Chases*, ST. PETERSBURG TIMES, Oct. 22, 1995, at 1B,3B *available in* 1995 WL 9629443.

402. *See* Teresa Starr Fugit, *Police Use Device to Deflate Pursuits*, SYRACUSE HERALD AM., Sept. 29, 1996, at C1, *available in* 1996 WL 7186548.

403. *See, e.g.*, Jeff Collins, *Police Pursue Alternatives to the High-Speed Chase*, ORANGE COUNTY REG.(Cal.), March 31, 1996, at B01, *available in* 1996 WL 7019907; Brian T. Murray, *At the Controls: Steering a Course Filled with Stress*, STAR-LEDGER (Newark, N.J.), April 7, 1996, at 35, *available in* 1996 WL 7956070.

404. *See* National Police Pursuit Policy Act of 1995, S. 923, 104th Cong. (1995).

405. *See* CAL. VEH. CODE § 17004.7 (West Cum. Supp. 1997).

406. *See* CAL. PENAL CODE § 13519.8 (West Cum. Supp. 1997).

407. *See* Geoffrey P. Alpert & Lorie Fridell, POLICE VEHICLES AND FIREARMS: INSTRUMENTS OF DEADLY FORCE (1992); William A. Geller & Michael Scott, DEADLY FORCE: WHAT WE KNOW (1994).

408. *See, e.g.*, Ronald D. White, *Under the Gun*, WASH. POST, July 14, 1991, at C8 (discussing use of interactive video in officer training).

409. *See* Michael Cooper, *Safir Says a Report Shows New Bullets Safer for Public*, N.Y. TIMES, Mar. 7, 1997, at B5, *available in* 1996 WL 7987123; Louis Sahagun, *LAPD Gets Approval to Switch Officers to Hollow-Point Ammo*, L.A. TIMES, April 18, 1990, at B1, *available in* 1990 WL 2408578.

410. Evans v. Avery, 100 F.3d 1033, 1038 (1st Cir. 1996), *cert. denied*, 117 S. Ct. 1693.

411. *See generally* James J. Fyfe, *The Expert Witness in Suits against the Police*, 21 CRIM. L. BULL. 244 (part I) & 515 (part II) (1985).

injury to a bystander should be labeled a constitutional violation. However, police departments and municipal authorities may know there is a risk of injury to bystanders as well as a risk of injury to suspects and officers. The department has an obvious self interest in reducing the risk to its officers, and a Fourth Amendment duty to be concerned about the risk to suspects. In some states, the potential for tort liability means a department must be concerned about the risk to bystanders, but tort liability does not exist in some states. In states where there is no available tort claim, the difference between a Fourth Amendment foundation for bystander claims and a substantive due process foundation will be significant. Bystanders will be left to absorb their own losses from being caught in the middle if they have no more than a symbolic substantive due process claim, even if such injuries could have been made less likely or less harmful with a different policy decision about how much money to spend on public safety, how to allocate it, or what to expect officers to be able to do.

The difference the choice of a constitutional right can make has been illustrated by decisions that address whether the police department can be held liable if the officer is not liable. The First Circuit is one of several that has given a negative answer to that possibility, concluding that "the fact that Avery and Greene did not violate Evans' constitutional rights means that the City is not liable to her under section 1983."[412] The Third Circuit gave an affirmative answer when it held "an underlying constitutional tort can still exist even if no individual police officer violated the Constitution."[413] The Third Circuit answer may be flawed because it allowed the need for a constitutional right to drop out of the analysis entirely. That does not mean there was a flaw in considering more than the immediate moment of the incident and resisting the assumption that good faith pursuit is never unreasonable because apprehension is always worth the cost. This approach is the first step in determining when the department could be liable, but not the officer, under the same definition of a constitutional right. However, the value of the approach was obscured by the reconstruction of the substantive due process claim. Fourth Amendment decisions provide a different starting point.

An opinion from the Ninth Circuit provides an illustrative set of facts involving a Fourth Amendment claim brought on behalf of a person who was shot and killed by a police officer.[414] The officer who responded to a disturbance call had found and searched the suspect.[415] The officer knew that the suspect was acting strangely but also knew the suspect was unarmed, so the officer let him leave. When the officer saw the suspect acting strangely a second time the officer again made contact. In this second contact the suspect approached the officer in a threatening way, so the officer used his baton to strike him and keep him away. This action was unsuccessful, either because the suspect grabbed the baton and began beating the officer or because the officer fell or was pushed backward. The officer decided to shoot, and hit the suspect 6 times. The wounded suspect continued to attack, but the

412. *Evans*, 100 F.3d at 1033.
413. Fagan v. City of Vineland, 22 F.3d 1292, 1296 (3d Cir. 1994).
414. Hopkins v. Andaya, 958 F.2d 881 (9th Cir. 1992).
415. The facts in *Hopkins* may be found at *id.* at 881-885.

officer was able to radio for help, reload, and hide across the street. When the suspect continued to advance, the officer fired four more shots and killed him.

The Ninth Circuit reversed the defense summary judgment on the claim against the officer; it concluded there were sufficient facts to support the allegation that at least the last four shots were excessive. In addition, the court reversed the summary judgment for the defense on the claim against the city. The court held that there might also be a claim against the city even if the officer's use of force was reasonable to protect himself from the suspect's continued attack.

> In any event, the police chief and city might be held liable for improper training or improper procedure even if Andaya is exonerated, since they put an officer on the street who is so badly trained and instructed he lets his baton be taken away from him and then has to kill an unarmed civilian to save his own life. Andaya has a history of citizen complaints of excessive force, a reputation for being quick-tempered, and has drawn or fired his gun inappropriately several times before. These facts would certainly bear on whether the city properly trained Andaya, and whether they should have sent him out on the streets carrying a weapon.[416]

An opinion from the Tenth Circuit also illustrates how Fourth Amendment rights of suspects affect the police department's duty to provide training. In *Zuchel v. City of Denver*[417] the survivors of a suspect shot by a police officer asserted a Fourth Amendment claim.[418] Once again the facts of the incident began as a minor disturbance by the suspect. The officer approached the suspect with his gun drawn and shot him four times when the suspect turned around. The court affirmed a judgment against the defendants, holding that the evidence supported the jury's finding that Denver's training in the use of deadly force was inadequate. In support of its holding it set out the trial testimony of the plaintiff's expert witness on police training and procedures: "Officer Spinharney handled this just the way any guy on the street would. He did not handle it as a professional, trained police officer who had received training on when it was appropriate to shoot and when it was appropriate not to shoot would have handled this situation."[419]

The Tenth Circuit found that the evidence was sufficient to support the finding that the police department was deliberately indifferent to the Fourth Amendment rights of suspects because it had made no effort to improve its training program. The evidence that they should have improved training included a letter from the district attorney two and a half years prior to the accident that had pointed out the high number of deadly force incidents and had recommended live training for officers on shoot-don't shoot situations and had warned the police chief that the officers were not prepared "to analyze situations, develop options, and select the option that minimizes the likelihood of a violent confrontation."[420] The plaintiff's

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416. *Id.* at 888.
417. 997 F.2d 730 (10th Cir. 1993).
418. The facts in *Zuchel* may be found at *id.* at 730-35.
419. *Id.* at 739-40.
420. *Id.* at 738.

expert on police training, tactics, and the use of deadly force testified that the city's training program was "far below generally accepted police custom and practice."[421]

An injured bystander, on the same facts, would have a much harder or even impossible case because a similar discussion of expert testimony comparing the particular response of an untrained officer with a professional, trained police officer has been notably absent from the circuit court opinions on bystander rights. Even if a professional, trained officer would not shoot or pursue, expert opinion might seem irrelevant under a conscience shocking standard for substantive due process if the measure depends only on what the judges find shocking. As commentators have noted, the general public's attitude toward deadly force and pursuit is strongly colored by television and movie portrayals.[422] The dramatic license that adds a good chase scene to every show may subtly affect judicial expectations of what should be acceptable and what should shock their conscience or otherwise violate substantive due process. A Fourth Amendment foundation for bystander rights would measure the department's duty to prepare its officers by the evolving standards of professional police work and not by an entertainment caricature.

There is substantial evidence that many police departments are trying to reduce the dangers of pursuits. A recent major study of police pursuits for the National Institute of Justice found that 91 percent of the responding police agencies had written pursuit policies.[423] Almost half reported that they had modified their policies in the last two years, mostly by making them more restrictive.[424] Newspaper stories from various cities likewise report that many police departments have adopted new policies that give officers more guidance on when and whether to pursue and that require more control of any pursuit by a supervisor.[425] However, even though many departments are already taking action that would defeat a claim of deliberate indifference to the rights of bystanders, that does not mean that recognizing the Fourth Amendment right will have no effect. The National Institute of Justice study also found departments that had no written policy and many others that were still following policies that had not changed since the 1970's. It also reported finding departments that had taken "limited steps to train their officers" and departments where training on whether to pursue was "minimal or nonexistent."[426]

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421. *Id.* at 740.

422. *See* Michael T. Charles et al. *supra* note 398 at 12-15; *see also* James Fyfe, POLICE EXPERT WITNESSES, IN EXPERT WITNESS: CRIMINOLOGISTS IN THE COURTROOM, 101-02 & 113 n.7 (1987).

423. *See* Geoffrey P. Alpert, POLICE PURSUIT: POLICIES AND TRAINING, NATIONAL INSTITUTE OF JUSTICE RESEARCH IN BRIEF 2 (1997).

424. *See id.*

425. *See, e.g.*, Naftali Bendavid, *Police Pursue New High-Speed Policy*, CHICAGO TRIB., Sept. 9, 1997, 1997 WL 3586700; *Training Helps Officers Avoid Fatal Errors*, FRESNO BEE, Aug. 17, 1997, 1997 WL 391769; *Danger of Chase Breeds High-Tech Police Tactics*, NEW ORLEANS TIMES-PICAYUNE, Aug. 7, 1997, 1997 WL 12659255; Teresa Owen-Cooper, *Police Hit Brakes on Pursuits*, COLO. SPRINGS GAZETTE, Jul. 28, 1997, 1997 WL 7458172; Maria Miro Johnson & Tom Mooney, *R.I. Puts the Brakes on Chases*, PROVIDENCE J. BULL., July 15, 1997, 1997 WL 10842559; Sarah Sturmon & Barry M. Horstman, *Police Re-evaluate Chase Policies*, CINCINNATI POST, Jun. 17, 1997, 1997 WL 3074174; Raymond Smith, *Reports Show Drop in Police Pursuits*, RIVERSIDE PRESS-ENTERPRISE, May 18, 1997, 1997 WL 10854055; *S.F. Police Undergo Rigorous Training Regarding the Use of Force*, FRESNO BEE, Jan.1, 1997, 1997 WL 3883806.

426. *See* Geoffrey P. Alpert, *supra* note 423.

VI. THE OPPORTUNITY PRESENTED BY *LEWIS*

Lewis provides the Supreme Court with an opportunity to observe what the circuit courts have built on the foundation the Court started to develop in 1989 in *Graham* and *Brower*. One clue that it is prepared to do more than pick between the standards for a substantive due process claim comes from a case it did not accept, namely *Evans*. The competing conscience shocking standard was well represented by the First Circuit opinion in *Evans*,[427] but the Court denied certiorari three weeks before accepting *Lewis* for review.[428]

As a preliminary step the Court will have to decide whether the allegations in Lewis's complaint are sufficient to avoid the fate of the plaintiff in *Albright v. Oliver*.[429] In *Albright*, a majority of the Court read a narrowly drawn complaint as a reason to address only whether there was a substantive due process claim and not to decide whether the facts would support a Fourth Amendment claim. *Albright* should not have the same effect in *Lewis* because the plaintiff in *Albright* did not want to assert a Fourth Amendment claim; Justice Ginsberg suggested in a concurrence that the plaintiff was concerned that the Fourth Amendment would not survive a limitations defense.[430] In *Lewis*, the plaintiff followed the consensus in omitting an explicit Fourth Amendment claim, but did not do so in order to avoid an affirmative defense. As the Ninth Circuit described the complaint, plaintiff asserted a violation of "Fourteenth Amendment due process rights,"[431] and it was the court that decided which standard to use for measuring whether the defendant's motion for summary judgment should be granted.

The closer match for the complaint in *Lewis* appears to be *Graham*, where the Court described the complaint as alleging a violation of "rights secured to him under the Fourteenth Amendment to the United States Constitution and 42 U.S.C. §1983."[432] The Court read the pleading in *Graham* as sufficient to state a claim under the Fourth Amendment. In addition, when the Supreme Court used Eighth Amendment doctrine to provide a foundation for the constitutional rights of pretrial detainees it did not hold that detainees actually have only an Eighth Amendment right.[433] Thus, the Court's past practice on pleading style would seem to support the conclusion that *Lewis* has sufficiently alleged a Fourteenth Amendment claim that can be based on a Fourth Amendment foundation.

The Ninth Circuit opinion provided a succinct explanation of its interpretation of the Court's decisions in a brief footnote discussion that relied exclusively on *Brower* and never mentioned *Graham*. "It is undisputed that Smith did not intend to hit Lewis with his patrol car. There was thus no Fourth Amendment violation. See *Brower v. County of Inyo* . . . ."[434] However, the facts described in the opinion make clear that the court was referring only to one part of the officer's intent.

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427. Evans v. Avery, 100 F.3d 1033 (1st Cir. 1997).
428. *See* Evans v. Avery, 117 S. Ct. 2533 (Mem.).
429. 510 U.S. 266 (1994).
430. *See Albright*, 510 U.S. at 280.
431. Lewis v. Sacramento County, 98 F.3d 434 (9th Cir. 1996), *cert. granted*, 117 S. Ct. 2406 (1997).
432. Graham v. Connor, 490 U.S. 386, 390 (1989).
433. *See* Revere v. Massachusetts Gen. Hosp., 463 U.S. 239, 244-45 (1983).
434. 98 F.3d 434, 438 n.3 (9th Cir. 1996).

There seemed to be no question that the officer intended to pursue the motorcycle, that he pursued it because he intended to seize the driver and passenger, and that he intentionally used the force at his command to accomplish his goal:

> Smith apparently only "needed" to apprehend the boys because they refused to stop. . . . The chase was at night, in a residential area, and hit speeds of up to 100 miles per hour. Smith could not have stopped his car within the range of his headlights. Finally, even though Officer Smith was familiar with the area, he crested a hill blindly at a speed of about 65 miles per hour.[435]

The Ninth Circuit's reliance on one part of the officer's intent as the reason to select substantive due process as the applicable constitutional right tends to obscure how much the Fourth Amendment controlled the officer's decision about a response. *Garner* and *Brower* established that the officer would have violated the Fourth Amendment if he had shot the unarmed driver or passenger to make them stop or if he had parked his police car where he knew it would force a deadly crash. The same Fourth Amendment right would have been violated if the officer had shot wildly in the direction of the driver and passenger and hoped the bullets would miss, or if the officer aimed his out of control police car in their direction out of frustration at their refusal to stop. However, the court's focus on a single part of *Brower* led the circuit court to the very mistake the Supreme Court warned against in *Brower* itself: "[W]e cannot draw too fine a line . . . . We think it enough for a seizure that a person be stopped by the very instrumentality set in motion or put in place in order to achieve that result."[436]

The most important step the Supreme Court can take in *Lewis* is to reinvigorate *Graham* by reaffirming that the Fourth Amendment provides the specific constitutional standard for judging whether the police used excessive force in the context of an arrest or investigatory stop. The course or context of an arrest or seizure should include the whole sequence of events from the start of the response to the conclusion. This holding by the Court would not mean immediate success for either party, nor would the decision "determine the future of high-speed police pursuits" as promised by initial press reports of the grant of certiorari.[437] Application of what *Graham* described as the "Fourth Amendment inquiry . . . of 'objective reasonableness' under the circumstances"[438] requires a much fuller examination of the facts than the circuit courts have done under substantive due process and a more extensive factual record than was developed in *Lewis* before the grant of summary judgment.

Once the Court holds that an injured passenger, such as Lewis, or a bystander is protected by a Fourth Amendment right, the lower courts will still have to address other issues they have not yet examined. Thus far only one circuit court has given much attention to the element of proximate cause. A majority in *Mays v. City*

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435. *Id.* at 442.

436. *Brower*, 489 U.S. at 598-99.

437. L.A. TIMES, June 3, 1997, at A3; David G. Savage, *Justices to Rule on Police Liability in High-Speed Chases*, LAW ENFORCEMENT, *available in* 1997 WL 2216618.

438. *Graham*, 490 U.S. at 399.

of East St. Louis[439] declared that a bystander's injuries are always "the result of criminal behavior by a private actor" and that the officer's pursuit may be a cause "but not the kind of cause the law recognizes as culpable."[440] Those conclusions would negate the practical effect of any constitutional right the court could recognize in *Lewis*, so it is important to ask if the Seventh Circuit has ended the debate with a preemptive strike.

There are several reasons this issue is more complicated than suggested by the Seventh Circuit's opening salvo. The declaration that "the law"[441] does not recognize that both the officer's pursuit and the suspect's driving can be a proximate cause is not true for states that already impose liability on an officer or department under tort law.[442] If the declaration is only a narrower statement about liability for constitutional claims after *Deshaney*,[443] it rests on an untested assumption that *DeShaney* applies to both its facts of passive failure to intervene and the arguably different facts of active involvement in the third party's conduct. The suggestion that constitutional rights of bystanders should be completely rejected as "unlikely to promote aggregate social welfare"[444] goes beyond what the Supreme Court has held. In its latest decision on departmental liability, the Court did not hold that the department could never be liable.[445] The strongest statement from a five judge majority went only as far as insisting that the courts should "adhere to rigorous requirements of culpability and causation" and warned that federalism concerns may be raised if the courts did not "apply stringent culpability and causation requirements."[446]

Finally, the Seventh Circuit's conclusion rests on the assumption that the courts face a bipolar choice between either "[z]ealous pursuit or "[l]ax law enforcement" and that courts can offer no more than "[e]asy solutions [that] rarely work."[447] As the parties litigate what is reasonable under the Fourth Amendment, their evidence will describe the standards the law enforcement community itself sets for police departments and will illustrate what a modern police department can expect from its officers and how it should properly train, supervise, and equip its officers. This will build the factual records in these cases that are essential in order to provide appellate judges with an accurate perspective of which police responses are reasonable and which are not.[448]

A remand in *Lewis* for application of the Fourth Amendment would leave for another day the much broader question of whether there are factual settings where the Court should recognize a substantive due process claim for conduct that shocks

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439. 123 F.3d 999 (7th Cir. 1997)

440. *Id.* at 1004.

441. *Id.* at 1005.

442. *See, e.g.*, Billester v. City of Corona, 32 Cal. Rptr. 2d 121 (Ct. App. 1994); Bryant v. County of Los Angeles, 32 Cal. Rptr. 2d 285 (Ct. App. 1994); Dickens v. Horner, 611 A.2d 693 (Pa. 1992); McLenahan v. Lawhorne, 849 S.W.2d 773 (Tenn. Ct. App. 1992).

443. DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189 (1989).

444. *Mays*, 123 F.3d at 1005.

445. *See* Bryan County v. Brown, 117 S. Ct. 1382 (1997).

446. *Id.* at 1394.

447. *Mays*, 123 F.3d at 1005.

448. *See generally* Kathryn R. Urbonya, *The Constitutionality of High-Speed Pursuits Under the Fourth and Fourteenth Amendments*, 35 ST. LOUIS U. L.J. 205, 286-88 (1991).

the conscience. That is the same issue the Court postponed in the last term in *United States v. Lanier*.[449] A number of lower court cases have raised that question in settings as varied as the right of a schoolchild to be free from sexual abuse by a public school employee,[450] the right of a motorist to be free from dangers created by state actors not involved in law enforcement,[451] and the right of a child to be protected by a state agency.[452] The number and variety of possible applications make clear that any attempt to answer a broad question about the viability or scope of substantive due process will have unforeseen and unpredictable consequences. The Court would continue its practice of defining constitutional rights in a manageable structure by doing no more in *Lewis* than making clear that the Fourth Amendment applies to all police pursuits.

449. 73 F.3d 1380, 1393 (6th Cir. 1996), *vacated*, 117 S. Ct. 1219 (1997).

450. *See, e.g.*, Doe v. Hillsboro Indep. Sch. Dist., 113 F.3d 1412 (5th Cir. 1997); Doe v. Claiborne County, 103 F.3d 495 (6th Cir. 1996); Doe v. Taylor Indep. Sch. Dist., 975 F.2d 137 (5th Cir.), *cert. denied*, 506 U.S. 1087 (1993).

451. *See* Parton v. City of Bentonville, 901 F. Supp. 1440 (W.D. Ark. 1995).

452. *See* Powell v. Georgia Dept. of Human Resources, 114 F.3d 1074 (11th Cir. 1997); Wooten v. Campbell, 49 F.3d 696 (11th Cir.), *cert. denied*, 116 S. Ct. 379 (1995).