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Comments: Police Liability in High-Speed Chases: Federal Constitution or State Tort Law; Why the Supreme Court's New Standard Leaves the Burden on the Burden on the State and What This Might Mean for Maryland

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POLICE LIABILITY IN HIGH-SPEED CHASES: FEDERAL CONSTITUTION OR STATE TORT LAW; WHY THE SUPREME COURT'S NEW STANDARD LEAVES THE BURDEN ON THE STATE AND WHAT THIS MIGHT MEAN FOR MARYLAND

Law and disorder on the interstate; Chase: At speeds hitting 110 m.p.h., police pursue a carload of bank holdup suspects from Baltimore, only to lose it in Silver Spring By the time police lost the car at the Colesville Road exit in Silver Spring, officers from eight jurisdictions driving everything from Ford Crown Victorias to Geo Trackers had joined the chase. The pursuit "involved anybody and everybody," said Special Agent Peter A. Gulotta, Jr. of the FBI. Police said they were amazed that no one was injured and nobody crashed.¹

I. INTRODUCTION

Newspaper headlines make it quite clear; high-speed police chases are a regular occurrence across the nation.² The necessity

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1. Peter Hermann et al., *Law and Disorder on the Interstate*, THE SUN (BALT.), Sept. 19, 1998, at 1A, available in 1998 WL 4985502.
 2. In a small study, the National Highway Traffic Safety Administration reported that in 1996 there were 108 deaths involving police vehicles. Of the 108 deaths, 18 were police officers, 75 were uninvolved motorists, and 15 were uninvolved pedestrians. A similar 1997 study reported a total of 104 deaths involving police vehicles. Of the 104 deaths, 25 were police officers, 54 were uninvolved motorists, and 24 were uninvolved pedestrians. See National Highway Traffic Safety Administration, *Motor Vehicle Crash Data from FARS and GES* (visited Sept. 7, 1999) <http://www.fars.nhtsa.dot.gov/www/co&selcityid=o&disp_col=1&showzero=n7>; see also Travis N. Jensen, Note, *Cooling the Hot Pursuit: Toward a Categorical Approach*, 73 IND. L.J. 1277, 1279-80 (1998) ("Indeed the motor vehicle has been determined to be the deadliest weapon in the police arsenal, surpassing even firearms." (citing Geoffrey P. Alpert & Patrick R. Anderson, *The Most Deadly Pursuits: Police Pursuits*, 3 JUST. Q. 1, 2 (1986))). While the numbers of this small study may seem very undaunting, it only includes deaths and not the larger number of accidents that ended in injury. See Geoffrey P. Alpert et al., *The Constitutional Implications of High-Speed Police Pursuits Under A Substantive Due Process Analysis: Homeward Through the Haze*, 27 U. MEM. L. REV. 599, 600 (1997) (noting that "the number of deaths resulting from high-speed pursuits far exceeds the number of deaths caused each

and effectiveness of police pursuits in modern law enforcement practice have been the center of vigorous debate³ at the courthouses and in legislative offices on both the state and federal levels.⁴ The main issue underlying this debate is the liability of police officers, including the localities that employ them, for injuries to both suspects and bystanders resulting from a high-speed police

year by any other police activity”) [hereinafter Alpert et al., *Constitutional Implications*]. According to one study, 45% of high-speed pursuits result in property damage and 23% cause personal injury. See Phillip M. Pickus, *Torts – Government Immunity – Police Officer Owes Duty of Care to Third Parties Injured by the Fleeing Suspect; Injured Plaintiff Can Recover From State and Political Subdivisions If Officer Was Negligent in Commencing and Maintaining Pursuit*. Boyer v. State, 323 Md. 558, 594 A.2d 121 (1991), 21 U. BALT. L. REV. 363, 363 n.1 (1992) (citing Geoffrey P. Alpert & Roger G. Dunham, *Policing Hot Pursuits: The Discovery of Aleatory Elements*, 80 J. CRIM. L. & CRIMINOLOGY 521, 528 (1989)). Furthermore, the economic costs of traffic crashes are very high—an average of \$150 billion a year. See Lawrence Blincoe, U.S. Dept. of Transportation, *The Economic Cost of Motor Vehicle Crashes* (visited Sept. 7, 1999) <<http://www.nhtsa.dot.gov/people/economic/ecomve1994.htm7>>. Given the substantial economic and societal costs of high-speed police chases, many commentators question the value of benefits from such pursuits. “Most research and professional literature concludes that pursuits create far greater risks than benefits to law enforcement and to the public. In other words, the risk created by vehicular pursuits is often greater than the need to enforce the law.” Alpert et al., *Constitutional Implications*, at 606 (citing Maurice Hannigan, *The Viability of Police Pursuits*, 59 POLICE CHIEF 46, 48-49 (1992)). These trends can be found in Maryland as well. For example, a six-year study of the Baltimore County police department reported 1064 pursuits, from which 388 accidents occurred. See Alpert et al., *Constitutional Implications*, at 612. This amounted to one accident for every 2.7 pursuits. See *id.* The reasons for these pursuits included traffic offenses (55%), suspected felonious activity (25%), and reckless or impaired driving (6%). See *id.* (citing Thomas Lucadamo, *Identifying the Dimension of Police Pursuit* (1984) (unpublished M.A. thesis, University of Maryland) (on file with Geoffrey Alpert, Andrew C. Clarke, and William C. Smith)).

3. See Dennis J. Kenney & Geoffrey P. Alpert, *A National Survey of Pursuits and the Use of Police Force: Data from Law Enforcement Agencies*, 25(4) J. CRIM. JUST. 315, 315-23 (1997); see also Alpert et al., *Constitutional Implications*, *supra* note 2, at 604-05. See generally Alpert & Dunham, *supra* note 2, at 531 (analyzing the relationship between various factors, such as officer’s age, duration of chase, number of officers involved, the officer’s gender, and the injuries that are incurred as a result of a high-speed chase).
4. See, e.g., Alpert et al., *Constitutional Implications*, *supra* note 2, at 604 (“The United States Congress, several local grand juries, and many other government entities have conducted investigations into the problems associated with police pursuits. This inquiry has led to reform in policies, training, and supervision of pursuit driving.” (citations omitted)).

chase.⁵

In the federal courts, this debate resulted in a split among the circuits as to what, if any, constitutional rights are afforded to a party recovering from injuries resulting from a high-speed chase,⁶ and what legal standard should be applied to determine when a police officer is liable for those injuries.⁷ The Supreme Court recently clarified whether the Constitution protects an individual injured during a high-speed pursuit and delineated the proper standard for police liability to be applied in police pursuit cases.⁸ While the Supreme Court has spoken, there is still considerable room for the states, depending on their particular political and social climates, to fashion their own tort remedies as they see fit.⁹

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5. *Cf.* *County of Sacramento v. Lewis*, 523 U.S. 833, 836 (1998) (stating the issue as “whether a police officer violates the Fourteenth Amendment’s guarantee of substantive due process by causing death through deliberate or reckless indifference to life in a high-speed automobile chase aimed at apprehending a suspected offender”); *Fagan v. City of Vineland*, 22 F.3d 1296, 1299-1302 (3d Cir. 1993) (en banc) (determining the standard for liability when a vehicle that was not involved with the chase was hit by a vehicle driven by the fleeing suspect); *Temkin v. Frederick County Comm’rs*, 945 F.2d 716, 717-18 (4th Cir. 1991) (inquiring into the liability of a police officer where an innocent driver was struck by both the vehicle of the fleeing suspect and the police officer pursuing him). *See generally* Roger W. Kirst, *Constitutional Rights of Bystanders in the War on Crime*, 28 N.M. L. REV. 59, 68-77 (1998) (discussing the need for constitutional protection for bystanders injured during the course of a high-speed chase); Mitchell J. Edlund, Note, *In the Heat of the Chase: Determining Substantive Due Process Violations Within the Framework of Police Pursuits When an Innocent Bystander is Injured*, 30 VAL. U. L. REV. 161, 162-68 (1995) (suggesting a lower level of culpability for injured bystanders under substantive due process).
 6. *See* discussion *infra* Part III.B.
 7. *See* discussion *infra* Part III.C; *see also, e.g.*, Alpert et al., *Constitutional Implications*, *supra* note 2, at 626-61 (discussing the various pre-*Lewis* approaches taken by the circuits and commenting, “[b]ecause the ‘shocks the conscience’ standard is an incoherent and unattainable standard for both litigants and courts, the Authors conclude that in high-speed pursuit cases under a substantive due process analysis, courts should apply the clearer and more concise ‘deliberate and reckless indifference’ standard”).
 8. *See Lewis*, 523 U.S. at 848-56. For a detailed discussion of *Lewis*, *see infra* Part II.D.
 9. *See Lewis*, 523 U.S. at 848 (stating that the constitutional concept of “conscience-shocking” duplicates no traditional category of common-law fault, but points either clearly away from liability or toward liability at the end of the tort law spectrum). Federal courts are reluctant to constitutionalize state tort law. *See Evans v. Avery*, 100 F.3d 1033, 1041 n.9 (1st Cir. 1996). One commentator has suggested that, “[a]lthough plaintiffs have been somewhat successful

This Comment sets forth the various considerations an attorney must account for when analyzing issues of police liability arising out of a high-speed chase.¹⁰ Through the framework that is developed by this Comment, an attorney will be better equipped to make the early tactical decisions that can determine the outcome of a case. Part II of this Comment examines the debate over liability for police actions, including the policy considerations and actors frequently involved.¹¹ Part III of this Comment will address the applicable federal statutory and constitutional provisions and provide relevant case law for each.¹² Part IV will discuss the applicable Maryland law and examine its importance in obtaining recovery for a client injured during a high-speed police chase.¹³ Finally, Part V navigates the web of Maryland law, suggesting areas of possible police liability that better balances individual compensation with law enforcement's need to ensure the safety of the public.¹⁴ Notwithstanding a high bar to recovery for plaintiffs injured during high-speed police pursuits, this Comment concludes that state law should be considered a viable avenue of recovery to serve both the interests of the state and of the injured parties.¹⁵

II. THE INTERESTS AND POLICIES IMPLICATED BY THE DEBATE OVER LIABILITY FOR A POLICE OFFICER'S ACTIONS

The debate surrounding the potential liability of officers, police departments, and municipalities to individuals who are injured¹⁶ as

in litigating pursuit claims on negligence grounds, judicial hostility to constitutional claims [still] runs high." Michael Avery, *Police Chases: More Deadly Than a Speeding Bullet?*, 33 TRIAL 52, 53 (Dec. 1997).

10. See *infra* notes 16-42 and accompanying text.
11. See *infra* notes 16-42 and accompanying text.
12. See *infra* notes 58-150 and accompanying text.
13. See *infra* notes 151-73 and accompanying text.
14. See *infra* notes 174-95 and accompanying text.
15. See *infra* notes 197-201 and accompanying text.
16. See *County of Sacramento v. Lewis*, 523 U.S. 833, 836-37 (1998) (injured suspect); *Boveri v. Town of Saugus*, 113 F.3d 4, 5 (1st Cir. 1997) (injured driver of an uninvolved vehicle); *Evans v. Avery*, 100 F.3d 1033, 1035 (1st Cir. 1996) (injured pedestrian); *Magdziak v. Byrd*, 96 F.3d 1045, 1046 (7th Cir. 1996) (injured driver of uninvolved vehicle); *Fagan v. City of Vineland*, 22 F.3d 1296, 1300 (3d Cir. 1994) (injured suspects and bystanders); *Webber v. Mefford*, 43 F.3d 1340, 1342 (10th Cir. 1994) (injured bystanders); *Medina v. City of Denver*, 960 F.2d 1493, 1494 (10th Cir. 1992) (injured bicyclist); *Temkin v. Frederick County Comm'rs*, 945 F.2d 716, 717-18 (4th Cir. 1991) (injured driver of uninvolved vehicle); *Jones v. Sherrill*, 827 F.2d 1102, 1103 (6th Cir. 1987) (injured driver of uninvolved vehicle); *Cannon v. Taylor*, 782 F.2d 947, 948 (11th

a result of a high-speed chase invariably invokes competing interests and policies.¹⁷ A police officer can incur liability¹⁸ either by intentionally stopping a fleeing suspect¹⁹ or by maintaining a pursuit that ends in an accident.²⁰ Bystanders are frequently injured during a police officer's pursuit of a fleeing suspect²¹ when their automobiles collide with either the officer's or the suspect's automobile, or when they are simply in the wrong place at the wrong time, also increasing the potential liability at issue.²²

A. *Competing Policies and Standards*

The debate over the potential liability of police officers, police departments, and municipalities bears significant policy considerations to be addressed and eventually balanced.²³ The competing pol-

Cir. 1986) (injured driver of uninvolved vehicle); *Checki v. Webb*, 785 F.2d 534, 535 (5th Cir. 1985) (injured suspect); *Frye v. Town of Akron*, 759 F. Supp. 1320, 1321-22 (N.D. Ind. 1991) (injured suspect); *Britt v. Little Rock Police Dep't*, 721 F. Supp. 189, 190 (E.D. Ark. 1989) (injured driver of uninvolved vehicle).

17. The National Highway Traffic Safety Administration and the International Association of Chiefs of Police define "police pursuit" as an event that is initiated when a law enforcement officer, operating an authorized emergency vehicle, gives notice to stop (either through the use of visual or audible emergency signals or a combination of emergency devices) to a motorist who the officer is attempting to apprehend, and the motorist fails to comply with the signal by either maintaining his or her speed, increasing speed, or taking other evasive action to elude the officer's continued attempts to stop the motorist. See Traffic Law Enforcement Planner, *Pursuit Policy* (visited Sept. 5, 1999) <<http://www.nhtsa.dot.gov/people/outreach/safesobr/16qp/pursuit.html>>.
18. It should be noted that the police officer may incur liability personally or in an official capacity. See *infra* notes 44-47 and accompanying text.
19. See *infra* Part III.B.1.
20. See *infra* Part III.B.2.
21. See *supra* note 5 and accompanying text.
22. See generally *Temkin v. Frederick County Comm'rs*, 945 F.2d 716, 717-19 (4th Cir. 1991) (discussing police liability where an innocent driver was severely injured when hit by the vehicles of the suspect and the officer in pursuit); Jeffrey M. Epstein, *Liability Under the Federal Civil Rights Act for Injuries Sustained During Police Pursuits*, 41 FED. B. NEWS & J. 356, 360-61 (1994) (analyzing bystander injury cases); Mark A. Mesler II, Note, *When an Innocent Bystander Who is Injured by a Police Officer Can Recover Under Section 1983*, 25 U. MEM. L. REV. 781, 794-800 (1995) (examining cases where innocent bystanders have been injured).
23. See Alpert et al., *Constitutional Implications*, *supra* note 2, at 602 ("On the one hand, if many restrictions are placed on police use of deadly force, the public may be endangered because dangerous persons will escape immediate appre-

icy considerations discussed herein tend to arise in tandem with concerns over police practices that pose a risk to the public.²⁴ Given the dangers posed by high-speed chases, especially through heavily populated areas, the appropriate amount of deference to police discretion becomes the central issue around which the debate swirls.²⁵ For analytical convenience, there are two key public policy perspectives to consider—pro-police and public safety.

1. Pro-Police

The major policy concern undermining the argument to increase police liability is the fear of hampering effective law enforcement.²⁶ Particularly in times of high crime rates and societal disgust with criminal activity,²⁷ there is an enormous fear that imposing too much liability on law enforcement officials will have a severe chilling effect on successful law enforcement efforts.²⁸ There is a belief that once the police officer must consider the possible civil consequences of a hot pursuit, wrongdoers will gain an undesirable incentive to flee.²⁹

The pro-police perspective is a natural outgrowth of the common-law doctrine of governmental immunity.³⁰ Governmental immu-

hension. Alternatively, insufficient control of the use of deadly force may result in needless killings in a community.”).

24. See *County of Sacramento v. Lewis*, 533 U.S. 833, 853 (1998). In discussing the police officer’s decision-making process, the Court recognizes the balance between the need to stop a suspect, and the need to protect the public from a high-speed threat. See *id.* See generally Alpert et al., *Constitutional Implications*, *supra* note 2, at 604-06 (discussing police pursuits and reform measures).
25. See Alpert et al., *Constitutional Implications*, *supra* note 2, at 606.
26. See *Evans v. Avery*, 100 F.3d 1033, 1037-38 (1st Cir. 1996). The court stressed that a finding of liability would “hamstring the police in their performance of vital duties.” *Id.* at 1038. Not eager for such a result, the court declined to judicially promulgate law enforcement decisions; this would simply create too much interference. See *id.*; see also *Pinder v. Johnson*, 54 F.3d 1169, 1173 (4th Cir. 1995) (“Holding police officers liable for every injurious consequence of their actions would paralyze the functions of law enforcement.”).
27. In recent years, the national violent crime rate has actually declined. See, e.g., *Crime at Lowest in Decades*, WASH. POST, Dec. 28, 1998, at A11, available in 1998 WL 22543569.
28. See *Evans*, 100 F.3d at 1037-38. The *Evans* court observed that police chases are “a necessary concomitant of maintaining order in our modern society.” *Id.*
29. See *Lewis*, 523 U.S. at 865 (Scalia, J., concurring).
30. See *Katz v. Washington Suburban Sanitary Comm’n*, 284 Md. 503, 507, 397 A.2d 1027, 1030 (1979) (“[The doctrine of governmental immunity] is presently viewed as a rule of policy which protects the State from burdensome interference with its governmental functions and preserves its control over State

nity is based on the premise that the State must be protected from litigants or be severely hindered in its governmental functions.³¹ This belief resonates even today.³² Unless the Maryland General Assembly statutorily creates an exception to governmental immunity, the State shall escape liability.³³ While some legislative enactments may chip away the protection of governmental immunity, the pro-police policy perspective is often served, in that statutes often limit the damages that can be awarded and prevent litigants from fully accessing the pockets of the State.³⁴ While this type of legislation waives the State's immunity in limited situations, it still fosters a pro-police policy by preserving the ability of police officers to perform their day-to-day functions without fear of personal liability.³⁵

agencies and funds." (citing *Godwin v. County Comm'rs of St. Mary's County*, 256 Md. 326, 333, 260 A.2d 295, 298-99 (1970); *Baltimore v. State*, 173 Md. 267, 271, 195 A. 571, 573-74 (1937); *State v. Wingert*, 132 Md. 605, 611, 104 A. 117, 119-20 (1918); *State v. Baltimore & Ohio R.R. Co.*, 34 Md. 344 (1871), *aff'd*, 88 U.S. 456 (1875)).

31. *See id.*; *see also Godwin*, 256 Md. at 332, 260 A.2d at 298 ("The immunity is said to rest upon public policy; . . . reluctance to divert public funds to compensate private injuries; and the inconvenience and embarrassment which would descend upon the government if it should be subject to such liability.").
32. *See Austin v. Mayor of Baltimore*, 286 Md. 51, 55, 405 A.2d 255, 257 (1979); *see also Town of Brunswick v. Hyatt*, 91 Md. App. 555, 565, 605 A.2d 620, 625 (1992) ("The Court concluded that to take the protection of governmental immunity away from the municipality would have a chilling effect on the municipality's willingness to provide this most vital and substantial public service." (discussing *Mayor of Baltimore City v. State ex rel. Blueford*, 173 Md. 267, 273, 195 A.2d 571, 574-75 (1937))). Specifically in regard to § 1983, limited immunity may protect an officer against the threat of individual recovery; as explained by one writer: "Under qualified immunity, state and local officials who perform their executive and administrative functions without violating clearly established laws are protected against § 1983 monetary liability in their personal capacities." Edlund, *supra* note 5, at 177 (citing *Buckley v. Fitzsimmons*, 509 U.S. 259, 268 (1993); *Harlow v. Fitzsimmons*, 457 U.S. 800, 807 (1982); *Butz v. Economou*, 38 U.S. 478, 508 (1978)).
33. *See Austin*, 286 Md. at 55, 405 A.2d at 257.
34. *See infra* note 182 and accompanying text.
35. *See MD. CODE ANN., CTS. & JUD. PROC. § 5-522(b)* (1998) ("State personnel are immune from suit in courts of this State and from liability in tort for a tortious act or omission that is within the scope of the public duties of the State personnel . . ."). For a further discussion of governmental immunity, see *infra* notes 151-60 and accompanying text.

2. Public Safety

Contrary to the pro-police perspective lies the belief that too much discretion afforded to police officers with lower risk of liability creates an overwhelming threat to the safety of the general public.³⁶ This idea is based on the notion that effective law enforcement need not entail high-speed chases that place the general public's lives and liberties at risk.³⁷ While the law must protect public coffers and the ability of governmental actors to efficiently do their job, it must also afford an avenue of resolution for dispute and collection of damages.³⁸ Notwithstanding the policy argument that a state must protect itself from excessive litigation, the acts of its agents may nonetheless result in injuries to a constituent it has avowed to protect.³⁹ This shortcoming is especially exacerbated when individuals from outside the state are injured by a government agent, representative, or employee working within another state.⁴⁰ In such a scenario, not even the democratic forces can protect this individual's interests.⁴¹ Therefore, from a public safety perspective, governmental immunity leaves governmental actors with essentially unfettered discretion, promoting unreasonable behavior and leaving the actors without any fear of the possible repercussions from their daily decisions.

Generally, both sides of the coin come into play in any police

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36. See *County of Sacramento v. Lewis*, 523 U.S. 833, 865 (1998) (Scalia, J., concurring); see also Joseph Finarelli, Feature, *High-speed Chases and Section 1983: Why a Definitive Liability Standard May Not Matter*, 66 DEF. COUNSEL J. 238, 246 (1999) ("Certain risks of potential harm inhere in driving streets and highways. In police pursuits, high-speeds, aggressive driving, and the obsession with escape or apprehension to the exclusion of concern for others all heighten the basic risks. This combination is a potentially lethal cocktail.").
37. See Tim Grimmond, *Police Pursuits: Traveling a Collision Course*, POLICE CHIEF, July 1993, at 43, 47. This inconsistency is especially glaring because it is the authority of a democratic government that the police officer is exercising when injuring a suspect or innocent bystander. See Edlund, *supra* note 5, at 217 (advocating the adoption of the "deliberate indifference" standard and reasoning that deliberately indifferent "pursuits entail an abuse of police powers that are uniquely bestowed upon a police officer and which entail grave risks when exercised").
38. See *Austin*, 286 Md. at 81-83, 405 A.2d at 272 (Cole, J., dissenting) (urging Maryland to adopt a rule which allows tort recovery from the State).
39. See *id.* at 83, 405 A.2d at 272 (Cole, J., dissenting).
40. See *id.* at 62, 405 A.2d at 261.
41. See *id.* at 78, 405 A.2d at 269 (Cole, J., dissenting) (noting that recovery would occur had the State not been a party).

pursuit litigation or legislation.⁴² These broad policy concerns should be the underlying theme of any argument for or against police liability. Yet, to appreciate the interaction of these opposing policy considerations, the practitioner must begin with the most fundamental questions for claims of recovery: from whom and under what causes of action may an injured plaintiff recover?

B. *The Potential Defendants*

There are two principal defendants who may be implicated by injuries resulting from a high-speed chase; one is the actual officer involved in the chase, the other is the municipality for whom the officer works.⁴³

1. Police Officer

When a police officer is acting under color of law, the officer can be held liable individually⁴⁴ if the officer's actions violate a citizen's constitutional rights.⁴⁵ Likewise, in a state tort action, the of-

42. See also Alpert et al., *Constitutional Implications*, *supra* note 2, at 601 ("[The topic of liability for high-speed pursuits], like many in the substantive due process area, has serious undertones and reflects major policy concerns of state and local governments throughout this country.").

43. See, e.g., Nicole G. Tell, Note, *Representing Police Officers and Municipalities: A Conflict of Interest For a Municipal Attorney in a § 1983 Police Misconduct Suit*, 65 *FORDHAM L. REV.* 2825, 2830-31 (1997).

44. See *Hafer v. Melo*, 502 U.S. 21, 25 (1991) ("Personal capacity suits . . . seek to impose individual liability upon a government officer for actions taken under color of state law. Thus, '[o]n the merits, to establish personal liability . . . it is enough to show that the official, acting under color of state law, caused a deprivation of a federal right.'" (quoting *Kentucky v. Graham*, 473 U.S. 159, 166 (1985))). Personal capacity suits can be brought against any governmental agent, regardless of whether they work for a state, county, or municipal agency. See *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 537 (1986) (addressing a personal capacity suit against local district school board members); *Rodriguez v. Phillips*, 66 F.3d 470, 482 (2d Cir. 1995) (deciding a claim against various state prison officials in their personal capacities); *Chavez v. Illinois State Police*, 27 F. Supp. 2d 1053, 1081 (N.D. Ill. 1998) (analyzing a claim against an Illinois state trooper in his personal capacity).

45. See *Crawford-El v. Britton*, 523 U.S. 574, 580-81 (1998) (litigating a First Amendment retaliation claim under § 1983); *Jefferson v. City of Tarrant*, 522 U.S. 75, 78 (1997) (Due Process and Equal Protection); *Albright v. Oliver*, 510 U.S. 266, 268 (1994) (substantive due process); *Brower v. County of Inyo*, 489 U.S. 593, 594 (1989) (Fourth Amendment); *City of St. Louis v. Praprotnik*, 485 U.S. 112, 115 (1988) (First Amendment and Due Process); *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691-92 (1978) (explaining that before any § 1983 liability there must be the commission of some constitutional tort); *Fagan v. City*

ficer may be sued personally for injuries incurred while the officer is acting in a wanton or recklessly negligent manner.⁴⁶

2. Municipality

If the police officer is not sued individually, but rather sued in an official capacity,⁴⁷ then the city or county that employs the officer may be liable for any damages.⁴⁸ In addition to finding the of-

of Vineland, 22 F.3d 1296, 1306 (3d Cir. 1994) (stating the issue as whether there has been a clear constitutional violation committed on the individual in custody); *Medina v. City of Denver*, 960 F.2d 1493, 1495 (10th Cir. 1992) (explaining that under § 1983 there must be a well-established violation of a constitutional right).

46. See *infra* note 166 and accompanying text.

47. See *Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985) (stating that official-capacity suits "generally represent only another way of pleading an action against an entity of which an officer is an agent"). As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity. See *id.* (citing *Monell*, 436 U.S. at 690 n.55). It is noteworthy that a finding of blameworthiness on the part of the government official still plays a pivotal role in prosecuting a successful claim against the municipality. See *City of Los Angeles v. Heller*, 475 U.S. 796, 797-99 (1986) (*per curiam*). According to the *Heller* Court: "If a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have *authorized* the use of constitutionally excessive force is quite beside the point." *Id.* at 799 (emphasis added).

48. See *Monell*, 436 U.S. at 690 (concluding that municipalities and local government units are subject to liability under § 1983 if the implementation of their policies causes constitutional injury); Edlund, *supra* note 5, at 172. From a practical perspective, the municipality is likely to be the most promising avenue of recovery, in that "most police officers do not have the financial capacity to satisfy a sizeable judgment, . . . unless the municipality indemnifies the officer." Edlund, *supra* note 5, at 172 (citing SHELDON H. NAHMOD, *CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION* § 1.03 (2d ed. 1986)). Yet, neither a state nor its governmental officials acting in their official capacities are subject to a § 1983 suit for money damages. See *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989) (holding that neither a state nor its officials are "persons" under § 1983); see also Mark R. Brown, *The Failure of Fault Under § 1983: Municipal Liability for State Law Enforcement*, 84 CORNELL L. REV. 1503, 1531 (1999) (noting that the Eleventh Amendment precludes the imposition of money damages from a state treasury under federal law). However, they can be the subject of a § 1983 claim for injunctive relief. See *Will*, 491 U.S. at 71 n.10 ("Of course a state official in his or her official capacity, when sued for injunctive relief, would be a person under section 1983 because 'official-capacity actions for prospective relief are not treated as actions against the State.'" (quoting *Graham*, 473 U.S. at 167 n.14; *Ex Parte Young*, 209 U.S. 123, 159-60 (1908))).

ficer liable, the plaintiff must also show that a citizen's constitutional rights were violated while the officer was acting in accordance with a formal policy or custom of the municipality.⁴⁹ This form of liability is not a respondeat superior theory; rather, the police officer's actions must be based on policies or customs of the entity.⁵⁰ Additionally, the municipality's liability is premised on clearly establishing the officer's underlying constitutional violation.⁵¹ Therefore, for any action brought under federal law, a prerequisite to any high-speed chase litigation is the identification of the constitutional source for the underlying claim.⁵²

Just as there are several potential defendants, there are multiple sources of potential relief for litigants attempting to recover damages incurred as a result of a high-speed police pursuit. Issues arising out of a high-speed chase can be litigated under state or federal law.⁵³ With the recent Supreme Court opinion in *County of Sacramento v. Lewis*,⁵⁴ absent egregious, intentional police conduct, a

49. See *McMillian v. Monroe County*, 520 U.S. 781, 783 (1997) ("If the sheriff's actions constitute county 'policy,' then the county is liable for them."); *Collins v. City of Harker Heights*, 503 U.S. 115, 124 n.6 (1992). The *Collins* Court stated that the proper analysis of a § 1983 claim against the municipality requires an inquiry into "(1) whether plaintiff's harm was caused by a constitutional violation, and (2) if so, whether the city is responsible for that violation." *Collins*, 503 U.S. at 120.

50. See *Monell*, 436 U.S. at 693-94. The Court stated that:

[A] local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.

Id. at 694. In fact, a municipality can be liable only if it acts in some way to cause the claimed constitutional violation. See *id.*

51. See *supra* note 45; see also *Temkin v. Frederick County Comm'rs*, 945 F.2d 716, 724 (4th Cir. 1991) (establishing that a claim of inadequate training on the part of the municipality as a supervisory authority cannot be made out unless the officers were themselves found to have committed a constitutional wrong); *Belcher v. Oliver*, 898 F.2d 32, 36 (4th Cir. 1990) (dismissing claims against the Mayor and Chief of Police where there was no showing that the individual officers committed a constitutional violation).

52. See *Albright v. Oliver*, 510 U.S. 266, 271 (1994) ("The first step in any [§ 1983] claim is to identify the specific constitutional right allegedly infringed." (citing *Graham v. Connor*, 490 U.S. 386, 394 (1989); *Baker v. McCollan*, 443 U.S. 137, 140 (1979))).

53. See *infra* Parts II, III.

54. 523 U.S. 833 (1998).

Fourteenth Amendment substantive due process allegation will fail.⁵⁵ Therefore, the possibility of filing a claim under state law becomes an essential alternative.⁵⁶ While the standards differ among states,⁵⁷ this Comment will focus on the laws that would affect litigants and practitioners in Maryland courts.⁵⁸

III. THE FEDERAL STANDARD

A. *Civil Rights Protection Under § 1983*

When a person injured by the conduct of a government official wishes to bring a claim in federal court, the general practice is to allege a violation under 42 U.S.C. § 1983.⁵⁹ Section 1983 creates a civil cause of action against persons who violate federal constitu-

55. See *id.* at 848 n.8. For a discussion of substantive due process actions brought pursuant to the Fourteenth Amendment, see *infra* notes 85-150 and accompanying text.

56. See Alpert et al., *Constitutional Implications*, *supra* note 2, at 601 ("Innocent third parties, who are injured during high-speed pursuits, may seek recovery under either state law or under federal law pursuant to 42 U.S.C. § 1983."); Jensen, *supra* note 2, at 1282-90 (noting and arguing the inadequacy of both § 1983 and state law actions to redress an injured bystander's injuries).

57. Almost all states offer some legislatively enacted tort liability scheme for specific acts committed by governmental officials in the scope of their employment. See, e.g., Jeremy D. Arkin, Note, *Police Chase the Bad Guys, and Plaintiffs Chase the Police: Young v. Woodall and the Standard of Care for Officers in Pursuit*, 75 N.C. L. REV. 2468 (1997) (providing an overview of North Carolina's tort law relating to police pursuit).

58. See *infra* Part III.

59. Section 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983 (1994). Congress enacted § 1983 as a means of enforcing the Fourteenth Amendment. See *Quern v. Jordan*, 440 U.S. 332, 351 n.3 (1979) (Brennan, J., concurring).

tional or statutory rights⁶⁰ while acting “under color of state law.”⁶¹ The requirement that a person act “under color of state law” has been defined as the exercise of power “possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.”⁶²

In addition to conduct resulting from action by a government officer, the plaintiff seeking recovery under § 1983 must also demonstrate a violation of a federal constitutional or statutory right.⁶³ Failure to meet the more-specific-provision rule⁶⁴ may result

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60. See Edlund, *supra* note 5, at 169 (“It is abundantly clear that § 1983 was adopted to address the failure of certain states to enforce their own laws with an even hand.” (citing *District of Columbia v. Carter*, 409 U.S. 418, 426 (1973); *Monroe v. Pape*, 365 U.S. 167, 175-76 (1961))); Comment, *Actionability of Negligence Under Section 1983 and the Eighth Amendment*, 127 U. PA. L. REV. 533, 549 (1978).
61. See *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 536 U.S. 687, 722 (1999) (Scalia, J., concurring). Justice Scalia commented that:
- Section 1983 establishes a unique, or at least, distinctive, cause of action, in that the legal duty which is the basis for relief is ultimately defined not by the claim-creating statute itself, but by an extrinsic body of law to which the statute refers, namely “federal rights elsewhere conferred.”
- Id.* (Scalia, J., concurring) (quoting *Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979)). There are three essential sources that provide extensive coverage of § 1983 and litigating claims involving police officers. See MICHAEL AVERY ET AL., *POLICE MISCONDUCT: LAW AND LITIGATION* (3d ed. 1998); 1 SHELDON H. NAHMOD, *CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983* (4th ed. 1997); 1-2 ISIDORE SILVER, *POLICE CIVIL LIABILITY* (1986 rev. ed. 1999).
62. *United States v. Classic*, 313 U.S. 299, 326 (1941). The “under color of state law” requirement of § 1983 has been thought to be essentially akin to the Fourteenth Amendment’s state action requirement. See *United States v. Price*, 383 U.S. 787, 794 n.7 (1966); see also *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 935 (1982) (holding that when the challenged conduct constitutes state action, the conduct also constitutes color of state law).
63. See *Parratt v. Taylor*, 451 U.S. 527, 535 (1981), *overruled on other grounds by Daniels v. Williams*, 474 U.S. 327 (1986). In *Parratt*, the Court stated:
- [I]n any § 1983 action the initial inquiry must focus on whether the two essential elements to a § 1983 action are present: (1) whether the conduct complained of was committed by a person acting under color of state law; and (2) whether this conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States.
- Id.* at 535; see also *County of Sacramento v. Lewis*, 523 U.S. 833, 841 n.5 (1998) (“As in any action under section 1983, the first step is to identify the exact contours of the underlying right said to have been violated.” (citing *Graham*

in the quick dismissal of any § 1983 claim based purely on substantive due process.⁶⁵ Obviously, this outcome is not desirable. However, before *County of Sacramento v. Lewis*,⁶⁶ plaintiffs struggled with the question of what constitutional right enabled injured parties to recover for injuries sustained during a high-speed chase. In police pursuit litigation, a claim arises under one of two principal constitutional provisions: (1) the Fourth Amendment as a seizure;⁶⁷ or (2) the Fourteenth Amendment as a claim under the more generalized, implied notions of substantive due process.⁶⁸

B. Fourth Amendment or Fourteenth Amendment?

1. Fourth Amendment

The Fourth Amendment protects individuals from unreasonable searches and seizures⁶⁹ and must be applied to police conduct in effectuating arrests, investigatory stops, and seizures.⁷⁰ If the conduct of the officers intentionally terminates the suspect's freedom of movement during a police pursuit, then a seizure has occurred; therefore, any claim arising from this seizure would be properly an-

v. Connor, 490 U.S. 386, 394 (1989)); *Baker v. McCollan*, 443 U.S. 137, 140 (1979) ("The first inquiry in any § 1983 suit, therefore, is whether the plaintiff has been deprived of a right 'secured by the Constitution and Laws.'"); 1 NAHMOD, *supra* note 61, §§ 2:2 to :45.

64. See *Graham*, 490 U.S. at 395. The more specific-provision rule is a doctrine of constitutional interpretation that favors the use of an explicit textual source over an amorphous substantive due process approach that lacks guideposts to gauge a claim. See *id.* at 394-95; see also *United States v. Lanier*, 520 U.S. 259, 272 (1997) ("*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.>").
65. See *Lewis*, 523 U.S. at 842-45 (rationalizing substantive due process claims when there has been no other cognizable constitutional violation).
66. For a discussion of *Lewis*, see *infra* notes 123-50 and accompanying text.
67. See *infra* notes 69-78 and accompanying text.
68. See *infra* notes 79-90 and accompanying text.
69. The Fourth Amendment assures that "[t]he right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated." U.S. CONST. amend. IV.
70. See *Graham v. Connor*, 490 U.S. 386, 395 (1989). The Court explained that: "[A]ll 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." *Id.*

alyzed under the Fourth Amendment.⁷¹ Generally, a seizure involves some intentional effort by the officer to terminate a suspect's or bystander's freedom of movement.⁷² In determining whether a seizure

71. See *Brower v. County of Inyo*, 489 U.S. 593, 594 (1989) (finding a seizure where the police officers set up a roadblock by placing an 18-wheel truck in the path of a fleeing suspect, which ultimately resulted in an accident); *Latta v. Keryte*, 118 F.3d 693, 696, 699 (10th Cir. 1997) (explaining that a fleeing suspect was seized when he stopped for a two-car roadblock that the police had set up to prevent him from traveling any further on the interstate); *Seekamp v. Michaud*, 109 F.3d 802, 804-06 (1st Cir. 1997) (acknowledging a Fourth Amendment seizure when state troopers set up a flatbed tractor-trailer loaded with lumber across the southbound traffic lanes of the highway and other tractor-trailers along the shoulder of the highway into which the plaintiff crashed); *Donovan v. City of Milwaukee*, 17 F.3d 944, 948-49 (7th Cir. 1994) (concluding that a Fourth Amendment seizure had occurred when a police officer intentionally backed his cruiser into the path of a fleeing motorcyclist and caused a collision that resulted in the rider's death); *Adams v. St. Lucie County Sheriff's Dep't*, 962 F.2d 1563, 1565, 1571-72 (11th Cir. 1992), *vacated*, 998 F.2d 923 (11th Cir. 1993) (recognizing a Fourth Amendment seizure occurred when a police officer intentionally slammed into a fleeing vehicle to halt its flight); *Campbell v. White*, 916 F.2d 421, 421-23 (7th Cir. 1990) (observing that no Fourth Amendment seizure had occurred when a police officer unintentionally struck the plaintiff after his motorcycle slid out onto the median and he had started to walk back onto the highway); *Estate of Story v. McDuffie County*, 929 F. Supp. 1523, 1527 (S.D. Ga. 1996) (stating that no seizure had occurred where the plaintiff's vehicle had crashed while going around a curve but had never been touched by the pursuing officer's vehicle); *Johnson v. Grob*, 928 F. Supp. 889, 889-95 (W.D. Mo. 1996) (construing the police officer's actions as a Fourth Amendment seizure when their roadblock caused the plaintiff to put her vehicle in reverse, slam into a parked car, and flip her car over); *Wozniak v. Cavender*, 875 F. Supp. 526, 530, 533 (N.D. Ill. 1995) (finding that no Fourth Amendment seizure had occurred when the pursuing officers maintained a distance of one to three car lengths and the injured plaintiff ultimately ended up wrecking his all-terrain vehicle in a ditch due to driver error); *Carroll v. Borough of State College*, 854 F. Supp. 1184, 1191-92 (M.D. Pa. 1994) (announcing that no seizure had occurred where a motorcyclist was injured when he failed to negotiate a turn and the pursuing officer had merely followed with sirens flashing but made no attempts to halt his flight); *Montgomery v. County of Clinton*, 743 F. Supp. 1253, 1255-57 (W.D. Mich. 1990) (concluding that a Fourth Amendment seizure had not occurred when the police had merely given chase and the fleeing suspect had run off the road, crashing into a telephone pole).

72. See *Brower*, 489 U.S. at 596-97.

It is clear, . . . that a Fourth Amendment seizure does not occur whenever there is a governmentally caused termination of an individual's freedom of movement (the innocent passerby), nor even whenever there is a governmentally caused and governmentally *desired* termination of an individual's freedom of movement (the fleeing felon),

has taken place, it is critical that "a person be stopped by the very instrumentality [that the officer] set in motion or put in place, in order to achieve that result."⁷³ Additionally, if a seizure has occurred, then it must be shown that the officer's actions made it unreasonable.⁷⁴ This is a lower burden⁷⁵ that provides an ideal constitutional ground for challenging police conduct,⁷⁶ as Fourth Amendment claims are analyzed under a reasonableness standard.⁷⁷ Unfortunately, arguing that a seizure occurred during a police pursuit is often frivolous if there is no intentional police contact with the suspect or bystander; accordingly, the Fourteenth Amendment becomes an essential tool for attacking an officer's conduct during a police pursuit.⁷⁸

but only when there is a governmental termination of freedom of movement *through means intentionally applied*.

Id. (emphasis added). The fact that a seizure requires an intentional termination of movement exemplifies the necessity of substantive due process and state tort law in situations where a bystander or uninvolved motorist is unintentionally injured during a police chase. See *Lewis*, 523 U.S. at 844 (holding that the Fourth Amendment does not govern in cases of an attempted seizure); Epstein, *supra* note 22, at 360-61 (contrasting the Fourth Amendment standard with the Fourteenth Amendment in police pursuit cases). *But see* Kirst, *supra* note 5, at 110-13 (advocating the adoption of the Fourth Amendment reasonableness standard in cases where uninvolved bystanders are injured because of a high-speed police chase).

73. *Brower*, 489 U.S. at 599 ("It was enough here, therefore, that, according to the allegations of the complaint, Brower was meant to be stopped by the physical obstacle of the roadblock and that he was so stopped.").
74. See *Campbell v. White*, 916 F.2d 421, 423 (7th Cir. 1990) ("Absent a seizure, a discussion of the reasonableness of [an officer's] actions would be merely academic.").
75. The reasonableness standard of the Fourth Amendment is a less demanding burden than the "shocks the conscience" standard that is now applied in Fourteenth Amendment challenges. Compare *Graham*, 90 U.S. at 399 ("[T]he 'reasonableness' inquiry in an excessive force case is an objective one: the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation."), with *Lewis*, 523 U.S. at 848-49 (holding that an intent to harm must be shown for an actionable Fourteenth Amendment claim).
76. See *supra* note 65.
77. By its own terms, the language of the Fourth Amendment mandates a reasonableness inquiry. See *supra* notes 69-70 and accompanying text.
78. See *Mesler*, *supra* note 22, at 801-05 (advocating a Fourth Amendment analysis in bystander cases while realizing in practice that most claims will fall under substantive due process); cf. Alpert et al., *Constitutional Implications*, *supra* note 2, at 660-62 (arguing the necessity of a lower standard under substantive due

2. Fourteenth Amendment⁷⁹

The Fourteenth Amendment contains substantive rights not enumerated.⁸⁰ It is well established that: "the Due Process Clause of the Fourteenth Amendment was intended to prevent government from abusing [its] power, or employing it as an instrument of oppression."⁸¹ The Due Process Clause has been interpreted as a limitation on a state actor's power to act arbitrarily and is not a blanket safeguard for protected interests.⁸² Deprivations of due process arise from conduct that is the result of some deliberate action on the part of a governmental official.⁸³

process in order to allow recovery in police pursuit cases).

79. Section 1 of the Fourteenth Amendment of the United States Constitution reads in pertinent part:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

80. *See, e.g.*, *Griswold v. Connecticut*, 381 U.S. 479, 481-82 (1965) (holding that a law forbidding contraceptive use by married couples violates the right to privacy implied in the Fourteenth Amendment); *see also* David H. Armistead, *Substantive Due Process Limits on Public Officials' Power to Terminate State-Created Property Interests*, 29 GA. L. REV. 769, 773 (1995) (characterizing due process as "one of the most important protectors of individual rights not specifically enumerated in the Constitution"); Edlund, *supra* note 5, at 179; Franklin J. Whittlesey, Casenote, *Fourth and Fourteenth Amendment—Substantive Due Process—Malicious Prosecution Does not Constitute a Deprivation of Liberty Actionable as a Constitutional Tort Pursuant to the Due Process Clause—Albright v. Oliver*, 114 S. Ct. 807 (1994), 5 SETON HALL CONST. L.J. 269, 277 (1994).
81. *Collins v. City of Harker Heights*, 503 U.S. 115, 126 (1992) (quoting *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 196 (1989) (quoting *Davidson v. Cannon*, 474 U.S. 344, 348 (1986))); *see, e.g.*, Rosalie Berger Levinson, *Protection Against Government Abuse of Power: Has the Court Taken the Substance Out of Substantive Due Process*, 16 U. DAYTON L. REV. 313, 321-32 (1991) (discussing the traditional role of substantive due process as a deterrent to government misconduct).
82. *See DeShaney*, 489 U.S. at 195.
83. *See, e.g.*, *Hudson v. Palmer*, 468 U.S. 517, 530 (1984) (deliberately destroying an inmate's property); *Ingraham v. Wright*, 430 U.S. 651, 653, 673-74 (1977) (disciplining a student); *Rochin v. California*, 342 U.S. 165, 172 (1952) (pumping a suspect's stomach for drugs); *see also* Irene Merker Rosenberg, *A Study in Irrationality: Refusal to Grant Substantive Due Process Protection Against Excessive Corporal Punishment in the Public Schools*, 27 HOUS. L. REV. 399, 413 (1990) ("Due process, said the Court, is concerned with 'deliberate' decisions by state officials that constitute an 'abuse of power.'" (quoting *Daniels v. Wil-*

The protections invoked by a procedural due process claim, which address the adequacy of notice and hearing before a state deprivation of life, liberty, or property,⁸⁴ are distinguishable from the rights protected by substantive due process.⁸⁵ Substantive due process is actionable as a direct challenge to certain government conduct, regardless of the government's satisfaction of notice and hearing requirements.⁸⁶ The Supreme Court has explicitly recognized that the substantive rights of the Due Process Clause extend beyond any requirement of fair procedure—substantive due process protects a broader scope of interests than procedural due process.⁸⁷

liams, 474 U.S. 327, 331-32 (1986)).

84. See, e.g., *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 570 n.7 (1972); Matthew S. Buttacavoli, Casenote, *Must Post-Termination Procedural Due Process Include a Full, Trial-like Evidentiary Hearing? A Critique of Townsel v. San Diego Metro. Transit Dev. Bd.*, 36 SAN DIEGO L. REV. 1109, 1114 (1999) (citing *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) (quoting *Baldwin v. Hale*, 68 U.S. (1 Wall.) 223, 233 (1863))).
85. See 1 NAHMOD, *supra* note 61, § 3.55; 1 SILVER, *supra* note 61, § 8A.06[8] (“The function of substantive due process as promulgated by *Rochin* is to serve as a constitutional ‘catch-all’ for egregious misconduct which cannot be characterized as a violation of a specific constitutional right.”).
86. See 1 NAHMOD, *supra* note 48, § 3.55; see also JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 13.1, at 510-11 (5th ed. 1995) (elaborating on the difference between the Fourteenth Amendment's substantive due process and procedural due process protections).
87. See, e.g., *Washington v. Glucksberg*, 528 U.S. 702, 719 (1997) (explaining that the Fourteenth Amendment protects certain areas of protected liberties); *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 846-48 (1992) (delineating the differences between the procedural and substantive protections of the Fourteenth Amendment); *Collins v. City of Harker Heights*, 503 U.S. 115, 125-28 (1992) (explaining the care with which substantive due process claims must be handled because of the lack of clear guideposts for judicial interpretation). Noted constitutional law scholars, John E. Nowak and Ronald D. Rotunda, have commented:

By “substantive review” we mean the judicial determination of the compatibility of the substance of a law or governmental action with the Constitution. The Court is concerned with the constitutionality of the underlying rule [or executive action] rather than with the fairness of the process by which the government applies the rule to an individual The concept the Court employs to control the substance of legislation under the due process clause is that certain types of lawmaking [or executive action] go beyond any proper sphere of governmental activity. In short, the Court views the act as incompatible with our democratic system of government and individual liberty. The judicial premise for this position is that any life, liberty, or property limited by such a law [or executive action] is taken without due

In the context of liability for injuries attributed to police chases, the protection of substantive due process is implicated by a police officer's abuse of power that is "so egregious or outrageous that no state post-deprivation remedy can adequately serve to preserve a person's constitutional guarantees of freedom from such conduct."⁸⁸ A claim is properly analyzed under the Fourteenth Amendment as a violation of substantive due process if a police pursuit results in injury and occurs either without any intentional physical control over the suspect or results in harm to an innocent bystander.⁸⁹ Due to the nature of most police pursuit cases, which

process because the Constitution never granted the government the ability to pass such a law [or take such an action].

NOWAK & ROTUNDA, *infra* note 86, § 10.6, at 346-47; *see also* Edlund, *supra* note 5, at 181 ("Substantive due process rights provide plaintiffs with a broad residual theory to challenge the root of governmental misconduct." (citing VINCENT R. FONTANA, MUNICIPAL LIABILITY: LAW AND PRACTICE § 4.8 (1990))).

Maryland's constitution contains an analogous due process provision—article 24 of the Declaration of Rights—which also contains a substantive component. *See* Branch v. McGeeney, 123 Md. App. 330, 352, 718 A.2d 631, 642 (1998) ("[The federal due process] clause is generally interpreted as being synonymous with article 24 of the Maryland Declaration of Rights." (citing Oursler v. Tawes, 178 Md. 471, 483, 13 A.2d 763, 768 (1940))). In addition, the Supreme Court's interpretation of the substantive component embodied in the Fourteenth Amendment provides authoritative guidance to the interpretation of article 24. *See* Pitsenberger v. Pitsenberger, 287 Md. 20, 27, 410 A.2d 1052, 1056 (1980); City of Frostburg v. Jenkins, 215 Md. 9, 15, 136 A.2d 852, 854-55 (1957); Goldsmith v. Mead Johnson & Co., 176 Md. 682, 686, 7 A.2d 176, 178 (1939).

88. Temkin v. Frederick County Comm'rs, 945 F.2d 716, 720 (4th Cir. 1991).

89. *See* County of Sacramento v. Lewis, 523 U.S. 833, 853-54 (1998) (stating that the Fourteenth Amendment is the proper provision from which to challenge the conduct of a police officer during a high-speed chase of a motorcycle and a passenger that was chased for several miles and followed closely, but never seized); Onossian v. Block, 175 F.3d 1169, 1172 (9th Cir. 1999) (employing a Fourteenth Amendment Due Process analysis where a fleeing "muscle car" was never touched by the pursuing officers and crashed into an uninvolved motorist); Boveri v. Town of Saugus, 113 F.3d 4, 5-6 (1st Cir. 1997) (examining a chase under the Fourteenth Amendment where the police officers stayed several car lengths behind the fleeing suspect's vehicle, which did not stop until it eventually hydroplaned into an uninvolved motorist); Evans v. Avery, 100 F.3d 1033, 1036 (1st Cir. 1996) (noting that absent a seizure, those injured during a police pursuit may prosecute a § 1983 claim under substantive due process); Magdziak v. Byrd, 96 F.3d 1045, 1046-47 (7th Cir. 1996) (analyzing a Fourteenth Amendment claim brought against a police officer where there was no contact between the officer's and the suspect's vehicles and the suspect's vehicle came to a stop after striking an uninvolved motorist); Fagan v.

generally do not involve an unreasonable Fourth Amendment seizure,⁹⁰ substantive due process becomes the central focus for recovery. While the Fourteenth Amendment's value as a vehicle for recovery is not questioned, the standard for judging the egregiousness of the police officer's actions has been far from clear. Therefore, a discussion of each of the differing standards that have been applied in Fourteenth Amendment cases is germane.

C. The Substantive Due Process Split Among the Circuits

Analyzing a growing number of police pursuit cases as potential violations of Fourteenth Amendment substantive due process, the federal circuit courts split as to the appropriate level of culpability necessary to impose liability.⁹¹ The result was the application of two

City of Vineland, 22 F.3d 1296, 1299-1301, 1303 (3d Cir. 1994) (en banc) (examining a Fourteenth Amendment case where the police chased a speeding Camaro throughout a city and nearby residential neighborhood before it ran a red light and plowed into the side of a pickup truck); *Temkin v. Frederick County Comm'rs*, 945 F.2d 716, 717-19 (4th Cir. 1991) (evaluating a high-speed chase under the Fourteenth Amendment where the fleeing suspect's vehicle sideswiped an uninvolved motorist's vehicle without having any contact with the pursuing police vehicle); *Pleasant v. Zamieski*, 895 F.2d 272, 276 n.2 (6th Cir. 1990) (explaining that a substantive due process analysis is preserved for those actions of a police officer other than a seizure); *Feist v. Simonson*, 36 F. Supp. 2d 1136, 1139-41, 1144 (N.D. Minn. 1999) (analyzing a bystander case under the Fourteenth Amendment where a limousine driver was killed instantly when his car was struck by a fleeing suspect); *Corbin v. City of Springfield*, 942 F. Supp. 721, 723, 725 (D. Mass. 1996) (undertaking a Fourteenth Amendment analysis where an innocent motorist was struck at an intersection by the fleeing suspect's vehicle).

90. An analysis of all the possible implications of a Fourth Amendment seizure in the police chase context is not within the scope of this Comment. For a brief discussion of the potential nexus between an officer or municipality's liability for injuries suffered during a high-speed chase and the Fourth Amendment, see *supra* notes 69-78 and accompanying text.

91. See *Lewis v. Sacramento County*, 98 F.3d 434, 439 (9th Cir. 1996) (citations omitted) *rev'd*, *County of Sacramento v. Lewis*, 523 U.S. 833, 854 (1998) (applying a shocks the conscience test). This was especially troublesome in this area of the law because:

In the framework of police pursuit situations, police misconduct can best be kept within constitutional norms by maintaining one clear, objective standard of liability The need for a concrete Fourteenth Amendment standard is shown by the confusion within the lower federal courts and the less than enthusiastic regard many jurists have for substantive due process analysis.

Edlund, *supra* note 5, at 205. However, it is interesting that the Supreme Court nonetheless retains the potential to distinguish Fourteenth Amendment

dissimilar standards: one, the “deliberate” or “reckless indifferent” standard, that turns on the concerns of public safety and imposes a lower burden for liability;⁹² and the other, the “shocks the conscience” standard, a pro-police stance that places an extremely high bar to an injured plaintiff’s claim.⁹³

1. “Deliberate” or “Reckless Indifference” Standard

In the recent past,⁹⁴ some federal circuits adopted a “deliberate” or “reckless indifference” standard that hedges between the competing policies underlying police pursuit liability—something a little more than mere negligence, but something less than intentional conduct.⁹⁵ To recover under this standard, a plaintiff must

violations during a high-speed chase from violations of an inmate’s rights while incarcerated. *See infra* note 141.

92. *See, e.g.,* Magdziak v. Byrd, 96 F.3d 1045, 1049 (7th Cir. 1996) (stating the standard for substantive due process violations is not clearly established, but suggesting a deliberate indifference approach); McKinney v. Pate, 20 F.3d 1550, 1556 n.7 (11th Cir. 1994) (rejecting a shocks the conscience standard as inapplicable in civil cases for money damages); Jones v. Sherrill, 827 F.2d 1102, 1106 (6th Cir. 1987) (applying a gross negligence standard); *see also* Alpert et al., *Constitutional Implications, supra* note 2, at 627-38 (providing a general overview of the circuits that have adopted the deliberate or “reckless indifference” standard).
93. *See* Evans v. Avery, 100 F.3d 1033, 1038 (1st Cir. 1996), *cert. denied*, 520 U.S. 1210 (1997) (adopting a shocks the conscience standard where chase occurred in a highly congested area but lasted no more than two minutes and never exceeded 50 miles per hour); Williams v. City of Denver, 99 F.3d 1009, 1014-15 (10th Cir. 1996) (adopting a shocks the conscience standard); Fagan v. City of Vineland, 22 F.3d 1296, 1308-09 (3d Cir. 1994) (en banc) (adopting a shocks the conscience standard where multiple police cars pursued a suspect’s vehicle through residential neighborhood at speeds reaching 80 miles per hour); *Temkin*, 945 F.2d at 719 (adopting a shocks the conscience standard where a police chase down a narrow, two-lane highway reached speeds of 105 miles per hour); Checki v. Webb, 785 F.2d 534, 538 (5th Cir. 1985) (adopting a shocks the conscience standard where pursuit in unmarked police vehicle reached speeds of 100 miles per hour down Louisiana interstate).
94. *See* Finarelli, *supra* note 36, at 242 (noting that although the deliberate indifference standard “has been applied predominantly in several contexts outside the high-speed police pursuit context,” this standard has been applied to determine liability in police chases within the “last decade or so”) (citations omitted).
95. *See* Medina v. City of Denver, 960 F.2d 1493, 1496 (10th Cir. 1992) (stating that reckless intent does not require a showing of intent to harm). The court adopted a reckless indifference standard. *See id.* In order for the officer to be liable, it would be sufficient that there was awareness of a known or obvious risk, substantial enough that there was a high probability that serious harm

show that the police officer created a dangerous condition and acted with deliberate indifference to subject the plaintiff to a known or obvious danger.⁹⁶ Deliberate indifference implies a reckless state of mind more in tune with mental states under criminal law, rather than in a tort sense.⁹⁷ Such a state of mind requires an element of actual knowledge or willful blindness to a known impending harm.⁹⁸

2. The "Shocks the Conscience" Standard

The "shocks the conscience" standard establishes a standard of care somewhere⁹⁹ between the deliberate indifference standard and absolute immunity.¹⁰⁰ To shock the conscience, the conduct of the

would follow. *See id.*

96. *See L.W. v. Grubbs*, 92 F.3d 894, 896 (9th Cir. 1996); *Wood v. Ostrander*, 879 F.2d 583, 588 (9th Cir. 1989).

97. *See Grubbs*, 92 F.3d at 899-900 (citing *Manarite v. City of Springfield*, 957 F.2d 953, 956 (1st Cir. 1992)).

98. *See id.* For example, in *Gutierrez-Rodriguez v. Cartagena*, a supervisory officer was held liable where a patrol officer shot and killed an innocent suspect. *See Gutierrez-Rodriguez v. Cartagena*, 882 F.2d 553, 557, 564 (1st Cir. 1989). In holding the supervisor liable, the court relied on a deliberate indifference standard. *See id.* at 562. The court explained that this standard had been met because the supervisor had knowledge of the patrol officer's prior record, received multiple citizen complaints regarding the same officer, and failed to institute any disciplinary action. *See id.* at 566.

99. Historically, the shocks the conscience standard has been criticized for its lack of clarity. *See, e.g., Gumz v. Morrissette*, 772 F.2d 1395, 1407 (7th Cir. 1985) (Easterbrook, J., concurring) ("[A] 'shocks the conscience' test spurns bright lines. It spurns rules. It is a vague standard . . . inviting all decisionmakers to consult their sensibilities rather than objective circumstances.").

In the words of one noted commentator:

[T]he "shocks the conscience" standard involves an amorphous and imprecise inquiry. Further, whose conscience must be "shocked"—the judge or the jury? As there is no clear indication as to what constitutes conscience shocking behavior, many circuits have blindly applied this restrictive, but undefinable, standard and denied recovery for victims of police pursuit accidents. On the other hand, the deliberate or reckless indifference standard is well-known to the law and capable of easy definition.

Alpert et al., *Constitutional Implications*, *supra* note 2, at 661-62.

100. *See Lewis*, 523 U.S. at 848 (1998). According to one author, the Supreme Court's reluctance to expand the parameters of substantive due process convinced at least one court to adopt the shocks the conscience standard in police pursuit cases, regardless of previous case law applying the reckless disregard standard. *See Edlund*, *supra* note 5, at 197-98 n.174 (discussing *Fagan v. City of Vineland*, 22 F.3d 1296, 1306 n.6 (3d Cir. 1993) (en banc) (noting that the court "cannot ignore the Supreme Court's repeated warnings against an

police officer must be outrageous or offensive to an individual's sense of justice.¹⁰¹ This standard requires a look into the mind of the police officer.¹⁰² However, this is not the sole inquiry. A proper analysis also includes any abuse of the officer's official police authority granted to the officer by the government¹⁰³ and the degree of discretion entrusted to police officers in the daily performance of their duties.¹⁰⁴ To better understand the heightened burden that the shocks the conscience standard entails, an analysis of a Fourth Circuit case that adopted the standard is particularly appropriate.

The United States Court of Appeals for the Fourth Circuit adopted the shocks the conscience standard in a police pursuit in *Temkin v. Frederick County Commissioners*.¹⁰⁵ In *Temkin*, an uninvolved driver was seriously injured when the car she was driving was hit by both the suspect's and the pursuing officer's vehicles.¹⁰⁶ After the district court granted Frederick County's motion for summary judgment,¹⁰⁷ the issue of whether the shocks the conscience standard should be applied to impose liability for Fourteenth Amendment violations was ripe for the United States Court of Appeals for the Fourth Circuit.¹⁰⁸

The pursuit in *Temkin* first began when the officer observed a car racing out of a gas station and spinning its wheels.¹⁰⁹ During the chase, the officer heard over his radio that the suspect had stolen seventeen dollars worth of gas.¹¹⁰ Both cars reached speeds of 65 to 105 miles per hour on a narrow two-lane highway that traversed populated areas.¹¹¹ The suspect lost control of his vehicle on a

overly generous interpretation of the substantive component of the due process clause" (citing *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992); *Albright v. Oliver*, 510 U.S. 266, 271-72 (1994))).

101. See *Fagan*, 22 F.3d at 1303-04 (citing *Rochin v. California*, 342 U.S. 165, 169 (1952) (quoting *Malinski v. New York*, 324 U.S. 401, 417 (1945))). A recent opinion by the United States Court of Appeals for the Eighth Circuit provides an excellent example of conduct that is shocking to the conscience. See *Rogers v. City of Little Rock*, 152 F.3d 790 (8th Cir. 1998); see also *infra* note 149.

102. See 1 NAHMOD, *supra* note 61, § 3.8-9.

103. See *Rankin v. City of Witchita Falls*, 762 F.2d 444, 447-48 (5th Cir. 1985).

104. See *id.*

105. 945 F.2d 716, 720 (4th Cir. 1991).

106. See *id.* at 718.

107. See *id.* The United States District Court for the District of Maryland specifically granted summary judgment in regard to the plaintiffs' § 1983 claims. See *id.*

108. See *id.* at 719-24.

109. See *id.*

110. See *id.*

111. See *id.* At one point, the chase proceeded through a carnival area where cars

curve, striking Temkin's vehicle.¹¹² Then, the pursuing officer hit Temkin's careening vehicle broadside at approximately sixty miles per hour.¹¹³ Due to the accident, Temkin suffered severe and permanent injuries.¹¹⁴

The United States Court of Appeals for the Fourth Circuit approved the district court's adoption of the shocks the conscience standard.¹¹⁵ The court considered whether the officer's conduct was so shocking that it constituted an abuse of state power, violating Temkin's substantive due process rights.¹¹⁶ The court held that the officer's conduct, although "disturbing and lacking in judgment,"¹¹⁷ failed to rise to the level of conscience shocking.¹¹⁸ Therefore, the grant of summary judgment was proper¹¹⁹ because Temkin had failed to state a cognizable violation of substantive due process.¹²⁰

lined both sides of the road. *See id.*

112. *See id.*

113. *See id.*

114. *See id.*

115. *See id.* at 720.

116. *See id.*

117. *Id.* at 723.

118. *See id.* Temkin raised five specific facts in an attempt to show that the officer's conduct shocked the conscience:

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

Id. The on-duty supervisor was responding to another call and did not monitor the pursuing officer's chase, in part because his own radio was inoperative. *See id.* at 718.

119. By finding that the pursuing officer had not committed a potential Fourteenth Amendment violation, the court further concluded that Temkin had similarly failed to make a cognizable claim against the Frederick County Commissioners for inadequate training and supervision. *See id.* at 723-27.

120. *See id.* The *Temkin* court distinguished police pursuits from other scenarios in which a Fourteenth Amendment violation may be found. According to the *Temkin* court, "we do not today address the question of whether the same [shocks the conscience] standard applies in those cases, such as incarceration or involuntary foster care, where governmental control over the claimant is intentional and direct." *Id.* (citing *Martin v. Gentile*, 849 F.2d 863, 871 (4th Cir. 1988)). In *Martin*, the United States Court of Appeals for the Fourth Circuit explained that "a pretrial detainee makes out a due process violation if he shows 'deliberate indifference to serious medical needs.'" *Id.* at 72 (quoting *Martin*, 849 F.2d at 871 (quoting *Estelle v. Gamble*, 429 U.S. 97, 106

As demonstrated by *Temkin*, the shocks the conscience standard is a difficult burden for a plaintiff to meet. Until recently, other circuits have permitted Fourteenth Amendment claims based on the lower burden of deliberate indifference.¹²¹ However, the Supreme Court recently resolved this inconsistency by explicitly adopting the “shocks the conscience” standard for police pursuit situations and ending the split among the federal circuits.¹²²

D. The Supreme Court Announces Its Position on the Standard of Care for Determining Police Liability in High-speed Pursuits—Actions Speak Louder Than Words

In *County of Sacramento v. Lewis*,¹²³ the Supreme Court set forth the proper standard for determining when substantive due process rights have been violated during police pursuit cases¹²⁴ by adopting the shocks the conscience standard.¹²⁵ The facts in *Lewis* illustrate the heightened burden that the shocks the conscience test places on the plaintiff in a police pursuit case.¹²⁶

Dispatched to break up a fight, an officer arrived at the scene around 8:30 p.m. and observed a motorcycle with two riders approaching at a high rate of speed.¹²⁷ The driver of the motorcycle was eighteen year old Brian Willard and the passenger was sixteen year old Philip Lewis.¹²⁸ With the assistance of another officer, the officer attempted to block the motorcycle’s path.¹²⁹ The motorcycle evaded the officers and sped off.¹³⁰ One of the officers took up the pursuit.¹³¹ The chase lasted for about seventy-five seconds through a busy residential area, with both parties reaching speeds of 100 miles

(1976)). The Supreme Court has made a similar distinction between injuries incurred during police pursuits and injuries flowing from police incarceration. *See infra* note 141.

121. *See supra* Part III.C.1.

122. *See* *County of Sacramento v. Lewis*, 523 U.S. 833, 846-47 (1998).

123. 523 U.S. 833 (1998).

124. *See id.* at 839. The Court explained that certiorari was granted to resolve the conflict among the circuits regarding the police pursuit cases under substantive due process. *See id.*

125. *See id.* at 846-49.

126. *See supra* notes 115-20 and accompanying text.

127. *See Lewis*, 523 U.S. at 836.

128. *See id.*

129. *See id.*

130. *See id.* at 836-37.

131. *See id.* at 837.

per hour.¹³²

Refusing to back down, the pursuing officer followed the motorcycle at distances as short as 100 feet.¹³³ The chase ended when Willard failed to negotiate a tight left turn and his motorcycle tipped over, ejecting both driver and passenger onto the roadway.¹³⁴ Following closely and with little time to react, the officer slammed on his brakes.¹³⁵ He avoided the driver, but ran into Lewis at about forty miles per hour.¹³⁶ The impact propelled Lewis approximately seventy feet down the road and inflicted serious injuries to his body.¹³⁷ Lewis died at the scene.¹³⁸

After initially rejecting a Fourth Amendment analysis,¹³⁹ the Court determined the appropriateness of the substantive due process claim.¹⁴⁰ The Court placed great weight on the fact that police officers lack time to make considered decisions and need to take almost instinctive, split-second action.¹⁴¹ The Court then explained

132. *See id.* at 836-37.

133. *See id.* at 837. At a distance so close and with such a high-speed, the officer would have needed 650 additional feet in order to stop his car. *See id.*

134. *See id.*

135. *See id.*

136. *See id.*

137. *See id.* The intensity of the impact sprayed Lewis's blood over the entire windshield of the patrol car and ruptured every major organ in his body. *See* Respondent's Brief at 2, *Lewis*, 523 U.S. at 833 (No. 96-1337) (citing the officer's deposition).

138. *See Lewis*, 523 U.S. at 837.

139. *See id.* at 843-44. The Court rejected any argument that Lewis was seized. *See id.*

140. *See id.* at 842-46. The Court emphasized: "The touchstone of due process is protection of the individual against arbitrary action of the government." *Id.* at 845 (quoting *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974)).

141. *See id.* at 850-53. The Court distinguished a pursuit situation from a challenge to a prison official's misconduct under the Eighth Amendment. *See id.* at 851. In a prison custody situation, the reckless indifference standard would still apply. *See id.* Under a custody situation, the prison official is responsible for the welfare of the inmates and has the luxury of considered forethought. *See id.* Additionally, there are no countervailing concerns which might excuse a prison official from taking action for the inmate's welfare. *See id.* A police officer has none of these luxuries when deciding whether to act. *See id.* at 852-53. This distinction reflects the inability for mechanical application of substantive due process principles.

[A]ttention to the markedly different circumstances of normal pre-trial custody and high-speed law enforcement chases shows why the deliberate indifference that shocks in the one case is less egregious in the other (even assuming that it makes sense to speak of indiffer-

that to make a cognizable claim of executive abuse of power under the Fourteenth Amendment in a police pursuit situation, a plaintiff must demonstrate that the pursuing officer's actions shock the conscience.¹⁴² The Court held that "high-speed chases with no intent to harm suspects physically or worsen their legal plight do not give rise to liability under the Fourteenth Amendment, redressible by an action under § 1983."¹⁴³

Looking to the facts, the Court found that the officer had acted within the bounds of his job as a law enforcement officer.¹⁴⁴ The officer had not acted with any intent to induce the suspect's lawlessness nor with any intent to terrorize, harm, or kill him.¹⁴⁵ Further, any prudence on the officer's part was subject to the countervailing demands of law enforcement.¹⁴⁶ Therefore, regardless of whether the officer had overstepped a tort law standard of reasonableness, his actions had failed to rise to a level that would shock the conscience.¹⁴⁷

From the foregoing, it should be apparent that the shocks the conscience standard leaves little room for recovery where an officer's conduct is challenged under Fourteenth Amendment substantive due process.¹⁴⁸ In fact, the shocks the conscience test exists

ence as deliberate in the case of sudden pursuit).

Id. at 851.

142. *See id.* at 846. As to the fluidity of the shocks the conscience standard, the Court noted: "While the measure of what is conscience-shocking is no calibrated yard stick, it does, as Judge Friendly put it, 'point the way.'" *Id.* at 847 (quoting *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973)).

143. *Id.* at 854.

144. *See id.* at 855.

145. *See id.*

146. *See id.*

147. *See id.* This point clarifies the position of the Court that the Fourteenth Amendment is not a "font of tort law to be superimposed upon whatever systems may already be administered by the states." *Id.* at 847 (quoting *Paul v. Davis*, 424 U.S. 693, 701 (1976)). Similarly, this point also reaffirms another earlier statement by the Court that "[o]ur constitution [sic] deals with the large concerns of the governors and the governed, but it does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society.'" *Id.* (quoting *Daniels v. Williams*, 474 U.S. 327, 332 (1986)).

148. Since *Lewis*, there have been several federal circuit court opinions applying the shocks the conscience standard to challenges to a police officer's actions. *See, e.g., Moreland v. Las Vegas Metro. Police Dep't*, 159 F.3d 365, 373 (9th Cir. 1998) (holding that an officer who inadvertently shot the wrong man during a gunfight did not violate substantive due process); *Schaefer v. Goch*, 153 F.3d

mainly to preserve the Fourteenth Amendment for extremely egregious and flagrant abuses of governmental authority.¹⁴⁹ Therefore, state law becomes the primary vehicle to impose liability on a police officer's conduct that fails to shock the conscience.¹⁵⁰

IV. POLICE LIABILITY IN MARYLAND

To assess an officer's conduct for potential liability under Maryland law, an attorney must understand the interplay of common-law principles and the statutory regime. In Maryland, the government and its employees are protected by sovereign immunity,¹⁵¹ a doctrine which bars all suits against the state absent legislative permission.¹⁵² While full immunity has traditionally been granted to the

793, 798-99 (7th Cir. 1998) (holding that an officer who unintentionally shot a crime victim in the course of a botched arrest failed to evince the requisite purpose to harm necessary for a substantive due process violation); *Rogers v. City of Little Rock*, 152 F.3d 790, 797 (8th Cir. 1998) (holding that an officer who raped a citizen violated her substantive due process rights); *Radecki v. Barela*, 146 F.3d 1227, 1228, 1232 (10th Cir. 1998) (explaining that there would be no violation of substantive due process when a citizen assisting an officer was shot in the struggle with a suspect); *Courville v. City of Lake Charles*, 720 So. 2d 789, 802 (La. Ct. App. 1998) (holding that an officer who undertook a high-speed chase through city streets resulting in the death of the fleeing suspect did not violate substantive due process).

149. Of the cases decided since *Lewis*, *Rogers* provides a graphic example of an officer's conduct that was deemed conscience shocking. See *Rogers*, 152 F.3d at 796-97. In *Rogers*, the officer, after pulling the plaintiff over for a minor traffic stop, followed her home and raped her. See *id.* at 793-94. The officer remained in uniform throughout the incident. See *id.* at 794. The court held that, "[the] rape was an intentional act that produced constitutional injury and that was an 'arbitrary exercise of government, unrestrained by the established principles of private right and distributive justice.'" *Id.* at 797 (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998) (quoting *Hurtado v. California*, 110 U.S. 516, 527 (1884))). The court then affirmed a \$100,000 damage award against the officer in his personal capacity. See *id.* at 798.
150. See *Lewis*, 523 U.S. at 854 n.14. The *Lewis* Court noted that simply because the officer's conduct did not rise to the level of a Fourteenth Amendment violation does not "imply anything about its appropriate treatment under state law." *Id.*
151. See *Austin v. Mayor of Baltimore*, 286 Md. 51, 54-55, 405 A.2d 255, 257 (1979) ("Once venerated, recently vilified, and presently substantially limited, the doctrine of sovereign immunity has been long recognized by this Court.").
152. See *Godwin v. County Comm'rs of St. Mary's County*, 256 Md. 326, 334, 260 A.2d 296, 299 (1970); see also *Board of Trustees of Howard Community College v. John K. Ruff, Inc.*, 278 Md. 580, 583, 366 A.2d 360, 362 (1976) (noting that a state agency cannot waive immunity, even if the agency fails to plead it); *Jekofsky v. State Roads Comm'n*, 264 Md. 471, 474, 287 A.2d 40, 42 (1972).

State, there has never been an extension of absolute immunity to the State's counties and municipalities.¹⁵³ Originally based on the ancient common-law premise that "the King can do no wrong,"¹⁵⁴ the doctrine of sovereign immunity has recently been modified by the Maryland General Assembly¹⁵⁵ to serve the existing public policy concerns of modern government.¹⁵⁶ This suggests the Legislature's awareness of the inherent unfairness of leaving those injured at the hands of state employees without a remedy.¹⁵⁷

The *Jekofsky* court observed: "[I]t is desirable and in the public interest that any change in the doctrine of sovereign immunity should come from the legislative branch of the State Government rather than from the judicial branch." *Id.* See generally Charles A. Rees, *State Constitutional Law for Maryland Lawyers: Judicial Relief for Violations of Rights*, 10 U. BALT. L. REV. 102, 122-33 (1980) (discussing the limitations imposed by various governmental and official immunities on judicial review under both federal and Maryland law); Steven D. Frenkil, Comment, *The State as a Party Defendant: Abrogation of Sovereign Immunity in Tort in Maryland*, 36 MD. L. REV. 653, 654-58 (1977) (explaining the doctrine of sovereign immunity in Maryland).

153. In the case of counties and municipalities, there is a distinction drawn between governmental and proprietary functions. See *Tadger v. Montgomery County*, 300 Md. 539, 549, 479 A.2d 1321, 1326 (1984) (discussing the need to discern between a government and proprietary function); *Austin*, 286 Md. at 63, 405 A.2d at 261 (holding that the city was involved in a governmental function in the operation of a day camp). A municipality is immune only if it is performing a governmental function, rather than a proprietary function, when the individual is allegedly injured. See *Austin*, 286 Md. at 63, 405 A.2d at 261. To determine whether a function is governmental, one must focus on whether "the act in question is sanctioned by legislative authority, is solely for the public benefit, with no profit or emolument inuring to the municipality, and tends to benefit the public health and promote the welfare of the whole public, and has in it no element of private interest." *Id.* at 60, 405 A.2d at 260 (quoting *E. Eyring & Sons Co. v. Mayor of Baltimore*, 253 Md. 380, 383, 252 A.2d 824, 824 (1969)). Distinguishing between proprietary and governmental functions can be difficult; as noted by the court of appeals, "[t]he distinction between governmental and proprietary functions is sometimes illusory in practice." *E. Eyring & Sons Co.*, 253 Md. at 382, 252 A.2d at 825.
154. *Katz v. Washington Suburban Sanitary Comm'n*, 284 Md. 503, 507, 397 A.2d 1027, 1030 (1979).
155. See MD. CODE ANN., STATE GOV'T §§ 12-101 to 12-110 (1995 & Supp. 1997). These provisions, which provide a broad waiver of the State's tort immunity, are known generally as the "Maryland Tort Claims Act." *Id.* § 12-110.
156. See Frenkil, *supra* note 152, at 658. There has been a shift to the view that the doctrine is based on the inappropriateness of diverting public funds for private use. See *id.* Further, allowing private recovery from the state can place such a burden on its ability to govern that the larger concerns of the public will go unanswered. See *id.* at 658-62.
157. The Act shall be construed broadly to effectuate the stated purpose, which is

In relation to the doctrine of sovereign immunity, the doctrine of public official immunity protects a government employee from individual liability for negligence.¹⁵⁸ To be immune from liability, the government actor must be a public official and the challenged conduct must have occurred while the official was performing a discretionary act.¹⁵⁹ Once both of these prongs are satisfied, "a qualified immunity attaches; namely in the absence of malice, the individual involved is free from liability."¹⁶⁰ When analyzing police pursuit issues in Maryland, an attorney must remember these common-law doctrines, as they provide the underlying framework for the various statutory enactments that follow.

A. *Maryland Tort Claims Act*

The Maryland General Assembly enacted the Maryland Tort Claims Act¹⁶¹ with the goal of affording a remedy to individuals injured by tortious conduct attributable to the State.¹⁶² Until its enactment, the State and its various agencies could not be sued without legislative authorization and an availability of funds.¹⁶³ The statute waives state governmental immunity from tort actions for simple negligence and provides a statutory cap of \$200,000 on such claims.¹⁶⁴ The challenged conduct must be committed by state per-

"ensur[ing] that injured parties have a remedy." MD. CODE ANN., STATE GOV'T § 12-102 (1995 & Supp. 1997).

158. See *James v. Prince George's County*, 288 Md. 315, 323-24, 418 A.2d 1173, 1178 (1980).

159. See *id.* The court set up a two part test: (1) the government actor must be a "public official rather than a mere government employee," and (2) the challenged conduct must have occurred while "performing discretionary, as opposed to ministerial acts." *Id.*

160. See *Clea v. Mayor of Baltimore*, 312 Md. 662, 673, 541 A.2d 1303, 1308 (1988) (citing *Bradshaw v. Prince George's County*, 284 Md. 294, 302-04, 396 A.2d 255, 260-61 (1979), *overruled by, James*, 288 Md. at 329-36, 418 A.2d at 1181-84; *Robinson v. Board of County Comm'rs*, 262 Md. 342, 346-47, 278 A.2d 71, 74 (1971)).

161. MD. CODE ANN., STATE GOV'T §§ 12-101 to 12-110 (1995 & Supp. 1997).

162. See *id.* § 12-102.

163. See *Kee v. State Highway Admin.*, 313 Md. 445, 448-49, 545 A.2d 1312, 1314-17 (1988). In order for sovereign immunity to be waived, there must be two conditions met: "[f]irst, the General Assembly must authorize suits for damages; and second, there must be a provision for the payment of judgments." *Id.* at 455, 545 A.2d at 1317.

164. See MD. CODE ANN., STATE GOV'T § 12-104(a)(2) (1998). Section (c) of 12-104 allows for the payment of claims exceeding \$200,000 if certain conditions are met. See *id.* at § 12-104(c).

sonnel acting within the scope of their official duties for the State's immunity to be waived.¹⁶⁵ If the official's actions either fall outside the scope of duty or are made with malice or gross negligence, the State's immunity will not be waived and the state employee can be held individually liable.¹⁶⁶

This statute balances the interests that are invoked by the debate over liability for injuries suffered during police pursuits.¹⁶⁷ It creates a broad remedy for injured third parties, while at the same time providing a safe harbor that relieves state employees of liability for acts of simple negligence.¹⁶⁸ While the Maryland Tort Claims Act creates a broad remedy for citizens injured by any state employee's negligence, a statute set forth in the Transportation Article provides more specific provisions from which to gauge a police officer's negligent conduct.

B. Section 19-103 of the Transportation Article

Section 19-103 of the Transportation Article¹⁶⁹ provides that the owner or lessee of an emergency vehicle is liable "for any damages caused by a negligent act or omission of an authorized operator while operating the emergency vehicle in the performance of emergency service."¹⁷⁰ As defined by the statute, emergency service includes "pursuing a violator or a suspected violator of the law."¹⁷¹ Put simply, this provision places liability on the owner or lessee of the emergency vehicle for acts of simple negligence committed by the driver.¹⁷² However, this statute provides that a police officer is individually immune from liability when operating an emergency vehicle in the performance of emergency service.¹⁷³ Therefore, even though this statute provides a remedy that governmental immunity might otherwise block, it also may be a minefield to erase other avenues of recovery that may be available.

165. *See id.*

166. *See* MD. CODE ANN., CTS. & JUD. PROC. § 5-522(b) (1998).

167. *See supra* notes 16-42 and accompanying text.

168. *See* MD. CODE ANN., STATE GOV'T § 12-104 (a)-(b) (1998).

169. MD. CODE ANN., TRANSP. II § 19-103 (1999).

170. *Id.* § 19-103(c).

171. *Id.* § 19-103(a)(3)(ii).

172. *See id.* § 19-103(c) (providing for liability to the extent afforded by MD. CODE ANN., CTS. & JUD. PROC. § 5-639 (1998)).

173. *See id.* § 19-103(b).

V. PRACTICAL STRATEGIES IN DECISION-MAKING

Litigating an officer's personal liability for various acts or omissions in the scope of official duties can be a daunting task. Tying all of these provisions together can be tricky. Each cause of action has a different result depending on who is chosen as a defendant—the police officer or the municipality. Based on an officer's common-law duty of due care owed to others on the roadway, the Maryland police officer owes a tort duty of care to a plaintiff injured by a suspected criminal if the officer "place[s] a citizen] within a 'zone of danger without reasonable justification,' and set[s] in motion a chain of events which [he] knew or should have known would lead to . . . injur[y]."174 When assessing the officer's actions to determine a breach of duty, an attorney must consider a number of factors including road conditions, amount of traffic in the area, pedestrian traffic, time of day, weather conditions, gravity of the offense the suspect allegedly committed, and the spontaneous nature of the officer's judgment.¹⁷⁵ Moreover, the officer's judgment should be viewed in light of what a reasonable officer at the scene would have faced without the benefit of hindsight.¹⁷⁶ Where an injury to a bystander is at issue, plaintiff's counsel must state with specificity all allegations of negligence which proximately caused a client's harm.¹⁷⁷ Once an attorney finds that a duty was in fact owed and states the allegations of breach, the next step is to consider the effect of the common-law doctrines and statutes.¹⁷⁸

174. *Boyer v. State*, 323 Md. 558, 586, 594 A.2d 121, 135 (1991) (grappling with multiple claims arising from the death of a couple killed when struck by a fleeing suspect's vehicle) (quoting *Keesling v. State*, 288 Md. 579, 589, 591, 420 A.2d 261, 266-67 (1980)). In *Boyer*, the Court of Appeals of Maryland extended the scope of an officer's common-law duty of care to cover both those directly involved with the officer and innocent bystanders. *See id.* at 584-85, 594 A.2d at 134-35.

175. As a case of first impression, the *Boyer* court in dictum suggested these factors be taken into account when assessing the new-found duty. *See id.* at 590, 594 A.2d at 137. Further, the court suggested particular aggravating circumstances: (1) violation of police department policies or guidelines; (2) failure to turn on warning devices; and (3) extremely high-speeds in congested areas. *See id.* at 591, 594 A.2d at 137.

176. *See id.* at 587-89, 594 A.2d at 136-37 (recognizing that an officer's conduct should be judged not by hindsight, but "in light of how a reasonable officer would respond faced with the same difficult emergency situation").

177. *See id.* at 589 n.20, 594 A.2d at 136 n.20.

178. *See discussion supra* Part III; *see also* MD. CODE ANN., CTS. & JUD. PROC. § 5-639(e) (1998).

Under Maryland law, the officer is granted governmental immunity from a personal liability suit for simple negligence.¹⁷⁹ This is in part because, as noted by the Court of Special Appeals of Maryland:

[A]n employee of the Maryland State Police, sworn as a police officer, is for police powers on duty twenty-four hours a day, seven days a week, fifty-two weeks a year, and where he acts as a law enforcement officer, he is under the protection of the Maryland Tort Claims Act.¹⁸⁰

To pierce the limited immunity provided by the Maryland Tort Claims Act and hold the officer individually liable, the officer's actions must be malicious or sufficiently wanton and reckless to constitute gross negligence.¹⁸¹ However, vaguely pleading malice or gross negligence is insufficient to remove the protective umbrella of immunity from the actions of a police officer; the plaintiff must make a strong showing of facts evincing wanton or reckless behavior.¹⁸²

There are also situations in which the doctrine of public official immunity will bar any recovery from an officer individually.¹⁸³ If an officer is acting in a discretionary manner and chooses not to apprehend a fleeing suspect, the officer is generally immune from suit if the suspect proceeds to injure others.¹⁸⁴ In such situations, the officer owes no tort duty of care to third persons.¹⁸⁵ Looking beyond an officer's individual liability, however, situations are likely to arise

179. See *supra* Part III.A. While the officer may be immune, the state can still be held liable to a certain extent. See *supra* notes 153-57 and accompanying text.

180. *Sawyer v. Humphries*, 82 Md. App. 72, 83-84, 570 A.2d 341, 347 (1990), *rev'd on other grounds*, 322 Md. 247, 587 A.2d 467 (1991).

181. See *Boyer v. State*, 323 Md. 558, 578-79, 594 A.2d 121, 131-32 (1991). According to the *Boyer* court: "In order to charge Trooper Titus with gross negligence, the plaintiffs must have pled facts showing that Trooper Titus acted with a wanton and reckless disregard for others in pursuing . . ." *Id.* at 579, 594 A.2d at 132.

182. See *Humphries*, 82 Md. App. at 86, 570 A.2d at 348; see also *Boyer*, 323 Md. at 580, 594 A.2d at 132. The plaintiffs in *Boyer* alleged that the trooper drove at a high rate of speed in a congested area, failed to immediately activate emergency equipment, and violated police procedures. See *Boyer*, 323 Md. at 580, 594 A.2d at 132. The court concluded that, "these somewhat vague allegations do not support the conclusion that he acted with gross negligence." *Id.*

183. See *supra* notes 158-59 and accompanying text.

184. See *Ashburn v. Anne Arundel County*, 306 Md. 617, 626-35, 510 A.2d 1078, 1081 (1986).

185. See *id.*

where an attorney can attempt to hold local municipalities liable for the actions of their officers.

Under Maryland law, sheriffs and deputy sheriffs are constitutional officers subject to the control of the Maryland General Assembly.¹⁸⁶ As constitutional officers some of their actions are performed as state government employees.¹⁸⁷ Furthermore, county agencies are generally not liable under the doctrine of respondeat superior for tortious acts committed by these state employees.¹⁸⁸ Accordingly, an attempt to hold a municipality or local government unit liable as an employer under the Maryland Tort Claims Act¹⁸⁹ for the actions of a sheriff or deputy will not always suffice.¹⁹⁰

However, all is not lost. If an attorney alleges that the municipality owns the police vehicle driven by the sheriff or deputy sheriff, then a claim might be viable.¹⁹¹ If the sheriff or deputy sheriff was negligent in the operation of that vehicle, then a claim under section 19-103,¹⁹² although immunizing the officer from liability, would allow for recovery against the municipality based on ownership of the emergency vehicle.¹⁹³ After the municipality, the next foreseeable defendant is the state government under the Maryland Tort

186. See CONST. OF MD., DECL. RTS., art. IV, § 44 (providing that the sheriff shall "exercise such powers and perform such duties as now are or may hereafter be fixed by law"). According to the court of appeals, "the . . . Constitution, which mentions the office, and provides for filling it, does not specify or describe the powers or duties of the sheriff. These are left to the common law and the acts of the assembly." *Beasley v. Ridout*, 94 Md. 641, 655, 52 A. 61, 64 (1902) (quoting *Mayor of Baltimore v. State*, 15 Md. 376, 488 (1860)).

187. See *Prince George's County, Md. v. Aluisi*, 354 Md. 422, 439, 731 A.2d 888, 895 (1999); *Rucker v. Harford County*, 316 Md. 275, 281, 558 A.2d 399, 402 (1989), *superseded by statute as stated in*, *State v. Card*, 104 Md. App. 439, 656 A.2d 400 (1995).

188. See *Boyer v. State*, 323 Md. 558, 572-73, 594 A.2d 121, 128 (1991); *cf. Ritchie v. Donnelly*, 324 Md. 344, 357, 597 A.2d 432, 438 (1991) (explaining that "while, under Maryland law, a sheriff is a state official, the . . . classification is not dispositive for purposes of § 1983" of the Civil Rights Act).

189. See *supra* Part III.A.

190. See *Boyer*, 323 Md. at 572-73, 594 A.2d at 128.

191. See *id.* at 575-76, 594 A.2d at 130. It is important to note that local governments have waived their immunity from torts committed by their employees in a statutory enactment similar to the Maryland Torts Claim Act. See MD. CODE ANN., CTS. & JUD. PROC. §§ 5-301 to 5-304 (1998) (containing the provisions of the Local Government Tort Claims Act).

192. See *supra* Part III.B.

193. See MD. CODE ANN., TRANSP. II § 19-103(c)(1) (1999).

Claims Act.¹⁹⁴

Regardless of whether the officer is protected by public official immunity for discretionary acts, if the officer acted negligently and if the officer is a government employee, the state government can be liable because it has waived its immunity under the Maryland Torts Claims Act.¹⁹⁵ Strategy is important if an argument is made that the officer's actions were grossly negligent, then the limited waiver of state immunity granted under the statute will be forever lost.¹⁹⁶

VI. CONCLUSION

The Supreme Court's decision in *County of Sacramento v. Lewis* limits the attractiveness of the Fourteenth Amendment as a potential avenue of recovery for injuries sustained as a result of a high-speed chase.¹⁹⁷ The result in *Lewis* suggests that only state legislative and political processes can provide a more conducive remedy for injured citizens at the state level.¹⁹⁸

To a limited extent, the Maryland Tort Claims Act provides the middle ground between competing policy goals protecting an officer with immunity for simple negligence, while waiving the state's sovereign immunity.¹⁹⁹ The Maryland General Assembly has the discretion to lower the bar and provide less police immunity depending on local community needs.²⁰⁰ A proper exercise of this discre-

194. See *supra* Part IV.A.

195. See *James v. Prince George's County*, 288 Md. 315, 329-32, 418 A.2d 1173, 1181-82 (1980).

196. See *supra* notes 164-66 and accompanying text; see also MD. CODE ANN., STATE GOV'T § 12-104(b) (1999). Section 12-104(b) states that immunity is not waived in those instances described in section 5-522(a) of the Courts and Judicial Proceedings Article. See *id.* Section 5-522(a) in pertinent part provides: "Immunity of the state is not waived under section 12-104 of the State Government Article for: . . . (4) [a]ny tortious act or omission of State personnel that: (i) [i]s not within the scope of the public duties of the State personnel; or (ii) [i]s made with malice or gross negligence." MD. CODE ANN., CTS. & JUD. PROC. § 5-522 (1998).

197. See discussion *supra* Part II.D.

198. See *supra* notes 148-50 and accompanying text.

199. See discussion *supra* Part III.A.

200. See discussion *supra* Part III. In the 1998 session, the Maryland Legislature adopted changes to the penalty for fleeing or eluding a police officer. See 1998 Md. Laws 649. These changes increase the fine from \$3,000 to \$5,000 in the case of bodily injury to another, and raise the maximum penalty if a death occurs from 5 years of imprisonment to 10 years. See MD. CODE ANN., TRANSP. II § 27-101(p)(2)-(3) (1999). Perhaps an even harsher penalty will

tion will strive to reach equipoise between the competing interests of the pro-police and those who advocate greater protection for the public.²⁰¹

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make an offender think twice before fleeing from the police.
201. *See supra* Part I.B.