

# Cooling the Hot Pursuit: Toward a Categorical Approach

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“Our decision, founded on reason and truth, gives to the individual no more than that which the Constitution guarantees him, to the police officer no less than that to which honest law enforcement is entitled, and, to the courts, that judicial integrity so necessary in the true administration of justice.”<sup>1</sup>

## INTRODUCTION

Imagine that you are driving home from an enjoyable evening out with your significant other, children, friends, or with whomever you would choose to share this enjoyable evening. As you proceed through the same intersection that has led you home so many times before, you do not even notice the car that is approaching from the left at well over eighty miles per hour. Without having experienced a comparable scenario, it is difficult to fathom the sense of loss that would accompany the first few moments of consciousness following the crash in which you learn of the deaths of your loved ones. However, it proves a much more arduous task to comprehend the range of emotions you would feel when you discover that you were struck by a driver being chased by police for stealing \$17 worth of gas.<sup>2</sup>

Unfortunately, the number of people who have experienced a similar sequence of events is appalling.<sup>3</sup> Despite substantial litigation in this area, hundreds of

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1. *Mapp v. Ohio*, 367 U.S. 643, 660 (1961). This statement regarding the application of the exclusionary rule to state courts is instructive of the standard that courts should apply to the subject of this Note.

2. The facts of this story are loosely based on *Temkin v. Frederick County Commissioners*, 945 F.2d 716 (4th Cir. 1991), however the cases involving high-speed pursuits are replete with similarly egregious facts. *See Fagan v. City of Vineland*, 22 F.3d 1296 (3d Cir. 1994); *Jones v. Sherrill*, 827 F.2d 1102 (6th Cir. 1987); *Haynes v. Hamilton County*, 883 S.W.2d 606 (Tenn. 1994); *City of Lancaster v. Chambers*, 883 S.W.2d 650 (Tex. 1994).

3. *See supra* note 2. Perhaps the most revolutionary commentary, however, has been offered by police officers like Chief John Whetsel of the Choctaw Police Department in Oklahoma. *See* John Whetsel & J.W. “Skip” Bennett, *Pursuits: A Deadly Force Issue*, POLICE CHIEF, Feb. 1992, at 30. Whetsel argues that ratcheting up the standard of due care, training, supervision, sanctions, and postcorrective action vis-à-vis the operation of the law-enforcement vehicle is long overdue. *See id.* To support this argument, he offers the following anecdote:

In 1980, I lost my first wife and 2-year-old daughter . . . as a result of an Oklahoma Highway Patrol trooper’s pursuit of three motorcycles for minor traffic

people die or are seriously injured as a result of high-speed police chases every year.<sup>4</sup> This Note argues that, because of the inherent risk of death or bodily injury, high-speed pursuits over minor crimes and traffic violations are unacceptable. Most of the law in this area is a product of the tension between encouraging diligent law enforcement and protecting the safety of innocent citizens. Although the interests on either side are substantial, this Note suggests that a significant number of high-speed pursuits could be avoided by replacing or even complementing the typical balancing of these interests with a categorical approach.

An approach that categorizes those situations which will never justify subjecting innocent third parties to the risk of death or serious injury is desirable in two respects. First, it replaces the imprecise balancing test that police officers must now apply before making the decision to initiate a pursuit. Second, it provides a much clearer mechanism for the courts to apply when an injured third party seeks postdeprivation remedies. I want to emphasize that the focus of this Note is not the case of a serial killer whose freedom or escape poses a significant danger to society. Instead, the Note addresses the shockingly common case of a minor traffic violation which triggers a Hollywood-style chase ending in death.<sup>5</sup>

Part I presents the facts about high-speed pursuits and why reform in this area is necessary. It introduces as well the two separate avenues of relief that have traditionally been employed by innocent third parties who are injured as the result of a high-speed pursuit.

Part II explains that there are two primary postdeprivation remedies available to innocent third parties injured from a high-speed pursuit. First, it describes the § 1983 action which until recently was the most favored avenue of relief.<sup>6</sup> It examines the analysis generally used by courts and why the current state of the law in this area is unfaithful to the Constitution, encourages police misconduct,

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violations in an area just west of Choctaw. Even though two of the riders soon pulled over to give up, the trooper continued pursuing the third motorcycle into a residential area and through a section-line intersection obscured by tall weeds, proceeding through a stop sign at 100 mph. The trooper's vehicle struck and demolished my private vehicle—driven by my wife—which had just entered the intersection.

I was dispatched to the accident scene to assist and was not aware until 15 minutes after my arrival that my family lay crushed in this carnage. There are no words to describe the trauma I went through.

*Id.* at 30.

4. Although the Department of Justice points out that "there are no reliable nationwide data on police pursuit," HUGH NUGENT ET AL., U.S. DEP'T OF JUSTICE, RESTRICTIVE POLICIES FOR HIGH-SPEED POLICE PURSUITS 21 (1990) (emphasis added), support for this assertion is provided by an article which appeared on the front page of *The New York Times*. "Increasingly alarmed by high-speed pursuits that are killing hundreds of people every year, police departments around the country, as well as state and Federal lawmakers, are clamping down on the wild, Hollywood-style chases that sometimes involve caravans of speeding cruisers." Seth Mydans, *Alarmed by Deaths in Car Chases, Police Curb High Speed Pursuits*, N.Y. TIMES, Dec. 26, 1992, § 1, at 1; see also *Haynes*, 883 S.W.2d at 611 n.2 (quoting statistics).

5. See *Haynes*, 883 S.W.2d at 606.

6. See Ronald B. Lieber, *Police Chase that Results in Injury Is a Tort: Tort Claims Now Better than § 1983 Actions*, *Lawyers Say*, LAW. WKLY. USA, Sept. 26, 1994, at 1.

and breaks down the integrity of the judiciary. This Part then describes a negligence action in the state courts which has recently become the avenue of choice for plaintiffs injured as a result of high-speed pursuits.<sup>7</sup> It explains why the current state of the law in this area provides an insufficient remedy for injured third parties and an ineffective disincentive for officers to refrain from high-speed pursuit in situations where the risk of harm to third parties clearly outweighs the state's interest in catching the subject of the pursuit.

Part III argues that a categorical approach would provide the much needed mechanism to improve this area of the law. By recognizing high-speed pursuit as a valid exercise of police authority only for certain categories of suspects, this approach would prevent police officers from having to perform a complex balancing test in the seconds before a decision to pursue, reduce the exposure of innocent third parties to the risk of injury from high-speed pursuits, and provide a much clearer doctrine for the courts to administer when an injury to a third party occurs. This Part then discusses the implications of adopting a categorical approach by explaining the likely effects on police behavior at the patrol-officer level and how specific fact situations would be resolved. I conclude that any successful reform effort must be sufficiently directed to the decisionmaking process of the individual police officer, and that this requires acknowledging several unique characteristics of the law-enforcement system.

#### I. THE FACTS ABOUT HIGH-SPEED PURSUITS

Vigorous public scrutiny and debate over high-speed police pursuits<sup>8</sup> is a relatively recent phenomenon.<sup>9</sup> This interest, as well as the conventional understanding of police pursuits, derives from sensational news reports and the impressions provided by Hollywood. Although most actual pursuits are not as entertaining as these dramatic events, they still generate the same high anxiety that often ends with destruction and injury.<sup>10</sup> Each and every high-speed pursuit can turn out to be the use of deadly force.<sup>11</sup> Indeed, the motor vehicle has been determined to be the deadliest weapon in the police arsenal, surpassing even

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7. *See id.*

8. One study defines high-speed pursuit as "an active attempt by a law enforcement officer operating an emergency vehicle to apprehend alleged criminals in a moving motor vehicle, when the driver of the vehicle, in an attempt to avoid apprehension, significantly increases his or her speed or takes other evasive action." Geoffrey P. Alpert & Patrick R. Anderson, *The Most Deadly Force: Police Pursuits*, 3 JUST. Q. 1, 4 (1986). Compare the important distinction in this definition:

[A]n active attempt by a law enforcement officer on duty in a patrol car to apprehend one or more occupants of a moving motor vehicle, providing [sic] the driver of such vehicle is aware of the attempt and is resisting apprehension by *maintaining or increasing his speed* or ignoring the law enforcement officer's attempt to stop him.

NUGENT ET AL., *supra* note 4, at 1 (emphasis added).

9. *See* Geoffrey P. Alpert & Roger G. Dunham, *Policing Hot Pursuits: The Discovery of Aleatory Elements*, 80 J. CRIM. L. & CRIMINOLOGY 521, 521 (1989).

10. *See id.* at 523.

11. *See* NUGENT ET AL., *supra* note 4, at 5.

firearms.<sup>12</sup> Considering that police officers throughout the country initiate hundreds of high-speed automobile chases every day, police pursuit is a major public concern.<sup>13</sup>

An understanding of the pursuit situation requires identifying the relevant actors and their respective competing interests. In every case there are at least three actors:<sup>14</sup> the police officer, the law violator, and innocent third parties. When a pursuit is initiated, the law violator is quite aware of it and is interested only in evading capture. The innocent third parties have an interest in both the law violator's capture and their own personal safety, but are most often without knowledge or control of the chase. The police officer, who shares the interests of the third party and maintains control of the chase, is therefore the pivotal actor in every pursuit situation.

Although the police officer shares interests with the innocent third parties, these interests are usually not balanced the same by both actors. The police function includes protection of life and property as well as enforcement of the law and maintenance of an orderly community. However, apprehension of a criminal is at the core of the police mission. It can be argued that any law violator should be chased and arrested, for if a police officer foregoes a chase, this decision violates his duty, affects his reputation, and perhaps encourages other criminals to attempt an escape. Furthermore, because only a fraction of all criminal offenders are identified and arrested, it is likely that a police officer actually witnessing an offense or chasing an offender will be tempted to make an arrest at all costs. With these potentially prejudicial factors in mind, every police officer must perform what becomes a complex balancing test in the seconds before each decision to pursue.<sup>15</sup>

This split-second application of the balancing test often produces results undesirable to our society. Several studies have been conducted in an attempt to identify the factors that predict the appropriateness of specific police pursuits,<sup>16</sup> but no reliable nationwide data have been compiled.<sup>17</sup> An ideal study of pursuit would involve experiments that control the discretionary decisions of individual officers by the random assignment of officers permitted to pursue and not permitted to pursue under a variety of conditions.<sup>18</sup> However, because such experimentation has not been and may never be permitted, studies must instead analyze empirical data as it is collected from law-enforcement agencies.

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12. See Alpert & Anderson, *supra* note 8, at 2.

13. See NUGENT ET AL., *supra* note 4, at iv.

14. This analysis leaves out the possibility of multiple officers, departmental administrators, or even supervisors exercising radio control of the pursuit.

15. See NUGENT ET AL., *supra* note 4, at 23; Alpert & Anderson, *supra* note 8, at 4-8; Alpert & Dunham, *supra* note 9, at 522.

16. See NUGENT ET AL., *supra* note 4, at 6-10.

17. See *id.* at 21. But see GEOFFREY P. ALPERT, U.S. DEP'T OF JUSTICE, POLICE PURSUIT: POLICIES AND TRAINING 1 (1997) (indicating that the first reliable nationwide data may now be available).

18. See Alpert & Dunham, *supra* note 9, at 523.

The first available studies resulted in quite alarming findings<sup>19</sup> which have been used by courts to decide state negligence actions.<sup>20</sup> Subsequent studies have produced interesting results: "The majority of fatalities resulting from pursuits are incurred by the fleeing driver, passengers, or uninvolved bystanders";<sup>21</sup> in more than ninety percent of the cases pursuit is triggered by a traffic violation;<sup>22</sup> "a felon is rarely apprehended purposefully or unintentionally as a result of vehicle pursuit";<sup>23</sup> "[n]o pursuit speed, distance, or duration is safe";<sup>24</sup> and accidents are sixty-five times more likely to occur in pursuit driving than in other police driving.<sup>25</sup> Notwithstanding these conclusions, police officers across the country continue to initiate pursuits, often for reasons that do not justify the danger imposed.<sup>26</sup>

This decision to initiate an unnecessary pursuit illustrates the nexus between police decisionmaking and postdeprivation remedies. Without the strong disincentive that is created by imposing liability equivalent to the harm in postdeprivation actions, unnecessary pursuits will continue. Innocent third parties have traditionally employed one or both of two separate avenues of relief

19. A group comprised mainly of physicians concluded that pursuit driving resulted in an unacceptable number of casualties:

"More than 500 Americans die and over 1,000 sustain major injuries each year as a result of rapid police pursuit of lawbreakers, most of whom are guilty of only minor traffic offenses . . . [O]ne pursuit in five leads to a traffic fatality (and) in only one percent of the cases was someone in the car wanted for violent crimes. . . ."

*Kuzmics v. Santiago*, 389 A.2d 587, 590 (Pa. Super. Ct. 1978) (omissions in original; alteration added) (quoting 2 MILFORD JOSEPH MEYER, LAW OF VEHICLE NEGLIGENCE IN PENNSYLVANIA § 4.32, at 14 (1970) (quoting a survey by Physicians for Automotive Safety reported to the American Medical Association at its annual convention in June 1968)).

20. *See id.*; *Haynes v. Hamilton County*, 883 S.W.2d 606 (Tenn. 1994); *infra* Part II.B.

21. NUGENT ET AL., *supra* note 4, at 6 (citing EDMUND F. FENNESSY ET AL., A STUDY OF THE PROBLEM OF HOT PURSUIT BY THE POLICE 5 (1970)).

22. *See id.* (citing FENNESSY ET AL., *supra* note 21, at 5); Alpert & Anderson, *supra* note 8, at 9.

23. NUGENT ET AL., *supra* note 4, at 7 (quoting SOLICITOR GENERAL'S SPECIAL COMM. ON POLICE PURSUITS, A REPORT FROM THE SOLICITOR GENERAL'S SPECIAL COMMITTEE ON POLICE PURSUITS 25 (1985)).

24. *Id.* at 8 (citing ERIK BECKMAN, A REPORT TO LAW ENFORCEMENT ON FACTORS IN POLICE PURSUITS (1986)).

25. *See* Alpert & Dunham, *supra* note 9, at 534. In this article, Alpert and Dunham argue that the ratio of costs (accidents, injuries) to benefits (arrests) is more favorable than conventional wisdom would suggest. The Department of Justice, however, expresses serious reservations about these conclusions. *See* NUGENT ET AL., *supra* note 4, at 9.

26. A recent example was discussed on the nationwide radio show *All Things Considered*:

Since Tampa police reinstated its chase policy last May, five people have been killed in Tampa and surrounding Hillsboro County. Twelve people have been seriously injured . . .

Tampa reinstated its chase policy in part to cut down on car thefts. Tampa police say car thefts are down almost 50 percent since they returned to chasing.

*All Things Considered: Tampa Police's High-Speed Chase Policy Questioned* (National Public Radio broadcast, Mar. 18, 1996) (transcript available in LEXIS, News Library, NPR File) (statement of Sally Watt).

for injuries resulting from a high-speed pursuit: a § 1983 action for deprivation of rights guaranteed under the U.S. Constitution and a state law negligence action. However, for both similar and distinct reasons, these remedies have not provided the necessary disincentive to adequately reduce the number of pursuits.

## II. POSTDEPRIVATION REMEDIES FOR INJURED THIRD PARTIES

There are two primary postdeprivation remedies available to innocent third parties injured as the result of high-speed pursuits. Until *County of Sacramento v. Lewis*,<sup>27</sup> the § 1983 action, which had been the most favored avenue of relief, generated much confusion among the circuits as to the level of conduct necessary to warrant recovery. Therefore, the state negligence action has recently become the avenue of choice. This Part examines the history of both actions, explaining why neither provides a sufficient remedy for injured third parties or an effective disincentive for the officer initiating an unnecessary pursuit.

### A. 42 U.S.C. § 1983

#### 1. Development of the "Constitutional Tort"

Innocent third parties with injuries resulting from a high-speed pursuit often seek relief against police officers and municipalities under the Civil Rights Act, 42 U.S.C. § 1983,<sup>28</sup> which has become "the predominant vehicle for civil suits filed in federal court alleging police misconduct."<sup>29</sup> The purpose of § 1983 is to provide a remedy for constitutional deprivations, here the substantive component of the Due Process Clause, caused by state actors or by operation of state law. By enacting this statute, Congress granted direct access to the federal courts for plaintiffs who were unable to secure redress in state courts due to the failure of certain states to enforce their laws with an even hand.<sup>30</sup> It is important to

27. 118 S. Ct. 1708 (1998).

28. The statute provides, in relevant part:

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 . . . .

42 U.S.C. § 1983 (1994).

29. Alpert & Anderson, *supra* note 8, at 1.

30. *See Monroe v. Pape*, 365 U.S. 167, 174-76 (1961). In the opinion of the Court, Justice Douglas stated:

It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies.

recognize, however, that § 1983 creates no new substantive rights but instead acts as a vehicle for enforcing federally protected rights.<sup>31</sup>

The use of § 1983 as an avenue of redress for violation of constitutional rights has resulted from judicial interpretation over the past few decades. *Monroe v. Pape*<sup>32</sup> involved an action for damages under § 1983 against the City of Chicago and thirteen police officers.<sup>33</sup> In this case, the Court first recognized the broad reach of § 1983's protection by holding that a civil suit was actionable under it, and that plaintiffs need not prove "specific intent" on the part of the defendants.<sup>34</sup> The Court also held, however, that the City of Chicago was properly dismissed as a party because it was not a "person," thereby seriously limiting local government liability.<sup>35</sup>

In *Monell v. Department of Social Services*,<sup>36</sup> the Court took another look at the legislative history and overruled its prior decision regarding the liability of local governing bodies.<sup>37</sup> The Court held that municipalities are like every other "person" under § 1983 and may therefore be sued for constitutional deprivations under the Act.<sup>38</sup> *Monell* limited this liability, however, by rejecting the possibility that a municipality could be held liable in a § 1983 proceeding under a theory of respondeat superior.<sup>39</sup> Instead, the Court explained that local governing bodies can be sued directly under § 1983 when the execution of a municipal "policy" or "custom"<sup>40</sup> causes a violation of federally protected rights.<sup>41</sup>

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*Id.* at 180.

31. *See* *Graham v. Connor*, 490 U.S. 386, 393-94 (1989) (citing *Baker v. McCollan*, 443 U.S. 137 (1979)).

32. 365 U.S. 167.

33. The complaint alleged that the officers broke into the plaintiff's "home in the early morning, routed them from bed, made them stand naked in the living room, and ransacked every room [in the house, after which Mr. Monroe] was taken to the station" and interrogated incommunicado about a two-day-old murder. *Id.* at 169.

34. *See id.* at 187.

35. The Court, per Douglas, explained that "we are of the opinion that Congress did not undertake to bring municipal corporations within the ambit [of the statute]." *Id.*

36. 436 U.S. 658 (1978). In this case, female employees of the New York Department of Social Services and the Board of Education alleged that an institutional policy compelled all pregnant employees to take unpaid maternity leave before such leaves were required for medical reasons. *See id.* at 660-61.

37. *See id.* at 701.

38. *See id.* at 690.

39. *See id.* at 691. The Court explained that the same legislative history compelled the conclusion that a municipality can only be held liable when a policy of some nature causes a constitutional tort, not for simply employing a tortfeasor. *See id.*

40. Local governments may be liable for a "custom" even though the custom "has not received formal approval through the body's official decisionmaking channels." *Id.*

41. *See id.* at 694. The Court later held that § 1983 did not confer upon municipalities the tort-law immunities for governmental functions and discretionary activities, and also that a municipality may not assert the good faith of its officers as a defense. *See* *Owen v. City of Independence*, 445 U.S. 622 (1980).

Three subsequent cases decided by the Supreme Court have helped develop the use of § 1983 in the context of high-speed pursuits.<sup>42</sup> In *Tennessee v. Garner*,<sup>43</sup> the Court held that, except in certain circumstances, the use of deadly force to apprehend a fleeing, unarmed suspect is an unreasonable seizure under the Fourth Amendment.<sup>44</sup> In *Brower v. County of Inyo*,<sup>45</sup> the Court held that pursuing a fleeing driver into a roadblock created to stop him constitutes a "seizure" within the meaning of the Fourth Amendment.<sup>46</sup> Finally, the Court held in *City of Canton v. Harris*<sup>47</sup> that a municipality may be liable for its failure to train officers in a particular duty, where the need for training is obvious and the inadequacy of training is likely to result in the violation of constitutional rights.<sup>48</sup> The combination of these holdings provides the foundation for a municipality's liability under § 1983 if it has failed to adopt reasonable policies or provide adequate training.

## 2. Application of § 1983 by the Federal Courts in High-Speed-Pursuit Cases

In order to be successful in a cause of action under § 1983, the plaintiff must show: (1) that the conduct complained of was committed by a person acting under color of state law; and (2) that this conduct deprived the plaintiff of a right, privilege, or immunity secured by the Constitution or the laws of the United States.<sup>49</sup> The Supreme Court has held that § 1983 "contains no state-of-mind requirement independent of that necessary to state a violation of the underlying constitutional right."<sup>50</sup> Therefore, the determination of whether government conduct is actionable in the context of high-speed pursuits depends upon a court's interpretation of the appropriate culpability level necessary to trigger the substantive component of the Due Process Clause.<sup>51</sup> The Court has

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42. See *Brower v. County of Inyo*, 489 U.S. 593 (1989); *City of Canton v. Harris*, 489 U.S. 378 (1989); *Tennessee v. Garner*, 471 U.S. 1 (1985).

43. 471 U.S. 1. This case involved a 15-year-old suspected burglar who was shot to death by police as he attempted to escape. See *id.* at 3-4.

44. See *id.* at 11. The Court clarified that "[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force." *Id.* This is precisely the standard urged in this Note for application to high-speed pursuits.

45. 489 U.S. 593. In this case, officers chased the driver of a stolen car into a roadblock created by other officers, causing the driver's death. See *id.* at 594.

46. See *id.* at 599.

47. 489 U.S. 378.

48. See *id.* at 390.

49. See *Parratt v. Taylor*, 451 U.S. 527, 535 (1981); see also *Daniels v. Williams*, 474 U.S. 327, 330 (1986); *Monroe v. Pape*, 365 U.S. 167, 171 (1961).

50. *Daniels*, 474 U.S. at 330.

51. The substantive Due Process Clause has traditionally been used to challenge serious deprivations of liberty and property by government officials, and is also the right that is implicated in a pursuit case. See *id.* at 331 (stating that "history reflects the traditional and common-sense notion that the Due Process Clause, like its forebear in the Magna Carta, was "intended to secure the individual from the arbitrary exercise of the powers of government"") (quoting *Hurtado v. California*, 110 U.S. 516, 527 (1884) (quoting *Bank of Columbia v. Okely*,



held that conduct must amount to more than mere negligence to constitute a deprivation under the Fourteenth Amendment.<sup>52</sup> However, it remains an open question “whether something less than intentional conduct, such as recklessness or ‘gross negligence,’ is enough to trigger the protections of the Due Process Clause.”<sup>53</sup>

In the high-speed-pursuit context, the lower federal courts were historically divided regarding the level of conduct necessary to constitute a substantive due process violation.<sup>54</sup> The courts of appeals generally applied one of three different standards in interpreting the conduct: “shocks the conscience,”<sup>55</sup> recklessness,<sup>56</sup> or gross negligence.<sup>57</sup> In applying each of these standards, the courts of appeals were no doubt mindful of “the Supreme Court’s repeated warnings against an overly generous interpretation of the substantive component of the Due Process

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17 U.S. (4 Wheat.) 235, 244 (1819)); *supra* note 2 (listing cases applying § 1983 and the substantive Due Process Clause in this context); *infra* note 54 (listing cases applying either the “shocks the conscience” standard or the deliberate-indifference standard and the substantive Due Process Clause in this context).

52. See *Davidson v. Cannon*, 474 U.S. 344, 347-48 (1986) (“[L]ack of care simply does not approach the sort of abusive government conduct that the Due Process Clause was designed to prevent.”); *Daniels*, 474 U.S. at 330-31.

53. *Daniels*, 474 U.S. at 334 n.3. *But see id.* at 341 (Stevens, J., concurring) (“‘Deprivation,’ it seems to me, identifies, not the actor’s state of mind, but the victim’s infringement or loss. The harm . . . is the same whether [inflicted] negligently, recklessly, or intentionally.”).

54. Several courts of appeals have applied the “shocks the conscience” standard when presented with substantive due process challenges involving affirmative government actions such as police pursuits. See, e.g., *Evans v. Avery*, 100 F.3d 1033, 1038 (1st Cir. 1996), *cert. denied*, 117 S. Ct. 1693 (1997); *Williams v. City of Denver*, 99 F.3d 1009, 1015 (10th Cir. 1996); *Fagan v. City of Vineland*, 22 F.3d 1296, 1308 (3d Cir. 1994); *Salas v. Carpenter*, 980 F.2d 299, 302-03, 309 (5th Cir. 1992); *Temkin v. Frederick County Comm’rs*, 945 F.2d 716, 720 (4th Cir. 1991). However, some courts of appeals have determined that a reckless, deliberately indifferent, or even grossly negligent act is actionable under the Due Process Clause. See, e.g., *Lewis v. Sacramento County*, 98 F.3d 434, 441 (9th Cir. 1996) (holding deliberate indifference or reckless disregard is proper standard for high-speed police pursuit), *rev’d*, 118 S. Ct. 1708 (1998); *Foy v. Berea*, 58 F.3d 227, 232 (6th Cir. 1995) (applying deliberate-indifference standard to a due-process-deprivation claim stemming from a car accident that occurred after a police officer had instructed an intoxicated person to leave a college campus); see also *Roach v. Fredericktown*, 882 F.2d 294 (8th Cir. 1989) (holding gross negligence insufficient but not stating what standard should be applied).

55. The “shocks the conscience” standard was first introduced by the Supreme Court in *Rochin v. California*, 342 U.S. 165, 172-73 (1952), in which police forcibly pumped the defendant’s stomach to acquire evidence. Some courts of appeals have regarded this as the proper standard for any substantive due process violation. See *Fagan*, 22 F.3d at 1303 (“Reexamination of our reckless indifference standard in light of *Collins* leads us to conclude that the substantive component of the Due Process Clause can only be violated by governmental employees when their conduct amounts to an abuse of official power that ‘shocks the conscience.’”) (citing *Collins v. City of Harker Heights*, 503 U.S. 115 (1992)). *But see id.* at 1309 (Cowen, J., dissenting) (“The in banc majority misreads *Collins* . . .”).

56. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 34, at 212-14 (5th ed. 1984).

57. See *id.* § 34, at 211-12.

Clause."<sup>58</sup> However, the Supreme Court recently resolved any dispute in *County of Sacramento v. Lewis*,<sup>59</sup> holding that the more stringent "shocks the conscience" standard must be met to give rise to liability under the Fourteenth Amendment in pursuit cases.<sup>60</sup>

Although the Court adopted the higher standard of fault, it is unlikely to make much difference for purposes of this Note because plaintiffs have been largely unsuccessful under even the least stringent standard of "gross negligence."<sup>61</sup> More important for purposes of this Note is the issue reserved by the Court:

Respondents do not argue that they were denied due process of law by virtue of the fact that California's post-deprivation procedures and rules of immunity have effectively denied them an adequate opportunity to seek compensation for the state-occasioned deprivation of their son's life. We express no opinion here on the merits of such a claim . . .<sup>62</sup>

This alternative claim appears the best choice for future plaintiffs, and the most logical approach for solving the problems of high-speed pursuits as described in this Note.<sup>63</sup>

Even in those cases which involve facts egregious enough to meet such high standards, municipalities can often escape liability under some form of immunity.<sup>64</sup> This leads one to the conclusion that a finding of immunity<sup>65</sup> is but another way to heed the Supreme Court's looming admonition:

To accept respondent's argument that the conduct of the state officials in this case constituted a violation of the Fourteenth Amendment would almost necessarily result in turning every alleged injury which may have been inflicted by a state official acting under "color of law" into a violation of the Fourteenth Amendment cognizable under § 1983. It is hard to perceive any logical stopping place to such a line of reasoning. Presumably, under this rationale any party who is involved in nothing more than an automobile accident with a state official could allege a constitutional violation under § 1983. Such reasoning "would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States."<sup>66</sup>

58. *Fagan*, 22 F.3d at 1306 n.6.

59. 118 S. Ct. 1708.

60. *See id.* at 1717-18.

61. For example, the Sixth Circuit found police conduct in a high-speed-pursuit case insufficient to meet the "gross negligence" standard. *See Jones v. Sherrill*, 827 F.2d 1102, 1106-07 (6th Cir. 1987); *see also infra* notes 63-65 and accompanying text.

62. *Lewis*, 118 S. Ct. at 1714 n.4. Such a claim appears to be the best choice for future plaintiffs, and the most logical approach for solving the problems of high-speed pursuits described in this Note. *See infra* Part II.B.

63. *See infra* Part III.

64. *See KEETON ET AL.*, *supra* note 56, § 132, at 1056.

65. *See id.* § 132, at 1062 ("Since most states afford a qualified, malice-destructible immunity for discretionary acts, but no immunity at all for 'ministerial' acts, the distinction between the two is critical . . . . Actually, the conclusion that the officer's acts were 'discretionary' is probably only a shorthand notation for a more complex policy decision . . . .") (emphasis added).

66. *Parratt v. Taylor*, 451 U.S. 527, 544 (1981) (quoting *Paul v. Davis*, 424 U.S. 693, 701 (1976)).

Another possible motivation for holding that pursuit cases are more properly characterized as tort actions is to avoid clogging the federal judiciary with undesirable subject matter.<sup>67</sup> However, whatever the motivation, the deprivation of a federally protected right must be recognized wherever it exists.<sup>68</sup> This is necessary both to protect the integrity of the judicial process and to provide the necessary deterrent to police behavior before injuries result.<sup>69</sup> Otherwise, an individual suffering a constitutional deprivation is left with only state law, which may fall far short of the remedy contemplated by the Framers.

### B. Negligence Actions in State Courts

Another avenue available to innocent third parties with injuries resulting from a high-speed pursuit is the state-law negligence action. Although varying among the states in form, the substantive elements of a negligence claim are usually the same.<sup>70</sup> Until recently, parties injured as a result of police pursuits had great difficulty proving the proximate-cause element of the negligence action.<sup>71</sup> This is because courts held that the conduct of police in initiating or continuing a high-speed pursuit was superseded by the negligence of the fleeing suspect.<sup>72</sup> Several states have now held, however, that in certain situations the decision by police to pursue a suspect is the "proximate cause" of a bystander's injuries.<sup>73</sup> As

67. See *Cannon v. Taylor*, 782 F.2d 947, 950 (11th Cir. 1986) ("Automobile negligence actions are grist for the state law mill.").

68. See *Monroe v. Pape*, 365 U.S. 167, 183 (1961) ("It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked.").

69. See *Temkin v. Frederick County Comm'rs*, 945 F.2d 716, 720 (4th Cir. 1991) ("[S]ome abuses of governmental power may be 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.") (emphasis added).

70. See *KEETON ET AL.*, *supra* note 56, § 30, at 164. "The traditional formula for the elements necessary [for a cause of action founded upon negligence] may be stated briefly as follows:

- 1) A duty, or obligation, recognized by the law, requiring the person to conform to a certain standard of conduct, for the protection of others against unreasonable risk.
- 2) A failure on the person's part to conform to the standard required: a breach of the duty.
- 3) A reasonably close causal connection between the conduct and the resulting injury. This is what is commonly known as "legal cause," or "proximate cause," and which includes the notion of cause in fact.
- 4) Actual loss or damage resulting to the interests of another.

*Id.* (citations omitted). *But see Haynes v. Hamilton County*, 883 S.W.2d 606, 611 (Tenn. 1994) (stating causation in fact and proximate cause are separate elements).

71. See *Lieber*, *supra* note 6, at 1.

72. See *id.*

73. See *id.*; see also, e.g., *Haynes*, 883 S.W.2d at 611-12 (holding that police decision to pursue could be the "proximate cause" of an innocent third party's injuries); *City of Lancaster v. Chambers*, 883 S.W.2d 650 (Tex. 1994) (holding that criminal conduct of third party is not superseding cause if it is a foreseeable result of the government actor's negligence).

a result, "plaintiff's lawyers now 'have a great deal more faith in state-law negligence claims than [they] do in § 1983 claims.'"<sup>74</sup>

In *City of Lancaster v. Chambers*,<sup>75</sup> the Supreme Court of Texas held that the defendants were not entitled to summary judgment on the ground that they were not negligent as a matter of law.<sup>76</sup> The court agreed with the court of appeals that "[w]hile the criminal conduct of a third party can be a superseding cause rendering the resulting injuries unforeseeable to the [government] actor, the criminal conduct is not a superseding cause if it is a foreseeable result of the [government] actor's negligence."<sup>77</sup> Coincidentally, the court went on to hold that plaintiff's § 1983 claim was subject to the "shocks the conscience" standard and found no substantive due process violation.<sup>78</sup>

Later the same year in *Haynes v. Hamilton County*,<sup>79</sup> the Supreme Court of Tennessee overruled its decision from five years prior to produce a holding similar to that in *Chambers*.<sup>80</sup> In explaining that a decision by police officers to chase a suspect could be the "proximate cause" of an innocent third party's injuries, the court stated:

[A] police officer's paramount duty is to protect the public. Unusual circumstances may make it reasonable to adopt a course of conduct which causes a high risk of harm to the public. However, such conduct is not justified unless the end itself is of sufficient social value. . . .

Unlike the [earlier] court, we are unable to conclude, that in all cases, all reasonable persons must agree, as a matter of law, that the conduct of police in commencing or continuing pursuit is superseded by the negligence of the fleeing suspect. We do not consider it beyond the realm of "reasonable anticipation" that a suspect, in an attempt to evade high-speed police pursuit, would in turn flee at a high rate of speed and collide with an innocent third party.<sup>81</sup>

The court suggested that an officer should balance the interest in apprehending a particular suspect against the risk of injury to innocent third parties before initiating a high-speed pursuit, and listed several factors that are relevant to this

74. Lieber, *supra* note 6, at 1 (alteration added) (quoting David Weiner, counsel for plaintiff in *Chambers*, 883 S.W.2d 650).

75. 883 S.W.2d 650. In this case, a motorcycle passenger was seriously injured in a crash following a high-speed police pursuit, initiated when the driver allegedly ran a traffic signal.

76. *See id.* at 653.

77. *Id.* (alterations added) (quoting *Chambers v. City of Lancaster*, 843 S.W.2d 143, 148 (Tex. Ct. App. 1992), *aff'd in part, rev'd in part*, 883 S.W.2d 650).

78. *See id.* at 661.

79. 883 S.W.2d 606 (Tenn. 1994). In this case, three teenagers were killed when a suspect being chased by police lost control of his automobile, crossed the center line, and collided head-on with the teenagers' vehicle. The high-speed pursuit was initiated when an officer, after following the suspect's vehicle for a short distance because it had no taillights, witnessed the subject "speeding and driving recklessly by traveling 55 miles per hour in a 40 mile-per-hour speed zone." *Id.* at 608.

80. *See id.* at 608 (overruling *Kennedy v. City of Spring City*, 780 S.W.2d 164 (Tenn. 1989)).

81. *Id.* at 611-12 (citations omitted).

determination.<sup>82</sup> By replacing the rule of no proximate cause as a matter of law with a rule that allows a jury to decide whether police conduct is the proximate cause of injury to innocent third parties, the court joined what is now the substantial and emerging majority view among the states.<sup>83</sup>

In this majority of states where tort suits have been made easier or at least possible to win, plaintiffs still face many obstacles to actually obtaining a recovery. The first of these is of course some type of governmental immunity that makes the proximate cause issue irrelevant.<sup>84</sup> Second, even if the particular state allows some kind of liability, there is often a statutory limit to the monetary amount.<sup>85</sup> Therefore, even if the jury finds a substantial loss and returns a verdict accordingly, that verdict will be reduced to the statutory limit. This result fails

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82. *See id.* at 611. Relevant factors include "the speed and area of the pursuit, weather and road conditions, the presence or absence of pedestrians and other traffic, alternative methods of apprehension, applicable police regulations, and the danger posed to the public by the suspect being pursued." *Id.*

83. Proximate cause is considered to be a question of fact in the majority of jurisdictions if the plaintiff alleges *negligence* on the part of the police. *See Biscoe v. Arlington County*, 738 F.2d 1352 (D.C. Cir. 1984) (applying District of Columbia law); *Myers v. Town of Harrison*, 438 F.2d 293 (2d Cir. 1971) (applying New York law); *Schatz v. Cutler*, 395 F. Supp. 271 (D. Vt. 1975) (applying Vermont law); *Scals v. City of Columbia*, 575 So. 2d 1061 (Ala. 1991); *Estate of Aten v. City of Tucson*, 817 P.2d 951 (Ariz. Ct. App. 1991); *Stark v. City of Los Angeles*, 214 Cal. Rptr. 216 (Ct. App. 1985); *Tetro v. Town of Stratford*, 458 A.2d 5 (Conn. 1983); *City of Pinellas Park v. Brown*, 604 So. 2d 1222 (Fla. 1992); *Mixon v. City of Warner Robins*, 444 S.E.2d 761 (Ga. 1994); *Fiser v. City of Ann Arbor*, 339 N.W.2d 413 (Mich. 1983); *Smith v. City of West Point*, 475 So. 2d 816 (Miss. 1985); *Lee v. City of Omaha*, 307 N.W.2d 800 (Neb. 1981); *Selkowitz v. County of Nassau*, 379 N.E.2d 1140 (N.Y. 1978); *Lowrimore v. Dimmitt*, 797 P.2d 1027 (Or. 1990); *Travis v. City of Mesquite*, 830 S.W.2d 94 (Tex. 1992); *Mason v. Bitton*, 534 P.2d 1360 (Wash. 1975). However, in a number of other jurisdictions proximate cause is a question of fact only if the plaintiff alleges *gross negligence*. *See, e.g., Bullins v. Schmidt*, 369 S.E.2d 601 (N.C. 1988); *Jones v. Ahlberg*, 489 N.W.2d 576 (N.D. 1992); *Colby v. Boyden*, 400 S.E.2d 184 (Va. 1991). Only a minority of jurisdictions offer complete immunity to police officers by either statute or the per se no-proximate-cause rule. *See, e.g., Jordan v. Crouch*, No. H 90-67, 1991 WL 274991, at \*5 (N.D. Ind. Dec. 19, 1991) (applying Indiana law) (statutory immunity); *Thornton v. Shore*, 666 P.2d 655 (Kan. 1983); *Pletan v. Gaines*, 494 N.W.2d 38 (Minn. 1992) (statutory immunity); *Tice v. Cramer*, 627 A.2d 1090 (N.J. 1993) (statutory and common-law immunity).

84. *See KEETON ET AL., supra* note 56, § 131, at 1032-56; *see also supra* notes 64-66 and accompanying text.

85. Among these states are Indiana, Tennessee, and Texas. *See, e.g., IND. CODE* § 34-4-16.5-4 (1993) (limiting liability to \$300,000 for each person and \$5 million for each occurrence); *TENN. CODE ANN.* § 9-8-307(e) (Supp. 1997) (limiting liability to \$300,000 per claimant and \$1 million per occurrence); *TEX. CIV. PRAC. & REM. CODE ANN.* § 101.023(c) (West 1997) (limiting liability of a municipality to \$250,000 for each person, \$500,000 for each occurrence of bodily injury or death, and \$100,000 for injury to property).

The traditional purpose of governmental immunity was to persuade prudent and just individuals to enter public service and, once in office, to encourage these officers to pursue their duties diligently without undue fear of potential liability. Placing limits on a municipality's liability is a related concept with the purpose of preventing an undue burden on taxpayers from the negligence of their government. *See KEETON ET AL., supra* note 56, §§ 131-32, at 1032-69.

to adequately compensate the victim and provides obviously less of a disincentive for future governmental misconduct.<sup>86</sup>

### III. THE NEED FOR REFORM

The preceding sections have explained that there are two primary postdeprivation remedies available to innocent third parties injured from a high-speed police pursuit. The § 1983 action has proven to be practically ineffective due to the high standard applied by federal courts.<sup>87</sup> The state tort action has become more promising, yet an adequate recovery is prevented in most instances by governmental immunity or statutory limitation.<sup>88</sup> This lack of or limit on liability leaves victims without sufficient compensation and creates little or no disincentive for the officer initiating an unnecessary pursuit. However, by acknowledging the converse and recognizing liability under either avenue of relief, we can solve both problems.<sup>89</sup>

In a state tort action, statutory limits prevent a verdict from exceeding the specified amount. These amounts are determined for the very purpose of preventing a governmental actor from being unduly affected by judgments.<sup>90</sup> One can argue, however, that this protection was intended for *negligent* acts and not for the more culpable conduct of initiating an unnecessary pursuit.<sup>91</sup> By *creating* the high degree of risk involved with any pursuit, the police officer must be regarded as acting at least *recklessly*.<sup>92</sup> Under such circumstances, it is not desirable to apply a statutory limit which protects the officer from the disincentive of a judgment. Notwithstanding the debate over protection for negligence, our society's interest in deterring the *reckless* conduct of government officials is beyond dispute. Therefore, an exception to the statutory limits may be created to allow a full jury award in these situations.<sup>93</sup>

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86. However, any state postdeprivation procedure or rule of immunity that effectively denies plaintiffs an adequate opportunity to seek compensation for state-occasioned deprivations may well constitute a due process violation. *See supra* notes 62-63 and accompanying text. Therefore, this is the most logical avenue for solving the problems of high-speed pursuits.

87. *See supra* notes 27-69 and accompanying text.

88. *See supra* notes 70-86 and accompanying text.

89. *See supra* note 86 and accompanying text.

90. *See supra* note 85.

91. A police officer's protection from liability for negligence refers to the average car accident. This immunity is usually supported by the argument that such protection is necessary to assure fearless police performance, since officers may act too timidly if they could be subjected to personal liability for negligence in the course of duty. The decision to initiate a high-speed pursuit with the inherent risks to innocent third parties, however, involves a much higher level of culpability than the average car accident. Therefore, the arguments in favor of granting immunity for *negligent* acts committed within the scope of a police officer's duty do not apply.

92. *See KEETON ET AL., supra* note 56, § 34, at 212-14.

93. *See supra* note 86 and accompanying text.

This analysis also seems to implicate the very interests that are protected by the substantive Due Process Clause.<sup>94</sup> When a police officer makes the decision to initiate a pursuit, he exercises a power granted by a governmental entity. Therefore, the officer's conscious decision to subject many individuals to the risk of death or serious bodily injury for an unnecessary and unjustified reason is quite clearly "the arbitrary exercise of the powers of government."<sup>95</sup> As stated by Justice White:

The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is *constitutionally unreasonable*. It is not better that all felony suspects die than that they escape. Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so. It is no doubt unfortunate when a suspect who is in sight escapes, but the fact that the police arrive a little late or are a little slower afoot does not always justify killing the suspect.<sup>96</sup>

If this reasoning applies to the use of deadly force toward felony suspects, it most certainly carries an even greater weight when applied to an innocent third party. Therefore, a change in the current § 1983 doctrine that recognizes liability in these cases appears warranted.<sup>97</sup> Such a change would also solve the problems outlined above, including the recognition of federally protected rights, the protection of the integrity of the judicial process, and the provision of the necessary deterrent to police behavior before injuries occur.<sup>98</sup>

#### *A. Proposal for a Categorical Approach*

Whichever method we may choose to remedy the problems that arise from high-speed pursuits, there is a clear need for some mechanism that would aid in determining when an officer's decision to initiate a pursuit is justified. Once such a mechanism is in place, its application will help police officers in making the decision whether to pursue and will provide the courts with a more precise doctrine in postdeprivation actions.<sup>99</sup> At present, individual officers must

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94. *See supra* note 51.

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

96. *Tennessee v. Garner*, 471 U.S. 1, 11 (1985) (emphasis added); *see also Fagan v. City of Vineland*, 22 F.3d 1283, 1322 (3d Cir. 1994) (Cowen, J., dissenting) ("[I]t is hard to see how a prisoner in a cell is any more helpless to protect himself against a fellow inmate's attack than an innocent citizen is to protect himself against a car barreling down a dark city clock without lights at 100 miles per hour.").

97. The change may instead need to come in the form of alternative claims that a state's postdeprivation procedures and rules of immunity effectively denied plaintiffs an adequate opportunity to seek compensation for state-occasioned deprivations, but the effect of either change would be the same. *See supra* notes 62-63 and accompanying text.

98. *See supra* Part II.A.2.

99. It will do this because most situations will simply NOT warrant initiating a pursuit; if the officer does pursue, the plaintiff will have a relatively easy task in proving liability. The court will ask, "Was the situation in the category where pursuit is even possibly justified (i.e., a violent felon)?" If not, the officer is liable. This categorical approach also helps the officer by encouraging him to think "no violent felon-no pursuit" when he must make a split-second decision. Instead of initiating a pursuit, the officer will just call the station and proceed with

perform a complex balancing test in the seconds before each decision to pursue, often under the influence of potentially prejudicial factors.<sup>100</sup> Recognizing this, some police departments have attempted to articulate policies regarding high-speed pursuit.<sup>101</sup> The policies usually fall under one of three models:<sup>102</sup> judgmental,<sup>103</sup> restrictive,<sup>104</sup> and discouragement.<sup>105</sup> The mechanism recommended in this Note for judicial application, a “categorical approach,” resembles the discouragement model.

The goal of this “categorical approach” is to prevent police officers from having to perform a balancing test as much as possible. In other words, it prefers the application of a rule over the application of a standard or balancing test in situations which will never justify subjecting innocent third parties to the risk of death or serious bodily injury.<sup>106</sup> By reducing the number of times an individual officer must apply the balancing test, this approach will also reduce opportunities for erroneous application. The balancing test is thus reserved for application in a specific “category” of predetermined situations.

The difficulty, of course, is determining which situations belong in this category. For this we must perform the balancing test in the abstract, using both statistical data and the benefit of objectivity.<sup>107</sup> Cognizant of the inherent risks in any high-speed pursuit,<sup>108</sup> it is clear that a suspect’s escape must equal this risk to society before a pursuit could be justified. In most cases, this requires a violent felony suspect.<sup>109</sup> In those situations only, an officer would perform the balancing test taking all relevant factors under consideration.<sup>110</sup>

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alternative measures.

100. See *supra* note 15 and accompanying text.

101. See Alpert & Dunham, *supra* note 9, at 523-24.

102. See *id.* at 524.

103. This model allows officers to make all major decisions relating to initiation, tactics, and termination.

104. This model places certain restrictions on officers’ judgments and decisions.

105. This model severely cautions or discourages any pursuit, except in the most extreme situations.

106. See, e.g., Alan K. Chen, *The Ultimate Standard: Qualified Immunity in the Age of Constitutional Balancing Tests*, 81 IOWA L. REV. 261 (1995). Professor Chen explains that advocates of standards or balancing tests argue their approach is fairer by allowing individualized results. Proponents of rules, however, argue that their approach prevents arbitrary or biased decisionmaking during application. See *id.* at 266.

107. The term “objectivity” refers here to the absence of any potentially prejudicial factors inherent in law enforcement. See *supra* note 15 and accompanying text.

108. See *supra* notes 8-26 and accompanying text.

109. An argument can be made that even a reckless driver justifies pursuit, but this ignores the possibility that pursuit may prolong or in many cases increase the actual risk to third parties without gain. Another response to this argument is the use of pursuit alternatives. See *infra* notes 116-18 and accompanying text.

110. See *supra* note 82.



### B. Effects of Categorization

The purpose of developing this categorical approach is to make the split-second decisions of police officers easier and liability for a violation clear.<sup>111</sup> By imposing liability equivalent to the harm, we provide a strong disincentive for initiating an unjustified pursuit while compensating innocent third parties. The rationale for creating such a strong presumption against high-speed pursuit is compelling. In situations where the danger from pursuit outweighs the danger posed to the public from the subject's escape, the pursuit will be avoided. This does not mean that the suspect will undoubtedly escape, for there are other methods of apprehension. What this does mean, however, is that as a society we choose the option that allows for later correction.<sup>112</sup>

Another benefit of imposing liability based on the categorical approach is the likelihood that it will affect decisionmaking at the patrol-officer level where it will be most effective. In a book on the excessive use of force, the authors explain:

Every day, out of their supervisors' sight, police officers at the lowest levels of their departments make . . . "low visibility decisions" that have great effects on the lives and liberties of individual members of the public. . . .

These are momentous decisions that can be reviewed only after the fact and, often, only after their consequences have been realized. . . . It is hard to think of any hierarchical organization in which the lowest-level employees routinely exercise such great discretion with such little opportunity for objective review.<sup>113</sup>

Without clear guidelines, decisionmaking at this level can produce unacceptable results. Officers are likely to perceive certain behavior as appropriate if it is not explicitly prohibited.<sup>114</sup> However, a tightened policy that is rigorously enforced has been proven to control undesirable patterns of behavior in individual officers, as well as throughout the agency.<sup>115</sup>

Finally, by creating a strong presumption against pursuit, law-enforcement agencies will have further incentive to develop and perfect alternative methods

111. The type of liability that is imposed provides a few options as well. In addition to allowing monetary judgments against the municipality, the individual officer, or both, there is also the possibility of terminating the officer's employment. Such a decision would be justified based on the officer's abuse of official power, a result no different than that likely to follow from placing a known innocent in custody or gaining access to a restricted area for personal gain.

112. This reasoning is similar to that used by Chief Justice Rehnquist in *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261, 283 (1990) ("An erroneous decision not to terminate results in a maintenance of the status quo; the possibility of subsequent developments . . . at least create the potential that a wrong decision will eventually be corrected or its impact mitigated. An erroneous decision [the other way] . . . , however, is not susceptible of correction.").

113. JEROME H. SKOLNICK & JAMES J. FYFE, *ABOVE THE LAW* 119-20 (1993) (quoting law scholar Joseph Goldstein).

114. See Alpert & Dunham, *supra* note 9, at 523.

115. See *id.*

of apprehending suspects. Among those currently used are air support and photographic evidence of identity.<sup>116</sup> Other technological means of incapacitating cars are being developed,<sup>117</sup> and an increased necessity will undoubtedly lead to further ideas.<sup>118</sup> In any event, all of these methods protect the innocent third party from unnecessary risk.

#### CONCLUSION

Police officers throughout the United States make the decision to initiate hundreds of high-speed automobile pursuits every day. Considering the risk to innocent third parties of death or serious bodily injury that accompanies each decision, police pursuit is a major public concern. Two separate avenues of relief have traditionally been used by innocent third parties with injuries resulting from a high-speed pursuit: a § 1983 action for substantive due process violations and a state-law negligence action. However, neither avenue sufficiently compensates a victim or provides an adequate disincentive against unnecessary pursuits.

By recognizing high-speed pursuit as a valid exercise of authority only for violent felons, police officers would rarely have to perform a complex balancing test in the seconds before a decision to pursue. This would reduce the exposure of innocent third parties to the risk of death or serious bodily injury from such pursuits, and provide the courts with a clear doctrine to apply in postdeprivation actions. If the categorical mechanism were in place, it would provide a strong presumption against initiating a high-speed pursuit and rely instead on the possibility of later apprehension. A categorical approach would also create strong incentives to develop alternative methods of capturing suspects.

When a police officer makes the decision to initiate a high-speed pursuit, he balances his interest in diligent law enforcement against the safety of innocent citizens. When he performs this balance he exercises a power that is granted by government; when he initiates an unjustified pursuit he engages in an arbitrary use of that power. Because of the exceedingly high risks involved, high-speed pursuits over minor crimes and traffic violations are simply unacceptable. Unfortunately, until courts recognize the substantial violations of the rights of innocent third parties and impose liability proportionate to the harm suffered, such pursuits will likely continue.

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116. See NUGENT ET AL., *supra* note 4, at 7, 20.

117. These include a spike strip that punctures the tires and built-in governors that can be triggered by remote. See *id.* at 20.

118. Another approach could utilize laser technology to identify license plate numbers from a great distance or place a homing device on the vehicle. This would prevent an officer from having to follow or even be within the view of a suspect, possibly avoiding notice. The officer could then call for air support or track the suspect later.