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CONFUSING PURSUITS: SACRAMENTO V. LEWIS AND THE FUTURE OF SUBSTANTIVE DUE PROCESS IN THE EXECUTIVE SETTING

Matthew D. Umhofer*

It thus appears that the Constitution does not constrain police officers when conducting a high-speed car chase. The decision of the court today will have the practical effect of immunizing reckless police conduct from all strictures of the Constitution, so long as no search or seizure occurs.

— Judge Robert E. Cowen

The motorcycle raced along the residential streets, its screaming engine shattering the silence of the warm spring evening. The crescendo of a wailing siren followed close behind, as the police cruiser raced along in pursuit. The motorcycle, bearing two young, helmetless passengers, hurtled past thirty miles per hour speed limit signs at speeds of up to one-hundred miles per hour, running red lights, weaving through traffic, and forcing two cars and a bicyclist off the road.

Undeterred, the motorcycle accelerated and disappeared over a hill. The cruiser sped up and crested the hill. Suddenly, just over the incline, the motorcycle came into view—it was lying on its side in the middle of the road, the passenger standing over it. The brakes of the police cruiser screeched, but it was too late. The car slammed into young Philip Lewis and flung him nearly seventy feet, killing him.

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1. Fagan v. City of Vineland, 22 F.3d 1296, 1319 (3d Cir. 1994).
The chase was over. But the case had just begun. Eight years later, the Supreme Court of the United States turned its attention to the death of Philip Lewis. In County of Sacramento v. Lewis, a case brought by Philip’s parents against the County of Sacramento and the officer at the wheel of the police cruiser, the Court unanimously affirmed the district court’s grant of summary judgment in favor of the defendants. In so doing, the Court resolved a question that it had long avoided by setting a minimum threshold of culpability for cases alleging substantive violations of the Fourteenth Amendment by executive branch officials. The Court concluded that in cases involving executive (rather than legislative) action, “the substantive component of the Due Process Clause is violated... only when it ‘can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense.’” In a high-speed police pursuit, the Court held, the conduct of a police officer will shock the conscience only when the police officer acts with intent to injure.4

The decision, however, was not nearly as simple as it first sounds. A glance beneath the glassy surface of Justice David Souter's majority opinion reveals severe and conflicting undercurrents that muddy the waters of the Court’s facially unanimous vote. In five concurring opinions, the Justices differed sharply over the meaning and significance of the Court's decision and presented divergent approaches to substantive due process in the executive setting.

The most bitter divide in Lewis came between Justice Souter’s “shock the conscience” majority opinion and Justice Antonin Scalia’s concurrence. Concurring in the judgment, Justice Scalia ridiculed the “shocks the conscience” test and argued that both executive and legislative conduct should be governed by the same analysis under the Fourteenth Amendment: the test set forth in Washington v. Glucksberg5

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3. Id. at 847 (quoting Collins v. Harker Heights, 503 U.S. 115 (1992)).
4. See id. at 849.
that focuses on whether the right asserted by the plaintiff was apparent in the nation's history, legal traditions, and practices.\(^6\) Justice Anthony Kennedy, joined by Justice Sandra Day O'Connor, sought to steer a middle course between Justice Souter and Justice Scalia.\(^7\)

The result was a decision that sowed more problems than it solved. *Lewis* failed to bring clarity to the substantive due process analysis in the executive setting, and has created real confusion among the lower courts. More importantly, the divergent analyses set forth in both the majority opinion and in Justice Scalia's concurrence are seriously flawed and set nearly insurmountable hurdles for plaintiffs seeking the protection of substantive rights under the Fourteenth Amendment.

This article attempts to unpack the Supreme Court's decision in *Lewis* and place it in context with the Court's substantive due process jurisprudence. In so doing, this article exposes serious flaws not only in the majority opinion but in the concurrences as well and explains the confusion *Lewis* sought to alleviate, yet only exacerbated.

Part I of this article reviews the history of the case and briefly describes the decision in *Lewis*. Part II explores the serious shortcomings of the majority opinion in *Lewis*. Particularly problematic is the Court's reliance on its Eighth Amendment jurisprudence and the shocks the conscience test, a standard with a dubious background and a host of critics. Moreover, in its efforts to distinguish when police pursuit cases come under the Fourth and Fourteenth Amendments, the Court produced a result under which a police pursuit that results in an injury to a fleeing suspect may never violate the Fourteenth Amendment.

Part III exposes the weaknesses of Justice Scalia's concurrence in the judgment. Justice Scalia argued that both executive and legislative conduct should be considered under a unified Fourteenth Amendment analysis that focuses on history and tradition. His approach, however, had scant support in precedent and failed to address the inherent

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\(^6\) See id. at 710.

\(^7\) See *Lewis*, 523 U.S. at 856-58 (Kennedy, J., concurring).
differences between executive and legislative conduct that make distinct analyses for executive and legislative conduct necessary.

Part IV describes the perplexing effect of Justice Kennedy’s concurrence, which attempted to draw on both the majority opinion and Justice Scalia’s concurrence. Providing two key votes for the majority opinion in *Lewis*, Justice Kennedy’s concurrence authoritatively undermined the majority and opened the door for courts to effectively choose between the majority opinion and Justice Scalia’s concurrence.

Part V captures the confusion among the lower courts in the wake of *Lewis*. Unsure whether to apply the majority, Justice Kennedy’s concurrence, or Justice Scalia’s concurrence, lower courts have already begun to struggle in their analysis of substantive due process cases since *Lewis*. The lower courts’ confusion with *Lewis* underscores the problems within the decision and the need for a solution.

Part VI provides a solution. By applying a strict deliberate indifference standard to all executive substantive due process cases, the Court could have avoided the quagmire of the shocks the conscience test and brought clarity to an area of the law that desperately needed it. By going another route, the Court added fuel to the fires of contention over substantive due process and perpetuated the state of constitutional disarray that has reigned under the Fourteenth Amendment for entirely too long.

I. BACKGROUND

A. The Chase

The chase that sparked the controversy in *Lewis* began innocently enough. On the evening of May 22, 1990, James Everitt Smith, a Sacramento County Sheriff’s Deputy, and Murray Stapp, a local police officer, had just finished breaking up a fight. As the officers returned to their cars around 8:30 p.m., two teenaged boys, who were not involved

in the earlier altercation, sped toward the officers on a motorcycle and exchanged words with Stapp. Stapp ran his overhead lights and attempted to block the passage of the motorcycle, but the two boys eluded him and sped away. Deputy Smith then executed a three-point turn, and the chase was on.

During the seventy-five second pursuit, the motorcycle ran four red lights, made three ninety-degree turns, and nearly collided with two cars and a bicyclist over 1.3 miles. Deputy Smith estimated he was as close as 100-150 feet from the motorcycle during the chase. Experts later determined that at the speed Deputy Smith was traveling, it would have taken his vehicle 650 feet to stop.

Just over the hill, as the motorcycle driver attempted to execute a sharp turn, the brakes of the motorcycle had locked. It slid out from under the youths and skidded to a halt in the middle of the street. Seconds later, Deputy Smith crested the hill at sixty-five miles per hour and saw the crashed motorcycle. The police car skidded 147 feet, slamming into sixteen-year-old Philip Lewis at forty miles per hour. Smith's car careened off the road, eventually stopping in a residential front yard after knocking over a mailbox. Lewis suffered massive internal injuries and a fractured skull and was pronounced dead at the scene.

The driver of the motorcycle, Brian Willard, who had suffered no major injuries, fled the scene and eventually pled no-contest to felony hit-and-run, failing to stop for a police officer, and fleeing an accident that resulted in death.

B. The Case

The parents of Philip Lewis brought suit against Deputy

9. See Lewis, 523 U.S. at 836.
10. See Brief for Respondents, supra note 8, at 1.
11. See Lewis, 523 U.S. at 837.
12. See id.
13. See id.
15. See id.
16. See id.
Smith, the Sacramento County Sheriff's Department, and the County of Sacramento under 42 U.S.C. § 1983, alleging that the defendants violated Philip Lewis' right to bodily integrity under the Due Process Clause of the Fourteenth Amendment.

The case was filed in the Sacramento County Superior Court, but was removed to federal court. The district court granted summary judgment in favor of all defendants on the Lewises' § 1983 claims. The Court of Appeals for the Ninth Circuit, however, reversed the district court's decision on the issue of Deputy Smith's qualified immunity. The court of appeals held that "‘[b]are’ gross negligence is never sufficient to sustain a § 1983 claim for a substantive due process violation. It is also clear that deliberate indifference is always sufficient." Applying its deliberate indifference analysis to the facts in Lewis, the court of appeals concluded that plaintiffs had produced sufficient evidence to survive summary judgment on the question of whether Deputy Smith was deliberately indifferent. The court noted a number of facts that demonstrated Deputy Smith's deliberate indifference for the boys' due process rights to life and personal security: the boys had neither violated a law nor given the police a reason to stop them before the chase began, the boys were on a motorcycle without helmets, the chase took place at night in a residential area at speeds of up to one-hundred miles per hour, and Deputy Smith crested a hill at sixty-five miles per hour despite the fact that he could not see over it. The defendants appealed the Ninth Circuit's

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18. The district court concluded that Deputy Smith was entitled to qualified immunity because the right asserted by the plaintiffs was not clearly established. The court also held that the plaintiffs' claim against the sheriff's department on a failure to train theory was not supported by the evidence. The court also concluded that municipal liability did not lie with the sheriff's department, because its pursuit policy was not so inadequate that the sheriff's department was deliberately indifferent in maintaining it.

19. Lewis, 98 F.3d at 440 (citing L.W. v. Grubbs, 92 F.3d 894, 897 (9th Cir. 1996)).

20. Having concluded that plaintiffs had shown a genuine issue of material fact as to whether Deputy Smith's conduct amounted to a constitutional violation, the court of appeals turned to the second step of the qualified immunity analysis: whether the constitutional right asserted by the Lewises was clearly established. Framing the asserted constitutional right as a substantive due process right to life and personal security in the context of a
ruling to the Supreme Court of the United States.

C. The Decision

The majority opinion in Lewis, authored by Justice David Souter and joined by Justices William Rehnquist, Sandra Day O'Connor, Anthony Kennedy, Ruth Bader Ginsburg, and Stephen Breyer, began by holding that absent an intent to terminate a person's freedom of movement (i.e., to hit or injure a person), police pursuits are to be analyzed by the Fourteenth Amendment. However, the Court observed, where an intent to hit or injure a person exists in the context of a police chase, the case should be analyzed under the Fourth Amendment.

Turning to the claim that the officer had violated Philip Lewis's substantive rights under the Due Process Clause of the Fourteenth Amendment, the Court held that in cases involving conduct by the executive branch, "only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense,'" and that the Court had long defined such constitutionally cognizable conduct as that which "shocks the conscience." Having set the "shocks the conscience" test as the minimum threshold of culpability in all substantive due process cases, the Court held that police pursuits will only shock the conscience when the pursuing officers intend to injure an individual. Mid-level culpability standards such as deliberate indifference and reckless disregard, the Court observed, are a closer call and may be insufficient to trigger the protections of the Fourteenth Amendment in police pursuits. The Court found that police

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22. See id. at 853.
23. Id. at 846 (quoting Collins v. Harker Heights, 503 U.S. 115, 129 (1992)).
24. Id. (quoting Rochin v. California, 342 U.S. 165, 172-73 (1952)).
25. See id. at 849.
26. See id.
officers in high-speed pursuits have little time to weigh competing factors and must make hasty judgments under great pressure. In such circumstances, the Court held that recklessness is not enough to trigger the protections of the Fourteenth Amendment. Recklessness or deliberate indifference could, however, violate an individual's substantive due process rights "when actual deliberation is practical," and when officers have time to make "unhurried judgments."

Concurring only in the judgment of the Court, Justice Antonin Scalia, joined by Justice Clarence Thomas, argued that the majority had erred in analyzing the Lewises' substantive due process claim under the shocks the conscience test. The Court, Justice Scalia pointed out, had recently adopted a different substantive due process analysis in a case challenging legislative action, Washington v. Glucksberg. Justice Scalia contended that the Glucksberg analysis, which recognizes only rights "deeply rooted in this Nation's history and traditions," is the correct analysis for all substantive due process cases, and that the Lewis majority's reliance on the shocks the conscience test in cases challenging executive conduct was misplaced. The shocks the conscience standard, Justice Scalia argued, is extraordinarily subjective and requires an inquiry for which judges are ill-suited. Applying the Glucksberg analysis, Justice Scalia concluded that there was no historical or textual basis for the substantive due process right asserted by the Lewis family, and that their case failed as a result.

Joined by Justice Sandra Day O'Connor, Justice Anthony Kennedy attempted to find a comfortable seat on the fence between the majority opinion and Justice Scalia's

27. See Lewis, 523 U.S. at 849.
28. Id. at 851.
29. Id. at 853.
30. 521 U.S. 702 (1997) (holding that a Washington state law banning physician-assisted suicide did not violate the substantive due process protections of the Fourteenth Amendment).
31. Lewis, 523 U.S. at 860 (Scalia, J., concurring) (quoting Glucksberg, 521 U.S. at 721).
32. See id. at 865 (Scalia, J., concurring).
33. See id. at 862-64 (Scalia, J., concurring).
CONCUSING PURSUITS

concurrency. Acknowledging that he "share[d] Justice Scalia's concerns" about the shocks the conscience test, Justice Kennedy observed that the majority opinion left plenty of room for an inquiry into history, tradition, and precedent, and thus had not strayed too far from Glucksberg.

A close reading of the Supreme Court's decision in Lewis reveals that despite the nominal unanimity of the decision there are deep rifts on the Court over the proper approach to the Fourteenth Amendment as it is applied to executive action. Among the majority and the concurrences are no fewer than four distinct analytical approaches to the problem presented in Lewis. While the Lewis decision may have provided something of a resolution of the conflict among the circuits as to the issue of police pursuits, the Court went further, attempting to establish a test for all substantive due process cases arising out of executive action. The ambitiousness of the Court's approach, combined with the splintered character of the decision, left court observers and, more importantly, lower courts guessing as to how to analyze future substantive due process cases.

II. MAJORITY MISSTEPS

The Lewis majority opinion began its treatment of substantive due process by framing the Due Process Clause as a bulwark against arbitrary government action. The Due Process Clause operates, according to the majority, both when "the fault lies in a denial of fundamental procedural fairness, or in the exercise of power without any reasonable justification in the service of a legitimate governmental objective." However, the majority observed, the analysis applied has traditionally differed depending on whether the complained of government action is legislative or executive in nature.

34. Id. at 858 (Kennedy, J., concurring).
35. See id. at 857-58 (Kennedy, J., concurring).
36. See id. at 845-46.
37. Lewis, 523 U.S. at 845-46 (citations omitted).
38. See id. at 846 ("While due process protection in the substantive sense limits what the government may do in both its legislative and its executive capacities, criteria to identify what is fatally arbitrary differ depending on
Focusing on the executive analysis, the majority proceeded to take the step the Court had avoided taking since the inception of modern substantive due process: it articulated the minimum level of executive conduct required to demonstrate a violation of an individual's substantive rights under the Due Process Clause. The majority noted that "only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense,'" and that the Court had long defined such constitutionally cognizable conduct as that which "shocks the conscience." Observing that the Court had "repeatedly adhered" to the shocks the conscience test in the substantive due process setting since *Rochin v. California*, the majority gave a less-than-rousing endorsement of the shocks the conscience test, acknowledging the most common criticism of the concept—its vagueness—and calling it "no calibrated yard stick." The best the majority could muster to answer this criticism was that the shocks the conscience test "points the way."

The majority went on to explain why shocks the conscience is the appropriate threshold for establishing a violation of substantive due process rights. A longstanding concern of substantive due process critics has been that a low threshold of culpability would transform the Due Process Clause into a "font of tort law," an area of the law properly reserved to the states. To avoid such a result, the majority stated that negligence must be ruled out as the proper standard under the Due Process Clause. Instead,

[i]t is . . . behavior at the other end of the culpability

\[\text{whether it is legislation or a specific act of a governmental officer that is at issue.} \]
spectrum that would most probably support a substantive
due process claim; conduct intended to injure in some way
unjustifiable by any government interest is the sort of
official action most likely to rise to the conscience-
shocking level.\textsuperscript{46}

Attempting to inject some flexibility into the shocks the
conscience test, the majority held out the possibility that
something less than intent to injure could shock the
conscience. The majority suggested that while negligence will
never suffice, conduct falling between intent and negligence
on the culpability spectrum “may be actionable under the
Fourteenth Amendment.”\textsuperscript{47} Referring to such middle-ground
cases as “closer calls,” the Court suggested that deliberate
indifference, recklessness, and even gross negligence may rise
to a conscience-shocking level, depending on the context.\textsuperscript{48}
“Deliberate indifference that shocks in one environment may
not be so patently egregious in another, and our concern with
preserving the constitutional proportions of substantive due
process demands an exact analysis of circumstances before
any abuse of power is condemned as conscience shocking.”\textsuperscript{49}

The majority then compared two “circumstances” under
which the differing levels of culpability might be conscience-
shocking. Circuit courts considering substantive due process
claims arising out of pretrial custody, the Court observed,
have held that deliberate indifference is sufficient to violate
the Due Process Clause. In contrast, police pursuits only
implicate the Fourteenth Amendment when the officers
intend to injure. The difference, the majority stated, is
essentially time and pressure. Deliberate indifference is
“sensibly employed only when actual deliberation is practical,
and in the custodial situation of a prison, forethought about
an inmate’s welfare is not only feasible but obligatory under a
regime that incapacitates a prisoner to exercise ordinary
responsibility for his own welfare.”\textsuperscript{50} On the other hand, the

\textsuperscript{46} \textit{Id.} (citing \textit{Daniels}, 474 U.S. at 331).

\textsuperscript{47} \textit{Id.} at 849-50 (citing \textit{City of Revere v. Massachusetts Gen. Hosp.}, 463
U.S. 239 (1983); \textit{Estelle v. Gamble}, 429 U.S. 97, 104 (1976)).

\textsuperscript{48} \textit{See id.} at 849.

\textsuperscript{49} \textit{Lewis}, 523 U.S. at 850.

\textsuperscript{50} \textit{Id.} at 851 (citation omitted) (footnote omitted).
majority stated, police chases are analogous to prison riots in that decisions involving a vast number of competing factors are made hastily and under pressure. In such situations, a higher standard must be used.

To recognize a substantive due process violation... when only mid-level fault has been shown would be to forget that liability for deliberate indifference rests upon the luxury... of having time to make unhurried judgments, upon the chance for repeated reflection, largely uncomplicated by the pulls of competing obligations. When such extended opportunities to do better are teamed with protracted failure even to care, indifference is truly shocking.... Accordingly, we hold that high-speed chases with no intent to harm suspects physically or to worsen their legal plight do not give rise to liability under the Fourteenth Amendment....

Turning to the facts of the case, the Court concluded that the Lewis family had failed to even state a claim for relief under the Court's newly minted shocks the conscience test. The complaint alleged mere negligence, recklessness, gross negligence, and conscious disregard. Nowhere in the complaint did the Lewis family allege that Deputy Smith intended to harm Philip Lewis or that Smith's behavior shocked the conscience, and thus the complaint failed to state a cognizable claim that Philip Lewis's substantive rights under the Due Process Clause were violated. Furthermore, the majority concluded that the evidence evinced no suggestion that Deputy Smith's conduct was intentional and thereby shocked the conscience. Accordingly, the majority reversed the Ninth Circuit and affirmed the district court's grant of summary judgment.

A. The Eighth Amendment Analogy

The shocks the conscience test as it is set forth in Lewis

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51. Id. at 853-54.
52. See id. at 854.
53. See id.
54. See id.
55. See Lewis, 523 U.S. at 854.
56. See id. at 855.
requires a three-tiered inquiry:

1. Did the actor/s have sufficient time to deliberate? If yes, go to No. 2, if no, go to No. 3.

2. If the actor/s had time to deliberate, were they deliberately indifferent to the plaintiff's well-being? If yes, liability, if no, no liability.

3. If there was no time to deliberate, did the actor/s intend to injure the plaintiff? If yes, liability, if no, no liability.

This complicated inquiry is not a novel one. Without clearly acknowledging it, the Lewis majority borrowed the entire inquiry from the Eighth Amendment context, with only minor linguistic adjustments.

In two major decisions, the Supreme Court established a dual approach to the wide range of prisoner cases that arise under the Cruel and Unusual Punishment Clause of the Eighth Amendment. In Estelle v. Gamble, the Court coined the controlling phrase in the Eighth Amendment context, construing the Eighth Amendment’s prohibition against cruel and unusual punishment to proscribe “unnecessary and wanton infliction of pain.” Applying this articulation to a prisoner’s complaint that a prison physician did not properly treat an injury, the Court held that “deliberate indifference to serious medical needs of prisoners constitutes the ‘unnecessary and wanton infliction of pain.’”

Ten years later, in Whitley v. Albers, the Court observed, “[T]he general requirement that an Eighth Amendment claimant allege and prove the unnecessary and wanton infliction of pain should also be applied with due regard for differences in the kind of conduct against which an Eighth Amendment objection is lodged.” Believing that deliberate indifference was too low a level of culpability to apply in cases involving prison riots and other high-pressure,

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58. Id. at 104 (quoting Gregg v. Georgia, 428 U.S. 153, 173 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.)).
59. Id.
60. 475 U.S. 312 (1986).
61. Id. at 320.
fast-paced situations that arise behind bars, the Court established a different inquiry for such cases under which the Eighth Amendment is violated only if the conduct was engaged in "maliciously and sadistically for the very purpose of causing harm."62

_Lewis_ adopts in its entirety the _Estelle-Whitley_ distinction between hasty, high-pressure situations, and circumstances where deliberation is possible. Where _Estelle-Whitley_ used the phrase "unnecessary and wanton infliction of pain" to capture the overall meaning of the Eighth Amendment, the _Lewis_ majority applied the "shocks the conscience" test to articulate the substantive protections of the Due Process Clause in the executive context. The _Estelle-Whitley_ inquiry uses the "maliciously and sadistically for the very purpose of harm" characterization and the "deliberate indifference" standard for the latter, while _Lewis_ uses the "conduct intended to injure" and "deliberate indifference" formulations, respectively.

So what is the problem? The problem is that the Fourteenth Amendment is different from the Eighth Amendment. The amendments are geared toward different contexts, recognize different rights, and are intended to protect against different kinds of conduct. Conflating the two of them makes little sense. The constitutional text upon which substantive due process jurisprudence is based is remarkably different from the Eighth Amendment's language. On its face, the Eighth Amendment would appear to offer less protection from government misconduct than the Due Process Clause, prohibiting only cruel and unusual punishment and the infliction of pain, as opposed to the Fourteenth Amendment's proscription against arbitrary government conduct. However, by cutting and pasting its Eighth Amendment analysis into the Fourteenth Amendment context in _Lewis_, the Supreme Court essentially held that the Fourteenth Amendment provides no more protection from government misconduct to people at large than convicted criminals in the midst of a prison riot. Such a result is difficult to defend.

62. _Id._ at 320-21 (citation omitted).
B. Police Pursuits Are Removed from Fourteenth Amendment Scrutiny

The second major problem with the majority opinion in Lewis is that it prevents a fleeing suspect from ever asserting a claim under the Fourteenth Amendment. While the majority in Lewis noted at the outset that it granted certiorari "to resolve a conflict among the circuits over the standard of culpability on the part of a law enforcement officer for violating substantive due process in a pursuit case," its efforts to preserve a place for substantive due process in police pursuit cases were completely nullified. Under the plain terms of the majority opinion, a police pursuit that results in an injury to a fleeing suspect can virtually never be found to violate the Fourteenth Amendment. In other words, the majority effectively destroys the applicability of the Fourteenth Amendment to police pursuits.

The first part of the Lewis majority was devoted to answering the question of whether police pursuits should be analyzed under the Fourteenth Amendment or the Fourth Amendment. The analysis was necessary to address the problems created by the Court's 1989 decision in Graham v. Connor, in which the Court held that individuals could be precluded from seeking the protections of substantive due process where the violative conduct is covered by a more particular amendment that applies to the conduct at issue. In Graham, the plaintiff asserted both violations of his rights under the Fourth and Fourteenth Amendments by police officers who detained him on suspicion of robbing a convenience store. The Court concluded that because

64. 490 U.S. 386 (1989).
65. See Lewis, 523 U.S. at 844 (citing United States v. Lanier, 520 U.S. 259 (1997)).
66. See Graham, 490 U.S. at 388-90. The plaintiff in Graham was a diabetic who, feeling the onset of an insulin reaction, asked a friend to drive him to a store so he could purchase some orange juice to counteract the reaction. When the plaintiff entered the store and saw the long line of people ahead of him, he rushed out of the store and asked his friend to drive him to another friend's house. A police officer had observed the plaintiff enter and exit the store quickly and became suspicious. About a half mile down the road, the officer
Graham’s claims involved a seizure and the alleged use of excessive force, the claims were properly analyzed under the Fourth Amendment, and not the Fourteenth Amendment. In holding that the Fourteenth Amendment did not apply to the conduct alleged in Graham, the Court reasoned that a substantive due process violation could never be stated where there is “an explicit textual source of constitutional protection against [the alleged] conduct.” In other words, where any other constitutional amendment is read to govern a particular claim, that particular amendment, and not “the more generalized notion of ‘substantive due process,’ must be the guide for analyzing these claims.

The Graham holding could, for instance, preclude the violation of substantive rights under the Due Process Clause arising out of a police search because such a claim would be “covered” by the Fourth Amendment. Graham represents a real threat to the continued viability of substantive due process analysis. Read broadly, Graham could preclude a large chunk of potential substantive due process claims that merely brush up against other enumerated constitutional rights. For example, Graham could prevent the operation of the substantive protections of the Fourteenth Amendment in any case involving police conduct due to the Fourth Amendment, in prison cases due to the Eighth Amendment,

stopped the car in which plaintiff was a passenger and placed Graham in handcuffs, ignored his pleas for something to treat his insulin reaction, and threw him into a police car. While Graham was released soon thereafter when it was discovered he had done nothing wrong, he suffered a broken foot, cuts on his wrists, a bruised forehead, an injured shoulder, and damage to his hearing. See id.

67. See id. at 394-95. The Graham Court considered the applicability of the Fourteenth Amendment to the plaintiff's claims, despite the fact that he had dropped his argument that the Fourteenth Amendment applied to the officer's conduct. See id. at 400 (Blackmun, J., concurring).

68. Id. at 395.

69. Id.

70. See Toni M. Massaro, Reviving Hugo Black? The Court’s “Jot for Jot” Account of Substantive Due Process, 73 N.Y.U. L. REV. 1086, 1103 (1998) (“Graham may logically be read to foreclose any substantive due process inquiry . . . whenever one can point to a specific textual provision that arguably covers the territory.”); see also Mays v. City of E. St. Louis, 123 F.3d 999, 1002 (7th Cir. 1997).

71. See Massaro, supra note 70, at 1103.
in expression or religion-related cases due to the First Amendment, and in criminally based civil suits due to the Fifth and Sixth Amendments.

The *Lewis* majority circumvented *Graham* by reading it narrowly. The Fourth Amendment's application to seizures, the Court observed, is limited to "governmental termination of freedom of movement through means intentionally applied." The Court pointed to a hypothetical offered in *Brower v. County of Inyo*, in which it observed that "no Fourth Amendment seizure would take place where a 'pursuing police car sought to stop the suspect only by a show of authority represented by flashing lights and continuing pursuit,' but accidentally stopped the suspect by crashing into him. That is exactly this case." Thus, the Court held that in police pursuit cases, the Fourth Amendment applies (and the operation of the Fourteenth Amendment's substantive protection is precluded) where a police officer stops a fleeing suspect by intentionally striking her. Since the Lewis family conceded that the case did not involve an intentional act by Deputy Smith, the Court held that the circumstances of the case were not covered by the Fourth Amendment, and thus the Fourteenth Amendment claim was not precluded under *Graham*.

Cut to the conclusion of the *Lewis* majority's substantive due process analysis in which the majority determined that only police conduct that shocks the conscience suffices to violate an individual's substantive rights under the Due Process Clause. Clarifying what sort of conduct would shock the conscience in the police pursuit setting, the majority concluded "high-speed chases with no intent to harm suspects . . . do not give rise to liability under the Fourteenth

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72. In holding that *Graham* did not operate to preclude altogether a Fourteenth Amendment claim in *Lewis*, the Supreme Court overruled the decision of the Seventh Circuit in *Mays v. City of E. St. Louis*, 123 F.3d 999 (7th Cir. 1997), in which Judge Easterbrook held in a policy-laden opinion that *Graham* required the application of the Fourth Amendment to a police chase case. See *County of Sacramento v. Lewis*, 523 U.S. 833, 842-45 (1998).


Amendment." Thus, the Court held that in police pursuits, the Fourteenth Amendment applies only if the police officer intends to harm the fleeing suspect.\textsuperscript{77}

The problem in \textit{Lewis} now becomes clear: a substantive due process violation may only be stated when a pursuing police officer intends to harm the suspect, yet because of \textit{Graham}, the Fourth Amendment precludes a Fourteenth Amendment claim when a police officer in pursuit intends to strike a fleeing suspect. The only circumstances under which a Fourteenth Amendment claim arising out of a police chase might exist are the very circumstances under which a Fourteenth Amendment claim is precluded by the Fourth Amendment under \textit{Graham}.\textsuperscript{78}

Thus, despite the \textit{Lewis} majority's apparent interest in preserving substantive due process as recourse for injuries arising out of a high-speed police chase, its analysis forecloses such a possibility. To the extent that any successful constitutional claim might arise out of a police pursuit, it will arise under the Fourth Amendment, or not at all.

Does it make a difference whether a police pursuit case involving intentional injury of a fleeing suspect is analyzed under the Fourth or the Fourteenth Amendment? As a general practical matter in civil claims under § 1983, no. The Fourth Amendment as interpreted by the Court in \textit{Brower}, or the Fourteenth Amendment as analyzed by the majority in \textit{Lewis} applies and a constitutional violation will be found as

\textsuperscript{76} Id. at 854.

\textsuperscript{77} See id. at 855. What the Court meant by suggesting that Fourteenth Amendment liability may lie where a police officer intended to "worsen [a fugitive's] legal plight" is unclear. It is difficult to conceive of a police officer chasing suspects solely or even largely for the purpose of somehow inspiring them to commit criminal violations in addition to those for which they were presumably suspected. Even if a police officer was found to have such intent, it is even more difficult to conceive of a case in which police officers and their employers would somehow be liable for a suspect's decision to, for example, break a speed limit or run a red light after a police officer commenced pursuit. Thus, I do not believe that the Court's reference to conduct intended to "worsen a suspect's legal plight" offers a viable option for a Fourteenth Amendment claim.

\textsuperscript{78} The distinction between "intent to strike" and "intent to harm" is meaningless in high-speed police pursuit cases like \textit{Lewis}. Intending to strike a person with a car is tantamount to intending to injure her.
long as the plaintiff proves that a police officer intentionally used her vehicle to strike a fleeing individual. In fact, it may be easier under the Fourth Amendment standard of "reasonableness" for a plaintiff to establish a constitutional violation. In addition, it might be that police chases resulting in injuries to innocent bystanders, not suspects, might be analyzed under the Fourteenth Amendment, as police would most likely never intend to hit or injure bystanders.

On a deeper level, however, it matters a great deal whether the Fourth or Fourteenth Amendment applies. The majority in *Lewis* purported to preserve a sphere of executive action, however limited, to which the substantive component of the Due Process Clause still applies and under which it protects the substantive, not merely procedural, rights of individuals. The fact that the Fourteenth Amendment may never operate in the particular context in which the Court attempted to preserve that sphere—police pursuits resulting in injuries to fleeing suspects—severely undermines not only the majority opinion and the Court's decision as a whole, but also the future of substantive due process in the executive setting.

C. **Shortcomings of the Conscience-Shocking Standard**

Another major difficulty with the *Lewis* decision is its use of the shocks the conscience test. Shocks the conscience has a troubled history, marked by a dubious birth, inconsistent usage, harsh criticism, and lukewarm advocacy, even from its proponents. Somehow, it has managed to maintain enough

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79. However, in a criminal case in which evidence was found as a result of a police officer intentionally hitting a fleeing suspect, the evidence might be suppressed. See *Mapp v. Ohio*, 367 U.S. 643 (1961).

80. Proving that an officer lacked probable cause or a reasonable basis to seize a person or thing is a less onerous task than establishing that such conduct shocks the conscience or was deliberately indifferent.

81. *See Onessian v. Block*, 175 F.3d 1169 (9th Cir. 1999) (holding that *Lewis* applies with equal force to injuries suffered by bystanders and fleeing suspects).

82. *See Fagan v. City of Vineland*, 22 F.3d 1296, 1320 (3d Cir. 1994) ("From the very day of its application in *Rochin*, the 'shocks the conscience' test, if it can be called a test at all, has received harsh criticism from many jurists . . . ."); *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973) ("While the *Rochin* test,
vigor for the Supreme Court to embrace it as the cornerstone of its analysis in executive action-related substantive due process claims. Given the test’s many shortcomings, however, it is unclear why the Court did so in Lewis.

1. Silence on the Threshold

The use of the shocks the conscience test in Lewis was surprising in light of prior cases in which the Supreme Court was squarely presented with the same issue, yet was reticent to set forth a minimum threshold of culpability for all substantive due process cases. The companion cases Daniels v. Williams and Davidson v. Cannon, which were handed down on the same day, were the Court’s first attempt at directly confronting the question of the requisite state of mind required to show a violation of the Fourteenth Amendment’s guarantees in a §1983 suit.

In Daniels, the Court considered a prisoner’s claim that prison officials violated his Fourteenth Amendment rights by negligently leaving a pillow and newspapers on prison stairs upon which the prisoner slipped and fell. The Daniels majority reviewed the history of the Fourteenth Amendment, and concluded that “it does not purport to supplant traditional tort law” or act as “a font of tort law to be superimposed upon whatever systems may already be administered by the States.” Therefore, the Court concluded, governmental negligence is “not addressed by the United States Constitution,” and an assertion of negligence is insufficient to state a claim under the Fourteenth Amendment.

‘conduct that shocks the conscience,’ is not one that can be applied by a computer, at least it points the way.” (internal citation omitted).

83. 474 U.S. 327 (1986).
84. 474 U.S. 344 (1986).
85. The Court had dealt with the question in passing in Parratt v. Taylor, 451 U.S. 527 (1981), where it held that the negligent loss of a prisoner’s hobby kit amounted to a Due Process Clause violation. See id. at 536-37. Daniels overruled Parratt to the extent that it held that mere negligence could violate an individual’s Fourteenth Amendment rights. See Daniels, 474 U.S. at 331-32.
86. Daniels, 474 U.S. at 332.
87. Id. (quoting Paul v. Davis, 424 U.S. 693, 701 (1976)).
88. See Daniels, 474 U.S. at 336.
The majority in *Daniels* expressly declined to state what level of culpability would be sufficient to state a claim under the Fourteenth Amendment. Addressing the plaintiff-petitioner's argument that refusing to set negligence as the standard would leave the courts guessing about whether intent or something less than intent could violate the Due Process Clause, the Court stated that drawing distinctions among such levels of culpability would not be overly burdensome to the lower courts and that "the difference between one end of the spectrum—negligence—and the other—intent—is abundantly clear." The Court relied on *Daniels* in deciding *Davidson*, which involved a prisoner's claim that prison officials failed to protect him from another inmate. The plaintiff had notified prison officials in writing of a threat from another prisoner. Prison officials received and considered the written communication from the plaintiff, but decided the threat was not serious. Soon thereafter, the plaintiff was attacked and beaten by the prisoner who had made the threat. The Court held that the plaintiff-petitioner had stated only a negligence claim, which, according to *Daniels*, was insufficient to give rise to a claim under the Fourteenth Amendment.

Dissenting in *Davidson* was Justice Blackmun, who, joined by Justice Marshall in whole and Justice Brennan in part, wrote that negligence was not perhaps necessarily insufficient to constitute a Fourteenth Amendment violation and that recklessness or deliberate indifference were certainly sufficient to constitute such a violation. What triggers the Fourteenth Amendment, Justice Blackmun

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89. See id. at 335 n.3 ("[T]his case affords us no occasion to consider whether something less than intentional conduct such as recklessness or 'gross negligence,' is enough to trigger the protections of the Due Process Clause.").
90. Id. at 335 (construing O. HOLMES, THE COMMON LAW 3 (1923)).
92. See id. at 348.
93. See id. at 345.
94. See id. at 347-48.
95. Justice Brennan declined to join Blackmun in his argument that negligence could rise to the level of a constitutional tort, but did join Blackmun in holding that recklessness or deliberate indifference could deprive a person of her rights under the Fourteenth Amendment.
wrote, is deliberation; negligence and certainly recklessness or deliberate indifference could involve a level of deliberation or intent sufficient to give rise to a claim under the Fourteenth Amendment. The acts of the prison officials in Davidson, Justice Blackmun continued, "may well have risen to the level of recklessness," and therefore, may have violated the prisoner's rights under the Due Process Clause. This was enough for the dissenters to find that Daniels, where the prisoner had neither pled nor produced evidence of anything more than negligence, did not control the outcome of Davidson.

Thus, the majorities in Daniels and Davidson had held that negligence was not enough to trigger the protections of the Fourteenth Amendment, but expressly left open the question of what was enough. Three justices had agreed that recklessness or deliberate indifference would be sufficient to violate a person's rights under the Due Process Clause. The circuit courts then raced to fill the vacuum left by the Supreme Court, staking out positions everywhere along the culpability threshold, from gross negligence and reckless disregard to deliberate indifference and intent. Daniels and Davidson remained good law in the years leading up to Lewis, and thus circuit courts were still guessing when Lewis came down.

96. See Davidson, 474 U.S. at 354 n.3 (arguing that negligence could involve deliberation and that there was evidence that prison officials deliberated over the threat against plaintiff and decided to ignore it); see also id. at 357 (stating prison officials knew of the threat and yet "intentionally delayed" protecting the prisoner).

97. See id. at 350 (Blackmun, J., dissenting).

98. Some courts required a showing of intent, including the First Circuit in Evans v. Avery, 100 F.3d 1033 (1st Cir. 1996), and the Third Circuit in Fagan v. City of Vineland, 22 F.3d 1296 (3d Cir. 1994). Other circuits required merely deliberate indifference, including the Fifth Circuit in Johnson v. Dallas Indep. Sch. Dist., 38 F.3d 198, 201 (5th Cir. 1994), cert. denied, 514 U.S. 1361 (1995), the Ninth Circuit in L.W. v. Grubbs, 92 F.3d 894 (9th Cir. 1996), and the Tenth Circuit in Uhlrig v. Harder, 64 F.3d 567, 571 (10th Cir. 1995), cert. denied, 516 U.S. 1118 (1996).

99. As previously discussed, the Supreme Court obliquely addressed the threshold question of what level of conduct was required to violate substantive due process in Collins v. Harker Heights, 503 U.S. 115 (1992), but it did so sub silentio, without announcing that it was resolving the question expressly left unanswered by those two cases.
A review of Daniels and Davidson makes it clear that the Court's precedent did not mandate the shocks the conscience test. The shocks the conscience test had taken a serious beating in the Court ever since its debut in Rochin v. California. It had commanded a clear majority in the Fourteenth Amendment setting only once, in Rochin, and was quickly disavowed by the Supreme Court after that first use. Whenever it has been applied, even its proponents appear to hold their noses. Most significantly, shocks the conscience is not a standard at all, but rather a vague overlay that offers little practical guidance and ultimately ends up relying on traditional standards of culpability. In light of the delinquent background of the shocks the conscience test, the Court's embrace of the test in Lewis is all the more baffling. At the very least, it is clear that the Court was not required by history or precedent to apply the shocks the conscience test in Lewis.

Moreover, the Court's precedent favored a lesser standard than shocks the conscience or intent. In Daniels and Davidson, the Court merely held that negligence could not violate the Fourteenth Amendment, leaving open the question of whether anything from gross negligence to intent was sufficient to give rise to a substantive due process claim. Three justices in Davidson held that reckless or deliberately indifferent conduct could violate the Fourteenth Amendment. Thus, in the cases preceding Lewis, the Court had, again and again, stopped short of holding that only behavior that was intentional or conscience-shocking could violate an individual's substantive rights under the Due Process Clause.

2. A Troubled Past

The shocks the conscience standard was first applied in the Fourteenth Amendment context in Rochin. In that case, police officers entered the home of a man they believed was selling drugs and forced their way into his bedroom, where they observed the plaintiff, his wife, and two capsules on the nightstand. When the officers asked the plaintiff who the capsules belonged to, he snatched the capsules and swallowed

them. After attempting to extract the pills themselves, the officers took the plaintiff to a hospital, where they directed a doctor to shove a tube into plaintiff's stomach against his will and thereby cause the plaintiff to vomit. Two capsules containing morphine were recovered, and plaintiff was convicted of drug possession and sentenced to sixty days in prison.

Writing for the majority in *Rochin*, Justice Frankfurter offered a spirited endorsement of substantive due process and an ode to the judiciary's role in protecting individual rights. The Due Process Clause, Justice Frankfurter argued, protects against government conduct that "'offends those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses,'"101 and guarantees respect for "'those personal immunities which . . . are 'so rooted in the traditions and conscience of our people to be ranked as fundamental' or are 'implicit in the concept of ordered liberty.'"102 Justice Frankfurter argued at length, and somewhat defensively, that despite its vagueness, the concept of substantive rights guaranteed by the Due Process Clause has sufficient limits to prevent it from becoming subject to the "merely personal and private notions" of individual judges.103 To the contrary, he continued, the judiciary is well suited to identify the substantive aspects of due process.104

The legitimacy of substantive due process established, Justice Frankfurter turned to the conduct of the police officers and concluded that "the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combating crime too energetically. This is conduct that shocks the

102. *Id.* (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).
103. *Id.* at 172 ("The faculties of the Due Process clause may be indefinite and vague, but the mode of their ascertainment is not self-willed.").
104. See *id.* at 171. Most of Frankfurter's decision is devoted to a defense of the judiciary's role in ascertaining the nature of the rights guaranteed by the Constitution. He relies particularly on the limitations inherent on the judiciary—the judicial method, the tools of reason and tradition, the narrow confines of judiciary power, etc.
Referring to the Fifth Amendment's protections against self incrimination and coerced confessions, Justice Frankfurter held that it would be wildly inconsistent "to hold that in order to convict a man the police cannot extract by force what is in his mind, but can extract what is in his stomach." He concluded that the police officers' conduct "offend[ed] 'a sense of justice'" and, thus, violated the Due Process Clause.

Justice Frankfurter's newly minted shocks the conscience standard was roundly criticized by Justices Black and Douglas in their separate concurrences in *Rochin*. Justice Black, writing that he preferred to consider the officers' conduct a violation of the Fifth Amendment right against compelled testimony, argued that the majority opinion "vests this Court with . . . unlimited power to invalidate laws," a view to which he could not subscribe. Invoking the specter of *Lochner v. New York*, Justice Black contended that the shocks the conscience standard threatened to subject state action of every kind to constitutional scrutiny based on a "reasonableness" standard and, despite the majority's protests to the contrary, appeared to turn largely on the personal notions of judges. Far from protecting individual liberties, Justice Black claimed, the shocks the conscience standard threatened them. Justice Douglas echoed Justice Black's sentiments, stating that the standard set forth by the majority intruded on the state administration of justice and was far too vague. The "decencies of civilized conduct" standard, Justice Douglas observed, threatened to make state rules of evidence "turn not on the Constitution, but on the idiosyncrasies of the judges who sit here."

The *Rochin* shocks the conscience test was essentially

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105. *Id.* at 172.
106. *Id.* at 173.
108. *Id.* at 176 (Black, J., concurring).
109. 198 U.S. 45 (1905).
110. See *Rochin*, 342 U.S. at 176-77.
111. See *id.* at 177 ("I long ago concluded that the accordion-like qualities of this philosophy must inevitably imperil all the individual liberty safeguards specifically enumerated in the Bill of Rights.").
112. *Id.* at 179 (Douglas, J., concurring).
rendered moot within two years, as seven justices in *Irvine v. California*\(^{113}\) appeared to reject the test’s reliance on the Due Process Clause in favor of the direct application of the Fourth and Fifth Amendment to circumstances like those in *Rochin*.\(^{114}\) *Rochin*’s demise was solidified in 1961, when the Court brought cases with facts similar to *Rochin* directly within the ambit of the Fourth Amendment and extended the exclusionary rule to state court proceedings in *Mapp v. Ohio*.\(^{116}\) Justice Black and others continued to rail against the shocks the conscience standard in subsequent cases.\(^{116}\)

The shocks the conscience standard was rarely mentioned after *Rochin*. It made cameo appearances in other areas of constitutional jurisprudence, warranting mention in a series of Eighth Amendment cases.\(^{117}\) However, the majority never relied upon it in any Fourteenth Amendment case for nearly three decades after *Rochin*.\(^{118}\) When it did


\(^{114}\) See id. at 133; id. at 138 (Clark, J., concurring); see also *Mapp v. Ohio*, 367 U.S. 643, 664 (1961) (Black, J., concurring). The shocks the conscience test also suffered a serious blow in *Breithaupt v. Abrams*, 352 U.S. 432 (1957), in which the Court held that the taking of blood from a suspect in an automobile accident to screen for intoxicants was held not to shock the conscience because the blood was drawn “under the protective eye of a physician.” The Court failed to explain why the drawing of a suspect’s blood in a physician’s presence is any less intrusive than the pumping of a suspect’s stomach by a physician.


\(^{117}\) See, e.g., *Whitley v. Albers*, 475 U.S. 312, 327 (1986) (Eighth Amendment “contemporary standards of decency” standard provides protection similar to that of Fourteenth Amendment shocks the conscience standard); *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (though not using the shocks the conscience test by name, the court cites “broad and idealistic concepts of dignity, civilized standards, humanity, and decency” as instructive in deciding prison condition cases under the Eighth Amendment); *Furman v. Georgia*, 408 U.S. 238, 360 n.142 (1972) (Marshall, J., concurring) (citing appellate cases holding that punishment that shocks the conscience may violate the Eighth Amendment).

\(^{118}\) The shocks the conscience test was invoked by a concurrence and a dissent and roundly criticized by another dissent in *Herrera v. Collins*, 506 U.S. 390 (1993), a case in which the court limited the habeas corpus appeals of a prisoner. See id. at 420 (O’Connor, J., concurring); id. at 428 (Scalia, J.,
arise, it was usually accompanied by harsh criticism.\textsuperscript{119}

After a long period of dormancy, the shocks the conscience test resurfaced in \textit{Collins v. City of Harker Heights},\textsuperscript{120} a case brought by the widow of a city worker who died of asphyxia after entering a manhole to unstop a sewer line. Plaintiff claimed that the city had failed to train or warn its sanitation employees about workplace hazards and thereby, caused her husband's death and violated the Fourteenth Amendment's Due Process Clause. In a rather brief analysis, the Court rejected the plaintiff's argument that a municipality's "failure to train its employees, or to warn them about known risks of harm, was an omission that can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense."\textsuperscript{121} The Court reasoned that the Due Process Clause was not a substitute for traditional tort law, and that only conduct that is "arbitrary in the constitutional sense" may violate the Fourteenth Amendment.\textsuperscript{122} The passing reference in \textit{Collins} to conscience-shocking behavior and its citation to \textit{Rochin} was the first time in four decades a majority had relied even implicitly on the test in the Fourteenth Amendment setting.

\textit{Collins} did not conclusively resolve the question of the minimum threshold of culpability in substantive due process

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{119} See, e.g., \textit{In re Winship}, 397 U.S. at 377-78 (Black, J., dissenting). There Justice Black stated:
\begin{quote}
I realize that it is far easier to substitute individual judges' ideas of "fairness" for the fairness prescribed by the Constitution, but I shall not at any time surrender my belief that that document itself should be our guide, not our own concept of what is fair, decent, and right. That this old "shock-the-conscience" test is what the Court is relying on, rather than the words of the Constitution, is clearly enough revealed by the reference of the majority to 'fair treatment' and to the statement by the dissenting judges in the New York Court of Appeals that failure to require proof beyond a reasonable doubt amounts to a "lack of fundamental fairness." As I have said time and time again, I prefer to put my faith in the words of the written Constitution itself rather than to rely on the shifting, day-to-day standards of fairness of individual judges.
\end{quote}
\item \textsuperscript{120} 503 U.S. 115 (1992).
\item \textsuperscript{121} \textit{Id.} at 128.
\item \textsuperscript{122} See \textit{id.} at 128-29.
\end{enumerate}
\end{footnotesize}
cases. Circuit courts split on the meaning of Collins, some circuits holding that the decision had established "shocks the conscience" as the minimum substantive due process threshold and others interpreting the Court's reliance on the term "arbitrary" as suggestive of a threshold lower than shocks the conscience. Some circuit judges suggested that the Court in Collins used the word "arbitrary" to denote a lower-culpability alternative to "conscience-shocking," and did not establish shocks the conscience as the new, exclusive standard for Fourteenth Amendment cases. The Court relied more heavily on the word "arbitrary" in Collins than it did "shocks the conscience," thus suggesting that "arbitrary" conduct was the Court's new minimum threshold for the Fourteenth Amendment. Other judges opined that perhaps, because the facts in Collins lacked the indicia of even tort liability, the Court was establishing shocks the conscience as an alternative standard to deliberate indifference or some other heightened threshold. It was of this split that the Supreme Court spoke when it decided Lewis.

124. See L.W. v. Grubbs, 92 F.3d 894 (9th Cir. 1996); Johnson v. Dallas Ind. Sch. Dist., 38 F.3d 198 (5th Cir. 1994).
125. See Fagan, 22 F.3d at 1312 (Cowen, J., dissenting).
126. See Collins, 503 U.S. at 128-30. As previously discussed, the word arbitrary lends itself to, at most, a deliberate indifference standard. Arbitrary was used four times, shocks the conscience was used twice.
127. See Grubbs, 92 F.3d 894 (Fernandez, J., concurring in part and dissenting in part).
128. It should be noted that the shocks the conscience test has occasionally found its way into the Eighth Amendment context, though in a more subtle fashion. In a case exploring the meaning of the "cruel and unusual punishment" clause of the Eighth Amendment, the Court took note of the view that the Eighth Amendment's protections were superfluous in a democracy, because "government by the people instituted by the Constitution would not imitate the conduct of arbitrary monarchs. The abuse of power might, indeed, be apprehended, but not that it would be manifested in provisions or practices which would shock the sensibilities of men." Weems v. United States, 217 U.S. 349, 375 (1910). This formulation of the meaning of cruel and unusual punishment, however, did not catch on. The shocks the conscience test was cited but not relied upon by the Court in Rhodes v. Chapman, 452 U.S. 337, 363 (1981) (listing shocks the conscience as one among many articulations of the analysis required by the Eighth Amendment; "the application of realistic yet
In light of this troubled pedigree, it is surprising that the Court chose to resuscitate the shocks the conscience test in *Lewis*. The history of the test belies the *Lewis* majority's observation that "for nearly half a century now we have spoken of the cognizable level of executive abuse of power as that which shocked the conscience."\(^{129}\) To the contrary, the test had virtually passed into constitutional oblivion since *Rochin* and there appear to be good reasons that it did.\(^{130}\) It is difficult to come up with a reason why a test that had fallen into such disrepute and suffers from so many shortcomings could arise to form the basis of the Supreme Court's jurisprudence in as contentious an area as substantive due process.

3. *Vagueness and Imprecision*

The most oft-voiced criticism of the shocks the conscience test is that it is vague and imprecise. This criticism was voiced even by the majority in *Lewis*, which, while endorsing the shocks the conscience test, called it "no calibrated yardstick," and that it merely "points the way."\(^{131}\) Justice Kennedy claimed that the shocks the conscience test should be viewed with great suspicion.\(^{132}\) Other courts have been less charitable with the test. In a case that applied the shocks the conscience test, the Court of Appeals for the Third Circuit called it "amorphous and imprecise."\(^{133}\) Likewise, the Fourth

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humane standards to the conditions as observed").

In a decision holding that the Fourteenth Amendment does not apply to alleged constitutional injuries inflicted in a post-trial incarceration context, the Court observed, "It would indeed be surprising if, in the context of forceful prison security measures, conduct that shocks the conscience or [affords] brutality the cloak of law, and so violates the Fourteenth Amendment, were not also punishment inconsistent with contemporary standards of decency and repugnant to the conscience of mankind." *Whitley v. Albers*, 475 U.S. 312, 327 (1986) (internal quotations and citations omitted).

Despite these brief cameos, the shocks the conscience test has not caught on in the prison context any more than it had in the Fourteenth Amendment context prior to *Lewis*.

130. *See infra* Part II.C.3-7.
132. *See id.* at 858 (Kennedy, J., concurring).
Circuit applied the shocks the conscience test only after stating that it “remains an admittedly imprecise [test] in formulation.”\textsuperscript{134} The Tenth Circuit noted that conscience-shocking behavior “cannot precisely be defined, but must necessarily evolve over time from judgments as to the constitutionality of specific government conduct.”\textsuperscript{135} And these are all cases that adopted and relied upon the shocks the conscience test.

Shocks the conscience is merely a name given to a Fourteenth Amendment concept that has taken on myriad formulations. The Fourteenth Amendment has been said to proscribe conduct that\textsuperscript{136} “shock[s] itself into the protective arms of the Constitution,”\textsuperscript{137} violates the “decencies of civilized conduct,”\textsuperscript{138} or violates “some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.”\textsuperscript{139} It rankles “those canons of decency and fairness which express the notions of justice of English-speaking peoples\textsuperscript{140} and breaches the community’s sense of fair play and decency,”\textsuperscript{141} conflicts with “deeply rooted feelings of the community,”\textsuperscript{142} infringes on “fundamental notions of fairness and justice,”\textsuperscript{143} and robs individuals of “rights... basic to our free society.”\textsuperscript{144} It constitutes “an unreasonable, unnecessary, and arbitrary interference with the right of the individual to his personal liberty or to enter into... contracts.”\textsuperscript{145} It intrudes upon “fundamental principles of liberty and justice,”\textsuperscript{146} constitutes an “arbitrary restraint of... liberties,”\textsuperscript{147} and a “denial of fundamental fairness,

\begin{itemize}
\item[134.] Hawkins v. Freeman, 195 F.3d 732 (4th Cir. 1999).
\item[135.] Uhlrig v. Harder, 64 F.3d 567, 574 (10th Cir. 1995).
\item[136.] I owe this list to Justice Black, who catalogued them in his dissenting opinion in Griswold v. Connecticut, 381 U.S. 479, 512 n.4 (Black, J., dissenting).
\item[139.] Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).
\item[140.] Malinski v. New York, 324 U.S. 401, 417 (1945).
\item[141.] Rochin, 342 U.S. at 173.
\item[142.] Haley v. Ohio, 332 U.S. 596, 604 (1948).
\item[143.] Id. at 607.
\item[145.] Lochner v. New York, 198 U.S. 45, 56 (1905).
\item[146.] Hebert v. Louisiana, 272 U.S. 312, 316 (1926).
\item[147.] Adkins v. Children's Hosp., 261 U.S. 525, 561 (1923).
\end{itemize}
shocking to the universal sense of justice." It is conduct that is "intolerable and unjustifiable," and which the Court and society can "not tolerate."

It is no wonder that this test is often criticized for vagueness. Not only have a wide range of characterizations been applied, but those characterizations themselves often have taken a more general and vague form than the shocks the conscience test they intended to clarify.

In light of the proliferation of articulations, one would think that the Court has at some point attempted to define the shocks the conscience test. It has not. Characterizations such as those cited above and references to common law levels of culpability are all lower courts have to go on in their efforts to ascertain the outer boundaries of what shocks the conscience.

4. Subject to Subjectivity

Soon after the shocks the conscience test was first applied, one Supreme Court Justice wrote that the test:

makes for such uncertainty and unpredictability that it would be impossible to foretell—other than by guesswork—just how brazen the invasion of the intimate privacies of one's home must be in order to shock itself into the protective arms of the Constitution. In truth, the practical result of this ad hoc approach is simply that when five Justices are sufficiently revolted by local police action a conviction is overturned and a guilty man may go free.161

This leads to the second criticism of the shocks the conscience test, that it is subject to subjectivity. Justice Scalia lampooned the test in his Lewis concurrence by quoting from a Cole Porter tune to illustrate his view that there is no judicial analysis more dependent on the individual predilections of judges than the shocks the conscience test: "[T]oday's [majority] opinion resuscitates the ne plus ultra, the Napoleon Brandy, the Mahatma Ghandi, the Celophane

of subjectivity, th' ol' 'shocks the conscience' test.\textsuperscript{152} Justice Scalia argued that he would prefer to decide the case not on the basis of whether the conduct at issue "shock[s] my still, soft voice within."\textsuperscript{153} In ridiculing the shocks the conscience test, Justice Scalia built on Justice Black's oft-stated, subjectivity-based criticism of the test.

The subjectivity of the shocks the conscience test stems from the fact that shocks the conscience is not a true standard of conduct at all. Shocks the conscience, as it originally was conceived, does not describe a level of culpability that turns on the actor's state of mind, such as intent or negligence. Rather, the shocks the conscience concept turns on the personal reaction of another to particular conduct, that is, whether the conduct shocks the conscience of others. Thus, the primary focus in the shocks the conscience test is not on the person whose conduct is at issue, but on the person who perceives that conduct and her reaction to it. And this is what makes the shocks the conscience analysis such a sticky inquiry.\textsuperscript{154}

\begin{itemize}
  \item \textsuperscript{152} County of Sacramento v. Lewis, 523 U.S 833, 861 (Scalia, J., concurring). Justice Scalia's footnote to the quotation read, "For those unfamiliar with classical music, I note that the exemplars of excellence in the text are borrowed from Cole Porter's 'You're the Top,' copyright 1934." \textit{Id.} at 861 n.1. Justice Scalia neglected to defend his characterization of this show tune as "classical" against those fans of Mozart and Bach who might take exception. Nor did he include a number of the more interesting "exemplars of excellence" contained in the Porter tune, such as a "Bendel bonnet," a "Shakespeare sonnet," the "Tow'r of Pisa," the "Mona Lisa," the "National Gall'ry," "Garbo's Sal'ry," "a baby grand of a lady and gent," "Pepsodent," a "Ritz hot toddy," a "Brewster's body," a "dance in Bali," a "hot tamale," or my favorite couplet of all, a "Drumstick Lipstick" and "da foist in da Irish Svipstick." Still more surprising was Justice Scalia's restraint in not using the line in the song that might have aptly characterized his belief that the majority opinion was "a toy balloon that is fated soon to pop."
  \item \textsuperscript{153} \textit{Id.} at 865.
  \item \textsuperscript{154} Compounding the difficulty of applying the shocks the conscience test is the distinction between conduct and harm. The test is intended to focus on whether the conduct of the state actor shocked the conscience. However, it becomes difficult if not impossible to prevent the extent of the harm from influencing the conclusion as to whether the conduct shocked the conscience. A judge is more likely to find that the particular conduct of an individual shocked the conscience where the injury is serious. Conduct, even that which in and of itself seems marginally blameworthy, is more likely to be found conscience shocking when it renders the victim a quadriplegic. If the police officer in \textit{Lewis}
By using a test that refers to the innermost sanctum of the human mind where individuals grapple with clashing norms and make deeply personal decisions, the Court has created a standard that is determined by standards as numerous as there are individuals. True, throughout history many have argued that in the human conscience lies a universal understanding of right and wrong, a standard compass with which all human beings are equipped to navigate the troubled waters of good and evil. But also throughout history, the human conscience has caused individuals to resist "universal" norms and to turn against the prevailing mores, often with heroic virtue. Even further, the conscience of individuals and societies has failed on numerous occasions to prevent grotesque and unspeakable acts of human cruelty. The human conscience, then, is at best a mystery and serves as a virtually unknowable, and therefore inappropriate, foundation for a legal inquiry.

Furthermore, the shocks the conscience test necessarily raises the question of whose conduct is being shocked. Is it the judge's conscience? The jury's? The victim's? Society's? A reasonable, prudent person's? Each possible "shockee" presents serious challenges because they either undermine the universality of the test (if the test varies from judge to judge, or jury to jury, it provides no reliable standard at all) or render the test unknowable (how does one assess whether conduct shocks society's conscience?). Remarkably, this question has never been answered directly by the Supreme Court. Some have concluded that the shocks the conscience test requires that the judge's conscience be shocked.155

had intended to hit the motorcyclist, but only caused scrapes and bruises, such facts would inevitably cause a judge to lean against a conscience shocking finding, even when the necessary intent was present. The difficulty of separating conduct and harms makes an already confusing inquiry even more subjective.

155. See County of Sacramento v. Lewis, 523 U.S. 833, 865 (Scalia, J., concurring) ("For judges to overrule that democratically adopted policy judgment on the ground that it shocks their consciences is not judicial review but judicial governance."); Herrera v. Collins, 506 U.S. 390, 428 (1993) (Scalia, J., dissenting) ("If the system that has been in place for 200 years (and remains widely approved) 'shock[s]' the dissenters' consciences, . . . perhaps they should doubt the calibration of their consciences, or, better still, the usefulness of
however, this is rarely clearly articulated. The test is set forth in neutral terms referring only to "the conscience," rather than "a judge's conscience." Perhaps this is because it seems inappropriate to establish a constitutional test that on its face turns on the consciences of judges, rather than on interpretations of law or elucidations of fact.

Assuming that the judge is the "shockee," the test appears to call upon judges to do that which is wholly inconsistent with the role of a jurist, to use their own deeply held and personal views to resolve a legal question. Certainly, such views creep into judicial decision making all the time, but judges are commanded by their role as fact finders and legal arbiters to fight that tendency. The shocks the conscience test thus corrupts the role of a judge by expressly incorporating a judge's own conscience into a constitutional analysis.

5. Reliance on Traditional Standards of Culpability

It is perhaps because of the subjectivity of the shocks the conscience test that the majority in *Lewis* went to such great lengths to tie the test to less subjective moorings. The majority's efforts in this regard, however, created new and different problems.

In an effort to tame the amorphous nature of the shocks the conscience test, the *Lewis* majority linked it to tort-based culpability standards such as intent and negligence. In *Lewis*, the Court explained on the one hand that "[i]t should not be surprising that the constitutional concept of conscience-shocking duplicates no traditional category of common-law fault," but the Court then proceeded to fall back on common law concepts in identifying what would shock the conscience on facts similar to those presented in *Lewis*. The majority held that in a high-speed police chase only an "intent to harm suspects physically" would be

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470 *SANTA CLARA LAW REVIEW* [Vol. 41

156. *Lewis*, 523 U.S. at 848.

156. *Lewis*, 523 U.S. at 848.
conscience-shocking; that is, where there was time to deliberate, deliberate indifference (or reckless disregard) to the safety and well being of the plaintiff would shock the conscience.157

Using tort culpability concepts to manage the meaning of the shocks the conscience test makes little sense because shocks the conscience, at least as it was originally conceived, is not a test of an individual’s state of mind. This argument was advanced before Lewis by Judge Anderson of the Court of Appeals for the Tenth Circuit, who concurred in part and dissented in part in Williams v. City and County of Denver.158 Judge Anderson criticized the majority’s effort to tie the shocks the conscience test to the state of mind of the government actor. The shocks the conscience test, Judge Anderson argued, was a test intended to evaluate the conduct of a government actor. The state of mind of the government actor, Judge Anderson argued, is relevant only to determine responsibility for a constitutional violation, but “it is simply irrelevant when the issue is whether the government conduct is so arbitrary as to be conscience shocking.”160

Judge Anderson’s criticism of the majority in Williams could easily apply to the majority in Lewis. By establishing an analysis that uses shocks the conscience as a mere proxy for tort-based state-of-mind concepts, the Lewis majority tore the shocks the conscience test from its roots as a standard focused on the nature of the conduct at issue and tied it to the state of mind of the actor. In Rochin, it was the act of government agents forcibly pumping a person’s stomach for evidence to use against him that shocked the conscience and not the mental state of the officers who oversaw it. In fact, the mental state of the officers in Rochin probably would not have risen to the level of a constitutional violation under the Lewis analysis as the officers were simply attempting to extract evidence they believed to be in the stomach of the plaintiff. Apparently, they had no intention of injuring the

157. See id. at 848-54.
158. 99 F.3d 1009 (10th Cir. 1996). After Lewis was decided, Williams was vacated and remanded to the district court for consideration in light of Lewis.
159. See id. at 1021.
160. Id. at 1022.
plaintiff or of being deliberately indifferent to his needs.

The *Lewis* majority had a laudable goal. Seeking to combat the vagueness and subjectivity of the shocks the conscience test, the majority harnessed it to the more objective benchmarks of intent and deliberate indifference. However, in doing so, the majority may have completely ignored the meaning of shocks the conscience. The shocks the conscience test, by its language and as it was historically conceived, calls for a judgment on the conduct itself; it does not call for a judgment on the state of mind of the perpetrator. A charitable reading of *Lewis* would be that the majority was attempting to fundamentally alter the shocks the conscience test *sub silentio*. However, the majority's reliance on precedent and its failure to acknowledge the very different approach it was taking on the shocks the conscience test undermines its decision to use this controversial test.

The Court's analysis involves four leaps. First, the Court invokes the substantive component of the Due Process Clause. Second, the Court states that the Due Process Clause protects against arbitrary action. Third, the Court holds that arbitrary action is conduct that shocks the conscience. Fourth, the Court concludes that conduct that shocks the conscience is conduct committed by an actor with intent to injure in some circumstances and deliberate indifference in others. It seems a torturous road to travel only to arrive at a fairly simple test. *Lewis* exposes the shocks the conscience test as not a test of culpability, but a judicial overlay, and not a particularly helpful one at that. The test is parasitic, returning ultimately to common law concepts of culpability, ranging from reasonable behavior and negligence to recklessness and intent. The shocks the conscience test does not bring clarity to the level of conduct required to violate the Due Process Clause. The Court has been forced to graft on common law concepts in order to provide it with substance. Why the Court went to such lengths to preserve such a vacuous standard is a mystery.

6. **Matters of Context and Timing**

The *Lewis* majority wrote that conduct that "shocks in one environment may not be so patently egregious in
another”\textsuperscript{161} and suggested that lesser levels of fault along the spectrum of culpability, such as deliberate indifference, might rise to a conscience-shocking level depending on the circumstances.\textsuperscript{162} In particular, the Court held that conduct involving split-second decision-making and high pressure only shocks the conscience when it involves an intent to injure, and conduct that was the result of “unhurried judgments” might shock the conscience if it was merely deliberately indifferent.\textsuperscript{163}

Thus, the shocks the conscience test set forth by the majority in \textit{Lewis} involves more than merely pointing to the extreme end of the spectrum of culpability, it involves an assessment of the context in which the conduct took place, including the amount of time the actor had to reflect on his or her actions. Even here, however, the test runs into problems. How much time must elapse before the move from “intent to injure” to “deliberate indifference” is made? Lower courts have begun struggling with this question already. The Court of Appeals for the Third Circuit recently decided that a social worker acting to separate a parent and child “will rarely have the luxury of proceeding in a deliberate fashion” even when that process may take a number of days. It applied the “purpose to harm” analysis to the facts concluding that a social worker had not intended to injure the child or its parents.\textsuperscript{164} On the other hand, a district court recently

\textsuperscript{161} \textit{Lewis}, 523 U.S. at 850.
\textsuperscript{162} See id. at 854.
\textsuperscript{163} See id. at 852. The majority referenced the Court's holding in \textit{Whitley v. Albers}, 475 U.S. 312 (1986), an Eighth Amendment case in which the Court declined to apply the deliberate indifference standard to official conduct during a prison riot, arguing that “a deliberate indifference standard does not adequately capture the importance of such competing obligations, or convey the appropriate hesitancy to critique in hindsight decisions necessarily made in haste, under pressure, and frequently without the luxury of a second chance.” \textit{Id.} at 320. The Court instead required conduct that was used “maliciously and sadistically for the very purpose of causing harm.” \textit{Id.} at 320-21 (quoting \textit{Johnson v. Glick}, 481 F.2d 1028, 1033 (2d Cir. 1973), \textit{cert. denied sub nom. John v. Johnson}, 414 U.S. 1033 (1973)).

\textsuperscript{164} See \textit{Miller v. City of Philadelphia}, 174 F.3d 368, 370-73, 375-76 (3d Cir. 1999) (despite the fact that the process of investigating and removing the children from custody took place over multiple days and included a physical examination and hearing, the court of appeals held that the social worker was acting under pressure similar to a police chase).
suggested that a police chase might have lasted long enough for the pursuing officers to have an opportunity to deliberate, thus subjecting them to a "deliberate indifference" test rather than the stricter intent to injure test.\(^\text{165}\) Thus, the *Lewis* majority's "time to deliberate" caveat creates new dilemmas for courts as they attempt to navigate the waters of substantive due process after *Lewis*.

Moreover, it is not clear why the constitutional standard of culpability should change with the amount of time the actor has to reflect. A middle-ground level of fault, such as deliberate indifference or reckless disregard, is capable of accounting for the circumstances the actor faces, including the time the actor has to reflect, the pressure or stress of the situation, and any other factors that might mitigate in the actor's favor. Thus, the conduct of a police officer who has ample time to contemplate whether to use force to subdue a suspect might be found deliberately indifferent, whereas a police officer subject to exigency and pressure might not be found deliberately indifferent, despite the fact that both made identical decisions. Requiring a showing of intent in the latter police officer's conduct simply because she didn't have as much time to think as the former officer ignores the fact that the time to deliberate is already incorporated into a mid-level fault analysis such as deliberate indifference. Under a deliberate indifference approach, the analysis would take into account the pressure under which an officer was acting but would not hold the under-pressure officer to a vastly different or more forgiving standard merely because the officer had to think and act quickly. Officers are trained and paid to make such decisions in difficult situations and should not be held less accountable in exigent circumstances.

The consequence of *Lewis* is that a whole spectrum of conduct is essentially constitutionally immunized whenever a state actor is under some sort of pressure. As noted, there is some evidence that courts are willing to apply the *Lewis* majority's time-to-deliberate test liberally, holding that even bureaucratic government officials with days to act are under sufficient time pressure to warrant the application of the

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higher, intent-level threshold. Thus, the apparently innocuous distinction the Court drew between hasty and deliberative decisions may cut a wide swathe, denying liability for a wide range of reckless and deliberately indifferent government conduct.

7. Shockingly Strict

Another criticism of the shocks the conscience test is that it is simply too strict a test. As noted above, the test requires a finding that the conduct is beyond the bounds of all human decency and antithetical to the idea of organized society. Under the shocks the conscience test, only the most extreme and egregious conduct will be sufficient to trigger the protections of the Due Process Clause. The test thus permits an immense array of injurious conduct to take place outside the protection of the Fourteenth Amendment.

In practice, courts have rarely found that the conduct of state actors shocks the conscience. The Supreme Court has found conduct to be conscience-shocking in the Fourteenth Amendment sense only once, in Rochin, more than three decades ago. The circuit courts have been just as tight-fisted in their willingness to find that conduct shocks the conscience. Circuit courts have found that executive conduct shocked the conscience only in the most extreme of circumstances where a police officer raped a woman after pulling her over for a broken tail light, and where an individual was detained for fifty-seven days before his trial without a hearing. A requirement that a police officer undergo a penile plethysmograph as a condition of reinstatement also shocked the conscience of a circuit court.

On the other hand, judges on the First Circuit were not shocked by police officers' threats to kill a criminal suspect's wife and statements to the suspect's children that they would never see their father again if he was caught, nor were they

166. See Miller, 174 F.3d at 375-76.
167. See supra Part II.C.3.
168. See Rogers v. City of Little Rock, 152 F.3d 790 (8th Cir. 1998).
169. See Armstrong v. Squadrito, 152 F.3d 564 (7th Cir. 1998).
171. See Pittsley v. Warish, 927 F.2d 3 (1st Cir. 1991).
shocked by a campaign of police intimidation intended to
dissuade a property owner from evicting a police officer living
at a house without the owner’s permission, including threats,
insults, and pushing the property owner’s pregnant
daughter.172

Particularly in police-chase cases, the shocks the
conscience bar is particularly high. To establish conscience-
shocking conduct on the part of an officer in pursuit, an
individual must show that a police officer actually intended to
strike and injure a person. As the Third Circuit put it,
“where a police officer uses a police vehicle to terrorize a
civilian, and he has done so with malicious abuse of official
power shocking the conscience, a court may conclude that the
officers have crossed the constitutional line.”173 Absent proof
of such extreme conduct, no constitutional violation will be
found.

By limiting the protections of the Fourteenth
Amendment to conduct that “shocks the conscience,” the
Supreme Court has constitutionally immunized a broad
swathe of wrongful conduct by executive actors. The shocks
the conscience test is the Fourteenth Amendment’s version of
the “rational basis” test, under which nearly every instance of
government conduct, short of rape or months of unjustified
incarceration, will be found not to violate the Due Process
Clause. The wholesale removal of such a large chunk of
executive conduct from the protection of the Constitution
should have given the Court greater pause.

III. SCALIA’S SCATHING “DISSENT”

A. Justice Scalia’s Approach

Justice Scalia, joined by Justice Thomas, concurred in the
judgment of the Court but authored an acerbic opinion that
ransacked the majority’s analysis. Justice Scalia’s argument
struck at the very root of the majority opinion by questioning
one of the majority’s fundamental premises: that the analysis

172. See Cruz-Erazo v. Rivera-Montanez, 212 F.3d 617 (9th Cir. 2000).
173. Fagan v. City of Vineland, 22 F.3d 1296, 1308 (3d Cir. 1994) (citing
Shaare Tefila Congregation v. Cobb, 785 F.2d 538 (4th Cir. 1986)).
of substantive due process claims based on executive conduct is different from the analysis of such claims in the legislative context.

Justice Scalia essentially made a case for a unified theory of substantive due process by arguing that all substantive due process cases, those involving both legislative and executive conduct, should follow the analysis set forth in 1996 by the majority in *Washington v. Glucksberg*.

In *Glucksberg*, another "unanimous" yet extraordinarily divided decision, the Court was faced with a substantive due process challenge to a Washington state statute that criminalized assisted suicide. There, the majority endorsed a substantive due process analysis that has two major elements. First, the *Glucksberg* majority required a "careful description" of the asserted substantive due process right. What this means for Justice Scalia is that the asserted right is identified at the lowest level of generality possible.

Second, the *Glucksberg* majority required a determination of whether the asserted right, narrowly defined, is "deeply rooted in [our] Nation's history and tradition." The *Glucksberg* analysis thus involves an examination of statutes and laws, past official or governmental practices and their prevalence, and legal history to determine whether an activity has been historically protected.

The proper analysis to apply in *Lewis*, argued Justice Scalia, was the *Glucksberg* analysis, which asks "whether our

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175. See WASH. REV. CODE § 9A.36.060(1) (1994); see also 1854 Wash. Laws 78, 17 (stating every person deliberately assisting another in the commission of self-murder, shall be guilty of manslaughter).
176. See *Glucksberg*, 521 U.S. at 721.
177. For example, consider the Court's decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986), a substantive due process challenge to a Georgia anti-sodomy law. There, the majority defined the right narrowly, as the right to engage in sodomy. The right could easily have been articulated at a much higher level, as the right to conduct oneself as one chooses in the privacy of one's own home, or the right to privacy in deeply personal areas such as sex and marriage, both of which the Court has determined to be areas of privacy protected by the Constitution. See *Stanley v. Georgia*, 394 U.S. 557 (1969); *Griswold v. Connecticut*, 381 U.S. 479 (1965).
Nation has traditionally protected the right respondents assert."  Defining the right at issue in *Lewis* as the right to be free from "deliberate or reckless indifference to life in a high-speed automobile chase aimed at apprehending a suspected offender," Justice Scalia conducted a perfunctory review of Supreme Court cases and concluded that there was no support for the proposition that mid-level culpability is insufficient to trigger due process protections, particularly in police pursuit cases. Holding otherwise would "transform every tort committed by a state actor into a constitutional violation."

Justice Scalia accused the *Lewis* majority of attempting to circumvent the *Glucksberg* analysis by taking an approach similar to the one advocated by Justice Souter but rejected by the majority in *Glucksberg*. In a concurring opinion in *Glucksberg*, Justice Souter had offered an alternative substantive due process analysis that grew out of the phrase "implicit in the concept of ordered liberty." Instead of looking to particular laws or practices, Justice Souter argued in *Glucksberg* that the Court's substantive due process analysis should be guided by principles deduced from broad constitutional provisions, language in prior decisions, and historical context. Justice Souter named "liberty," "privacy," and "personal autonomy" as principles that had, in the past, been relied upon to trigger substantive due process review.

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180. *See id.*
181. *Id.* at 864 (quoting DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 202 (1989)).
184. *Id.*
185. *Id.* at 770.
186. *Id.* at 777.
According to Justice Scalia, Justice Souter's majority in *Lewis* resembled Justice Souter's discarded concurring opinion in *Glucksberg* in that it represented a "throwback to highly subjective substantive due process methodologies." Like Justice Souter's principle-based approach to substantive due process in *Glucksberg*, Justice Scalia argued, the shocks the conscience test itself results in arbitrary action by courts because it offers nothing but an amorphous standard that turns on the particular sensitivities of individual judges. Justice Scalia concluded, "I would reverse . . . not on the ground that petitioners have failed to shock my still soft voice within, but on the ground that respondents offer no textual or historical support for their alleged due process right."

**B. The Shortcomings of Scalia's Approach: Combining Legislative and Executive Action**

Justice Scalia's approach does not solve the shortcomings of the majority opinion in *Lewis* and, in fact, creates a new set of problems. Justice Scalia's criticisms of the shocks the conscience test were accurate but incomplete, and his novel effort to unify the substantive due process analysis for cases involving legislative and executive action is not only unsupported by precedent, it also has grave consequences in the executive setting that could decimate the application of the substantive aspects of the Fourteenth Amendment to the conduct of executive officials.

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189. *Id.* at 865 (Scalia, J., concurring).

190. The *Glucksberg* majority's analysis, combining a narrow definition of asserted rights with the historical approach, has an extraordinary limiting effect on new substantive due process claims. Writing for the majority in *Glucksberg*, Chief Justice Rehnquist stated that substantive due process protects only those rights that are deeply rooted in our nation's history and traditions. *See Glucksberg*, 521 U.S. at 710. Surveying the laws of the 50 states, as well as philosophical and cultural records, Rehnquist concluded that physician-assisted suicide had no roots in tradition and history, and therefore could not be considered a right protected by the Due Process Clause. *Id.* at 728. Three other Justices joined Rehnquist's majority without comment. In order to establish a new substantive due process right under the *Glucksberg* analysis,
There are serious problems with Justice Scalia’s argument. First, a review of precedent reveals that the
there would have to be evidence that the right, narrowly defined, has received protection throughout the nation's history—that is, there would have to have been laws on the books in at least a majority of the states protecting the conduct at issue, widespread government policies or practices allowing or protecting the activity, or other historical evidence, on a national scale, of society's acceptance or endorsement of the conduct. Put simply, the *Glucksberg* majority makes the recognition of new substantive due process rights virtually impossible—it is highly unlikely that a newly asserted right, narrowly defined, will survive the rigid historical inquiry that seems to require nothing short of longstanding laws in most states that protect the particular conduct at issue. Thus, the *Glucksberg* majority's analysis presents a nearly insurmountable hurdle to new substantive due process rights.

However, *Glucksberg*’s 9-0 vote was not nearly as clear as Scalia implies. In truth, *Glucksberg* was, like *Lewis*, a deeply divided decision with an unclear outcome. The hard blow to substantive due process inflicted by the majority in *Glucksberg* was softened by Justice O'Connor, who, in providing a necessary fifth vote for the majority opinion, noted that she voted with the majority only because the statute at issue did not infringe on the use of pain medication and “palliative care, even when doing so would hasten their deaths.” Id. at 738 (O'Connor, J., concurring). She did not believe the Court needed to reach the issue of “whether a mentally competent person who is experiencing great suffering has a constitutionally cognizable interest in controlling the circumstances of his or her imminent death.” Id. at 736. O'Connor all but stated that, were the circumstances of the case different, she would find a right to physician-assisted suicide. Such a right, however, would be antithetical to Rehnquist's historical exegesis, which found no such right. Providing the fifth vote to the slight *Glucksberg* majority favoring the tradition approach, O'Connor casts doubt on whether Rehnquist's tradition approach would indeed command a majority in subsequent substantive due process cases and suggests that the analysis set forth in the majority opinion in *Glucksberg* may have all the force of a plurality opinion.

Furthermore, there is an inherent flaw in the *Glucksberg* majority's logic. The majority looks to history and tradition to ascertain whether a right has received sufficient protection in the law and society to consider it “implicit in the concept of ordered liberty.” Id. at 721. In other words, to decide whether a right should be protected, the Court looks to whether it has been historically protected. Thus, under the *Glucksberg* majority, the Due Process Clause protects only those that are already protected. The *Glucksberg* majority relegates substantive due process to an unnecessary, irrelevant back-up role, and renders it virtually inoperable. In light of the tenuousness of support on the Court for the *Glucksberg* majority's tradition approach to substantive due process, Justice Scalia's heavy reliance on it may have been a bit over-enthusiastic.

Interestingly, the author of the *Glucksberg* majority, Chief Justice Rehnquist, did not sign on to Justice Scalia's concurrence in *Lewis*, and instead joined Justice Souter's majority opinion, severely undermining Justice Scalia's contention that the majority had adopted an approach rejected in *Glucksberg* and Justice Scalia's efforts to import *Glucksberg* into the *Lewis* analysis.
shocks the conscience test, and other tort-based tests such as deliberate indifference, have only been applied by the Court in executive action cases. Justice Scalia pointed to no cases in which the shocks the conscience test was applied in a legislative action case. In support of his argument that the shocks the conscience test has never been limited to executive action, Justice Scalia observed that "in fact, 'shocks-the-conscience' was recited in at least one opinion involving legislative action," United States v. Salerno. Justice Scalia's reliance on Salerno was mistaken. First, the Court did not apply the shocks the conscience test in Salerno, it merely mentioned it in a general discussion of the Fourteenth Amendment's protections: "This Court has held that the Due Process Clause protects individuals against two types of government action. So-called 'substantive due process' prevents the government from engaging in conduct that 'shocks the conscience,' or interferes with rights 'implicit in the concept of ordered liberty.'"

This was the only reference to the shocks the conscience test in Salerno. The case itself involved legislative conduct in which two criminal defendants argued that the Bail Reform Act's authorization of pretrial detention on the basis of dangerousness to the community violated the Fourteenth Amendment. The Salerno majority applied a version of intermediate scrutiny and held that the government had a compelling interest in preventing persons who pose a danger to the community from being released, and that the Act was narrowly tailored to further that interest. Thus, the only case Justice Scalia could find to support his argument that the shocks the conscience test had been applied to legislative action did no such thing.

In fact, Salerno undermines Justice Scalia's argument because the majority in Salerno drew the very distinction he resists. The Salerno majority separated the protections of the Due Process Clause into two categories: (1) against

192. Id. at 746.
193. See id. at 741.
194. See id. at 751.
government conduct that shocks the conscience, and (2) against the interference with rights implicit in the concept of ordered liberty. This is precisely the dichotomy the majority drew in Lewis. Justice Scalia, on the other hand, argued that there is only one possible category of substantive due process cases, the latter.

The Lewis majority adopted sub silentio the distinction drawn in Salerno holding that, consistent with precedent, the shocks the conscience test applies to executive action, and the "implicit in the concept of ordered liberty" test applies to legislative matters. The problem with the Lewis majority is that it failed to explain and justify this distinction adequately. In order to soundly defeat Justice Scalia's criticism, the majority needed to offer a compelling explanation as to why executive action required a substantive due process analysis different from that applied in legislative action. But what should have been a bang was a whimper because the majority's explanation consisted of one sentence buried in a footnote: "Executive action challenges raise a particular need to preserve the constitutional proportions of constitutional claims, lest the Constitution be demoted to what we have called a font of tort law." It was not an explanation, but a tautology, carrying with it about as much meaning as Justice Marshall's oft quoted non sequitur in McCulloch v. Maryland that "it is a constitution we are expounding." The explanation begs the very question it seeks to answer.

The Lewis majority had plenty of compelling reasons for an analytical distinction between substantive due process in the executive and legislative settings. First, the Lewis majority had precedent on its side. While Justice Scalia argued that there is no case holding that the shocks the conscience test applies only to executive action, he did not address the fact that the shocks the conscience test originated in a quintessential executive action case involving the use of police force (Rochin), and that all the cases in which the

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195. Lewis, 523 U.S. at 847 n.8.
197. Id. at 407.
shocks the conscience test was invoked by the Court involved only executive action.\textsuperscript{198} Thus, Justice Scalia’s invocation of precedent to support his unified theory of substantive due process backfired; the prior cases, even those Justice Scalia cited, stack up against his contention.

Second, the \textit{Lewis} majority may have refrained from explaining why the shocks the conscience test applies to executive action challenges because the proposition is so obvious. According to the Court in \textit{Lewis}, shocks the conscience is a culpability-based standard that turns on the state of mind of the actor. In certain circumstances, intent to injure will shock the conscience and in others, deliberate indifference will suffice. Such a standard is inappropriate to apply to legislative action because it is difficult, if not impossible, to ascribe traditional levels of culpability to a legislature. Shocks the conscience requires a type of “legislative intent” that is nearly impossible to determine. It would make little or no sense to ask whether a particular law was passed with intent to injure or with deliberate indifference to a person’s constitutional rights.

This leads us to the most important problem with Scalia’s argument. The shocks the conscience test and the \textit{Glucksberg} analyses each come at the Fourteenth Amendment from different directions. Where \textit{Glucksberg} seeks to identify discrete substantive rights embedded in history and tradition, the shocks the conscience test straddles the line between protecting procedural and substantive rights by asking whether executive conduct was carried out in such an egregious manner as to offend a fundamental sense of justice. Thus, it could be argued that the shocks the conscience test is more consistent with the Due Process Clause because it simply protects against executive action of any kind that takes place in a manner that is completely inconsistent with notions of due process, that is, arbitrary, malicious, and offensive executive action. Put another way, the right protected under the shocks the conscience test is the right not to be subjected to government conduct that shocks the

conscience. It does not protect some other discrete and specific right that we must search through dusty historical volumes to unearth.

The reason that distinct approaches are warranted is that legislative and executive action is inherently different. Executive action is less deliberate than legislative action. Executive action involves a different kind of decision-making that is often highly individualized and particularized, in contrast to legislative consensus building and generality. Executive action is often a one-shot affair not involving the lasting sort of burden on one's constitutional rights that a statute does. And executive officials, unlike legislators, require some level of deference in order to effectively perform their functions. Thus, executive action demands an analysis that is different from legislative action. It demands an analysis that accounts for the distinctive nature of executive action by providing straightforward yet deferential guidance to executive officials who, for the most part, have neither the time nor the resources to consult those dusty historical volumes to ascertain whether a particular right is deeply rooted in our nation's history. The shocks the conscience test apparently was intended to provide the kind of analysis most appropriate for executive action. It is, at root, a gut-level test that provides some deferential guidance to executive officials short of requiring that officials and agencies know and understand whether particular rights are deeply rooted in the nation's history and traditions.


200. This takes us back to the legislative-executive distinction. Procedural due process violations arise almost exclusively out of executive actions; actions by executive officers taken without notice or without providing a citizen an opportunity to be heard. Legislative actions rarely give rise to procedural due process violations because the legislative process is by its very nature a procedure. Legislation, rather, most often impinges on substantive rights, and therefore the challenges to legislation are not based on the procedure by which they are passed, but the effect a law has on a person's constitutional rights. The inherent differences between legislative and executive action, are reflected in the substantive due process analysis. As discussed above, substantive due process in the executive setting has a procedural bent to it, because executive action inherently involves less process than legislative action. Thus, action by an executive officer often shocks the conscience because it is arbitrary, not
noted *supra*, the shocks the conscience test has serious shortcomings, but it is far more appropriate in the executive context than the *Glucksberg* history and tradition analysis.

Justice Scalia’s approach in *Lewis* has the attractive quality of reducing the substantive due process inquiry into one central analysis that applies in all cases. However, the major problems with the approach are that it is inappropriate in light of the substantial differences between legislative and executive action and unsupported in case law.

C. The Majority’s Rejoinder to Scalia: The Footnote

In a lengthy footnote, the *Lewis* majority confronted Justice Scalia’s argument that the shocks the conscience test is inappropriate, and that *Glucksberg*’s history/tradition analysis is the alpha and omega for all substantive due process cases.

The *Lewis* majority distinguished *Glucksberg* on the basis that *Lewis* involved a due process challenge to executive action, while *Glucksberg* addressed a substantive due process violation arising out of legislative conduct.\(^{201}\) Executive action, the majority wrote, “presents an issue antecedent to” the history/tradition question addressed in *Glucksberg*.\(^{202}\)

\[E\]xecutive action challenges raise a particular need to preserve the constitutional proportions of constitutional claims, lest the Constitution be demoted to what we have called a font of tort law. Thus, in a due process challenge to executive action, the threshold question is whether the behavior of the governmental officer is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience. That judgment may be informed by a history of liberty protection, but it necessarily reflects an understanding of traditional executive behavior, of contemporary practice, and of the

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\(^{201}\) *See* County of Sacramento v. Lewis, 523 U.S. 833, 847 n.8 (1998).

\(^{202}\) *Id.*
standards of blame generally applied to them. Only if the necessary conditions of egregious behavior were satisfied would there be a possibility of recognizing a substantive due process right to be free of such executive action, and only then might there be a debate about the sufficiency of historical examples of enforcement of the right claimed, or its recognition in other ways. In none of our prior cases have we considered the necessity for such examples, and no such question is raised in this case.203

The meaning of this footnote is a mystery. On one extreme, it could be argued that the footnote constitutes a nearly complete capitulation to the reasoning of Justice Scalia's concurrence. The footnote appears to relegate the shocks the conscience test to a mere "antecedent" and "threshold" test and to concede to Justice Scalia's argument that the root inquiry in all substantive due process cases is whether the asserted right is rooted in the nation's legal history and traditions. Thus interpreted, the footnote makes the majority's approach to substantive due process cases involving executive action even more restrictive than Justice Scalia's approach in that plaintiffs must not only show that the state actor's conduct shocked the conscience, but also that the right asserted by the plaintiff is rooted in the nation's history and traditions. This poses a nearly insurmountable hurdle for plaintiffs asserting substantive Fourteenth Amendment violations by executive actors, particularly in the realm of high-speed police chases.

On the other hand, the footnote could be interpreted in the context of the majority opinion as a whole, which treats the shocks the conscience test as the sum and substance of the analysis required under the Fourteenth Amendment. Nowhere in the text or in any other footnote is there a reference to an additional inquiry beyond the shocks the conscience test. This suggests that the observation was not essential to the holding, and therefore was dicta. Moreover, the conditional language of the footnote—that shocks the conscience "may" be informed by history and tradition; there "might" be a debate about history and tradition after the

203. Id.
shocks the conscience test was satisfied—suggests that Justice Souter was not conceding Justice Scalia's point. Perhaps the footnote was meant to secure a majority for Justice Souter's opinion.

Regardless of what the majority intended to say with this footnote, it lends the opinion to an interpretation that could render the shocks the conscience test essentially moot. By characterizing shocks the conscience as a "threshold" test and possibly conceding Justice Scalia's point that the Glucksberg analysis governs all substantive due process cases, the footnote makes it possible for a lower court to bypass the shocks the conscience test altogether by assuming the answer to the threshold question of whether the conduct shocks the conscience and proceeding directly to the history and tradition inquiry set forth in Glucksberg. Lower courts often take such an approach in qualified immunity cases, assuming that a constitutional violation has occurred and proceeding directly to the question of whether the right was clearly established such that a reasonable person in the defendant's shoes should have known the right would be violated by his or her actions.\textsuperscript{204} Thus, footnote eight, particularly when coupled with Justice Kennedy's concurrence,\textsuperscript{205} creates a way for lower courts to do an end run around the shocks the conscience analysis set forth by the majority and apply the approach endorsed by Justice Scalia.

At any rate, the footnote muddies the waters of the opinion significantly. It could be argued that the footnote, by failing to defend the shocks the conscience test as the alpha and omega of the analysis in substantive due process cases, created an opening for Justice Kennedy's concurrence, which, as discussed below, compounded the confusion in Lewis.

IV. KENNEDY'S CONFUSING CONCURRENCE

While five other justices joined Justice Souter's majority

\textsuperscript{204} This assume-the-constitutional-violation approach is precisely the approach Justice Stevens recommends in his concurrence in Lewis as a way of avoiding the underlying constitutional adjudication in Lewis altogether. See id. at 859 (Stevens, J., concurring).

\textsuperscript{205} See infra Part IV.
opinion, three of them wrote concurring opinions that articulated their reasons for joining the majority. The most troublesome of these was Justice Kennedy's. Joined by Justice O'Connor, Justice Kennedy attempted to find a comfortable seat on the fence between the majority opinion and Justice Scalia's concurrence. However, in trying to span the chasm between the majority and Justice Scalia, Justice Kennedy's opinion attempted too much and succeeded only in bringing even more confusion to an already divided decision.

Justice Kennedy began with a rousing defense of substantive due process jurisprudence, pronouncing, "It can no longer be controverted that due process has a substantive component." Justice Kennedy also found that the facts in Lewis clearly implicated the Fourteenth Amendment, as the state was a causal agent in the taking of a life.

"The Court decides this case," Justice Kennedy wrote, "by applying the 'shocks the conscience' test first recognized in Rochin v. California. The phrase has the unfortunate connotation of a standard laden with subjective assessments. In that respect it must be viewed with considerable skepticism." However, despite the weaknesses of the shocks the conscience test, Justice Kennedy observed that it "can be used to mark the beginning point in asking whether or not the objective character of certain conduct is consistent with our traditions, precedents, and historical understanding of

206. Rehnquist's concurrence was the most harmless of the bunch, simply agreeing with the majority's choice of shocks the conscience as the proper standard to be applied in substantive due process cases. Justice Stevens, who did not join in the majority's opinion, argued that the Court should avoid difficult constitutional questions when presented with a qualified immunity defense, and instead assume that a constitutional violation has been stated and proceed to the qualified immunity analysis of whether the asserted right was clearly established at the time of the alleged violation. Justice Breyer concurred in the majority opinion, but agreed with Stevens that lower courts should be afforded the choice of avoiding "difficult or poorly presented" constitutional questions by proceeding directly to a qualified immunity analysis.


209. Lewis, 523 U.S. at 857 (Kennedy, J., concurring).
the Constitution and its meaning. Justice Kennedy went on to note that history and tradition, too, are only starting points in most substantive due process cases, and that substantive due process inquiries must also take into account "objective" elements, such as the majority's "intent to injure" requirement, which ensures that the analysis includes consideration of the necessities of law enforcement.

Justice Kennedy's opinion is problematic from a substantive standpoint because it attempts to strike a middle ground between a majority opinion and a concurrence that are simply too far apart. The majority and Justice Scalia endorse divergent analyses, one that assesses state actors' conduct on a spectrum of intent and culpability and another that measures state actors' conduct against legal history and tradition. Justice Kennedy strains to meld the two analyses but ultimately ends up complicating them and, consequently, confusing the courts below.

While Justice Kennedy signed on to the majority's shock the conscience standard, he demonstrates clear sympathies for Justice Scalia's historical approach, because the latter provides the objectivity Justice Kennedy found lacking in the majority opinion. In fact, Justice Kennedy's opinion appears to be more closely aligned with Justice Scalia's than the majority. Unlike the majority, which, for the most part, saw the shocks the conscience test as the sum of the analysis of substantive due process claims in the executive context, Justice Kennedy considered shocks the conscience to merely "mark the beginning point in asking whether or not the objective character of certain conduct is consistent with our traditions, precedents, and historical understanding of the Constitution and its meaning."

210. Id.
211. Id. Justice Kennedy's affinity for Justice Scalia's approach is obvious, as he continued, "As Justice Scalia is correct to point out, we so interpreted the test in Glucksberg. In the instant case, the authorities cited by Justice Scalia are persuasive, indicating that we would contradict our traditions were we to sustain the claims of the respondents." Id. at 858. He also wrote, "I share Justice Scalia's concerns about using the phrase 'shocks the conscience' in a manner suggesting that it is a self-defining test." Id.
212. Id. This contrasts with footnote eight of the majority opinion, which focuses almost exclusively on the shocks the conscience test and barely
Thus, Justice Kennedy attempts to marry the majority opinion and Justice Scalia's concurrence in the judgment into one overarching analysis by relegating the shocks the conscience analysis to a minimal threshold test and treating Justice Scalia's history and tradition approach as the meat of the inquiry. In doing so, Justice Kennedy holds would-be plaintiffs to a more exacting burden than Justice Scalia or the majority because, under Justice Kennedy's approach, a plaintiff asserting a violation of a substantive due process right by an executive actor would not only have to establish that the complained-of conduct shocks the conscience but also would have to clear the additional and even more daunting hurdle of proving that statutes and judicial decisions have historically frowned upon such conduct.

Justice Kennedy's approach would not be nearly so problematic if it was simply the individual musings of a member of the majority on his interpretation of the Court's holding. But Justice Kennedy's concurring opinion holds votes crucial to the majority, and thus it must be taken seriously. Five other justices joined Justice Souter's majority opinion. However, Justice Kennedy's concurrence reflects the views of two of the majority's six signees: his and Justice O'Connor's. Because Justice Kennedy's opinion constitutes a "swing" concurrence, lower courts may view it as persuasive. Furthermore, because Justice Kennedy's "middle-ground" concurrence pays homage to Justice Scalia's concurrence in the judgment and adopts an approach that is closer in substance to Justice Scalia's than it is to the majority's, Justice Scalia's concurrence also may be viewed as persuasive by the lower courts. Justice Kennedy's opinion thus transforms Justice Scalia's "dissent" from the Court's reasoning into a competing analysis and consequently, severely undermines the authority of the majority opinion.

mentions the Glucksberg test.


214. See id.
V. LET CONFUSION REIGN

The difficulty posed by Lewis is that it leaves lower courts guessing as to the proper analysis to apply in substantive due process claims arising out of executive action. Lower courts may effectively choose among the majority, Justice Kennedy's concurrence, or Justice Scalia's concurrence, in deciding whether a due process violation has occurred.

The confusion among the Lewis opinions is no idle concern. At least one circuit has explicitly adopted Justice Kennedy's concurrence as the proper approach to substantive due process claims against executive officials. In Armstrong v. Squadrito, the Seventh Circuit considered the case of a plaintiff who had voluntarily turned himself in to authorities pursuant to a warrant that had been issued when he failed to appear in court for a hearing related to his child support payments. Due to clerical errors and sheriff's department procedures, the plaintiff was locked up for fifty-seven days, despite the fact that he should have been held no longer than one day. Plaintiff filed a § 1983 claim, asserting a violation of his substantive rights under the Fourteenth Amendment's Due Process Clause.

In framing its analysis, the Seventh Circuit panel turned to Lewis, which had been handed down just a few months earlier. The panel described Lewis as a "vigorous debate over how to determine whether substantive due process confers a particular right." First, the panel described Justice Scalia's "dissent," then the majority opinion, and finally Justice Kennedy's concurrence. The court waffled, approving of Justice Scalia's historical approach while deferring to the majority's shock the conscience test. The court stated, "[g]iven the divergence on this issue, we will attempt to strike a middle ground by following Justice Kennedy's schema."

Further, the Armstrong panel got the Justice Kennedy

215. 152 F.3d 564 (7th Cir. 1998) (the panel was comprised of judges Cummings, Bauer, and Evans).
216. Id. at 571.
217. See id. (In an ironically accurate slip, the panel mislabeled Scalia's concurrence in the judgment as a dissent).
218. Id.
analysis wrong. The panel conducted the analysis backward; it did not begin its analysis with the shocks the conscience analysis, as mandated by Justice Kennedy, but instead examined “precedent, long-standing state and federal statutes, and specific textual rights” in an effort to determine whether there was a due process right “protecting against prolonged confinement.”

Relying on the analysis applied in a 1985 case with similar facts, the circuit court panel concluded that the right asserted by the plaintiff was historically based. The court then proceeded to apply the “shocks the conscience” test and concluded that the proper level of culpability under the shocks the conscience test was “deliberate indifference.” The panel concluded that the defendants were deliberately indifferent to the plaintiff’s rights, and that the indifference shocked the conscience.

219. Id. at 570. The Armstrong panel claimed to be adhering to Justice Kennedy’s opinion. In doing so, the panel stated:

[We will organize our thoughts as follows: First, we examine whether the Due Process Clause protects against an extended detention, without an appearance before a magistrate, following an arrest pursuant to a valid bodily attachment. Second, we will explore whether the defendants’ conduct offended the standards of substantive due process. And third, we will consider whether the totality of the circumstances shocks the conscience.

Id.

However, Justice Kennedy’s inquiry proceeds in precisely the opposite manner. The shocks the conscience test is, according to Justice Kennedy, the “beginning point.” County of Sacramento v. Lewis, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring). After a decision is made as to whether particular conduct shocks the conscience, then the court moves to an inquiry into the historical nature of the asserted right. See id.

220. Id. at 571.

221. See Coleman v. Frantz, 754 F.2d 719 (7th Cir. 1985). In Coleman, the plaintiff asserted a substantive due process violation arising out of his detention pursuant to a criminal arrest warrant. The Coleman court conducted an historical analysis of the right protecting against prolonged confinement and found it to be sufficiently historically rooted to be of constitutional stature.

222. Armstrong, 152 F.3d at 576.

223. The Armstrong panel held that the particular conduct that violated the plaintiff’s rights in Armstrong was the jail’s “will call system,” under which the jail would take no action once a prisoner was incarcerated unless it heard from the court. See id. at 579. Thus, a prisoner whose court file was lost or misplaced could be incarcerated indefinitely, and the jail had no policy of reviewing prisoners’ status to ensure that a prisoner was not detained too long.
The problems presented by Justice Kennedy's concurrence were realized in *Armstrong*. The panel (reasonably, in my opinion) came to the conclusion that the majority opinion was not worthy of complete deference in light of Justice Kennedy's concurrence. Also, bolstered by Justice Scalia's strong concurrence in the judgment, the panel attempted to meld the approaches of the majority and Justice Scalia, just as Justice Kennedy suggested, with disastrous results. Furthermore, the panel appeared to be confused by the very schema it sought to be guided by, as it applied Justice Kennedy's analysis in reverse, thus exacerbating the already confusing status of *Lewis*.

A second problem with the confusion in *Lewis* is that courts are tempted to ignore *Lewis* altogether. The Seventh Circuit panel virtually ignored the *Lewis* majority in a later case, *Khan v. Gallitano*.\(^2\) While the facts of *Khan* are somewhat confusing,\(^2^2\) the conduct at issue was that of officials in a municipality who allegedly used coercive tactics while negotiating the condemnation of a particular piece of property. Despite the fact that the substantive due process violation asserted in that case unquestionably involved an executive act, to which *Lewis* by its very terms applied, the *Khan* panel inexplicably applied the historical inquiry set forth in *Glucksberg*, calling it the "prevailing view." Almost as an afterthought, the panel noted, "Although the Court in *Lewis* used a substantially different analysis than it had in *Glucksberg*, this does not mean that the *Glucksberg* analysis

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\(^2\) See id. at 578.
\(^2^2\) 180 F.3d 829 (7th Cir. 1999) (sitting on the panel were judges Bauer, Manion, and Rovner).

\(^2^2^5\) *Khan* was a suit brought by an attorney who sued city officials for settling a case out from under her. The controversy swirled around the refusal of a mall owner to release a tenant, Jewell Food Stores, from a lease or allow it to sublet. Jewell sued the owner, but lost in court, and the mall owner then turned around and sued Jewell. City officials stepped in and initiated proceedings to condemn the mall in order to force the mall owner to drop his suit against Jewell. After negotiations with city officials, the mall owner agreed to drop the suit against Jewell. Khan, the plaintiff, was the mall owner's attorney in the suit against Jewell, and was not apprised of the negotiations that led the mall owner to drop the suit. Khan alleged that city officials coerced her client, the mall owner, to dismiss the action she had filed on the mall owner's behalf. *See id.* at 830-33.
does not apply here.\textsuperscript{226} The panel reasoned that \textit{Lewis} did not apply to the facts at issue in \textit{Khan} because \textit{Lewis} involved "a high speed chase where government officials had to make split-second decisions."\textsuperscript{227} Thus, \textit{Lewis} "has no resemblance to the situation in this case."\textsuperscript{228} The panel went on to limit \textit{Lewis} to its facts, holding "that the \textit{Glucksberg} fundamental rights analysis generally applies in substantive due process cases, but for the particular circumstances such as the high-speed chase in \textit{Lewis} or pre-trial detention, the specialized analysis adopted for those circumstances would apply."\textsuperscript{229}

\textit{Khan}'s treatment of \textit{Lewis} is inexplicable. There is absolutely nothing in the \textit{Lewis} majority or in any other opinion written by any other justice in \textit{Lewis} that limits it to the particular facts of high-speed police chases.\textsuperscript{230} To the contrary, \textit{Lewis} explicitly sets forth the analysis for non-police chase cases involving executive action. \textit{Lewis} was not merely a case about the proper analysis to apply to police chases, it was a case that sought to define the proper analysis for all substantive due process claims arising out of executive action. \textit{Khan} was a substantive due process claim arising out of executive action, and thus, the Seventh Circuit should have adhered to the \textit{Lewis} analysis and applied the shocks the conscience test. The only thing shocking about the Seventh Circuit's analysis in \textit{Khan} was its utter disregard for the holding in \textit{Lewis}.

Moreover, to the extent that the \textit{Khan} panel tried to apply \textit{Lewis}, it did so incorrectly. Having already concluded under the \textit{Glucksberg} analysis that no substantive due

\begin{thebibliography}{9}
\bibitem{226} Id. at 836.
\bibitem{227} Id.
\bibitem{228} Id.
\bibitem{229} Id.
\bibitem{230} To the contrary, there are numerous cases extending \textit{Lewis} beyond the scope of police pursuits. \textit{See}, \textit{e.g.}, Moreland v. Las Vegas Metro. Police Dept., 159 F.3d 365 (9th Cir. 1999) (police officer shooting bystander in gunfight); Schaefer v. Goch, 153 F.3d 793 (7th Cir. 1998) (police officer shooting bystander in stand-off with suspect); Medeiros v. O'Connell, 150 F.3d 164 (2d Cir. 1998) (bystander shot by police officer pursuing suspect who had commandeered a school van); Radecki v. Barello, 146 F.3d 1227, 1231-32 (10th Cir. 1998) (bystander shot when officer requested his intervention in struggle with suspect).
\end{thebibliography}
process violation had occurred, the panel stated that "we would reach the same conclusion whether we ask if the defendants’ conduct shocks our conscience or if the defendants violated a fundamental right deeply rooted in our tradition and history."\textsuperscript{231} A cursory review of the allegations led the panel to conclude that the defendants' conduct did not shock the conscience. The Khan approach, however, ignored the Lewis majority's holding that a lower level of culpability, "deliberate indifference," is the proper standard when the defendants have time to deliberate, as was certainly the case in Khan. The panel, however, made no mention of deliberate indifference and appeared to apply the shocks the conscience test oblivious to the guidance supplied by the majority in Lewis.

The most plausible reason for the Seventh Circuit's holding in Khan is that the panel, emboldened by the opinions of Justice Kennedy and Justice Scalia, chose to ignore the Lewis majority altogether. Justice Scalia, and, to a lesser extent, Justice Kennedy, adopted the analysis set forth in Glucksberg as the core of all substantive due process inquiries, and the Khan panel, therefore, may have decided that Glucksberg offered a way to circumvent Lewis altogether.

The Fourth Circuit grappled with Lewis in Hawkins v. Freeman.\textsuperscript{232} The plaintiff in Hawkins was a convicted felon serving out a fifty-year sentence and was prematurely paroled by mistake and then reincarcerated when the blunder was discovered twenty months later. The plaintiff brought a habeas action under 28 U.S.C. § 2254, claiming that his reincarceration violated his substantive rights under the Due Process Clause. A divided panel of the Fourth Circuit held that the reincarceration constituted a substantive due process violation. After a hearing en banc, the Fourth Circuit reversed the panel and held that no substantive due process

\textsuperscript{231} Khan, 180 F.3d at 836. This observation by the Khan court reveals a failure to closely read the Lewis decision, because it implies that the Supreme Court in Lewis presented a choice between the shocks the conscience test and the Glucksberg history and tradition analysis. As discussed above, the fairest reading of the Lewis decision is that shocks the conscience is a threshold test to the Glucksberg analysis; the two are sequential, not mutually exclusive.

\textsuperscript{232} 195 F.3d 732 (4th Cir. 1999).
In approaching the question of whether the executive act of revoking the plaintiff's parole and returning him to prison constituted a violation of his substantive due process rights, the Fourth Circuit appeared to use footnote eight of the *Lewis* majority opinion to justify the application of Justice Kennedy's analysis. Identifying the shocks the conscience test as a "threshold question," the court described the controversy among the majority, Justice Scalia, and Justice Kennedy, and noted that Justice Kennedy appeared to see the shocks the conscience test as a beginning point to the kind of historical inquiry demanded by Justice Scalia and *Glucksberg*. Noting that the *Lewis* majority "seemed not to require this," the Fourth Circuit nonetheless concluded that "courts seeking faithfully to apply the *Lewis* methodology in executive act cases properly may look to history for whatever it may reveal about traditional executive practices and judicial responses in comparable situations by way of establishing context for assessing the conduct at issue." The Fourth Circuit bolstered this conclusion by seizing on the reference in footnote eight of the *Lewis* majority to help understand "traditional executive behavior" in assessing whether particular conduct shocks the conscience.

Thus, under the Fourth Circuit's understanding of *Lewis*, the shocks the conscience test is immediately transformed into an investigation of history and tradition just as Justice Scalia argued in his concurrence. While the Fourth Circuit ultimately found that history and traditional practice were unhelpful in determining whether the state conduct shocked the conscience, the analysis appears to invoke history and tradition to a far greater degree than what was contemplated by the majority in *Lewis*. Footnote eight and Justice Kennedy's concurrence appear to have been major factors in the Fourth Circuit's misapplication of *Lewis*.

The Fifth Circuit, too, relied heavily on footnote eight in holding that the substantive due process analysis set forth in

233. *See id.* at 738 n.1.
234. *Id.* at 739.
235. *See id.* at 742.
Lewis requires a two-step analysis: (1) a determination of whether the conduct shocked the conscience, and (2) “whether there exists historical examples of recognition of the claimed liberty protection at some appropriate level of specificity.”

There are indications from other circuits that the opinions of Justices Kennedy and Scalia are influencing decisions in substantive due process cases. Thus, Armstrong, Khan, and Hawkins may be just the beginning of the circuit courts' understandably divergent interpretations and applications of Lewis.

VI. A DELIBERATE SOLUTION

As the foregoing analysis demonstrates, lower courts confront a serious challenge in attempting to solve the riddle of Lewis. Even more difficult, however, is the process of attempting to unravel the legal tangle Lewis has created. A few observations might point the way.

First, the shocks the conscience test in Lewis was a disaster. Regardless of whether the Court used the test as it was originally conceived, as a measure of the nature of the conduct at issue, or whether it piggybacks on traditional common law concepts of culpability as it did in Lewis, the test is confusing and misleading and abandoning it would greatly alleviate the problems of substantive due process.

Second, there must be more clarity as to the relationship between Lewis and Glucksberg. Is the shocks the conscience test an essentially superfluous threshold inquiry, or is it something more? Is Justice Scalia correct in arguing that the Glucksberg history and tradition analysis is the root of all substantive due process inquiries? Does a plaintiff who overcomes the hurdle of proving that executive conduct shocked the conscience then also have to prove that the

236. Morris v. Dearborne, 181 F.3d 657, 668 (5th Cir. 1999) (concluding that “a teacher's fabrication of sexual abuse against a student's father shocks the contemporary conscience.”).

237. See, e.g., Miller v. City of Philadelphia, 174 F.3d 768 (3d Cir. 1999) (using Justice Kennedy's concurrence to characterize the holding of the Supreme Court in Lewis; focusing in particular upon the shocks the conscience test as the beginning point of an inquiry into whether certain conduct is consistent with the history and tradition of American society).
conduct has been proscribed by laws or norms throughout American history? By leaving these questions unanswered in Lewis the Court only caused more problems for itself down the line.

Finally, there must be another standard to replace the shocks the conscience test. One could argue that that standard is the deliberate indifference standard, which is a clear measure of culpability with a far more reliable constitutional pedigree than shocks the conscience. The Supreme Court could have avoided the problems of Lewis by simply adopting the strict test of deliberate indifference for all substantive due process cases involving executive conduct. Instead, the Court relegated deliberate indifference to a subpart of the shocks the conscience test and restricted its application to circumstances where deliberation would be possible. A close look at the deliberate indifference test reveals that it would have better served the Court’s purposes in Lewis had it been applied across the board to all cases involving executive action.

A. The Test of Indifference

Deliberate indifference is a high level of culpability, the highest short of actual intent. Deliberate indifference requires a showing of (1) a serious risk of harm; (2) defendant’s actual knowledge of (or, perhaps, willful blindness to) that elevated risk; and (3) defendant’s failure to address that known, serious risk. In this incarnation, deliberate indifference is a formidably demanding standard, requiring plaintiffs to prove a state actor’s actual knowledge of a serious risk and indifference to that risk in order to prevail. In that formulation, deliberate indifference had served with distinction in the Eighth Amendment context. It has offered far more clarity and simplicity than the shocks the conscience test. Despite all these advantages, the Lewis Court inexplicably abandoned the deliberate indifference test in favor of the confusing shocks the conscience test.

238. See Manarite v. City of Springfield, 957 F.2d 953, 956 (1st Cir. 1992).
239. As discussed later, there are two basic versions of deliberate indifference: objective and subjective.
Intended to occupy the large and unpredictable terrain between negligence and intent, deliberate indifference has been applied by courts in the Fourteenth Amendment arena and in other contexts without the severe controversy generated by the shocks the conscience test. Most importantly, deliberate indifference provides a minimum threshold of culpability that is more consonant with the Court's approach to substantive due process than shocks the conscience.

B. The Background

Deliberate indifference made its constitutional debut before the Supreme Court in \textit{Estelle v. Gamble},\textsuperscript{240} where the Court considered the complaint of a prisoner who claimed that prison doctors and officials had violated his rights under the Eighth Amendment by failing to provide adequate medical care. The court held that the prisoner had not adequately stated his claim because he had alleged mere negligence and accident. To survive Eighth Amendment scrutiny, the Court held that a complaint "must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs."\textsuperscript{241}

The \textit{Estelle} majority did not elaborate on what constituted deliberate indifference, but one thing was clear: deliberate indifference was intended to capture a level of culpability that was greater than negligence, but less than intent.\textsuperscript{242} In the years after \textit{Estelle}, circuit courts grappled with the precise definition of deliberate indifference. The courts seemed to split between two different approaches to defining deliberate indifference. The first and most popular approach equated deliberate indifference with the common law tort concept of reckless disregard, under which a person is reckless if she believes, or reasonably should believe, that her conduct is very likely to result in harm.\textsuperscript{243} The defining

\textsuperscript{240} 429 U.S. 97 (1976).
\textsuperscript{241} Id. at 106.
\textsuperscript{242} See id.
\textsuperscript{243} This was the approach of the Eleventh, Tenth, and First Circuits. See Taylor v. Ledbetter, 818 F.2d 791, 815-16 (11th Cir. 1987) (relying on the Restatement (Second) of Torts in concluding that deliberate indifference
feature of this test is its objectivity and use of the “reasonable person” standard to assess an individual’s culpability. The second approach was to borrow the concept of criminal recklessness. The essence of criminal recklessness is that it requires subjective proof of a conscious disregard of the risk of harm or evidence that an act is so dangerous that the defendant’s knowledge of the risk can be inferred.

The Supreme Court clarified the meaning of deliberate indifference in Farmer v. Brennan, another Eighth Amendment case. There, the Court considered a

requires a showing “that the defendants either had actual knowledge of a substantial risk or had knowledge of facts that would indicate this risk to any reasonable person”); Berry v. City of Muskogee, 900 F.2d 1489, 1495-96 (10th Cir. 1990) (holding that an Eighth Amendment violation occurs when an official “disregards a known or obvious risk that is very likely to result in the violation of a prisoner’s constitutional rights”); Germany v. Vance, 868 F.2d 9, 17-18 (1st Cir. 1989) (holding that common law tortious recklessness could constitute a violation of the Fourteenth Amendment’s Due Process Clause). The Ninth Circuit held that gross negligence (“the want of even scant care or an extreme departure from the ordinary standard of conduct”) could be sufficient to give rise to a constitutional violation. See Fargo v. City of San Juan Bautista, 857 F.2d 638, 641-42 (9th Cir. 1988).

244. See MODEL PENAL CODE § 2.20(2)(c):
A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.

245. The Seventh Circuit embraced criminal recklessness as the definition of deliberate indifference in Eighth Amendment cases in Duckworth v. Franzen, 780 F.2d 645, 652 (7th Cir. 1985). The Seventh Circuit referred to the recklessness required to prove second-degree murder, i.e., a defendant choking a victim with the intent to harm but not kill, and the victim dies. See id. This approach was criticized by the Tenth Circuit in Berry, where the court of appeals advocated the application of common law tort recklessness and noted that the Seventh Circuit had chosen the highest level of criminal recklessness possible. See Berry, 900 F.2d at 1495 n.7.


247. However, it is unclear from Farmer which approach ultimately wins out. See Heather M. Kinney, The “Deliberate Indifference” Test Defined, 5 TEMP. POL. & CIV. RTS. L. REV. 121 (1995). On one hand, the Court repeatedly stated that it was setting forth a subjective test. See, e.g., Farmer, 511 U.S. at 845, 848. On the other hand, the Court observed that in some circumstances, “a factfinder may conclude that a prison official knew of a substantial risk from
transsexual prisoner's claim that prison officials violated the Eighth Amendment by placing the prisoner in the general population, where the prisoner was beaten and raped by another inmate. Plaintiff argued that the objective test of deliberate indifference (criminal recklessness), which the Court used in Canton v. Harris\(^\text{248}\) to determine whether a municipality could be liable for a constitutional violation, should also be used to determine whether a constitutional violation has in fact occurred. In a decision remanding the case, the Court held that a prison official violates a prisoner's rights "only if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it."\(^\text{249}\) The Court explicitly rejected the Canton objective test, stating that it was "not an appropriate test for determining the liability of prison officials under the Eighth Amendment."\(^\text{250}\) Instead, the Court conclusively established a subjective test for deliberate indifference in Eighth Amendment cases.\(^\text{251}\)

Despite the minor questions addressed in Farmer over exactly what level of deliberate indifference is required under particular circumstances and whether an objective or subjective standard should apply, the deliberate indifference test has generated little or no controversy. Since the

\(^{249}\) Farmer, 511 U.S. at 847.
\(^{250}\) Id. at 841.
\(^{251}\) See, e.g., id. at 845, 848; see also S.S. v. McMullen, 186 F.3d 1066 (8th Cir. 1999), vacated by 1999 U.S. App. LEXIS 24361 (8th Cir. Sept. 30, 1999). "Deliberate indifference" does not meaningfully differ from willful recklessness, i.e., wherein the actor responds unreasonably to a substantial and known risk rather than to a risk of which the actor merely should have known. By contrast, so-called "civil recklessness" or "gross negligence" may exist when the risk of harm is so obvious that the actor should have known about it even if he or she did not actually know about it.

Id. at 1074 n.8 (citations omitted).
deliberate indifference test was established in Estelle, it has been applied by courts on a regular basis in the Eighth Amendment context, in the numerous cases filed by prisoners alleging failure to provide medical assistance, deprivations of property, and failure to ensure prisoner safety. A large body of case law has developed that has elaborated on the meaning of deliberate indifference and its application in various contexts. The orderly development of deliberate indifference as a dependable, easily applied standard contrasts sharply with the tumultuous history of the shocks the conscience test.

Borrowing the deliberate indifference test from the Eighth Amendment is far less problematic than the Lewis court's wholesale importation of the Eighth Amendment analysis into the Fourteenth Amendment. Deliberate indifference is merely a discrete standard of culpability, not an entire analytical framework, and its use in the Fourteenth Amendment is completely distinct from its use in the prison setting. Furthermore, the use of deliberate indifference across the board avoids the problems of deciding when the circumstances are exigent enough to justify the application of a higher level of culpability, such as intent, and it moves away from the confusion attendant to the shocks the conscience test. That said, the deliberate indifference test is no cakewalk for plaintiffs. To the contrary, the subjective test of deliberate indifference set forth in Farmer is a formidable hurdle for any plaintiff. A plaintiff must somehow show what was going on inside the head of the state actor and prove that the actor knew of the particular risk to which the plaintiff was subjected, or that the risk was patently obvious to the actor. Beyond unlikely admissions in depositions or other personal admissions by state actors, plaintiffs have little hope of happening upon evidence of such knowledge at the proper level of particularity.

252. See discussion supra Part II.A.

253. The level of particularity presents the greatest problem for plaintiffs. It is not enough for a plaintiff to prove that a state actor knew car chases were dangerous in general; a plaintiff must show that the officer actually knew the particular plaintiff was very likely to be hurt by this particular chase but ignored that risk. It is not enough for a prisoner to show that a prison official knew she was in danger in general; the prisoner must show the prison official in
C. Consonance with the Fourteenth Amendment

Even more important than the clarity, reliable background, and selectivity of the deliberate indifference standard is its consonance with the Fourteenth Amendment. Throughout the history of the Supreme Court's struggles with the concept of due process, the Court has characterized the Due Process Clause as a constitutional bulwark against the "arbitrary exercise" of governmental power.\(^{254}\) As the majority in *Lewis* put it, "We have emphasized time and again that 'the touchstone of due process is protection of the individual against arbitrary action of government.'"\(^{255}\) In *Collins* and numerous prior cases, the buzz word for the Fourteenth Amendment has not been shocks the conscience, but "arbitrary."\(^{256}\)

In *Lewis*, the majority chose to equate "arbitrary" with "shocks the conscience," holding that "only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense.'"\(^{257}\) This may not have been a logical leap, particularly when one considers the closeness of the concepts of "arbitrariness" and "deliberate indifference." In both *Collins* and *Lewis*, the Court failed to explain the meaning of "arbitrary," the term it deemed so central to the Due Process Clause. *Black's Law Dictionary* offers this definition:

In an unreasonable manner, as fixed or done capriciously or at pleasure. Without adequate determining principle; not founded on the nature of things; nonrational; not done or acting according to reason or judgment; depending on the will alone; absolutely in power; capriciously; tyrannical; despotic. Without fair, solid, and substantial

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257. *Id.* (quoting *Collins*, 503 U.S. at 129).
cause; that is, without cause based upon the law. Willful and unreasoning action, without consideration and regard for facts and circumstances presented.\textsuperscript{258}

Under this definition, arbitrariness is not a proxy for intent or maliciousness, as suggested in \textit{Lewis}. Rather, the definition intimates that arbitrariness is far closer to the concept of wantonness; that is, taking an action without regard for the possible harmful consequences. At worst, under this definition, arbitrary action is conduct with actual knowledge or sufficient information from which one could or should have known of the potential for harm or injury. Thus, under its most common definition, the concept of "arbitrary" falls far short of intent, and is more closely related to recklessness and deliberate indifference in that it involves conduct with knowledge of potential harm.

Even if arbitrariness was considered a proxy for intent, courts have held that the tort equivalent of deliberate indifference, recklessness, is a form of wrongful intent.\textsuperscript{259} Deliberate indifference is, essentially, "an intent to place a person unreasonably at risk,"\textsuperscript{260} which is shown when a state actor "was aware of a known or obvious risk that was so great that it was highly probable that serious harm would follow and he or she proceeded in conscious and unreasonable disregard of the consequences."\textsuperscript{261} Because deliberate indifference is a form of intent, it is unclear why it would be insufficient to meet the test of "arbitrary in the constitutional sense."

The \textit{Lewis} majority did not explain why the word arbitrary should have any different meaning in the constitutional setting than in any other setting, other than to advance Justice Marshall's famous \textit{non sequitur} that "it is a constitution we are expounding."\textsuperscript{262} The substitution of the

\textsuperscript{258} BLACK'S LAW DICTIONARY 104 (6th ed. 1991).
\textsuperscript{259} See, e.g., Uhlig v. Harder, 64 F.3d 567 (10th Cir. 1995) (citing Medina v. City and County of Denver, 960 F.2d 1493, 1496 (10th Cir. 1992)); Fagan, 22 F.3d at 1324 (Cowen, J., dissenting) (citing Archie v. City of Racine, 847 F.2d 1211, 1220 (7th Cir. 1988) (en banc), cert. denied, 489 U.S. 1065 (1989)).
\textsuperscript{260} Uhlig, 64 F.3d at 574.
\textsuperscript{261} Id.
\textsuperscript{262} McCulloch v. Maryland, 17 U.S. 316 (1819).
shocks the conscience test as the "touchstone" of due process seems unnecessary in light of the fact that the term arbitrary has a clear meaning, while shocks the conscience, as discussed above, defies definition. Furthermore, the additional step of substituting "intent to injure" and "deliberate indifference" for shocks the conscience, depending on the circumstances, takes the Court further afield from the clear meaning of arbitrary. The close definitional nexus between the core concept of due process, arbitrary action, and deliberate indifference and reckless disregard makes deliberate indifference the better choice to guide the inquiry in the due process setting.

The deliberate indifference test outlined by the Supreme Court in Farmer offers a clear and demanding threshold of culpability that has proved workable in the Eighth Amendment setting. It is a threshold that, if clearly articulated, could have allowed the Court to remove itself from the subjective mire of the shocks the conscience test in Lewis. But the relative ease and clarity with which the deliberate indifference test could be applied in the Fourteenth Amendment context is not the most compelling reason for its application to substantive due process claims. The most compelling reason to apply the deliberate indifference test to substantive due process claims is that it is the measure of culpability most consistent with the Court's prior Fourteenth Amendment jurisprudence and with the essence of substantive due process. The Court should have gone with deliberate indifference across the board in Lewis. Instead, the Court thrust substantive due process into yet another tailspin.

VII. CONCLUSION

Though Judge Cowen penned the prescient words that began this article four years prior to the Lewis decision, he aptly describes the effect of Lewis.\(^\text{263}\) Lewis indeed has the

\(^{263}\) See Fagan, 22 F.3d at 1319 (Cowen, J., dissenting) ("It thus appears that the Constitution does not constrain police officers when conducting a high-speed car chase. The decision of the court today will have the practical effect of immunizing reckless police conduct from all strictures of the Constitution, so
effect of immunizing the reckless conduct of police officers in the all-too-common circumstance of police chases. This, however, is just the beginning of the problematic implications of the Lewis decision.

The Supreme Court granted certiorari in Lewis for the purpose of resolving a conflict among the circuits over the minimum threshold of culpability required to violate substantive due process in a police pursuit.\textsuperscript{264} As discussed above, the majority opinion conflates the Eighth and Fourteenth Amendments, rests its analysis on a threshold that has been heavily criticized, and creates an opening that gives lower courts carte blanche in choosing among the majority and concurring opinions. Moreover, the majority produced an opinion that has the possible effect of removing police pursuit cases from the protection of the Fourteenth Amendment altogether.

Instead of limiting its analysis to the police-pursuit issue, the Court went further, setting forth an analysis intended to cover all substantive due process cases arising out of conduct by the executive branch. The Lewis majority's analysis, bogged down by the malleability of the shocks the conscience standard, adds multiple levels of judicial gloss, sowing confusion where it sought to bring clarity. The confusion among the lower courts that have struggled with Lewis reflects the severe turmoil within the Lewis decision itself. As discussed above, the Lewis decision did not have to be as conflicted as it was.

Beyond the confusion, the real casualty of Lewis is substantive due process itself. Over the years, the bell has tolled more than once for the concept of "unenumerated rights" in the form of substantive due process and commentators have penned obituaries upon its first and second "deaths."\textsuperscript{265} Yet somehow, the belief that the due process guarantee of the Fourteenth Amendment protects something more than mere procedural rights has survived long as no search or seizure occurs.


and stumbled, flourished and faltered, confounding both its advocates and detractors.

Such a tumultuous history is bound to take its toll. Following closely on the heels of the Court's thorough but conflicted surgery on substantive due process in the legislative setting in Glucksberg, the Court sliced open substantive due process again in Lewis with, as discussed above, extraordinarily dubious results. Such a clumsy treatment of an area of the law that cries out for clarity is as unfortunate as it is avoidable. The prognosis for executive misconduct lawsuits invoking the substantive protections of the Due Process Clause in the wake of Lewis appears dim. At the very least, the decision portends yet another bruising jurisprudential struggle over the present and future of "unenumerated rights" under the U.S. Constitution.

The night of Philip Lewis's fateful motorcycle ride, Deputy Smith made a number of choices that led to the evening's tragic outcome. He gave chase to two youths who had done nothing more than shout an obscenity and refuse to stop when asked. He pursued the two helmetless boys at great speeds in a chase fraught with obvious perils and near accidents. He crested a hill blindly at a velocity that rendered his efforts to avoid Philip Lewis futile. Unquestionably, these facts were enough for a reasonable jury to find that Deputy Smith was deliberately indifferent to the rights of Philip Lewis.

The U.S. Supreme Court refused to let a jury decide the case. Instead, they set the bar for Fourteenth Amendment cases so high that plaintiffs like the Lewis family will have scant opportunity to prove that an executive actor violated the Fourteenth Amendment. In the wake of the Court's decision, not only will a police officer chasing a fleeing suspect never be liable under the Fourteenth Amendment unless he meant to hit the fleeing suspect, but more gravely, no executive actor acting under pressure will be liable unless he actually and subjectively intended to harm someone. Moreover, Lewis leaves a number of fundamental questions about the Fourteenth Amendment unanswered and raises countless new questions that are bound to occupy the Court in coming years. Thus, despite its efforts to reduce the
confusion among courts considering police pursuit cases, the
Supreme Court transformed the analysis of Fourteenth
Amendment actions against executive officials into a
confusing pursuit all its own.