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Stretching the Fourteenth Amendment and Substantive Due Process: Another Close Call for 42 U.S.C. 1983

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Stretching the Fourteenth Amendment and Substantive Due Process: Another "Close Call" for 42 U.S.C. § 1983

Terrell v. Larson[1]

I. INTRODUCTION

Forty years ago, Justice John Harlan noted that the United States Constitution "is not a panacea for every blot upon the public welfare, nor [is the] Court . . . a general haven for reform movements."[2] Written during an era of judicial progressivism, Justice Harlan's words capture perfectly the essence of the Eighth Circuit's majority opinion in *Terrell v. Larson*, a recent substantive due process case from Minnesota.

Substantive due process claims often tug at the heartstrings of our jurisprudence, and *Terrell* is certainly no exception. This Note will explore the legal foundations and policy implications of *Terrell* and attempt to illustrate that, while the Eighth Circuit correctly dismissed Terrell's claims, the court failed to capitalize on an opportunity to encourage state legislatures to provide causes of action for these substantive due process cases.

II. FACTS AND HOLDING

On December 29, 2000, at 10:05:07 p.m., Deputy Sheriffs Brek Larson and Shawn Longen received a transmission from the Anoka County Sheriff Department (the "Department") regarding a domestic disturbance call.[3] Upon learning that the Department had assigned the call a "very high priority,"[4] Larson radioed back at 10:05:39 p.m. and stated that he and Longen would respond.[5] At 10:06:06 p.m. and at 10:06:43 p.m., two other officers radioed that they were already responding to the call and that Larson and Longen could cancel.[6] The two officers continued, however, at least in part because Larson thought that responding would provide Longen with "some good experience handling" these emergency situations.[7]

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1. 396 F.3d 975 (8th Cir. 2005).
2. Reynolds v. Sims, 377 U.S. 533, 624-25 (1964) (Harlan, J., dissenting).
3. Appellants' Brief & Addendum at 5, *Terrell*, 396 F.3d 975 (No. 03-1293).
4. *Terrell*, 396 F.3d at 977.
5. Appellants' Brief & Addendum, *Terrell*, 396 F.3d 975, at 5.
6. *Id.* at 5-6.
7. *Terrell*, 396 F.3d at 980. An internal affairs report produced by the Department concluded that Larson "believed this to be a high-priority, threatening-type call and because of that continued driving emergency." *Id.* Terrell did not challenge Lar-

Approximately two minutes later, Larson and Longen set out in their patrol vehicle, with Larson at the wheel.[8] Due to a recent snowfall, the roads were covered with ice and slush.[9] At a speed of approximately 95 miles per hour,[10] Larson approached the intersection of Minnesota Highway 65 and Crosstown Boulevard and noticed yellow lights flashing ahead, indicating the light at the intersection was about to turn red.[11] Larson slowed to between 30 and 45 miles per hour and then accelerated, believing that there were no other cars near the intersection.[12] After the light had turned red,[13] Larson entered the intersection at approximately 64 miles per hour and broadsided the vehicle of Talena Terrell, who died as a result of injuries sustained in the accident.[14]

Terrell's heirs brought this action under 42 U.S.C. § 1983,[15] alleging a violation of Terrell's substantive due process right to life.[16] Larson and Longen filed a motion for summary judgment based on qualified immunity.[17] The United States District Court for the District of Minnesota denied the summary judgment motion, and the two officers appealed.[18] A divided Eighth Circuit

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son's assertion that he did, in fact, believe he was responding to an emergency. *See id.* In fact, the issue was not discussed until the *en banc* argument. *Id.* For further discussion, see *infra* note 145.

8. Brief of Appellees at 4, *Terrell*, 396 F.3d 975 (No. 03-1293). The vehicle was a new Ford F-250 truck that Larson had never driven before his shift that day. *Id.* at 13-14.

9. Brief of Appellees, *Terrell*, 396 F.3d 975, at 5.

10. Appellants' Brief & Addendum, *Terrell*, 396 F.3d 975, at 7.

11. *Terrell*, 396 F.3d at 977.

12. Appellants' Brief & Addendum, *Terrell*, 396 F.3d 975, at 7.

13. The Minnesota State Highway Patrol determined that the light had turned red at least four or five seconds before Larson's vehicle entered the intersection. Brief of Appellees, *Terrell*, 396 F.3d 975, at 5. Because of this, and also because of the road's conditions, an Internal Affairs report concluded that "Larson violated state law regulating officers engaged in emergency driving, violated department regulations, and drove in a manner totally inconsistent with his training." *Terrell*, 396 F.3d at 985 (Lay, J., dissenting).

14. *Terrell*, 396 F.3d at 977 (majority opinion).

15. Section 1983 states, in part, that any "person who, under color of any statute, ordinance, regulation, custom, or usage, . . . causes . . . any citizen of the United States . . . to [be deprived] of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law." 42 U.S.C. § 1983 (2000).

16. *Terrell*, 396 F.3d at 975. The original action named Larson, Longen, former Sheriff Larry Podany, and Anoka County as Defendants. Appellants' Brief & Addendum, *Terrell*, 396 F.3d 975, at 3. The district court granted summary judgment for Larry Podany and Anoka County. *Id.*

17. Appellants' Brief & Addendum, *Terrell*, 396 F.3d 975, at 3.

18. *Id.*

panel affirmed the denial of qualified immunity for Larson, reversed the denial of qualified immunity for Longen, and remanded for further proceedings.[19]

After vacating the panel's decision, the Eighth Circuit granted *en banc* review, and on February 4, 2005, the court reversed the district court's denial of summary judgment as to both of the defendants.[20] In dismissing Terrell's claims, the Eighth Circuit held that Larson and Longen were entitled to qualified immunity under either an intent-to-harm standard or a standard of deliberate indifference because their conduct was neither intentional nor conscience-shocking.[21]

III. LEGAL BACKGROUND

Terrell involves a number of broad legal issues, including claims brought under section 1983, assertions of qualified immunity, and the varying standards used to determine whether state actors have violated a person's constitutional rights. This section will separately analyze each of these issues in an effort to contextualize the discussion that occurs in *Terrell*.

A. 42 U.S.C. § 1983

Enacted in 1871 to preserve "human liberty and human rights,"[22] "§ 1983 creates an action for damages and injunctive relief for the benefit" of individuals whose constitutional rights have been violated.[23] At its base, the statute reflects the congressional judgment that "[a] damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees."[24] During the last twenty-five years, the statute "has become the primary vehicle for litigation requiring state officials to obey the commands of federal constitutional or statutory law."[25] However, as

19. Terrell v. Larson, 371 F.3d 418 (8th Cir. 2004), *vacated & rev'd*, *Terrell*, 396 F.3d 975.

20. *Terrell*, 396 F.3d at 977.

21. *Id.* at 978-81.

22. Owen v. City of Independence, Mo., 445 U.S. 622, 636 (1980) (citation omitted) (quotation marks omitted).

23. SHELDON H. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION § 1.01 (2nd ed. 1986).

24. *Owen*, 445 U.S. at 651.

25. WILLIAM COHEN, JONATHAN D. VARAT & VIKRAM AMAR, CONSTITUTIONAL LAW 1182-83 (12th ed. 2005). In 1961, after lying dormant for ninety years, section 1983 finally arrived on the civil rights scene, with the Supreme Court's holding in *Monroe v. Pape*, 365 U.S. 167 (1961). The *Monroe* case arose in Chicago, after police officers broke into and ransacked Monroe's house, arrested Monroe, and prohibited him from communicating with an attorney. *Monroe*, 365 U.S. at 167. Monroe sued the officers and the City of Chicago in federal court under section 1983, claiming a violation of his Fourth Amendment rights. *Id.* On appeal to the Supreme Court,

courts often remind us, section 1983 "is not itself a source of substantive rights, but merely . . . a method for vindicating federal rights elsewhere conferred."[26]

In an article discussing section 1983's evolution, legal scholar Richard Carlisle noted that section 1983 litigation "developed against a 'background of tort liability' – largely in cases against public officials sued in their individual capacities for malfeasant conduct and abuse of authority."[27] According to Carlisle and other scholars, "a kind of constitutional tort" was developing, which was neither a private tort nor constitutional law, despite possessing elements of both.[28] This "interesting amalgam" gave rise to serious questions about the extent of the substantive rights being protected by section 1983, questions that continue to plague courts today.[29]

In attempting to answer these questions, Marshall Shapo maintains that the "ideal judicial solution must be one with enough substance to supply a standard of flexibility to cover a broad range of interests."[30] In practice, however, this standard has not been so flexible. Rather, the Supreme Court has "thrown 'interpretation of the contours of . . . liability under § 1983' into 'a state of evolving definition and uncertainty.'"[31] And, as evidenced by the case law, it seems that the selection of the appropriate level of culpability is determinative in deciding the defendant's liability in each case.[32]

Ultimately, to be successful, section 1983 claimants must assert and prove two separate elements.[33] The first inquiry is "whether the conduct complained of was committed by a person acting under color of state law."[34] If the first question is answered affirmatively, courts then ask "whether th[e]

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the Court held that Monroe's "federal remedy [was] supplementary to the state remedy, and the latter need not be first sought and refused before the federal one [was] invoked." *Id.* at 169. Additionally, the Court held that the police officers' actions fell under color of state law, even though the officers were acting in violation of state law. *Id.* at 187. Today, *Monroe* is recognized as a landmark case in civil rights actions, and many current cases can be traced back to *Monroe*.

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

27. Richard G. Carlisle, *Section 1983: The Preeminent Issue – A Species of Tort or Statutory Liability, in* SECTION 1983: SWORD AND SHIELD 3, 3 (Robert H. Freilich & Richard G. Carlisle eds., 1983) (quoting Morgan v. Pape, 365 U.S. 167, 187 (1961)).

28. Marshall S. Shapo, *Constitutional Tort:* Monroe v. Pape, *and the Frontiers Beyond*, 60 NW. U. L. REV. 277, 323-24 (1965) (quotation marks omitted).

29. *Id.* at 324.

30. *Id.* at 325.

31. Carlisle, *supra* note 27, at 6 (citation omitted).

32. See *infra* Parts III.C and III.B for a discussion of these levels of culpability and corresponding case law.

33. Parratt v. Taylor, 451 U.S. 527, 535 (1981) *overruled on other grounds by* Daniel v. Williams, 474 U.S. 327 (1986); *see also* DuBose v. Kelly, 187 F.3d 999, 1002 (8th Cir. 1999) (quoting *Parratt*, 451 U.S. at 535).

34. *Parratt*, 451 U.S. at 535.

conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States."[35] If these two elements are established, a court will then look at any defenses asserted by the defendant, the most common of which is the affirmative defense of qualified immunity.

B. The Affirmative Defense of Qualified Immunity

A significant obstacle in the path of many section 1983 claims, qualified immunity provides state actors with "an entitlement not to stand trial or face the other burdens of litigation."[36] Because the defense is "an immunity from suit rather than a mere defense to liability[,]" and because it is lost when "a case is erroneously permitted to go to trial[,]" qualified immunity rulings must occur early "so that the costs and expenses of trial are avoided where the defense is dispositive."[37]

In determining whether a state actor is entitled to qualified immunity, courts use a sequential, two-step analysis.[38] Viewing the facts in a light most favorable to the allegedly injured party, the first question is whether a state actor's conduct violated a constitutional right.[39] In an action alleging a violation of substantive due process rights, courts require plaintiffs to show that the state actor's behavior was "so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience."[40] In making these determinations, courts have recognized that official conduct can cause injury in a variety of ways, and that "conscience shocking" behavior may take on a number of forms.[41] As a result, with an eye toward tort law's continuum of liability, courts "must first determine the level of culpability the § 1983 plaintiff must prove to establish that [a] defendant's conduct [was] conscience shocking."[42] In applying these standards, jurisdictions have reached varying results.[43]

If a court finds that a state actor's conduct violated a plaintiff's constitutional rights, the next step is to determine whether the right in question was clearly established at the time of the violation.[44] The "relevant, dispositive inquiry in determining whether a right is clearly established is whether it

35. *Id.*

36. Mitchell v. Forsyth, 472 U.S. 511, 526 (1985).

37. Saucier v. Katz, 533 U.S. 194, 200-01 (2001) (emphasis omitted).

38. *Id.*

39. *Id.* at 201. In contrast to the second requirement, courts have struggled to articulate consistent answers to this first question, and as a result, have delineated a number of standards to help guide them in their considerations. For an in-depth discussion of these standards, see *infra* Part III.C.

40. Terrell v. Larson, 396 F.3d 975, 978 (8th Cir. 2005) (quoting County of Sacramento v. Lewis, 523 U.S. 833, 847 n.8 (1998)).

41. *Id.*

42. *Id.*

43. *See infra* Part III.D.

44. *Saucier*, 533 U.S. at 201.

would be clear to a reasonable officer that his conduct was unlawful in the situation."[45] Application of this standard, however, does not mean that the "very action in question"[46] must have been addressed by a previous court. Rather, it means that "in the light of pre-existing law the unlawfulness must be apparent."[47]

In cases like *Terrell*, where the underlying action is based on the plaintiff's constitutional right to life, this second element is rarely an issue. The controversy usually centers on the determination of whether a state actor's conduct violated a constitutionally protected right. As noted previously, this determination is driven by the court's selection of the appropriate level of culpability.[48]

C. Levels of Culpability

In assessing whether a state actor has violated a constitutionally protected right, courts have traditionally used three levels of culpability: negligence, intent, and deliberate indifference. In *County of Sacramento v. Lewis*, the leading Supreme Court case on these varying standards, the Court summarized its reluctance to expand substantive due process beyond intentionally caused harm, stating that the "constitutional concept of conscience shocking . . . points clearly away from liability, or clearly toward it, only at the ends of the tort law's spectrum of culpability."[49]

In keeping with this tradition of confining substantive due process, courts have consistently held that "liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process."[50] In rationalizing these rulings, most courts have followed the Supreme Court's assertion that the "Fourteenth Amendment is not a 'font of tort law to be superimposed upon whatever systems may already be administered by the States.'"[51]

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45. *Id.* at 202; *see also* Hope v. Pelzer, 536 U.S. 730, 739 (2002) (adding that "[f]or a constitutional right to be clearly established, its contours 'must be sufficiently clear that a reasonable official would understand that what he is doing violates that right'" (quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987)).

46. *Hope*, 536 U.S. at 739.

47. *Anderson*, 483 U.S. at 640 (citations omitted).

48. *See supra* text accompanying notes 30-32.

49. *Lewis*, 523 U.S. at 848 (holding that in a police chase aimed at apprehending a suspected offender, intent-to-harm is the only level of culpability that will shock the conscience).

50. *Id.* at 848-49; *see also* Davidson v. Cannon, 474 U.S. 344, 348 (1986) (extending *Daniels* to substantive, as well as procedural, due process); Daniels v. Williams, 474 U.S. 327, 332 (1986) (reaffirming the idea that the Constitution "does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society").

51. *Lewis*, 523 U.S. at 848 (quoting Paul v. Davis, 424 U.S. 693, 701 (1976)). *Lewis* also stated that the "'[United States] Constitution deals with the large concerns

In contrast, while "[m]ere negligence is never sufficient"[52] for substantive due process purposes, behavior that is "intended to injure . . . is the sort of official action most likely to rise to the conscience-shocking level."[53] This intent-to-harm standard is most clearly applied in "rapidly evolving, fluid, and dangerous situations which preclude the luxury of calm and reflective deliberation."[54]

In *Terrell*, with negligence out as a potential basis of liability, and without any evidence of intent on the part of either Larson or Longen to violate Terrell's constitutional rights, the only alternative for the plaintiffs was to frame their argument in terms of "deliberate indifference."[55] The following two sections will focus on this nebulous standard.

D. Deliberate Indifference

1. *County of Sacramento v. Lewis*

In *County of Sacramento v. Lewis*, a motorcycle passenger was killed during a high-speed police chase, and his parents brought a section 1983 claim against the driver of the police vehicle, alleging a deprivation of substantive due process rights.[56] After ruling out negligence and intent-to-harm as possible bases of liability, the Court began its analysis of deliberate indifference by acknowledging that "[w]hether the point of the conscience shocking is reached when injuries are produced with culpability . . . following from something more than negligence" but less than intent is a close call.[57] Despite some misgivings, the *Lewis* Court "expressly recognized the possibility that some official acts in this range may be actionable under the Fourteenth Amendment."[58]

The Court in *Lewis* realized that "[d]eliberate indifference that shocks in one environment may not be so patently egregious in another, and . . . [that]

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of the governors and the governed, but it does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society.'" *Id.* (quoting *Daniels*, 474 U.S. at 332).

52. Terrell v. Larson, 396 F.3d 975, 978 (8th Cir. 2005).

53. *Lewis*, 523 U.S. at 849; *see also Daniels*, 474 U.S. at 331 (asserting that the "guarantee of due process has been applied to *deliberate* decisions of government officials to deprive a person a person of life, liberty, or property").

54. *Terrell*, 396 F.3d at 978 (quoting Neal v. St. Louis County Bd. of Police Comm'rs, 217 F.3d 955, 958 (8th Cir. 2000)) (quotation marks omitted).

55. *See Terrell*, 396 F.3d at 977.

56. *Lewis*, 523 U.S. at 836-37.

57. *Id.* at 849 (citing Daniels v. Williams, 474 U.S. 327, 334 n.3 (1986)).

58. *Id.* (mentioning that in *City of Revere v. Massachusetts General Hospital*, 463 U.S. 239 (1983), the court equated the due process rights of a pretrial detainee with those of a convicted prisoner, and held that deliberately indifferent conduct in either case could constitute a violation of substantive due process rights).

preserving the constitutional proportions of substantive due process demands an exact analysis of [the] circumstances."[59] Guided by this circumstantial approach, the *Lewis* Court stated that, in contrast to the intent-to-harm standard, a deliberate indifference standard "is sensibly employed only when actual deliberation is practical."[60] Since the *Lewis* Court found that the police officer's decision was made "under pressure, and . . . without the luxury of a second chance[,]" the Court applied the intent-to-harm standard.[61]

2. *Coleman v. Parkman*

In addition to the *Lewis* Court's deliberate indifference standard, the Eighth Circuit devised a two-part test in *Coleman v. Parkman*[62] to assess conduct falling in the realm of deliberate indifference. Under this two-part analysis, an injured party must demonstrate that (1) the state official knew of a substantial risk of harm, and (2) the state official failed to reasonably respond to that risk.[63] Regarding the first element, it is not enough to show that a reasonable person would have known, or even that the state official should have known, of a substantial risk.[64] An injured party may, however, demonstrate knowledge of a risk through the use of "circumstantial evidence," and courts may infer that an official knew of a substantial risk simply because the risk was obvious.[65]

In applying the *Lewis* and *Coleman* standards, different jurisdictions have emphasized different components of each test, resulting in a disordered and unpredictable body of case law.

3. Deliberate Indifference Case Law

A review of decisions from courts focusing on section 1983 liability in situations involving police officer misconduct[66] demonstrates that the "critical consideration [for determining liability under section 1983 is] whether the

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59. *Id.* at 850.

60. *Id.* at 851. Like many legal terms, the phrase "actual deliberation" has been manipulated and molded into a variety of meanings. The court in *Lewis* mentioned, however, that the phrase "'actual deliberation' [does] not mean 'deliberation' in the narrow," criminal law sense of the term. *Id.* at 851 n.11.

61. *Id.* at 853 (citation omitted) (quotation marks omitted).

62. 349 F.3d 534 (8th Cir. 2003).

63. *Id.* at 538.

64. Farmer v. Brennan, 511 U.S. 825, 843 n.8 (1994).

65. *Id.*

66. Like section 1983 claims in general, police officer misconduct claims encompass a variety of circumstances. In many cases, including *Terrell*, courts faced with a scarcity of case law in one specific area will compare a number of these circumstances in hopes of deriving consistent results.

circumstances are such that 'actual deliberation is practical.'"[67] For instance, in *Radecki v. Barela*, the Tenth Circuit held that there was no violation of a constitutional right when a bystander was killed by a suspect after a sheriff instructed the bystander to assist him in subduing the suspect.[68] In keeping with *Lewis*, the *Radecki* court asserted that when actual deliberation is practical, "public officials must make policy decisions with careful attention to their special relationship to those in custody – and about which they have the luxury of prolonged consideration."[69] Under the facts of *Radecki*, however, the court found that such deliberation was not practical.[70]

More recently, in *Claybrook v. Birchwell*, plaintiffs filed suit against several police officers after the officers, while attempting to apprehend a suspect, killed one plaintiff's father-in-law and injured the other plaintiffs.[71] After outlining *Lewis*'s deliberate indifference standard, the Sixth Circuit suggested that a "more exacting 'malicious or sadistic' standard of proof" might exist in situations where officers have little or no time to deliberate.[72] Ultimately, the court concluded that because the officers were not aware of the plantiffs' presence, the officers did not deprive the plaintiffs of their constitutional rights.[73]

Although also focusing on the time available for deliberation, the Sixth Circuit in *Ewolski v. City of Brunswick*[74] reached the opposite result. In *Ewolski*, the plaintiffs filed an action alleging that the police officers violated their Fourth and Fourteenth Amendment rights during a standoff that ended in a murder-suicide.[75] The Sixth Circuit ultimately held that the defendants had not, in fact, violated the plaintiffs' constitutional rights.[76] In doing so, however, the court subjected the defendants' actions to the deliberate indifference

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67. Moreland v. Las Vegas Metro. Police Dep't, 159 F.3d 365, 372 (9th Cir. 1998) (quoting County of Sacramento v. Lewis, 523 U.S. 833, 851 (1998)).

68. Radecki v. Barela, 146 F.3d 1227, 1228, 1232 (10th Cir. 1998).

69. *Id.* at 1231.

70. *Id.* at 1232.

71. Claybrook v. Birchwell, 199 F.3d 350, 354-55 (6th Cir. 2000).

72. *Id.* at 360 (quoting County v. Sacramento v. Lewis, 523 U.S. 833, 854 (1998)).

73. *See id.*; *see also* Carter v. Simpson, 328 F.3d 948 (7th Cir. 2003) (holding that there was no violation of a constitutional right when a police officer who was responding to a reported death collided with the plaintiff's car); Apodoca v. Rio Arriba County Sheriff's Dep't, 905 F.2d 1445 (10th Cir. 1990) (concluding that there was no constitutional violation when a woman was killed by a police vehicle responding to a silent burglar alarm); Walton v. Salter, 547 F.2d 824 (5th Cir. 1976) (asserting no violation of constitutional rights when officers struck pedestrian while responding to an armed robbery call because it constituted only an isolated act of negligence).

74. 287 F.3d 492, 496 (6th Cir. 2002).

75. *Id.* at 496.

76. *See id.* at 515-16.

standard, because the officers' actions had taken place over the course of a two-day period.[77]

The Eighth Circuit has faced similar issues in recent years. In *Helseth v. Burch*, a motorist was severely injured after being struck by a suspect who was being pursued by a police officer.[78] The court held that because the officer did not intend to harm the plaintiff, there had been no deprivation of the plaintiff's rights.[79] In so holding, the *Helseth* court overruled the decision in *Feist v. Simonsen*, which held that a deliberate indifference standard should be applied in cases where there is "ample time to deliberate."[80] The *Helseth* court took issue with the *Feist* panel's unwillingness to pay heed to the *Lewis* decision, which expressly dealt with high-speed automobile pursuit cases.[81] Additionally, the court criticized the *Feist* panel for failing to recognize that *Lewis* was founded on the Supreme Court's unwillingness to increase the scope of substantive due process.[82]

The Eighth Circuit, however, has held that the deliberate indifference standard is applicable in some instances, most notably when an officer's actions were reckless.[83] For example, in *Wilson v. Lawrence County*, the Eighth Circuit affirmed the district court's denial of qualified immunity because the evidence presented could prove that the officer in question acted recklessly or intentionally.[84] Additionally, in *Entergy, Arkansas, Inc. v. Nebraska*, the court stated that where "officials had an opportunity to consider various alternatives[,]" deliberately indifferent conduct on the part of the official may be conscience-shocking.[85] With this case law as its backdrop, the Eighth Circuit in *Terrell* attempted to pull these theoretical strands together in the hopes of discerning a consistent and just result.

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77. *Id.* at 510-16.

78. Helseth v. Burch, 258 F.3d 867, 869 (8th Cir. 2001), *overruling* Feist v. Simonsen, 222 F.3d 455 (8th Cir. 2000).

79. *See id.* at 872.

80. *Feist*, 222 F.3d at 464.

81. *Helseth*, 258 F.3d at 871 ("*Lewis* plainly stated that the intent-to-harm standard, rather than the deliberate indifference standard, applies to *all* high-speed police pursuits aimed at apprehending suspected offenders"); *see also* Slusharchuk v. Hoff, 346 F.3d 1178, 1182-83 (8th Cir. 2003) (holding no constitutional violation when a motorist's vehicle was struck in an intersection by a suspect who was fleeing police officers).

82. *See Helseth*, 258 F.3d at 870.

83. *See* Neal v. St. Louis County Bd. of Police Comm'rs, 217 F.3d 955, 958 (8th Cir. 2000) (stating that "[i]n situations where a state actor is afforded a reasonable opportunity to deliberate various alternatives prior to electing a course of action, the chosen action will be deemed 'conscience shocking' if the action was taken with 'deliberate indifference'" (citation omitted)).

84. Wilson v. Lawrence County, 260 F.3d 946, 957 (8th Cir. 2001).

85. Entergy, Arkansas, Inc. v. Nebraska, 241 F.3d 979, 991 (8th Cir. 2001).

IV. INSTANT DECISION

A. The Majority Opinion

The Eighth Circuit granted *en banc* review of *Terrell* after vacating a panel decision to reverse the district court's denial of qualified immunity.[86] Chief Judge Loken authored the majority opinion of the court, in which nine other justices joined.[87]

The majority began by citing the Supreme Court's assertion in *Lewis* that when police officers are involved "in a high-speed automobile chase aimed at apprehending a suspected offender . . . only a purpose to cause harm unrelated to the legitimate object of arrest will satisfy the element of arbitrary conduct shocking to the conscience, necessary for a [substantive] due process violation."[88] The court then mentioned its post-*Lewis* holding in *Helseth*, noting that this intent-to-harm standard "applies to all § 1983 substantive due process claims based upon the conduct of public officials engaged in a high-speed automobile chase," regardless of whether the pursuing officers had time to deliberate.[89]

After discussing the facts and procedural posture of the case,[90] the court applied a two-step test to determine whether Larson and Longen were entitled to qualified immunity.[91] Drawing from *Lewis*, the court noted that the first inquiry is whether a "plaintiff has alleged a deprivation of a constitutional right," and the second is "whether the right allegedly implicated was clearly established at the time of the events in question."[92] After establishing that for a substantive due process violation to occur, a plaintiff must demonstrate that the behavior in question "shock[ed] the contemporary conscience,"[93] the court asserted that while negligence will never qualify as conscience-shocking, proof of intent-to-harm will usually suffice.[94] According to the court, an "intermediate level of culpability" known as deliberate indifference

86. Terrell v. Larson, 396 F.3d 975 (8th Cir. 2005); *see supra* notes 15-21 and accompanying text.

87. *Id.* at 976.

88. *Id.* (quoting County of Sacramento v. Lewis, 523 U.S. 833, 836 (1998)) (quotation marks omitted) (alterations in original).

89. *Id.* at 977 (quoting Helseth v. Burch, 258 F.3d 867, 871 (8th Cir. 2001) (en banc), *overruling* Feist v. Simonson, 222 F.3d 455 (8th Cir. 2000)) (quotation marks omitted).

90. *See supra* Part II.

91. *Terrell*, 396 F.3d at 978.

92. *Id.* (quoting *Lewis*, 523 U.S. at 841 n.5) (quotation marks omitted).

93. *Id.* (quoting *Lewis*, 523 U.S. at 847 n.8) (quotation marks omitted).

94. *Id.* (citing *Lewis*, 523 U.S. at 848-49).

will sometimes satisfy the conscience-shocking standard,[95] but only when "actual deliberation is practical."[96]

The court rejected the panel majority's decision to limit *Lewis*'s holding to cases involving high-speed pursuit cases and likened the decision facing Larson and Longen in this case to that of police during a riot.[97] The majority reasoned that like prison officials during a riot, police officers responding to highly unpredictable domestic disturbances are precluded "the luxury . . . of having time to make unhurried judgments."[98] According to the majority, the panel's decision to hold these officers liable under a deliberate indifference standard would deter effective police response in these situations, thereby increasing the risk of harm.[99]

Then, the court discussed decisions of other circuits in these situations, and decided that "every circuit to consider the issue has applied the *Lewis* intent-to-harm standard to . . . situations involving law enforcement and government workers deployed in emergency situations."[100] Fearful of deterring police response, and mindful of these other courts' decisions, the majority held that the "intent-to-harm standard of *Lewis* applies to an officer's decision to engage in high-speed driving in response to other types of emergencies, and to the manner in which the police car is then driven in proceeding to the scene of the emergency."[101]

Substantive due process liability, according to the court, hinges on this intent-to-harm standard, and as a result, courts making these inquiries should look to a state official's subjective "evil intent."[102] Upon making this determination, the court stated that in the case of Larson and Longen, liability would depend on whether they "subjectively believed that they were responding to an emergency."[103]

The court then discussed the plaintiffs' argument that the question of whether Larson and Longen subjectively believed they were responding to an emergency was a material issue of fact and that, as a result, the determination should be made by a jury.[104] The majority, however, declared this argument "irrelevant," explaining that the inquiry was not whether Larson and Longen were reasonable in believing they were responding to an emergency, but whether the deputies subjectively believed they were responding to an emer-

95. *Id.* (citing *Lewis*, 523 U.S. at 848-49).

96. *Id.* (quoting *Lewis*, 523 U.S at 851) (quotation marks omitted).

97. *Id.*

98. *Id.* at 979 (alteration in original) (quoting *Lewis*, 523 U.S. at 853) (quotation marks omitted).

99. *Id.*

100. *Id.* (quoting Radecki v. Barela, 146 F.3d 1227, 1230 (10th Cir. 1998)) (quotation marks omitted).

101. *Id.*

102. *Id.* at 980.

103. *Id.*

104. *See id.*

gency.[105] After reaffirming this subjective standard and mentioning that it was "undisputed that Larson and Longen believed they were responding to an emergency," the court held that "the intent-to-harm standard applie[d] as a matter of law."[106]

The court also concluded that even under the "deliberate indifference standard of fault adopted by the panel majority," Larson and Longen were not liable.[107] The court based this alternative holding on the fact that the "conscience shocking standard is intended to limit substantive due process liability,"[108] and because "the Fourteenth Amendment is not a font of tort law" that can be applied to a state's pre-existing legal systems.[109]

In closing, the court reversed the district court's order, and remanded the case with directions to dismiss the claim against Larson and Longen.[110]

B. The Dissenting Opinion

Authored by Circuit Judge Lay, and joined by Judge Heaney[111] and Judge Bye, the dissent began by claiming that the majority's decision to extend *Lewis*'s high-speed pursuit rule to shield Larson and Longen from liability would, in effect, grant other officers in these situations "*un*qualified immunity."[112] For fear of creating such a standard, and because of their belief that section 1983 exists to provide citizens with a remedy for these usurpations of executive power, the three judges dissented.[113]

After establishing that the court's task was to determine whether Larson and Longen were entitled to qualified immunity, the dissent restated the se-

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105. *Id.*

106. *Id.* The majority remarked that the police department's internal report suggested that at least part of Larson's motivation in responding to this call was to provide Longen with experience in handling these types of calls. *Id.* The court, however, refused to take this evidence into account, as the plaintiffs failed to raise the issue in the district court. *Id.*

107. *Id.* at 980.

108. *Id.* at 981.

109. *Id.* (quoting County of Sacramento v. Lewis, 523 U.S. 833, 848 (1998)) (quotation marks omitted).

110. *Id.*

111. In a separate dissent, Judge Heaney investigated the suggestion that if Terrell had been killed in Nebraska, her estate could have recovered under Nebraska's tort law. *Id.* at 986 (Hearney, J., dissenting). He concluded that because the statute only applied in cases where officers were attempting to "apprehend one or more occupants of another motor vehicle," the statute would not provide Terrell's family with the type of recovery to which they were entitled. *Id.* at 986-87. Thus, Judge Heaney joined in Judge Lay's dissent, but also wrote separately to call attention to the inability of families to recover in these situations. *Id.* at 987.

112. *Id.* at 981 (Lay, J., dissenting).

113. *Id.*

quential, two-part test, as proscribed in *Coleman*.[114] The dissent analyzed the three standards of culpability, and stated that when "actual deliberation . . . is practical, conduct that is deliberately indifferent may shock the conscience."[115] Based on this language, the dissent argued that the *Lewis* intent-to-harm standard, as expounded by the Eighth Circuit in *Helseth*,[116] should be limited to high-speed pursuit cases.[117]

After asserting that the majority's reliance on *Lewis* was misplaced, the dissent pointed out several differences between a high-speed pursuit and the response in *Terrell*.[118] First, the dissent noted that officers in pursuit cases find themselves thrust into these situations, while Larson consciously and voluntarily decided to respond to this call, despite being informed that other officers were already responding.[119] Second, according to Judge Lay, suspect pursuits require instantaneous reactions, whereas Larson and Longen were afforded ample opportunity to deliberate.[120] The dissent argued that Larson and Longen had plenty of time to "deliberate various alternatives" before deciding to depart, and that Larson "actually did deliberate" in deciding to respond to provide Longen with experience.[121] Finally, the dissent stated that, whereas officers in pursuit cases often must break traffic laws to avoid losing a fleeing suspect, Larson and Longen were in no danger of losing anyone.[122] Because of these distinctions, the dissent concluded that deliberate indifference was the appropriate standard to assess Larson's and Longen's liability in this case.[123]

This deliberate indifference standard, according to the dissent, requires the "defendant know of and disregard a substantial risk of serious harm."[124] In applying this standard to Longen, the dissent concurred with the majority and agreed that the claims against Longen should be dismissed.[125] Pointing out that "[c]ontext is of vital importance in due process analysis[,]" the dis-

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114. *Id.* at 984. For a discussion of this test, see *supra* notes 63-65 and accompanying text.

115. *Terrell*, 396 F.3d at 982 (citing County of Sacramento v. Lewis, 523 U.S. 833, 851 (1998)) (emphasis omitted).

116. Helseth v. Burch, 258 F.3d 867 (8th Cir. 2001) (extending *Lewis'* intent-to-harm standard to all section 1983 claims based upon the conduct of public officials engaged in high-speed chases, regardless of whether conditions allowed time to deliberate).

117. *See Terrell*, 396 F.3d at 982.

118. *Id.* at 984.

119. *Id.*

120. *Id.*

121. *Id.* at 983 (emphasis omitted).

122. *Id.* at 984.

123. *Id.*

124. *Id.*; *see also* Coleman v. Parkman, 349 F.3d 534, 538 (8th Cir. 2003) (delineating the Eighth Circuit's test, which is similar to the one proposed by the dissent).

125. *See Terrell*, 396 F.3d at 984 (Lay, J., dissenting).

sent turned its attention to Larson.[126] In looking at the context of the accident in *Terrell*, the dissent emphasized Larson's unfamiliarity with the police vehicle, his speed at the time of the accident, and the fact that this accident occurred on a wet and slushy December night.[127] Because of these factors, and because Larson would have known of the dangers of violating traffic laws, the dissent concluded that Larson "was deliberately indifferent to a substantial risk of harm."[128]

After establishing a violation of Terrell's constitutionally protected rights, the dissent analyzed whether this right was clearly established at the time of the violation.[129] According to the dissent, a right is clearly established when the "contours of the right [are] sufficiently clear [so] that a reasonable official would understand that what he is doing violates that right."[130] Judge Lay had "no doubt that Ms. Terrell had a substantive due process right to be free from the state's arbitrary deprivation of her life."[131] The dissent argued that the *Lewis* decision would have put the defendants on notice that "in situations other than suspect pursuits [when] actual deliberation is practical[,]" the deliberate indifference standard would apply.[132] Thus, the dissent determined that at the time of the accident, Terrell's rights were clearly established.[133]

Ultimately, after performing the two-step qualified immunity analysis, the dissent concluded that while Longen was entitled to qualified immunity, Larson was not.[134]

V. COMMENT

Undoubtedly, the *Terrell* decision is one of the "close[] calls" mentioned in *Lewis*, teetering on the edge of liability.[135] *Terrell* involved an intricate balancing of policy concerns. On one side, the court looked at the egregiousness of the officers' actions in killing Talena Terrell. On the other, the court considered the effects of holding these officers to a deliberate indifference standard, and the Supreme Court's reluctance to stretch or distort the Fourteenth Amendment's Substantive Due Process Clause.

This section will investigate the Eighth Circuit's attempt at balancing these competing concerns by first discussing the alternative prongs on which the *Terrell* decision hangs. After determining that the *Terrell* court simply

126. *Id.* at 985.
127. *Id.* at 984-85.
128. *Id.* at 985.
129. *Id.*
130. *Id.* (quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987)) (quotation marks omitted).
131. *Id.*
132. *Id.* at 985-86.
133. *Id.* at 986.
134. *Id.*
135. County of Sacramento v. Lewis, 523 U.S. 833, 849 (1998).

failed to fully explain its decision to dismiss the claims against these officers, the section will explore the constitutional foundations and broad policy considerations of the decision in *Terrell*, and attempt to fully explain why section 1983 claims require such a high level of state actor culpability. Finally, this section will conclude that while the Eighth Circuit's decision in *Terrell* is correct in regard to its constitutional and legal principles, the court should have encouraged state legislatures to adopt policies that will provide for victims in these situations.

In *Terrell*, the majority's alternative holdings are both sufficient, on their own, to prove that Larson and Longen are entitled to qualified immunity. Under the first holding, which applied the intent-to-harm standard, the court determined that because there was no evidence that Larson or Longen intended to harm Terrell, they could not have violated her rights in this manner.[136] The second holding applied the deliberate indifference standard, as delineated by *Lewis* and its predecessors, and the court asserted that even under this lesser standard, the defendants' behavior was not conscience-shocking and, thus, did not violate Terrell's constitutional rights.[137]

In contrast to the rich discussion leading to the first holding, the second holding, which involved the standard of deliberate indifference, is hammered out in a conclusory and unsatisfying manner, providing little, if any, guidance to future courts or plaintiffs. In fact, the majority refuses to acknowledge that Larson had time to deliberate his response in this instance. At least twice, he was told to cancel his response, but did not.[138] Instead, believing that this was, indeed, an emergency, and that responding would provide Longen with experience in handling these volatile situations, Larson consciously decided to respond.[139]

Under *Lewis*, the deliberate indifference standard applies when there is actual time for deliberation.[140] In contrast, the intent-to-harm standard applies in "rapidly evolving, fluid, and dangerous situations which preclude the luxury of calm and reflective deliberation."[141] In *Terrell*, there was time for deliberation, but that time was short and continually evolving, in that changes

136. *Terrell*, 396 F.3d at 980 (majority opinion). The *Terrell* case may have come out completely differently, at least on the intent-to-harm side of the holding, if the plaintiffs had raised the issue of whether Larson and Longen actually thought they were responding to an emergency. The court implied that if Larson's intent was not to actually respond to the emergency, but instead to provide Longen with much-needed experience at handling these emergency calls, the result may have been different. *See id.*

137. *See id.* at 980-81.

138. *See supra* notes 3-7 and accompanying text.

139. *Terrell*, 396 F.3d at 980 (stating that "Larson said one reason he decided not to cancel was that responding would give Deputy Longen, 'a rookie, some good experience handling [these emergency] type[s] of call[s]'").

140. *Lewis*, 523 U.S. at 851.

141. Neal v. St. Louis County Bd. of Police Comm'rs, 217 F.3d 955, 958 (8th Cir. 2000).

were rapidly occurring in the status of the Department's collective response.[142] Thus, the question remains whether deliberate indifference or intent-to-harm should have been used.

Interestingly, though, the Eighth Circuit's decision to protect the officers in *Terrell* fails to secure this same protection in the future, as the majority fails to explain why several minutes of time is not enough to constitute "actual time for deliberation."[143] Presumably, if the majority had entered into this sort of analysis, the result would have been the same – Larson and Longen would have been protected from liability. In addition, however, future officers in Larson's and Longen's shoes would have guidance as to what constitutes adequate time for deliberation, and moreover, what is meant by "deliberation."

In reaching its alternative conclusions, the Eighth Circuit mentioned the Supreme Court's trend of limiting the scope of substantive due process. Unfortunately, neither *Lewis* nor *Terrell* explain why this trend has developed the way it has. At first glance, it is difficult to feel comfortable with the decision in *Terrell*, as the innocent plaintiffs are forced to leave empty-handed, while the defendants, who acted irresponsibly and contrary to their own internal policies, successfully avoided liability. In looking at the constitutional underpinnings of *Terrell*'s dispositive policies, however, the decision begins to seem more palatable, and even correct.

In a prudential and cautious fashion, the Supreme Court has been reluctant to stretch or distort the Fourteenth Amendment's substantive due process clause to cover section 1983 claims like *Terrell*. According to civil rights scholar Sheldon Nahmod,

> there is considerable tension between the underlying purposes of § 1983, which . . . reflect a distrust of state entities and state courts . . . , and the current view of some of the Justices of the Supreme Court (and increasing numbers of federal judges) that many [of these] claims do not belong in federal courts but should instead be brought in state courts in the first instance, if at all.[144]

Elaborating on Nahmod's assertion, Richard Carlisle states that "[s]tretching the use of the tort remedy to every case in which a constitutional right has been abridged, without regard to traditional tort concepts, goes too far."[145]

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142. *See supra* notes 3-7 and accompanying text.

143. *See Terrell*, 396 F.3d 975.

144. NAHMOD, *supra* note 23, at § 1.04.

145. Carlisle, *supra* note 27, at 6. The author goes on to state that "[i]t is difficult to grasp, however, what is specifically wrong with [stretching the section 1983 claim, and thereby the Fourteenth Amendment] because it possesses a certain superficial appeal that almost defies criticism." *Id.*; *see also* Collins v. City of Harker Heights, Tex., 503 U.S. 115 (1992). *Collins* stated that the Supreme Court "has always been reluctant to expand the concept of substantive due process because guideposts for

Nahmod's assertion underscores the broader point that the United States Constitution's chief purpose, in addition to securing the rights of its citizens, is to provide the structure of our government. It is far beyond the scope of this Note, however, to delve into the successes and failures of federalism, but it is apparent that under our current federalist system, ample respect is given to state governments and state court systems to achieve adequate results in a variety of legal areas.[146]

In light of this, in situations such as that presented in *Terrell*, it seems preferable for state legislatures to address these more local concerns, as each state could then tailor its laws accordingly. In this case, for example, Minnesota could provide a state tort action for citizens who find themselves in the position of Terrell's family. This approach seems to be the one that the *Terrell* court endorses, although the majority failed to fully explain itself in this regard. With ten judges in agreement,[147] the *Terrell* decision is strong in its endorsement of this more "hands-off" approach to section 1983 claims in cases where there is no evidence of the state official's intent-to-harm.[148] The court, however, should have explained its rationale in a more satisfying and forthcoming manner.

VI. CONCLUSION

As evidenced by the underlying claim in *Terrell*, substantive due process claims challenge the constraints of our government's federalist system, and the limits of the Fourteenth Amendment. The Terrell family suffered an incredible loss at the hands of irresponsible police conduct, and basic notions of justice suggest that they should be compensated for their loss. According to the Eighth Circuit, however, this compensation should not be awarded on the basis of substantive due process constitutional law, but rather as a result of state tort law. This assertion finds support in our judicial system's commitment to federalism, but while the Eighth Circuit's decision in *Terrell* is correct, the court should have encouraged state legislatures to adopt tort laws designed to help provide compensation to victims in these situations.

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responsible decisionmaking in this unchartered area are scarce and open-ended." *Id.* at 125. Furthermore, the "doctrine of judicial self-restraint" also plays a role in these section 1983 cases, and courts are required "to exercise the utmost care whenever [they] are asked to break new ground in this field." *Id.*

146. *See generally* NAHMOD, *supra* note 23, at § 1.04.

147. *Terrell*, 396 F.3d at 976.

148. *See generally id.*