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## Twisted Machines: Police Pursuit Policy and Accountability

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## Twisted Machines: Police Pursuit Policy and Accountability

### Introduction

The American public loves a car chase. On the silver screen or the small screen, the roar of the engine, the thrill of the hunt, and the inevitable crash fascinate us.<sup>1</sup> If the chase is from a sea of black-and-white police cars, all the better. On the news, “it doesn’t get more American” than a car chase.<sup>2</sup> Off-screen, however, high-speed pursuits are the unsung travesty of excessive force. Too-common police chases cause injuries to suspects, bystanders, and police officers.<sup>3</sup> The Supreme Court set a prohibitively high bar to recovery for victims of police pursuits gone wrong, and federal legislatures passively uphold the status quo. Only a few states have passed laws undermining qualified immunity. Insurance companies are increasingly called to legislate, leveraging their significant power against troubled police forces to change their policies. Police-department pursuit policies cover a wide spectrum, from “factors-to-consider” policies that essentially leave pursuits to the discretion of officers to restrictive policies that specify which crimes officers are permitted to pursue.<sup>4</sup> Regardless of whether a legitimate pursuit goes wrong or police display bad judgment or even malfeasance, qualified immunity shields departments and officers. To solve the problem of deadly and dangerous pursuits, police departments must adopt

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<sup>1</sup> James Morgan, *Why America Loves a Police Car Chase*, BBC (Feb. 14, 2015), <https://www.bbc.com/news/magazine-31387485>.

<sup>2</sup> Mark Arnold, *Top Ten Best Real Life Police Chases*, JALOPNIK (July 3, 2008), <https://jalopnik.com/top-ten-best-real-life-police-chases-397566>.

<sup>3</sup> See Christopher Ingraham, *Police Chases Kill More People Each Year Than Floods, Tornadoes, Hurricanes, and Lightning—Combined*, WASH. POST (July 25, 2015), <https://www.washingtonpost.com/news/wonk/wp/2015/07/25/why-police-shouldnt-chase-criminals/>.

<sup>4</sup> See Geoffrey P. Alpert & Roger G. Dunham, *Criminology: Policing Hot Pursuits: The Discovery of Aleatory Elements*, 80 J. CRIM. L. & CRIMINOLOGY 521, 524 (1989).

restrictive policies and extensive training; state and federal legislatures must end qualified immunity.

Part I of this comment will examine the cultural and legal approach to high-speed pursuits exemplified in Los Angeles—the national center of televised car chases. Part II will unpack the thorny judicial doctrine of qualified immunity and evaluate how it impacts the incentives and accountability of police pursuits. Part III will examine who pays for the lawsuits that survive qualified immunity and the role insurance companies have in the facilitation of police reform. In Part IV, this comment will examine the qualified immunity bills in New Mexico and Colorado, the nationwide example they set, and the pushback they have received. In Part V, this comment will address Customs and Border Protection’s record of deadly pursuits and their 2023 change in policy. In Part VI, this comment will examine the end of *Bivens* actions and the hole left in accountability and justice for pursuit victims.<sup>5</sup>

## **I. The Big Show: Los Angeles as a Microcosm of Car Chases in America**

### **A. L.A. and Police Pursuits: A Love Story**

Los Angeles’s love for high-speed pursuits began on January 3, 1992.<sup>6</sup> Darren Stroh’s car broke down on Interstate 5, and when another driver pulled over to help, Stroh shot and killed him.<sup>7</sup> Stroh then stole his victim’s car and led police on a 300-mile, four-hour long chase

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<sup>5</sup> *Bivens Action: Overview*, CORNELL L. SCH., [https://www.law.cornell.edu/wex/bivens\\_action](https://www.law.cornell.edu/wex/bivens_action) (last visited Oct. 12, 2023); Mary Jo Buchanan, Tom Jawetz & Stephanie Wylie, *Promoting Accountability: State and Federal Officials Shouldn’t Be Above the Law*, CTR. FOR AMERICAN PROGRESS (Dec. 17, 2020), <https://www.americanprogress.org/article/promoting-accountability-state-federal-officials-shouldnt-law/>.

<sup>6</sup> Mary Melton, *How High-Speed Car Chases Became a Citywide Pastime in Los Angeles*, L.A. MAG. (Apr. 7, 2016), <https://www.lamag.com/longform/how-high-speed-car-chases-became-a-citywide-pastime-in-los-angeles/>.

<sup>7</sup> Eric Malnic & Lily Dizon, *Murder Suspect Slain After 300-Mile Pursuit*, L.A. TIMES (Jan. 4, 1992), <https://www.latimes.com/archives/la-xpm-1992-01-04-mn-1258-story.html>.

across Los Angeles, “using shoulders, on-ramps, off-ramps,” and surface streets to stay ahead of police and firing at them through the broken windows of his car.<sup>8</sup> Meanwhile, news helicopters circled overhead.<sup>9</sup> Local news broke into their channel’s regular programming.<sup>10</sup> When they ended news coverage to return to regular programming, “viewers phoned in, demanding the chase.”<sup>11</sup> Stroh’s car ran out of gas as he reached Orange County; when he pointed his shotgun at police, they shot him.<sup>12</sup> The end of the chase, too, was broadcast live.<sup>13</sup> In the wake of the Stroh chase, local news stations bought new helicopters and cameras, creating a new, uniquely Californian entertainment industry.<sup>14</sup>

Two years later, the O.J. Simpson “slow-speed” chase brought Los Angeles’s pastime to a global stage.<sup>15</sup> As the football star and accused murderer drove south followed by twenty police cars, drivers “stopped in their tracks to cheer Simpson on, with some even holding signs that read ‘Go O.J!’.”<sup>16</sup> Even in the digital age, the fascination persists through “homemade

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<sup>8</sup> *Id.*

<sup>9</sup> Melton, *supra* note 6.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> Itzel Luna, *28 Years Ago Today: The O.J. Simpson Police Chase That Captivated L.A. and the Nation*, L.A. TIMES (June 17, 2022), <https://www.latimes.com/california/story/2022-06-17/28-years-later-the-o-j-simpson-police-chase>.

<sup>16</sup> *Id.*

commentary” on social media, and apps that “alert chase aficionados to breaking pursuits.”<sup>17</sup>

The reality beyond the spectacle, however, is far grimmer.

## **B. Statistical and Legal Realities**

In the early hours of August 19, 2022, police attempted to pull over Matthew Sutton for speeding.<sup>18</sup> Sutton failed to stop, and police chased him down the street as he reached speeds of up to 70 miles per hour.<sup>19</sup> Eventually the LAPD turned their lights and sirens off and abandoned the chase.<sup>20</sup> Seconds later, Sutton slammed into a BMW in an intersection, killing both its occupants.<sup>21</sup> This story—a minor traffic infraction snowballing into a catastrophic accident—has played out on roads across the nation for decades.<sup>22</sup> Although a “wide-spread misconception” of pursuits is that “suspects who flee the police ‘have a dead body in the trunk’,” non-violent crimes precipitate 91% of high-speed pursuits.<sup>23</sup> Forty-two percent of those crimes are traffic

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<sup>17</sup> Doug Struck, *In a City of Freeways and Showbiz, Live Broadcast Cop Chases are ‘Great Spectacle*, WASH. POST (Dec. 15, 2021), [https://www.washingtonpost.com/national/in-a-city-of-freeways-and-showbiz-live-broadcast-cop-chases-are-great-spectacle/2021/12/14/44b38882-5a0a-11ec-9a18-a506cf3aa31d\\_story.html](https://www.washingtonpost.com/national/in-a-city-of-freeways-and-showbiz-live-broadcast-cop-chases-are-great-spectacle/2021/12/14/44b38882-5a0a-11ec-9a18-a506cf3aa31d_story.html).

<sup>18</sup> *Driver Faces Slew of Charges in Death of Two People in LAPD Pursuit*, THE DOWNEY PATRIOT (Aug. 30, 2022), <https://www.thedowneypatriot.com/articles/driver-faces-slew-of-charges-in-death-of-two-people-in-lapd-pursuit>.

<sup>19</sup> Richard Winton, *LAPD Releases Pursuit Video*, L.A. TIMES, Sept. 2, 2022.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> James Queally, *LAPD leads state in bystander injuries in high-speed chases*, L.A. TIMES, (Oct. 17, 2015), <https://graphics.latimes.com/lapd-pursuits/>.

<sup>23</sup> Brief for Pursuit SAFETY as Amici Curiae Supporting Plaintiffs-Appellants, *Clugston v. City of Garden Grove*, 9th Cir. (2023) (No. 22-55203), 2023 U.S. App. LEXIS 5513; *see also* Queally.

infractions.<sup>24</sup> Nationally, bystanders comprise nearly a third of fatalities resulting from pursuit crashes.<sup>25</sup> In Los Angeles, although 82% of pursuits led to arrests (compared to a 62% national average), one in ten high-speed pursuits injured a third party.<sup>26</sup> Nationwide, automobile crashes were the leading cause of on-call police officer deaths from 2011–2020, averaging one officer death per week.<sup>27</sup>

Police pursuits killed more than 6,200 people from 1999 to 2015.<sup>28</sup> Every year, roughly 355 people are killed in police pursuits, an average of one person a day, according to the U.S. Department of Justice.<sup>29</sup> Because participation in these reports is voluntary, the number is likely higher, potentially closer to “400 to 500 deaths per year.”<sup>30</sup> The most common suspect in a police pursuit is a young man under twenty-four.<sup>31</sup> According to a year-long 1987 study of police

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<sup>24</sup> *Id.* 18% of the remaining pursuits are initiated by suspected stolen vehicles and 15% by suspected drunk drivers—the latter especially problematic as engaging an already impaired driver in a dangerous, high-pressure driving situation has obvious, severe risks. *Id.*

<sup>25</sup> Ingraham, *supra* note 3.

<sup>26</sup> Queally, *supra* note 22.

<sup>27</sup> *Causes of Law Enforcement Deaths*, THE NAT’L LAW ENF’T OFFICERS MEM’L FUND, <https://nleomf.org/memorial/facts-figures/officer-fatality-data/causes-of-law-enforcement-deaths/> (updated Mar. 24, 2023); *Law Enforcement Officer Motor Vehicle Safety*, CTRS FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/niosh/topics/leo/default.html#:~:text=From%202006%2D2019%2C%20809%20officers,Law%20Enforcement%20Officers%20Memorial%20Fund>, (last visited Aug. 22, 2022). These statistics include but are not limited to crashes caused by police pursuits. *Id.*

<sup>28</sup> Brief for Petitioner, *supra* note 23.

<sup>29</sup> Brian A. Reaves, *Special Report: Police Vehicle Pursuits, 2012-2013*, U.S. DEP’T OF JUSTICE, 1, 13 (2017), <https://bjs.ojp.gov/content/pub/pdf/pvp1213.pdf>.

<sup>30</sup> Brief for Petitioner, *supra* note 23.

<sup>31</sup> Hugh Nugent, et. al, *Restrictive Policies for High-Speed Police Pursuits*, NAT’L INST. OF JUSTICE (1990), <https://www.ojp.gov/pdffiles1/Digitization/122025NCJRS.pdf>.

chases in Metro-Dade County, chases that most commonly end in crashes occur during daylight, and young male officers of any race are most likely to initiate those chases.<sup>32</sup>

### **A. Scholarship and Police Policy**

Police pursuit scholarship began in the 1980s; in 1983, California Highway Patrol conducted initial, formative surveys of pursuit data.<sup>33</sup> Many police pursuit articles applied legal standards on use of force, a line of inquiry later thwarted by Supreme Court case *Scott v. Harris* in 2007.<sup>34</sup> Legal scholarship also focused particularly on *Sacramento v. Lewis* and the “shocks the conscience” test.<sup>35</sup> Statistics are difficult to find for police pursuits, as it is impossible to collect data from each of the over 17,000 police agencies in the United States.<sup>36</sup> The needs, populations, road safety, and policing tactics of each jurisdiction are incredibly diverse; therefore, smaller studies cannot represent the national picture of police pursuits. Adding to this difficulty, statistical research on police pursuits is rapidly aging, as most studies date back to the 1980s and 90s.<sup>37</sup>

Police pursuit scholarship identifies three types of police department pursuit initiation policies.<sup>38</sup> Judgmental policies leave initiation to officer discretion, often instructing that officers

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<sup>32</sup> Alpert, *supra* note 4, at 524.

<sup>33</sup> NAT’L INST. OF JUST., POLICE PURSUIT AND THE USE OF FORCE, (1996), [https://www.ojp.gov/pdffiles1/pr/164833\\_part1.pdf](https://www.ojp.gov/pdffiles1/pr/164833_part1.pdf).

<sup>34</sup> *Scott v. Harris*, 550 U.S. 372, 374 (2007).

<sup>35</sup> M. Amanda Racines, *Case Note: Constitutional Law- To Chase or Not to Chase: What “Shocks the Conscience” in High-Speed Police Pursuits?- County of Sacramento v. Lewis*, 523 U.S. 833 (1998),” 73 TEMP. L. REV. 413, 414 (2000); *County of Sacramento v. Lewis*, 523 U.S. 833 (1998).

<sup>36</sup> OFFICE OF JUST. PROGRAMS, NATI’L SOURCES OF LAW ENF’T EMP. DATA (2016), <https://bjs.ojp.gov/content/pub/pdf/nsleed.pdf>.

<sup>37</sup> Zoom Interview with Geoffrey Alpert (Spring 2023).

<sup>38</sup> Alpert, *supra* note 4.

“may” initiate pursuit under certain circumstances.<sup>39</sup> These policies may include clauses allowing pursuit when officers believe suspects intend to “actively flee,” or only requiring officers to “consider” a list of factors when they decide to initiate pursuit.<sup>40</sup> Discouragement policies “severely caution . . . pursuit, except in the most extreme circumstances”.<sup>41</sup> Departments with discouragement policies may include language prohibiting chases except within set criteria, including imminent deadly threat to the officer or others or the pursuit of a violent felon.<sup>42</sup> Restrictive policies split the difference, “plac[ing] certain restrictions on officers’ judgments and decisions.”<sup>43</sup> According to Professor Alpert, the nation’s leading social scientist in the field of police pursuits, the safest policies limit pursuit to “violent crimes,” falling into the discouragement category.<sup>44</sup>

#### **D. Police Policy in Los Angeles**

Los Angeles merely exaggerates traits found in jurisdictions across the United States. On its highways, drivers might encounter Los Angeles Police Department (LAPD), Los Angeles Sheriff’s Department (LASD), or California Highway Patrol officers (CHP).<sup>45</sup> Each department

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<sup>39</sup> *Id.*

<sup>40</sup> DEP’T OF PUB. SAFETY POLICIES AND PROCES., SUBJECT: VEHICULAR PURSUITS, (2020), [https://www.dps.nm.gov/wp-content/uploads/2022/07/OPR\\_08\\_VEHICULAR\\_PURSUIT.pdf](https://www.dps.nm.gov/wp-content/uploads/2022/07/OPR_08_VEHICULAR_PURSUIT.pdf).

<sup>41</sup> Alpert, *supra* note 4.

<sup>42</sup> ALBUQUERQUE POLICE DEP’T PROCEDURAL ORDERS, SOP 2-45: PURSUIT BY MOTOR VEHICLE (2023), <https://documents.cabq.gov/police/standard-operating-procedures/2-45-pursuit-by-motor-vehicle.pdf>.

<sup>43</sup> Alpert, *supra* note 4.

<sup>44</sup> Zoom Interview, Alpert, *supra* note 37.

<sup>45</sup> 2019-2020 L.A. CNT’Y. CIV. GRAND JURY, CAN TECHNOLOGY ELIMINATE POLICE PURSUITS?, (2020), <http://grandjury.co.la.ca.us/pdf/2019-20%20Los%20Angeles%20County%20Civil%20Grand%20Jury%20Final%20Report.pdf>.



has a different policy for when it pursues vehicles.<sup>46</sup> Under CHP policy, officers may pursue “a violator of the law who refuses to yield to the officer’s lawful direction to do so.”<sup>47</sup> CHP officers “should not” pursue if they can identify the suspect “to the point where later apprehension can be accomplished,” unless “greater hazard would result” from the lack of pursuit.<sup>48</sup> The LASD’s department policy limits pursuits to fleeing drivers suspected of a “serious felony,” confirmed grand theft auto, and restricted categories of misdemeanor suspects.<sup>49</sup> Under LASD policy, misdemeanor suspects may only be pursued if they are observed “displaying a firearm in an assaultive manner... contemporaneous” to the pursuit or officers believe the driver is impaired because the driver is driving “so flagrantly reckless that it presents a clear and present danger” to other drivers or pedestrians.<sup>50</sup> The officer must also determine that if the driver is not apprehended, they “would likely pose an imminent and life threatening danger to the public.”<sup>51</sup> Like the CHP, the LAPD allows its officers wide latitude when deciding whether to pursue a fleeing motorist.<sup>52</sup> The Los Angeles Police Department prohibits its officers from pursuing drivers “based only on an infraction, misdemeanor evading ... or reckless driving in response to” police action.<sup>53</sup> LAPD officers may, however, “pursue felons and misdemeanants,” including

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<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> Los Angeles County Sheriff’s Department, Volume 5 – Line Procedures, 5-09/210.02 – Initiation of a Pursuit, (2022), <https://pars.lasd.org/Viewer/Manuals/10008/Content/12381>.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> Los Angeles Police Department, Volume 1 Policy, General Provisions, <https://lapdonlinestrgeacc.blob.core.usgovcloudapi.net/lapdonlinemedia/2023/01/VOLUME-1-word-1.pdf>

<sup>53</sup> *Id.*

suspected impaired drivers.<sup>54</sup> In the same city, a motorist suspected of a misdemeanor could therefore be chased by officers of two departments, but not the third.<sup>55</sup>

### **E. California Law**

These parties struggle to recover for their injuries from departments and municipalities because California law shields those entities. California Vehicle Code § 17004.7 (“Code”) shields police from liability in chase-related crashes and fatalities if they execute certain training and mandates state-wide police policy guidelines.<sup>56</sup> The Code orders departments to include in their policy the logistical constraints of a pursuit (i.e., role of a supervisor, role of air support, pursuit intervention techniques) but does not require police policies to have specific conditions.<sup>57</sup> The Code merely requires that police policies “address the importance of protecting the public and balance the... apparent need for immediate capture against the risks to peace officers, innocent motorists, and others.”<sup>58</sup> The Code requires these written policies to be “promulgat[ed]” within departments via signed certifications from officers that they have “received, read, and understand the policy.”<sup>59</sup>

In 2018, the California Supreme Court ruled that the “plain” reading of the Code does not imply that departments will be open to liability if their officers do not certify department policy.<sup>60</sup> In *Ramirez v. City of Gardena*, the California Supreme Court ruled that the Code only

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<sup>54</sup> *Id.*

<sup>55</sup> Queally, *supra* note 22.

<sup>56</sup> Cal Veh Code § 17004.7

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Ramirez v. City of Gardena*, 5 Cal. 5th 995, 1023 (Cal. 2018).

requires departments to ask their officers to certify they have read department policy; it does not require officers to actually have done so.<sup>61</sup> The Court did cite a 4th Circuit Case that described the Code as a “‘get out of liability free card’ to public entities that go through the formality of adopting such a policy,” but noted that the legislature had since improved the Code by adding training requirements.<sup>62</sup> The annual state-mandated vehicle pursuit training is a minimum of one hour long.<sup>63</sup> The state government also does not review the pursuit policies of individual agencies but “recommends that your agency retain competent legal counsel.”<sup>64</sup> Under California law, if departments have a pursuit policy, train their officers for one hour per year, and require officers to certify they have read the policy, departments are immune from suit.

## **F. Attempted Solutions**

Kristie’s Law—named for a fifteen-year-old killed by a driver fleeing from the police—would have increased restrictions on policie initiation of pursuits.<sup>65</sup> Kristie’s Law “would have permitted police to only pursue violent criminals who posed a danger to the public ... and required police to follow their department’s policies to maintain the immunity that prevents cities, counties, and the state from being sued in connection with pursuits.”<sup>66</sup> The law was

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<sup>61</sup> *Id.*

<sup>62</sup> *Nguyen v. City of Westminster*, 103 Cal. App. 4<sup>th</sup> 1161, 1168 (Cal. Ct. App. 2002); *Ramirez*, 5 Cal. 5th at 1023.

<sup>63</sup> *Vehicle Pursuit Guidelines Frequently Asked Questions*, POST, <https://post.ca.gov/Vehicle-Pursuit-Guidelines-FAQs> (last updated Aug. 26, 2022, 1:30 PM).

<sup>64</sup> *Id.*

<sup>65</sup> *Pursuit of Justice, KRISTIE’S LAW*, <https://www.kristieslaw.org/> (last visited Oct. 17, 2023). The driver that killed Kristie was another fifteen year old, whose mother called the police after they took her car on a joyride. *Id.*

<sup>66</sup> *Chico Enterprise-Record, Kristie’s Law*, Marin INDEP. J., <https://www.marinij.com/2008/07/27/kristies-law/> (last updated July 28, 2018).

introduced in both the 2003 and 2004 legislative sessions in the California State Senate and was defeated both times after “police organizations lobbied hard” against it.<sup>67</sup>

Kristie’s mother founded the advocacy group PursuitSAFETY, which advocates for discouragement of pursuit policies to save the lives of bystanders, suspects, and police officers.<sup>68</sup> PursuitSAFETY filed an amicus brief in *Clugston v. City of Garden Grove*, challenging both *Ramirez* and *Lewis*.<sup>69</sup> In *Clugston*, Michael Clugston was killed by the fleeing vehicle at the end of a chase that began as an attempted stop for speeding in a parking lot.<sup>70</sup> Michael’s family sued the City under §1983 and a *Monell* claim, or a claim that a city formed its policies in “deliberate indifference to the plaintiff’s constitutional right[s],” and were “the moving force” behind a violation of those rights.<sup>71</sup> The plaintiffs argued that in pursuits where “actual deliberation is practical . . . deliberate indifference” meets the “shocks the conscience standard.”<sup>72</sup> The District Court rejected both claims under *Lewis*, ruling that under Ninth Circuit precedent, “deliberate indifference” does not meet the standard of liability for police pursuits.<sup>73</sup> The Court followed Ninth Circuit precedent and held that *every* high-speed pursuit, whether an “emergency” or not, triggers a *Lewis* analysis.<sup>74</sup> This, of course, is a self-fulfilling prophecy—a

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<sup>67</sup> *Id.*

<sup>68</sup> Brief for Petitioner, *supra* note 22, at 6.

<sup>69</sup> *Clugston v. City of Garden Grove*, 2022 U.S. Dist. LEXIS 25501 (C.D. Cal. 2022).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 8.

<sup>72</sup> *Id.* at 4.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 5.

frivolous pursuit initiated through negligence or even recklessness is rendered an “emergency,” unreviewable by the court, by the very act of negligence for which plaintiffs demand a remedy. The plaintiffs appealed the District Court decision, and presented oral arguments at the Ninth Circuit in San Francisco on February 15, 2023.<sup>75</sup> The ruling on *Clugston v. City of Garden Grove* stands to change Ninth Circuit precedent for the better— or become yet another example of justice denied in California pursuits.

## **II. Road Blocks: Qualified Immunity Denies Justice to Victims of Dangerous Pursuits**

### **A. *Scott v. Harris* and the 4th Amendment**

Plaintiffs challenge police action during high-speed pursuits through two main avenues: the 14th Amendment and the 4th Amendment.<sup>76</sup> The 4th Amendment, which protects against unreasonable searches and seizures, seems a natural choice for suspects injured or killed in police chases. In 2007, however, the Supreme Court closed this door. In *Scott v. Harris*, Victor Harris failed to stop when police attempted to pull him over for speeding.<sup>77</sup> The police-initiated crash that ended the chase left Harris paraplegic.<sup>78</sup> Harris’s attorneys argued that under existing

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<sup>75</sup> *Ninth Circuit Court of Appeals to Hold First Law School Special Sitting Since 2020*, UNIV. OF SAN DIEGO SITTING (Feb. 6, 2023), [https://cdn.ca9.uscourts.gov/datastore/ce9/2023/University\\_of\\_San\\_Diego\\_Sitting\\_Feb15.pdf](https://cdn.ca9.uscourts.gov/datastore/ce9/2023/University_of_San_Diego_Sitting_Feb15.pdf).

<sup>76</sup> Jess Bravin & Brent Kendall, *Immunity Doctrine Often Shields Police From Lawsuits*, WALL ST. J., (June 9, 2020), [https://www.wsj.com/articles/immunity-doctrine-often-shields-police-from-lawsuits-11591720435?mod=article\\_inline](https://www.wsj.com/articles/immunity-doctrine-often-shields-police-from-lawsuits-11591720435?mod=article_inline); *see also* *Scott v. Harris*, 550 U.S. 372, 374 (2007).

<sup>77</sup> *Scott*, 550 U.S. at 374.

<sup>78</sup> *Id.*

Supreme Court precedent, the police exerted unreasonable force.<sup>79</sup> A majority of Justices, however, declared their reluctance “to lay down a rule requiring the police to allow fleeing suspects to get away whenever they drive *so recklessly* that they put other people’s lives in danger.”<sup>80</sup> The majority opinion emphasized the risk that Harris’s driving posed to the public and noted that running Respondent off the road was “‘*certain* to eliminate the risk that respondent posed to the public’ while ‘ceasing pursuit was not.’”<sup>81</sup> As Harris posed a grave threat to the public, the court ruled that the potentially deadly force used to end the chase was reasonable.<sup>82</sup>

In his dissent, however, Justice Stevens pointed out that “[t]here is no evidentiary basis for an assumption that dangers caused by flight from a police pursuit will continue after the pursuit ends.”<sup>83</sup> Had the police ceased their pursuit, Justice Stevens noted, they could have later located Respondent using his license plate number.<sup>84</sup> Justice Stevens also pointed out that while fleeing from the police was a serious crime, it was not “a capital offense, or even an offense that justified the use of deadly force.”<sup>85</sup>

## **B. Qualified Immunity and the 14th Amendment**

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<sup>79</sup> *Id.* Respondent argued that his case should be judged under *Tennessee v. Garner*, in which police shot a fleeing suspect in the back of the head. The Court, however, noted that “*Garner* had nothing to do with . . . car chases,” and declined to institute a more exacting test for the application of deadly force based on *Garner*. *Id.* at 383.

<sup>80</sup> *Id.* at 385.

<sup>81</sup> *Id.*

<sup>82</sup> *Scott v. Harris*, 550 U.S. 372, 393 (2007).

<sup>83</sup> *Id.* at 394.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 393.

Executive action can easily violate the 14th Amendment, which protects citizens' rights to due process. The Supreme Court established the "shocks the conscience" test in the 1951 case *Rochin v. California* to determine when those rights have been violated, and government officials may be held liable.<sup>86</sup> Under this test, executive action must have "deprived a person of life, liberty, or property in a manner so arbitrary it shocks the judicial conscience" for a plaintiff to recover.<sup>87</sup> Critics frame the "shocks the conscience" test as overly subjective, unjustly blocking the path to recovery of victims of state brutality.<sup>88</sup> In practice, if plaintiffs cannot find precedent cases with "nearly identical" facts to theirs, "many judges" will find their rights were not violated.<sup>89</sup> The test, however, survived the intervening courts and the invention of qualified immunity to become the defining standard for whether victims of government violence may receive justice in court.

The Supreme Court created the doctrine of qualified immunity in the 1967 case *Pierson v. Ray*.<sup>90</sup> *Pierson* established that public employees who act with "good faith and probable cause" and do not "violate clearly established statutory or constitutional rights of which a reasonable person would have known" cannot be held liable for the actions they undertook in

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<sup>86</sup> *Rochin v. California*, 342 U.S. 165, 172 (1951).

<sup>87</sup> *Doe v. Woodard*, 912 F.3d 1278, 1300 (10th Cir. 2019).

<sup>88</sup> Rosalie Berger Levinson, *Time to Bury the Shocks the Conscience Test*, 13 Chap. L. Rev. 307, 308 (2010). Even the Supreme Court called the shocks-the-conscience test "no calibrated yardstick" in the *Sacramento v. Lewis* decision. See Matthew D. Umhofer, *Confusing Pursuits: Sacramento v. Lewis and the Future of Substantive Due Process in the Executive Setting*, 41 Santa Clara L. Rev. 437, 461 (2001).

<sup>89</sup> Jess Bravin & Brent Kendall, *Immunity Doctrine Often Shields Police From Lawsuits*, WALL ST. J., (June 9, 2020), [https://www.wsj.com/articles/immunity-doctrine-often-shields-police-from-lawsuits-11591720435?mod=article\\_inline](https://www.wsj.com/articles/immunity-doctrine-often-shields-police-from-lawsuits-11591720435?mod=article_inline).

<sup>90</sup> *Pierson v. Ray*, 386 U.S. 547, 557 (1967); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

pursuing their official duties.<sup>91</sup> To determine whether an executive action, including law enforcement action, violated an established right, the Justices ruled that the action must “shock the conscience” to be unconstitutional.<sup>92</sup>

In 1998, a police officer pursuing a motorcycle struck and killed its sixteen-year-old passenger after the motorcycle tipped over.<sup>93</sup> The passenger’s mother sued the county, and when *County of Sacramento v. Lewis* reached the Supreme Court, the justices addressed the standard of behavior for law enforcement in high-speed pursuits.<sup>94</sup> The plaintiff argued that the police conduct displayed “deliberate indifference to” and “reckless disregard for” her son’s life.<sup>95</sup> In his majority opinion, Justice Souter wrote that “on ... occasion[s] calling for fast action,” such as high-speed car chases, police should not be found liable unless they engaged in “conduct intended to injure in some way unjustifiable by any government interest.”<sup>96</sup>

*County of Sacramento v. Lewis* “destroys” the 14th Amendment as a cause of action for fleeing suspects.<sup>97</sup> Under the “intent-to-harm” standard, “a police pursuit that results in an injury to a fleeing suspect can virtually never be found to violate the Fourteenth Amendment.”<sup>98</sup> The

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<sup>91</sup> *Ray*, 386 U.S. 547 at 557; *Fitzgerald*, 457 U.S. 800 at 818.

<sup>92</sup> *County of Sacramento v. Lewis*, 523 U.S. 833, 837 (1998).

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 839.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 853, 848.

<sup>97</sup> Matthew D. Umhofer, *Confusing Pursuits: Sacramento v. Lewis and the Future of Substantive Due Process in the Executive Setting*, 41 SANTA CLARA L. REV. 437, 451 (2001).

<sup>98</sup> *Id.*; see also *White v. Polk County*, 207 Fed. Appx. 977 (11th Cir., 2006). In *White*, a Deputy later known to initiate unjustified chases and commit sexual assaults on young men, driving in an unmarked patrol car, initiated a chase on a car he believed was stolen. *Id.*; Jason Geary, *Family Files Suit in Youth’s Death*, THE LEDGER, (May 23, 2006 12:01 AM),



post-*Lewis* judicial world is one in which citizens, at times innocent of any crime, may be pursued without suspicion of any crime more serious than speeding. If they are injured, maimed, or killed, they are frequently denied any form of recovery.

### III. Follow the Money: Settlements, Indemnity, and Insurance

Although police officers fear that without qualified immunity they will be bankrupted by costly legal settlements, the current reality is that even when cases overcome qualified immunity, individual officers do not pay.<sup>99</sup> In Professor Joanna Schwartz’s study of \$735 million dollars in settlements over six years, individual police officers only contributed to 0.02 percent of settlements.<sup>100</sup> In the same study, “half” of participating law enforcement agencies “financially contribute[d] in some manner” to lawsuit settlements.<sup>101</sup> Large law enforcement agencies build settlements into their department or municipal budget.<sup>102</sup> Small agencies rely on “outside insurance” or risk pools—groupings of “government entities” who “pool their risk to diversify it and to control costs.”<sup>103</sup> An estimated “80% of municipalities participate in one or more risk

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<https://www.theledger.com/story/news/2006/05/23/family-files-suit-in-youths-death/25913182007/>. Although he was told during the chase that it was not stolen, and there was no indication that the teenaged boys driving the car knew they were being pursued by law enforcement, he continued the chase. *White*, 207 Fed. Appx. at 978. One of the boys was killed, but the district court, applying *Lewis*, ruled that because Plaintiffs did not prove that the Deputy intended to harm their son, qualified immunity applied. *Id.* at 979.

<sup>99</sup> Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. LAW REV. 885, 890 (June 2014), <https://www.nyulawreview.org/wp-content/uploads/2018/08/NYULawReview-89-3-Schwartz.pdf>.

<sup>100</sup> Joanna C. Schwartz, *How Governments Pay: Lawsuits, Budgets, and Police Reform*, 63 UCLA L. REV. 1144, 1147 (2016).

<sup>101</sup> *Id.* at 1148.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 1162; Nicholas Frankel, *Municipal Risk Pools 101*, BENCHMARK ANALYTICS (Oct. 19, 2021), <https://www.benchmarkanalytics.com/blog/municipal-risk-pools-101/>.

pools” giving risk pools and insurance companies tremendous power over policing in America.<sup>104</sup> In the void left by judiciaries and legislatures, insurance companies are becoming rule makers for police departments across the country.<sup>105</sup> Small jurisdictions, which hold the majority of the nation’s police departments, depend on their risk pool or insurance company, and if they lose coverage, cease to exist.<sup>106</sup> St. Ann, Missouri’s police force, chased suspects with such frequency and so aggressively that its motto was “St. Ann will chase you until the wheels fall off.”<sup>107</sup> They also injured 11 people in 19 crashes from 2015-2017.<sup>108</sup> Then their insurance company, the St. Louis Area Insurance Trust risk pool, stepped in; the insurance company demanded a dramatic change in policy.<sup>109</sup> St. Ann’s police department adopted a no-pursuit policy for “traffic infractions and nonviolent crimes.”<sup>110</sup> While annual crashes have dropped, the impact of the policy on St. Ann’s settlements with victims is unclear.<sup>111</sup> Although the St. Louis Area Insurance Trust risk pool is publicly funded and staffed by public officials, as a private entity “it does not have to disclose settlement costs.”<sup>112</sup>

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<sup>104</sup> Frankel, *supra* note 111.

<sup>105</sup> Kimberly Kindy, *Insurers force change on police long resistant to it*, THE WASH. POST (Sept. 19, 2022), <https://www.washingtonpost.com/investigations/interactive/2022/police-misconduct-insurance-settlements-reform/>.

<sup>106</sup> Schwartz, *supra* note 109, at 1190–91; Kindy, *supra* note 113.

<sup>107</sup> Kindy, *supra* note 113.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

While it appears that risk pools are successfully incentivizing pursuit reform in jurisdictions like St. Ann, an extra-governmental system staffed by government officials should not be citizens' only hope for accountability. In some states, laws banning qualified immunity provide a worthy alternative to this non-democratic means of reform.

#### IV. State Bills Banning Qualified Immunity Bring Accountability to the Roads

##### A. Federal Attempts at Reform

After a rash of highly publicized civilian deaths at the hands of police, and the wave of protests that followed, national attention turned to police policy and qualified immunity.<sup>113</sup> Senate Democrats pushed for the end of qualified immunity, but Republicans in every branch of government refused to consider the idea.<sup>114</sup> Even when Senators Cory Booker and Tim Scott attempted to reach across the aisle on a broad police reform bill, the realities of American politics conspired against them.<sup>115</sup> The two sides had “deep differences” over the prosecution of police officers and qualified immunity, with Democrats preferring “sweeping changes” and Republicans “incremental moves.”<sup>116</sup> This difficulty deepened with Senate Minority Leader

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<sup>113</sup> Eliza Collins & Sadie Gurman, *Bipartisan Police-Overhaul Talks End With No Deal*, WALL ST. J., (updated Sept. 22, 2021), <https://www.wsj.com/articles/bipartisan-police-overhaul-talks-end-with-no-deal-11632330043>.

<sup>114</sup> Jess Bravin & Brent Kendall, *Immunity Doctrine Often Shields Police From Lawsuits*, WALL ST. J., (June 9, 2020), [https://www.wsj.com/articles/immunity-doctrine-often-shields-police-from-lawsuits-11591720435?mod=article\\_inline](https://www.wsj.com/articles/immunity-doctrine-often-shields-police-from-lawsuits-11591720435?mod=article_inline). In 2020, Judge James Ho of the Fifth Circuit wrote that “[judges] have no business... second-guessing split-second decisions by police officers from the safety of our chambers.” *Id.* The Trump Administration denied that they would consider proposals to change police immunity in the same year. *Id.*

<sup>115</sup> Collins & Gurman, *supra* note 121.

<sup>116</sup> *Id.*

Mitch McConnell’s waning enthusiasm for “compromise legislation,” and the Democrats shifting “their attention to advancing President Biden’s agenda.”<sup>117</sup>

## B. State Bills

The buck thus passed to state legislatures.<sup>118</sup> While the federal government has proved ineffectual at addressing anything but the controversy *du jour*, or overcoming partisan divisions, states have had the opportunity to serve as laboratories of democracy, and step into the gap.<sup>119</sup> Unfortunately, few states have proved so “courageous.”<sup>120</sup> In 2020 and 2021, thirty-five state bills to change or end qualified immunity withered on the vine.<sup>121</sup> Only Colorado and New Mexico’s bills survived.<sup>122</sup>

Colorado’s 2020 Senate Bill 217 (“SB 20-217”), in addition to restricting police use of physical force and chokeholds, created a new cause of action.<sup>123</sup> Plaintiffs who sue police officers for civil rights violation under SB 20-217 cannot have their path blocked by qualified immunity.<sup>124</sup> SB 20-217 also prohibits defendants from using the Colorado Governmental

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<sup>117</sup> *Id.*

<sup>118</sup> Kimberly Kindy, *Dozens of states have tried to end qualified immunity. Police officers and unions helped beat nearly every bill*, WASH. POST, (Oct. 7, 2021 6:00 AM) [https://www.washingtonpost.com/politics/qualified-immunity-police-lobbying-state-legislatures/2021/10/06/60e546bc-0cdf-11ec-aea1-42a8138f132a\\_story.html](https://www.washingtonpost.com/politics/qualified-immunity-police-lobbying-state-legislatures/2021/10/06/60e546bc-0cdf-11ec-aea1-42a8138f132a_story.html).

<sup>119</sup> *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932).

<sup>120</sup> *Id.*

<sup>121</sup> Kindy, *supra* note 126.

<sup>122</sup> *Id.*

<sup>123</sup> S.B. 20-217, 72nd Gen. Assemb., 2d Reg. Sess. (Colo. 2020).

<sup>124</sup> *Id.*

Immunity Act as a defense.<sup>125</sup> As this act grants the state immunity in cases involving emergency vehicles, SB 20-217 stands to have an immense impact on pursuit litigation.<sup>126</sup> While some officers praised Colo. Rev. Stat. 13-21-131(1) as “weed[ing] out the bad folks” in law enforcement, fears over its implementation have also been credited as one of the causes of a state-wide officer shortage.<sup>127</sup> In 2020, the Colorado Court of Appeals held that while 13-21-131(1) mandates that police departments indemnify its officers from suit, it does not allow plaintiffs to directly sue departments or municipal bodies, even if the plaintiff claims that the organization’s policies or lack of training led to the harm against them.<sup>128</sup> While a step in the right direction, 13-21-131(1) still only takes aim at the trees, preventing plaintiffs from seeing the forest.

In its New Mexico Civil Rights Act (“NMCRA”), the state indemnified police officers from being personally sued, but prohibited qualified immunity as a legal defense.<sup>129</sup> Groups from police officers to “survivors of police shootings,” Americans for Prosperity to the ACLU

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<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> Alison Sherry, *Police and sheriff departments across Colorado are struggling to hire for thousands of empty positions*, COLO. PUB. RADIO NEWS, (July 18, 2022), <https://www.cpr.org/2022/07/18/police-sheriff-hiring/>.

<sup>128</sup> *Ditirro v. Sando*, 520 P.3d 1203 (Colo. App. 2022). In the case in question, the individual defendants, state troopers were held not liable based on a since-closed loophole that only applied Colo. Rev. Stat. 13-21-131(1) to local, not state, employees. *Id.* The decision has been criticized as “inconsistent with the legislative purpose for the statute.” Michael Karlik, *Appeals court interprets police accountability law to block lawsuits against localities*, CO. POL., (Nov. 3, 2022), [https://www.coloradopolitics.com/courts/appeals-court-interprets-police-accountability-law-to-block-lawsuits-against-localities/article\\_a348827a-1fd1-11ed-af99-07c8766010b8.html](https://www.coloradopolitics.com/courts/appeals-court-interprets-police-accountability-law-to-block-lawsuits-against-localities/article_a348827a-1fd1-11ed-af99-07c8766010b8.html).

<sup>129</sup> Kindy, *supra* note 126.

collaborated to pass the NMCRA.<sup>130</sup> While critics describe the NMCRA as “taxpayer accountability, not law enforcement ... accountability,” the NMCRA ultimately does not grant officers or departments any more protection from suit than they previously enjoyed.<sup>131</sup>

In court, claims based on the NMCRA have so far largely failed because their cases were based on alleged violations that occurred before the law took effect in July 2021, or because the plaintiff filed the case in federal court, where §1983 and not the NMCRA governs civil rights violation claims.<sup>132</sup> From 2018 to 2021, the Albuquerque Police Department (APD), paid 1.1 million dollars in settlements to people injured in police chases, including a bystander killed by a fleeing vehicle.<sup>133</sup> As Albuquerque is a “stand-alone entity” and not part of a larger risk pool, Albuquerque pays far more in settlements than comparably sized cities.<sup>134</sup> While Albuquerque has settled a “moving vehicle accident” lawsuit “every year” since 2012, the city’s overall

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<sup>130</sup> Laurie Roberts, *We know why innocent people are wrongfully convicted, so we fight for their right to sue police*, USA TODAY (Feb. 7, 2022), <https://www.usatoday.com/story/opinion/2022/02/07/police-misconduct-victims-can-sue/9239845002/>. New Mexico’s grassroots organizing around the NMCRA might be explained by the state’s complex history with law enforcement, particularly in Albuquerque, its largest city. In 2012, the Department of Justice launched an investigation into APD’s police practices, and in 2014, released a report finding that the APD had an “aggressive organizational culture,” deficient training, and a lackluster intervention system, all of which contributed to overuse of force against civilians. Letter from Jocelyn Samuels & Damon P. Martinez to The Honorable Richard J. Berry, U.S. Dep’t of Just. Civ. Rts. Div., (Apr. 10, 2014), [https://www.justice.gov/sites/default/files/crt/legacy/2014/04/10/apd\\_findings\\_4-10-14.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2014/04/10/apd_findings_4-10-14.pdf). Although the inciting incidents to the report and the report itself largely focused on police involved shootings and uses of force during arrest, the report did recommend that vehicle pursuits should be tracked and considered as a factor in so-called “early intervention[s]” for problem officers. *Id.* at 29.

<sup>131</sup> Kindy, *supra* note 126.

<sup>132</sup> *Barela v. City of Hobbs*, (Dec. 9, 2022).

<sup>133</sup> Curtis Segarra, *How much have lawsuits against police cost Albuquerque taxpayers*, KRQE (Jan. 5, 2023), <https://www.krqe.com/plus/data-reporting/how-much-have-lawsuits-against-police-cost-albuquerque-taxpayers/>.

<sup>134</sup> *Id.*

number of lawsuits has declined, and APD predicts that solutions like the purchase of a new helicopter will cause lawsuits caused by pursuits to decline further.<sup>135</sup>

### C. Backlash

Every political movement inspires its own “equal and opposite reaction”, and qualified immunity reform has created backlash both in-state and across the country.<sup>136</sup> Republicans in the New Mexico House of Representatives moved to repeal the NMCRA in early 2023, and as a result produced a report from the Legislative Finance Committee (LFC) detailing the cost of the NMCRA to New Mexico taxpayers.<sup>137</sup> The New Mexico General Services Department reported they have yet to settle any lawsuits filed under the NMCRA but do have ten cases in “active litigation” and received “74 notices of future litigation.”<sup>138</sup> While H.B. 109’s sponsor predicted that the NMCRA would cause “police officers and local governments” to be “bankrupted by civil rights trial lawyers,” LFC predicted that the impact of the NMCRA for the next three years would be “indeterminate but minimal”.<sup>139</sup> H.B. 109 failed in the House, and a second bill that explicitly would have restored qualified immunity as a defense, was “tabled”.<sup>140</sup>

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<sup>135</sup> *Id.* “Moving vehicle” suits include all APD involved car accidents, not only those caused by pursuits. *Id.*

<sup>136</sup> Christopher E. Smith, *Blue Lives Matter Versus Black Lives Matter: Beneficial Social Policies as The Path Away from Punitive Rhetoric and Harm*, 44 VT. L. REV. 463, 466 (2020).

<sup>137</sup> Curtis Segarra, *New Mexico’s Civil Rights Act stands for now*, KRQE (Feb. 6, 2023), <https://www.krqe.com/news/politics-government/legislature/new-mexicos-civil-rights-act-stands-for-now/>.

<sup>138</sup> Legislative Finance Committee 2, *Financial Impact Report HB 109* (Feb. 2, 2023), <https://www.nmlegis.gov/Sessions/23%20Regular/firs/HB0109.PDF>.

<sup>139</sup> *Id.*; John Block, FACEBOOK (Jan. 22, 2023), <https://www.facebook.com/groups/RPOC88310/posts/10160412099044035/>.

<sup>140</sup> Segarra, *supra* note 137.

Meanwhile, Iowa enacted their “Back the Blue Act” in 2021.<sup>141</sup> In addition to increasing legal penalties for rioting and adding police officers as a suspect classification for hate crimes, the Act also enshrined qualified immunity in state law.<sup>142</sup> As a response to Black Lives Matter and the subsequent push for police reforms, as well as killings of police officers in Dallas and New York, several state legislatures have enacted “Blue Lives Matter” acts.<sup>143</sup> While five other states have included law enforcement as a protected category under their hate crime laws since 2016, Iowa is the only state to have included a qualified immunity provision as part of a “Blue Lives Matter” law.<sup>144</sup> These trends show that while police reform has become a national issue, qualified immunity remains fairly niche on both sides, with less than a handful of states particularly interested in either ending or preserving it.

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<sup>141</sup> Katie Akin, *Reynolds signs ‘Back the Blue’ law, raising riot penalties and adding police protections,* IOWA CAPITAL DISPATCH (June 17, 2021), <https://iowacapitaldispatch.com/2021/06/17/reynolds-signs-back-the-blue-law-raising-riot-penalties-and-adding-police-protections/>.

<sup>142</sup> “Senate File 342: An Act Relating to Public Records and Communications in Professional Confidence; Uniform Commercial Code Filings; Qualified Immunity; Peace Officer Health Plans and Workers’ Compensation; Certain Law Enforcement Matters; Criminal Law Enforcement Matters; Criminal Laws Involving Public Disorder, Assaults, and Harassment; Civil Liability for Certain Vehicle Operators, Window Tinting; Acts on Certain Highways; and Civil Service Commission Examinations; Providing Penalties, and Including Effective Date and Retroactive Applicability Provisions,” <https://www.legis.iowa.gov/docs/publications/LGE/89/SF342.pdf/>.

<sup>143</sup> Smith, *supra* note 136.

<sup>144</sup> Julia Craven, *32 Blue Lives Matter Bills Have Been Introduced Across 14 States This Year*, HUFFPOST (Mar. 1, 2017), [https://www.huffpost.com/entry/blue-black-lives-matter-police-bills-states\\_n\\_58b61488e4b0780bac2e31b8](https://www.huffpost.com/entry/blue-black-lives-matter-police-bills-states_n_58b61488e4b0780bac2e31b8); Taylor Stevens, *Utah is about to get a tougher hate crimes law after legislative OK*, SALT LAKE TRIBUNE (Mar. 13, 2019), <https://www.sltrib.com/news/politics/2019/03/13/utah-is-about-get-tougher/>; Morgan Watkins, *Bevin signs contentious Blue Lives Matter law*, COURIER J. (Mar. 22, 2017), <https://www.courier-journal.com/story/news/politics/2017/03/22/bevin-signs-contentious-blue-lives-matter-law/99514820/>; *State Hate Crime Statutes*, BRENNAN CTR. FOR JUST. (July 2, 2020), <https://www.brennancenter.org/our-work/research-reports/state-hate-crimes-statutes>.



By the nature of their work, police officers frequently find themselves with the power of life and death over civilians. Advocating that citizens be able to seek accountability for those officers should not be a partisan issue, but rather a matter of common sense. In the world of police pursuits, accountability is critical, as under qualified immunity negligence, recklessness, and even malice are not sufficient for plaintiffs to recover.<sup>145</sup> While officers fear they could potentially “lose everything they have” if qualified immunity ends, the balance struck in the New Mexico Civil Rights Act incentivizes those with the most power over police pursuits—municipalities and departments—to change their behavior and policies.<sup>146</sup> Officers are products of their departments. If the only training required by the state for a high-speed pursuit is a one-hour training once a year, the state and the department are then to blame when officers lost in the “red mist” of adrenaline make the decision to pursue.<sup>147</sup>

## **VI. Technology and Techniques: Alternatives to High-Speed Pursuits**

In the majority *Scott* opinion, Justice Scalia noted that if the Supreme Court created a higher standard for high-speed pursuits, criminals would be incentivized to flee the police rather than pull over.<sup>148</sup> Political conservatives, as well as some police unions and departments, tend to

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<sup>145</sup> *White, supra* note 98.

<sup>146</sup> Kimberly Kindy, *Dozens of states have tried to end qualified immunity. Police officers and unions helped beat nearly every bill,* WASH. POST (Oct. 7, 2021).

<sup>147</sup> *Vehicle Pursuit Guidelines Frequently Asked Questions*, COMM’N ON PEACE OFFICER STANDARDS AND TRAINING, <https://post.ca.gov/Vehicle-Pursuit-Guidelines-FAQs> (last updated Aug. 26, 2022); Tim Dees, *Deciding to pursue or not to: the implications of pursuit policy for the officer, department, and community*, POLICE 1 (Mar. 31, 2017), <https://www.police1.com/police-products/pursuit-management-technology/articles/deciding-to-pursue-or-not-to-the-implications-of-pursuit-policy-for-the-officer-department-and-community-kT0m9MYYoZq9leMi/>.

<sup>148</sup> *Scott v. Harris*, 550 U.S. 372, 385 (2007).

agree with Justice Scalia on this point.<sup>149</sup> Although data does not support this conclusion, many police officers believe that no-pursuit policies empower “the crooks”, and more suspects will flee the police, knowing they won’t be chased.<sup>150</sup>

Technological alternatives to police chases exist; however and are in use at departments across the country. As Justice Stevens noted, even at the time of *Scott* police could have traced suspects’ license plate numbers to discover their identities and addresses.<sup>151</sup> Since *Scott*, new technologies—like Crookhook, hooks on the front of police cars that hook onto the back of suspect cars, and StarChase, miniature GPS darts fired onto suspect vehicles from the front of police cars—have developed.<sup>152</sup>

According to a 1995 to 1996 study of Miami-Dade and Baltimore pursuits, the involvement of a helicopter allowed police vehicles to “follow a suspect’s vehicle at a safe distance, and in most cases” without their lights and sirens on.<sup>153</sup> Helicopter-involved pursuits

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<sup>149</sup> Laurel Demkovich, *Police pursuit legislation making chases easier passes key House committee*, THE SPOKESMAN-REVIEW (Feb. 17, 2023), [https://www.union-bulletin.com/news/northwest/police-pursuit-legislation-making-chases-easier-passes-key-house-committee/article\\_75cd7883-be3c-51ae-bd08-8c95bc389c04.html](https://www.union-bulletin.com/news/northwest/police-pursuit-legislation-making-chases-easier-passes-key-house-committee/article_75cd7883-be3c-51ae-bd08-8c95bc389c04.html); Paul Best, *Border Patrol union rips Biden admin’s new pursuit policy: ‘Smugglers will be encouraged to drive recklessly,’* FOX NEWS (Jan. 31, 2023), <https://www.foxnews.com/politics/border-patrol-union-rips-biden-admin-new-pursuit-policy-smugglers-encouraged-drive-recklessly>.

<sup>150</sup> Tim Dees, *Deciding to pursue or not to: the implications of pursuit policy for the officer, department, and community*, POLICE 1 (Mar. 31, 2017), <https://www.police1.com/police-products/pursuit-management-technology/articles/deciding-to-pursue-or-not-to-the-implications-of-pursuit-policy-for-the-officer-department-and-community-kT0m9MYYozq9leMi/>.

<sup>151</sup> *Harris*, 550 U.S. at 385.

<sup>152</sup> Los Angeles County Civil Grand Jury 2019-2020, *Can Technology Eliminate Police Pursuits?*, <http://grandjury.co.la.ca.us/pdf/2019-20%20Los%20Angeles%20County%20Civil%20Grand%20Jury%20Final%20Report.pdf>.

<sup>153</sup> Geoffrey P. Alpert, *Helicopters in Pursuit Operations*, NAT’L INST. OF JUSTICE (Aug. 1998), <https://www.ojp.gov/pdffiles/171695.pdf>.

ended in an arrest in 83% of Baltimore pursuits, and 91% of Miami-Dade pursuits.<sup>154</sup> By utilizing these technologies officers can largely eliminate the need for a high-speed pursuit, reducing risk to citizens while maintaining law enforcement goals.<sup>155</sup> Of course, small municipalities might not have the budget for a helicopter or cutting edge technology like StarChase. One possible solution to this inequity is a Congressional law providing funding for these types of technological solutions, perhaps tied to the implementation of restrictive pursuit policies.

One response to high-speed pursuits has become increasingly controversial. In the Precision Immobilization Technique (“PIT maneuver”), considered the vanguard method of pursuit termination, an officer “uses [their] cruiser to push the fleeing vehicle’s rear end sideways, sending it into a spin and ending the pursuit.”<sup>156</sup> Conventional wisdom holds that PIT maneuvers are “safe and effective” below “35 to 45” miles per hour, and become increasingly dangerous at high speeds.<sup>157</sup> However, there has been no widespread study of PIT maneuver safety and efficacy, and police departments have widely diverging policies on the matter.<sup>158</sup>

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<sup>154</sup> *Id.*

<sup>155</sup> Los Angeles County Civil Grand Jury 2019-2020, *Can Technology Eliminate Police Pursuits?*, at page 57 (2020).

<sup>156</sup> Shaun Raviv & John Sullivan, *Risky police car-chase tactic faces little scrutiny*, WASH. POST, (Aug. 24, 2020), <https://www.proquest.com/usmajordailies/docview/2436320189/32A590D5D34D4C12PQ/1?accountid=13159>.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* For example, the Albuquerque Police Department requires PIT maneuvers to be recorded as a “Level 2 use of force” under 35 miles per hour, and “deadly force” when conducted above 35 miles an hour; in January 2023, Customs and Border Protection banned the practice outright. Albuquerque Police Dep’t., 2-12: Pursuit Intervention Technique (PIT) (Dec. 12, 2022), <https://documents.cabq.gov/police/standard-operating-procedures/2-12-pursuit-intervention-technique-pit.pdf>; U.S. Customs and Border Prot., U.S. Customs and Border Protection Emergency Driving and

Although PIT maneuvers are increasingly in the public eye, “less than one percent of all pursuits” terminate with a PIT maneuver.<sup>159</sup>

## VII. Customs and Border Patrol Chases with Unmatched Impunity

Chases executed by Customs and Border Patrol (“CBP”) are unique and particularly deadly to occupants of border states.<sup>160</sup> As “by far the largest federal police agency,” with jurisdiction over “[a]lmost two thirds” of America’s population, the CBP has an under-regulated and increasingly scrutinized role on American roads.<sup>161</sup> In 2021, the CBP employed over 25,000 officers and 19,000 Border Patrol agents.<sup>162</sup> The CBP’s jurisdiction reaches “100 air miles” from any border of the United States, a rule apparently enacted with “little deliberation on either the statute or the regulation.”<sup>163</sup> The Tenth and the Fifth Circuits ruled that the 100-mile zone is not a “bright line test,” with the Fifth Circuit even holding that a search “between 200 and 300 miles

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Vehicular Pursuits (Jan. 11, 2023), [https://www.cbp.gov/sites/default/files/assets/documents/2023-Jan/cbp-directive-4510-026A\\_0.pdf](https://www.cbp.gov/sites/default/files/assets/documents/2023-Jan/cbp-directive-4510-026A_0.pdf).

<sup>159</sup> Travis Yates, *Analysis of the IACP report “Police Pursuits in an Age of Innovation and Reform*, POLICE1 (Mar. 23, 2009), <https://www.police1.com/vehicle-incidents/articles/analysis-of-the-iacp-report-police-pursuits-in-an-age-of-innovation-and-reform-Gbxx8372wPiLNJcl/>.

<sup>160</sup> Joshua Bowling, *Hot Pursuit*, SEARCHLIGHT N.M. (Oct. 13, 2022), <https://searchlightnm.org/hot-pursuit/>.

<sup>161</sup> Kimberly Strawbridge Robinson, *Supreme Court Again Raises Barrier to Sue Law Enforcement*, BLOOMBERG L. (Jun. 8, 2022), <https://news.bloomberglaw.com/us-law-week/supreme-court-raises-barrier-to-suing-law-enforcement>; Katherine Hawkins, *The Border Zone Next Door, and Its Out-Of-Control Police Force*, PROJECT ON GOV’T OVERSIGHT (Jan. 10, 2023), <https://www.pogo.org/report/2023/01/the-border-zone-next-door-and-its-out-of-control-police-force>.

<sup>162</sup> *On a Typical Day in Fiscal Year 2021, CBP...*, U.S. CUSTOMS AND BORDER PROT., (May 10, 2022), <https://www.cbp.gov/newsroom/stats/typical-day-fy2021>.

<sup>163</sup> HILLEL R. SMITH, CONG. RSCH. SERV., LSB10559, U.S. CUSTOMS AND BORDER PROT. POWERS AND LIMITATIONS: A PRIMER, (Nov. 30, 2021); Deborah Anthony, *The U.S. Border Patrol’s Constitutional Erosion in the “100-Mile Zone,”* 124 PENN ST. L. REV. 391, 398 (2020).

of the border” could be considered reasonable.<sup>164</sup> In the Fifth Circuit case, Judge James Dennis argued in his dissent that “[i]t would be unreasonable to assume that the Supreme Court meant to dilute the protections of the Fourth Amendment so as to authorize the Border Patrol to make suspicion-based roving patrol stops anywhere in the United States.”<sup>165</sup> As it stands, CBP can operate in nearly any area of the United States, and is accountable only to itself, particularly on the border.

On July 27, 2022, Gloria Chavez, then-head of the CBP sector encompassing New Mexico, announced agents “arrived” to the scene of an accident that killed two people and injured ten in Santa Teresa, New Mexico.<sup>166</sup> On August 8, 2022, the CBP admitted that the crashed vehicle had been fleeing an agent in an “unmarked” CBP vehicle, after the agent observed that the suspect vehicle was driving “slower than the normal” speed and initiated a chase.<sup>167</sup> The CBP does not release statistics on the frequency or lethality of their chases, but reports from investigative reporters in border states uncovered alarming trends.<sup>168</sup> In an examination of “federal criminal complaints filed against suspected human smugglers from 2015 to 2018,” ProPublica found that the CBP initiated “more than 500 pursuits . . . in California,

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<sup>164</sup> Anthony, *supra* note 168 at 398 n.124 (citing *United States v. Gutierrez-Orozco*, 191 F.3d 578, 581 (5th Cir. 1999)).

<sup>165</sup> *United States v. Gutierrez-Orozco*, 191 F.3d 578, 584 (5th Cir. 1999).

<sup>166</sup> Bowling, *supra* note 167.

<sup>167</sup> Press Release, U.S. Customs and Border Prot., Two die in vehicle accident transporting undocumented migrants in New Mexico, (Aug. 6, 2022), <https://www.cbp.gov/newsroom/speeches-and-statements/two-die-vehicle-accident-transporting-undocumented-migrants-new>.

<sup>168</sup> *Abuse of Power and its Consequences*, S. BORDER CMTY. COAL. (last updated Sept. 12, 2023), [https://www.southernborder.org/border\\_lens\\_abuse\\_of\\_power\\_and\\_its\\_consequences](https://www.southernborder.org/border_lens_abuse_of_power_and_its_consequences); Bowling, *supra* note 167; Kavitha Surana, Brittny Mejia & James Queally, *Trapped in a Deadly Chase*, PROPUBLICA, (Apr. 4, 2019), <https://features.propublica.org/border-crashes/death-injuries-in-high-speed-border-patrol-chases/>.

Texas, New Mexico, and Arizona.”<sup>169</sup> One of three chases ended in a crash, averaging one crash “every nine days”.<sup>170</sup> From 2010 to 2022, 31% of the 245 people killed in encounters with CBP died in car chases.<sup>171</sup> In New Mexico, 23% of those fatalities were U.S. citizens.<sup>172</sup>

Targets of CBP chases are commonly “down-on-their-luck U.S. citizens” or “immigrants getting a discount on their journey for manning the wheel”.<sup>173</sup> Dr. Alpert met with CBP officials during President Obama’s tenure to discuss changing their policies.<sup>174</sup> He recounted to ProPublica that CBP’s response was that they were not “an urban police department” and that their “rules are different.”<sup>175</sup> CBP agents have also explained that when they decide to pursue, they must “weigh a lot of factors,” and then must ask “[i]f I let this person go, are they going to hurt someone else?”<sup>176</sup> Of course, discouragement policies take this calculus into account—a restrictive policy would not forbid CBP agents from chasing a suspect they believe to be dangerous, it would only prevent scenarios where agents pursue cars they know “are carrying

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<sup>169</sup> Surana et.al, *supra* note 175.2

<sup>170</sup> *Id.* In 2012-2013, 15% of pursuits nationally ended in a crash; in 2020, CHP reported 23.3% of their pursuits ended in a crash. Brian A. Reaves, DEP’T OF JUST.SPECIAL REP., POLICE VEHICLE PURSUITS, 2012-2013, 1, 13 (May 2017); CAL. HIGHWAY PATROL, REPORT TO THE LEGISLATURE: SENATE BILL 719, POLICE PURSUITS, (Sept. 2020). While objectively and extremely dangerous, CBP’s record is not an extraordinary departure from national crash rate, which should be read as an indictment of national trends, rather than a pardon of CBP.

<sup>171</sup> *Abuse of Power and its Consequences*, *supra* note 173.

<sup>172</sup> Bowling, *supra* note 165.

<sup>173</sup> Hugh Nugent, et. al, DEP’T OF JUST., RESTRICTIVE POLICIES FOR HIGH-SPEED POLICE PURSUITS, (1990); Surana et.al, *supra* note 175.

<sup>174</sup> Surana et.al, *supra* note 175.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

unrestrained children or are packed so far beyond capacity” with people they sag.<sup>177</sup> Even when CBP chases resulted in an indictment, “[t]hose convicted often served less than a year,” and the arrests “never recovered” weapons caches and “rarely” drugs.<sup>178</sup>

CBP changed its pursuit policy in 2023.<sup>179</sup> The “Commissioner’s Message” that precedes the new regulations does not mention media reports, and instead credits a 2021 report of “CBP’s Law Enforcement and Compliance Directorate” with the data that led to the change.<sup>180</sup> Although ACLU chapters of both New Mexico and Texas praised the changes as “long overdue” and anticipated they would “save lives,” and the National Border Patrol Council predicted “smugglers” would be “encouraged to drive recklessly,” the changes are part of an incremental process.<sup>181</sup> The original policy only required “reasonable suspicion to believe” the driver failed to stop at an immigration checkpoint, at an Agent’s attempt, or “committed a vehicle incursion into the United States.”<sup>182</sup> The new rule states that agents “may engage in . . . pursuits only if”

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<sup>177</sup> *Id.*

<sup>178</sup> Surana et.al, *supra* note 175.

<sup>179</sup> Matt Levin, *New CBP Vehicle Pursuit Policy Will Save Lives, Say ACLU of Texas and ACLU of New Mexico*, ACLU OF TEX. (Jan. 13, 2023), <https://www.aclutx.org/en/press-releases/new-cbp-vehicle-pursuit-policy-will-save-lives-say-aclu-texas-and-aclu-new-mexico>.

<sup>180</sup> U.S. CUSTOMS & BORDER PROT., DIRECTIVE NO. 4510-026A, U.S. CUSTOMS AND BORDER PROT. EMERGENCY DRIVING AND VEHICULAR PURSUITS (May 2023).

<sup>181</sup> Levin, *supra* note 186, <https://www.aclutx.org/en/press-releases/new-cbp-vehicle-pursuit-policy-will-save-lives-say-aclu-texas-and-aclu-new-mexico>; Paul Best, *Border Patrol Union Rips Biden Admin’s New Pursuit Policy: ‘Smugglers Will Be Encouraged to Drive Recklessly,’* FOX NEWS (Jan. 31, 2023), <https://www.foxnews.com/politics/border-patrol-union-rips-biden-admin-new-pursuit-policy-smugglers-encouraged-drive-recklessly>.

<sup>182</sup> Geoffrey P. Alpert & Roger G. Dunham, *Criminology: Policing Hot Pursuits: The Discovery of Aleatory Elements*, 80 J. CRIM. L. & CRIMINOLOGY 521, 524 (1989); U.S. CUSTOMS & BORDER PROT., DIRECTIVE NO. 45-10-26, EMERGENCY DRIVING INCLUDING VEHICULAR PURSUITS BY U.S. CUSTOMS AND BORDER PROTECTION PERSONNEL (2021) at para. 7.4(A)(1). CBP did not disclose this policy until 2021. Sullivan, *supra* note 189.

they have reasonable suspicion the vehicle has failed to stop.<sup>183</sup> While these represent small steps on the path towards restrictive pursuit policies, a few of CBP’s updated rules stand to effect reach change.

First is a requirement that pursuing vehicles are “Emergency Vehicles with Activated Emergency Equipment which must include red and blue emergency lights and audible siren.”<sup>184</sup> Earlier regulations had, shockingly, only required use of a “marked sedan or specialty pursuit vehicle . . . when reasonably possible.”<sup>185</sup> The new directive adds a requirement that the agent determine that a pursuit is “Necessary and Objectively Reasonable” before engaging.<sup>186</sup> The new regulations define “necessary” as a conclusion that “there is a need to *immediately* apprehend a subject as part of [the agent’s] enforcement duties based on the totality of the facts and circumstances.”<sup>187</sup> The new regulations also enumerate a list of “Foreseeability of Risk” factors-to-consider, classics in judgmental pursuit policy. In the case of the CBP’s new rules, these factors are speed or “erratic” driving of the suspect, whether the suspect is driving towards a densely populated area, weather, road conditions, and distance from the vehicle.<sup>188</sup> Both new

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<sup>183</sup> U.S. Customs and Border Protection, “U.S. Customs and Border Protection Emergency Driving and Vehicular Pursuits” (Accessed Jan. 11, 2023), [https://www.cbp.gov/sites/default/files/assets/documents/2023-Jan/cbp-directive-4510-026A\\_0.pdf](https://www.cbp.gov/sites/default/files/assets/documents/2023-Jan/cbp-directive-4510-026A_0.pdf).

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*; Department of Homeland Security U.S Customs and Border Protection, Directive 45-10-26 7.4(A)(1), “Vehicle Pursuit Driving Procedures,” <https://www.cbp.gov/sites/default/files/assets/documents/2021-Nov/CBP-directive-emergency-driving-Including-vehicular-pursuits-us-cbp-personnel-redacted.pdf>.

<sup>186</sup> *Supra* note 190.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*



and old rules mandate that agents terminate pursuits when “risk to the public” outweighs “law enforcement benefit.”<sup>189</sup>

Because of his decades of experience on issues of police pursuits, then-Commissioner of the CBP Chris Magnus asked Dr. Alpert to help design the new policy.<sup>190</sup> Dr. Alpert also will contribute to designing the methodology for assessing the efficacy of the policy.<sup>191</sup> Although the methodology is not yet written, Dr. Alpert predicts it will test the attitudes, retention, and adherence of CBP agents to the new rules.<sup>192</sup> Ultimately, according to Professor Alpert, the broadness of the new rules for the CBP means that “training” will ultimately determine the change these rules make in practice.<sup>193</sup> This training will take place “later” in 2023, and the department has not announced the content of the training.<sup>194</sup> The difficulty in evaluating this new policy in practice will of course be that CBP is consistently reticent to release data or even their standard operating policies.<sup>195</sup>

According to CBP reports, reasonably suspicious activities include “staring straight ahead,” “look[ing] at or acknowledged[ing] an agent,” “traveling below the posted speed limit,” and “either measurably speeding up or reducing speed” upon seeing a Border Patrol agent.<sup>196</sup>

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<sup>189</sup> *Id.*

<sup>190</sup> Zoom Interview with Alpert, *supra* note 37.

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> Surana et.al, *supra* note 175; Sullivan, *supra* note 189.

<sup>196</sup> *The Border’s Long Shadow*, ACLU OF MICH. (Mar. 25, 2021), [https://www.aclumich.org/sites/default/files/field\\_documents/100\\_mile\\_zone\\_report-updated.pdf](https://www.aclumich.org/sites/default/files/field_documents/100_mile_zone_report-updated.pdf).

Although the procedure requires a supervisor’s determination that the “law enforcement benefit . . . outweighs the risk to the public,” it also concedes that Agents “may initiate” vehicle pursuits before receiving this determination.<sup>197</sup>

After a CBP involved crash, the road to recovery for plaintiffs is even narrower than if a state or local officer had been involved. Until May 2022, CBP’s own “Critical Incident Teams” processed crash scenes.<sup>198</sup> While CBP maintained these “secretive” units supported their Office of Professional Responsibility (or internal affairs office), an internal memo revealed that the true purpose of Critical Incident Teams was the “mitigation of civil liability.”<sup>199</sup> A former deputy assistant commissioner from the Office of Professional Responsibility predicted in December 2022 that CBP would “reconstitute [Critical Incident Teams] under a completely different name.”<sup>200</sup> The involvement of Critical Incident Teams and CBP’s secrecy and evasiveness around crashes mean that potential plaintiffs lack access to objective evidence, and their claims come down to their own voices against that of the U.S. government.<sup>201</sup>

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<sup>197</sup> Department of Homeland Security U.S Customs and Border Protection, Directive 45-10-26 7.4(A)(1), “Vehicle Pursuit Driving Procedures,” <https://www.cbp.gov/sites/default/files/assets/documents/2021-Nov/CBP-directive-emergency-driving-Including-vehicular-pursuits-us-cbp-personnel-redacted.pdf>.

<sup>198</sup> Eileen Sullivan, *Customs and Border Protection Will Disband Secretive ‘Critical Incident Teams’*, N.Y. TIMES (May 9, 2022), <https://www.nytimes.com/2022/05/06/us/politics/border-protection-critical-incident-teams.html#:~:text=The%20%E2%80%9Ccritical%20incident%20teams%2C%E2%80%9D,most%20inquiries%20into%20agent%20misconduct>.

<sup>199</sup> Mark Scialla, *‘Hurting people’: The ‘Cover-Up Teams’ Operating on the US Border*, AL JAZEERA (Dec. 12, 2022), <https://www.aljazeera.com/features/2022/12/12/the-cover-up-teams-operating-on-the-us-border>.

<sup>200</sup> *Id.*

<sup>201</sup> *Id.* In the incident in question, an undocumented immigrant claimed that CBP “rammed” the back of the SUV he was riding in, causing it to crash and killing two of the SUV’s occupants. While the CBP dispatch reported that “a vehicle... got clipped,” the subsequent Critical Incident Team report “concludes that there was no contact between the vehicles.” The report includes “no clear” pictures of CBP cars on the scene, and conflicting details about the crash and cars involved. *Id.*

## VII. The Death of *Bivens* (and Accountability for Federal Law Enforcement)

The Supreme Court recently narrowed the avenue of litigation available against federal agents.<sup>202</sup> Lawsuits against federal agents for violations of civil rights are known as *Bivens* actions, named for the case in which they originated, *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*.<sup>203</sup> In *Bivens*, Federal Bureau of Narcotics agents entered a man's house without a warrant, shackled him in front of his family, and threatened to arrest his wife and daughter.<sup>204</sup> *Bivens* sued, alleging violations of his Fourth Amendment rights.<sup>205</sup> The Court, holding that "an agent ... acting in the name of the United States possesses a far greater capacity for harm" than a private citizen committing the same acts, ruled that plaintiffs could sue the federal government for damages when federal agents violated their rights.<sup>206</sup> In the years since *Bivens*, the Court has emphasized that "recognizing a cause of action under *Bivens* is 'a disfavored judicial activity,'" and declined to recognize causes of action under amendments other than the Fourth Amendment.<sup>207</sup>

In 2022, the Court ruled in *Egbert v. Boule* that it was Congress's duty to create new causes of action and declined to recognize an alleged smuggler's claim against a CBP agent.<sup>208</sup> Justice Clarence Thomas wrote for the majority that judges should ask themselves "who should

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<sup>202</sup> *Egbert v. Boule*, 142 S. Ct. 1793, 1803 (2022).

<sup>203</sup> *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> *Id.* at 392.

<sup>207</sup> *Egbert*, supra note 202.

<sup>208</sup> *Id.*

. . . provide for a damages remedy [for a new cause of action under *Bivens*], Congress or the courts?”<sup>209</sup> In “[al]most every case,” the Court ruled, the answer will be Congress.<sup>210</sup> In her dissent, Justice Sotomayor described the plaintiff’s cause of action as “materially indistinguishable” from previously recognized actions under *Bivens*, and critics of *Egbert* describe it as “rendering *Bivens* almost entirely moot”.<sup>211</sup> The Supreme Court also refused to hear two cases from the Fifth and Eighth Circuits involving ““garden-variety”” *Bivens* claims that those circuits had dismissed “because the offending officers were federal employees . . . effectively render[ing] *Bivens* a dead letter in the 10 states governed by those circuits.”<sup>212</sup>

While §1983 creates civil rights actions against local and state officials, “there is no similar statute that explicitly authorizes suits against federal agents,” and courts inevitably remove state suits against federal officials to federal court.<sup>213</sup> Although the Supreme Court insists that “we are a court of law, not policymakers of last resort,” all but pleading for congressional action, Congress has been slow to close the *Bivens* gap.<sup>214</sup> In 2020, a group of twelve Democrats in the House introduced H.R. 6185, the *Bivens* Act of 2021. The *Bivens* Act

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<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> Editorial Board, *Suing federal officers is nearly impossible. Congress can fix that.*, WASH. POST (June 27, 2022), <https://www.washingtonpost.com/opinions/2022/06/27/suing-federal-officers-is-nearly-impossible-congress-can-fix-that/>.

<sup>212</sup> Nick Sibilla, *With Just Five Words, Congress Can Rein in The IRS and Other Federal Agencies*, FORBES (Sept. 7, 2022), <https://www.forbes.com/sites/nicksibilla/2022/09/07/with-just-five-words-congress-can-rein-in-irs-and-other-federal-agents/?sh=4e8d92004091>.

<sup>213</sup> Ian Millhiser, *The Supreme Court could make it very easy for federal law enforcement to violate the Constitution*, VOX (Mar. 1, 2022), <https://www.vox.com/2022/3/1/22946305/supreme-court-egbert-boule-bivens-law-enforcement-constitution-border>; 28 U.S.C.S. §1442.

<sup>214</sup> *Arizona v. Mayorkas*, 143 S. Ct. 1312 (2023).

would amend §1983 to provide individuals with the right to sue and recover damages from “a person acting under Federal authority” for violating their constitutional rights.<sup>215</sup> The House and Senate have introduced versions of the Bivens Act, in 2020 and 2021; the Senate referred the Act to committee in December 2021, and the House in November 2022.<sup>216</sup> In 2020, law professor Cassandra Robertson predicted that “it seems highly unlikely that Congress would act without a formal overruling of *Bivens*”; and, so far, Congress’s reticence to react to a clear liability loophole for the federal government has borne out Professor Robertson’s prediction.<sup>217</sup>

## Conclusion

‘Cops and robbers’ car chases created an entertaining spectacle on American screens large and small for decades.<sup>218</sup> In reality, however, police pursuits are incredibly risky, a use of force that is rarely classified as such. Permissive police pursuit policies allow citizens to die for traffic infractions, and qualified immunity denies justice to those who attempt to find it in court.<sup>219</sup> New Mexico’s NMCRA and Colorado’s SB 20-217 establish a blueprint that more states must follow, providing protection for their citizens in a way that the federal government is

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<sup>215</sup> Bivens Act of 2021, H.R. 6185, 117<sup>th</sup> Cong. (1st Sess. 2021).

<sup>216</sup> H.R. 6185; “All Information (Except Text) for S.3343- Bivens Act of 2021”, Congress.Gov, <https://www.congress.gov/bill/117th-congress/senate-bill/3343/all-info>.

<sup>217</sup> Cassandra Robertson, *SCOTUS Sharply Limits Bivens Claims—and Hints at Further Retrenchment*, A.B.A. (Apr. 14, 2020), <https://www.americanbar.org/groups/litigation/committees/civil-rights/practice/2020/scotus-sharply-limits-bivens-claims-and-hints-at-further-retrenchment/>.

<sup>218</sup> Morgan, *supra* note 1.

<sup>219</sup> *Driver faces slew of charges in death of two people in LAPD pursuit*, THE DOWNEY PATRIOT, (Aug. 30, 2022), <https://www.thedowneypatriot.com/articles/driver-faces-slew-of-charges-in-death-of-two-people-in-lapd-pursuit>; Jess Bravin and Brent Kendall, *Immunity Doctrine Often Shields Police From Lawsuits*, WALL ST. J. (June 9, 2020), [https://www.wsj.com/articles/immunity-doctrine-often-shields-police-from-lawsuits-11591720435?mod=article\\_inline](https://www.wsj.com/articles/immunity-doctrine-often-shields-police-from-lawsuits-11591720435?mod=article_inline).

unwilling or unable to.<sup>220</sup> Meanwhile, Customs and Border Protection pursues with impunity, shielded by in-house investigatory units and a chronic lack of transparency.<sup>221</sup> While their 2023 policy change is a step in the right direction, real change can only come with accountability. The Court in *Egbert v. Boule*, eliminated the limited redress for victims that Bivens provided.<sup>222</sup> In order to restore it, Congress must pass a Bivens bill like those introduced in 2020 and 2021.<sup>223</sup> Dangerous police pursuits have haunted American streets for decades, and those who died or suffered grievous injuries in these pursuits have not received justice. Legislators and policymakers have the means and opportunity to change that reality, and they must.

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<sup>220</sup> S.B. 20-217, 2020 Regular Sess. (Colo. 2023); COLO. REV. STAT §24-10-106(1)(a) (2021); Kimberly Kindy, *Dozens of states have tried to end qualified immunity. Police officers and unions helped beat nearly every bill*, WASH. POST, (Oct. 7, 2021).

<sup>221</sup> Surana et.al, *supra* note 175; Sullivan, *supra* note 189.

<sup>222</sup> 142 S. Ct. at 1803; Editorial Board, *Suing federal officers is nearly impossible. Congress can fix that.*, Washington Post (June 27, 2022).

<sup>223</sup> H.R.6185.