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IN PURSUIT OF THE ELUSIVE FOURTH AMENDMENT: THE POLICE CHASE CASES

RONALD J. BACIGAL*

INTRODUCTION

As we mark the fourth amendment's bicentennial, the amendment continues to generate completely new questions as well as innovative variations on the familiar themes of search and seizure. Much of the present uncertainty surrounding the amendment understandably arises from the difficulty of applying the 200-year-old document to a twentieth century society permeated with computers, cellular phones, spy-in-the-sky satellites, and other technological threats to privacy.¹ It is surprising, however, to learn that the Supreme Court recently uncovered a fundamental fourth amendment issue unrelated to modern-day technological advances. The question of whether the amendment encompasses "accidental seizures" allows us to momentarily discard the debate over the "War on Drugs"² and other contemporary privacy issues, in order to refocus our attention on the fundamental purposes underlying the amendment.

While welcoming the Supreme Court's invitation to reflect upon the underlying theme of the fourth amendment, I find it somewhat paradoxical to be asked to apply the modifier "accidental" to the term "seizure." The paradigmatic definition of search and seizure was formulated in *Katz v. United States*³ and *Terry v. Ohio*,⁴ in

* Professor, University of Richmond. The author expresses his gratitude to Professor Gary C. Leedes and Professor Arnold H. Loewy who reviewed the initial draft of this article and offered helpful insights and criticism. Of course, any faults which remain are the sole responsibility of the author.

1. "The 200 year march of science spanning our history as a free republic has equipped the police with tools that enable them to monitor our actions with startling efficiency." Katz, *In Search of a Fourth Amendment for the Twenty-First Century*, 65 IND. L.J. 549, 549 n.2 (1990). See generally Steinberg, *Making Sense of Sense-Enhanced Searches*, 74 MINN. L. REV. 563 (1990).

2. See, e.g., Winn, *Seizures of Private Property in the War Against Drugs: What Process is Due?*, 41 SW. L.J. 1177 (1988).

3. 389 U.S. 347 (1967).

4. 392 U.S. 1 (1968).

which the Court held that the fourth amendment is applicable whenever government agents intrude upon a citizen's justifiable expectation of privacy or liberty. *Katz* and *Terry* indicated that there was no need to distinguish accidental from intentional seizures so long as the Court determined that there had been a governmental intrusion upon protected privacy or liberty interests.⁵

Without openly challenging the doctrinal definition set forth in *Katz* and *Terry*, the Court now suggests that a government agent's intent is an equally important benchmark for defining fourth amendment seizures. This novel suggestion was prompted by the Court's consideration of two fatal automobile crashes that occurred during high speed pursuits by police officers.⁶ In *Brower v. County of Inyo*⁷ the police erected a roadblock in hopes of convincing a fleeing felon to stop the chase upon sighting the barrier,⁸ but the fleeing felon stopped only when he collided with the roadblock. In *Galas v. McKee*⁹ the escaping suspect crashed and died after losing control of his vehicle. To a majority of the Court, these factual situations posed a new fourth amendment question: Can there be a seizure within the meaning of the amendment when a police officer's objective conduct plays a role in terminating a suspect's freedom of movement even though the suspect's loss of liberty does not come about in the manner intended by the officer? The Court answered its own query by declaring that the fourth amendment does not encompass "the accidental effects of otherwise lawful government conduct"¹⁰ and that there can be no seizure unless the police officer utilizes "*means intentionally applied*"¹¹ to bring about the termination of the suspect's freedom of movement.

The Court's focus on means intentionally applied is not a mere variation on the *Katz* and *Terry* standards for defining the coverage

5. See *supra* notes 1-2.

6. Conventional wisdom suggests that the fatal crashes in *Brower* and *Galas* are common-place occurrences. "High-speed pursuit is an exceedingly dangerous kind of police operation. . . . More often than not, a high-speed pursuit ends only when either the fugitive or the officer is involved in a collision, often a fatal one." A. STONE & S. DELUCA, POLICE ADMINISTRATION 414 (1985), quoted in Alpert & Dunham, *Policing Hot Pursuits: The Discovery of Aleatory Elements*, 80 J. CRIM. L. & CRIMINOLOGY 521, 534 (1989). A recent study by the California Highway Patrol, however, revealed that most pursuits are terminated voluntarily by the offender and that seventy percent of pursuits end without an accident. Alpert & Dunham, *supra*, at 526.

7. 489 U.S. 593 (1989).

8. The plaintiff in *Brower* alleged that the police concealed the roadblock in order to bring about the crash. See *infra* note 60. For purposes of its analysis, however, the Court assumed that "respondents here preferred and indeed earnestly hoped, that *Brower* would stop on his own, without striking the barrier. . . ." *Brower*, 489 U.S. at 598.

9. 801 F.2d 200 (6th Cir. 1986). See *Brower*, 489 U.S. at 545.

10. *Brower*, 489 U.S. at 596.

11. *Id.* at 597.

of the fourth amendment. Instead, the Justices have reformulated the amendment's scope by shifting the center of attention to the previously unaddressed factor of the governmental intent to bring about a seizure.¹² The first section of this article considers whether the police officer's intent¹³ is an indispensable component of fourth

12. *Accord* *Britt v. Little Rock Police Dep't*, 721 F. Supp. 189, 192 (E.D. Ark. 1989); *see* *Reed v. Hoy*, 891 F.2d 1421, 1426 (9th Cir. 1989) ("The *Brower* analysis breaks down into a three-part test: a seizure is a (1) governmental (2) termination of freedom of movement (3) through means intentionally applied."). *Compare* *Landol-Rivera v. Cosme*, 906 F.2d 791, 795 (1st Cir. 1990) (citing *Brower*, as establishing a constitutional distinction between police action directed toward producing a particular result and police action that simply causes a particular result) *with* *Roach v. City of Fredericktown*, 882 F.2d 294, 297 (8th Cir. 1989) (All injuries arising in the context of an arrest or investigatory stop must be analyzed under the fourth amendment's prohibition against unreasonable seizures even if the plaintiffs were not the targets of the attempted seizure.).

13. It is difficult to decipher precisely what form of intent Justice Scalia was discussing. *See* *Keller v. Frink*, 745 F. Supp. 1428 (S.D. Ind. 1990). In legal parlance, his use of terms such as "willful" detention, "desired," "sought," and "meant" results, as well as "designed" and "selected" means, connote a subjective state of mind. In normal usage, according to WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY, the word "intention" implies "little more than what one has in mind to do or bring about." Having authored an opinion replete with allusions to the police officer's subjective state of mind, Justice Scalia proclaimed that he did not think it "practicable" to inquire into subjective intent. *Brower*, 489 U.S. at 598. The concurring Justices commended their colleague for avoiding inquiries into subjective intent, although they questioned his introduction of the "concept of objective intent" as a standard for determining fourth amendment seizures. *Brower*, 489 U.S. at 600 (Stevens, J., concurring).

It is not clear that Justice Scalia was formulating a concept of objective intent because his opinion does not employ the term, nor does he contest or endorse the concurring opinion's use of the term. If objective intent is the new litmus test for fourth amendment seizures, I confess that I am unable to locate any clarification of the term itself or any prior discussion of what role objective intent plays in defining fourth amendment seizures. "The reported cases all seem to look to subjective intent. However, the distinction between subjective and objective intent was not in issue in any of those cases." *Keller v. Frink*, 745 F. Supp. 1428, 1431 (S.D. Ind. 1990). The closest analogy arises in the pretext arrest cases in which the lower courts have focused upon objective facts that establish probable cause for the arrest as distinguished from those subjective factors that actually prompted the individual officer to seize the suspect. *See, e.g.,* *United States v. Smith*, 799 F.2d 704, 708 (11th Cir. 1986) ("The proper inquiry is whether a reasonable officer *would* have made the seizure in the absence of illegitimate motivation."). *See generally* Burkoff, *The Pretext Search Doctrine: Now You See It, Now You Don't*, 17 U. MICH. J.L. REF. 523 (1984); Haddad, *Pretextual Fourth Amendment Activity: Another Viewpoint*, 18 U. MICH. J.L. REF. 639 (1985).

One can readily grasp the distinction between objective facts upon which a reasonably prudent officer might have acted (a hypothetical construct) and subjective factors which in reality motivated an individual officer. The distinction between subjective and objective intent, however, is more difficult to comprehend in light of the general understanding that the term intent normally betokens an existing state

amendment seizures. The second section of the article addresses the Court's efforts to define a seizure by focusing upon the objective causal link between an officer's efforts to apprehend a suspect and the suspect's attempt to avoid apprehension.

I. THE THRESHOLD OF THE AMENDMENT

To describe police action as a search or seizure implies that fourth amendment activity is involved, but it does not suggest whether the search or seizure is reasonable or unreasonable.¹⁴ Nonetheless, the courts sometimes allow the tail to wag the dog by answering the threshold question of the amendment's coverage only after looking ahead to the ultimate issue of whether a search or seizure can be deemed to be reasonable under the circumstances of the case.¹⁵ Prior to the landmark decisions in *Katz* and *Terry*, there may have been some justification for this tail-wagging-the-dog approach.¹⁶ Pre-*Terry* seizures of suspects were tested under formidable constitutional

of mind rather than a hypothetical construct.

The ambiguities of the *Brower* opinion suggest at least three plausible readings of Justice Scalia's allusions to intent: (1) despite his disclaimer, the Justice is in fact addressing subjective intent as a requirement for fourth amendment seizures. See *Roach v. City of Fredericktown*, 882 F.2d 294, 296 (8th Cir. 1989) (omitting any discussion of objective intent and holding that no seizure took place because "Officer Truska did not intend for the pursuit to end by means of an accident"); (2) the Justice is formulating a requirement for subjective intent but is suggesting that the "practicable" way to proceed is to examine the objective circumstances from which subjective intent may be inferred; or (3) in place of an inquiry into subjective intent, the Court will examine the objective circumstances in order to determine whether a reasonably prudent officer would have realized that his action would result in a seizure.

Having admitted my own confusion over the Justice's terminology, the remainder of this article addresses both a subjective intent to seize and the reasonably prudent officer's perception of whether a seizure has taken place.

14. *Contra* *Michigan v. Chestnut*, 486 U.S. 567, 570-72 (1988).

15. The oral arguments in *Brower v. County of Inyo*, 489 U.S. 593 (1989), demonstrate the Court's tendency to blur the existence of a seizure with the reasonableness of that seizure. During presentation of plaintiff's argument, counsel made it clear that he preferred not to explore the ultimate reasonableness of the seizure. But, assaulted by questions on this issue throughout his presentation, "counsel was at pains to assure the justices that the question was not before them at this time and a reversal of the lower court's decision would mean only that the reasonableness of the seizure could finally be put to the test." 44 CRIM. L. REP. at 4149. When the justices continued to raise questions about the reasonableness of the seizure, counsel pleaded: "All we want, he reminded the justices, is for you to say that there was a seizure here so that we can explore the question of reasonableness." *Id.* at 4150.

16. In a broader context, Professor Bickel defended the Supreme Court's use of threshold determinations to avoid substantive issues. Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961).

standards¹⁷ that could not be satisfied in a variety of police-citizen encounters¹⁸ in which the police lacked probable cause for an arrest.¹⁹ In light of the heavy burden placed on police to justify seizures of citizens, there was a certain parity in requiring the suspect²⁰ to meet a rigorous standard for establishing that a seizure had taken place.²¹

When *Katz* and *Terry* transformed the definition of search and seizure, the Court concomitantly adjusted the burdens of proof placed upon both police and suspects. The two cases expanded the definition of search and seizure to encompass previously excluded police activity,²² thereby increasing the number of situations in which the suspect could demand that the police offer legal justification for their conduct. At the same time, *Terry* allowed the police to justify their conduct under a less demanding standard of constitutional reasonableness.²³ In place of a rigid requirement of probable cause (reasonable belief), certain lesser intrusions upon privacy and liberty could now be justified by a lower standard of reasonable suspicion.²⁴

17. For the most part the Court had treated the fourth amendment "as a monolith: wherever it restricts police activities at all, it subjects them to the same extensive restrictions that it imposes upon physical entries into dwellings. To label any police activity a 'search' or 'seizure' within the ambit of the amendment is to impose those restrictions upon it." Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 388 (1974).

18. See La Fave, "Street Encounters" and the Constitution: *Terry*, *Sibron*, *Peters*, and *Beyond*, 67 MICH. L. REV. 40 (1968).

19. "[A] perfectly reasonable apprehension of danger may arise long before the officer is possessed of adequate information to justify taking a person into custody for the purpose of prosecuting him for a crime." *Terry*, 392 U.S. at 26-27.

20. "The opinions of both Justice Brennan and Justice O'Connor, by their use of 'cf.' citations, implicitly recognize that none of our prior decisions tells us who has the burden of proving whether [the plaintiff's] expectation of privacy was reasonable." *Florida v. Riley*, 488 U.S. 445, 467 (1989) (Blackmun, J., dissenting). The *Riley* dissent, however, agreed with the concurring opinion "that the burden of alleging and proving facts necessary to show standing could ordinarily be placed on the defendant." *Id.* at 466 n.7 (Brennan, J., dissenting). Past cases also generally assumed that the burden fell upon the defendant. See, e.g., *Jones v. United States*, 362 U.S. 257, 261 (1960) ("Ordinarily, then, it is entirely proper to require of one who seeks to challenge the legality of a search as the basis for suppressing relevant evidence that he allege, and if the allegation be disputed that he establish, that he himself was the victim of an invasion of privacy"); see also *Rakas v. Illinois*, 439 U.S. 128, 131 n.1 (1978) ("The proponent of a motion to suppress has the burden of establishing that his own fourth amendment rights were violated by the challenged search or seizure.").

21. See, e.g., *Rakas v. Illinois*, 439 U.S. 128 (1978); *Jones v. United States*, 362 U.S. 257 (1960).

22. *Terry*, 392 U.S. 1, 16-17 (1968) (stating that the fourth amendment applies to temporary detentions falling short of full custodial arrests); *Katz*, 389 U.S. 347, 359 (1967), *overruling* *Omstead v. United States*, 277 U.S. 438 (1928) (stating that the amendment extends to electronic surveillance).

23. *Terry*, 392 U.S. at 16.

24. "In *Terry v. Ohio*, we held that the police can stop and briefly detain a

The present Supreme Court, however, appears to have lost sight of *Terry's* even-handed approach to the fourth amendment. While continuing to lessen the government's burden to establish the constitutional reasonableness of its conduct,²⁵ there has been no corresponding expansion of the suspect's zone of protected privacy and liberty.²⁶ Instead, the Court has narrowed the coverage of the fourth amendment by holding that more and more law enforcement activity is excluded from the definition of search and seizure.²⁷ This on-going contraction of the amendment's scope follows a pattern in which the facts of the particular case suggest that the police cannot justify their actions as constitutionally reasonable, yet the Court will conclude that the police conduct is a desirable part of the war on crime.²⁸ In

person for investigative purposes if the officer has a reasonable suspicion supported by articulable facts that criminal activity 'may be afoot,' even if the officer lacks probable cause." *United States v. Sokolow*, 109 S. Ct. 1581, 1585 (1989). The "scaling down" of probable cause in search cases came in *Katz's* progeny. See Bacigal, *The Fourth Amendment in Flux: The Rise and Fall of Probable Cause*, 1979 ILL. L.F. 763.

25. In *Illinois v. Gates*, 462 U.S. 213 (1983), the Court replaced the two-pronged test of *Aguilar v. Texas*, 378 U.S. 108 (1964), with a less-demanding totality-of-the-circumstances test for determining probable cause. The Court also lessened the probable cause requirement in *O'Connor v. Ortega*, 480 U.S. 709 (1987) (upholding the search of a government employee's office and desk based upon reasonable suspicion); *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (upholding the search of a school child based on reasonable suspicion); *Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602 (1989) (upholding drug testing of railroad engineers following accidents); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989) (upholding drug urinalysis of employees involved in drug interdiction or positions requiring the carrying of firearms).

26. Faced with conflicting demands for "safe streets" and freedom of movement on those streets, the Supreme Court "increasingly has opted in favor of public safety. It has done so by electing to raise the threshold of what is meant by a 'seizure. . .'" *United States v. Barnes*, 496 A.2d 1040, 1044 (D.C. 1985).

27. See *Florida v. Riley*, 488 U.S. 445 (1989); *California v. Ciraolo*, 476 U.S. 207 (1986) (aerial surveillance of curtilage, not a search); *New York v. Class*, 475 U.S. 106 (1986) (observation of vehicle identification number from outside the vehicle, not a search); *Maryland v. Macon*, 472 U.S. 463 (1985) (examining wares exposed to the public, not a search); *Oliver v. United States*, 466 U.S. 170 (1984) (trespass upon open field, not a search); *United States v. Jacobsen*, 466 U.S. 109 (1984) (chemical field test of substance contained in package previously opened by private carrier, not a search); *United States v. Place*, 462 U.S. 696 (1983) (canine inspection of luggage in public place, not a search); *Texas v. Brown*, 460 U.S. 730 (1983) (shining flashlight into automobile, not a search).

28. "We would hesitate to declare a police practice of long standing 'unreasonable' if doing so would severely hamper effective law enforcement." *Tennessee v. Garner*, 471 U.S. 1, 19 (1985). See *United States v. Notorianni*, 729 F.2d 520, 523 (7th Cir. 1984) (dissenting opinion) (The court's "modest fiction" that a suspect questioned by police will feel free to say nothing and move on "makes it possible to cope with drug traffic in a place like O'Hare airport."); see also *supra* note 26.

such situations the police conduct can receive Court approval only if it is placed beyond the coverage of the fourth amendment, thereby eliminating any requirement of constitutional reasonableness.²⁹ The result-oriented nature of the Court's approach allows it to tailor³⁰ the amendment's coverage by covertly determining whether the reasonableness requirement can be satisfied before deciding whether to impose the requirement upon the police.

The Court's efforts to narrow the coverage of the fourth amendment have prompted some disingenuous decisions based upon the type of factual determinations that should play a relatively minor role in defining the amendment's scope. When the Court implies that surveillance by a helicopter triggers fourth amendment protections only when an unacceptable amount of dust is blown up by the helicopter,³¹ or that airplanes, but not helicopters, "search" when they drop below an altitude of 1,000 feet,³² the scope of the amendment is made to turn upon minute factual differences.³³ The Court's misplaced reliance upon factual determinations manifests itself in the recent series of police "chase" cases³⁴ that define the point at which a seizure occurs in the course of police pursuit of a fleeing suspect. Several of the chase cases involved unintended or unforeseen conse-

29. See *supra* notes 23-24 and accompanying text.

30. The suspicion is that the Court's hostility to the exclusionary rule leads it to cut back the scope of fourth amendment protections. See Joseph & Hunter, *Circumventing the Exclusionary Rule Through the Issue of Standing*, 10 J. CONTEMP. L. 57 (1984); Knox, *Some Thoughts on the Scope of the Fourth Amendment and Standing to Challenge Searches and Seizures*, 40 MO. L. REV. 1 (1975). See also *Rakas v. Illinois*, 439 U.S. 128, 156 (1978) (White, J., dissenting) ("If the Court is troubled by the practical impact of the exclusionary rule, it should face the issue of that rule's continued validity squarely instead of distorting other doctrines in an attempt to reach what are perceived as the correct results in specific cases.").

31. *Riley*, 488 U.S. at 452 ("[T]here was no undue noise, no wind, dust, or threat of injury"). Compare *Colorado v. Pollock*, 796 P.2d 63 (Colo. Ct. App. 1990) (distinguishing *Riley* and holding that a search occurred when the police helicopter, hovering at 200 feet, created "excessive noise") with *Commonwealth v. Oglialoro*, ___ Pa. ___, 579 A.2d 1288 (1990) (A search occurred when a police helicopter, hovering at fifty feet, created a great deal of noise and represented a hazard to persons and property on the ground.).

32. *Riley*, 488 U.S. at 456 (Brennan, J., dissenting).

33. See *United States v. Berry*, 670 F.2d 583 (5th Cir. 1982) (scope of the amendment increasingly turns upon minute factual differences). See generally Dworkin, *Fact Style Adjudication and the Fourth Amendment: The Limits of Lawyering*, 48 IND. L.J. 329, 366 (1973) (the Court must address fourth amendment protections in "bold, broad policy terms instead of asking what was reasonable under the circumstances . . ."); LaFave, *Being Frank About the Fourth: On Allen's "Process of Factualization" in the Search and Seizure Cases*, 85 MICH. L. REV. 427 (1986) (The establishment of fourth amendment categories is a process of factualization.).

34. See *Brower*, 489 U.S. 593 (1989); *Michigan v. Chesternut*, 486 U.S. 567 (1988); *Tennessee v. Garner*, 471 U.S. 1 (1985); *Hester v. United States*, 265 U.S. 57 (1924).

quences of the chase,³⁵ thus raising fundamental questions about whether the fourth amendment encompasses accidental seizures. Unfortunately, the Court has failed to address the issue with the kind of sweeping analysis utilized to mark the limits of the amendment in *Katz* and *Terry*. Instead, the Court has reduced the question of accidental seizures to a factual inquiry into (1) the pursuing officer's intent³⁶ and (2) the causal link between the chase and the suspect's alleged loss of liberty.³⁷ This analysis, however, is flawed because the Court has failed to relate its view of intended consequences and accidental causation to the language of the amendment itself or to the policies and history surrounding the amendment.

A. All Around the Fourth Amendment, the Police Chased the Suspect. . . . Where Is the Seizure?

The first of the chase cases, *Tennessee v. Garner*,³⁸ arose when a police officer fired a fatal shot at a fleeing felony suspect. The threshold question of whether a seizure had occurred was disposed of in a single sentence: "[T]here can be no question that apprehension by the use of deadly force is a seizure"³⁹ After passing quickly over the threshold question of the amendment's coverage, the *Garner* Court centered its attention on the substantive issue of striking a constitutionally appropriate balance between law enforcement needs and the rights of suspects.⁴⁰ When the Court concluded that the need to apprehend fleeing felons does not "justify the killing of nonviolent suspects,"⁴¹ the unrestricted use of deadly force was removed from the arsenal of police pursuit. The Court's willingness to address the reasonableness of police pursuit was eroded, however, in the subsequent chase cases when the Court invoked a grudging and rigid view of the amendment's scope.

Garner was followed by *Michigan v. Chesternut*,⁴² a chase case that presented the Supreme Court with sharply contrasting theories for determining when police pursuit amounts to a fourth amendment seizure. The chase in *Chesternut* began with a police patrol car's approach to an intersection where the defendant was standing. When the defendant turned and ran, the patrol car drove alongside the

35. See *Roach v. City of Fredericktown*, 882 F.2d 294 (8th Cir. 1989); *Britt v. Little Rock Police Dep't*, 721 F. Supp. 191 (E.D. Ark. 1989).

36. *Brower*, 489 U.S. 593, 598 (1989).

37. *Id.* at 599.

38. 471 U.S. 1 (1985).

39. *Garner*, 471 U.S. at 7.

40. *Id.* at 8.

41. *Id.* at 10.

42. 486 U.S. 567 (1988).

defendant⁴³ until he discarded several packets of codeine that the police retrieved. When these facts were presented to the Supreme Court, the defendant argued that the initiation of a chase constitutes the litmus test for defining a seizure.⁴⁴ According to the defendant "any and all police 'chases' are fourth amendment seizures . . ."⁴⁵ and "the police may never pursue an individual absent a particularized and objective basis for suspecting that he is engaged in criminal activity."⁴⁶ The government, on the other hand, maintained that "a lack of objective and particularized suspicion would not poison police conduct, no matter how coercive, as long as the police did not succeed in actually apprehending the individual."⁴⁷ According to the government, successful apprehension of the suspect is the determinative factor in defining seizures.⁴⁸

The Court refused to adopt either side's proposal for defining a seizure by reference to a single factual occurrence,⁴⁹ whether the fact be pursuit itself or the actual apprehension of the suspect. Instead, the Court applied *United States v. Mendenhall's*⁵⁰ test of whether the totality of the circumstances would lead a reasonable person to perceive that his freedom of movement had been constrained by the police.⁵¹ "Looking to the reasonable man's interpretation of the conduct in question . . .,"⁵² the Court concluded that the police conduct in *Chesternut* could not have induced the defendant to believe that he was not free to disregard the presence of the police and go about his business.⁵³ Because the Court ruled that no seizure took

43. *Id.* at 569. The officer testified that "the goal of the chase was not to capture [the defendant], but to see where he was going." The Court noted that "the subjective intent of the officers is relevant to an assessment of the Fourth Amendment implications of police conduct only to the extent that that intent has been conveyed to the person confronted." *Id.* at 576 n.7.

44. *Id.*

45. *Id.* at 572.

46. *Id.* See *In re D.J.*, 532 A.2d 138, 140 (D.C. App. 1987) ("When the chase commences, the stop has begun."); *Commonwealth v. Thibeau*, 384 Mass. 762, 429 N.E.2d 1009, 1010 (1981) ("[A] stop starts when pursuit begins."); *People v. Washington*, 192 Cal. App. 3d 1120, 1126, 236 Cal. Rptr. 840, 843 (Ct. App. 1987) (Giving chase "in a manner designed to overtake and detain or encourage the individual to give up his flight is a detention.").

47. *Chesternut*, 486 U.S. at 572.

48. *Id.*

49. *Id.*

50. 466 U.S. 544, 554 (1980).

51. *Mendenhall's* reasonably prudent person test has been criticized as a legal fiction because "in fact, citizens almost never feel free to end an encounter initiated by a police officer and walk away." Butterfoss, *Bright Line Seizures: The Need for Clarity in Determining When Fourth Amendment Activity Begins*, 79 J. CRIM. L. & CRIMINOLOGY 437, 439 (1988).

52. *Chesternut*, 486 U.S. at 574.

53. *Id.* at 576.

place,⁵⁴ there was no need to determine whether the chase of the suspect was motivated by idle curiosity or by a legitimate governmental interest. Thus, while *Garner* had given scant attention to the threshold question of defining a seizure⁵⁵ and had focused on the substantive reasonableness of the police pursuit,⁵⁶ the *Chesternut* Court avoided the substantive question by ruling that there was no seizure.

The most recent police chase case, *Brower v. County of Inyo*,⁵⁷ was generated by a factual situation in which a suspect was killed when he crashed into a police roadblock following a high speed chase over approximately twenty miles.⁵⁸ The suspect's heirs brought a section 1983⁵⁹ suit claiming that the police used brutal and unnecessary physical force in establishing the roadblock⁶⁰ and thereby effectuated an unreasonable seizure of the suspect. The court of appeals, however, refused to address the reasonableness of the alleged seizure because no seizure had taken place.⁶¹ According to the Ninth Circuit, "[p]rior to [the suspect's] failure to stop voluntarily, his freedom of movement was never arrested or restrained," and "[h]e had a number of opportunities to stop his automobile prior to the impact."⁶² The court of appeals ruled that there was no loss of liberty during the chase itself and that the loss of liberty accompanying the crash was attributable to the suspect's own actions in continuing the chase.⁶³

54. *Id.*

55. *Tennessee v. Garner*, 471 U.S. 1, 7 (1984).

56. *Id.* at 7-20.

57. 489 U.S. 593 (1989).

58. *Id.* at 594.

59. The statute provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1988).

60. Petitioners alleged that the police: (1) caused an eighteen-wheel tractor-trailer to be placed across both lanes of a two-lane highway in the path of the suspect's flight; (2) effectively concealed this roadblock by placing it behind a curve and leaving it unilluminated; and (3) positioned a police car, with its headlights on, between the suspect's oncoming vehicle and the truck, so that the suspect would be blinded on his approach. *Brower*, 489 U.S. at 594. The Fifth Circuit referred to a similar arrangement as a "deadman" roadblock. *Jamieson v. Shaw*, 772 F.2d 1205, 1207 (5th Cir. 1985). The Fifth Circuit held that use of the roadblock constituted a seizure, and the Supreme Court granted certiorari in *Brower* to resolve the conflict among the circuits. *Brower*, 489 U.S. at 594-95.

61. *Brower v. Inyo County*, 817 F.2d 540, 547 (9th Cir. 1987).

62. *Id.* at 546.

63. *Id.*

In reversing the court of appeals, the Supreme Court cited *Garner's* which held that a police officer's fatal shooting of a fleeing suspect constituted a fourth amendment seizure.⁶⁴ The Court stated that: "Brower's independent decision to continue the chase can no more eliminate respondents' responsibility for the termination of his movement effected by the roadblock than Garner's independent decision to flee eliminated the Memphis police officer's responsibility for the termination of his movement effected by the bullet."⁶⁵

While holding the police accountable for the fatal crash in *Brower*,⁶⁶ the Court exonerated the police from all responsibility for a suspect's loss of control of his vehicle during the chase in *Galas*.⁶⁷ The Court distinguished the two cases by resurrecting a pre-*Terry* case once regarded principally as an example of the open fields doctrine⁶⁸ rather than as a chase case. The newly discovered chase case, *Hester v. United States*,⁶⁹ involved a revenue agent's pursuit of the defendant and his accomplice after seeing the suspects obtain containers thought to be filled with moonshine whisky.⁷⁰ During their flight the suspects dropped the containers which the agent recovered.⁷¹ A unanimous Court in *Hester* held that "[t]he defendant's own acts, and those of his associates, disclosed the jug, the jar and the bottle—and there was no seizure in the sense of the law when the officers examined the contents of each after it had been abandoned."⁷² After recasting the *Hester* decision as a chase case, the *Brower* Court announced that the result in *Hester* would have been quite different if the revenue agent had shouted: "Stop and give us those bottles, in the name of the law!"⁷³ According to *Brower*, "[t]hen the taking of possession would have been not merely the result of government action but the result of the very means (the show of authority) that the government selected, and a Fourth Amendment seizure would have occurred."⁷⁴

The Court's attempt to distinguish *Brower* from *Hester* and *Galas*, as well as its reinterpretation of *Hester* as a chase case, raises an obvious question: Why didn't the chase in *Hester* constitute a manifest "show of authority" that implicitly commanded the suspect to

64. *Brower*, 489 U.S. 593, 595 (1989) (citing *Tennessee v. Garner*, 471 U.S. 1 (1985)).

65. *Brower*, 489 U.S. at 595.

66. *Id.* at 599.

67. *Id.* at 595 (citing *Galas v. McKee*, 801 F.2d 200 (6th Cir. 1986)).

68. *Id.* at 597-98.

69. 265 U.S. 57 (1924).

70. *Id.* at 58.

71. *Id.*

72. *Id.*

73. *Brower*, 489 U.S. at 597.

74. *Id.* at 597-98.

“[s]top and give us those bottles, in the name of the law?”⁷⁵ Under *Chesternut*'s reasonably prudent person test,⁷⁶ it is difficult to envision that the suspects or the revenue agent in *Hester* perceived the chase as anything other than a show of authority intended to obtain the containers. The *Brower* Court parenthetically conceded as much by acknowledging that the containers in *Hester* “were unquestionably taken into possession as a result (in the broad sense) of action by the police”⁷⁷ For fourth amendment purposes, however, the Court declined to accept this “broad sense” of causal connection between the government's action and the defendant's counteraction.⁷⁸ At the same time that it rejected an overly broad definition of causation, the *Brower* Court refused to “draw too fine a line, or we will be driven to saying that one is not seized who has been stopped by the accidental discharge of a gun with which he was meant only to be bludgeoned, or by a bullet in the heart that was meant only for the leg.”⁷⁹

Having framed the issue as a question of drawing an appropriate line somewhere between overly broad and unacceptably narrow concepts of causation,⁸⁰ the *Brower* Court failed to identify the methodology underlying its line-drawing in the chase cases. The Court merely announced its conclusion that:

We think it enough for a seizure that a person be stopped by the very instrumentality set in motion or put in place in order to achieve that result. It was enough here, therefore, that . . . *Brower* was meant to be stopped by the physical obstacle of the roadblock—and that he was so stopped.⁸¹

The Court's reference to the “physical obstacle of the roadblock”⁸² suggests that the Court elected to focus on the mechanical⁸³ cause of

75. *Id.* at 597. In *Brower* there was no verbalization of the officer's desire that the suspect “Stop in the name of the Law!” Although such an intent was manifest from the circumstances of the chase itself, one wonders why the officer's intent in *Hester* was not equally manifest. Ambiguity, however, remains even when the officers verbally communicate their desire that the suspect stop. For example, a call of “Police, wait a second. We want to talk to you” did not implicate the fourth amendment, according to *Richardson v. United States*, 520 A.2d 692, 697 (D.C. 1987), *cert. denied*, 484 U.S. 917 (1987), but a call of “Come here, police officer” did implicate the amendment according to *Johnson v. United States*, 468 A.2d 1325, 1327 (D.C. 1983).

76. *Chesternut*, 486 U.S. 569, 574 (1988).

77. *Brower*, 489 U.S. at 597.

78. *Id.*

79. *Id.* at 598-99.

80. *Id.*

81. *Id.* at 599.

82. *Id.*

83. The *Brower* Court required that the police intend “to produce a stop by physical impact.” *Brower*, 489 U.S. at 598. This language suggests that the Court

the stop, a point addressed in the latter section of this article. The reference to whether the police "meant" to stop the suspect "by" use of the roadblock⁸⁴ indicates the newly discovered significance of the police officers' intent. In an apparent effort to banish any doubt as to the Court's heightened consideration of police intent, the Court embarked upon a discussion of hypothetical⁸⁵ situations designed to demonstrate that "even [when] there is a governmentally caused and governmentally *desired* termination of an individual's freedom of movement,"⁸⁶ a constitutional seizure occurs "only when there is a governmental termination of freedom of movement *through means intentionally applied*."⁸⁷

The *Brower* Court's concern for "means intentionally applied"⁸⁸ is an ill-conceived approach to determining the reach of the fourth amendment. The most puzzling aspect⁸⁹ of the *Brower* opinion is its

is limiting its view of causation to "direct cause" or "purely mechanical rules [which] produce absurd results." R. PERKINS & R. BOYCE, *CRIMINAL LAW* 779, 787 (3d ed. 1982). See *Landol-Rivera v. Cosme*, 906 F.2d 791, 795 (1st Cir. 1990) ("Each of the Supreme Court's recent cases on the fourth amendment . . . involved scenarios in which the individual claiming to have been seized had been the direct object of police intervention."). *Brower's* analysis ignored "indirect causes" and the multiple components of causation that coalesce to produce a given result. See *infra* text accompanying note 201.

84. *Brower*, 489 U.S. at 599.

85. There is a temptation to dismiss Justice Scalia's opinion in *Brower* as the hypothetical musings of a law professor turned Supreme Court Justice. There is, however, the possibility that far more is going on here than the positing of harmless hypotheticals. In *Michigan v. Chesternut* the majority left "to another day the determination of the circumstances in which police pursuit could amount to a seizure under the Fourth Amendment." *Chesternut*, 486 U.S. at 576 n.9. Justice Scalia joined a concurring opinion in *Chesternut* observing that:

[N]either "chase" nor "investigative pursuit" need be included in the lexicon of the Fourth Amendment. . . . It is at least plausible to say that whether or not the officers' conduct communicates to a person a reasonable belief that they intend to apprehend him, such conduct does not implicate Fourth Amendment protections until it achieves a restraining effect.

Id. at 577.

The *Chesternut* concurrence, combined with Justice Scalia's use of hypotheticals in *Brower* and his approval of *Galas*, indicate an attempt by the Justice to foreclose *Chesternut's* assertion that "police pursuit could amount to a seizure. . . ." Four Justices in *Brower* concurred only in the judgment and noted that Justice Scalia's "dicta seem designed to decide a number of cases not before the Court. . . ." *Brower*, 489 U.S. at 600 (Stevens, J., concurring). The Supreme Court recently granted certiorari in *California v. Hodari D.*, 111 S. Ct. 38 (1990) to consider the question: "Is physical restraint required for seizure of person under Fourth Amendment?"

86. *Brower*, 489 U.S. at 597.

87. *Id.*

88. *Id.*

89. Justice Scalia's allusions to intent are arguably ambiguous. See *supra* note 13. Nonetheless, *Brower* purported to follow precedent by rejecting any attempt

attempt to promulgate a constitutional distinction between a desired result and the desired or intended means of achieving that result. An evaluation of several hypotheticals that isolate and distinguish the Court's use of the terms "intentional means" and "intended results" should clarify the nomenclature on which the chase cases are based.

Hypothetical One

Assume that the police enter what they honestly, but mistakenly, believe to be an abandoned apartment in order to look for drugs which they find and retrieve.

This hypothetical posits an intentional act (the police enter by means of their willed bodily movements)⁹⁰ and an intended or desired result (the view of the apartment and the retrieval of contraband).⁹¹ The only unintended facet of this hypothetical is that the police do not intend that a search or seizure take place because they believe that the defendant has abandoned any expectation of privacy with regard to the apartment or the drugs. The hypothetical illustrates the need to distinguish between a police officer's intent to perform a volitional act and his recognition of the legal significance attaching to that act.

Unless some new form of good faith exception⁹² is created, entering an apartment and securing drugs must be defined as a search

to examine the subjective motivation of the police. See *Graham v. Connor*, 109 S. Ct. 1865, 1872 (1989) (Subjective motivations of the individual officers have no bearing on whether a particular seizure is unreasonable under the fourth amendment.); see also *Massachusetts v. Painten*, 389 U.S. 560, 565 (1968) (White, J., dissenting) (Inquiry into the subjective state of mind of police officers would be a costly "misallocation of judicial resources."). But see Butterfoss, *supra* note 51, at 442 (proposing a per se rule defining a seizure on the basis of the police officer's intent to initiate contact with a citizen for purposes of investigating that individual's complicity in criminal activity). If the officer's intent to restrain the suspect were irrelevant, then in some cases "the perception rather than the fact of a restriction on freedom of movement" would determine the scope of the fourth amendment. Williamson, *The Dimensions of Seizure: The Concepts of "Stop" and "Arrest,"* 43 OHIO ST. L.J. 771, 814 (1982).

90. There is general agreement that an act should be defined as a movement of a part of the body. See MODEL PENAL CODE § 1.13(2) ("bodily movement whether voluntary or involuntary"); S. 1722, 96th Cong., 1st Sess. § 111 (1979) ("bodily movement or activity"); RESTATEMENT (SECOND) OF TORTS § 2 (1965) (The word "act" is used "to denote an external manifestation of the actor's will and does not include any of its results even the most direct, immediate and intended."); O. HOLMES, THE COMMON LAW 54 (1881) (An "act" is a "muscular contraction.").

91. The *Brower* Court noted that "the detention or taking itself must be willful." *Brower*, 489 U.S. at 596.

92. In *Massachusetts v. Sheppard*, 468 U.S. 981 (1984) and *United States v. Leon*, 468 U.S. 897 (1984), the Court created a good-faith exception for searches pursuant to a warrant.

and seizure within the meaning of the fourth amendment.⁹³ Otherwise, the amendment becomes a prohibition merely of calculated attempts to violate the constitutional ban against unreasonable searches and seizures. While the intentions underlying police conduct may be significant in the context of the amendment's exclusionary rule,⁹⁴ the Court has never interpreted the scope of the amendment to require a knowing and willful intent to violate the law.⁹⁵ In *Garner*, for example, the pursuing officer's use of deadly force comported with practices derived from common law and approved by a substantial number of state legislatures.⁹⁶ Despite the officer's reliance upon legal precedents⁹⁷ and his good faith belief in the legality of his actions,⁹⁸ the United States Supreme Court concluded that such practices were unreasonable under the fourth amendment.⁹⁹

So long as *Katz* and *Terry* remain in effect, a search or seizure under the fourth amendment is properly defined by the Court's acknowledgment of an expectation of privacy or liberty¹⁰⁰ which society recognizes as justifiable.¹⁰¹ It is society's intent to protect privacy and liberty from intrusive government action, not the intent of the police, that determines the reach of the fourth amendment. In deciphering the constitutional dimensions of society's justifiable expectations, the Court is the ultimate lexicographer. Individual officers or even reasonably prudent officers simply cannot dictate to

93. See *supra* note 12 and accompanying text.

94. See *Graham v. Connor*, 109 S. Ct. 1865 (1989).

95. See *id.* at 1872 ("An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional.") (citing *Scott v. United States*, 436 U.S. 128, 138 (1978)).

96. The Court found that the common-law rule "allowed the use of whatever force was necessary to effect the arrest of a fleeing felon . . ." *Garner*, 471 U.S. at 12. Further, the Court noted that the officer "was acting under the authority of a Tennessee statute and pursuant to Police Department policy." *Id.* at 4.

97. TENN. CODE ANN. §40-7-108 (1982) provides that "[i]f, after notice of the intention to arrest the defendant, he either flee or forcibly resist, the officer may use all the necessary means to effect the arrest."

98. See *supra* note 96.

99. See also *Payton v. New York*, 445 U.S. 573 (1980) (striking down the long-standing practice of warrantless arrests in the suspect's dwelling).

100. In the context of the police chase cases, the term liberty encompasses freedom of movement. *United States v. Mendenhall*, 100 S. Ct. 1870, 1877 (1980). See Maclin, *The Decline of the Right of Locomotion: The Fourth Amendment on the Streets*, 75 CORNELL L. REV. 1258 (1990). In a broader context, the term liberty encompasses an individual's right of autonomy—the right to live one's life without arbitrary physical interference by the state. See Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410, 1415 (1974).

101. "[T]here is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second that the expectation be one that society is prepared to recognize as 'reasonable.'" *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

the Court a judicial definition of search and seizure according to what they think about the constitutional concept.

Although *Brower* declared that “[v]iolation of the Fourth Amendment requires an intentional acquisition of physical control,”¹⁰² the statement should not be read as an indication that the police must comprehend that their exercise of physical control is legally defined as a seizure.¹⁰³ Something less than a knowing intent to violate the Constitution will suffice to trigger fourth amendment coverage.

Hypothetical Two

Assume that a police officer standing in front of a private dwelling is shoved through the door of the dwelling and falls upon a suspect who is holding contraband drugs.

While the first hypothetical posited an intentional act and an intended result, the second hypothetical posits, from the police officer's standpoint, unintentional involvement in a physical event coupled with an unintended result. This situation depicts a non-search and a non-seizure because there is an absence of any intentional (volitional) act¹⁰⁴ performed by a government agent.¹⁰⁵ Although the suspect's privacy has been invaded by the police officer's physical presence in the dwelling, the government is no more responsible for this invasion of privacy than it is responsible for a private citizen who breaks into another's dwelling and discloses the fruits of his search to the police.¹⁰⁶ In either case, while the sovereign is the

102. *Brower*, 489 U.S. at 596.

103. See *Reed v. Hoy*, 891 F.2d 1421 (9th Cir. 1989) (A police officer maintained that no seizure took place because he shot the suspect in self-defense and not for purposes of effectuating an arrest or other stop. The court held that, regardless of the officer's motivation, the acquisition of physical control over the suspect constituted a fourth amendment seizure.). Accord *Keller v. Frink*, 745 F. Supp. 1428 (S.D. Ind. 1990) (A game warden shot at an automobile for the purpose of marking it for later identification. His bullet hit one of the auto's occupants, with the result that the vehicle stopped, and all those inside were arrested.).

104. “By ‘events’ jurists mean those occurrences which take place independent of the will. By ‘acts’ those which are subject to the control of the human will and so flow therefrom. Acts, then, are exertions of the will manifested in the external world.” R. POUND, *READINGS ON THE HISTORY AND SYSTEM OF THE COMMON LAW*, 513 (3rd ed. 1927). See J. MILL, *A SYSTEM OF LOGIC*, 59 (1873) (Volition is one of the constituents of positive action.); see also authorities cited *supra* note 90.

105. The hypothetical assumes that the police officer was pushed by a private citizen. If he were pushed by another police officer, there would be a volitional act by a government agent.

106. *Walter v. United States*, 447 U.S. 649 (1980); *Burdeau v. McDowell*, 256 U.S. 465 (1921). “[T]he Fourth Amendment does not apply to a search or seizure, even an arbitrary one, effected by a private party on his own initiative” *Skinner v. Railway Labor Executives Ass’n*, 489 U.S. 602, 614 (1989).

fortuitous beneficiary of a non-governmental act, the fourth amendment is limited to regulating governmental activity.¹⁰⁷

Although the *Brower* Court's analysis is flawed in other respects, the Court correctly recognized that the word seizure "can hardly be applied to an unknowing act."¹⁰⁸ The fourth amendment addresses conduct that is wrongful only if done by the government, but in the absence of volitional conduct by government agents no purpose is served by extending the amendment to the government's "accidental" involvement in intrusions upon a suspect's liberty.

The above hypotheticals involving a volitional¹⁰⁹ and an accidental¹¹⁰ entry of the suspect's apartment set the parameters for defining fourth amendment intent.¹¹¹ The first hypothetical demon-

107. The fourth amendment's "origin and history clearly show that it was intended as a restraint upon the activities of sovereign authority . . ." *Burdeau v. McDowell*, 256 U.S. 465, 475 (1921). See generally *Amsterdam*, *supra* note 17.

108. *Brower*, 489 U.S. at 596.

109. See *supra*, p. 86.

110. See *supra*, p. 88.

111. The hypotheticals involved two possible combinations of the factors of intentional conduct and an intended or desired result. Hypothetical one addressed the presence of both factors while hypothetical two addressed the absence of both factors. There are two other possible combinations of conduct and corresponding result which may exist.

For example, consider the situation in which a result was desired but no volitional act occurred. Because this scenario requires postulating a desired result free of any physical conduct by police, the hypothetical facts necessarily take on a far-fetched nature much like Justice Scalia's hypotheticals in *Brower*. *Brower*, 489 U.S. at 596-97. One can formulate such facts, however, by drawing upon what must be the secret dream of frustrated police officers. Assume that a major drug dealer has just been acquitted due to the legalistic maneuverings of a "sleazy" defense counsel. As the disheartened arresting officer stands in the courtroom, he vows that some day, some way, he will vanish this scum (the drug dealer, if not the lawyer) from the face of the earth, whereupon the drug dealer promptly drops dead at the officer's feet. Whatever the tabloids might headline about the officer's psychic powers, the Court will hold the fourth amendment inapplicable in the absence of volitional conduct by the officer.

In the final scenario, the act, but not the result, was intended. For this hypothetical, assume that the police fire at a fleeing suspect, but the bullet strikes a hostage held by the suspect. See *Landol-Rivera v. Cosme*, 906 F.2d 791 (1st Cir. 1990). The lower court held that the hostage had been seized by the police because the officers deliberately fired their weapons at the car containing the hostage, and the shooting resulted in the hostage's loss of liberty. *Id.* at 793. The First Circuit reversed the lower court on grounds that police action simply causing a particular result must be distinguished from police action directed toward producing a particular result. *Id.* at 795. According to the First Circuit, unless the restraint of liberty resulted from an attempt to gain control of the individual, there has been no fourth amendment seizure. *Id.*

What takes *Brower* beyond the four addressed combinations of act and result is the Court's discussion of an additional factor, *i.e.*, the intent to utilize conduct as a means of bringing about a desired result. *Brower*, 489 U.S. at 596-97. According to *Brower*, unless the means are intentionally applied, no fourth amendment seizure

strates that something less than a knowing intent to violate the Constitution will suffice to trigger fourth amendment coverage,¹¹² and the second hypothetical demonstrates that the amendment requires something beyond the government's unwitting involvement in an intrusion upon privacy and liberty interests.¹¹³ If the first two hypotheticals accurately establish the boundaries for a proper definition of fourth amendment intent, the third hypothetical considers what intermediate form of intent is required to trigger the amendment's coverage.

Hypothetical Three

Assume that the pursuing officer in *Brower* did not order a roadblock, but instead intended to continue the chase until this show of authority persuaded or intimidated the suspect to stop voluntarily. Assume further that in the course of the chase, the officer rounded a blind curve and crashed into the suspect's vehicle which had stopped due to mechanical failure.

The question posed by this hypothetical is whether the fourth amendment will apply to a result which was not achieved in the precise manner that the government agent intended. The *Brower* decision appears to exclude the above hypothetical from fourth amendment coverage because of the absence of a perfect match between the intended means and the actual means of terminating the suspect's freedom of movement.¹¹⁴ If the suspect had stopped his car because of the intimidation created by the chase, the intended means and the actual means would coincide and a seizure would exist according to the Court's interpretation of *Hester*.¹¹⁵ Similarly, if the police had intended to collide with the suspect's vehicle, there would

occurs "even whenever there is a governmentally caused and governmentally *desired* termination of an individual's freedom of movement . . ." *Id.* at 597.

112. See *supra* pp. 86-88.

113. See *supra* pp. 88-90.

114. In the broad sense the police set an instrumentality (the police car) into motion for the purpose of stopping the suspect. But in the narrow sense the police car was intended to intimidate the suspect, not to run over him. As the *Brower* Court noted: "In marked contrast to a police car pursuing with flashing lights, . . . a roadblock is not just a significant show of authority to induce a voluntary stop, but is designed to produce a stop by physical impact if voluntary compliance does not occur." *Brower*, 489 U.S. at 598. This situation is not unlike Justice Scalia's hypothetical in which "a serial murderer for whom there was an outstanding arrest warrant" and who "in the process of running away from two pursuing constables," is apprehended when "a parked and unoccupied police car slips its brake and pins [the fleeing suspect] against a wall . . ." *Brower*, 489 U.S. at 596. Justice Scalia maintained that the unintended method of terminating the suspect's freedom of movement would not constitute a seizure. *Id.*

115. *Hester*, 265 U.S. 57 (1924). See *supra* text accompanying note 74.

again be a perfect match between intent and result, and a seizure would occur.¹¹⁶ Under the facts of this hypothetical, however, the officer's physical collision with the suspect is contrary to the officer's intent to intimidate the suspect into a voluntary stop. According to *Brower*, no seizure occurs when there is a failure to match the intended means with the actual means of terminating the suspect's freedom of movement.¹¹⁷

As justification for its novel treatment of accidental seizures,¹¹⁸ the *Brower* Court opined that the fourth amendment encompasses a willful detention or taking¹¹⁹ and a "misuse of power"¹²⁰ but "not the accidental effects of otherwise lawful conduct."¹²¹ The Court, however, neglected to define these terms. If the Court uses the term "willful detention" to denote any detention resulting from a volitional act (willed bodily movement),¹²² then the latter hypothetical posits a detention resulting¹²³ from the officer's volitional conduct in chasing the suspect. If, on the other hand, the terms "willful detention" or "misuse of power" mean that the officer or a reasonably prudent officer must be aware that he is intruding upon the suspect's liberty interests, such a requirement must be rejected under the analysis of the first hypothetical.¹²⁴ The Court's final statement that the amendment does not address the "accidental effects of otherwise lawful government conduct"¹²⁵ involves a sleight-of-hand machination which assumes away the very issue under consideration.

116. See *Brower*, 489 U.S. at 597 (If a police vehicle "had pulled alongside the fleeing car and sideswiped it, producing the crash, then the termination of the suspect's freedom of movement would have been a seizure.").

117. *Id.* The Court observed in *Brower* that the officers in *Galas* "sought to stop the suspect only by the show of authority represented by flashing lights and continuing pursuit," whereas the suspect was actually stopped "by a different means—his loss of control of his vehicle and the subsequent crash." *Id.*

118. Prior to *Brower*, the Court considered a form of unintended search and seizure under the rubric of inadvertent plain view. A plurality of the Court in *Coolidge v. New Hampshire* suggested that an anticipated or intended plain view seizure may taint otherwise lawful actions by the police. 403 U.S. 443 (1971). In promulgating a constitutionally significant link between intended seizures and otherwise lawful conduct, however, the *Coolidge* Court did not address the reverse question of whether there is a similarly significant relationship between unintended seizures and otherwise unlawful conduct. The full ramifications of the "inadvertence" requirement under the plain view doctrine were never addressed by the Supreme Court, and the inadvertence requirement was eventually abandoned. *Horton v. California*, 110 S. Ct. 2301 (1990).

119. *Brower*, 489 U.S. at 596.

120. *Id.* at 596 (citing *Byars v. United States*, 273 U.S. 28, 33 (1927)).

121. *Id.*

122. See *supra* note 90.

123. The detention also results from a suspect's volitional conduct in seeking to avoid apprehension. The allocation of responsibility between the police and the suspect is discussed in the second section of this article. See *infra* text accompanying note 189.

124. See *supra* text accompanying note 90.

125. *Brower*, 489 U.S. at 596.

If "lawful conduct" denotes lawfulness under substantive criminal law, *e.g.*, whether a statute authorizes or prohibits high speed chases,¹²⁶ *Oliver v. United States*¹²⁷ teaches that common-law or statutory provisions do not dictate the scope of the fourth amendment. Unless *Oliver* has been overruled sub silentio, the Court must be using the term lawful conduct as a synonym for constitutional conduct. But to say that the fourth amendment does not apply to the accidental effects of otherwise "lawful conduct" is a tautology. When there is no unlawful or unconstitutional intrusion upon privacy or liberty, there is no constitutional violation that can contaminate the physical seizure of citizens or their property. Once the Court determines or assumes that the police conduct is constitutionally lawful, it is constitutionally irrelevant whether the effects of that conduct are accidental or intentional.¹²⁸

The *Brower* Court's reference to lawful conduct¹²⁹ fails to distinguish between a situation in which the police conduct is deemed constitutionally lawful because there has been no intrusion upon privacy or liberty interests (the threshold question)¹³⁰ and a situation in which an intrusion may have taken place, but the intrusion is lawful because it satisfies the amendment's reasonableness requirement (the substantive question).¹³¹ In the latter case, the Court has once again bypassed the threshold question of the amendment's scope by looking ahead to the reasonableness of the government's action.¹³² In the former case, the Court has failed to define a seizure without reference to the ultimate question of the seizure's lawfulness or reasonableness. The *Brower* allusion to the accidental effects of otherwise lawful conduct thus avoids the fundamental question of whether the fourth amendment encompasses a situation in which a police officer's volitional act (whether ultimately reasonable or unreasonable) results in an accidental intrusion upon the suspect's freedom of movement.

In fact, *Brower's* majority directly addressed this fundamental question only in the context of the historical fact that "the writs of

126. See Alpert & Dunham, *Policing Hot Pursuits: The Discovery of Aleatory Elements*, 80 J. CRIM. L. & CRIMINOLOGY 521 (1989) (discussing the need for legal and administrative control of high-speed pursuit).

127. 466 U.S. 170 (1984) (A criminal trespass into open fields was not an intrusion upon privacy for fourth amendment purposes.).

128. See *Horton v. California*, 110 S. Ct. 2301, 2309-10 (1990) ("[N]o additional Fourth Amendment interest is furthered by requiring that the discovery of evidence be inadvertent.').

129. *Brower*, 489 U.S. at 596 (The Supreme Court noted that the fourth amendment addresses "misuse of power" and not the effects of otherwise lawful governmental conduct.).

130. *Id.* at 595.

131. *Id.* at 595-96.

132. See *supra* note 15.

assistance that were the principal grievance against which the Fourth Amendment was directed . . . did not involve unintended consequences of government action."¹³³ The Court's reading of history, however, does not answer the question of accidental seizures. While condemning the intentional seizures associated with writs of assistance,¹³⁴ the constitutional framers¹³⁵ were never called upon to consider the question of accidental seizures. Given the climate of hostility surrounding writs of assistance and general warrants,¹³⁶ it is unlikely that the framers would endorse the Court's view that no seizure took place in *Galas*¹³⁷ when the suspect crashed while trying to avoid the police. If *Galas* were transported back to the time of the writs of assistance controversy,¹³⁸ one could contrive a situation in which a customs inspector directs a royal frigate to stop and board a colonial merchant vessel. The merchant vessel flees into shallow waters where it crashes on a reef causing the demise of the crew. Would the founding fathers have been content to ignore the incident because the customs inspector meant no physical harm to the merchant, or would the colonists have demanded to know the custom inspector's justification for initiating the pursuit of the merchant?

One of the most odious features of writs of assistance was "the unbridled discretion given public officials to choose targets of the searches. . . ."¹³⁹ Thus, history indicates that the American colonists were concerned with and sought protection against the arbitrary exercise of government power as well as protection against intentional misconduct by government officials.¹⁴⁰ When the framers of the fourth amendment guaranteed "the right of the people to be secure

133. *Brower*, 489 U.S. at 596.

134. *Id.*

135. *Id.* (quoting T. COOLEY, CONSTITUTIONAL LIMITATIONS 301-02 (1883)) (acknowledging that the seizure clause of the fourth amendment does not encompass unintended consequences of governmental actions nor did the general warrants issued by Lord Halifax in the 1760s which spawned the first and only major search-and-seizure litigation in the English courts).

136. *See generally id.*

137. *See supra* text accompanying notes 9-11.

138. *See Brower*, 489 U.S. at 596.

139. Hufstедler, *Invisible Searches for Intangible Things: Regulation of Governmental Information Gathering*, 127 U. PA. L. REV. 1483, 1487 (1979).

140. *See Katz, Reflections on Search and Seizure and Illegally Seized Evidence in Canada and the United States*, 3 CAN.-U.S. L.J. 103, 109-14 (1980) (The fourth amendment eliminated the broad intrusions associated with general warrants and writs of assistance and replaced them with limited intrusions based upon the probable cause and warrant requirements in addition to an overall requirement of reasonableness.); *see also* Loewy, *The Fourth Amendment as a Device for Protecting the Innocent*, 81 MICH. L. REV. 1229, 1236 (1983) ("[V]irtually every significant pre-revolutionary search or seizure involved a nonspecific or arbitrarily obtained warrant.").

... against unreasonable searches and seizures," they were not equating the reasonableness of police pursuit with the absence of malicious intent.¹⁴¹ It is fallacious to impart to the framers a desire to confine the amendment to a prohibition of only the most egregious abuses associated with eighteenth century writs of assistance. In light of the Court's acknowledgement that it "has not simply frozen into constitutional law those law enforcement practices that existed at the time of the Fourth Amendment's passage,"¹⁴² the Court must look beyond specific historical practices to discern the broader purposes underlying the creation of the amendment.

According to *Katz* and *Terry*, the fundamental purposes of the amendment are reflected in the twin predicates that trigger its application—intrusions upon privacy or liberty interests brought about by governmental action.¹⁴³ Both predicates are met when our hypothetical police officer unintentionally crashes into the suspect's vehicle, thereby bringing about a convergence of volitional police conduct and a resulting intrusion upon the citizen's liberty interests. The *Brower* Court went beyond *Katz* and *Terry* when it suggested that the concurrence of these twin predicates does not constitute a seizure unless the two predicates are linked by an intent to bring about the intrusion "through means intentionally applied."¹⁴⁴ While *Katz* and *Terry* undoubtedly assumed that the predicates must be linked in some fashion,¹⁴⁵ the *Katz* and *Terry* Courts never addressed the nature of that connection. *Brower* is the first Supreme Court case to focus upon the causal connection between governmental action and a loss of liberty and the first case to suggest that the government agent's intent is the vital link between the two.¹⁴⁶

In the absence of clear precedent, one can only speculate as to what prompted the Court to create a requirement that seizures be

141. "It is apparent that in order to satisfy the 'reasonableness' requirement of the Fourth Amendment, what is generally demanded of the many factual determinations that must regularly be made by agents of the government . . . is not that they always be correct, but that they always be reasonable." *Illinois v. Rodriguez*, 110 S. Ct. 2793, 2800 (1990).

142. *Payton v. New York*, 445 U.S. 573, 591 n.33 (1980). See also *Weems v. United States*, 217 U.S. 349, 373 (1910):

Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth In the application of a constitution, therefore, our contemplation cannot be only of what has been but of what may be.

Id.

143. See *Amsterdam*, *supra* note 17, at 367.

144. *Brower*, 489 U.S. at 597 (italics omitted).

145. See *Terry*, 392 U.S. at 2 ("[A]n arrest is a[n] . . . intrusion upon individual freedom."); *Katz*, 289 U.S. at 350 (The amendment "protects individual privacy against certain kinds of governmental intrusion.").

146. 489 U.S. at 598-99.

brought about "through means intentionally applied."¹⁴⁷ Perhaps the *Brower* Court balked at the prospect of extending the fourth amendment to accidental seizures and thereby further punishing the constable for well-intentioned blunders. If the *Brower* decision were influenced by the Court's hostility to the exclusionary rule¹⁴⁸ or its reluctance to extend section 1983 to encompass mere negligence,¹⁴⁹ the Court has lost sight of its limited task in defining the threshold requirements for a search and seizure. Merely acknowledging that the threshold may be crossed by accidental intrusions upon privacy and liberty does not commit the Court to punishing the police for accidents. The coverage of the amendment is only the preliminary inquiry.¹⁵⁰ The reasonableness or unreasonableness of the policeman's conduct¹⁵¹ and the application of the exclusionary rule¹⁵² remain separate issues for the Court's determination.

If, for example, our hypothetical police officer's crash into the suspect's vehicle were to be classified as a seizure, the reasonableness of that seizure hinges upon striking the appropriate balance between the justification for the chase and potential threat of the chase to the suspect's liberty.¹⁵³ In the event that the Court strikes the balance in favor of the governmental interest underlying the chase, the Court would sanction the reasonableness of the officer's actions. But the Court would do so by issuing a limited ruling that condones only a particular specimen of accidental seizure.¹⁵⁴ A decision on the substantive reasonableness of a specific form of accidental seizure is

147. In *Daniels v. Williams*, the Court held that the due process clause is not implicated by a negligent act of an official causing unintended loss of or injury to life, liberty, or property. 474 U.S. 327, 328 (1986). The *Brower* Court, however, addressed the unintended means of bringing about an intended loss of liberty. *Brower*, 489 U.S. at 596.

148. See *supra* note 30. Although the exclusionary rule is not germane in section 1983 cases like *Brower*, the constitutional definition of a seizure is equally applicable to criminal prosecutions. *Brower* interchangeably cites criminal cases (*e.g.*, *Hester*) and section 1983 cases (*e.g.*, *Garner*) to support a generic definition of accidental seizures which would then apply to criminal prosecutions and thereby affect the operation of the exclusionary rule. See *Michigan Dep't State Police v. Sitz*, 110 S. Ct. 2481, 2485 (1990) (quoting *Brower's* definition of a seizure within the context of sobriety checkpoints).

149. See *infra* note 169.

150. See *supra* text accompanying notes 15-16.

151. See *supra* text accompanying notes 25-28.

152. See *supra* note 148.

153. See *infra* text accompanying note 269; see also *Roach v. City of Fredericktown*, 882 F.2d 294 (8th Cir. 1989); *Britt v. Little Rock Police Dep't*, 721 F. Supp. 189 (E.D. Ark. 1989). After expressing reservations about *Brower's* definition of accidental seizures, both courts assumed that a seizure took place and upheld the reasonableness of the seizure.

154. See, *e.g.*, *Roach*, 882 F.2d 294 (8th Cir. 1989); *Britt*, 721 F. Supp. 189 (E.D. Ark. 1989).

fundamentally distinct from *Brower's* universal dictate that the threshold of the fourth amendment never encompasses the unintended consequences of governmental action.¹⁵⁵ Applying *Brower's* inflexible constitutional dogma to the hypothetical leads to the startling conclusion that because the officer "didn't mean it," no seizure of a person occurred even though the officer ran over and killed the very suspect whom the officer was pursuing.

The Court can avoid such nonsensical results by discarding the *Brower* majority's categorical rejection of accidental seizures¹⁵⁶ in favor of the concurring opinion's recognition that "[t]he intentional acquisition of physical control of something is no doubt a characteristic of the typical seizure, but I am not entirely sure that it is an essential element of every seizure or that this formulation is particularly helpful in deciding close cases."¹⁵⁷ The concurring Justices refused to join the majority in elevating a characteristic of a typical seizure to the level of a constitutional prerequisite for application of the fourth amendment.¹⁵⁸ Unlike the majority opinion, the concurring opinion holds open the possibility of extending the amendment to the atypical¹⁵⁹ accidental seizure whenever necessary to achieve the primary goals of the amendment.

Consider the differing results when *Brower's* majority and concurring opinions are applied to our hypothetical set out above, with one last fact added to the situation. Assume that the police officer initiated the chase of the suspect because the officer did not approve of the political bumper sticker on the suspect's vehicle. According to the *Brower* majority, if the officer had intended to run over the suspect, a seizure would result, and *Garner* would require the Court to balance the intentional use of deadly force against the justification for using the force.¹⁶⁰ Under the facts of this hypothetical, however, the *accidental* use of deadly force remains beyond the scope of the

155. *Brower*, 489 U.S. at 596.

156. *Id.*

157. *Id.* at 600 (Stevens, J., concurring).

158. *Id.*

159. Accidental seizures may be atypical, but they are not rare occurrences. Numerous accidental injuries arise from the countless incidents in which the state and its citizens interact. *See, e.g.,* Landol-Rivera v. Cosme, 906 F.2d 791 (1st Cir. 1990) (bullet intended for fleeing suspect struck the suspect's hostage); Roach v. City of Fredericktown, 882 F.2d 294 (8th Cir. 1989) (Police pursuit of fleeing felon caused the felon to collide with an innocent citizen's vehicle.); Fernandez v. Leonard, 784 F.2d 1209 (1st Cir. 1986) (shooting of unarmed hostage); Grandstaff v. City of Borger, 767 F.2d 161 (5th Cir. 1985) (intentional, though mistaken, shooting of innocent bystander); Keller v. Frink, 745 F. Supp. 1428 (S.D. Ind. 1990) (A bullet intended to mark an automobile for identification struck an occupant of the vehicle.); Britt v. Little Rock Police Dep't, 721 F. Supp. 189 (E.D. Ark. 1989) (A citizen was killed in car crash following a police officer's pursuit of a car thief.).

160. *Tennessee v. Garner*, 471 U.S. 1 (1985).

fourth amendment and beyond the scope of judicial review.¹⁶¹ Thus, the *Brower* majority would refuse to entertain allegations of a blatantly unjustified use of deadly force so long as the officer “didn’t mean” to hurt anyone.¹⁶² When attaching so much significance to intent, the *Brower* majority ignored the maxim that “though boys throw stones at frogs in jest, the frogs die in earnest.” Regardless of the officer’s intent, the injury inflicted on the suspect is a risk that the constitutional prohibition against unreasonable seizures seeks to avoid¹⁶³ and, thus, within the scope of the fourth amendment.

In contrast to the *Brower* majority’s view of intentional seizures,¹⁶⁴ the concurring opinion suggests that an examination of the officer’s intent “adds little to the well-established rule that ‘a person has been ‘seized’ within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.’”¹⁶⁵ In the hypothetical situation above, there can be no doubt that a person run over by a police cruiser would reasonably perceive that his freedom of movement has been constrained. Having crossed this threshold requirement for a seizure,¹⁶⁶ the concurring opinion would examine the reasonableness of the seizure¹⁶⁷ and address the issue that the *Brower* majority would refuse to reach—the underlying justification for the chase. The *Brower* majority’s aversion to examining the underlying justification for a police pursuit sanctions what *Terry* condemned—the government’s attempts “to isolate from constitutional scrutiny the initial stages of the contact between the policeman and the citizen.”¹⁶⁸

If the Court is to remain faithful to the rudimentary purposes of the fourth amendment, it should not refuse to examine claims of improper police conduct merely because that conduct accidentally caused a citizen’s loss of liberty.¹⁶⁹ The link between creation of risk

161. Absent a violation of the fourth amendment, the Court may not invoke its supervisory powers to exclude evidence obtained by offensive police conduct. *United States v. Payner*, 447 U.S. 727, 733 (1980). “[A]ll claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other ‘seizure’ of a free citizen should be analyzed under the Fourth Amendment and its ‘reasonableness’ standard, rather than under a ‘substantive due process’ approach.” *Graham v. Connor*, 109 S. Ct. 1865, 1871 (1989).

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

163. “[T]he interest in freedom from bodily harm surely qualifies as an interest in ‘liberty’.” *Daniels v. Williams*, 474 U.S. 327, 341 (1985) (Stevens, J., concurring).

164. *Brower*, 489 U.S. at 598-99.

165. *Id.* at 600 (Stevens, J., concurring) (citing *United States v. Mendenhall*, 446 U.S. 544, 554 (1980)).

166. *Id.*

167. *Id.* at 600-01 (Stevens, J., concurring).

168. *Terry*, 392 U.S. at 17.

169. I do not suggest that the fourth amendment applies to all improper police

and realization of harm is often fortuitous, yet the government's freedom to engage in certain conduct is restricted in the first instance to avoid certain harms to citizens. The intentional or fortuitous occurrence of those harms triggers fourth amendment protections in the form of a judicial inquiry into the reasonableness of the police officer's conduct.¹⁷⁰

B. Summary

The hypotheticals presented in this article serve to isolate and distinguish the terms that the *Brower* Court failed to define, *i.e.*, "willful detention,"¹⁷¹ "desired termination of an individual's freedom of movement,"¹⁷² "an intentional acquisition of physical control"¹⁷³ and "means intentionally applied."¹⁷⁴ The first hypothetical considered a volitional act (entering the apartment) and a physical result (taking control of the suspect's property) that were both intended, although the police officer did not intend to bring himself within the coverage of the amendment.¹⁷⁵ When there is both an intentional act and an intended result that qualifies as an intrusion

conduct causing physical harm to a citizen. "[I]t is perfectly clear that not every injury in which a state official has played some part is actionable under" section 1983. *Martinez v. California*, 444 U.S. 277, 285 (1980). A state law tort suit, not federal civil rights litigation, is the appropriate vehicle for compensation of a citizen accidentally run over by a police car on a frolic to the doughnut shop. *See Paul v. Davis*, 424 U.S. 693, 698 (1976) (Section 1983 does not create a cause of action for survivors of an innocent bystander negligently killed by a sheriff driving a government vehicle.); *see also Daniels v. Williams*, 474 U.S. 327, 328 (1985) (Negligent acts by government officials, though causing loss of liberty, are not actionable under the due process clause.).

When, however, the police engage in volitional conduct for the very purpose of apprehending the suspect, it matters not that the conduct succeeds in apprehending the suspect in some unintended or unforeseen manner. "It is intervention directed at a specific individual that furnishes the basis for a Fourth Amendment claim." *Landol-Rivera v. Cosme*, 906 F.2d 791, 796 (1st Cir. 1990) (Unless the restraint of liberty resulted from an attempt to gain control of the individual, there has been no fourth amendment seizure.).

170. It is inevitable that the police response to violent crime will at times create some risk of injury to suspects and innocent bystanders. The reasonableness of creating such risks depends upon the totality of the circumstances. *See, e.g., Britt v. Little Rock Police Dep't*, 721 F. Supp. 189, 195 (E.D. Ark. 1989). The court found that it is reasonable for an officer to turn on the flashing lights and siren in an attempt to induce the suspect to stop and for an officer to pursue a fleeing car for a short distance in light traffic to see if the suspect would desist from flight. At some point, however, continued pursuit at high speeds in heavy traffic might become unreasonable. *Id.*

171. *Brower*, 489 U.S. at 596.

172. *Id.* at 597.

173. *Id.* at 596.

174. *Id.* at 597.

175. *See supra* pp. 86-88.

upon protected privacy or liberty interests, the Court must characterize the situation as a search and seizure.¹⁷⁶ The scope of the fourth amendment cannot be made dependent upon the legal judgments of police officers, whether the officers act in good faith or otherwise.

In contrast to the first hypothetical, the second hypothetical situation posited an absence of volitional conduct coupled with an unintended result.¹⁷⁷ There is no search or seizure in this situation because the fourth amendment is limited to regulating governmental activity,¹⁷⁸ and in this hypothetical there is no volitional act performed by a government agent. It is in this limited context—the absence of volitional conduct by government agents—that one can accurately speak of the government's accidental involvement in any intrusion upon privacy or liberty as falling beyond the scope of the fourth amendment.

Finally, the third hypothetical suggested a volitional act coupled with an intent to bring about the termination of the suspect's liberty, but the officer did not intend the precise manner of termination.¹⁷⁹ Although the hypothetical contains the fundamental predicates that have traditionally triggered fourth amendment coverage—government action¹⁸⁰ and a citizen's loss of liberty¹⁸¹—the *Brower* Court went further and addressed the previously unstated assumption that the predicates must be linked in some fashion.¹⁸² The *Brower* Court, however, took a false step by requiring the two predicates be linked by a government agent's intent to bring about a loss of liberty through means intentionally applied.¹⁸³ Instead of evaluating intent, the Court should have examined the objective causal connection between the predicates. The nature of that causal connection is discussed in the second section of this article.

II. RELATING CAUSATION CONCEPTS TO THE PURPOSES OF THE FOURTH AMENDMENT

The first section of this article isolated and focused upon the issue of the governmental intent to accomplish a seizure.¹⁸⁴ The

176. See, e.g., *Brower*, 489 U.S. at 596.

177. See *supra* pp. 88-90.

178. U.S. CONST. amend. IV; see also *supra* note 107.

179. See *supra* pp. 90-91.

180. See *Maryland v. Macon*, 472 U.S. 463, 468 (1989) (declaring that fourth amendment protections do not apply, absent governmental action which could be characterized as a search and seizure).

181. See *Tennessee v. Garner*, 471 U.S. 1, 6 (1984) (A seizure occurs when a person's freedom is restrained.).

182. *Brower*, 489 U.S. at 597-98.

183. *Id.* at 597.

184. See *supra* pp. 76-99.

analysis assumed that the suspect suffered a loss of liberty and that the loss could be attributed to the physical conduct of government agents.¹⁸⁵ The causal link between government conduct and the suspect's loss of liberty was most easily discerned in the first hypothetical¹⁸⁶ in which only the police engaged in affirmative volitional conduct. What remains for consideration is the additional issue that troubled the *Brower* Court—a situation in which the suspect is an active participant and, as a result, clouds the objective causal connection between the governmental conduct and the suspect's loss of liberty. For example, the police in *Brower* erected a roadblock in hopes that a visual sighting of the barrier would induce the suspect to stop voluntarily.¹⁸⁷ The suspect, however, elected to continue his flight until he crashed into the roadblock.¹⁸⁸ In determining the cause of the crash, the *Brower* Court was forced to allocate responsibility between the police and the suspect, both of whom played an active role in bringing about the alleged seizure.

The proper allocation of responsibility among multiple actors in a chase scenario is an integral part of the Court's analysis of the chase cases.¹⁸⁹ Each case involved a combination of arguably dependent and independent volitional conduct by both the police and the suspect.¹⁹⁰ It is impossible, however, to reconcile the chase cases by reference to a consistent¹⁹¹ theory that would explain how the Court apportioned responsibility among the participants in a chase scenario. In particular, the Court has failed to address the extent to

185. See *Landol-Rivera v. Cosme*, 406 F.2d 791, 793 (1st Cir. 1990) (situation in which a policeman's bullet, intended to stop the fleeing felon, struck a hostage). The court stated that *Brower* had carefully distinguished between police action directed toward producing a particular result, and police action that simply caused a particular result. Compare *id.* at 795 with *Keller v. Frink*, 745 F. Supp. 1428, 1432 (S.D. Ind. 1990) (A seizure occurred when a shot intended to mark a vehicle for identification struck an occupant of the vehicle.).

186. See *supra* text accompanying note 90.

187. See *supra* note 8.

188. See *id.*

189. If the police officer's subjective intent is a relevant factor in defining a seizure, *Chesternut* may be distinguished from the other chase cases on grounds that the police intended to follow the suspect and not to apprehend him. See *supra* note 13. In *Chesternut* itself, the Court noted that "the subjective intent of the officers is relevant to an assessment of the Fourth Amendment implications of police conduct only to that extent that the intent has been conveyed to the person confronted." *Chesternut*, 486 U.S. at 576 n.7.

190. The Ninth Circuit characterized the situation in *Brower* as involving "the combined intentional conduct of both victims and defendants." *Brower*, 817 F.2d 540, 546 (9th Cir. 1987), *rev'd*, 489 U.S. 593 (1989).

191. In *Chesternut* the Court stated that the test for fourth amendment seizures "calls for consistent application from one police encounter to the next," in order that the police may "determine in advance whether the conduct contemplated will implicate the Fourth Amendment." *Chesternut*, 486 U.S. at 574.

which one party may be held accountable for eliciting responsive conduct¹⁹² from another. In *Brower* and *Garner* each suspect's decision to take flight did not relieve the police of responsibility for their own actions.¹⁹³ Yet, in *Hester* and *Chesternut*, each suspect's decision to discard the containers that he was carrying exempted the police from all accountability for their conduct in initiating the chase.¹⁹⁴

A consideration of whether one person is culpable for the reactions elicited from another¹⁹⁵ must begin with the requirement for a scientific connection (the but-for test) between cause and effect.¹⁹⁶ In the fourth amendment context, the Court has acknowledged the requirement for a but-for causal connection when formulating the independent discovery exception to the exclusionary rule.¹⁹⁷ Thus, a chase that begins with the issuance of an arrest warrant in New York plays no part in the independent and simultaneous decision of a suspect to surrender to the police in California.

Doctrines such as the independent discovery rule¹⁹⁸ illustrate the manner by which a scientific analysis of causation serves as a screening process for eliminating unnecessary factors from responsibility for the result.¹⁹⁹ When irrelevant factors are removed, the

192. *Hester*, *Garner*, *Chesternut*, and *Brower* involved the suspects' response of flight while *Hester* and *Chesternut*, in addition, involved the suspects' discarding containers that the police later retrieved.

193. *Brower* and *Garner* might have been distinguished from each other under the "last clear chance doctrine." In *Garner*, the police performed the last of a sequence of acts when they fired the fatal shot after the suspect engaged in the act of flight—*Garner*, 471 U.S. at 4—whereas in *Brower*, the suspect performed the final act of driving into the roadblock previously erected by the police. *Brower*, 817 F.2d at 452. This article maintains that a decision to invoke or ignore causation theories such as the "last clear chance doctrine" must be related to the purposes underlying the fourth amendment. See *infra* text accompanying note 204.

194. *Hester* and *Chesternut* might have been distinguished from each other by examining the subjective intent of the pursuing officers. While the revenue agents in *Hester* sought to obtain the containers, the police in *Chesternut* merely intended to see where the suspect was going. The Court's recognition of subjective intent is subject to debate. See *supra* note 13.

195. See Terry, *Proximate Consequences in the Law of Torts*, 28 HARV. L. REV. 10 (1914). The lower court in *Brower* maintained that the combined intentional conduct of the police and the suspect "can be fully evaluated under ordinary tort principles without any need to reach out for a bizarre definition of 'seizure.'" *Brower*, 817 F.2d 540, 546 (9th Cir. 1987).

196. "Common law approaches to causation often require proof of but-for cause as a starting point toward proof of legal cause." *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775, 1807 (1989) (Kennedy, J., dissenting). See PERKINS & BOYCE, *supra* note 83, at 772; Prosser, *Proximate Cause in California*, 38 CALIF. L. REV. 369, 375 (1950).

197. *Murray v. United States*, 487 U.S. 533 (1988); *Segura v. United States*, 468 U.S. 796, 805 (1983).

198. *Segura*, 468 U.S. at 805.

199. Scientific causation functions in a negative manner to exclude certain

remaining factors are identified as the necessary and sufficient conditions for the result. Thus, the complete scientific cause of any effect is the sum of the necessary antecedents.²⁰⁰ In *Brower*, the police officer's decision to initiate the chase, the police officer's decision to erect the roadblock, and the suspect's decision to avoid apprehension and drive down the path to his death were all necessary antecedents for the resulting stop. By singling out the roadblock in *Brower* as *the*²⁰¹ cause of the crash, the Court moved beyond the realm of scientific analysis to address the concept of legal²⁰² causation. While science provides a pool of candidates or antecedents from which the Court can choose,²⁰³ the Court must resolve the issue of legal causation by forming a judgment that, among the many antecedent causes, one particular cause will best serve the purposes for which the relevant law was adopted.²⁰⁴

The manner in which the purposes underlying the fourth amendment has guided the analysis of legal causation is reflected in the Court's interpretations of the amendment's exclusionary rule²⁰⁵ and the fruit of the poisonous tree doctrine.²⁰⁶ From a purely scientific standpoint, the outer reaches of the exclusionary rule can be determined by the existence of a but-for causal connection between police conduct and the seizure of evidence. The Court, however, limits an overly mechanical application of the exclusionary rule by invoking policy considerations that mark "the point at which the detrimental

forces from responsibility for the result. It eliminates candidates from responsibility; it does not resolve the question of who is ultimately responsible. D. DRESSLER, *UNDERSTANDING CRIMINAL LAW* 160 (1987).

200. "All antecedents which contribute to a given result are, as a matter of fact, the causes of that result." R. PERKINS, *CRIMINAL LAW* 598 (1957). See also Smith, *Legal Cause in Actions of Tort*, 25 *HARV. L. REV.* 103, 104 (1911).

201. While the Supreme Court focused on the police roadblock as the cause of the crash, the Ninth Circuit held that the suspect's flight was the cause of the crash. *Brower*, 817 F.2d at 546 ("Brower's seizure, if any, was the result of his own effort in avoiding numerous opportunities to stop.").

202. The American Law Institute states that the term "legal cause" is superior to the term "proximate cause" because the latter places undue emphasis upon the nearness in time or space. *RESTATEMENT (SECOND) OF TORTS* § 9 (1965). See also Smith, *supra* note 200, at 106-08.

203. "The question is not what philosophers or logicians will say is the cause. The question is what the courts will regard as the cause." Smith, *supra* note 200, at 104.

204. "Here is the key to juridical treatment of the problems of causation. We pick out the cause which in our judgment ought to be treated as the dominant one with reference, not merely to the event itself, but to the jural consequences that ought to attach to the event." B. CARDOZO, *THE PARADOXES OF LEGAL SCIENCE* 83 (1928).

205. The exclusionary rule bars the use of evidence secured through an illegal search and seizure. See *Weeks v. United States*, 232 U.S. 383 (1914).

206. Fruit of the poisonous tree is evidence obtained by an unlawful search. See *Wong Sun v. United States*, 371 U.S. 471 (1963).

consequences of illegal police action become so attenuated that the deterrent effect of the exclusionary rule no longer justifies its cost."²⁰⁷ This article suggests that the Court's consideration of fundamental fourth amendment policy should be extended to the question of identifying seizures caused by the government.²⁰⁸

The lack of attention to fundamental fourth amendment policy is evident in the *Brower* Court's focus upon unduly formalistic concepts of causation. Faced with a choice between what the Court referred to as a "broad" sense of causation²⁰⁹ and "too fine" a sense of causation,²¹⁰ the Court failed to articulate how the primary purposes underlying the amendment would guide the selection of the proper constitutional view of causation. To paraphrase Professor Perkins, whether one uses the term broad cause, narrow cause, proximate cause, or some equivalent, "the idea sought to be expressed is 'legally-recognized cause,' which should be promptly tested by the question—legally recognized for what purpose?"²¹¹

The dual purposes of the fourth amendment are to protect individual rights of privacy and liberty and to regulate certain forms of governmental conduct.²¹² What is missing from the chase cases is a discussion of whether those purposes are best served by a broad or narrow definition of the causal link between police pursuit and a suspect's loss of liberty. When faced with a choice between conflicting theories of causation, the Court must assess the manner in which each theory contributes to or detracts from the purposes underlying the amendment.

207. *Brown v. Illinois*, 422 U.S. 590, 609 (1975) (Powell, J., concurring). See also *United States v. Ceccolini*, 435 U.S. 268, 276 (1978) ("[W]e have declined to adopt a 'per se or 'but-for' rule' that would make inadmissible any evidence, whether tangible or live-witness testimony, which somehow came to light through a chain of causation that began with an illegal arrest.").

208. "[A] legal cause is a cause which stands in such a relation to its consequences that it is just to give legal effect to the relation: meaning by 'just,' not merely fair as between the parties, but socially advantageous, as serving the most important of the competing individual and social interests involved." Edgerton, *Legal Cause*, 72 U. PA. L. REV. 343, 348 (1924).

209. The court rejected the "broad" sense of causation in *Chesternut and Hester*. See *Chesternut*, 486 U.S. 567 (1989); *Hester*, 265 U.S. 57 (1924).

210. The Court rejected "too fine" of a sense of causation in *Brower and Garner*. See *Brower*, 489 U.S. 593 (1989); *Garner*, 471 U.S. 1 (1985).

211. PERKINS & BOYCE, *supra* note 83, at 776. See also Malone, *Ruminations on Cause-In-Fact*, 9 STAN. L. REV. 60, 67 (1956) (The causation theory "can be given a direction that is consistent with the policy considerations that underlie the controversy.").

212. See Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349 (1974); Bacigal, *Some Observations and Proposals on the Nature of the Fourth Amendment*, 46 GEO. WASH. L. REV. 529 (1978).

A. *Choosing Between a "Broad" and "Narrow" Sense of Causation*

Defining seizures according to a narrow sense of causation²¹³ benefits the government by relieving it of the burden of justifying its conduct as constitutionally reasonable.²¹⁴ This burden is no longer onerous under the present Court's utilization of a sliding scale of reasonableness.²¹⁵ The price for that benefit is the significant cost associated with removing vast areas of governmental conduct from judicial scrutiny.²¹⁶

The need for judicial review of certain types of governmental activity, *i.e.*, searches and seizures, lies at the heart of the fourth amendment.²¹⁷ The peril of diminishing this aspect of the amendment was illustrated in *Galas v. McKee*²¹⁸ in which the Sixth Circuit held that no seizure took place when a fleeing suspect lost control of his vehicle and crashed during a high speed chase by the police.²¹⁹ *Brower* endorsed the Sixth Circuit's narrow view of causation and its decision to single out the suspect's flight as *the* cause of the suspect's loss of liberty when he crashed.²²⁰ The suspect's actions, however, tell only

213. *Hester*, 265 U.S. at 58 (no seizure when police officers examined bottles of moonshine tossed away by fleeing defendants as the defendants' own act disclosed the evidence).

214. Once the Court classifies the government action as a non-seizure, "it is of course of no consequence whether or not there was probable cause." *United States v. Gravitt*, 484 F.2d 375, 380 n.5 (5th Cir. 1973), *cert. denied*, 414 U.S. 1135 (1974).

215. See Bacigal, *The Fourth Amendment in Flux: The Rise and Fall of Probable Cause*, 1979 U. ILL. L.F. 763 (1979).

216. To label any police activity a "search" or "seizure" within the ambit of the amendment is to impose [the reasonableness] restriction[s] upon it. On the other hand, if it is not labeled a "search" or "seizure," it is subject to no significant restrictions of any kind. It is only "searches" or "seizures" that the fourth amendment requires to be reasonable: police activities of any other sort may be as unreasonable as the police please to make them.

Amsterdam, *supra* note 212, at 388. See also *supra* note 161.

217. See *Amsterdam*, *supra* note 212; see also Murphy, *Encounters of a Brief Kind: On Arbitrariness and Police Demands for Identification*, 1986 ARIZ. ST. L.J. 207, 209-10 (suggesting that the Court extend fourth amendment to "brief encounters" which do not meet the test of *Terry*).

218. 801 F.2d 200 (6th Cir. 1986). See *Brower*, 489 U.S. at 595.

219. *Galas*, 801 F.2d at 203. See *Brower*, 489 U.S. at 595.

220. The Sixth Circuit noted that when the suspect crashed he was not free to walk away. "This restraint on plaintiff's freedom to leave, however, was not accomplished by the show of authority but occurred as a result of plaintiff's decision to disregard it." *Galas v. McKee*, 801 F.2d 200, 203 (6th Cir. 1986). The Supreme Court agreed that the police "sought to stop the suspect only by the show of authority represented by flashing lights and continuing pursuit," whereas the suspect was actually stopped "by a different means—his loss of control of his vehicle and

half the story. By focusing solely upon the suspect's conduct, the courts effectively foreclosed any inquiry into the reasonableness of the police conduct that motivated the suspect's flight. What if, however, the officer in *Galas* had chased the suspect because the suspect was black?²²¹ This speculative possibility remains pure conjecture because the police are not required to expose or explain their justification for a chase when the Court concludes that the threshold requirement for a seizure has not been satisfied.²²²

Exempting law enforcement officers from any requirement to justify pursuit culminating in a citizen's loss of liberty impedes the fourth amendment's goal of regulating police misconduct.²²³ The judiciary can exercise meaningful review of police pursuit only when the underlying justification for a chase is revealed and subjected to judicial scrutiny.²²⁴ Accordingly, a "broad" view of the causal link between police pursuit and a suspect's loss of liberty facilitates a broader review of police conduct. The most far-reaching view of causation is the but-for test, which, when applied to situations like *Galas*, reveals the causal link between the chase and the suspect's crash.²²⁵ *I.e.*, but for the police officer's initiating efforts to apprehend the suspect, there would have been no flight by the suspect;

the subsequent crash." *Brower*, 489 U.S. at 597. Both courts failed to consider whether the flashing lights and continuing pursuit played any part in causing the suspect's loss of control of his vehicle. If the suspect's conduct were the most immediate cause of the crash, did the police cause the suspect's conduct? *See infra* text accompanying note 226.

221. *See* Hufstедler, *The Directions and Misdirections of a Constitutional Right of Privacy*, 26 REC. N.Y.B.A. 546, 552 (1971) (Governmental conduct that is not classified as a search or seizure is immunized from scrutiny even though it results from such illegitimate or even malicious motives as governmental curiosity, a desire to gather and report interesting information, or personal distaste for the political philosophies or lifestyles of certain citizens.). In *Garner*, the plaintiffs alleged that the Memphis police department employed deadly force in a racially discriminatory manner. *Fyfe, Tennessee v. Garner: The Issue Not Addressed*, 14 N.Y.U. REV. L. & SOC. CHANGE 721 (1986) ("[T]he facts establish an administration . . . with an evil eye and an unequal hand' against blacks.'").

222. If the police conduct is not designated a search or seizure, the fourth amendment is totally inapplicable and "the law does not give a constitutional damn" about whether the police conduct complied with any of the amendment's provisions. Moylan, *The Fourth Amendment Inapplicable vs. the Fourth Amendment Satisfied: The Neglected Threshold of "So What?"*, 1977 S. ILL. U.L.J. 75, 76. By placing the police conduct beyond the reach of the fourth amendment, the courts "leave the individual at the mercy of the police" and "deny the protection (of the amendment) to those most in need of it—those individuals who have not given the police probable cause to act." Mascolo, *The Role of Functional Observation in the Law of Search and Seizure: A Study in Misconception*, 71 DICK. L. REV. 379, 418-19 (1967).

223. *Terry*, 392 U.S. at 12.

224. *Id.* at 15. The courts still "retain their traditional responsibility to guard against police" misconduct that "trenches upon personal security without the objective evidentiary justification which the Constitution requires." *Id.*

225. *See* Price Waterhouse v. Hopkins, 109 S. Ct. 1775 (1989).

but for the flight, there would have been no automobile crash terminating the suspect's liberty.²²⁶ According to the but-for analysis, while the suspect's decision to flee may be (in spatial terms of time and distance) the most immediate cause of the crash, the chase itself is the cause of a cause.²²⁷

The flow of but-for causation originates with the chase in *Galas* and can be interrupted only if the Court invokes the doctrine of supervening causation²²⁸ by characterizing a suspect's decision to flee as a supervening and totally autonomous act.²²⁹ Distinguishing between situations in which flight is "an exercise of autonomy"²³⁰ and those in which flight is a foreseeable response to police pursuit is a particularly slippery endeavor. Thus in *Brower*, the Court rejected the Ninth Circuit's characterization of flight as an autonomous act but simultaneously approved the Sixth Circuit's decision to attribute the crash in *Galas* to the "plaintiff's decision" to take flight.²³¹ At

226. But-for causation is a hypothetical construct. In determining whether a particular factor was a but-for cause of a given event, we begin by assuming that that factor was present at the time of the event, and then ask whether, even if that factor had been absent, the event nevertheless would have transpired in the same way.

Price Waterhouse v. Hopkins, 109 S. Ct. 1775, 1785 (1989).

227. See PERKINS & BOYCE, *supra* note 83, at 791.

228. One form of supervening cause arises when a person initiates a chain of causation to which another responds in an unforeseen and absurd fashion. PERKINS & BOYCE, *supra* note 83, at 790-97. When assessing the foreseeability or reasonableness of the suspect's response to police pursuit, it is important to remember that the Court has recognized that no seizure occurs so long as the suspect is allowed to exercise his right to ignore the police and "walk away." *United States v. Mendenhall*, 446 U.S. 544, 553 (1980). The exercise of the right to "walk away" by means of high-speed flight in an automobile may be unreasonable for purposes of assigning fault within the context of tort law or substantive criminal law, but it is a separate question whether the method of exercising that right is so absurd that it removes the citizen from the protections of the fourth amendment. This article suggests that the threshold of the amendment is not dependent upon tort law or substantive criminal law concepts of reasonable conduct. Instead, the threshold of the amendment should be interpreted to facilitate consideration of the constitutional significance of both the suspect's and the police officer's actions. "It is not necessary to say that one has a constitutional right to hide from the police; it is sufficient to say that no government right exists to demand the physical presence of the accused at any given time or at any . . . given place, except upon a showing of sufficient justification." *Williamson*, *supra* note 89, at 813; see also *Terry*, 392 U.S. at 9 ("right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law") (quoting *Union Pac. R.R. Co. v. Botsford*, 141 U.S. 250, 251 (1891)).

229. See *infra* note 230.

230. The Ninth Circuit characterized *Brower's* flight as "an exercise of autonomy" that could not be attributed to the police. *Brower*, 817 F.2d at 546.

231. "This restraint on plaintiff's freedom to leave, however, was not accomplished by the show of authority, but occurred as a result of plaintiff's decision to disregard it." *Galas v. McKee*, 801 F.2d 200, 203 (6th Cir. 1986).

best, the term "supervening cause" may be an acceptable short-hand for describing situations in which one person makes a de minimis contribution to causing another's conduct.²³² At its worst, however, an overly solicitous application of the concept of supervening causation forces the Court to ignore the catalyst that prompted a suspect's decision to flee. The doctrine of supervening causation is, thus, counterproductive to the purposes of the fourth amendment because the doctrine effectively shields the underlying police conduct from judicial review. In order to serve the amendment's purpose of regulating governmental conduct, the Court should decline to import the doctrine of supervening causation into fourth amendment analysis and should recognize that chase-and-crash situations like *Galas* satisfy the but-for test of causation.

Nonetheless, the Court has opined that the but-for test is merely "a starting point"²³³ for analysis of causation. The Court may rightly demand some limitation on a purely mechanical view of causation in order to avoid absurd results.²³⁴ This article suggests that the fourth amendment's threshold requirement for a seizure is met whenever police pursuit significantly contributes²³⁵ to a suspect's loss of

232. See *infra* note 234.

233. *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775, 1807 (1989) (Kennedy, J., dissenting).

234. Consider the following scenario:

John stops his vehicle at a red light and notes that a police cruiser has pulled into the lane behind him. To the objective observer there is nothing sinister about the appearance of the police car—no flashing lights or menacing gestures. John, however, has an irrational fear of the police, and concludes that he is about to be arrested. He prefers death to apprehension, and therefore slits his own throat.

In this situation there is (1) volitional police conduct (driving the police cruiser); (2) an ultimate loss of freedom of movement brought on by death; and (3) a but-for factual connection between the first two occurrences. There is, however, a qualitative disparity between the risks to citizens created by the police action and the specific injuries that result from the action. When this occurs, but-for causation lacks legal significance. See Jeffries, *Damages for Constitutional Violations: The Relation of Risk to Injury in Constitutional Torts*, 75 VA. L. REV. 1461 (1989); see also *State v. Foster*, 269 S.C. 373, 237 S.E.2d 589 (1977) (No seizure occurred when the driver, without prompting by police, stopped his vehicle after seeing that the police were following him.).

235. Identification of a "significant" contribution is judgmental and thereby sacrifices the superficial certainty of mechanical concepts of causation or categorical rules defining "means intentionally applied." Such judgments are unavoidable, however, because "the question of causative relations is in reality one of fact and degree." *Smith, supra* note 200, at 317. See *Bivens v. Six Unknown Agents*, 403 U.S. 388, 409 (1971) (Harlan, J., concurring) (Courts are "capable of making the types of judgment concerning causation and magnitude of injury necessary to accord meaningful compensation for invasion of Fourth Amendment rights."); see also *City of Canton v. Harris*, 489 U.S. 378 (1989) (Determining whether government fault is closely related to the ultimate injury is a difficult task, "[b]ut judge and jury, doing their respective jobs, will be adequate to the task.").

liberty.²³⁶ The proposed standard stops short of a full endorsement of the but-for test, but is less restrictive than *Brower's* categorical approach to *the* cause of a seizure.²³⁷ When confronted with a situation like *Galas* in which the police and the suspect have both played a significant role in causing a loss of liberty, the Court should not be forced to an all-or-nothing determination as to which actor is *the* cause of an event such as an automobile crash. Instead, the Court should recognize that a broad sense of causation identifies each actor as a significant contributor to the event.

Under the proposed standard, the Court would exclude from fourth amendment coverage only those absurd cases in which a police officer's contribution to the suspect's loss of liberty is *de minimis*.²³⁸ In all other instances, the Court would serve the purposes of the amendment by reaching another level of inquiry and addressing the justification for the chase.²³⁹ It is consistent with the fourth amend-

236. The approach suggested in this article is the opposite of the approach employed by the Sixth Circuit in *Galas*. When the Sixth Circuit held that the defendant police officer's conduct was not "the proximate cause" of the crash, the court opined that "the question of whether defendant's conduct enhanced the likelihood of the accident need not be addressed." *Galas v. McKee*, 801 F.2d 200, 202 (6th Cir. 1986). The court of appeals failed to recognize that "when the conduct of two or more persons contributes concurrently as proximate causes . . . , the conduct of each person is a proximate cause regardless of the extent to which each contributes" *People v. Vernon*, 89 Cal. App. 3d 853, 864, 152 Cal. Rptr. 765, 772 (1979). According to the dissent in *Tennessee v. Garner*, the majority opinion implied that the "Fourth Amendment constrains the use of any police practice that is potentially lethal, no matter how remote the risk." *Garner*, 471 U.S. at 31.

237. The proposed standard is more in keeping with the traditional Article III case-and-controversy requirement under which the alleged injury must be "fairly traceable" to the government. Prior to *Rakas*, the fourth amendment's threshold requirement could be spoken of in terms of the Constitution's Article III case-and-controversy requirements for standing. See Simien, *The Interrelationship of the Scope of the Fourth Amendment and Standing to Object to Unreasonable Searches*, 41 ARK. L. REV. 487 (1988). *Rakas*, however, placed the traditional standing inquiries "within the purview of substantive Fourth Amendment law." *Rakas*, 439 U.S. at 140. Thus the search and standing "inquiries merge into one." *Rawlings v. Kentucky*, 448 U.S. 98, 106 (1980). The *Rakas* Court itself asserted that "[w]e can think of no decided cases of this Court that would have come out differently . . ." under the search or standing inquiries. *Rakas*, 439 U.S. at 139. If the Court's statement is accurate, the existence of a significant causal connection between the officer's action and the suspect's loss of liberty satisfies the traditional standing requirement that the alleged injury be "fairly traceable" to the government action. See J. BARRON & T. DIENES, *CONSTITUTIONAL LAW IN A NUTSHELL* 24 (1986) (The litigant must allege an injury in fact that is fairly traceable to the government.); see also *City of Canton v. Harris*, 489 U.S. 378 (1989) (Government fault must be "closely related to the ultimate injury.").

238. See *supra* note 234.

239. By separating the issue of standing from the merits of the case, the Court will be better able to analyze the right of the litigant to proceed with his claim

ment's goal of regulating police misconduct²⁴⁰ and with elemental notions of fairness to require that one whose conduct contributes to another's loss should justify his actions. When called upon to explain their role in contributing to a suspect's loss of liberty, the police should offer the type of substantive justification recognized by the amendment, *e.g.*, that the chase was prompted by probable cause, reasonable suspicion, or the like.²⁴¹ The existence or absence of a constitutionally appropriate justification for police pursuit can be brought to light only if the Court brings the chase within the coverage of the fourth amendment by broadly interpreting the nature of the causal link between the police action and the suspect's reaction.

If the Court did bring both *Brower* and *Galas* within the scope of the amendment, the Court would not thereby be trapped into punishing the police for accidents because the two cases may still be distinguished under the amendment's reasonableness requirement.²⁴² Although a significant causal link between police action and a citizen's loss of liberty satisfies the threshold requirement of the fourth amendment,²⁴³ causation itself is morally neutral. The question of wrongful police conduct adds to causation the moral dimension essential to a determination of constitutional reasonableness.²⁴⁴ "It is the relation of wrong to injury—not merely the relation of act to injury—that justifies constitutional condemnation."²⁴⁵ Thus, in *Brower*, the highly foreseeable loss of liberty created by the chase and the roadblock may be justified as morally and constitutionally reasonable in light of the weighty interest in apprehending fleeing felons.²⁴⁶ In contrast to *Brower*, it was less foreseeable that the police pursuit in *Galas* would terminate in a fatal crash. Yet, that comparatively improbable threat to the suspect's liberty would be morally and constitutionally unreasonable if the justification for the chase

without being prejudiced by the Court's view of the ultimate merits of the claim or by its views of the remedy dictated by the exclusionary rule. *Rawlings v. Kentucky*, 448 U.S. 98, 111-13 (1980) (Blackmun, J., concurring).

240. See *Nix v. Williams*, 467 U.S. 431 (1984); *Dunaway v. New York*, 442 U.S. 200 (1979).

241. "Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability." *Brinegar v. United States*, 338 U.S. 160, 176 (1949). See also *Illinois v. Rodriguez*, 110 S. Ct. 2793, 2800 (1990).

242. See *United States v. Leon*, 468 U.S. 897, 960 (1984) (Stevens, J., dissenting).

243. See *Dunaway v. New York*, 442 U.S. 200, 217-18 (1979).

244. See *supra* note 242.

245. See Jeffries, *supra* note 234, at 1469.

246. During the oral arguments on *Brower*, Justice O'Connor suggested that the suspect was armed with a deadly weapon in the form of a vehicle, and used it in an aggressive and dangerous manner. 44 CRIM. L. REP. at 4150.

were nothing more than an intent to harass a black motorist. While the fourth amendment's reasonableness requirement may be flexible enough to distinguish between the crashes in *Brower* and *Galas*, both crashes should be brought within the scope of the amendment so that the Court may inquire into the justification for the chase.

B. Integrating Causation with Other Threshold Requirements for Seizures.

Applying a broad sense of causation to the scope of the fourth amendment, the Court must focus upon three threshold requirements for defining a seizure: (1) Has there been a loss of privacy or liberty (the ultimate result with which the amendment is concerned)?²⁴⁷ (2) Was there volitional police conduct (a necessary predicate for triggering the application of the amendment)?²⁴⁸ (3) Was there a significant connection between the predicate and the result?²⁴⁹ While the first two requirements can be resolved independently of each other, the third requirement provides the vital link between police conduct and a citizen's loss of privacy or liberty.

(1) The Loss of Privacy or Liberty

When discussing the threshold showing of a loss of privacy or liberty, the Court has reserved judgment on what appears to be the most troubling aspect of the chase cases—the question of whether an unsuccessful chase (one not resulting in the suspect's apprehension) can ever constitute a seizure.²⁵⁰ This perplexing question, however, does not fully address the complexities of the issues raised by the chase cases. In a genuinely unsuccessful chase, the police fail to apprehend the suspect and fail to recover evidentiary items. Such situations do not arise in a criminal proceeding because a completely fruitless chase produces no items to be suppressed under the fourth amendment's exclusionary rule.²⁵¹ *Chesternut* and *Hester* demon-

247. U.S. CONST. amend. IV; see *supra* text accompanying note 5.

248. *Brower*, 489 U.S. at 597.

249. *Id.*

250. See *supra* note 85.

251. Even if the defendant is apprehended, he may not utilize the exclusionary rule to gain his release from custody. He may only suppress the fruits of an illegal arrest. See *Frisbie v. Collins*, 342 U.S. 519 (1952). Unlike a criminal prosecution, however, a section 1983 suit may raise the unadulterated question of whether a wholly unsuccessful chase constitutes a seizure. For example, after successfully escaping apprehension, the suspect files a claim for the mental anguish of having felt a loss of liberty when the police initiated the chase. See *Checki v. Webb*, 785 F.2d 534 (5th Cir. 1986) (where the plaintiffs claimed that they were "alarmed" by a twenty-mile chase at speeds of up to 100 miles per hour). The court stated that

strate, however, that a chase may be partially unsuccessful because the police fail to apprehend the suspect but do obtain evidentiary items used to incriminate the defendant.²⁵²

The *Chesternut* Court overlooked the important distinction between a seizure of the person and a seizure of property²⁵³ because the Court limited itself to a consideration of whether the evidentiary items produced by the chase should be suppressed as the fruits of an illegal seizure of the person.²⁵⁴ Even assuming that the *Chesternut* Court correctly decided that the chase was not a seizure of the person, however, the Court failed to consider whether the chase caused a seizure of the suspect's property. That is, was the suspect's decision to discard private property a wholly voluntary abandonment or one caused by the chase?²⁵⁵ The *Chesternut* Court ignored the possibility that police pursuit falling short of a seizure of the person could nonetheless prompt a person to abandon involuntarily his expectation of privacy in his property.

If the Court accords proper attention to the distinction between seizures of the person and seizures of property, the threshold question of the suspect's loss of privacy or liberty is not dependent upon whether a seizure of the person occurs when the police initiate the

the pursuing officers' actions "crossed the constitutional line that would make their pursuit and harassment actionable under section 1983." *Id.* at 538. *But see Garner*, 471 U.S. at 31 (O'Connor, J., dissenting) ("Absent apprehension of the suspect, there is no 'seizure' for Fourth Amendment purposes."). *See Bruce, Emotional Distress Claims for Police Misconduct: Does a Cause of Action Exist Under Section 1983?*, 22 VAL. U.L. REV. 61 (1987).

252. *See supra* notes 42 & 49 and accompanying text.

253. "Although the interest protected by the Fourth Amendment injunction against unreasonable searches is quite different from that protected by its injunction against unreasonable seizures, neither the one nor the other is of inferior worth or necessarily requires only lesser protection." *Arizona v. Hicks*, 480 U.S. 321, 328 (1987) (citation omitted). *See also Horton v. California*, 110 S. Ct. 2301, 2313 (1990) (Brennan, J., dissenting) ("The Court today eliminates a rule designed to further possessory interests on the ground that it fails to further privacy interests. I cannot countenance such constitutional legerdemain.").

254. *Chesternut*, 486 U.S. at 569-72.

255. "While it is true that a criminal defendant's voluntary abandonment of evidence can remove the taint of an illegal stop or arrest, it is equally true that for this to occur the abandonment must be truly voluntary and not merely the product of police misconduct." *United States v. Beck*, 602 F.2d 726, 729-30 (5th Cir. 1979) (citations omitted). *See also Smith v. Ohio*, 110 S. Ct. 1288 (1990) (The suspect did not abandon his paperbag by throwing it onto the hood of his car and turning to face an approaching police officer.); *In re Hodari D.*, 216 Cal. App. 3d 745, 265 Cal. Rptr. 79 (Ct. App. 1989) (The pursuing police officer caused the suspect to abandon his property.). The Supreme Court recently granted certiorari to consider the question: "May a citizen who is pursued by a police officer on a public street immunize himself from prosecution by discarding incriminating evidence and by asserting that he did so out of fear of unlawful search?" *California v. Hodari D.*, 111 S. Ct. 38 (1990).

chase or only when the police apprehend the suspect. While the Court may continue to struggle with defining the precise point at which a seizure of the person occurs,²⁵⁶ the threshold showing of a seizure of property²⁵⁷ will be more apparent when the defendant discards evidentiary items. In such situations, the defendant must establish only that at some point he had a legitimate expectation of privacy in the discarded property and that the expectation was subsequently lost.²⁵⁸ Then the Court can address the remaining threshold question: Was the loss of privacy caused by government conduct²⁵⁹ or by the defendant's autonomous decision to abandon the property?²⁶⁰

(2) Government Conduct

After successfully establishing that he suffered a loss of privacy or liberty, the defendant must meet the second threshold requirement for a seizure by pointing to some volitional conduct on the part of government agents.²⁶¹ This factor should be readily apparent in most cases. This article's second hypothetical²⁶² illustrates, however, that in unusual situations the police may be mere instrumentalities of willful acts performed by a non-government agent. If the Court does confront a case in which there is no volitional police conduct, the fourth amendment would be inapplicable.

(3) The Causal Link

When the defendant successfully establishes both a loss of privacy or liberty²⁶³ and the existence of volitional conduct by government agents,²⁶⁴ only the question of causation²⁶⁵ remains to fully satisfy the threshold for invoking fourth amendment protections. Despite *Brower's* focus on intentional causes,²⁶⁶ this article suggests that the amendment requires an objective and legally significant connection between police conduct and the suspect's loss of privacy or liberty. In the context of a traditional causation analysis, the but-for test²⁶⁷

256. See *supra* note 251.

257. See *supra* note 253.

258. *Id.*

259. See *supra* text accompanying note 250.

260. See *supra* text accompanying note 253.

261. See *supra* note 90.

262. See *supra* text accompanying note 104.

263. See *supra* text accompanying note 247.

264. See *supra* note 90.

265. See *supra* text accompanying notes 90 & 255.

266. See *supra* text accompanying notes 80-81.

267. See *supra* text accompanying note 197.

may disclose the most obvious failures to establish an objective causal link, e.g., the situation in which an arrest warrant is issued in New York at the same time that the suspect surrenders in California.²⁶⁸ Focusing on the requirement for a legally significant connection between the chase and a loss of liberty allows the Court to adjust mechanical rules of causation in such a way as to serve the fundamental purposes of the amendment²⁶⁹ that are not served by focusing upon a police officer's intent²⁷⁰ or upon formalistic determinations of *the* cause of the citizen's loss of liberty.²⁷¹

C. *Beyond the Threshold*

If there are affirmative answers to the above questions regarding a loss of liberty, the existence of volitional police conduct, and a significant connection between the police conduct and the loss of liberty,²⁷² the Court should recognize that the threshold requirements for invoking the fourth amendment have been satisfied. Then the Court should move on to address the substantive question of whether a specific seizure caused by police pursuit is constitutionally reasonable.²⁷³

When determining the reasonableness of the seizure, the Court can revisit and weigh the initial threshold questions as part of the substantive balancing process that determines constitutional reasonableness.²⁷⁴ For example, although both *Chesternut* and *Garner* may involve a loss of liberty sufficient to trigger application of the fourth amendment,²⁷⁵ the extent of the suspect's loss of liberty ranges from the discomfort caused by a police car driving alongside a pedestrian²⁷⁶ to the loss of life resulting from an officer's firing a fatal shot at a suspect.²⁷⁷ Under the balancing test of reasonableness,²⁷⁸ the Court would attach varying weights to the vastly different infringements upon liberty that occurred in cases such as *Chesternut* and *Garner*.

268. See *supra* text accompanying note 267.

269. The requirement for a significant causal connection also precludes extending the amendment to situations in which the suspect responds to a chase in an irrational or absurd fashion. See *supra* note 234.

270. See *supra* pp. 86-88, 90-91.

271. See *supra* pp. 88-91.

272. See *supra* pp. 110-13.

273. See *supra* text accompanying notes 256-62.

274. The goal of balancing is to directly correlate the importance of the government interest with the severity of the intrusion upon individual interests in privacy and liberty. Bacigal, *supra* note 215, at 803. See also *supra* note 15 and accompanying text.

275. See *supra* text accompanying notes 38-56.

276. *Chesternut*, 486 U.S. at 569.

277. *Garner*, 471 U.S. at 4.

278. *Id.* at 7-8.

When the Court confronts situations in which there is an equivalent loss of liberty, the situations must still be measured by the degree of foreseeability that the loss of liberty would occur.²⁷⁹ For example, the positioning of a roadblock around a blind curve and the use of headlights to blind a motorist²⁸⁰ would make the crash into the roadblock more foreseeable than the motorist's losing control of his vehicle.²⁸¹ When the relation between the harm risked and the injury caused is expressed in terms of foreseeability, the more foreseeable consequences in *Brower*, for example, would figure more prominently in the Court's balancing test for reasonableness.

In addition to evaluating the extent of the suspect's loss of liberty and the foreseeability of that loss, the Court must evaluate the degree of justification for a police officer's conduct. In *Brower*, probable cause to believe that the suspect committed a felony constituted ample justification for some form of police pursuit.²⁸² Less weight should be accorded to the justification that existed in *Chesternut*,²⁸³ and perhaps negative weight should be assigned to situations in which a police officer initiates a chase as a means of harassing black citizens.²⁸⁴

As the above examples demonstrate, redirecting the Court's focus from the threshold question of the amendment's coverage to the substantive question of reasonableness will not precipitate a bright-line rule governing the chase cases. The variable weights that the Court would utilize in determining the reasonableness of a police

279. See *supra* pp. 86, 88, 90.

280. See *supra* note 60.

281. *Galas*, 801 F.2d at 202.

282. The particular method of pursuit, e.g., high-speed pursuit or "dead man" roadblocks, also affects the reasonableness of the seizure. As *Brower* noted, "the circumstances of this roadblock, including the allegation that headlights were used to blind the oncoming driver, may yet determine the outcome of this case." 489 U.S. at 599. See also *Britt v. Little Rock Police Dep't*, 721 F. Supp. 189, 195 (E.D. Ark. 1989) ("At some point, continued pursuit at high speeds in heavy traffic might rise to the level of recklessness.").

283. In *Chesternut*, the police justified pursuit on the ground that they wanted to see where the suspect was going. *Chesternut*, 486 U.S. at 569.

284. Confronted with a factual situation akin to *Chesternut*, the New York Court of Appeals stated that:

[T]he basic purpose of the constitutional protections against unlawful searches and seizures is to safeguard the privacy and security of each and every person against all arbitrary intrusions by government. Therefore, any time an intrusion on the security and privacy of the individual is undertaken with intent to harass or is based upon mere whim, caprice or idle curiosity, the spirit of the Constitution has been violated

People v. DeBour, 40 N.Y. 2d 210, 217, 352 N.E.2d 562, 567-68, 386 N.Y.S.2d 375, 380-81 (1976). See also *State v. Saia*, 302 So. 2d 869, 873 (La. 1974) ("Police officers cannot actively create 'street encounters' unless they have knowledge of suspicious facts and circumstances sufficient to allow them to infringe on the suspect's right to be free from governmental interference.").

pursuit will certainly keep the mystery in the fourth amendment.²⁸⁵ What is to be gained, however, is that the Court's dialogue on the amendment will rise to a higher level when the Court addresses more readily the reasonableness of police pursuit. A comparison of the opinions in *Garner* and *Brower* illustrates the quality of that dialogue. After quickly passing over the threshold question of defining a seizure in *Garner*,²⁸⁶ the Justices displayed a willingness to address the appropriate balance between the competing societal interests in personal liberty and effective law enforcement.²⁸⁷ The societal interests that figured so prominently in *Garner* were all but obscured by *Brower's* musings over far-fetched hypotheticals and formalistic concepts of causation and means intentionally applied.²⁸⁸ The Court's reliance on narrow and formalistic causation theories to resolve fourth amendment issues should be abandoned in favor of a constitutional view of causation broad enough to facilitate the identification and evaluation of the competing societal interests that the Court must take into account when interpreting the fourth amendment.

CONCLUSION

The principal lesson of *Terry* is twofold: (1) a sliding scale of constitutional reasonableness allows the Court some flexibility when balancing competing societal interests; and (2) the admittedly inexact balancing process is preferable to a rigid delineation that forces the Court's analysis of the fourth amendment into all-or-nothing determinations. In light of the flexibility of the amendment's reasonableness requirement,²⁸⁹ there is little justification for the Court's insistence upon a grudging and rigid interpretation of the causal link between police pursuit and the suspect's loss of liberty.²⁹⁰ The Court, because of its narrow view of causation, is forced to select either the suspect or the police as *the* cause of the suspect's loss of liberty. By recreating the type of rigid demarcation discarded in *Terry*, the Court has unnecessarily limited the scope of the fourth amendment.²⁹¹

285. Interpretation of the fourth amendment "is inescapably judgmental" and in "the pans of judgment sit imponderable weights." Amsterdam, *supra* note 212, at 353-54.

286. See *Garner*, 471 U.S. at 7.

287. See *id.* at 7-8.

288. See *Brower*, 489 U.S. at 596-97. Current fourth amendment law has created an ironic situation in which the threshold requirement for a search or seizure is now less clear than the substantive requirement of reasonableness. See Cunningham, *A Linguistic Analysis of the Meanings of "Search" in the Fourth Amendment: A Search for Common Sense*, 73 IOWA L. REV. 541, 606 n.397 (1988).

289. See *supra* text accompanying note 24.

290. See *supra* text accompanying notes 36-37.

291. See *supra* text accompanying note 5.

In the wake of *Terry* and *Katz*, the Court has continually broadened the amendment's reasonableness requirement to correlate the degree of intrusion upon privacy and liberty with the degree of justification for the intrusion.²⁹² The Court should likewise broaden the scope of the amendment to take account of both the suspect's and the government's degree of contribution to the suspect's loss of liberty. In place of categorical distinctions between intentional and accidental seizures²⁹³ or between seizures solely attributable to the police or the suspect,²⁹⁴ the Court should examine the totality of the circumstances to determine whether a police officer's conduct significantly contributed to a citizen's loss of liberty.

292. Although *Terry* and its progeny "scaled down" the level of justification for a constitutional search or seizure, *Winston v. Lee* demonstrated that a scaled approach to reasonableness could produce a decision favoring a heightened protection of privacy and liberty. 470 U.S. 753 (1985). See Bacigal, *Dodging a Bullet, but Opening Old Wounds in Fourth Amendment Jurisprudence*, 16 SETON HALL L. REV. 597 (1986).

293. See *Winston*, 470 U.S. 753 (1985).

294. See *supra* text accompanying notes 36-37.