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After viewing the outrageous beating of Rodney King and after repeatedly reading of police officers "accidentally" firing their guns and killing suspects, the public has begun questioning the manner in which police officers arrest suspects.[1] Central to this inquiry is the Fourth Amendment of the United States Constitution,[2] which prohibits unreasonable seizures.[3] In the civil rights case brought by Mr. King, the focus

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1. *See, e.g.*, Geoffrey P. Alpert et al., *Law Enforcement: Implications of the Rodney King Beating*, 28 CRIM. L. BULL. 469, 471 (1992) ("The not-guilty verdicts in [the Rodney King case] shocked the American public. . . . Although the deaths, injuries, and destruction to property can be counted, . . . the immediate damage to the social fabric of this country is immeasurable."); David Rudovsky, *Police Abuse: Can the Violence Be Contained?*, 27 HARV. C.R.-C.L. L. REV. 465, 501 (1992) ("As long as the courts and both federal and state government treat police abuse as a series of isolated incidents, or as a regrettable by-product of the war on crime, the . . . Rodney Kings will continue to pay an unconscionable price for our misguided policies."); Charles Strum, *Newark Police Start Plan With Safe Streets the Goal*, N.Y. TIMES, June 22, 1992, at B4, C1 (Newark adopted a plan to put police officers on foot patrol after recent police shootings at teenagers involved in stealing automobiles resulted in numerous deaths.).

2. U.S. CONST. AMEND. IV. The Amendment provides in part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." *Id.* The Fourth Amendment is applicable to the states by the Fourteenth Amendment. *See* Mapp v. Ohio, 367 U.S. 643, 660 (1961); Wolf v. Colorado, 338 U.S. 25, 27-28 (1949), *overruled in part*, Mapp v. Ohio, 367 U.S. 643, 643 (1961) (all evidence obtained by searches and seizures in violation of the Constitution held to be inadmissible in a state court).

3. The Supreme Court has determined that three amendments of the United States Constitution protect an individual's constitutional right to personal security: the Fourth Amendment applies to individuals who have been "seized" by the use of "unreasonable" force; Graham v. Connor, 490 U.S. 386, 394 (1989); Tennessee v. Garner, 471 U.S. 1, 7-8 (1985); the Fourteenth Amendment applies to pretrial detainees who have been subject to "excessive force that amounts to punishment"; *Graham*, 490 U.S. at 395 n.10; and the Eighth Amendment applies to prisoners who have been subject to the "malicious" use of force; Hudson v. McMil-

has been on the reasonableness of beating him.[4] In stark comparison, some courts have failed to scrutinize the reasonableness of police officers shooting suspects because they have determined that the Fourth Amendment was not even applicable.[5] After considering the circumstances of the shootings, they held that the shootings were "accidents," not Fourth Amendment "seizures."[6] These decisions fail to understand the role of the Fourth Amendment. This failure has been in part engendered by the United States Supreme Court's difficulty in defining what conduct constitutes a Fourth Amendment "seizure."[7] For example, the Supreme Court has articulated three definitions of Fourth Amendment "seizures,"[8] has

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lian, 112 S. Ct. 995, 998-99 (1992); Whitley v. Albers, 475 U.S. 312, 320-21 (1986) (quoting Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973)). The focus of this Article is on the right to personal security protected by the Fourth Amendment.

4. *See, e.g.*, Alpert et al., *supra* note 1, at 473 ("The City of Los Angeles and its police department, as well as individual officers, each [sic] faces astronomical civil judgments.").

5. *See generally* text accompanying notes 156-214.

6. *See infra* text accompanying notes 164-92 for a discussion of these cases.

In Brower v. County of Inyo, 489 U.S. 593 (1989), the United States Supreme Court stated that the Fourth Amendment does not apply to "the accidental effects of otherwise lawful governmental conduct." *Id.* at 596. *See infra* text accompanying notes 77-91 for a discussion of this case. The word "accident," like the word "seizure," however, is not self-defining.

If a court were to interpret broadly the word "accident," it could apply to all action in which no harm was specifically intended. This broad reading, however, is even inconsistent with the Court's narrowest "seizure" definition, which it specified in *Brower*. *Id.* at 599. In *Brower* the Court did not interpret the word "seizure" to require a specific intent to harm. *Id.* It found that a "seizure" occurs if a person was "stopped by the very instrumentality set in motion or put in place in order to achieve that result." *Id.*

A narrow interpretation of the word "accident" would encompass only negligent conduct. In *Brower* the Court used examples of negligent conduct to show that the Fourth Amendment did not apply. *Id.* at 596-97.

In short, the statement that the shooting was an "accident" for some courts constitutes a conclusion, not a mere description of conduct. Interpreting the scope of the Fourth Amendment has historically involved balancing of interests, not an exegesis of the text of the amendment. *See infra* notes 35, 45-47, 51-55, 73 and accompanying text. The purpose of this Article is to focus on the conduct that precedes the shooting to show that the Fourth Amendment may be implicated prior to the shooting, however a court labels the shooting.

7. *See, e.g.*, Silas J. Wasserstrom & Louis Michael Seidman, *The Fourth Amendment as Constitutional Theory*, 77 GEO. L.J. 19, 20 (1988) ("[T]here is virtual unanimity, transcending normal ideological dispute, that the Court has simply has made a mess of search and seizure law."). This article focuses on what constitutes a Fourth Amendment "seizure" of a person, not of an object. *See generally* Wayne LaFave, *The Fourth Amendment: A Bicentennial "Checkup,"* 26 VAL. U. L. REV. 223, 227 (1991) ("[T]he Court's definition of what constitutes a seizure of an object has been more straightforward and less controversial: 'some meaningful interference with an individual's possessory interests in . . . property.' ") (quoting United States v. Jacobsen, 466 U.S 109, 113 (1984)). Even with a clearer definition of what constitutes "seizure" of property, the Court in the 1992 Term will determine if the Seventh Circuit Court of Appeals erred in determining that state officials did not "seize" a person's mobile home when they disconnected it and towed it away from its lot. Soldal v. County of Cook, 942 F.2d 1073, 1075 (7th Cir. 1991), *cert. granted*, 112 S. Ct. 1290 (1992).

8. *See infra* text accompanying notes 29-92.

used different approaches to justify its interpretations,[9] and has repeatedly warned that an application of one of its definitions was limited to the facts of the particular case.[10]

The Court has not clarified the relationship among the three "seizure" definitions. In *Terry v. Ohio*,[11] the Court questioned whether "the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen."[12] In *United States v. Mendenhall*,[13] the Court asked whether "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."[14] The *Mendenhall* definition, however, the Court recently modified in *Florida v. Bostick*.[15] It explained that the "free to leave" concept of *Mendenhall* is inapplicable when police officers question bus passengers at a layover stop.[16] It explained that the modified *Mendenhall* definition focuses on "whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter."[17] In contrast to the *Mendenhall* definition, which focuses on a reasonable person's response to the assertion of authority, the Court in *Brower v. County of Inyo*[18] stated a third "seizure" definition, which focuses on an officer's intent to assert authority. It declared that a "seizure" occurs when there is "a governmental termination of freedom of movement *through means intentionally applied*."[19] Although all the

9. *See infra* text accompanying notes 34, 45-47, 51-55, 77-82.

10. *See, e.g.*, Florida v. Bostick, 111 S. Ct. 2382, 2387 (1991) (prior "seizure" definition is inapplicable and must be modified to the facts of the case); Brower v. County of Inyo, 489 U.S. 593, 596-600 (1989) (majority opinion never mentions prior "seizure" definitions as it articulates a new definition); Michigan v. Chesternut, 486 U.S. 567, 573 (1988) (definition of Fourth Amendment "seizure" is "necessarily imprecise" because "what constitutes a restraint on liberty . . . will vary, not only with the particular police conduct at issue, but also with the setting in which the conduct occurs"); Terry v. Ohio, 392 U.S. 1, 19 n.16 (1968) ("We thus decide nothing today concerning the constitutional propriety of an investigative 'seizure' upon less than probable cause for purposes of 'detention' and/or interrogation. Obviously, not all personal intercourse between policemen and citizens involves 'seizures' of persons.") *See infra* text accompanying notes 29-92 for a discussion of the Court's three "seizure" definitions.

11. 392 U.S. 1 (1968).

12. *Id.* at 19 n.16; *see infra* text accompanying notes 36-47 for a discussion of this definition.

13. 446 U.S. 544 (1980).

14. *Id.* at 554. (opinion of Stewart, J. and Rehnquist, J.); *see also* INS v. Delgado, 466 U.S. 210, 215 (1984); *see infra* text accompanying notes 48-76 for a discussion of this definition.

15. 111 S. Ct. 2382, 2387 (1992).

16. *Id.*

17. *Id.*

18. 489 U.S. 593 (1989).

19. *Id.* at 597 (emphasis in original). *See infra* text accompanying notes 77-92 for a discussion of this definition.

definitions require an obvious assertion of authority,[20] the last one also requires the "intentional" use of force.[21] In analyzing police shootings, courts thus need to determine whether they must apply all of the definitions, choose one that was articulated in a case with the most analogous facts, or craft a new definition for its particular facts.

In determining what constitutes a Fourth Amendment seizure, courts may also scrutinize the justifications the Court has given for its definitions. Although most Supreme Court decisions attempt to give meaning to the history of the Fourth Amendment,[22] they reveal differences in emphasis. In deriving the *Terry*[23] and *Mendenhall*[24] broad definitions, the Court emphasized balancing: it balanced the need to subject the police practices to constitutional scrutiny against the state's interest in effective law enforcement. In its significantly narrower decision in *Brower*[25] and its recent application of the prior definitions,[26] the Court has found guidance from dictionaries and the common law in interpreting a Fourth Amendment "seizure."[27] The Court's recent decisions reflect a movement to narrow drastically the Court's scrutiny of various police practices.[28]

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20. *See infra* text accompanying notes 41-44, 66-72 for a discussion of the two categories of force created by the Supreme Court—a "show of authority" and physical force.

21. *See infra* text accompanying notes 136-40 for a discussion of "intentional" use of force.

22. *See, e.g.*, Brower v. County of Inyo, 489 U.S. 593, 596 (1989) (the Fourth Amendment was a rejection of the use of writs of assistance and general warrants by English officials.).

23. *Terry*, 392 U.S at 18 n.15 ("[T]he sounder course is to recognize that the Fourth Amendment governs all intrusions by agents of the public upon personal security," (rather than to rely on an "overly technical definition").

24. *Mendenhall*, 446 U.S. at 554 ("[C]haracterizing every street encounter between a citizen and the police as a 'seizure,' while not enhancing any interest secured by the Fourth Amendment, would impose wholly unrealistic restrictions upon a wide variety of legitimate law enforcement practices.").

25. *Brower*, 489 U.S. at 596 (Intentional conduct is "implicit in the word 'seizure,' which can hardly be applied to an unknowing act.").

26. California v. Hodari D., 111 S. Ct. 1547 (1991).

27. *See infra* text accompanying notes 74-75, 325-54 for a discussion of reliance on dictionaries and the common law.

28. The Court's decision in Florida v. Bostick, 111 S. Ct. 2382, 2387-88 (1991) suggested that sweeps of buses for drugs did not constitute a Fourth Amendment "seizure." *See infra* text accompanying notes 60-65 for a discussion of this case. Commentators have vehemently condemned the Court's narrow reading of the Fourth Amendment. *See, e.g.*, Wayne R. LaFave, *Pinguitudinous Police, Pachydermatous Prey: Whence Fourth Amendment "Seizures"?*, 1991 U. ILL. L. REV. 729, 752 (The Court's decision in *Bostick* indicates "that lower courts are not to interfere with bus sweep procedures."); Tracey Maclin, *Justice Thurgood Marshall: Taking the Fourth Amendment Seriously*, 77 CORNELL L. REV. 723, 800 (1992) ("The Court's blind acceptance of police power produces distorted standards, ignores the real world, and destroys Fourth Amendment freedoms under the guise of law enforcement interests."); Christopher Slobogin, *The World Without a Fourth Amendment*, 39 UCLA L.

As a result of having three "seizure" definitions, different approaches to defining Fourth Amendment "seizures," and the context-specific nature of any application of the definitions by the Supreme Court, how a particular court resolves the issue whether a police officer seized an individual by shooting implicitly depends upon its interpretation of the Fourth Amendment.

This article contends that when police officers shoot at an individual during an investigation or attempted arrest they have effected a Fourth Amendment seizure. The justification for this view is largely derived from balancing the need to subject a police practice to constitutional scrutiny against the state's interest in law enforcement. Part I details the development of the "seizure" definitions by the Supreme Court. Although the Rehnquist Court appears to look to dictionaries and the common law for easy answers, Part I reveals that balancing has been implicit in all of its decisions regarding what constitutes a Fourth Amendment "seizure." Part II specifies some common shooting situations that police officers encounter. It reveals that whether a court determines that an individual has been seized depends upon which definition it applies and also how it interprets *Brower*'s requirement that police of-

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REV. 1, 80 n.262 (1991) (In suggesting that no "seizure" occurred during a bus sweep, "the Court was wrong in both result and rationale.").

In California v. Hodari D., 111 S. Ct. 1547, 1551-52 (1991), the Supreme Court also determined that a police officer's footchase of a suspect did not implicate the Fourth Amendment. *See infra* text accompanying notes 66-76 for a discussion of this case; *see also* LaFave, *supra* at 762 (The Court "unwisely and unnecessarily permit[s] the police to make serious intrusions upon the liberty and freedom of action of citizens without the need to offer even a modicum of justification."); Maclin, *supra*, at 751 ("[T]he police rather than the individual is [sic] now sovereign on the streets of America."); Hamida Abdal-Khallaq, Comment, *Precedent for* Hodari *in Modern Supreme Court Cases—Does It Exist? An Analysis of* California v. Hodari, 17 T. MARSHALL L. REV. 171, 172 (1991) (The Court furthers the goal of law enforcement by sacrificing "our fundamental right to Fourth Amendment protection against unreasonable seizures . . . .").

The Court's decision in Brower v. County of Inyo, 489 U.S. 593, 596-97 (1989), similarly restricts the application of the Fourth Amendment by requiring officers to act intentionally when apprehending suspects. *See infra* text accompanying notes 77-92 for a discussion of this case; *see also* Ronald J. Bacigal, *In Pursuit of the Elusive Fourth Amendment: The Police Chase Cases*, 58 TENN. L. REV. 73, 115 (1990) (The court ignored society's interest in personal liberty as it pondered "far-fetched hypotheticals and formalistic concepts of causation and means intentionally applied."); Tracey Maclin, *The Decline of the Right to Locomotion: The Fourth Amendment on the Streets*, 75 CORNELL L. REV. 1258, 1313 (1990) ("Fourth Amendment protection should not depend on such slippery and deceptive conclusions about the presence of official intent, or whether official conduct resulted in acquiring physical control over a suspect."); Thomas K. Clancy, *The Supreme Court's Search for a Definition of a Seizure: What is a "Seizure" of a Person Within the Meaning of the Fourth Amendment*, 27 AM. CRIM. L. REV. 619, 647 (1990) ("Because the *Brower* test does not recognize the significance of intimidating or coercive shows of authority, the test fails to properly balance individual and governmental interests.").

ficers act intentionally. Part III briefly describes the relationship between the Fourth Amendment and the substantive due process component of the Fourteenth Amendment. It contends that the Fourth Amendment is the proper amendment under which to analyze police shootings. Parts IV proposes that the Court should adhere to its original definition in *Terry*—was there a "show of authority"—in evaluating whether an individual was seized. Part V argues that the balance should be struck in favor of constitutional scrutiny of the police practice under the Fourth Amendment. The appropriate place to show greater concern for the law enforcement interest is in the reasonableness prong of the Fourth Amendment.[29]

I. The Court's Approach to Creating Three Definitions of Fourth Amendment "Seizures"

Determining when police officers have "seized" an individual within the meaning of the Fourth Amendment has been a difficult task for the United States Supreme Court. During an eight-year period, from 1983 to 1991, the Court has issued six opinions on the scope of Fourth Amendment seizures.[30] The Court's last three opinions unmistakably indicate a significant narrowing of the definition.[31] Even though lower courts can easily perceive the Court's direction, they face the task of applying three seizure definitions to shootings by police.[32] Analysis of these decisions indicates the morass the Court has created: whether an individual was "seized" depends upon which definition a court selects.[33] The problem is also exacerbated by the Court's failure to clarify how one should interpret the Fourth Amendment.[34] The Court's jurisprudence has involved

29. *See infra* text accompanying notes 361-68.

30. Florida v. Bostick, 111 S. Ct. 2382 (1991); California v. Hodari D., 111 S. Ct. 1547 (1991); Brower v. County of Inyo, 489 U.S. 593 (1989); Michigan v. Chesternut, 486 U.S. 567 (1988); INS v. Delgado, 466 U.S. 210 (1984); Florida v. Royer, 460 U.S. 491 (1983); United States v. Mendenhall, 446 U.S. 544 (1980); Terry v. Ohio, 392 U.S. 1 (1968).

31. *See, e.g.*, Clancy, *supra* note 28, at 645 ("[T]he *Brower* test is in direct conflict with the reasonable person analysis," which was the Court's prior standard.); LaFave, *supra* note 28, at 734 (In the *Hodari D.* and *Bostick* decisions the Supreme Court failed to find a Fourth Amendment "seizure" even though under its prior definitions a "seizure" definitely occurred.); Maclin, *supra* note 28, at 1314 (A rule requiring a pursued suspect to stop in order to implicate the Fourth Amendment "would fasten the final nail in the coffin for the right of locomotion.").

32. *See infra* text accompanying notes 36-92 for a discussion of the Court's three seizure definitions.

33. *See infra* text accompanying notes 156-258 for a discussion of the conflicting results lower courts have reached in applying the Court's seizure definitions to shootings by police officers.

34. *See infra* text accompanying notes 42-44, 48-50, 78-82 for a discussion of the different approaches the Court has used in defining Fourth Amendment "seizures."

both balancing and the creation of "rigid" rules.[35]

A. The *Terry* Definition

The concept of an investigatory stop was first defined in *Terry v. Ohio*,[36] the Court's classic stop and frisk case. In determining whether such a stop was a Fourth Amendment "seizure" and whether a frisk was a Fourth Amendment "search, the Court evaluated the intrusiveness of the law enforcement practice upon an individual's interest in personal security.[37] In *Terry,* a police officer watched individuals walk back and forth past a store many times.[38] Suspecting that they were going to rob the store, the officer approached them, identified himself as a police officer, and asked their names.[39] When Terry mumbled a response, the officer grabbed him.[40] The Supreme Court determined that the officer had seized Terry when he grabbed him.[41] In a footnote, the Court articulated two types of compulsion officers employ in seizing individuals: "physical force" and a "show of authority."[42] The Court stated, "Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' occurred."[43] Because the grabbing constituted a clear seizure by the use of physical force, the Court found it unnecessary to determine if the police officer had effected a Fourth Amendment "seizure" by an assertion of authority before he grabbed Terry.[44]

The Court justified its definition by balancing "the sanctity of the person" with the state's interest in law enforcement.[45] One significant factor it used in striking the balance in favor of the right to personal

35. *See, e.g.*, Wasserstrom & Seidman, *supra* note 7, at 22 (The Court has failed to explain why, when it is addressing Fourth Amendment issues, it sometimes uses balancing and sometimes uses "rigid" rules.).

36. 392 U.S. 1 (1968).

37. *Id.* at 16-18.

38. *Id.* at 6.

39. *Id.* at 6-7.

40. *Id.* at 7.

41. *Id.* at 19.

42. *Id.* at 19 n.16.

43. *Id.*

44. *Id.*

45. *Id.* at 16-19. In determining whether an investigatory stop and frisk implicated the Fourth Amendment, the Court first noted that each person has an interest in being " 'free from all restraint or interference of others, unless by clear and unquestionable authority of law.' " *Id.* at 9 (quoting Union Pac. R. Co. v. Botsford, 141 U.S. 250, 251 (1891)). The Court determined that an investigatory stop does not infringe upon this right if it is based upon reasonable suspicion, given the weight of the government's interest in law enforcement and the limited intrusion upon the right to personal security. *Terry*, 392 U.S. at 27-30. Because the Court did not label the stop a "de minimis" intrusion outside the scope of the Fourth Amendment, it

security was "the degree of community resentment aroused by particular practices . . . ."[46] In short, the Court refused "to isolate from constitutional scrutiny the initial stages of the contact between the policeman and the citizen."[47]

B. The *Mendenhall* Definition

The Court articulated its second "seizure" definition in *United States v. Mendenhall*.[48] In this case the Court attempted to clarify *Terry*'s "show of authority" prong by determining that a "seizure" occurs "only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."[49] It declared that the following factors were relevant to that issue: "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person . . ., or the use of language or tone of voice indicating that compliance with the officer's request might be compelled."[50] It did not, however, indicate how to weigh these factors.

As with the *Terry* definition, the Court's second definition of a "seizure" in *Mendenhall* was based on balancing the interests of personal security against the state's interest in law enforcement.[51] Under this definition, however, the Court sought to limit the broad reach of *Terry* by distinguishing stops which are Fourth Amendment "seizures" from consensual encounters[52] which are not "seizures." Encounters, the Court

affirmed the importance of the right to personal security and of subjecting police practice to scrutiny under the Fourth Amendment. *Id.* at 16-17.

46. *Id.* at 17 n.14.

47. *Id.* at 17.

48. 446 U.S. 544 (1980) (opinion of Stewart, J.).

49. *Id.* at 554.

50. *Id.* at 554.

51. *Id.* at 553-54. The right to personal security, however, need not always be considered solely in opposition to the state's interest in law enforcement. Sometimes the Court characterizes the right to personal security as a part of the state's interest in law enforcement. In *Mendenhall*, 446 U.S. at 554, the Court placed both interests on the same side of the balance scale. It explained that "the security of all would be diminished" if police officers were not able to conduct investigations to identify those who are guilty of wrongdoing. *Id.* at 554 (quoting Hayres v. Washington, 373 U.S. 503, 503 (1963)). Professors Silas Wasserstrom and Michael Seidman have also noted this false conflict. *See supra* Wasserstrom & Seidman, note 7, at 65. They surmise that a resident of a crime-ridden area would welcome a law enforcement program that would include "aggressive patrolling or random, warrantless searches and arrests . . . ." *Id.* at 65-66. In this situation, an interest in personal security is present on both sides of the balance: the person subject to the program has an interest in personal security, but so does the person who lives in the high-crime neighborhood.

52. *Id.* at 555-56. The Court stated that if the contact was "otherwise inoffensive" then no "seizure" occurred. *Id.* at 555. The dichotomy between an encounter and a Fourth Amendment stop, however, is apparent to the Court, not to lower courts and scholars. *Com-*

explained, allow police officers to ask citizens questions without implicating the Fourth Amendment. As long as a person "remains free to disregard the questions and walk away, there has been no intrusion on that person's liberty or privacy . . . ."[53] In declaring that consensual encounters do not implicate the Fourth Amendment, the Court again balanced interests, but this time determined that the state's interest was "legitimate" and that the individual had no interest in being free from questions.[54] The *Mendenhall* Court declared that characterizing all police/citizen encounters as seizures under the Fourth Amendment "would impose wholly unrealistic restrictions upon a wide variety of legitimate law enforcement practices."[55]

The *Mendenhall* definition of a seizure and the Court's subsequent applications of it, however, have been widely criticized as wholly unrealistic.[56] If the *Mendenhall* definition were literally interpreted, most exchanges between police officers and citizens would constitute Fourth Amendment "seizures" because most individuals confronted with questioning by police officers do not "feel free to leave." In applying the *Mendenhall* definition, the Court has nevertheless determined that most questioning is consensual.

In attempting to understand the Court's perplexing applications of the *Mendenhall* definition, Professor Wayne LaFave has stated that the reasonable person that the Court envisions has incredibly thick skin, making it possible to resist the obvious assertion of authority by police

pare State v. Gerrish, 815 P.2d 1244, 1248 (Or. 1991) (quoting State v. Holmes, 813 P.2d 28, 34 (Or. 1991)) (Stopping at a roadblock was not a "seizure" because a roadblock is like " 'tapping [a] citizen on the shoulder at the outset to get a citizen's attention'.") *and In re* Gissette, Angela P., 1992 WL 148206, *leave to appeal granted*, 581 N.Y.S. 259 (N.Y. App. Div. 1992) (juvenile was not seized by officer asking numerous and demanding questions on a bus where there was limited or no movement allowed) *with* Jamieson v. Shaw, 772 F.2d 1205, 1210 (5th Cir. 1985) (roadblock constituted a Fourth Amendment seizure) *and* United States v. Wilson, 953 F.2d 116, 123 (4th Cir. 1991) (officer seized suspect by walking alongside him, repeatedly asking permission to search coat).

53. *Mendenhall*, 446 U.S. at 554.

54. *Id.* at 554-55.

55. *Id.* at 554.

56. *See, e.g.*, Tracy Maclin, *The Decline of the Right to Locomotion: The Fourth Amendment on the Streets*, 75 Cornell L. Rev. 1258, 1303 (1990). Professor Maclin incisively summarizes the problems with the Court's second definition:

> It is unrealistic because few, if any, citizens will resist an officer's demands. It is unfair because it adopts the police officer's perspective, rather than the citizen's, in judging the constitutional validity of police invasions. After all, the Fourth Amendment speaks of the rights of the people, not of the police.

Id.

officers[57]. Only such a person could perceive that there was freedom to leave. For example, in *INS. v. Delgado*[58] the Supreme Court held that Hispanic factory workers were not seized when some immigration agents stationed themselves at exits as other agents, armed with walkie-talkies and weapons, displayed their badges as they roamed about the factory asking questions.[59] Similarly, in *Florida v. Bostick*,[60] the Supreme Court implied that the lower court, on remand, should determine that an African-American bus passenger, who was at a layover stop, was not seized by two police officers, who had badges and carried a gun in a "recognizable zipper pouch," as they questioned the passenger.[61] Even though the passenger allowed the officer to inspect his ticket and identification, the police then asked to inspect his luggage as one of the officer's blocked his path to exit the bus.[62] The Supreme Court stated that understanding the *Mendenhall* definition requires sensitivity to the facts of the particular case.[63] It explained, "the 'free to leave' analysis . . . is inapplicable."[64] "In such a situation, the appropriate inquiry is whether a reasonable person would feel free to decline the officers' requests . . . ."[65] These interpretations of the *Mendenhall* definition may also suggest that the reasonable person that the Supreme Court envisions implicitly knows of her right to walk away or to terminate questioning and has faith in the integrity of the police, traits certainly not possessed by many minority suspects.

In *California v. Hodari D.*,[66] although the Court similarly narrowed the *Terry/Mendenhall* definition of what constitutes a "show of authority" restricting a reasonable person's liberty, the Court nevertheless expanded what type of physical force constitutes a "seizure" under its prior *Terry* definition.[67] In *Hodari D.*, the Court declared that the *Mendenhall* definition merely states a "*necessary* but not *sufficient* condition for seizure."[68] The Court ruled that a *Terry/Mendenhall* "show of author-

57. *See* LaFave, *supra* note 28, at 734-740 ("The Court finds a perceived freedom to depart in circumstances when only the most thick-skinned of suspects would think such a choice was open them.").

58. 466 U.S. 210 (1984).

59. *Id.* at 212, 219.

60. 111 S. Ct. 2382 (1991).

61. *Id.* at 2387-88.

62. *Id.* at 2385.

63. *Id.* at 2386-87.

64. *Id.* at 2387.

65. *Id.*

66. 111 S. Ct. 1547 (1991).

67. *Id.* at 1550.

68. *Id.* at 1551. Under this approach, the Court can drastically limit the doctrine of stare decisis by merely declaring prior cases did not articulate all the requirements necessary to

ity" is insufficient; there must also be compliance with the shown authority.[69] In *dicta*, however, the Court explained that if officers use physical force, voluntary compliance is not necessary.[70] The Court broadly stated, "To constitute an arrest . . . the mere grasping or application of physical force with lawful authority, whether or not it succeeded in subduing the arrestee, [is] sufficient."[71] It thus added two bright-line rules to a fuzzy definition: if an individual does not stop then there is no seizure even if there was a "show of authority," but if officers use physical force, then voluntary compliance is not necessary. Therefore, even if a footchase constitutes a "show of authority," no seizure occurs until the individual stops.[72]

In crafting this limitation, the *Hodari* Court not only balanced interests,[73] but it also found guidance from dictionaries[74] and some aspects of

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fulfill a particular legal standard. In short, this practice would allow the court to change well-established law without requiring reasons for doing so.

69. *Id.* at 1550-51.

70. *Id.* at 1551.

71. *Id* at 1550.

72. *Id.* at 1552.

73. *Id.* at 1551. The Court stated, "We do not think it desirable, even as a policy matter, to stretch the Fourth Amendment beyond its words and beyond the meaning of arrest . . . . Street pursuits always place the public at some risk, and compliance with police orders to stop should therefore be encouraged." *Id.* Even though the Court's interpretation of the role of language in constitutional adjudication is naive, balancing is similarly subject to manipulation based on personal preferences. *See, e.g.*, Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1186-87 (1989) (Judges should favor general rules to balancing tests because the latter compels judges to act more like "fact-finders [rather] than as expositors of the law."); Maclin, *supra* note 28, at 1303 ("[T]he inevitable result of [F]ourth [A]mendment jurisprudence keyed to balancing or sound social policy is to 'give the police the upper hand'.") (quoting Terry v. Ohio, 392 U.S. 1, 39 (1968) (Douglas, J., dissenting)).

74. *See* 111 S. Ct. at 1549 (1992) ("From the time of the founding to the present, the word 'seizure' has meant a 'taking possession'. . . .") (*citing* NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 67 (1828); 2 JOHN BOUVIER, A LAW DICTIONARY 510 (6th ed. 1856); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2057 (1981). *See generally* Scalia, *supra* note 73, at 1184.

In this recent article, Justice Scalia, the author of *Hodari D.*, stated that the task of deriving general rules is perhaps easier for him than for other judges because he is "more inclined to adhere closely to the plain meaning of a text." *Id.* He explained that this was his approach for determining what constitutes a Fourth Amendment "seizure." *Id.* To illustrate his approach, he cited his concurring opinion in Michigan v. Chesternut, 486 U.S. 567 (1988). In *Chesternut*, the Court determined that police officers had not seized a suspect by following him in a cruiser. 486 U.S. at 574-75. The majority opinion refused to adopt two proposed bright-line rules: a suspect must stop before a seizure can occur, or that all chases are Fourth Amendment seizures. *Id.* at 572-73. In the concurring opinion, however, Justice Scalia agreed with Justice Kennedy's adoption of the first proposed bright-line rule—a "seizure" does not occur until the suspect actually stops, the view later adopted in *Hodari D. Id.* at 577 (Kennedy, J., concurring). Justice Scalia in his article maintained that his approach to determining what consti-

the common law.[75] The Court's *dictum*—that the use of any physical force that actually touches an individual would constitute a "seizure"—appears in conflict with its third "seizure" definition, articulated just three years before in *Brower v. County of Inyo*.[76]

C. The *Brower* Definition

The confusion about the relationship among the Court's "seizure" definitions is apparent in *Brower v. County of Inyo*.[77] In *Brower*, the majority opinion not only articulated a third definition[78] without ever mentioning its prior definitions, but it implicitly balanced the parties' interest as it attempted to distinguish a constitutional tort under the Fourth Amendment from an ordinary state tort.[79] Its explicit vehicle for narrowing the scope of the constitutional tort was its interpretation of the word "seizure." The Court explained that only intentional conduct can create a Fourth Amendment "seizure" because the word "seizure" "can

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tutes a Fourth Amendment "seizure" is much better than the Court's imprecise test of examining all of the circumstances to ascertain if the police conduct was coercive.

Many scholars, however, do not accept textual analysis with the same confidence as Justice Scalia does. *See, e.g.*, HARRY H. WELLINGTON, INTERPRETING THE CONSTITUTION: THE SUPREME COURT AND THE PROCESS OF ADJUDICATION 80 (1990) (A textual argument is actually "an appeal to values and morality."); Peter C. Schanck, *The Only Game in Town: An Introduction to Interpretive Theory, Statutory Construction, and Legislative Histories*, 38 KAN. L. REV. 815, 860-61 (1990) (Conventionalism "teaches that there is no transcendently right interpretive practice [and] that we cannot step outside our own interpretative community to judge its conventions."); Wasserstrom and Seidman, *supra* note 7, at 54 n.140 ("[I]t is not possible to generate a determinate body of rules governing searches and seizures from a simple reading of the constitutional text"); Note, *The Dictionary and the Law*, J. LEGAL HIST. 389, 391 (1989) (A dictionary is not the source to resolve legal disputes.).

75. *See, e.g., Hodari D.*, 111 S. Ct. at 1551 n.3 (Common law "defines the limits of a *seizure of the person*.") In *Hodari D.* the Supreme Court selectively used the common law to interpret the Fourth Amendment. *Id.* at 1150-51. It rejected using the common law on attempted arrest, but adopted the common law as it applied to actual arrests. *Id.* It failed to explain not only why the common law was significant, but also why it selectively chose certain aspects of it to shed light on what constitutes a Fourth Amendment "seizure." *See, e.g.*, Kathy R. Mahrt, Note, *Seizure and the Fourth Amendment: The Meaning and Implications of* California v. Hodari, 25 CREIGHTON L. REV. 213, 231 (1991) ("Our interpretation of the [F]ourth [A]mendment as it has grown over the last twenty-five years should define the scope of a seizure, not the common law of arrest."); *see infra* text accompanying notes 339-43 for a discussion of the Court's inconsistent application of the common law to Fourth Amendment issues.

76. 489 U.S. 593 (1989). *See infra* text accompanying notes 77-92 for a discussion of this case.

77. 489 U.S. 593 (1989).

78. *Id.* at 596-97. A "seizure" occurs under the third definition "whenever there is a governmentally caused termination of an individual's freedom of movement . . . *through means intentionally applied*." *Id.* (emphasis in original).

79. *Id.* at 596. A state tort occurs, according to the Court, if "a parked and unoccupied police car slips its brake" and injures someone. *Id.*

hardly be applied to an unknowing act."[80] It thus created a dichotomy for analyzing the display of force by police officers: whether there a "misuse of power"[81] or just an "accident."[82]

The Court derived this dichotomy by considering only the two extremes of conduct—negligence and intentional acts.[83] In *Brower*, the Court held that police officers had seized a pursued driver by intentionally setting up a roadblock on a curve that stopped the pursued individual by killing him.[84] It contrasted this clear intentional conduct with negligent behavior.[85] The Court explained that if police officers accidentally pin a serial killer against a wall with their cruiser, there would be no Fourth Amendment seizure.[86] If, however, the officers intentionally "sideswipe[]" a fleeing car, causing a crash, then there would be a seizure.[87] The Court's definition of "intentional" conduct focuses attention on the intent to stop a suspect, not the intent to harm a person.[88] The Court explained that intentional conduct should be measured objectively by focusing on the means used to stop a suspect.[89] A seizure occurs if a person is "stopped by the very instrumentality set in motion or put in place in order to achieve that result."[90] This clarification, the Court stated, was necessary because otherwise it would "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."[91] The Court thus impliedly defines objective intent as the desire to bring about the stated physical consequence of stopping, not of a particular physical harm.

The significance of this third definition is unclear. Since the *Brower* decision, some courts have interpreted *Brower* to require an intent to cause a particular harm, not the intent to cause a suspect to stop.[92] The confusion arising from the *Brower* definition is understandable. *Brower* raises questions as to the significance of police officers' drawing their weapons and using them. Analysis of common situations resulting in

80. *Id.* at 596.
81. *Id.* (quoting Byars v. United States, 273 U.S. 28, 33 (1927)).
82. *Id.*
83. *Id.* at 596-97.
84. *Id.* at 599-600.
85. *Id.* at 596-97.
86. *Id.*
87. *Id.* at 597.
88. *Id.* at 599.
89. *Id.*
90. *Id.* at 599.
91. *Id* at 598-99 (emphasis added). The Court explained that a court should not "draw too fine a line" in examining the means used to cause a suspect to stop. *Id* at 598.
92. *See infra* text accompanying notes 185-92, 220-26, 249-54.

shooting reveals not only the complexities associated with the *Brower* definition, but also confusion arising from the three "seizure" definitions.

II. The Use of Weapons by Police Officers: Applying the Three "Seizure" Definitions

Police officers may attempt to stop individuals by asking or commanding them to stop, by displaying their guns, or by injuring them.[93] Within each category, of course, are numerous factual distinctions. Application of the three "seizure" definitions to various situations in which police officers use their weapons reveals the difficult tasks courts face in determining whether a "seizure" occurred. Some conduct is clearly a seizure under any definition;[94] some conduct, however, is a "seizure" under the *Terry* and *Mendenhall* definitions, but not a "seizure" under the *Brower* definition.[95] In addition, conflicting interpretations of the application of these definitions is also possible. In short, as Professors Silas Wasserstrom and Michael Seidman have accurately stated, "the Court simply has made a mess of search and seizure law."[96]

A. The Display of a Weapon

Because the Supreme Court created a distinction between encounters, which are not governed by the Fourth Amendment, and investigatory stops, which do constitute Fourth Amendment seizures, the mere presence of a gun on a police officer is insufficient to label any exchange between officers and citizens as a stop.[97] The average citizen expects to view a police officer carrying a gun. The question of when conduct amounts to a "seizure" arises when police officers remove guns

93. The greatest source of controversy arises when police officers use their guns to effect an arrest, not when they act in self-defense. *See, e.g.*, GEOFFREY P. ALPERT & LORIE A. FRIDELL, POLICE VEHICLES AND FIREARMS: INSTRUMENTS OF DEADLY FORCE 70 (1992). Some police departments do not have a firearms policy. *Id.* at 73. Those departments that do have policies disagree as to the circumstances under which the use of weapons is appropriate. *Id.* at 70-71. Some allow officers to use deadly force to effect an arrest when the suspect has committed a forcible felony, such as "murder, arson, mayhem, burglary, aggravated assault, rape, kidnapping, extortion, or robbery." *Id.* at 71. Others allow police to use deadly force only when " 'someone's life is in direct jeopardy even if the suspect has allegedly committed a heinous crime and was believed to be dangerous.' " *Id.* (quoting David B. Griswold, *Controlling the Police Use of Deadly Force: Exploring the Alternatives*, 4 AM. JUR. *Police* 93, 103 (1985)).

94. *See infra* text accompanying notes 116-18.

95. *See infra* text accompanying notes 101, 145-47, 154-55, 238-42, 271-83.

96. Wasserstrom & Seidman, *supra* note 7, at 20.

97. *See, e.g.*, INS v. Delgado, 466 U.S. 210, 210, 212 (1984) (no seizure occurred when officers with holstered guns approached suspects and asked them questions).

from their holsters and point them at suspects.[98] Under the Court's recent decision in *California v. Hodari D.*,[99] which purports to interpret the *Terry/Mendenhall* "show of authority" prong,[100] the conduct would be a seizure only if the suspect stops; under the *Brower* definition, a "seizure" occurs only if the officers intentionally acquired physical control of the suspect.[101]

Only the Court's recent decision in *Hodari D.* discussed all three "seizure" definitions. In one sense, it reaffirmed the vitality of *Terry* by declaring two categories of Fourth Amendment seizures: those in which the officers use physical force and those in which suspects stop as a result of a *Terry/Mendenhall* "show of authority."[102] In the first category the mere touching of a person can constitute a Fourth Amendment "seizure."[103] In contrast, if there were just a show of authority, then the suspect would have to stop in response to this assertion for there to be a Fourth Amendment "seizure."

Under *Hodari D.*, pointing a gun at a suspect would constitute a "seizure" only if the suspect stopped as a result of this assertion of authority. If the suspect ran, then there would be no Fourth Amendment seizure.[104]

This approach to Fourth Amendment "seizures" leads, however, to the debatable conclusion that the Fourth Amendment is not implicated when police officers repeatedly shoot at suspects, but miss them.[105] In *Cameron v. City of Pontiac*[106] a suspect was killed by a car as he ran to avoid gunfire from police officers.[107] In this situation the Sixth Circuit held that was no Fourth Amendment "seizure," despite the obvious "show of authority" through the shooting, because the suspect did not

98. *See infra* text accompanying notes 104, 116-18.

99. 111 S. Ct. 1547 (1991).

100. *See supra* text accompanying notes 36-76 for a discussion of the *Terry* and *Mendenhall* definitions.

101. *See supra* text accompanying notes 77-92 for a discussion of the *Brower* definition.

102. *Hodari D.*, 111 S. Ct. at 1550-52.

103. *Id.* at 1550. Although the *Hodari D.* decision does suggest that the a "mere touching" could constitute a Fourth Amendment "seizure," a touching that is like a touching from an ordinary citizen would probably not constitute a "seizure." *See, e.g.*, LaFave, *supra* note 28, at 737 ("physical contact is acceptable if it is 'a normal means of attracting a person's attention.' ") (quoting United States v. Burrell, 286 A.2d 845, 846 (D.C. 1972)).

104. California v. Hodari D., 111 S. Ct. 1547, 1551 (1991).

105. Dissenting in *Hodari D.*, Justices Stevens and Marshall criticized the Court's narrow interpretation of the Fourth Amendment. *Id.* at 1552-62 (Stevens, J., dissenting). They stated, "a police officer may now fire his weapon at an innocent citizen and not implicate the Fourth Amendment—as long as he misses his target." *Id.* at 1552.

106. Cameron v. City of Pontiac, 813 F.2d 782, 784 (6th Cir. 1987).

107. Id.

comply with it.[108]

The Sixth Circuit's holding is consistent with *Hodari D.*, which reinterpreted *Terry* and *Mendenhall* to require compliance with a show of authority.[109] Prior to the compliance requirement, shooting at a suspect could have constituted a "show of authority," which would have allowed the courts to scrutinize whether the police conduct was reasonable. For example, under the earlier interpretations of *Terry* and *Mendenhall,* the moment officers use sirens in an attempt to stop someone[110] or as soon as they begin chasing a suspect, "the stop has begun."[111] The *Hodari D.* restriction of the *Mendenhall* definition, however, suggests that the seizure begins when the suspect stops.

The *Hodari D.* limitation further undermines an individual's interest in personal security, particularly when one considers that the majority of bullets fired by police officers do not hit their intended targets.[112] In *Terry* the Court created a reasonable suspicion standard that allowed police officers to stop individuals for limited questioning,[113] even though the language of the Fourth Amendment suggests that a "probable cause" standard could have been necessary for these exchanges.[114] The Court, however, balanced the need for law enforcement against this more limited intrusion into privacy. The individual's interest in privacy, it declared, could be protected by the reasonableness clause: "In our view the sounder course is to recognize that the Fourth Amendment governs all intrusions by agents of the public upon personal security, and to make the scope of the particular intrusion, in light of all the exigencies of the

108. *Id.* at 785.

109. California v. Hodari D., 111 S. Ct. 1547, 1552 (1991).

110. *See, e.g.*, United States v. Morrison, 546 F.2d 319, 320 (9th Cir. 1976) ("seizure occurs when the officer first communicates the command to halt").

111. *See, e.g., In re* D.J., 532 A.2d 138, 140 (D.C. 1987); LaFave, *supra* note 28, at 758-62.

112. *See, e.g.* GEOFFREY P. ALPERT & LORIE A. FRIDELL, POLICE VEHICLES AND FIREARMS: INSTRUMENTS OF DEADLY FORCE, 41 (1991) (in analyzing police shootings in fifty largest cities in the United States, 52% of all shots resulted in misses); 1992 studies by Geller and Alpert, to be added in September, will document the frequencies of and some covert reasons for "accidental" shootings; WILLIAM GELLER, DEADLY FORCE: WHAT WE KNOW 194 (1992) (several studies "show relatively high levels of *accidental* gun discharges or accidental shootings of persons by police officers during different time periods": Chicago, 9% in 1974-1983, 15% in 1991; Boston, 27% in the 1970s; New York City, 13% in 1971-75, 24% in 1987, 23% in 1990).

113. Terry v. Ohio, 392 U.S. 1, 21 (1968) ("[I]n justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.").

114. *Id.* at 35 (Douglas, J., dissenting) ("[I]t is a mystery how that 'search' and that 'seizure' can be constitutional by Fourth Amendment standards, unless there was 'probable cause' to believe that (1) a crime had been committed or (2) a crime was in the process of being committed or (3) a crime was about to be committed.").

case, a central element in the analysis of reasonableness."[115] In contrast, the *Hodari D.* narrow "seizure" definition fails to discern any intrusion of the right to personal security when police officers shoot at individuals and miss them.

Similar narrow interpretations of what constitutes a Fourth Amendment "seizure" occur when applying the *Brower* "seizure" definition both to the mere display of weapons and to shootings missing their targets. Under *Brower*, a police officer who points a gun at a suspect effectuates a Fourth Amendment "seizure" only if there was "an intentional acquisition of physical control."[116] Like the *Hodari D.* definition, an actual stop is perhaps what the Court means by "physical control."[117] In contrast to the *Hodari D.* definition, if the stop were caused by the use of physical force, then voluntary compliance would not be necessary. The *Brower* Court explained that for the purpose of determining whether a seizure occurred it would not distinguish between a roadblock designed to give a pursued the option to stop and one designed to produce a collision.[118]

Under the *Brower* decision, an officer thus seizes a suspect by pointing a gun if the suspect stops. The drawing of the gun is an intentional act that produces physical control over the suspect. But if the officer shoots at the suspect, misses the target, and the suspect flees, then the officer has not acquired physical control over the suspect. Under both the *Brower* and *Hodari* definitions, shootings at citizens are not governed by the Fourth Amendment as long as police officers miss and the citizens continue to flee. Under *Brower*, no "seizure" occurs because the shooting does not result in physical control over the suspect, and under *Hodari D.*, no seizure occurs because the suspect has not complied with the "show of authority" as manifested by the shooting. In short, these "seizure" definition severely narrowed the scope of the Fourth Amendment because they shield this common and dangerous police practice from review under the Fourth Amendment while permitting review when individuals stop in response to other types of coercive conduct, such as verbal demands.

115. *Id.* at 18 n.15.

116. Brower v. County of Inyo, 489 U.S. 593, 596 (1989).

117. *See, e.g.*, Willhauck v. Halpin, 953 F.2d 689, 716 (1st Cir. 1991) (quoting *Brower* 489 U.S. at 597 (1989) (A seizure occurs when the suspect stops in response to signalling because at that point the officer has "physical control" over the suspect)). (quoting Brower v. County of Inyo, 489 U.S. 593, 597 (1989)).

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

B. Shooting Citizens

Applying the Court's "seizure" definitions to shootings resulting in injuries to suspects and bystanders is also difficult. Litigation has included the following common situations: 1) the intentional killing of a suspect;[119] 2) the intentional firing at a suspect who becomes injured yet continues to flee;[120] 3) "accidental shootings," e.g., the withdrawal of a gun to stop a suspect, which fires as the officer approaches a suspect,[121] or the firing of a gun after the suspect has stopped in response to the officer's show of authority;[122] and 4) the firing of a gun at a suspect which results in injury either to a known passenger[123] or an unknown bystander.[124] Central to resolution of the "seizure" issue is examination of what the *Hodari D.* Court meant by "physical force" and what the *Brower* Court meant by "intentional" conduct.

1. Intentional Killing of Suspects

The easiest application of the Court's seizure definitions involves clear, intentional conduct: shootings designed to stop suspects by killing them and shootings in self-defense. Yet, even in this context, courts have disagreed as to what type of conduct on the part of police is intentional, as opposed to reckless or grossly negligent.

The Supreme Court evaluated a shooting designed to kill a suspect in *Tennessee v. Garner.*[125] In *Garner,* a police officer saw a burglary suspect fleeing from a house.[126] When the suspect ignored the officer's command to halt, the officer intentionally shot the suspect in order to stop him.[127] The issue of whether there was a "seizure" merited only a two-sentence discussion from the Court.[128] It stated, "there can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment."[129] In reach-

119. *See infra* text accompanying notes 125-51 for a discussion of intentional killings of suspects.

120. *See infra* text accompanying notes 152-55 for a discussion intentional injuries to suspects.

121. *See infra* text accompanying notes 156-214.

122. *See infra* text accompanying notes 215-58.

123. *See infra* text accompanying notes 259-84 for a discussion of injuries to a known passenger.

124. *See infra* text accompanying notes 285-88 for a discussion of injuries to an unknown bystander.

125. 471 U.S. 1 (1985).

126. *Id.* at 3.

127. *Id.* at 4.

128. *Id.* at 7.

129. *Id.*

ing this conclusion, the Court did not qualify the types of killings that constitute "seizures." It only noted that the suspect died as a result of the intentional shooting.[130]

Similarly, in *Brower v. County of Inyo*,[131] police officers stopped a pursued driver by using deadly force, this time in the form of a roadblock.[132] Just like the fleeing victim in *Garner*, the pursued driver refused to stop.[133] Even though the suspect did not voluntarily comply with the police officers' show of authority as manifested by the roadblock, police officers used physical force to effectuate a stop. The *Brower* held that police officers seized the driver when he hit the roadblock and stopped.[134]

Thus under both *Garner* and *Brower* voluntary compliance with a show of authority is not necessary if police officers intentionally cause a stop using physical force. In *Garner* the officer intentionally shot his gun,[135] and in *Brower*, the officers intentionally established a roadblock.

Although both *Garner* and *Brower* involved obvious intentional conduct by the police, courts have disagreed as to how to evaluate an intentional killing when the officer asserts that the shooting was in self-defense.[136] Even though a jury may resolve the issue of whether the officer acted intentionally,[137] some courts have prevented the issue from going to trial by determining that no "seizure" occurred. For example, in *Estate of Jackson v. City of Rochester*,[138] a federal district court in New York held that a police officer did not seize a suspect by shooting him because the purpose of the shooting was to act in self defense, not to effectuate a Fourth Amendment "investigatory stop."[139] It also declared that the Fourth Amendment was not applicable to the shooting because

130. *Id.* at 11.

131. 489 U.S. 593 (1989); *see supra* text accompanying notes 77-92 for a discussion of this case.

132. *Brower*, 489 U.S. at 595 (1989).

133. *Id.*

134. *Id.* at 599.

135. *See generally* Fernandez v. Leonard, 784 F.2d 1209, 1217 (1st Cir. 1986) (intentional killing of suspect stated claim under the Fourth Amendment).

136. *Compare* Reed v. Hoy, 909 F.2d 324, 329 (9th Cir. 1989) (shooting constituted a "seizure"), *cert. denied*, 111 S. Ct. 2887 (1991); Gilmere v. City of Atlanta, 774 F.2d 1495, 1502 (11th Cir. 1985), *cert. denied*, 476 U.S. 1124 (1986); Loria v. Town of Irondequoit, 775 F. Supp. 599, 604 (W.D.N.Y. 1990); *with* Estate of Jackson v. City of Rochester, 705 F. Supp. 779, 786 (W.D.N.Y. 1989) (no seizure); *see also* Frank G. Zarb, *Police Liability for Creating the Need to Use Deadly Force in Self-Defense*, 86 MICH. L. REV. 1982, 1995-2002 (1988) (excellent examination of the issues associated with self-defense shootings by police officers).

137. *See, e.g.*, Loria v. Town of Inrondequoit, 775 F. Supp. 599, 604 (W.D.N.Y. 1990); Keller v. Frink, 745 F. Supp. 1428, 1432 (S.D. Ind. 1990).

138. 705 F. Supp. 779 (W.D.N.Y. 1989).

139. *Id.* at 786.

it occurred after a "completed" investigatory stop.[140]

In conflict with this interpretation of the Fourth Amendment is the same court's subsequent decision in *Loria v. Town of Irondequoit.*[141] In *Loria,* it held that a "seizure" occurred when a police officer shot a suspect in self-defense.[142] The *Loria* court explained that the officer's motive in using the gun goes to the issue of reasonableness, not to the issue of whether there was a Fourth Amendment "seizure."[143] It explained that the Fourth Amendment would thus be implicated if the jury determined either that "he drew his weapon intending to use it, or that he meant to fire it at the time of discharge."[144]

The disagreement as to whether the Fourth Amendment is implicated when officers assert that a shooting was in self-defense appears to focus on the scope of the *Brower* "seizure" definition. In *Brower,* the Supreme Court emphasized that a "seizure" requires "an intentional acquisition of physical control" which causes the suspect to stop, whether voluntarily or involuntarily.[145] Determining whether the Fourth Amendment is implicated during a shooting allegedly done in self-defense should not depend upon whether it occurred before or soon after the suspect stops. A self-defense shooting is itself an admitted intentional act. If the act result in physical control of a suspect, then the Fourth Amendment should be considered implicated because it meets even the restrictive *Brower* "seizure" definition. The *Loria* court explained that a contrary view would result in an "overly restrictive" interpretation of *Brower.*[146] Determining that a "seizure" occurred when officers intentionally kill a suspect during an investigatory stop or while acting in self-defense is also consistent with the *Hodari D.* Court's dicta about the use of physical force.[147] Although *Hodari D.* defined when a seizure occurs in the absence of physical force, it nonetheless made some broad statements about the use of physical force. It stated that "the mere touching of a person would suffice" as a "seizure."[148] In addition, it explained

140. *Id.*

141. 775 F. Supp. 599 (W.D.N.Y. 1990).

142. *Id.* at 604.

143. *Id.*

144. Id. at 603-04. It stated that a jury could determine that the officer intended to use the gun within the meaning of *Brower* not only because the gun had to have been cocked before using it, but also because six pounds of force was necessary to pull the trigger. *Id.*

145. *Brewer,* 489 U.S. at 596.

146. *Loria,* 775 F. Supp. at 603-04.

147. California v. Hodari D., 111 S. Ct. 1547, 1550 (1991).

148. Id. at 1550 n.2 (1991). The Court never adequately explained its use of the common law in determining what constitutes a Fourth Amendment "seizure." At one point the Court stated that it is "irrelevant that English law proscribed 'an unlawful *attempt* to take a presumptively innocent person into custody.' " *Id.* (emphasis in original). In contrast, the Court

that if the person escaped control after the touching, the arrest did not continue.[149] It also stated that a "seizure" could be a "single act, . . . not a continuous fact."[150] With this broad interpretation of physical force, the *Hodari D.* dicta thus resembles the *Terry* Court, which stated that the use of physical force constitutes a Fourth Amendment seizure.[151]

Under all three Supreme Court "seizure" definitions—*Terry, Brower,* and *Hodari,* which modified the *Mendenhall* definition—police officers thus seize individuals within the meaning of the Fourth Amendment when they intentionally kill them. These shootings generally do not engender complex questions as to the scope of the Court's "seizure" definitions because the police officers admit that they intentionally killed the suspects, whether during an investigation or as an act of self-defense.

2. *Intentional Injury of Fleeing Suspects*

A more complex case occurs when a suspect flees after being shot by police officers.[152] Whether a Fourth Amendment seizure occurred depends upon which seizure definition a court applies. Under *Terry* and *Hodari D.*'s dicta[153] on physical force, a seizure occurs when the bullet hits the suspect because the officer has used physical force. Under *Brower,* however, that conclusion is debatable because one may interpret the Court's decision to exclude physical force that does not cause an immediate stop or one shortly after the use of physical force.

In declaring another "seizure" definition, the *Brower* Court did not adopt a physical-injury litmus test for Fourth Amendment "seizure." It explained that a "seizure" occurs only when officers act intentionally,

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did find relevant the common law when an officer has actual custody of an individual. *Id.* To justify its conclusions, the Court relied on its notion of what type of conduct implicates the Fourth Amendment. *Id.* This latter justification is implicitly related to balancing. In this context the Court failed to discern the significance of personal liberty. It tersely explained that even though "street pursuits always place the public at some risk, . . . compliance with police orders to stop should be therefore encouraged." *Id.* at 1551.

149. *Id.* at 1550.

150. *Id.* (comparing Thompson v. Whitman, 85 U.S. (18 Wall.) 457, 471 (1873)).

151. Terry v. Ohio, 392 U.S. 1, 19 n.16 (1968).

152. *See, e.g.,* Cooper v. Merrill, 736 F. Supp. 552, 557 (D. Del. 1990) (the first shot hitting the suspect caused him to gasp, but not to stop; he continued toward the officer, who fired two more times; the suspect escaped but fell over some bushes; officer later hit him twice as suspect attempted to give himself up). In *Cooper,* the police officer admitted that he seized the suspect by shooting him. 736 F. Supp. at 559.

153. *Hodari D.,* 111 S. Ct. at 1550 ("To constitute an arrest . . . the mere grasping or application of physical force with lawful authority, whether or not it succeeded in subduing the arrestee, was sufficient"). The Court also cites an 1862 case to support its view of physical force: "officer effects an arrest of a person whom he has authority to arrest, by laying his hand on him for the purpose of arresting him, though he may not succeed in stopping and holding him") *Id.* (citing Whitehead v. Keyes, 85 Mass. 495, 501 (1862)).

regardless of the harm caused by police officers. It stated that if an officer's parked cruiser accidentally "slips its brake and pins" an innocent bystander or a serial killer, no seizure has occurred.[154] Few, however, would dispute the Court's conclusions here because these situations involve obvious negligence claims unrelated to investigations and arrests. Under *Brower* there is no "seizure" because the officers objectively did not intend to stop the bystander or the killer by using their cruiser as a weapon.

Application of the *Brower* definition to the injured fleeing suspect reveals some of the problems with the definition. In this situation, there is an objective intent to stop the suspect as demonstrated by aiming the gun and repeatedly hitting the suspect. What is missing, however, is the actual stop. The *Brower* Court stated that it is "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."[155] In other words, there must be both the intent to stop and a stop caused by the intent to stop. The *Brower* definition does not clarify when an individual must stop in response to an officers use of physical force. For example, it is unclear if the *Brower* definition would bar recovery for injuries arising from a shooting in which the suspect fled and was captured the next day or if the person died the next day as a result of the shooting.

In this situation, whether an injured fleeing suspect has been seized depends upon which definition a court applies. Under both *Terry* and *Hodari D.*'s dicta, a seizure occurs when the officer's bullet hits the suspects because the bullet represents the use of physical force; however, under *Brower*, one may contend that a "seizure" occurs only when the suspect stops shortly after being injured. Consequently, in this situation, application of the Court's seizure definitions results in conflicting conclusions as to the scope of the Fourth Amendment.

3. *"Accidental Shootings" of Suspects*

The *Brower* definition of a "seizure," in contrast to the *Terry* and *Hodari D.*'s definitions, also similarly shields "accidental shootings" from scrutiny under the Fourth Amendment.[156] Two situations are common: guns "accidentally" discharge as police officers approach a suspect[157] and guns "accidentally" discharge as they arrest someone who

154. Brower v. County of Inyo, 489 U.S. 593, 596-97 (1989).

155. *Id.* at 599 (emphasis added).

156. *See infra* text accompanying notes 157-290 for a discussion of cases in which courts have failed to find the Fourth Amendment implicated because the officers did not intend to shoot their weapons.

157. *See infra* text accompanying notes 159-214.

has stopped.[158] The central issue is to understand what the Court means by "intentional conduct."

a. Shootings During Investigations

In the first situation, officers draw their weapons while investigating suspicious activity. As they approach the suspects with drawn guns, the suspects do not respond to this assertion of authority either because they do not see the guns or because they choose to ignore the officers' requests.[159] The suspects eventually stop because police officers "accidentally" discharge their drawn guns, hitting or killing the suspects.[160]

In analyzing this situation, courts have reached conflicting conclusions as to whether the suspects were "seized" within the meaning of the Fourth Amendment.[161] Those courts that have found that there was no "seizure" have described the shooting as an accident.[162] In contrast, some courts have found that this type of shooting is a Fourth Amendment "seizure" by implicitly recognizing the seriousness of drawing a gun.[163] They have proceeded to analyze whether the drawing of the gun was reasonable under the circumstances. By examining some of these conflicting cases in light of the Court's three "seizure" definitions, one can discern the bases for the confusion and the need for the Supreme Court to declare that the Fourth Amendment is implicated when police officers withdraw their weapons during an investigation or an arrest.

One federal district court refused to find the Fourth Amendment applicable to a shooting because the shooting "was not a volitional act."[164] In *Matthews v. City of Atlanta*,[165] which was decided before *Brower v. County of Inyo*,[166] a police officer suspected that two men were about to leave the parking lot in a stolen truck.[167] With his gun drawn,

158. *See infra* text accompanying notes 215-58.

159. *See infra* text accompanying notes 159-214.

160. *See infra* text accompanying notes 159-214.

161. *Compare* Glasco v. Ballard, 768 F. Supp. 176, 180 (E.D. Va. 1991) ("a wholly accidental shooting is not a 'seizure' ") *and* Matthews v. City of Atlanta, 699 F. Supp. 1552, 1557 (N.D. Ga. 1988) (no seizure because shooting was "not a volitional act") *with* Pleasant v. Zamieski, 895 F.2d 272, 276 (6th Cir. 1990) (court analyzes both the withdrawal of gun and failure to reholster to determine if conduct was "reasonable" within the meaning of the Fourth Amendment), *cert. denied*, 111 S. Ct. 144 (1990).

162. *See infra* text accompanying notes 164-92.

163. *See infra* text accompanying notes 193-214.

164. Matthews v. City of Atlanta, 699 F. Supp. 1552, 1557 (N.D. Ga. 1988)

165. *Id.* at 1552.

166. 489 U.S. 593 (1989); *see supra* text accompanying notes 77-92 for a discussion of this case.

167. *Matthews*, 699 F. Supp. at 1553.

the police officer ordered the driver to "disengage the engine."[168] The officer then placed his gun at or near the driver's head and ordered him and his passenger to exit the truck.[169] When the driver failed to comply with the officer's demand, the officer reached into the truck to disengage the engine.[170] The truck suddenly "lurched forward," hitting either the officer's hand or weapon.[171] The gun then discharged into the driver's head, killing him.[172]

After considering these facts, the federal district court determined that no "seizure" occurred.[173] Its conclusion, however, was not based on any of the Supreme Court's seizure definitions. It instead focused on the lack of intent to fire the gun, not the intentional act of drawing the gun and pointing it at the suspect's head.[174] Even though the court recognized that "under the proper facts" the drawing of a gun and its firing could both be Fourth Amendment seizures,[175] it balanced the parties' interests and determined that the drawing of a gun generally does not implicate the Fourth Amendment.[176] It declared that officers may draw their guns even if they would not be justified in firing them.[177] The district court implicitly based this bright-line rule on the theory of time reaction: officers must have their guns ready for use because suspects can injure or kill them faster than they can react.[178]

Another federal district court has also found support for a similar conclusion by applying the Supreme Court's "seizure" definition from *Brower v. County of Inyo*. In *Glasco v. Ballard*,[179] a federal district court stated, "[A] wholly accidental shooting is not a 'seizure' within the meaning of the Fourth Amendment."[180] In that case, a police officer drove alongside two men who were walking.[181] He thought he noticed in one of the men's pockets objects stolen from a convenience store.[182] While in his car, the officer asked the man what was in his pocket.[183]

168. *Id.*
169. *Id.*
170. *Id.*
171. *Id.*
172. *Id.* at 1553-54.
173. 699 F. Supp. at 1557.
174. *Id.*
175. *Id.*
176. *Id.*
177. *Id.*
178. *Id.*
179. 768 F. Supp. 176 (E.D. Va. 1991).
180. *Id.* at 180.
181. *Id.* at 177.
182. *Id.*
183. *Id.*

When the officer could not understand the man's response, he got out of his cruiser and withdrew his gun.[184] The cruiser, however, rolled forward.[185] The officer in attempting to stop the car lost control of his gun, which discharged and hit one of the suspects in the neck.[186]

In applying the *Brower* definition, the court interpreted the Supreme Court's definition to focus on the intent to harm the suspect, not the means used to stop the suspect.[187] The court stated that under *Brower*, "it is still relevant whether the officer intended to perform the underlying violent act at all."[188] The court refused to analyze whether the drawing of the gun was a Fourth Amendment "seizure."[189] Under its narrow interpretation of *Brower*, the district court focused only on the firing of the gun. In addition, it interpreted what constitutes a Fourth Amendment "seizure" by attempting to define the line between an ordinary state tort and a Fourth Amendment violation.[190] The court stated that if an accident were a Fourth Amendment "seizure," then police officers would automatically be liable under the Fourth Amendment for negligent conduct.[191] It determined that more than negligent conduct was necessary to violate the Fourth Amendment.[192] The court thus limited the reach of the Fourth Amendment by focusing only on the act of shooting, an "accident," and not the intentional act of withdrawing a gun.

Others courts, however, both before and after *Brower*, have not interpreted the Fourth Amendment so narrowly. They have focussed on whether there was an objective intent to stop the individual and whether the drawing of the gun was reasonable under the circumstances. In *Pleasant v. Zamieski*,[193] a police officer was investigating an alleged theft of an automobile.[194] He approached the driver, identified himself, "showed" the driver his gun, and commanded the driver to get out of the car.[195] The driver, who initially refused to leave the car, got out and began to climb a fence.[196] As the officer grabbed the driver, the gun "accidentally discharged" into the suspect's back, killing him.[197]

184. 768 F. Supp. at 177.
185. *Id.*
186. *Id.*
187. *Id.* at 179.
188. 768 F. Supp. at 179.
189. *Id.* at 179-80.
190. *Id.* at 180.
191. *Id.*
192. *Id.*
193. 895 F.2d 272 (6th Cir. 1990), *cert. denied*, 111 S. Ct. 144 (1990).
194. *Id.* at 273.
195. *Id.*
196. *Id.*
197. *Id.*

In addressing the Fourth Amendment claim, the Sixth Circuit in *Pleasant* determined that the Fourth Amendment was applicable to two claims: the officer's intentional decision to draw his gun and the officer's failure to reholster the gun as the driver tried to escape.[198] The court interpreted *Brower* to question whether the gun was the instrumentality used to effectuate a stop.[199] It explained that whether the officer had acted properly in drawing the gun was a question relating to the second issue in Fourth Amendment cases, whether the officer's conduct was objectively reasonable.[200] It stated, "[t]he inquiry as to whether or not some action constitutes a 'seizure' under the Fourth Amendment is distinct from the inquiry as to whether an action already found to constitute a Fourth Amendment seizure is also 'unreasonable' under the Fourth Amendment."[201] The court thus found that the suspect had been seized.[202] It used the circumstances surrounding the shooting incident as facts to consider in determining whether the officer acted reasonably.[203]

Similarly, the Fourth Circuit Court of Appeals in *Jenkins v. Averett*[204] evaluated an officer's conduct prior to a shooting to determine whether it was reasonable.[205] Like the *Pleasant* court, it did not find controlling the officer's assertion that the firing was an accident.[206] In *Jenkins*, a police officer chased a youth who fled upon the sight of seeing a police car.[207] After using the cruiser to chase the youth, the officer got out of the car, "drew and cocked his pistol, and then chased his quarry about 60 feet."[208] When the officer yelled "halt," the youth stopped.[209] A few seconds later, the officer's gun "accidentally" discharged.[210]

The court determined that the Fourth Amendment was applicable to this shooting by relying on the Supreme Court's decision in *Terry v. Ohio*.[211] As *Terry* explained, the "right of personal security belongs as much to the citizen on the street of our cities as to the homeowner closeted in his study to dispose of his secret affairs."[212] It stated that the

198. 895 F.2d at 276-77.
199. *Id.* at 277 (interpreting Brower v. County of Inyo, 109 S. Ct. 1378 (1989)).
200. *Id.*
201. *Id.*
202. *Id.*
203. *Id.* at 276-77.
204. 424 F.2d 1228 (4th Cir. 1970).
205. *Id.* at 1232.
206. *Id.*
207. *Id.* at 1230.
208. *Id.*
209. *Id.*
210. *Id.*
211. 424 F.2d at 1232; *see* Terry v. Ohio, 392 U.S. 1, 8-9 (1968).
212. *Id.* at 1232 (quoting Terry v. Ohio, 392 U.S. at 1, 8-9 (1968)).

word "accident" was not a talisman for releasing the officer from liability.[213] The shooting was only an accident in the sense that the harm was not "specifically intended."[214] It declared that the Fourth Amendment was applicable because the officer acted wantonly in shooting the suspect.[215] It did not determine that the Fourth Amendment was applicable because the suspect had stopped in compliance with the officer's show of authority. Under these facts, however, the conduct would also signify a "seizure" under both prongs of the *Hodari D.* "seizure" definition regardless of the time frame used.[216] When the suspect stopped in compliance with the officer's command to halt, the officer "seized" him. When the officer shot him, thus using physical force, he also "seized" him. Under both the *Terry* and *Hodari D.* definitions of "seizure" a seizure occurred.

The conflicts in analyzing shootings that occur during investigations thus arise from whether courts evaluate the officer's conduct prior to the shooting or just the shooting itself. They also arise from different interpretations of *Brower*, with some courts requiring an intent to harm and others requiring an intent to stop.

b. Shootings After a Seizure Has Occurred

Other issues surface when analyzing a shooting that follows a Fourth Amendment seizure. In contrast to shootings occurring during investigations, the Fourth Amendment is always implicated when the suspect stops in compliance with the officer's show of authority.[217] The question in this situation is how to analyze a shooting that follows a Fourth Amendment "seizure." Similar to the decisions addressing "accidental" shootings during investigations, some courts have considered only the conduct of the shooting itself, even though the shootings occurred after a Fourth Amendment "seizure."[218] They have failed to find the Fourth Amendment implicated because the shooting was an "accident."[219] In contrast, other courts have focused on the act of drawing a weapon and analyzed whether this act was reasonable within the meaning of the Fourth Amendment.[220] Few courts, however, have discussed whether the prior Fourth Amendment seizure supports a determination

213. *Id.* at 1232.
214. *Id.*
215. *Id.*
216. California v. Hodari D., 111 S. Ct. 1547, 1551 (1991).
217. *See, e.g.*, California v. Hodari D., 111 S. Ct. 1547, 1550 (1991).
218. *See infra* text accompanying notes 220-42.
219. *See infra* text accompanying notes 202-24.
220. *See infra* text accompanying notes 243-58.

that the post-seizure shooting implicated the Fourth Amendment.[221] In this context, a question emerges as to whether the Fourth Amendment applies to post-seizure conduct by police officers.[222]

In a decision decided before *Brower*, the Second Circuit Court of Appeals[223] declared that the Fourth Amendment applies to shootings designed for "the purpose of seizing" the suspect, not accidents that happen after the suspect has stopped.[224] In *Dodd*, a police officer had stopped a burglary suspect.[225] With his weapon drawn, the officer placed one handcuff on the suspect who was lying on the ground after falling through a window.[226] As the officer attempted to put the other handcuff on, the suspect reached for the officer's gun.[227] As the officer attempted to keep his gun from the suspect, it "accidentally" discharged, killing the suspect.[228] The court determined that the Fourth Amendment did not

221. *See, e.g.*, Loria v. Town of Irondequoit, 775 F. Supp. 599, 604 n.1 (W.D.N.Y. 1990) (court distinguishes cases in which a Fourth Amendment "seizure" occurred before the shooting); Estate of Jackson v. City of Rochester, 705 F. Supp. 779, 786 (W.D.N.Y. 1989) ("the shooting was unrelated to the stop"; officer "did not shoot [the suspect] for the purpose of seizing him"); *see generally* Wilkins v. May, 872 F.2d 190, 194-95 (7th Cir. 1989) (the court rejects the concept of a continuing "seizure" because "it could lead to an unwarranted expansion of constitutional law; the court, however, determines that a suspect had stated a claim under the fourteenth amendment, which requires the suspect to prove conduct that "shocks the conscience"; the court refuses to label this deprivation of "liberty" a claim of "substantive due process," even though most courts do) (*cert. denied*, 493 U.S. 1026) (1990)).

222. Two recent Supreme Court cases support analysis of this latter issue. In Graham v. Connor, 490 U.S. 386 (1989), the Supreme Court held that the Fourth Amendment applies to "*all* 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. . . ." *Id.* at 395 (emphasis in original). Although it explained that the Fourteenth Amendment applies to excessive force claims asserted by pretrial detainees, it did not explain which amendment applies to force used after a Fourth Amendment "seizure." *Id.* at 395 n.10. In addition, in California v. Hodari, 111 S. Ct. 1547 (1991), the Supreme Court implied that a scenario could result in multiple seizures if the suspect escaped after the initial seizure. *Id.* at 1550. It cited an 1874 case for the proposition that a " 'seizure is a single act, and not a continuous fact.' " *Id.* (citing Thompson v. Whitman, 85 U.S. (18 Wall.) 457, 471 (1874)). When read together, these cases could suggest that "the course of an arrest" or an "investigation" could result in multiple claims under the Fourth Amendment if each aspect of the challenged conduct constitutes a Fourth Amendment "seizure." They also, however, support applying the Fourth Amendment to a post-seizure shooting because during the investigation or arrest the officer has maintained control over the suspect. In this context, one could interpret the conduct as a "continuing arrest." Analysis of some of these situations reveals the difficulties of applying the Court's "seizure" definitions.

223. Dodd v. City of Norwich, 827 F.2d 1 (2d Cir. 1987), *cert. denied*, 484 U.S. 1007 (1988).

224. *Dodd*, 827 F.2d at 7.

225. *Id.* at 2-3.

226. *Id.* at 3.

227. *Id.*

228. *Id.*

apply because "[t]he shooting was a pure accident."[229]

When the Second Circuit decided what constitutes a Fourth Amendment "seizure," it did not cite the *Terry* or *Mendenhall* definitions. The Second Circuit instead relied on the Supreme Court's decision in *Tennessee v. Garner*,[230] in which the officer intentionally killed the fleeing suspect in order to stop him.[231] The Second Circuit stated that the *Garner* decision clearly indicated that intentional conduct was necessary to effectuate a Fourth Amendment "seizure."[232] The court thus found that there was no "seizure" in this case because the shooting was not intentional and because it was not done "for the purpose of seizing" the suspect.[233] In addition to its interpretation of *Garner*, the court also maintained that negligent conduct during an arrest is not actionable under the Fourth Amendment.[234]

After the Court's decision in *Brower,* other courts have similarly analyzed post-seizure shootings. A federal district court in *Troublefield v. City of Harrisburg*[235] determined that post-seizure shootings should be evaluated in the same manner as shootings during the course of an investigation.[236] In *Troublefield*, a police officer suspected a driver in a parked car of automobile theft.[237] The officer withdrew his weapon, approached the car, and asked the driver if he owned the car.[238] When the driver admitted that he did not, the officer ordered him to get out of the car and lie on the ground.[239] The officer then handcuffed the suspect.[240] As he returned his gun to his holster, it accidentally discharged into the driver's leg.[241]

The federal court interpreted the *Brower* "seizure" definition to require an intent to stop a suspect by shooting him.[242] Because the suspect had already been stopped, there was no intent to stop the suspect by

229. *Id.* at 7.

230. 471 U.S. 1 (1985); *see supra* text accompanying notes 125-30 for a discussion of this case.

231. *Id.* at 7-22.

232. *Dodd*, 827 F.2d at 7.

233. *Id.*

234. *Id.* at 7-8; *see also* Miller v. City of Fort Lauderdale, 569 So. 2d 1386, 1387 (Fla. Dist. Ct. App. 1990) (negligent shooting not actionable); *but see* Borunda v. Richmond, 885 F.2d 1384, 1391 (9th Cir. 1988) (negligence may be actionable under Fourth Amendment).

235. 789 F. Supp. 160 (M.D. Pa. 1992).

236. *Id.* at 166.

237. *Id.* at 162.

238. *Id.*

239. *Id.*

240. *Id.*

241. 789 F. Supp. at 162.

242. *Id.* at 165-66.

using a gun.[243] It refused to scrutinize whether the officer was negligent in "pulling out a firearm or in reholstering it" because it found that negligence does not rise to the level of a constitutional violation under the Fourth Amendment.[244] It did, however, state that the Fourth Amendment would be implicated if an officer intended to shoot a suspect who had already stopped.[245] The court explained that a shooting under those circumstances would constitute a "second seizure."[246]

In contrast to the extremely narrow viewpoints expressed in *Troublefield* and *Dodd*, other courts have determined that similar post-seizure shootings implicate the Fourth Amendment.[247] They have questioned whether the act of withdrawing a gun was reasonable within the meaning of the Fourth Amendment. They have interpreted the Fourth Amendment to require courts to evaluate the circumstances to determine whether the use of a gun was reasonable.

In *Leber v. Smith*,[248] the Sixth Circuit Court of Appeals recognized that a driver who was stopped by a roadblock was "seized"[249] under the Court's definition in *Mendenhall*, which stated that a "seizure" occurs when a reasonable person would not feel free to leave.[250] The Sixth Circuit appeared to automatically subject the police officer's conduct following the seizure to scrutiny under the reasonableness standard of the Fourth Amendment. It evaluated whether the officer acted reasonably in approaching the stopped driver with his gun drawn.[251] Even though both parties agreed that the gun accidentally discharged when the officer slipped on some ice, the court nevertheless required the officer to provide reasons for approaching the suspect with a gun.[252]

The seriousness of drawing a gun was also considered by a federal court in *Patterson v. Fuller*.[253] In this case, an officer had a suspect lie on the floor near a companion.[254] As the officer stood at the suspect's head,

243. *Id.* at 166. The court stated, "as [the driver] was injured by a bullet fired by accident, no Fourth Amendment rights have been trampled upon because [the officer] did not intend the bullet to bring [the driver] within his control or to, perhaps, settle him down were he struggling to break free." *Id.*

244. *Id.* at 166.

245. *Id.* at 166.

246. *Id.*

247. *See infra* text accompanying notes 244-58.

248. 773 F.2d 101 (6th Cir. 1985), *cert. denied*, 475 U.S. 1084 (1986).

249. *Leber*, 773 F.2d at 105.

250. United States v. Mendenhall, 446 U.S. 544, 554 (1980), *reh'g denied*, 448 U.S. 908 (1980).

251. *Leber*, 773 F.2d at 105.

252. *Id.*

253. 654 F. Supp. 418 (N.D. Ga. 1987).

254. *Id.* at 420.

another officer had a shotgun to maintain control.[255] When the suspect moved his hand, the officer stepped back and tripped on an ashtray.[256] His cocked gun accidentally discharged, killing the suspect.[257] Instead of characterizing the shooting as an "accident," the court determined that the shooting constituted a "seizure."[258]

Even though the Second Circuit in *Dodd* had interpreted the *Garner* decision to require an intentional shooting, the federal district court noted that all nine justices in *Garner* had agreed "that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment."[259] Although the *Patterson* court recognized the ambiguity associated with the *Mendenhall* definition, the court thought that it was obvious that killing someone constituted a Fourth Amendment "seizure."[260] It also determined that negligence was actionable under the Fourth Amendment.[261] Liability would attach if a jury determined that the officer was negligent in standing with a cocked gun over the head of the suspect.[262] The court thus focused on the officer's conduct that preceded the shooting.

The cases thus reveal the different approaches the circuits have taken in defining what constitutes a Fourth Amendment "seizure" when guns "accidentally" discharge during an investigation or after a seizure. One disagreement arises from how courts view the act of drawing a gun: some courts refuse to evaluate the reasonableness of this act and others focus on it. Courts also disagree on whether negligence is actionable. These conflicts implicitly reflect different views of the authority that the Fourth Amendment affords courts to evaluate each action taken by police officers during their investigations and arrests.

4. "Accidental" Injuries to Known and Unknown Bystanders

Because all three "seizure" definitions arose in situations in which the use of physical force or the "show of authority" was directed at the suspect, most courts have applied the Fourth Amendment only to the relationship between the police officer and the suspect, not the officer and injured bystanders.[263] Some courts, however, have applied the Fourth

255. *Id.*
256. *Id.*
257. *Id.*
258. 654 F. Supp. at 426.
259. *Id.* at 426 (quoting Tennessee v. Garner, 471 U.S. 1, 7 (1985)).
260. *Id.* at 426.
261. *Id.* at 427.
262. *Id.*
263. *See infra* text accompanying notes 261-70, 275-88.

Amendment to claims arising from injuries to bystanders if police officers knew or should have known of their presence when they decided to use physical force to stop a suspect.[264] An examination of some of these conflicting decisions also reveals the problems in understanding the scope of the Court's "seizure" definitions.

Courts have disagreed as to how to apply the Court's "seizure" definitions to situations in which police officers "accidentally" injure known bystanders as they use physical force to apprehend a suspect. In *Landol-Rivera v. Cruz Cosme*,[265] the First Circuit Court of Appeals very narrowly interpreted the *Brower* decision by not applying the tort doctrine of "transferred intent"[266] to a shooting.[267] In that case, police officers were attempting to stop a driver who had just used a gun to rob a store and who had taken a hostage into an automobile.[268] As the driver, who had the hostage on his lap, tried to drive away, a police officer shot at the driver, but hit the hostage instead, causing serious injury.[269]

The First Circuit rejected the hostage's Fourth Amendment claim by holding that the officer had not seized him by the shooting.[270] It refused to define "intent" in terms of the "deliberateness with which a given action is taken."[271] It stated that *Brower* required "police action *directed toward* producing a particular result."[272] Under this interpretation of *Brower*, the court determined that the shooting was not directed at stopping the hostage, but rather at stopping the suspect.[273] A "seizure" would have occurred only if the bullet had hit its desired object, the driver. The doctrine of "transferred intent," however, indicates that intent travels with the bullet: if a police officer intended to wound the suspect, but "accidentally" hits the hostage, the officer has acted "in-

264. *See infra* text accompanying notes 270-74.

265. 906 F.2d 791 (1st Cir. 1990).

266. *See, e.g.*, W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 8, at 37-39 (5th ed. 1984) (under this doctrine if one intends to harm a person, but the act unforeseeably results in injury to another, the injury is nevertheless deemed intentional).

267. 906 F.2d at 794-96.

268. *Id.* at 791-92.

269. *Id.* at 792.

270. *Id.* at 795.

271. *Id.*

272. *Id.*

273. *Id.* at 795. The court stated, "no Fourth Amendment seizure occurred here because [the hostage] was not the object of the police bullet that struck him." *Id.* Another judge has suggested that this narrow interpretation of a Fourth Amendment "seizure" is proper. *See* Adams v. St. Luckie County Sheriff's Dept., 962 F.2d 1563, 1574 (11th Cir. 1992) (Edmonson, J., dissenting) (known passenger in vehicle may not have been "seized" by a police cruiser, which rammed the vehicle because he was not the "object" of the seizure).

tentionally" in wounding the hostage.[274] If courts were to apply this tort doctrine to the issue of interpreting what constitutes a Fourth Amendment "seizure," they would determine that a "seizure" occurred and then proceed to determine if the "seizure" was reasonable within the meaning of the Fourth Amendment. Application of this tort doctrine would thus sometimes afford innocent bystanders with a civil remedy in damages. In contrast to suspects who may at times be able to suppress evidence as a result of an unlawful "seizure," innocent bystanders only remedy against reckless shootings is one in damages for a violation of a constitutional right.

Other courts, however, have found Fourth Amendment "seizures" under similar circumstances, without having to invoke the doctrine of transferred intent. In examining the use of physical force to stop a vehicle containing a suspect and passenger, some courts have found that officers have "seized" every person in the vehicle.[275] In *Keller v. Frink*,[276] a federal district court interpreted the *Brower* definition more broadly than the First Circuit. It determined that if an officer intended to stop a car by shooting at it and the car stops, then the officer has "seized" every person in the vehicle.[277] Similarly, the Fifth Circuit held that when a police officer stopped a driver by using a roadblock, the officer had also "seized" the passenger, whom the officer knew was present.[278] In that case, the Fifth Circuit suggested that an officer's knowledge of a passenger's presence may be relevant to determining whether a "seizure" occurred. In the context of shooting at vehicles or stopping them by a roadblock, the courts thus disagree whether police officers seize passengers when their objective intent is to stop the driver. This conflict is possible because there are different interpretations of what the *Brower* seizure definition meant by "intentional conduct." Some courts require an objective intent to stop a particular individual, and others require an objective intent to use means which results in a stop, whether of a known or unknown person.

In other situations, courts have also failed to find that known bystanders were "seized" because of their interpretation of "intentional" conduct. In *Frye v. Town of Akron*,[279] a federal district court determined

274. *See* KEETON ET AL., *supra* note 262 § 8, at 37-39.

275. *See, e.g.*, Adams v. St. Lucie County Sheriff's Dept., 962 F.2d 1563, 1570 (11th Cir. 1992) ("intentional successful use of physical force applied directly to an automobile in order to apprehend its occupants implicates the Fourth Amendment and constitutes a seizure").

276. 745 F. Supp. 1428 (S.D. Ind. 1990).

277. *Id.* at 1432.

278. Jamieson v. Shaw, 772 F.2d 1205, 1210 (5th Cir. 1985).

279. 759 F. Supp. 1320 (N.D. Ind. 1991).

that a police officer who crashed into the pursued motorcyclist and his passenger did not "seize" the passenger.[280] The court stated that no "seizure" occurred because under *Brower* the officer had not "intended" to cause a stop by crashing into the motorcycle.[281] In contrast, the Eighth Circuit Court of Appeals in *Roach v. City of Fredericktown*[282] evaluated under the Fourth Amendment the claim asserted by a motorist who was injured when a pursued driver crashed into him.[283] The court applied the Fourth Amendment because the injury to the innocent motorist had occurred during the pursuit.[284] It interpreted the Court's decision in *Graham v. Connor*[285] to apply to this claim because it had arisen "in the context of an arrest or investigatory stop."[286] After determining that the Fourth Amendment was implicated, it determined that the officer did not violate the reasonableness clause of the Fourth Amendment in conducting a high-speed pursuit of a stolen automobile.[287]

Even though the federal courts disagree as to when a known bystander is "seized" by the application of physical force, most courts do not find the Fourth Amendment applicable when unknown bystanders are injured during an investigation.[288] To illustrate, the Fourth Circuit Court of Appeals in *Rucker v. Harford County*[289] held that a bystander whom the officers reasonably believed had left the scene of a confrontation was not "seized" when a stray bullet hit him.[290] The court noted that officers had told the bystander to leave, that the bystander had the opportunity to leave, and that the bystander should have willingly left because the confrontation between the suspect and the officers presented "visible danger."[291] In finding no seizure, the court interpreted the *Brower* definition and declared that absent intent (either to harm or to stop) the "shooting was purely accidental" and therefore failed to invoke

280. *Id.* at 1323.

281. *Id.*

282. 882 F.2d 294 (8th Cir. 1989).

283. *Id.* at 297.

284. *Id.*

285. 490 U.S. 386 (1989).

286. *Roach*, 882 F.2d at 297.

287. *Id.*

288. *See, e.g.*, Medina v. City and County of Denver, 960 F.2d 1493, 1495 n.3 (10th Cir. 1992) (Fourth Amendment not applicable to driver who was injured by the vehicle of a fleeing suspect). Many courts, however, have considered the claims of injured third parties under the Fourteenth Amendment to the United States Constitution. *See, e.g., id.* at 1496 (collecting cases).

289. 946 F.2d 278 (4th Cir. 1991).

290. *Id.* at 281.

291. *Id.* at 281-82.

the Fourth Amendment.[292]

In determining whether police officers have seized known and unknown bystanders by injuring them, courts have thus applied some of the same contrasting viewpoints as expressed when analyzing injuries to suspects. They have disagreed as to whether conduct they label an "accident" can constitute a seizure, regardless of whether the injured person was a suspect or a bystander. They have also interpreted *Brower* differently, with some courts requiring an intent to harm and others requiring an intent to stop.

Courts considering the claims of bystanders, similar to courts evaluating the claims of injured suspects, attempt to define the scope of the Fourth Amendment. In doing so, they also frequently discuss the relationship of the Fourth Amendment with the substantive due process component of the Fourteenth Amendment.[293] Courts have disagreed as to whether the Fourth Amendment is the only ground on which injured individuals may properly assert a basis of recovery.[294] An examination of this conflicts reveals the contrasting viewpoints of the scope of the Fourth Amendment.

III. "Accidental" Shooting Claims Under the Fourth and Fourteenth Amendements

In analyzing shootings by police officers, lower courts have not only had different interpretations of the Court's three "seizure" definitions in *Terry, Mendenhall,* and *Brower,* they have also disagreed as to whether shootings that did not constitute Fourth Amendment "seizures" are nevertheless actionable under the Fourteenth Amendment.[295] Some courts have determined that accidental shootings may be actionable under the substantive due process component of the Fourteenth Amendment,[296] and others have determined that accidental shootings that occur during an investigation or an arrest may be actionable only under the Fourth Amendment.[297] At the core of this conflict is the role of the Fourth

292. *Id.*

293. *See infra* text accompanying notes 292-93, 305.

294. *See infra* text accompanying note 293.

295. *See infra* text accompanying notes 292-93.

296. *See, e.g.*, Rucker v. Hartford County, 946 F.2d 278, 281 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 1175 (1992); Landol-Rivera v. Cruz Cosme, 906 F.2d 791, 796 (1st Cir. 1990); Fargo v. City of San Juan Bautista, 857 F.2d 638, 640-41 (9th Cir. 1988); Frye v. Town of Akron, 759 F. Supp. 1320, 1323 (N.D. Ind. 1991); Palmer v. Williamson, 717 F. Supp. 1218, 1223 (W.D. Tex. 1989); Estate of Jackson v. City of Rochester, 705 F. Supp. 779, 785 (W.D.N.Y. 1989); Patterson v. Fuller, 654 F. Supp. 418, 425 (N.D. Ga. 1987).

297. *See, e.g.*, Troublefield v. City of Harrisburg, 789 F. Supp. 160, 166-67 (M.D. Pa. 1992); Montgomery v. County of Clinton, 743 F. Supp. 1253, 1255-56 (W.D. Mich. 1990),

Amendment: whether it protects individuals from reckless or grossly negligent police shootings and whether it protects individuals who are injured during the detention immediately following their arrest. Recent Supreme Court decisions support the view that the Fourth Amendment is the proper amendment under which to analyze shootings by police officers.

In 1989, the Supreme Court in *Graham v. Connor*[298] attempted to clarify the relationship between the Fourth Amendment and the substantive due process component of the Fourteenth Amendment and its applications to police shootings.[299] When analyzing excessive force claims, the Court held that the Fourth Amendment applies to "seized" suspects, and the Fourteenth Amendment applies to "pretrial detainees," classifications, however, not clearly defined by the Court.[300] The Supreme Court held that conduct that is actionable under the Fourth Amendment is not actionable under the Fourteenth Amendment.[301] It determined that the Fourth Amendment was the sole amendment for alleging that police officers used unreasonable force during a seizure because the Amendment "provides an explicit textual source of constitutional protection against . . . physically intrusive governmental conduct. . . ."[302] The Court did not, however, expound upon what constitutes a Fourth Amendment "seizure." It merely reiterated in a footnote the *Terry* definition and cited the *Brower* definition.[303] It identified classic situations involving Fourth Amendment "seizures": an arrest and an investigative stop.[304] The Court did, however, also state that the Fourth Amendment applies to "other 'seizure[s]' of a free citizen."[305]

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aff'd mem., 940 F.2d 661 (6th Cir. 1991); McKenzie v. City of Milpitas, 738 F. Supp. 1293, 1299 n.5 (N.D. Cal. 1990) *aff'd mem.*, 953 F.2d 1387 (9th Cir. 1992).

298. 490 U.S. 386 (1989).

299. *Id.* at 394-95. Prior to and after the Court's decision in *Tennessee v. Garner*, 471 U.S. 1 (1985), lower courts applied different standards for determining whether officials had used excessive force, in violation of the Fourth Amendment. *See e.g.*, Kathryn R. Urbonya, *The Constitutionality of High-speed pursuits under the Fourth and Fourteenth Amendments*, 35 ST. LOUIS U. L.J. 205, 209-11 (1991).

300. 490 U.S. at 395 n.10.

301. *Id.* at 395.

302. *Id.*

303. *Id.* at 395 n.10.

304. *Id.* at 395.

305. *See, e.g.*, McDonald v. Haskins, 966 F.2d 292, 293-94 (7th Cir. 1992) (child was "seized" by officer's pointing of a gun at his head during the execution of a search warrant, even though the child was not a suspect or interfering with the search); *see also* Michigan Dept. of State Police v. Sitz, 496 U.S. 444, 450 (1990) (stop of a driver at a roadblock for inspection of signs of intoxication).

The *Graham* Court, however, did leave open an important question that directly relates to the scope of the Fourth Amendment. It recognized that it has not resolved the issue of whether the Fourth Amendment applies "beyond the point at which [an] arrest ends and pretrial detention begins."[306]

Despite the *Graham* Court's demarcation between the proper application of the Fourth and Fourteenth Amendment, the Supreme Court in *County of Riverside v. McLaughlin*[307] never discussed applying the Fourteenth Amendment to the issue of how long the government may detain suspects without a probable cause determination. In *Riverside*, the Supreme Court interpreted the Fourth Amendment to apply to claims that governmental officials had failed to provide timely probable cause determinations for suspects who had been detained for days.[308] Even though one could easily classify the plaintiffs as "pretrial detainees," the Court did not evaluate these claims under the Fourteenth Amendment.[309] The Fourth Amendment was the proper amendment for their protection because the Court had previously applied it when determining the type of a probable cause hearing necessary.[310] In short, the Fourth Amendment guided the Court in determining not only what type of probable cause hearings suspects are to receive, but also when they are to receive them.[311]

306. *Graham*, 490 U.S. at 395 n.10. This unresolved question, however, is an issue related to shootings after a "seizure" has occurred. *See supra* text accompanying notes 213-56.

307. 111 S. Ct. 1661 (1991).

308. *Id.* at 1667-71.

309. *Id.* at 1665, 1667-71.

310. *See* Gerstein v. Pugh, 420 U.S. 103, 114 (1975) (after a warrantless arrest, a prompt hearing to determine probable cause is necessary under the Fourth Amendment under some circumstances).

311. *County of Riverside*, 111 S. Ct. at 1670. The Court created a three-part standard for determining when a hearing was prompt: (1) a hearing within forty-eight hours is generally permissible, (2) a hearing within forty-eight hours may nevertheless violate the Fourth Amendment if the delay was caused by a need to gather evidence, ill will, or "delay for delay's sake," and (3) a hearing after forty-eight hours may nevertheless be prompt if the government can establish that "extraordinary circumstances" caused the delay. *Id.*

This application of the Fourth Amendment to post-seizure conduct is consistent with the lower federal courts' trend to extend the scope of the Fourth Amendment beyond an arrest. *See, e.g.*, Austin v. Hamilton, 945 F.2d 1155, 1160 (10th Cir. 1991) (Fourth Amendment applies to "treatment of the arrestee detained without a warrant"); Hammer v. Gross, 932 F.2d 842, 845 (9th Cir. 1991) (en banc) (Fourth Amendment applies to force used in administering a blood test at the hospital after the plaintiff was arrested), *cert. denied*, 112 S. Ct. 582 (1991); Powell v. Gardner, 891 F.2d 1039, 1044 (2d Cir. 1989) (Fourth Amendment applies to force used prior to time plaintiff was arraigned or formally charged); Lester v. City of Chicago, 830 F.2d 706, 713 n.7 (7th Cir. 1987) (Fourth Amendment applies to force used before booking and the setting of bail); Spell v. McDaniel, 824 F.2d 1380, 1384 n.3 (4th Cir. 1987) (Fourth Amendment applies to force used in "effecting and maintaining arrests"), *cert. denied*, 484

In addition, the Supreme Court in *California v. Hodari D.*[312] suggested that the Fourth Amendment may apply to the conduct of police officers after they effectuate a Fourth Amendment "seizure."[313] The Court briefly mentioned the concepts of a "continuing arrest" and of multiple "seizures."[314] It explained that if an officer used physical force to stop a suspect, an arrest might have occurred, but if the suspect escaped then there would not be a "continuing arrest."[315] Application of these concepts to a situation in which officers maintain control over a suspect might suggest that there is a "continuing arrest" and the Fourth Amendment applies to conduct until the suspect becomes a pretrial detainee.[316]

Although these Supreme Court decisions suggest a broad application of the Fourth Amendment to conduct by police officers, the Fourteenth Amendment nevertheless re-emerged as a ground for excessive force claims after the Court's decision in *Brower v. County of Inyo*.[317] In *Brower,* the Court significantly narrowed the scope of the Fourth Amendment by interpreting the word "seizure" to signify "intentional" conduct.[318] The question arose as to how to evaluate less culpable conduct, that is, conduct that was reckless or grossly negligent.

U.S. 1027 (1988); Robins v. Harum, 773 F.2d 1004, 1010 (9th Cir. 1985) (Fourth Amendment applies while arrestee was "in the custody of the arresting officers"); *but see* Titran v. Ackman, 893 F.2d 145, 147 (7th Cir. 1990) (Fourteenth Amendment, not Fourth Amendment, applies to force used after the booking process).

312. 111 S. Ct. 1547 (1991).

313. *Id.* at 1550.

314. *Id.*

315. *Id.*

316. In addition, the Court was willing to protect the right to personal security by labeling "touching" a Fourth Amendment "seizure." *Id.* Under this view, the Fourth Amendment would permit citizens to bring multiple claims under the Fourth Amendment for each application of physical force that was "unreasonable."

The concepts of multiple seizures and a continuing arrest, however, do not clarify the scope of the Fourth Amendment because the concepts are subject to conflicting interpretations. For example, some courts have interpreted the Fourth Amendment to apply to multiple claims only if each event would constitute an independent seizure. *See, e.g.,* Wilkins v. May, 872 F.2d 190, 194 (7th Cir. 1989) (court rejected concept of a "continuing seizure" under the Fourth Amendment; Fourteenth Amendment applied to the officers' pointing of a gun at a suspect's head during custodial interrogation), *cert. denied,* 493 U.S. 1026 (1990); *see also supra* text accompanying notes 169-72. On the other hand, some courts have interpreted the Fourth Amendment to apply not only to a single seizure but also to all conduct after the seizure to determine if the conduct was "reasonable." *See supra* notes 271-74 and accompanying text.

317. 489 U.S. 593 (1989). *See supra* text accompanying notes 77-92 for a discussion of this case.

318. *Id.* at 596-97.

Some Supreme Court decisions suggested that such conduct could constitute a "constitutional tort" under the substantive due process component of the Fourteenth Amendment and its applications to police shootings. The Supreme Court has repeatedly affirmed that the substantive due process component of the Fourteenth Amendment prohibits governmental officials from violating citizens' civil liberties.[319] In defining the scope of protected civil liberties, the Supreme Court in *Daniels v. Williams*[320] and *Davidson v. Cannon*[321] held that negligence was not actionable under the Fourteenth Amendment. The *Daniels* Court based its conclusion on its interpretation of the word "deprivation" in the Fourteenth Amendment and its view of the history of the Fourteenth Amendment.[322] The Court interpreted the word "deprivation" to signify an "abuse of power"[323] and stated that the amendment was designed to "secure the individual from the arbitrary exercise of the powers of government."[324] In rejecting negligence as a basis for a Fourteenth Amendment claim, the Court distinguished a "constitutional tort" from a state tort. It recognized that the Constitution does not necessarily duplicate the tort remedy available under state law. It did not dictate that conduct actionable under tort law is not actionable under the Fourteenth Amendment. It instead required more culpable conduct than negligence to state a violation of the substantive due process component of the Fourteenth Amendment. The Court explicitly left open the question whether gross negligence and recklessness would be actionable under the Fourteenth Amendment.[325]

The Supreme Court also suggested in *DeShaney v. Winnebago County Department of Social Services* that governmental officials could be liable under the substantive due process component of the Fourteenth Amendment for harm that they cause.[326] Although the *DeShaney* Court determined that there is no general duty to protect the public from harm caused by third parties, it did imply that when official actions makes citi-

319. *See, e.g.*, Zinermon v. Burch, 494 U.S. 113, 125 (1990) ("[T]he Due Process Clause contains a substantive [due process] component that bars certain arbitrary, wrongful governmental actions. . . ."); DeShaney v. Winnebago County Dep't. of Social Servs., 489 U.S. 189, 199-200 (1989) (officials have a constitutional duty to protect individuals in custody from harm); Daniels v. Williams, 474 U.S. 327, 334 n.3 (1986) (Although negligence is not actionable under the Fourteenth Amendment, gross negligence and recklessness may be.).

320. 474 U.S. 327, 332-33.

321. 474 U.S. 344, 348 (1986).

322. *Daniels*, 474 U.S. at 331.

323. *Id.* at 330, 332.

324. *Id.* at 326-27 (quoting Hurtado v. California, 110 U.S. 516, 527 (1884) (quoting Bank of Columbia v. Okely, 4 Wheat. 235, 244 (1819))).

325. *Id.* at 334.

326. 489 U.S. 189, 201 n.9 (1989).

zens "more vulnerable" to harm, then governmental officials may be liable for the harm that they themselves create.[327]

In recognizing substantive due process as a basis for infringements of the right to personal security, the Court thus clarified that both the Fourth and Fourteenth Amendments are possible sources for scrutinizing the conduct of officials. The *Graham* decision, however, expressed a preference for analyzing claims of "seized" individuals under the Fourth Amendment because it is an "explicit textual source . . . of constitutional protection."[328] The Court labeled the Fourth Amendment as a "primary source of constitutional protection."[329] The Court's narrow interpretations of what constitutes a Fourth Amendment "seizure," however, limited application of the Amendment. Although the amendment would seem to apply to most conduct between police officers and citizens because it addresses "unreasonable" conduct, the Court in *Brower* imposed a requirement that officers act intentionally in order to effectuate a seizure of a person. Courts that find reckless or grossly negligent shooting to constitute a "constitutional tort," however, have looked to the Fourteenth Amendment as a basis of recovery, even after the Court's decision in *Graham*. In contrast, those courts that believe that the *Brower* court struck the proper balance between a constitutional tort and an ordinary tort have refused to apply the Fourteenth Amendment to accidental shootings.

Even though the task of distinguishing a constitutional tort from a state tort can be extraordinarily difficult, this task when placed in the context of police shootings is less complex.

IV. Resuscitating the *Terry* Definition in the Context of Shootings by Police Officers

The Fourth Amendment allows courts to scrutinize various police practices to determine whether they are "reasonable."[330] This authority is contingent upon whether the challenged conduct was also a "search" or "seizure." Articulating the boundaries of conduct that constitutes a Fourth Amendment "seizure" has been a difficult task for the Supreme Court as well as the lower courts. Fourth Amendment jurisprudence has become so fact-specific that it is hard to know if a prior decision is prece-

327. *Id.*

328. *Graham*, 490 U.S. at 395.

329. *Id.* at 394.

330. *See, e.g.*, Michigan Dep't of State Police v. Sitz, 496 U.S. 444, 455 (1990) (Court found reasonable under the Fourth Amendment the use of roadblocks to inspect drivers for signs of intoxication).

dent or totally irrelevant to a particular case.[331] In the context of police shootings, however, bright-lines are not only possible but desirable. Resuscitating the spirit of *Terry v. Ohio* would allow courts to scrutinize whether officers act reasonably when they use their guns as a "show of authority." The justification for application of this definition to police shooting lies in the Court's historic approach to balancing interests under the Fourth Amendment. Although the greatest defect of balancing is its unpredictable outcome, the Court's more recent justifications of reliance on the common law and dictionaries are similarly unpredictable. Balancing, however, has the added benefit of allowing courts to utilize policy to shape the contours of the Fourth Amendment.

The task of defining what kind of conduct constitutes a Fourth Amendment "seizure" begins with the text of the Fourth Amendment. Textualism, however, "creates new problems of its own"[332] because a text "is not self-interpreting."[333] The Supreme Court, however, has embraced textualism as a method of limiting the application of various amendments, sometimes reaching peculiar conclusions.[334]

In defining what constitutes a Fourth Amendment "seizure," the Court in *California v. Hodari D.* examined both old and modern dictionaries. It summarized all the different uses of the word "seizure" in a

331. In examining a variety of police practices, the Court has not clarified whether a particular seizure definition applies only to the facts of that case or is applicable in other contexts. Harmonizing the Supreme Court's seizure definitions is difficult. For example, in *Hodari D.* the Court in dicta suggested that "mere touching" could constitute a Fourth Amendment seizure, but in *Brower v. County of Inyo*, the Court suggested that the force must be used intentionally. Similarly, the *Hodari* Court did not seem to require that the officer require physical control over the suspect if officers used physical force, but the *Brower* Court based its physical force definition on the "acquisition of physical control." In addition, one never knows whether these definitions apply only to foot chases and roadblocks.

332. *See* Wasserstrom & Seidman, *supra* note 7, at 53.

333. *Id.*

334. For example, the Court has studied the words "punishment" in the Eighth Amendment, Wilson v. Seiter, 111 S. Ct. 2321, 2325 (1991), "deprivation" in the Fourteenth Amendment, Daniels v. Williams, 474 U.S. 327, 331, 333-35 (1986), and "seizure" in the Fourth Amendment. California v. Hodari D., 111 S. Ct. 1547, 1550-51 (1991). The Court has proclaimed that the word "punishment" not only signifies "deliberate indifference" if the claim involved the serious medical needs of prisoners or prison conditions, Estelle v. Gamble, 429 U.S. 97, 106 (1976), but also signifies "malicious" conduct if the claim is based on the use of excessive force by prison officials. Hudson v. McMillian, 112 S. Ct. 995, 999 (1992). In interpreting the word "punishment," the Court failed to understand that it was merely interpreting the word from its own perspective. *See generally* Schanck, *supra* note 74, at 831 ("Judges will continue to interpret texts and will do so in accord with their deeply embedded assumptions, which include their commonly held jurisprudential and judicial interpretive constructs."). The Court nevertheless declared, "[t]he source of the intent requirement is not the predilections of this Court, but the Eighth Amendment itself, which bans only cruel and unusual *punishment*." *Seiter*, 111 S. Ct. at 2325 (emphasis in original).

short phrase: the word means "taking possession."[335] This definition, however, does not distinguish between the act of seizing an object from the act of seizing a person, a distinction that the Court had previously recognized.[336] The Court's reliance on dictionaries is misplaced because "the majestic generalities of the [F]ourth [A]mendment itself suggest that the Framers were writing for the ages—that they were dealing with concepts, not conceptions."[337] For example, this general language has allowed courts to scrutinize modern police practices of using airplanes,[338] beepers,[339] drug tests,[340] electronic devices,[341] and helicopters[342]—practices not in existence at the time the Fourth Amendment was enacted.[343] Complex legal issues arising under the Fourth Amendment thus should not be mechanically resolved by relying on a definition specified in a particular dictionary.

Reliance on the common law as a means of interpreting the Fourth Amendment has also been an unsound guidepost for the Court.[344] In many situations the Court has adopted the common law in its interpretation of the Fourth Amendment,[345] other times it has rejected the com-

335. *Hodari D.*, 111 S. Ct. at 1549 (quoting NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 67 (1828); 2 JOHN BOUVIER, A LAW DICTIONARY 510 (6th ed. 1856); WEBSTER'S THIRD NEW INT'L DICTIONARY 2057 (1981)).

336. *See, e.g.*, United States v. Jacobsen, 466 U.S. 109, 113 (1984) ("some meaningful interference with an individual's possessory interest[]").

337. Wasserstrom & Seidman, *supra* note 7, at 55 (citing R. DWORKIN, TAKING RIGHTS SERIOUSLY 134-36, 226 (1977)). Reliance on the language of the Fourth Amendment is also misplaced because "the actual language of the [F]ourth [A]mendment appears to have been the product of a back room maneuver that resulted in Congress' adoption of a provision that it had soundly defeated earlier and never consciously endorsed." *Id.* at 56-57 (citing NELSON B. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT 101-02 (1937)).

338. *See, e.g.*, Dow Chemical Co. v. United States, 476 U.S. 227, 234-39 (1986) (aerial photography); California v. Ciraolo, 476 U.S. 207 (1986) (aerial surveillance).

339. *See, e.g.*, United States v. Karo, 468 U.S. 705, 713-18 (1984); United States v. Knotts, 460 U.S. 276, 282-85 (1983); *see also* Note, Mark C. Rohdert, *Tracking* Katz*: Beepers, Privacy, and the Fourth Amendment*, 86 YALE L.J. 1461, 1461 (1977) ("The beeper is a miniature, battery-powered radio transmitter that emits recurrent signals at a set frequency.").

340. *See, e.g.*, National Treasury Employees Union v. Von Raab, 489 U.S. 656, 665-66 (1989) (drug tests); Skinner v. Railway Labor Executives' Assn., 489 U.S. 602, 618-23 (1989) (drug and alcohol tests).

341. *See, e.g.*, United States v. White, 401 U.S. 745, 748-54 (1971) (radio transmitter); Katz v. United States, 389 U.S. 347, 354-59 (1967) (recording device).

342. *See, e.g.*, Florida v. Riley, 488 U.S. 445, 450-52 (1989).

343. *See generally* Tennessee v. Garner, 471 U.S. 1, 13 (1985) (quoting Payton v. New York, 445 U.S. 573, 591 n.33 (1980)) ("[The Court] 'has not simply frozen into constitutional law those law enforcement practices that existed at the time of the Fourth Amendment's passage.' ").

344. *See supra* note 75 and accompanying text.

345. *See, e.g.*, United States v. Watson, 423 U.S. 411, 418-19 (1976) (common law on warrantless arrests); Gerstein v. Pugh, 420 U.S. 103, 111, 114 (1975) (detention without a warrant).

mon law because of technological changes,[346] and sometimes the Court explicitly adopted only limited aspects of the common law view for its interpretation of the Fourth Amendment.[347] In *California v. Hodari D.*, the Supreme Court both adopted and rejected common law views in defining a Fourth Amendment "seizure." Under the common law a police officer may at times act unlawfully in merely touching suspects or attempting to arrest them. In defining the scope of the Fourth Amendment, the Court declared that a touching could constitute a Fourth Amendment "seizure," but that an attempted arrest was not a "seizure."[348]

Resolution of what constitutes a Fourth Amendment "seizure" should lie ultimately in balancing,[349] not in the use of dictionaries and selective application of the common law. The *Terry* Court recognized that the amendment was designed for courts to strike a balance between the government's interest in law enforcement and a citizen's interest in personal security. In creating the concept of a Fourth Amendment "stop," the Court found no justification in the language of the Fourth Amendment. It instead balanced the need to recognize what most citizens would find an acceptable police practice against an individual's interest in personal security. For example, the language of the Fourth Amendment did not cause the Court to create a reasonable suspicion standard to justify a Fourth Amendment "stop." It also did not clearly indicate to the Court that the word "seizure" included both the concept of a stop and an arrest, but not an "encounter." The Court created these three categories as it balanced the intrusiveness of police practices against a citizen's freedom of movement. The Court evaluated numerous practices: asking a suspect to answer questions,[350] keeping a plane ticket from a boarding passenger,[351] following a pedestrian in a car,[352] and establish-

346. Tennessee v. Garner, 471 U.S. 1, 13 (1985) ("[R]eliance on the common law rule in this case [concerning a shooting] would be a mistaken literalism that ignores the purposes of a historical inquiry.").

347. *See* California v. Hodari D., 111 S. Ct. 1547, 1550-51 (1991).

348. In adopting a portion of the common law, the Court stated that it was "expand[ing]" the meaning of a Fourth Amendment "seizure." *Id.* at 1550 n.2. The "expansion[,]" however, was limited only to the use of physical force, not to the assertion of authority. *Id.* at 1550.

349. Professor Wayne LaFave recognized the importance of balancing when determining what constitutes a Fourth Amendment "seizure." LaFave, *supra* note 28, at 742. He explained, "If not every . . . intrusion constitutes a seizure, then certainly in making the policy judgment as to precisely where the constitutional line should be drawn, account may be taken of *both* (i) the degree of intrusiveness of a particular practice and (ii) the degree of public benefit if that practice is free of the usual Fourth Amendment restraints." *Id.* (emphasis in original).

350. United States v. Mendenhall, 446 U.S. 544, 554-55 (1980).

351. Florida v. Royer, 460 U.S. 491, 497-501 (1983).

ing a roadblock.[353] Narrow "seizure" definitions, derived from dictionaries and selective application of the common law, however, preclude courts from analyzing modern police practices and the circumstances in which they occur.

In the context of police shootings, a "show of authority," as first articulated by the *Terry* Court should be sufficient to implicate the Fourth Amendment because it represents a standard that properly recognizes the need to subject police practices to scrutiny under the Fourth Amendment. To the extent that other "seizure" definitions conflict with the concept of a "show of authority," they should be limited to their specific facts, which is a common aspect of Fourth Amendment jurisprudence, or rejected as unsound.

With *Terry* as the standard for analyzing police shooting, courts should also apply the *Mendenhall* definition and its progeny to the extent that they define what constitutes a *Terry* "show of authority." Because the *Hodari D.* decision did not interpret what constituted a "show of authority," courts should not apply it to police shootings. The Court's newly added restriction to the *Mendenhall* definition, compliance with the "show of authority," would produce bizarre results in the context of police shootings. If courts were to apply the new restriction, the Fourth Amendment would not be implicated when police officers shoot their guns as long as they missed their targets. The risks associated with guns are too obvious to allow such a practice to evade constitutional scrutiny.

The *Brower*[354] definition also creates numerous problems when applied to police shootings. The greatest difficulty is the *Brower* requirement that a seizure be "intentional." Such a requirement allows reckless shootings to evade review if one focuses solely on the act of shooting and not the conduct preceding the shooting.[355] In addition, it creates disagreements as to whether the Court requires objective intent to stop a suspect or an objective intent to harm.

Applying the "show of authority" definition to police shootings allows courts to determine whether the use of a weapon implicates a citizen's right to personal security. A determination that the use of a weapon constituted a "show of authority" does not, however, mean that the officer has violated a citizen's Fourth Amendment right to personal security. A violation only occurs if the use of the weapon was "unrea-

352. Michigan v. Chesternut, 486 U.S. 567, 574-76 (1988).

353. Michigan Dep't of State Police v. Sitz, 496 U.S. 444, 451-53 (1990); Brower v. County of Inyo, 489 U.S. 593, 599-600 (1989).

354. *Brower*, 489 U.S. at 596-97.

355. *See supra* text accompanying notes 154-92, 216-42, 261-70.

sonable" within the meaning of the Fourth Amendment. In determining whether the seizure was reasonable, the Court has considered the seriousness of the alleged offense, whether the suspect was resisting apprehension, and whether the suspect's escape would "pose[ ] an immediate threat to the safety of the officers or others. . . ."[356] In short, a police practice is reasonable if it properly balances the need for apprehension against the infringement of bodily integrity.

Balancing to resolve both whether there was a Fourth Amendment "seizure" and whether a police practice was reasonable may seem confusing. Professor LaFave, however, has justified balancing to determine what constitutes a Fourth Amendment "seizure."[357] He explains that if not all intrusions constitute a Fourth Amendment "seizure," then balancing is necessary to delineate "precisely where the constitutional line should be drawn.[358] Balancing interests to define a Fourth Amendment "seizure" is different from balancing to assess unreasonableness. At the core of the first issue is the role of the courts in monitoring police practices. A determination that a practice implicates a person's right to personal security allows the court to consider the reasonableness of the challenged practice. A decision that the Fourth Amendment is not implicated leaves only the states to subject challenged practices to scrutiny. Because some states, however, provide police officers with immunity for discretionary acts committed during the scope of their employment,[359] review by state courts may never occur. The dangerous act of shooting at citizens thus requires scrutiny by courts under the Fourth Amendment.

V. Application of the "Show of Authority" Definition to the Use of Weapons by Police Officers

In the context of "accidental" shootings, application of the "show of authority" standard would allow courts to evaluate some situations in

356. Graham v. Connor, 490 U.S. 386, 396 (1989); *see also* Tennessee v. Garner, 471 U.S. 1, 11-12 (1985). In *Garner*, the Supreme Court recognized that the officers should not use their weapons to kill all fleeing suspects:

> [I]f the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.

Id. See also, Kathryn R. Urbonya, *The Constitutionality of High-Speed Pursuits Under the Fourth and Fourteenth Amendments*, 35 ST. LOUIS U. L.J. 205, 248-54 (1991).

357. LaFave, *supra* note 28, at 742.

358. *Id.*

359. *See, e.g.*, GEOFFREY P. ALPERT & LORIE A. FRIDELL, POLICE VEHICLES AND FIREARMS: INSTRUMENTS OF DEADLY FORCE 26-27 (1991).

which police officers use their weapons. Police officers use their weapons in a variety of manners: they carry them holstered, withdraw them, keep them out while handcuffing suspects, cock them, fire warning shots, and fire at objects, such as lights and vehicles, and at suspects. When considering "accidental shootings," some courts determine that the Fourth Amendment is not implicated because they focus exclusively on the last use of a gun: a shooting. If courts would consider the prior actions of the police, such as the act of holding a gun at a suspect's head, they could determine the Fourth Amendment applicable because such an act would constitute a "show of authority." Before a violation of the Fourth Amendment could be found, the challenged action would have to be judged "unreasonable" within the meaning of the Fourth Amendment. In addition, the doctrine of standing[360] would limit the class of individuals who could bring claims against police officers for their "show of authority" because the doctrine requires plaintiffs to establish an injury, whether physical or psychological.[361]

Courts should adopt a bright-line rule: withdrawal of a gun is a Fourth Amendment seizure when it causes physical or psychological

360. *See, e.g.*, County of Riverside v. McLaughlin, 111 S. Ct. 1661, 1667 (1991) ("at the core of the standing doctrine is the requirement that a plaintiff 'allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.") (quoting Allen v. Wright, 468 U.S. 737, 751 (1984)); City of Los Angeles v. Lyons, 461 U.S. 95, 105-13 (1983)) (standing issue applies to each request for relief, whether for damages or injunctive relief).

361. The Supreme Court recently discussed the type of injury necessary to establish a violation of the Eighth Amendment, which prohibits "cruel and unusual punishments." U.S. CONST. amend. VIII; Hudson v. McMillian, 112 S. Ct. 995, 1000 (1992). The Court stated, "[t]he Eighth Amendment's prohibition of 'cruel and unusual' punishment necessarily excludes from constitutional recognition *de minimis* uses of physical force, provided that the use of force is not of a sort 'repugnant to the conscience of mankind.' " *Id.* (quoting Whitley v. Albers, 475 U.S. 312, 327 (1986), (quoting Estelle v. Gamble, 429 U.S. 97, 106 (1976))). If prisoners do not have to allege more than de minimis injuries, then suspects injured during an investigation or an arrest should not have to allege greater harm. *See, e.g.*, Elliot v. Thomas, 937 F.2d 338, 342-43 (7th Cir. 1991) (the Supreme Court's decision in Graham v. Connor, 490 U.S. 386 (1989), suggests that there is no significant injury requirement for a Fourth Amendment claim), *cert. denied*, 112 S. Ct. 1242 (1992); Note, *Excessive Force Claims: Is Significant Bodily Injury the* Sine Qua Non *to Proving a Fourth Amendment Violation*, 58 FORDHAM L. REVIEW 739, 759 (1990) ("significant injury requirement runs contrary to the Fourth Amendment"). One Justice also stated that psychological injuries are also actionable. *Hudson*, 112 S. Ct. at 1004 (Blackmun, J., concurring) (citing Wisniewski v. Kennard, 901 F.2d 1276 (5th Cir. 1990) (guard put a gun in an inmate's mouth and threatened to shoot)) *cert. denied*, 111 S. Ct. 309 (1990); *see also* Titran v. Ackman, 893 F.2d 145, 147 (7th Cir. 1990) (quoting Williams v. Boles, 841 F.2d 181, 183 (7th Cir. 1988) (In analyzing a substantive due process claim the court emphasized that a " 'state is not free to inflict . . . pains without cause just so long as it is careful to leave no marks.' ")); Brief for The United States at 8-9, *Graham v. Connor*, 490 U.S. 386 (1989) (Fourth Amendment should apply if an officer unjustifiably terrorized a suspect with an empty gun.).

harm. In the alternative, subsequent uses of a gun, such as cocking it, firing it, issuing warning shots, or shooting at people, should also be considered "seizures." Application of the "show of authority" definition to some common shooting situations reveals how the Fourth Amendment should be implicated.

The mere presence of a gun on a police officer is insufficient to constitute a "show of authority" under *Terry* because of the doctrine of "encounters."[362] Under this doctrine, police officers may ask citizens a few questions without implicating the Fourth Amendment.[363] Because officers generally have their weapons holstered as they approach citizens, asking a few questions does not implicate citizens' right to personal security. The holstered weapon is simply a part of the uniform.

Withdrawing a weapon, however, should implicate the Fourth Amendment when this "show of authority" causes harm, whether physical or psychological. Although many dispute the boundaries of permissible encounters, when police officers withdraw their weapons there is an obvious assertion of authority. In articulating factors that aid courts in determining what constitutes a "seizure," the *Mendenhall* Court stated that one factor was "the display of a weapon by a [police] officer."[364] Although the Court did not explain what it meant by "display,"[365] the act of withdrawing a gun is an unmistakable escalation of power during a confrontation between an officer and a citizen. The act increases the likelihood that someone, whether the suspect, the officer, or a bystander, will be injured by the gun. This act by a police officer should be sufficient to constitute a Fourth Amendment "seizure."

The focus of Fourth Amendment "seizure" analysis should be on the dangerous act of withdrawing a weapon, an act that makes a weapon not only more accessible to a police officer but also sometimes more accessible to a suspect. In other contexts, the Supreme Court has focused on the suspect's response to an assertion of authority, sometimes evaluating the response from the suspect's viewpoint and sometimes from a reasonable person's viewpoint.[366] The act of withdrawing a gun is an

362. *See, e.g.*, INS v. Delgado, 466 U.S. 210 (1984) (No seizure occurred when officers with holstered guns approached suspects and asked them questions.).

363. *See supra* text accompanying notes 36-47.

364. United States v. Mendenhall, 446 U.S 544, 554 (1980).

365. *See generally* Florida v. Bostick, 111 S. Ct. 2382, 2384, 2387-88 (1991) (Court suggested to the lower court on remand that no seizure occurred when an officer approached a suspect carrying a gun in "a recognizable zipper pouch.").

366. In *California v. Hodari D.*, 111 S. Ct. 1547, 1551 (1991), the Supreme Court stated that a "show of authority" alone is insufficient to constitute a Fourth Amendment "seizure." It focused on the suspect's actual response to the assertion of authority, a footchase between the officer and the suspect. It stated that a "seizure" occurs only when the suspect stops in

assertion of power that is markedly different from the act of questioning a suspect, of examining identification, or of following a suspect. In these latter contexts, focusing on how a reasonable person would respond or how the suspect in fact did respond is a part of any court's struggle to define actions that implicate the Fourth Amendment, and those that do not. The act of withdrawing a gun, however, is an act that clearly signifies that a suspect is involved with a governmental actor, an act that in no way resembles ordinary discourse with other citizens.

By determining that this action constitutes a Fourth Amendment "seizure," courts would then proceed to examine the justification for this action. This view of the Fourth Amendment is consistent with the fact-specific jurisprudence of the Fourth Amendment.[367] For example, in the context of arresting suspects in their homes, they have scrutinized each action by a police officer to determine whether it complied with the Fourth Amendment. They have evaluated a police officer's authority to enter,[368] to search the suspect,[369] to search the area near the suspect,[370] to examine other rooms,[371] and to stay in the home.[372] Although these situations implicate the Fourth Amendment because they involve searches, the Court has used all the circumstances of the search process to explain reduced levels of justification by a police officers for their actions.[373] In short, the Court has examined each action in relationship to other actions. If withdrawing a weapon were considered a Fourth Amendment "seizure," then each use of the weapon after this act could

response to the assertion of authority. *Id.* In contrast, in *Mendenhall* and its progeny the Court attempted to define the line between a Fourth Amendment stop and an encounter. *See supra* text accompanying notes 48-76. The Court questioned whether a "reasonable person would have believed that he was not free to leave." *Mendenhall*, 446 U.S. at 554. Under this definition the suspect need not stop in response to the officer's conduct in order to implicate the Fourth Amendment.

367. *See supra* text accompanying notes 48-76.

368. *See, e.g.*, Steagald v. United States, 451 U.S. 204, 220-22 (1981) (search warrant necessary to enter third-party's home to arrest suspect); Payton v. New York, 445 U.S. 573, 602-03 (1980) (arrest warrant is necessary to enter home of suspect).

369. *See, e.g.*, Smith v. Ohio, 494 U.S. 541, 543 (1990) (per curiam) (search preceding an arrest can not be used to provide probable cause to justify the arrest).

370. *See, e.g.*, Chimel v. California, 395 U.S. 752, 763 (1969) (police officer may search "the area into which an arrestee might . . . grab a weapon or evidentiary items").

371. *See, e.g.*, Maryland v. Buie, 110 S. Ct. 1093, 1098 (1990) (protective sweep of area permissible if officers have reasonable suspicion that another may be present in the area and that this person poses a danger to officers or others), *reh'g denied*, 111 S. Ct. 1011 (1991).

372. *See, e.g.*, Michigan v. Tyler, 436 U.S. 499, 511 (1978) (after fire of home is extinguished, re-entry to search for evidence of arson is impermissible under some circumstances).

373. *See, e.g.*, *Buie*, 110 S. Ct. at 1098 (protective sweep requires only reasonable suspicion, not probable cause); United States v. Robinson, 414 U.S. 218, 234-35 (1973) (search incident to an arrest does not require any independent belief of harm or of items of evidentiary value).

also be scrutinized to determine whether it was "reasonable" within the meaning of the Fourth Amendment.

Even if the act of withdrawing a gun were not a Fourth Amendment "seizure, once an officer attempts to handcuff a suspect, a "seizure" has occurred under any definition that a court may use. Because the Fourth Amendment has been implicated, courts should then evaluate whether the use of a weapon during the process was reasonable within the meaning of the Fourth Amendment. This approach is similar to the court's approach when considering each aspect of an officer's conduct during a search.

In the alternative, even if the act of withdrawing a gun and using it to maintain control during an arrest were not a "seizure," the cocking of a gun must be a "seizure" because this action dramatically increases the likelihood of an injury. Although a subsequent firing of a gun may be unintentional, the act of cocking a gun is a deliberate act. The consequences of this action are potentially lethal. In contrast to annoying questioning by police officers, this act signifies not only potential bodily injury, but also potential psychological harm. This assertion of authority by police officers is like the practice the Supreme Court considered in *Terry*. It is a practice necessary for effective law enforcement, yet it requires special justification for it to be constitutional. Determining that the act of cocking a gun constitutes a Fourth Amendment "seizure" would allow courts to evaluate the circumstances confronting officers when they decide to use a potentially lethal weapon.

The act of intentionally firing a warning shot should also be a Fourth Amendment "seizure" because this action can present even greater risks than the actions that precede it. The danger of the warning shot is dependent upon the likelihood of individuals near the area of shooting. A shot fired during daylight in an open field as a police officer attempts to apprehend a suspect is quite different from firing a warning shot at night in a congested area. Although the officer may not have intended to injure a third-party or even the suspect, the firing creates an serious risk.

Similarly, when police officers intentionally shoot at vehicles, their conduct should constitute a Fourth Amendment "seizure," regardless of whether the suspect stops in response to the show of authority or whether a bullet injures a suspect or passenger. Shooting at a moving target is a dramatic assertion of authority, one that may deprive citizens of their lives.

When evaluating police shootings of vehicles, some courts, however, have imposed numerous restrictions on what constitutes a Fourth

Amendment "seizure." They have determined that no "seizure" occurs when the suspect continues to flee or when a known passenger is injured by mistake.[374] Under this narrow view, application of the Fourth Amendment is directly related to the skill level of the shooting police officers: the more skilled they are in shooting, the more likely the Fourth Amendment applies; if police officers lack skill and miss their targets, then the Fourth Amendment is not applicable. This narrow view fails to account for the inherent risk in all shootings and likelihood of serious harm arising from poor training. In addition, under the narrow view of a Fourth Amendment "seizure," no local governmental entity could be held liable for its failure to train police officers in the use of deadly weapons because a predicate to this liability is a determination that an officer who shot his weapon violated the Fourth Amendment. Yet, before a violation of the Fourth Amendment can be found, a court must first determine that the officer effected a Fourth Amendment "seizure."

A determination that an intentional shooting of a weapon constitutes a Fourth Amendment "seizure" is built upon the need to balance the interest in personal security against the need to subject this dangerous police practice to scrutiny under the Fourth Amendment. Few citizens would contend that a police officer should be able to fire multiple rounds at a suspect's car if the officer believes that the driver has just stolen a candy bar. A narrow view of what constitutes a Fourth Amendment "seizure," such as the one suggested in *Brower* would not allow courts to subject this practice to scrutiny.

By considering the different ways officers use their weapons, courts would be able to examine the reasonableness of the acts preceding an "accidental shooting." By using the "show of authority" standard for Fourth Amendment "seizures," courts would not need to determine whether the officer intended to stop a suspect or to harm the injured persons. They would also not need to define the relationship between the Fourth and Fourteenth Amendment when the shooting injury occurs during an arrest or shortly after it. Additionally, the suspect's response to the assertion of authority would be irrelevant. In the context of police shootings, a "show of authority" standard creates a bright-line rule, one that compels officers to evaluate the reasonableness of withdrawing a weapon in the same manner that they consider the reasonableness of other actions they take during investigations and arrests.

Once an officer has effected a Fourth Amendment "seizure," then a jury will determine the reasonableness of the use of a weapon. At this

374. *See supra* text accompanying notes 149, 261-70.

stage, the Supreme Court has articulated factors to assist juries in this determination.[375]

Conclusion

Courts have disagreed as to how to evaluate "accidental" shootings by police officers under the Fourth Amendment. Central to the disagreement is a court's interpretation of what constitutes a Fourth Amendment "seizure." In applying the Supreme Court's three "seizure" definitions in *Terry, Mendenhall,* and *Brower,* some courts have concluded that an "accidental" shooting, even one that results in death, cannot be a Fourth Amendment "seizure." These courts have erroneously focused on the last act committed by the officer—the "accidental" shot. By looking at the actions that precede the shooting, courts can discern how the Fourth Amendment is implicated when police officers withdraw their guns. Withdrawal of the gun is a "show of authority" and thus a Fourth Amendment "seizure" under *Terry v. Ohio.* Courts should renew the vitality of *Terry* by applying it to the context of police shootings.

To determine what constitutes a Fourth Amendment "seizure," the Court has implicitly balanced the interest of subjecting a police practice to constitutional scrutiny against the state's interest in law enforcement. Balancing is necessary in order to protect the right to personal security. While citizens want a law enforcement agency to protect them from criminals, they do not want their right to personal security undermined by the police practice that is supposed to protect them. When police officers engage in "encounters" by asking citizens a few brief questions, the law enforcement interest in crime prevention and detection clearly outweighs the de minimis intrusion. Accordingly, the Fourth Amendment is not implicated, and police officers may engage in this practice without being subject to scrutiny under the Fourth Amendment. In contrast, when police officers withdraw and use weapons during their investigations and arrests, the right to personal security is implicated because of the inherent danger present.

Police officers may cause two types of injury when they use their weapons during investigations and arrests: physical injuries and psychological injuries. These injuries may occur regardless of whether the injured person stops in response to the assertion of authority. The Supreme Court's examination of other police practices such as questioning suspects, following them, or chasing them on foot has implicated the Fourth Amendment only when a suspect actually stops in response to an

375. *See supra* text accompanying notes 119-290.

assertion of authority or when officers intentionally use physical force to stop the suspect. These restrictions have no place in evaluating the police practice of using weapons during investigations and arrests. The fact-specific nature of Fourth Amendment jurisprudence has logically evolved from assessing the intrusiveness of various police practices. The deliberate act of withdrawing a weapon during an investigation significantly increases the intrusiveness of the meeting between officers and suspects.

Determining that the Fourth Amendment is implicated does not necessarily mean that an officer has violated the Fourth Amendment by the withdrawal of a weapon, a common action in policing. A violation of the Fourth Amendment occurs only if the withdrawal or subsequent use of a gun was "unreasonable" within the meaning of the Fourth Amendment.[376]

This second determination does not require courts to automatically exonerate all officers from liability, nor to automatically impose liability for negligent shootings. In *Graham v. Connor*,[377] the Supreme Court articulated factors to aid courts in determining whether the use of force was unreasonable: the "severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight."[378] Although the Court did not indicate the weight of these factors, in *Tennessee v. Garner*,[379] the Supreme Court expressly stated that police officers may not shoot suspects just because they are attempting to evade capture. The Court declared, "It is not better that all felony suspects die than that they escape."[380]

This determination does not require courts to decide whether the officers acted negligently, grossly negligent, recklessly, or intentionally. Nor does it allow courts to create a per se rule that officers may always withdraw their weapons during investigations and arrests. Assessing reasonableness is a function of the alleged crime committed and an objective officers' assessment of the danger present in confrontation with a particular suspect. Unless society is prepared to believe that all suspects are armed, the use of weapons by police officers is dependent upon the partic-

376. *See, e.g.*, Simons v. Montgomery County Police Officers, 762 F.2d 30, 33 (4th Cir. 1985) ("We perceive nothing improper if an officer conducting a search for narcotics under a valid search warrant enters the room to be searched with her gun drawn."), *cert. denied*, 474 U.S. 1054 (1986).

377. 490 U.S. 386 (1989).

378. *Id.* at 396.

379. 471 U.S. 11 (1985).

380. *Id.* at 11.

ular circumstances confronting them. This fact-specific inquiry is what protects a citizen's right to personal security.

Whether a shooting was intended or just an "accident," the Fourth Amendment is implicated because the acts prior to the shooting constituted a "show of authority." By focusing on these acts, courts may assess whether the police were reasonable within meaning of the Fourth Amendment. The inherent danger presented by the use of weapons, whether by the police or by suspects, is the core of the reasonableness inquiry. This inquiry allows police officers to use their weapons only when suspects present a danger to police officers or others. It properly protects suspects, bystanders, and police officers from unjustified shootings.