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The Constitutionality of High-Speed Pursuits under the Fourth and Fourteenth Amendments

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ARTICLES

THE CONSTITUTIONALITY OF HIGH-SPEED PURSUITS UNDER THE FOURTH AND FOURTEENTH AMENDMENTS

KATHRYN R. URBONYA*

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I. INTRODUCTION

Police officers routinely use their vehicles to pursue individuals who flee when signalled to stop.¹ Many of these pursuits conclude only when drivers, passengers, and pedestrians are injured or killed.² Indi-

1. The traditional definition of a police pursuit is "an active attempt by a law enforcement officer operating a vehicle with emergency equipment to apprehend a suspected law violator in a motor vehicle, when the driver of the vehicle attempts to avoid apprehension." R. DUNHAM & G. ALPERT, *CRITICAL ISSUES IN POLICING: CONTEMPORARY READINGS* 217 (1989). Under this definition, an officer's initial signalling of a driver to pull over to the side of the road does not become a pursuit until the driver exhibits flight behavior and the officer follows. Most law enforcement agencies similarly define police pursuits. One agency has exempted from its pursuit definition the act of following if it is of a "short duration." See, e.g., *City of Springfield v. Kibbe*, 480 U.S. 257 joint app. at 90 (1987) (Rule 23, § 8(a) provides: "The guidelines regarding the continuous high speed pursuit are not meant to deter the high speed chase situation of short duration which is so often necessary in traffic violation enforcement or cases involving misdemeanors"). For purposes of this article, the traditional definition applies because pursuits of short duration are as harmful as longer pursuits and the need to pursue all traffic offenders is questionable. See e.g., Alpert & Dunham, *Policing Hot Pursuits: The Discovery of Aleatory Elements*, 80 J. CRIM. L. & CRIMINOLOGY 521, 531 (1989) ("no clear relationship between time elapsed and injury"); see *infra* notes 262-80 and accompanying text for a discussion of the unlawfulness of pursuits for non-serious traffic offenses.

2. Barker, *Police Pursuit Driving: The Need for Policy*, 51 POLICE CHIEF 70 (1984) (pursuits "may result in more deaths and injuries than any other law enforcement activity, including the use of firearms").

One recent scientific study examined police pursuits in a Florida county. Alpert & Dunham, *supra* note 1, at 527-38. It determined that 34% of all pursuits ended in accidents. *Id.* at 528. Twenty-three percent resulted in bodily injury and 1% resulted in death. *Id.* Of those injured, 63% were either the driver or the passenger, 31% were officers, and 6% were bystanders. *Id.*

Police officers initiated the "majority of the pursuits . . . for relatively minor traffic infractions." *Id.* at 535.

viduals harmed as result of a pursuit have generally sought relief under state law.³ This relief, however, has often been difficult to obtain because state law often provides officers with immunity for their discretionary actions.⁴ Recent statistical studies of pursuits⁵ and decisions by the United States Supreme Court,⁶ however, provide support for the position that when police officers use their vehicles to pursue individuals, they generally use force that is disproportionate to the need for it. Such excessive force may violate an individual's constitutional right to personal security,⁷ a right protected by the fourth amendment's prohi-

Another study examined pursuits that occurred in Minnesota in 1989. 1989 Minnesota State Report 124-127. Forty-four percent terminated with an accident. *Id.* at 125. Twenty-four percent resulted in bodily injury and less than 1% resulted in fatalities. *Id.* Of those injured, 54% were the driver, 23% were the driver's passengers, 18% were police officers, and 5% were other motorists. *Id.* Seventy-six percent of the pursuits were initiated for traffic offenses. *Id.* at 124.

Although examining statistics related to pursuits is helpful in determining whether the practice of pursuing is too inherently dangerous to justify the risks associated with pursuits, one should also recognize that an outcome of a pursuit is not necessarily the best measure of whether the force actually used was disproportionate to the need for it. See Alpert, *Questioning Police Pursuits in Urban Areas*, 15 J. POLICE SCI. & ADMIN. 298, 301 (1987) ("The obvious measure, an outcome of a pursuit, may not be a responsible criterion of good or bad police behavior, as many bad pursuits end without an accident, and many good pursuits end in an accident."). One should also consider what offenses justify police officers engaging in pursuits and under what environmental circumstances pursuits should be restricted. See *infra* notes 262-84 and accompanying text for a discussion of these issues.

3. See G. ALPERT & L. FRIDELL, *POLICE OFFICERS USE OF DEADLY FORCE: GUNS, VEHICLES, AND OTHER WEAPONS* (1991) ("Until the Supreme Court acknowledges the severe danger of pursuits . . . , the law of pursuits will be that of negligence."). See generally Zevitz, *Police Civil Liability and the Law of High Speed Pursuit*, 70 MARQ. L. REV. 237, 245 (1987) (the typical state statute provides that police officers exercise "due regard" during pursuits).

4. See, e.g., G. ALPERT & L. FRIDELL, *supra* note 3 ("many states provided limited sovereign immunity to discretionary rather than ministerial decisions"); Zevitz, *Police Civil Liability and the Law of High Speed Pursuit*, 70 MARQ. L. REV. 237, 254 (1987) (some states may allow officers immunity if they in "good faith [relied] . . . on existing departmental pursuit policies"). See generally CAL. VEHICLE CODE § 17004.7 (West 1990) (immunity for public agency if it adopts a pursuit policy that complies with statutory requirements); OHIO REV. CODE ANN. § 2744.02(b)(1)(a) (Anderson 1989) (political subdivision has defense to liability unless pursuing officers acted willfully or wantonly); *id.* at § 2744.03(A)(6) (officer is immune unless act was "manifestly outside the scope of his employment" or he acted "in bad faith, or in a wanton or reckless manner").

5. Alpert & Dunham, *supra* note 1, at 528, 535 (pursuits caused personal injuries in more than one-fifth of all pursuits and the reason compelling the pursuit was a traffic offense); 1989 Minnesota Report 1, 125-26 (same).

6. See *infra* notes 214-353 and accompanying text for a discussion of the Supreme Court's disproportionality standard for excessive force claims.

7. Although the United States Supreme Court has never detailed the exact scope of the right to personal security, the fourteenth amendment prohibits governmental officials from imposing "bodily restraint and punishment" unless the government af-

bition of unreasonable seizures.⁸ Excessive force may also violate the substantive due process component of the fourteenth amendment,⁹

fords due process. *Ingraham v. Wright*, 430 U.S. 651, 673-74 (1977) (students have an interest in personal security); *see also* *Washington v. Harper*, 110 S. Ct. 1028, 1036 (1990) (mentally ill prisoner has "significant liberty interest in avoiding the unwanted administration of antipsychotic drugs" under the fourteenth amendment); *Youngberg v. Romeo*, 457 U.S. 307, 315 (1982) (institutionalized persons have a liberty interest in personal security). *See generally* 1 W. BLACKSTONE, COMMENTARIES *134 (right to personal security constitutes a fundamental right). The fourth amendment also protects an individual's interest in bodily integrity and autonomy. *See, e.g.,* *Tennessee v. Garner*, 471 U.S. 1, 9 (1985) (individual has a "fundamental interest in his own life"); *Winston v. Lee*, 470 U.S. 753, 766-67 (1985) (fourth amendment prohibits unnecessary surgery to remove bullet for evidence during trial); *Terry v. Ohio*, 392 U.S. 1, 8-9 (1968) ("inestimable right of personal security belongs as much to the citizen on the streets of our cities as to the homeowner closeted in his study"). In describing the scope of the right to personal security, some courts have recognized that psychological injuries as well as physical injuries are actionable under the fourth and fourteenth amendments. *See, e.g.,* *Johnson v. Morel*, 876 F.2d 477, 481 (5th Cir. 1989) (en banc) (Rubin, J., concurring) (fourth and fourteenth amendment protection "is not limited to physical injuries but extends to all damage inflicted"); *Wright v. District of Columbia*, No. 87-2157 (D.D.C. June 28, 1990) (order granting partial summary judgment) (driver pursued by officers in unmarked vehicle stated a fourth amendment claim for psychological injury caused by being in fear for her life). This Article focuses on physical injuries arising from police pursuits, injuries actionable under the fourth or fourteenth amendments.

8. U.S. CONST. amend. IV. The fourth amendment provides in part that "[t]he right of the people to be secure in their persons . . . against unreasonable . . . seizures, shall not be violated." *Id.*

9. U.S. CONST. amend. XIV, § 1. The fourteenth amendment prohibits state officials from depriving a person of "life [or] liberty . . . without due process of law." *Id.* The fifth amendment to the United States Constitution similarly restricts federal officials. U.S. CONST. amend. V. Some courts have struggled to understand the substantive due process component of the fourteenth amendment. *See, e.g.,* *Duckworth v. Franzen*, 780 F.2d 645, 652 (7th Cir. 1985), *cert. denied*, 479 U.S. 816 (1986) (substantive due process is an oxymoron). The Supreme Court has stated that conduct that "shocks the conscience" violates the substantive due process component of the fourteenth amendment. *Rochin v. California*, 342 U.S. 165, 172 (1952). One court has stated that applying the "shocks the conscience" standard is only possible in the context of an excessive force claim. *Braley v. City of Pontiac*, 906 F.2d 220, 226 (6th Cir. 1990) (uniform decisions are possible for fourteenth amendment substantive due process claims that implicate physical abuse).

Recently the Supreme Court clarified that the substantive due process component of the fourteenth amendment is one of three types of "due process" claims possible under the fourteenth amendment. *See Zinermon v. Burch*, 110 S. Ct. 975, 983 (1990). The Court described the substantive due process component as barring "certain arbitrary, wrongful governmental actions 'regardless of the fairness of the procedures used to implement them.'" *Id.* (quoting *Daniels v. Williams*, 474 U.S. 327, 331 (1986)). The fourteenth amendment also provides protection under section 1983 for violations of other substantive rights found in the Bill of Rights, such as the fourth amendment right to be free from unreasonable seizures. *Id.* at 982-83; *see* 42 U.S.C. § 1983 (1982). In contrast to these substantive rights, the fourteenth amendment also guarantees the right to procedural due process, the right to a "fair procedure." 110 S. Ct. at

which prohibits egregious conduct. Determining the constitutionality of police pursuits thus requires consideration of two issues: 1) the standard of disproportionality under the fourth¹⁰ and fourteenth¹¹ amendments and 2) the definition of a "seizure,"¹² because the fourth amendment applies only to individuals "seized" within the meaning of the fourth amendment.¹³

Courts have interpreted both the fourteenth¹⁴ and the fourth¹⁵

983.

This Article describes the right of personal security as an interest protected by the fourth amendment and the substantive due process component of the fourteenth amendment. These are the terms the Supreme Court recently used in discussing excessive force claims brought by pretrial detainees and by individuals seized by police officers. *Connor v. Graham*, 109 S. Ct. 1865, 1871 (1989). The eighth amendment, however, protects a prisoner's right to personal security. *See, e.g., Whitley v. Albers*, 475 U.S. 312, 318-27 (1986).

10. *See infra* notes 214-92 and accompanying text for a discussion of the standard of disproportionality under the fourth amendment.

11. *See infra* notes 294-353 and accompanying text for a discussion of the standard of disproportionality under the fourteenth amendment.

12. *See infra* notes 353-459 and accompanying text for a discussion of what conduct constitutes a fourth amendment "seizure."

13. *See, e.g., Graham v. Connor*, 109 S. Ct. 1865, 1871 (1989) ("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 should be analyzed under the [f]ourth [a]mendment and its 'reasonableness' standard, rather than under 'substantive due process' approach") (emphasis in original)).

14. The first test of disproportionality was articulated in *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir.), *cert. denied*, 414 U.S. 1033 (1973).

Since this decision, courts have considered, but interpreted differently, the four factors in determining whether force was disproportionate to the need for it. The Fifth Circuit Court of Appeals has interpreted the first two factors as requiring "grossly disproportionate" force. *See, e.g., Simpson v. Hines*, 903 F.2d 400, 403 (5th Cir. 1990) (citing *Shillingford v. Holmes*, 634 F.2d 263, 265 (5th Cir. 1981)). The Seventh Circuit, in contrast, has recently criticized the Fifth Circuit's interpretation of the factors and has focused the inquiry on whether the force used was reasonable. *Titran v. Ackman*, 893 F.2d 145, 147 (7th Cir. 1990). Some courts have required the plaintiff to have incurred a "severe injury." *See, e.g., Garcia v. Miera*, 817 F.2d 650, 655-56 (10th Cir. 1987). Other courts have required more than a "minimal" injury. *See, e.g., Bennett v. Parker*, 898 F.2d 1530, 1533 (11th Cir. 1990); *Robison v. Via*, 821 F.2d 913, 924 (2d Cir. 1987) ("permanent or severe" injury not necessary). Similar disagreement has occurred regarding the fourth factor, the need for malicious conduct. *Compare Shillingford v. Holmes*, 634 F.2d at 265 (malice necessary) with *Landol-Rivera v. Cruz Cosme*, 906 F.2d 791, 796 (1st Cir. 1990) ("reckless or callous indifference to an individual's right" sufficient) (quoting *Gutierrez-Rodriguez v. Cartagena*, 882 F.2d 553, 559 (1st Cir. 1989)). The Supreme Court, however, has expressly left open whether conduct that is grossly negligent or reckless is actionable under the fourteenth amendment. *Daniels v. Williams*, 474 U.S. 327, 334 n.3 (1986). *See generally Urbonya, Establishing a Deprivation of a Constitutional Right to Personal Security under Section 1983: The Use of Unjustified Force by State Officials in Violation of the Fourth, Eighth, and Fourteenth Amendments*, 51 ALB. L. REV. 171, 174-99 (1987) (collecting fourteenth amendment excessive force cases).

amendment as prohibiting disproportionate force. In 1973, Judge Friendly of the Second Circuit first detailed in *Johnson v. Glick*¹⁶ the following four factors for determining when force is disproportionate under the fourteenth amendment: 1) the need for the force, 2) the relationship between the need and the amount of force used, 3) the extent of the injury, and 4) the officer's motives.¹⁷ Since this decision, all courts have applied the first two factors,¹⁸ which directly relate to the question of proportionality, and only a few courts have considered the last two factors,¹⁹ which do not directly relate to the issue of proportionality.

The fourth amendment standard of proportionality similarly entails consideration of the first two *Glick* factors.²⁰ In 1985, the Supreme Court in *Tennessee v. Garner*²¹ implicitly applied these *Glick* factors to a fourth amendment excessive force claim.²² In *Garner*, the Court held that police officers used disproportionate force when they killed a burglary suspect who was attempting to flee.²³ In balancing the interests of the parties, the Court noted that the state's need to apprehend the individual did not outweigh the suspect's interest in his life because the suspect did not present a risk to others if left at large, even though he had allegedly committed a felony.²⁴ Recently, the Supreme Court in *Graham v. Connor*²⁵ applied the *Garner* proportionality test to

15. In 1985, the fourth amendment became a basis for evaluating the excessiveness of force used during an arrest after the Supreme Court, in *Tennessee v. Garner*, 471 U.S. 1, 11-12 (1985), declared that the use of deadly force to stop all fleeing felons was objectively unreasonable and that this force violated the fourth amendment. See, e.g., *Gilmere v. City of Atlanta*, 774 F.2d 1495, 1499-1502 (11th Cir. 1985) (en banc), cert. denied, 476 U.S. 1115 (1986) (examining excessive force claim under both fourth and fourteenth amendment); *Lester v. City of Chicago*, 830 F.2d 706, 711 (7th Cir. 1987) (examining excessive force claim solely under fourth amendment standard of objective reasonableness). Recently, the Supreme Court declared that only the fourth amendment's standard of reasonableness applies to claims that officers used excessive force arising from a stop, an arrest, or "other seizure" of an individual. *Graham v. Connor*, 109 S. Ct. 1865, 1871 (1989). For a discussion of how the fourth amendment standard of reasonableness questions the disproportionality of force, see *infra* notes 214-93 and accompanying text.

16. 481 F.2d 1028 (2d Cir.), cert. denied, 414 U.S. 1033 (1973).

17. *Id.* at 1033.

18. See *supra* note 14 and *infra* notes 319-22 for a discussion of the federal circuit courts' interpretation of the *Glick* factors.

19. 481 F.2d at 1033.

20. See *infra* notes 214-93 and accompanying text for a discussion the fourth amendment standard of disproportionality.

21. 471 U.S. 1 (1985).

22. See *infra* notes 224-47 and accompanying text for a discussion the *Garner* standard of disproportionality.

23. 471 U.S. at 11-12.

24. *Id.*

25. 109 S. Ct. 1865 (1989).

the use of nondeadly force.²⁶ The Court determined that the force applied should be proportionate to the danger posed by the suspect, with the danger being measured by the seriousness of the alleged offense and the risk of harm in failing to capture the suspect.²⁷ In addition, the Court clarified that the fourth *Glick* factor — the officials' motives — was not necessary to establish a fourth amendment excessive force claim.²⁸

When police officers pursue individuals without relating the risk of harm inherent in the pursuit to the offense or offenses initiating the pursuit, they may breach the duty they owe under the fourth²⁹ and fourteenth³⁰ amendments not to use force that unduly infringes upon an individual's interest in personal security. The scope of protection available under these amendments, however, depends upon the relationship between the police officers and the injured individual. The fourth amendment specifically applies to the relationship between the police officers and individuals "seized" within the meaning of the fourth amendment.³¹ In contrast, the fourteenth amendment applies to the relationship between police officers and individuals not "seized" within the meaning of the fourth amendment.³² Determining which amendment applies thus depends upon whether police officers "seized" an individual. The Court's recent decision in *Brower v. County of Inyo*,³³ however, makes this task difficult because it set forth a new definition of a fourth amendment "seizure."³⁴

In *Brower*, the Court stated that a seizure occurs "only when there is a governmental termination of freedom of movement through means intentionally applied."³⁵ *Brower* not only leaves unclear whether this definition replaces the Court's prior two "seizure" definitions,³⁶ but it

26. *Id.* at 1871-72.

27. *Id.*

28. *Id.* at 1872-73.

29. *See infra* notes 214-93 and accompanying text for a discussion of the duty police officers owe under the fourth amendment.

30. *See infra* notes 294-353 and accompanying text for a discussion of the duty police officers owe under the fourteenth amendment.

31. *See Graham v. Connor*, 109 S. Ct. 1865, 1871 (1989); *see also infra* notes 355-457 and accompanying text for a discussion of when individuals are "seized" within the meaning of the fourth amendment.

32. *Graham*, 109 S. Ct. at 1871 n.10.

33. 489 U.S. 593 (1989).

34. *See infra* notes 404-56 and accompanying text for a discussion of the confusion created by the Court's new "seizure" definition.

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

36. *See infra* notes 368-79 and accompanying text for a discussion of the "seizure" definition the Court articulated in *Terry v. Ohio*, 392 U.S. 1, 20 n.16 (1968) and *infra* notes 383-400 and accompanying text for a discussion of the "seizure" definition the Court articulated in *INS v. Delgado*, 466 U.S. 210, 215 (1984).

also creates two distinct causation issues for pursuits:³⁷ whether a pursuit caused an individual to stop³⁸ and whether the pursuit caused an individual's injuries.³⁹ Applying the new "seizure" definition in the context of a pursuit claim thus requires an understanding of how police officers may use their cruisers as both physical force⁴⁰ and psychological force⁴¹ to apprehend and injure an individual.

Whether a pursuit violates the fourth or fourteenth amendment depends upon how one views the force officials use during a pursuit — that is, whether it was disproportionate and whether it effected a fourth amendment "seizure." Resolving these issues, however, also entails choosing between two polar modes of discourse,⁴² "communalism"⁴³ and "individualism."⁴⁴ According to Professor Balkin, an individualist "deemphasize[s] a person's responsibility for the effect of her behavior on others" and a communalist emphasizes this responsibility.⁴⁵ Each

37. See *infra* notes 422-31 and accompanying text for a discussion of the causation issues created under the new "seizure" definition.

38. See *infra* notes 415-21 and accompanying text for a discussion of the issue of causation to stop under the new "seizure" definition.

39. See *infra* note 424 and accompanying text for a discussion of the causation issue relating to an individual's injuries.

40. See *infra* notes 125, 128-38 and accompanying text for a discussion of how police officers use physical force during pursuits.

41. See *infra* notes 127, 139-70 and accompanying text for a discussion of how police officers use psychological force during pursuits.

42. Recently Professor Balkin discerned two modes of discourse in his attempt to develop "a semiotics of legal discourse — that is, understanding legal discourse as a system of interrelated signs, much like a language." Balkin, *The Rhetoric of Responsibility*, 76 VA. L. REV. 197, 200 (1990).

43. Professor Balkin has defined "communalism" as a perspective that compels one to characterize factual issues in a manner that deemphasizes the injured person's responsibility for the harm that occurred and emphasizes the injurer's responsibility for the harm. *Id.* at 207-211.

44. Professor Balkin has defined "individualism" as a perspective that compels one to characterize factual issues in a manner that emphasizes the injured person's responsibility for the harm that occurred and deemphasizes the injurer's responsibility for the harm. *Id.*

45. *Id.* at 207. Professor Balkin has recognized that the question of whether a person was an injured party or the injuring party is also a question resolved by rhetoric. *Id.* at 211. He has emphasized that factual characterization is the key to understanding legal discourse about responsibility:

Terms like 'responsibility' or 'injury' require a context in which to be understood and used. To the extent that we can vary the context, or rather our description of the context, we can vary the meaning of these terms [W]ithout a grounding in a particular set of social assumptions, legal concepts like 'responsibility,' 'harm,' and 'injury,' threaten to become empty. By varying our assumptions we can produce radically different conclusions about who is harming whom, what is the relevant injury, and who is ultimately responsible for the injury.

Id. at 210.

Determining responsibility for harm is thus a question of how one characterizes

perspective influences how one characterizes the underlying issues relating to the general issue of responsibility — actions, “intention, causation, free will, and available options.”⁴⁶ In the context of a pursuit, the injured party, the plaintiff, generally adopts a communalist position because this position emphasizes the responsibility of police officers for their actions during pursuits and deemphasizes the individual’s actions during the pursuit.⁴⁷ In contrast, police officers, the defendants, generally adopt an individualist position because they emphasize the individual’s responsibility for his actions during a pursuit and deemphasize the officers’ actions.⁴⁸ The particular viewpoint accepted by a court ultimately determines whether a pursuit is subject to constitutional scrutiny.⁴⁹

Any court’s determination of the constitutionality of pursuits entails a consideration of policy. This Article advocates that courts adopt a communalist position in determining the constitutionality of pursuits because a communalist position is consistent with the Supreme Court’s perspective as expressed in excessive force cases.⁵⁰ In evaluating the use of force by officials, the Supreme Court has strongly protected an individual’s interest in personal security.⁵¹ Under a communalist perspective, pursuits would be permissible only when deadly force would be authorized and the risk to the public is minimal.⁵²

facts. Balkin has identified rhetorical devices that courts use in describing the facts relating to responsibility. *Id.* at 212-53. According to Balkin, a communalist perspective would compel the following factual characterizations: 1) emphasizing facts that relate to the defendant’s responsibility and deemphasizing facts that relate to the plaintiff’s responsibility, 2) broadly characterizing inculpatory facts about the defendant that relate to causal probability and narrowly characterizing exculpatory facts about the defendant that relate to causal responsibility, 3) abstractly describing the defendant’s actions concerning the foreseeability of harm and concretely describing the plaintiff’s actions concerning the foreseeability of harm, 4) broadly describing the time frame relating to the defendant’s inculpatory conduct and narrowly describing the time frame relating to the plaintiff’s conduct, and 5) narrowly describing the options available to the plaintiff and broadly describing the options available to the defendant. *Id.* An individualist perspective would compel the opposite characterizations. *Id.* at 207, 212-53.

46. *Id.* at 211.

47. *See infra* notes 84-90, 96-97 and accompanying text for an application of the communalistic perspective to police pursuits.

48. *See infra* notes 78-83, 94-95 and accompanying text for an application of the individualistic perspective to police pursuits.

49. *See infra* notes 78-97 and accompanying text for a discussion of the individualist and communalist perspectives as applied to police pursuits.

50. *See generally*, *Graham v. Connor*, 109 S. Ct. 1865 (1989); *Brower v. County of Inyo*, 490 U.S. 593 (1989); *Tennessee v. Garner*, 471 U.S. 1 (1985); *see also infra* notes 224-47 and accompanying text for a discussion of how the Supreme Court has implicitly expressed a communalist perspective in evaluating excessive force claims.

51. *Id.*

52. *See infra* notes 84-90, 96-97 and accompanying text for a discussion of the

Part II discusses the need to adopt a communalist perspective in evaluating pursuits.⁵³ It contends that this perspective allows pursuits to be subject to constitutional scrutiny.⁵⁴ Part III describes how police officers use either physical or psychological force to cause injuries during pursuits.⁵⁵ Part IV details the broad protection that the courts have afforded to an individual's interest in personal security under the fourth⁵⁶ and fourteenth⁵⁷ amendments. This section demonstrates that most pursuits constitute the use of disproportionate force. Part V analyzes the three "seizure" definitions that the Supreme Court has articulated.⁵⁸ The analysis reveals that the fourth amendment generally applies to the relationship between the police officers and the pursued driver and his passengers because police officers "seize" these individuals within the meaning of the fourth amendment during a pursuit.⁵⁹ Further, the fourteenth amendment applies to the relationship between police officers and other drivers, their passengers, and pedestrians because these individuals are not "seized" during a pursuit.⁶⁰ Part VI indicates that the pursuit policies of many law enforcement agencies are unconstitutional. Such policies may expose these agencies to civil liability under section 1983.⁶¹ This Article concludes with a discussion outlining ways to balance a government's need for police pursuits with an individual's interest in personal security, as protected by both the fourth and fourteenth amendments.

proper use of police pursuits from a communalistic perspective.

53. See *infra* notes 67-109 and accompanying text for a discussion of the need to apply a communalistic perspective to police pursuits.

54. See *infra* notes 78-97 and accompanying text for a discussion of how the communalist perspective, in contrast to the individualist perspective, allows police pursuits to be subject to constitutional scrutiny.

55. See *infra* notes 125-70 and accompanying text for a discussion of how police officers use physical or psychological force during a pursuit.

56. See *infra* notes 214-93 and accompanying text for a discussion of the right to personal security under the fourth amendment.

57. See *infra* notes 294-351 and accompanying text for a discussion of the right to personal security under the fourteenth amendment.

58. See *infra* notes 357-459 and accompanying text for a discussion of the meaning of a fourth amendment "seizure."

59. See *infra* notes 380, 402-403, 432-33, 436-39 and accompanying text for an application of the Supreme Court's "seizure" definition as applied to a pursued driver and her passengers.

60. See *infra* notes 380, 402-03, 434 and accompanying text for an application of the Supreme Court's "seizure" definition as applied to other motorists and pedestrians.

61. See generally *City of Canton v. Harris*, 489 U.S. 378, 390 n.10 (1989) ("need to train officers in the constitutional limitations on the use of deadly force . . . can be said to be 'so obvious,' that the failure to do so could properly be characterized as 'deliberate indifference' to constitutional rights").

II. THE NEED TO SUBJECT POLICE PURSUITS TO CONSTITUTIONAL SCRUTINY

Determining whether the practice of police pursuits should be subject to constitutional scrutiny under the fourth and fourteenth amendments is a question linked not only to constitutional doctrines⁶² associated with these amendments but also to policy. Policy is implicated in every court's examination of the constitutional doctrines associated with pursuits, because enmeshed in all pursuit cases are complex social issues of who should be responsible for the harm that arises from a pursuit.⁶³ Scholars have sometimes referred to the contrasting policies

62. The constitutional doctrines associated with fourth amendment excessive force claims focus upon whether police officers "seized" an individual and whether the force used was disproportionate. In analyzing pursuit claims under the fourth amendment, some courts have avoided discussion of either of these constitutional doctrines because they have determined that police do not use force during a pursuit. *See, e.g., Galas v. McKee*, 801 F.2d 200, 203 (6th Cir. 1986) ("police used absolutely no force" during pursuit). This narrow perspective fails to see how police officers are implicated in the harm that pursuits present. A policy of strongly guarding against physical intrusions, however, would discern that police officers are implicated in the harm that occurs during pursuits. This perspective is similar to the perspective Professor Balkin has described as "communalism." Balkin, *supra* note 42, at 206-11.

63. In determining whether police officers or the pursued driver caused the harm that occurred as a result of a pursuit, many courts have attributed responsibility to the pursued driver for the harm that he incurred. *See, e.g., Sutherland v. Holcombe*, No. 89-1708 (4th Cir. Nov. 17, 1989), *cert. denied*, 110 S. Ct. 1949 (1990) (even though police officers allegedly knew that driver and passenger would lose control of their vehicle as they began approaching a dangerous curve, police officers who failed to terminate the pursuit did not cause their deaths); *Patterson v. City of Joplin*, 878 F.2d 262, 263 (8th Cir. 1989) (officers who pursued motorcyclist and his passenger for failing to wear helmets did not "seize" them within the meaning of the fourth amendment even though pursuit ended in fatal accident; there was "no evidence that either of the police cars collided with the motorcycle or innocent victim"); *Tagstrom v. Pottebaum*, 668 F. Supp. 1269, 1273 (N.D. Iowa 1987), *appeal denied sub nom. Tagstrom v. Enockson*, 845 F.2d 1027 (8th Cir. 1988), *rev'd in part*, 857 F.2d 502 (8th Cir. 1988) (pursuit of motorcyclist for failing to stop at a stop sign and for failing to have a headlight on was constitutional under both fourth and fourteenth amendments because the motorcyclist caused his own harm by crashing into another vehicle); *Boren v. City of Colorado Springs*, 624 F. Supp. 474, 477 (D. Colo. 1985) (although the driver was pursued by an unmarked police vehicle and even though officers did not have probable cause to believe that the driver had violated any offense, driver who was in fear of his life caused his own injury by leaving his vehicle); *Veatch v. Cross*, 532 N.E.2d 1069, 1073-74 (Ill. App. Ct. 1988) (pursued driver, not police officers, caused the injury the passenger incurred when the vehicle crashed into the ditch). Some courts have characterized the facts in a manner to suggest that the pursuit did not rise to the level of a constitutional violation. *See, e.g., Jones v. Sherrill*, 827 F.2d 1102, 1107 (6th Cir. 1987) (officers' pursuit at speeds greater than 100 miles per hour of driver who had allegedly been driving in an unsafe manner did not "rise to the level of gross negligence and outrageous conduct necessary to sustain a section 1983 claim"); *Cannon v. Taylor*, 782 F.2d 947, 950 (11th Cir. 1986) (even though police officer exceeded the speed limit by 15 miles per hour and failed to use his lights or sirens, his conduct amounted only to

influencing decisions as "individualism"⁶⁴ and "communalism"⁶⁵ or "altruism."⁶⁶ An examination of these polar policies reveals that in the

negligence, not actionable under the fourth or fourteenth amendment); *Roach v. City of Fredericktown*, 882 F.2d 294, 297 (8th Cir. 1989) (pursuit did not "rise to the level of gross negligence"); *Britt v. Little Rock Police Dept.*, 721 F. Supp. 189, 195 (E.D. Ark. 1989) ("[a]t some point, continued pursuit at high speeds in heavy traffic might rise to the level of recklessness, but the brief chase here did not involve such disregard of known dangers as to allow the plaintiffs to recover against the officer"). Some courts have stated that a pursuit does not involve the use of any force. *See, e.g., Brower v. County Inyo*, 817 F.2d 540, 546 (9th Cir. 1987) (police officers used no force during a pursuit; decedent had the option of stopping before crashing into a roadblock), *rev'd*, 489 U.S. 593, 598 (1989); *Galas v. McKee*, 801 F.2d 200, 203 (6th Cir. 1986) (pursued driver's crash was not a "result of the officer's show of authority," but instead a result of his loss of control of the vehicle when he crashed into a tree). Some courts have not analyzed whether police officers use force during a pursuit and have instead tersely concluded that the pursuit was reasonable. *See, e.g., Roach v. City of Fredericktown*, 882 F.2d at 297 (pursuit of vehicle with license plates registered to another vehicle was reasonable, even though driver was killed and two persons in another car were seriously injured); *Johnson v. Morris*, 453 N.W.2d 31, 36 (Minn. 1990) ("mere pursuit, without more, [does not] constitute the exercise of unreasonable force"). Some courts have also determined that police officers have no duty to refrain from pursuits, regardless of the risk to the public. *See, e.g., Jackson v. Olson*, 712 P.2d 128, 130-31 (Or. Ct. App. 1985) (adopting majority rule that police officers have no duty to refrain from pursuing drivers, even for misdemeanor offenses, "even when risk of harm to the public arising from the chase is foreseeable").

Few courts have subjected pursuits to constitutional scrutiny. *See, e.g., Brower v. County of Inyo*, 884 F.2d 1316, 1317 n.1 (9th Cir. 1989) (in dicta the court stated that police officers may not be able to use the danger present during a pursuit as a reason justifying their use of force); *Wierstak v. Heffernan*, 789 F.2d 968, 975 (1st Cir. 1986) (city failed to properly train police officers about policies on the use of "high speed chases"); *Checki v. Webb*, 785 F.2d 534, 538 (5th Cir. 1986) (passenger stated claim under fourteenth amendment for psychological injury he received during pursuit initiated by police officers in an unmarked vehicle); *Jamieson v. Shaw*, 772 F.2d 1205, 1211 (5th Cir. 1985) (injured passenger stated claim under the fourth amendment when police officer's used roadblock to stop driver who refused to terminate the pursuit); *Easterling v. City of Glennville*, 694 F. Supp. 911, 920-22 (S.D. Ga. 1986) (even though officers did not directly use "physical force," they may be liable for the death of a driver who lost control of his vehicle; jury will decide whether high-speed pursuit of a speeding driver "amounted to an abuse of their police powers"); *Wright v. District of Columbia*, No. 87-2157 (D.D.C. June 21, 1990) (order granting partial summary judgment) (driver pursued by officers in unmarked vehicle stated a fourth amendment claim for psychological injury caused by being in fear for her life); *Travis v. City of Mesquite*, No. C-8576 (Tex. Dec. 31, 1990) (WESTLAW, State Library, Tex. file) (pursuit of person allegedly involved in prostitution may constitute "deliberate indifference" to personal security rights of third parties who were injured and killed in violation of fourteenth amendment).

64. *See Balkin, supra* note 42, at 206-211; *see also infra* notes 78-83, 94-95.

65. *See Balkin, supra* note 42, at 206-211; *see also infra* notes 84-90, 96-97.

66. Professor Balkin has stated that his theory of individualism and communalism is similar to Professor Duncan Kennedy's theory of individualism and altruism, a theory Kennedy applied to contract law. *See Balkin, supra* note 42, at 202. In applying Kennedy's theory to contract law, "denying contractual liability in the absence of con-

context of police pursuits courts should adhere to a policy of communalism, because to do otherwise would be to allow the dangerous practice of pursuits to evade constitutional scrutiny.

A policy of communalism affords individuals more protection of their right to personal security than does a policy of individualism. Communalism recognizes that when a person is injured,⁶⁷ others may be implicated in the harm that the person experienced;⁶⁸ individualism, however, emphasizes that each person needs to protect himself from the harm associated with the presence of others.⁶⁹ Because communalism

sideration was relatively individualist, while permitting recovery in cases of detrimental reliance was relatively altruist." *Id.* at 203. The only difference between Kennedy's theory and Balkin's is the manner in which each theory emphasizes or deemphasizes excuses or defenses. *Id.* at 204. Under Kennedy's theory, individualism "deemphasize[s] both liability and the recognition of excuses and defenses, [and] altruism emphasize[s] both liability and the recognition of excuses and defenses." *Id.* (emphasis in original). Under Balkin's theory, although individualism similarly deemphasizes liability, it emphasizes, not deemphasizes, excuses or defenses because these are means of diminishing liability in tort law. *Id.*

67. Although determining that an individual was physically injured during a pursuit is not dependent upon how one characterizes the facts, Professor Balkin has noted when an individual asserts that she was acting in self-defense, factual characterization is central to determining whether the individual was the injured or the injurer. See Balkin, *supra* note 42, at 235-36 (questioning whether a battered wife who killed her husband was the injured or injurer).

68. *Id.* at 206-07. Courts can find that other individuals were implicated in the harm by using rhetorical devices that make their participation seem obvious. *Id.* at 210. They can also conclude that others were not implicated by using the same rhetorical devices, but in the opposite manner. *Id.* According to Professor Balkin, the following rhetorical devices might be present in an opinion that represents a communalist perspective, one that would find that a defendant was implicated in the harm that occurred: 1) characterizing the facts to emphasize the defendant's responsibility and to deemphasize the plaintiff's responsibility, 2) characterizing broadly inculpatory facts relating to the defendant's link to the harm and narrowly characterizing exculpatory facts relating to the defendant's distance from the harm, 3) using abstract terms to describe the foreseeability of harm to the plaintiff, 4) using a broad time frame to find inculpatory facts relating to the defendant and a narrow time frame to find exculpatory facts relating to the defendant, and 5) narrowly characterizing alternative ways for the plaintiff to have acted and broadly characterizing the options available to the defendant. *Id.* at 202-52; see also *id.* at 252-53 for a concise chart summarizing the rhetorical devices relating to the characterization of responsibility. See generally Note, *Police Liability for Creating the Need to Use Deadly Force in Self-Defense*, 86 MICH. L. REV. 1982, 1985 n.17 (1988) ("social policy considerations have persuaded courts to find defendants liable for civil damages even in cases in which the line of causation between the defendant's conduct and the injury is so indirect that defendant could not have had any meaningful choice in causing the injury").

69. See Balkin, *supra* note 42, at 206-07. Courts can deemphasize the role of others in causing harm by using rhetorical devices that make their involvement seem remote. *Id.* at 210. The following rhetorical devices might be present in an opinion that represents an individualist perspective, one that would find that a defendant was not implicated in the harm that occurred: 1) characterizing the facts to deemphasize the defendant's responsibility and emphasize the plaintiff's responsibility, 2) characterizing

may provide the injured individual with compensation for the harm incurred, the availability of compensation may deter others in the future from acting in a manner that threatens the safety of others.⁷⁰ Individualism, on the other hand, forces the harmed individual to incur the loss without any compensation and fails to deter others from causing similar harm.

Although these simple contrasting perspectives seem removed from constitutional analysis, Professor Balkin has cogently detailed how these perspectives influence courts in deciding important legal issues.⁷¹ For instance, courts may advance a perspective by using rhetorical devices that are hidden in the deep structures of an opinion.⁷² Therefore, understanding how courts may apply these devices aids in discerning the need to adopt a communalist perspective of police pursuits.

The typical pursuit has different classes of injured persons: the pursued driver, passengers in the pursued vehicle, other drivers and their passengers, and pedestrians. The perspective one adopts may depend upon how one perceives the culpability of the particular injured person. To group these plaintiffs according to culpability would result in two classes: the culpable plaintiff — the pursued driver, who violated a law by fleeing — and nonculpable plaintiffs — the pursued's passengers and other persons harmed who have done nothing to engender the pursuit.

When passengers, motorists, and pedestrians are injured, the central issue is who is responsible,⁷³ the pursued driver or the police of-

narrowly inculpatory facts relating to the defendant's link to the harm and characterizing broadly the exculpatory facts relating to the defendant's proximity to the harm, 3) using concrete terms to describe the foreseeability of the harm to the plaintiff; 4) using a narrow time frame to find inculpatory facts relating to the defendant and a broad time frame to find exculpatory facts relating to the defendant, and 5) broadly characterizing the alternative ways for the plaintiff to have acted and narrowly characterizing the options available to the defendant. *Id.* at 202-52; see also *id.* at 252-53 for a concise chart summarizing the rhetorical devices relating to the characterization of responsibility.

70. Jeffries, *Damages for Constitutional Violations: The Relation to Risk in Constitutional Torts*, 75 VA. L. REV. 1461, 1462-63 (1989).

71. See Balkin, *supra* note 42.

72. *Id.* at 200.

73. The term "responsible" implies that ultimate liability may lie with either the police officers or the pursued driver. Although Professor Balkin indicates how courts use rhetorical devices to determine the ultimate issue of liability, the devices also apply to issues related to the ultimate issue, such as causation. *Id.* at 240-46. This Article discusses Professor Balkin's theory, not as a means to impose liability upon police officers for the harm that arises from pursuits, but instead to subject pursuits to constitutional scrutiny under the fourth and fourteenth amendments. Professor Balkin's theory is helpful in the pursuit context to aid courts in discerning that police officers use either physical or psychological force during a pursuit and that this force can cause injuries to the pursued drivers and others. Adopting a communalist perspective would allow pursuit claims to be subject to constitutional scrutiny to determine whether the force police

ficers who pursued the driver. When police cruisers crash into one of these individuals, causation is not in issue because the police officers directly caused the harm.⁷⁴ When the pursued's vehicle inflicts the harm, the causation question, however, is complex. The actions of the pursued driver cannot be subject to constitutional scrutiny because the driver is a private actor, not a state official.⁷⁵ The actions of police officers do, however, signify the presence of state action.⁷⁶ Thus the officers' actions may be subject to constitutional scrutiny, but only if a court finds them to be causally implicated in the harm.

Resolving the issue of causation depends upon how one characterizes the facts, whether it is from a communalist or individualist perspective.⁷⁷ When police officers are the defendants, the individualist

officers use is actually disproportionate to the need. Many courts have failed to discern that police officer use any force; thus, they never need to determine whether the alleged force caused any injuries and whether the force used was disproportionate to the need for it. *See infra* notes 159-60 and accompanying text for these issues and how courts have resolved them.

74. Causation is not an issue, however, only to the degree that the facts cannot be subject to an interpretation that the pursued driver was somehow responsible for the officer's cruiser hitting her. According to Professor Balkin, if facts can be subject to different interpretations, then courts may resolve the causation issue either under a communalist perspective or an individualist perspective. Balkin, *supra* note 42, at 240-46.

75. A remedy under state law may be available, but this remedy can be without any force if the pursued driver has no assets. The profile of the typical pursued driver indicates that the driver is generally a young male. *See, e.g.,* H. NUGENT, E. CONNORS, J. MCEWEN & L. MAYO, *RESTRICTIVE POLICIES FOR HIGH-SPEED POLICE PURSUITS* 17 (1989) (almost 60% of pursued drivers were between the ages of 18 and 25; 96% were males); Beckman, *Identifying Issues in Police Pursuits: The First Research Findings*, 54 *POLICE CHIEF* 57, 60 (1987) (82% of suspects were between the ages of 11 and 30; 96% were males).

The private person's actions can signify state action when the person acts jointly with a state official. *See, e.g.,* *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 152 (1970) (state action may be present if private restaurant owner conspired with police officers). A pursued driver, however, acts as an adversary to the police officers and thus she is not a state actor. *See, e.g.,* *Polk County v. Dodson*, 454 U.S. 312, 325-326 (1981) (public defender does not act jointly with a state, even though paid by the state for the legal services he provided, because the defender acts as an adversary to state).

76. For the purpose of claims brought under section 1983, whenever a plaintiff has established state action he also has established action "under color of [state] law." *See, e.g.,* *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 935 n.18 (1982) ("the under-color-of-state-law requirement does not add anything not already included within the state-action requirement of the [f]ourteenth [a]mendment").

If federal officials abuse the power they have under federal law, their actions constitute federal action and they may be subject to liability for a violation of an individual's constitutional rights. *See, e.g.,* *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971) (federal officials liable for violating an individual's fourth amendment right to be free from an unlawful search and seizure).

77. *See generally* Balkin, *supra* note 42, at 240-43 (discussing rhetorical devices

perspective shifts the responsibility of the harm to the pursued driver, but the communalist perspective allows courts to see how the police officers are implicated in the harm.

From an individualist perspective, a court would characterize the facts in a manner that would suggest that responsibility follows naturally from the facts it emphasizes. The court would declare that the pursued driver was in control of the pursuit — he could have stopped the pursuit at anytime.⁷⁸

This perspective also would emphasize that it was the pursued driver's vehicle, not the police officers' cruiser, that physically produced the harm.⁷⁹ In addition, it would emphasize the pursued driver's inculpatory conduct in failing to follow the officers' command to stop.⁸⁰ To

that enable courts to resolve the issue of causation in the manner that furthers either an individualist or a communalist perspective).

78. One rhetorical device focuses on the free will of an individual and the options available to him. *Id.* at 233-46. From an individualist perspective, one would characterize the plaintiff's options broadly and the defendant's options narrowly. *Id.*; see, e.g., *Tagstrom v. Pottebaum*, 668 F. Supp. 1269, 1273 (N.D. Iowa), *appeal denied sub nom.* *Tagstrom v. Enockson*, 845 F.2d 1027 (8th Cir. 1988), *rev'd in part*, 857 F.2d 502 (8th Cir. 1988). In *Tagstrom*, a federal court used an individualist perspective as it discussed the issue of free will and causation:

The Court believes that the proper focus should be upon the nature of the [officers'] acts, rather than the risk created or the foreseeability of the harm. The pursuit, by itself, did not limit the plaintiff's ability to protect himself from harm in the same way in which a shot or attempt to run him down would limit that ability. At all times the plaintiff retained the ability to lower or eliminate the risk of injury by slowing down or stopping. Instead, he appears to have preferred the risk of injury over the risk of apprehension and suffered the consequences of that choice. Because the Court cannot find that the plaintiff was forced to make that choice, it cannot find that the [officers] . . . used excessive force or any force.

Id. Although the court states that the focus is on the police officers' conduct, it actually characterized the facts to emphasize the plaintiff's inculpatory act of fleeing. The court deemphasized the officers' role in the pursuit by finding that the police officers may not have even used "any force" during the pursuit. Similarly, it focused on the plaintiff's options, not the officers' option of terminating the risk of harm.

79. See, e.g., *Patterson v. City of Joplin*, 878 F.2d 262, 263 (8th Cir. 1989) (there was "no evidence that either of the police cars collided with the motorcycle or the innocent victim"). One rhetorical device relates to emphasis and deemphasis of facts relating to responsibility. Balkin, *supra* note 42, at 202-12. From an individualist perspective, one would emphasize facts relating to the plaintiff's responsibility and deemphasize facts relating to the defendant's responsibility. *Id.*

80. See, e.g., *Brower v. County of Inyo*, 817 F.2d 540, 546 (9th Cir. 1987) (pursued driver had "numerous opportunities to stop" pursuit before he crashed into a roadblock), *rev'd*, 489 U.S. 593, 599 (1989). One rhetorical device characterizes events either broadly or narrowly depending upon whether they are inculpatory or exculpatory. Balkin, *supra* note 42, at 212-20. Under an individualist perspective, one would broadly characterize inculpatory events relating to the plaintiff and exculpatory events relating to the defendant; one would also narrowly characterize exculpatory events relating to the plaintiff and inculpatory events relating to the defendant. *Id.*

the same degree that it emphasizes facts associated with the pursued driver's blameworthy conduct, it would deemphasize the police officers' role in the pursuit.⁸¹ By using concrete language, a court adhering to an individualist perspective would state that the police officers could not have foreseen the specific accident, nor could they have known who in particular would be injured.⁸² In addition, it would deemphasize that police officers have the option to decide whether they should pursue an individual under the circumstances.⁸³

A communalist perspective, however, reverses the emphasis and adopts the opposite characterization. From a communalistic perspective, a court would declare that the police officers were in control of the pursuit.⁸⁴ The officers could not only determine whether to initiate a pursuit but also when to terminate the pursuit if it became apparent that the danger of harm was too great.⁸⁵ By using abstract language,

81. See *supra* notes 78-80 for a discussion of this rhetorical device; see also *Britt v. Little Rock Police Dept.*, 721 F. Supp. 189, 194 (E.D. Ark. 1989) (deemphasizes police officer's role in the pursuit). In *Britt*, a federal court factually characterized the police officer's role from an individualist perspective:

The officer pursued in a chase that lasted about a minute, including a brief period of time when the stolen car was stopped and apparently out of gear. There was initially not much traffic, and the officer was on the verge of breaking off the pursuit when the accident occurred. He did not see the actual accident because the stolen car had disappeared through a dust cloud.

Id. The court deemphasizes the officer's role during the pursuit by highlighting the short duration of the pursuit, the officer's assertion that he was just about to terminate the pursuit, and the distance between the officer's vehicle and the crash. Studies have indicated, however, that accidents are as likely to happen during pursuits of short duration as they are during pursuits of longer duration. See *supra* note 1.

82. See *e.g.*, *Roach v. City of Fredericktown*, 882 F.2d 294, 296 (8th Cir. 1989) (officer "did not intend for the pursuit to end by means of an accident with another vehicle"). One rhetorical device relates to characterization of the foreseeability of harm. Balkin, *supra* note 42, at 221-227. Under an individualist perspective, one would use concrete language to describe whether the defendant could have foreseen the specific harm and abstract language to describe whether the plaintiff could have foreseen the general harm. *Id.*

83. See, *e.g.*, *Jones v. Sherrill*, 827 F.2d 1102, 1107 (6th Cir. 1987) (whether the officers chose to pursue or not to pursue, they could have been exposed to a lawsuit for their actions or for their failure to act); see also *supra* note 69.

84. See, *e.g.*, *Easterling v. City of Glennville*, 694 F. Supp. 911 (S.D. Ga. 1986) (police officers may be liable for failing to terminate pursuit, even though the pursued driver was injured when he lost control of his car and hit a tree). The rhetorical device associated with this characterization relates to an individual's free will and options. See *supra* note 72. Under a communalist perspective, one would characterize the plaintiff's options narrowly and the defendant's options broadly. Balkin, *supra* note 42, at 233-46.

85. See, *e.g.*, *Easterling v. City of Glennville*, 694 F. Supp. at 922 ("officers may have been negligent and/or reckless in failing to break-off the chase and arrest [the driver] at a later time when it would have been safer for all concerned"). The rhetorical device associated with this characterization is the perspective on foreseeability of harm. See *supra* note 76. Under a communalist perspective, one would use abstract language to describe whether the defendant could have foreseen the general harm and

the court would find the accident was foreseeable by stressing the inherently dangerous nature of pursuits in general.⁸⁶ The opinion would characterize the police officers as using psychological force,⁸⁷ force that compels a pursued driver to continue his flight as his adrenalin increases and his judgment decreases.⁸⁸ The court would deemphasize the

concrete language to describe whether the plaintiff could have foreseen the specific harm. Balkin, *supra* note 42, at 221-27.

86. Some recent police pursuit policies indicate a communalist perspective when discussing the dangerousness of pursuits. *See, e.g.*, Butler County, Emergency Operation of Sheriff's Office Vehicles (Dec. 13, 1989) ("foremost thought in the officer's mind must always be SAFETY"; pursuit is *justified only when the necessity of immediate apprehension outweighs the level of danger created by the pursuit*) (emphasis in original). *See supra* note 68.

87. *See, e.g.*, *Checki v. Webb*, 785 F.2d 534, 538 (5th Cir. 1986) (psychological injury is actionable for fear arising from pursuit in an unmarked vehicle). In *Checki*, the Fifth Circuit Court of Appeals emphasized the police officers' inculpatory acts in determining that psychological force itself is actionable, even if the plaintiff receives no physical injury:

It cannot reasonably be argued that no serious physical danger confronts civilians who are forced to travel at speeds over 100 mph in their attempt to flee a terrorizing police officer. Furthermore, there is no valid reason for insisting on physical injury before a section 1983 claim can be stated in this context. A police officer who terrorizes a civilian by brandishing a cocked gun in front of that civilian's face may not cause *physical* injury, but he has certainly laid the building blocks for a section 1983 action against him. Similarly, where a police officer uses a police vehicle to terrorize a civilian, and he has done so with malicious abuse of official power shocking to the conscience, a court may conclude that the officers have crossed the constitutional line.

Id. (emphasis in original). The court uses a communalist perspective by comparing the use of a speeding vehicle to the use of a cocked gun. It implicitly emphasizes the foreseeability of psychological harm and explicitly emphasizes the foreseeability of physical harm, even though the plaintiff was never physically injured. The court thus determined that the officers' use of psychological force was actionable under the fourteenth amendment. *See also infra* notes 139-170 and accompanying text for a discussion of how police officers use psychological force during pursuits.

88. The rhetorical device associated with this characterization relates to an individual's free will and the options available to him. *See Balkin, supra* note 42, at 233-46. Under a communalist perspective, one would characterize the plaintiff's options narrowly and the defendant's options broadly. *Id.*

Pursuits also have a psychological effect upon some police officers. Barker, *Police Pursuit Driving: The Need for Policy*, 51 POLICE CHIEF 70, 72 (1984) (studies reveal that "bad judgment shootings occur more often in pursuit situations than in apprehension without pursuits"). Some officers may experience "pursuit fixation," which has been defined as "becoming so engrossed in the apprehension of a fleeing violator that the safety of others is forgotten or ignored." *Id.* at 70. This fixation compels officers to have a "'run them until they wreck' mentality." *Id.* One study has indicated that young male officers are more likely to conduct unnecessary and danger pursuits. *See Alpert & Dunham, supra* note 1, at 532, 537 ("aggressiveness of the younger male officers is a characteristic not conducive to efficient and safe pursuits"; chases initiated by female officers resulting in personal injury are 50% less likely to occur than chases initiated by male officers). The adrenalin they experience may explain their combative

pursued driver's refusal to stop by narrowing the time frame to focus on the harm as arising from the officers' decision to continue the pursuit.⁸⁹ It would also deemphasize the driver's ability to stop once the pursuit has begun.⁹⁰ In short, the communalist perspective focuses attention on the police officers' actions, but the individualist perspective focuses attention on the pursued driver's actions.

The shifting emphasis of the rhetorical device also is apparent when the situation involves only two parties, the pursued driver, who is injured, and the police officer.⁹¹ Although Professor Balkin has identified five distinct rhetorical devices⁹² for this situation, the application of

behavior. See *International Association of Chiefs of Police Conference Report*, 44 CRIM. L. REP. 2136 (1988) (a Maryland assistant attorney general stated that "[i]n far too many pursuits cases . . . the offense that precipitated the chase was 'contempt of cop' — that is, the officer's ego says, I won't let him outrun me"). See generally *Johnson v. Morris*, 453 N.W.2d 31, 33-34 (Minn. 1990) (police officers stopped a pursued farmer's pickup truck at 2:00 a.m. by surrounding it with police vehicles after having collided with it earlier; after farmer exited from truck, an officer unnecessarily shot the truck's tires and threatened to kill the farmer); *Wierstak v. Heffernan*, 789 F.2d 968, 971 (1st Cir. 1986) (after the pursuit ended, a police officer handcuffed the driver and "repeatedly [beat him] about his head, neck and shoulders with his revolver").

89. One police association has crafted guidelines for terminating pursuits that represent a communalist perspective. See NATIONAL ASSOCIATION OF CHIEFS OF POLICE MODEL POLICY: VEHICULAR PURSUIT (1989). The guidelines generally provide that "[a] decision to terminate pursuit may be the most rational means of preserving the lives and property of both the public, and the officers and suspects engaged in a pursuit." *Id.*

One rhetorical device is to characterize the applicable time frame either narrowly or broadly, depending upon whether the events are inculpatory or exculpatory. Balkin, *supra* note 42, at 228-33. Under a communalist perspective, one would broadly characterize time to include inculpatory events related to the defendant and exculpatory events related to the plaintiff; one would also narrowly characterize time to include exculpatory events related to the defendant and inculpatory events related to the plaintiff. *Id.*

90. The rhetorical device associated with this characterization relates to an individual's free will and options. See *supra* note 69.

91. See Balkin, *supra* note 42, at 202-46. The rhetorical devices discussed above apply to any factual characterization, whether the disputed event involves two or three individuals. *Id.* at 246.

92. The following are some of the rhetorical devices Professor Balkin has identified: 1) factual characterization emphasizing or deemphasizing responsibility, 2) factual characterization broadly or narrowly describing causal probability, 3) abstract or concrete descriptions of foreseeability of harm to the plaintiff, 4) narrow or broad time frames of fact relating to inculpatory or exculpatory facts, and 5) broad or narrow characterization of free will. *Id.* at 202-46.

The first device is factual characterization. A court with a communalist perspective would emphasize the facts that implicate the police officers in the harm arising from a pursuit and deemphasize the facts that focus on the pursued driver's responsibility. See *supra* notes 84-90, 96-97 and accompanying text. In the context of a pursuit, this rhetorical device is important in characterizing who causes a pursuit to occur.

these devices is similar to the three-party situation.⁹³

The individualist perspective would detail how the driver is implicated in the harm he incurred, but the communalistic perspective would emphasize the police officers' actions.⁹⁴ The individualist perspective would emphasize the driver's culpable conduct of fleeing from the officers, the driver's option⁹⁵ of stopping either at the time the police officers signalled or after the pursuit began, and the link between the act of fleeing and the harm. It would deemphasize the police officers' decision to pursue and any control the officers have over the pursued. The communalist perspective, however, would emphasize that police officers used psychological force during a pursuit, that this force is linked to the harm that the pursued driver incurred, and that bodily injury is a foreseeable event. The communalist perspective thus deemphasizes the driver's culpable conduct in order to view more broadly the police officers' role during a pursuit. The need to scrutinize police pursuits is apparent when considering three aspects of pursuits: (1) the potential harm present during pursuits,⁹⁶ (2) the reason that police officers generally pursue, and (3) the availability of other means either to apprehend individuals or to stop the need for pursuits.⁹⁷

93. See Balkin, *supra* note 42, at 202-46.

94. See *id.*

95. An individualist perspective broadly characterizes the pursued driver's options and narrowly describes the police officers options. See, e.g., *Jones v. Sherrill*, 827 F.2d 1102, 1107 (6th Cir. 1987). In *Jones*, the Sixth Circuit Court of Appeals used an individualist perspective to describe the alternatives available to the pursued driver and officers:

The officers made a choice to protect the public safety by attempting to apprehend an obviously dangerous driver. Although the pursuit ended tragically, the officers may have averted equal or greater tragedy by halting [the driver] when they did rather than allowing him to continue driving. Indeed, had the officers not pursued [the driver] and had his unimpeded progress resulted in a fatal accident, as it well could have, the officers might be facing a different section 1983 claim based on their failure to act

Id. The court thus narrowly defined the officers' options by determining that they may have a duty to pursue. The Supreme Court, however, has recently held that state officials have no duty to protect individuals against harm from third parties. *DeShaney v. Winnebago County Dept. Social Servs.*, 489 U.S. 189, 196-97 (1989). See *infra* notes 185-204 and accompanying text for a discussion of this case.

96. Foreseeability of harm, however, is subject to either a communalist perspective or an individualist perspective: an individualist perspective questions whether the specific harm was foreseeable and a communalist perspective questions whether harm was foreseeable. See *supra* note 69. Because the Supreme Court has broadly protected an individual's interest in personal security, a communalist perspective on this aspect of pursuits seems appropriate. See *infra* notes 224-353 and accompanying text for a discussion of the Supreme Court's protection of the right to personal security.

97. A discussion of the availability of other means signifies the use of a rhetorical device that furthers a communalist perspective. See *supra* note 68. To focus on the options available to police officers is to deemphasize the options available to the pursued driver. The Supreme Court has frequently scrutinized the means that police of-

All pursuits represent an event in which someone may either be seriously injured or killed.⁹⁸ The injured is not necessarily the individual who is fleeing from the officers' assertion of authority. The pursued driver may have passengers who have not consented to the placing of their lives in danger.⁹⁹ In addition, pursuits also may result in other drivers, their passengers, or pedestrians being injured or killed. Under an individualist perspective, captive passengers, other drivers, and pedestrians need to take actions to protect themselves from the harm arising from the pursuits. Crowded roads and sidewalks, however, as well as other circumstances, may not permit some of these individuals an avenue of escape from the harm. Under a communalist perspective, one may see that the police officers' conduct is at least implicated in the harm created by the pursuit. To find, as some individualist courts have done, that police officers do not use force during a pursuit is to allow all pursuits to evade scrutiny.¹⁰⁰

The need for scrutiny is even more obvious when considering the typical reason that police officers conduct pursuits. The most common reason police officers pursue is to apprehend an individual who has committed a traffic offense.¹⁰¹ Even though some traffic offenses, such as speeding, may at first appear to warrant police intervention to stop the danger presented to others, police intervention can increase rather than lessen the danger.¹⁰² In addition, police officers have pursued indi-

ficers have used when these means threaten to infringe an individual's interest in personal security. *See infra* note 235 and accompanying text.

98. *See supra* note 1 and accompanying text for a discussion of the serious risks associated with police pursuits.

99. Some courts have failed to see how police officers are implicated in the harm that a passenger incurs when the pursued driver's car crashes. *See, e.g., Veach v. Cross*, 532 N.E.2d 1069, 1074 (Ill. App. Ct. 1988). In *Veach*, the state court characterized the passenger as a person over whom the police officers had no control; any injury that she incurred came as a result of the pursued driver. *Id.* at 1073. Under state law, the court declared, the police officers have no duty to protect individuals from private violence, as demonstrated by the pursued driver's act of fleeing. *Id.* Although the court's interpretation of state law is correct, the court fails to characterize the facts in a manner that reveals how police officers are implicated in the harm. Police officers increase the risk of harm by using psychological force during pursuits. *See infra* notes 139-76 for a discussion of the use of psychological force during pursuits.

100. *See infra* note 160 and accompanying text.

101. *See supra* note 2.

102. *See infra* notes 139-76 and accompanying text for a discussion of the use of psychological force during pursuits.

Some pursuit policies allow police officers to pursue drivers who appear to be intoxicated. *See, e.g.,* Metropolitan Police, Boston, Mass., General Order 4.4.4, §§ 2.10, 3.0 (July 16, 1990) ("operating under the influence of drugs or alcohol" is a "life-threatening offense" justifying a pursuit). *See generally* Metropolitan Police, Boston, Mass., Statistical Summary on Pursuits 5 (Aug. 9, 1989) (54% of drivers pursued in Boston from April 1, 1989 through June 30, 1989 were charged with operating under the influence of alcohol). Although drivers who are intoxicated do present a danger to

viduals who have violated a safety law, such as failing to wear a helmet¹⁰³ or failing to turn on headlights.¹⁰⁴ By pursuing the individual not wearing the required helmet, police officers increase the risk of harm present to the driver and thus thwart the purpose of the safety law. Similarly, by pursuing the individual driving without headlights, police officers increase the risk of harm present to others on the road and pedestrians.

Other means are available to apprehend drivers. Police officers may maintain an effective pursuit of a driver by using a helicopter or small airplane.¹⁰⁵ These means allow for constant surveillance without the risk of harm to the driver, police officers, and others in the driver's path. Sometimes spike belts¹⁰⁶ may be a means of stopping an individual. When the pursued driver travels over a spike belt that police officers have laid in his path, the punctured tires of the pursued vehicle gradually lose air and compel the driver to stop.¹⁰⁷ In addition, legislatures could create a rebuttable inference that the owner of a pursued vehicle was the driver of the vehicle.¹⁰⁸ When they know the identity of

others, pursuing someone believed to have impaired physical skills and judgment increases the danger presented by the impaired driver. See Volusia County, Florida Departmental Standards Directive § 41.2.2 (Feb. 15, 1990) (pursuing an impaired driver "compounds the danger to the public"). Better means are available to stop drunk drivers. See, e.g., Michigan Dept. of State Police v. Sitz, 110 S. Ct. 2481, 2483-84 (1990) (sobriety checkpoints for stopping motorists do not violate the fourth amendment); see *id.* at 2496 (Stevens, J., dissenting) (purpose of sobriety checkpoint was not to be an effective means of apprehending intoxicated drivers but to deter people from driving after drinking).

103. See *Webbs v. Hyans*, No. 88-3180 (6th Cir. Feb. 7, 1989) (WESTLAW, Federal library, Court of Appeals file).

104. *Tagstrom v. Pottebaum*, 668 F. Supp. 1269, 1271 (N.D. Iowa 1987), *appeal denied sub nom.* *Tagstrom v. Enockson*, 845 F.2d 1027 (8th Cir. 1988), *rev'd in part*, 857 F.2d 502 (8th Cir. 1988).

105. See, e.g., A. STONE & S. DELUCA, *POLICE ADMINISTRATION: AN INTRODUCTION* 415 (1985). Air surveillance reduces the risk of injury to the driver, police officers, other motorists, and pedestrians. Because the pursued driver frequently will not know that he is being pursued, he will "slow down as soon as the pursuing patrol car is out of sight." *Id.* Air surveillance also increases the likelihood of apprehension because officers can prepare to intercept the driver. *Id.*

106. See Markell, *Spike Belts: A Suitable Alternate to High Speed Pursuits?* 389 INT'L CRIM. POLICE REV. 161, 162 (1985). A spike belt consists of "two or more rows of hollow spikes inserted in a four-ply, woven rubber belting with segmented metal backing. The spikes are case hardened, the tips of which are ground to a fifteen degree angle and then teflon coated to allow easier penetration." *Id.*

107. *Id.* Police officers successfully used the belts in the Province of Alberta. *Id.*

108. This policy has been proposed by civil rights advocate Jerry LaCross, whose daughter was a bystander killed as a result of a pursued driver's vehicle crashing into her, a death witnessed by the victim's mother. J. LaCross, Remarks at Conference on Police Pursuits: New Horizons in Law Enforcement Driver Training (July 17, 1990). Some police officers, however, have conducted pursuits even when they know who the offender is and that he has not committed a serious offense. See, e.g., *Richardson v.*

the violator, police officers may use other means to arrest the individual. Similarly, states could adopt programs that educate young drivers, who are frequently the individuals fleeing from police,¹⁰⁹ about the extreme dangers associated with police pursuits.

One should adopt a communalist perspective in analyzing the constitutional issues arising from pursuits by recognizing the danger that all pursuits entail and the needless harm that often occurs as a result of pursuits. A communalist perspective allows courts to focus attention on the conduct of police officers during pursuits. This communalist perspective is particularly appropriate in the pursuit context because the Supreme Court has implicitly adopted this viewpoint when analyzing the scope of the right to personal security under the fourth¹¹⁰ and fourteenth amendments.¹¹¹

III. THE USE OF PHYSICAL OR PSYCHOLOGICAL FORCE DURING PURSUITS CAN CAUSE INJURIES

When individuals seek recovery for the harm caused as a result of a pursuit, the essence of their claim is that the police officers used disproportionate force in violation of the fourth¹¹² or fourteenth amendment.¹¹³ Determining whether force is disproportionate is both similar

City of Indianapolis, 658 F.2d 494, 499 (7th Cir. 1981), *cert. denied*, 455 U.S. 945 (1982); *Reed v. County of Allegan*, 688 F. Supp. 1239, 1243 n.4 (W. D. Mich. 1988).

109. *See, e.g.*, H. NUGENT, E. CONNORS, J. McEWEN & L. MAYO, *supra* note 75, at 17 (almost 60% of pursued drivers were between the ages of 18 and 25; 96% were males); Beckman, *supra* note 75, at 60 (82% of suspects were between the ages of 11 and 30; 96% were males). Some pursuit policies, recognizing that young drivers are often the ones attempting to flee, have adopted a restrictive pursuit policy. *See* Volusia County, Florida Departmental Standards Directive § 41.2.2 (Feb. 15, 1990) ("many persons who flee from law enforcement officers while operating motor vehicles are youthful and do so because of drivers license violations and other non-violent crimes").

110. *See infra* notes 214-93 and accompanying text for a discussion of the Supreme Court's broad protection of the right to personal security under the fourth amendment.

111. *See infra* notes 294-353 and accompanying text for a discussion of the Supreme Court's broad protection of the right to personal security under the fourteenth amendment.

112. *See, e.g.*, *Sutherland v. Holcombe*, No. 89-1708 (4th Cir. Nov. 17, 1989); *Patterson v. City of Joplin*, 878 F.2d 262, 263 (8th Cir. 1989); *Galas v. McKee*, 801 F.2d 200, 203 (6th Cir. 1986); *Wright v. District of Columbia*, No. 87-2157 (D.D.C. June 21, 1990) (order granting partial summary judgment); *Reed v. County of Allegan*, 688 F. Supp. 1239, 1241-43 (W.D. Mich. 1988); *Johnson v. Morris*, 453 N.W.2d 31, 36 (Minn. 1990).

113. *See, e.g.*, *Sutherland v. Holcombe*, No. 89-1708 (4th Cir. Nov. 17, 1989), *cert. denied*, 110 S. Ct. 1949 (1990); *Roach v. City of Fredericktown*, 882 F.2d 294, 296-97 (8th Cir. 1989); *Jones v. Sherrill*, 827 F.2d 1102, 1106-07 (6th Cir. 1987); *Brower v. County of Inyo*, 817 F.2d 540, 543-44 (9th Cir. 1987), *rev'd on other grounds*, 489 U.S. 593, 599 (1989); *Britt v. Little Rock Police Dept.*, 721 F. Supp.

to and different from the task of resolving the typical fourth or fourteenth amendment excessive force claim. The typical fourth amendment claim includes allegations that officers unnecessarily used their weapons¹¹⁴ or physical force¹¹⁵ in arresting an individual. The typical fourteenth amendment claim includes allegations that officers used disproportionate force during pretrial detention.¹¹⁶ A pursuit claim is different from these excessive force claims because some courts have ques-

189, 192-95 (E.D. Ark. 1989); *Easterling v. City of Glennville*, 694 F. Supp. 911, 920-22 (S.D. Ga. 1986).

114. See, e.g., *Tennessee v. Garner*, 471 U.S. 1, 3-7 (1985) (gun used to kill fleeing felon); *Landol-Rivera v. Cruz Cosme*, 906 F.2d 791, 796 (1st Cir. 1990) (officer who shot at hostage in escaping vehicle was negligent); *Fargo v. City of San Juan Bautista*, 857 F.2d 638, 639, 643 (9th Cir. 1988) (officer was grossly negligent when his gun accidentally discharged); *Dodd v. City of Norwich*, 827 F.2d 1, 8 (2d Cir. 1987), *cert. denied*, 484 U.S. 1007 (1988) (officer was not negligent when his gun accidentally discharged); *Gilmere v. City of Atlanta*, 774 F.2d 1495, 1501 (11th Cir. 1985) (en banc) (shooting was unreasonable because officer could not have reasonably thought his life was in danger); *Leber v. Smith*, 773 F.2d 101, 104-05 (6th Cir. 1985), *cert. denied*, 475 U.S. 1084 (1986) (officer was not negligent when his gun accidentally discharged as he slipped on ice); *Jenkins v. Averett*, 424 F.2d 1228, 1232-34 (4th Cir. 1970) (accidental shooting constituted reckless conduct).

115. See, e.g., *Graham v. Connor*, 109 S. Ct. 1865, 1867-71 (1989) (physical force during an investigatory stop); *Brower v. County of Inyo*, 489 U.S. at 599 (physical force by establishing a roadblock); *Johnson v. Morel*, 876 F.2d 477, 478-80 (5th Cir. 1989) (physical force during an arrest); *Lester v. City of Chicago*, 830 F.2d 706, 714 (7th Cir. 1987) (physical force during arrest).

116. See, e.g., *Simpson v. Hines*, 903 F.2d 400, 401-02 (5th Cir. 1990) (facts surrounding struggle between detainee and law enforcement officers in dispute; officers claimed that they acted in self-defense); *White v. Roper*, 901 F.2d 1501, 1507 (9th Cir. 1990); *Titran v. Ackman*, 893 F.2d 145, 147 (7th Cir. 1990) (force occurred at jail after the detainee was booked); *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973), *cert. denied*, 414 U.S. 1033 (1973).

The United States Supreme Court has stated that the fourteenth amendment protects the right to personal security for pretrial detainees; it has not, however, determined "whether the [f]ourth amendment continues to provide individuals with protection against the deliberate use of excessive physical force beyond the point at which arrest ends and pretrial detention begins." *Graham*, 109 S. Ct. at 1871 n.10. Lower courts appear to be extending the reach of the fourth amendment beyond the point of actual arrest. See, e.g., *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); *Hammer v. Gross*, 884 F.2d 1200, 1204 (9th Cir. 1989) (force used in administering a blood test at the hospital after the plaintiff was arrested); *Spell v. McDaniel*, 824 F.2d 1380, 1384 n.3 (4th Cir. 1987) (force used in "effecting and maintaining" arrest), *cert. denied sub nom. City of Fayetteville v. Spell*, 484 U.S. 1027 (1988); *Robins v. Harum*, 773 F.2d 1004, 1010 (9th Cir. 1985) (force used while an arrestee was "in the custody of the arresting officers"). One writer has proposed the following bright-line rule: "In warrantless arrests, the rule would define the end of a seizure as the first appearance of the suspect before a judicial officer for a probable cause hearing[;] [i]n warrant arrests, the end of a seizure would be the first appearance before a judicial officer." Note, *Excessive Force and the Fourth Amendment: When Does Seizure End?*, 58 *FORDHAM L. REV.* 823, 824 (1990).

tioned whether police officers use force during a pursuit,¹¹⁷ and if they do, whether the officers, rather than the pursued driver, caused the alleged injuries.¹¹⁸ In the typical excessive force case, the parties do not dispute that police officers used force¹¹⁹ and only sometimes do they dispute whether the force used caused a particular injury.¹²⁰ Instead, the focus of an excessive force claim is whether the circumstances justified the degree of force used by the officers.¹²¹ In this respect, pursuit claims and excessive force claims are similar. Both question whether officers used disproportionate force.

Whether pursuits violate the disproportionality standards of the fourth and fourteenth amendments thus requires consideration of three related issues: whether police officers used force during a pursuit;¹²² if so, whether this force caused a particular injury;¹²³ and if so, whether the circumstances justified the degree of force applied.¹²⁴ An examination of these specific issues, however, should include an understanding of how policy implicitly affects resolution of these issues. An analysis of these issues reveals that most pursuits constitute the use of disproportionate force.

117. See *infra* notes 125-70 and accompanying text for a discussion of the use of force during pursuits.

118. See *infra* notes 171-206 and accompanying text for a discussion of the causation issue in police pursuits.

119. When police officers shoot during an arrest, the use of force is not disputed. See *supra* note 114 (collecting cases in which plaintiff challenged the reasonableness of using deadly force during an arrest). When suspect and police officers engage in physical combat, the plaintiff typically alleges that the force used was unreasonable. See *supra* note 114. Officers often assert that the force used was necessary either to control the suspect or to protect themselves from the suspect. See, e.g., *Graham v. Connor*, 109 S. Ct. 1865, 1869 (1989) (officer claimed that physical force was necessary to control the suspect); *Brower v. County of Inyo*, 489 U.S. 593, 598 (1989) (officers claimed that roadblock was necessary to apprehend fleeing driver); *Tennessee v. Garner*, 471 U.S. 1, 4 (1985) (officer claimed that shooting was necessary to apprehend fleeing burglar suspect); *Gilmere v. City of Atlanta*, 774 F.2d 1495, 1501 (11th Cir. 1985) (en banc) (officer claimed shooting was in self-defense), *cert. denied*, 476 U.S. 1115 (1986), *cert. denied sub nom.* *Sampson v. Gilmore*, 476 U.S. 1124 (1986).

120. In a case where more than one police officer shoots at the plaintiff, there may be a question of which officer's bullet caused the plaintiff's injury. See, e.g., *Kibbe v. Springfield*, 777 F.2d 801, 802-03 (1st Cir. 1985), *cert. dismissed*, 480 U.S. 257 (1987) (ten officers involved in three shootings).

121. See *infra* notes 214-353 and accompanying text for a discussion of how the fourth and fourteenth amendments prohibit the use of disproportionate force.

122. See *supra* notes 112-70 and accompanying text for discussion of the force police officers use during pursuits.

123. See *infra* notes 171-204 and accompanying text for a discussion of how the force police officers use during pursuits may cause harm to the pursued driver, his passengers, other motorists, and pedestrians.

124. See *infra* notes 214-353 and accompanying text for a discussion of the disproportionality standards of the fourth and fourteenth amendments as applied to pursuits.

A. The Act of Pursuing Constitutes the Potential Use of Deadly Force

During a pursuit, police officers may use two different types of force, physical force and psychological force. Physical force is apparent when police officers use their cruisers to collide with an individual's vehicle. In this situation, the use of force is obvious because the collision produces a visible mark of force, whether it is a dent or a totalled car.¹²⁶ When the cruisers do not actually touch the individual's vehicle,¹²⁶ then they may have used psychological force, force that causes an individual to continue to flee even though there is a substantial risk of harm to himself and others.¹²⁷ An examination of these two types of force indicates that some pursuits involve the use of physical force and that all pursuits involve the use of psychological force.

1. Use of Physical Force

Officers may use physical force during a pursuit in two ways. First,

125. See, e.g., *Kuhar v. Hanton* No. 86-4110 (6th Cir. Jan. 8, 1988) (table published 836 F.2d 1348) (police officers' cruiser collided with motorcyclist); *Benskin v. Addison Township*, 635 F. Supp. 1014, 1019 (N.D. Ill. 1986) (police officers acted maliciously in causing a direct collision, which resulted in severe injuries). Even when the use of physical force is obvious, what caused an injury may nevertheless be disputed. See, e.g., *City of Miami v. Harris*, 490 So. 2d 69 (Fla. Dist. Ct. App. 1985), cert. denied, 479 U.S. 1031 (1987) (police officers "rammed the fleeing suspect's car, locked fenders with it, and forced it off the road into a bus bench [killing a bystander]").

Using a vehicle to stop a fleeing suspect is similar to using a roadblock to stop his flight. Recently the United States Supreme Court recognized that police officers use physical force when they set up a roadblock to stop a fleeing suspect. *Brower v. County of Inyo*, 489 U.S. 593, 598-99 (1989). Other courts have similarly recognized that a roadblock constitutes the use of force. See, e.g., *Jamieson v. Shaw*, 772 F.2d 1205, 1207 (5th Cir. 1985) (passenger was severely injured as driver crashed into roadblock); *Reed v. County of Allegan*, 688 F. Supp. 1239, 1240, 1245 (W. D. Mich. 1988) (crash into roadblock resulted in suspect becoming a quadriplegic); *City of Amarillo v. Langley*, 651 S.W.2d 906, 911 (Tex. Ct. App. 1983) (suspects were seriously injured when their motorcycle crashed into roadblock; second motorcyclist who swerved around roadblock was seriously injured when he collided with a parked car).

126. See, e.g., *Sutherland v. Holcombe*, No. 89-1708 (4th Cir. Nov. 17, 1989) (pursued driver and passenger killed when driver hit a bump and flew through the air, crashing into a utility pole); *Roach v. City of Fredericktown*, 882 F.2d 294, 295 (8th Cir. 1989) (pursued driver died and passengers were seriously injured when pursued driver lost control of vehicle and crashed into oncoming motorist); *Patterson v. City of Joplin*, 878 F.2d 262, 262 (8th Cir. 1989) (per curiam) (motorcyclist and passenger killed when motorcyclist lost control); *Jones v. Sherrill*, 827 F.2d 1102, 1104 (6th Cir. 1987) (motorist was killed when pursued's vehicle crossed center line and crashed into his vehicle); *Easterling v. City of Glennville*, 694 F. Supp. 911, 914 (S.D. Ga. 1986) (pursued driver lost control of vehicle and crashed into tree).

127. See *infra* notes 139-70 and accompanying text for a discussion of the use of psychological force during police pursuits.

they may intentionally use their cruiser to crash into the individual's vehicle.¹²⁸ This situation implicates the fourth amendment because the officers' conduct does not signify mere negligence.¹²⁹ By intentionally using a cruiser to stop a fleeing individual, the officers have used force that is potentially deadly.¹³⁰ The use of a cruiser in this manner is like

128. See *supra* note 125 and accompanying text.

129. In defining what constitutes a fourth amendment "seizure," the United States Supreme Court recently stated that to effectuate a "seizure" police officers must have "intentionally applied" the means that caused an individual to stop. *Brower v. County of Inyo*, 489 U.S. 593, 597 (1989). The Court explained that the question of intent relates to the means that the officers have applied, not a subjective desire to cause a particular result. *Id.* at 598. Under the fourth amendment, the question of "intent" only relates to the question of whether officers "seized" an individual. See *infra* notes 367-459 and accompanying text for a discussion of what constitutes a fourth amendment "seizure." Intent is not relevant to determining whether the force used was disproportionate under the fourth amendment. See, e.g., *Graham v. Connor*, 109 S. Ct. 1865, 1873 (1989) ("fourth amendment inquiry is one of 'objective reasonableness' under the circumstances, and subjective concepts like 'malice' and 'sadism' have no proper place in that inquiry"); *Lester v. City of Chicago*, 830 F.2d 706, 712 (7th Cir. 1987) ("fourth amendment standard calls for objective analysis without regard to the officer's underlying intent or motivation.").

Some courts have failed to distinguish negligent conduct from reckless or intentional actions. See, e.g., *Cannon v. Taylor*, 782 F.2d 947 (11th Cir. 1986). In *Cannon*, a police officer, traveling 15 miles per hour in excess of the speed limit, killed another driver when he crashed at an intersection. *Id.* at 948. Even though the officer was driving an unmarked car and he failed to use his siren, the Eleventh Circuit Court of Appeals stated that officer was only negligent. *Id.* at 949. The officer, however, had been charged with vehicular homicide. *Id.* at 951. By characterizing the conduct as negligence, the federal court was able to dismiss the action and send the plaintiff to state court to seek recovery. The court stated, "Automobile negligence actions are grist for the state law mill. But they do not rise to the level of a constitutional deprivation." *Id.* at 950. Such characterization, however, is another example of how courts have narrowed the protection available under section 1983 by restrictively interpreting the underlying constitutional rights. See, e.g., Wells, *The Impact of Substantive Interests on the Law of Federal Courts*, 30 WM. & MARY L. REV. 499, 502-03 (1989). Professor Wells states: "Although the Court invokes the conventional tools of judicial decision making, . . . the results reflect a strong tendency to subordinate each . . . of these considerations in favor of promoting the substantive interests of one side or the other in the litigation on the merits." *Id.*

130. See, e.g., Alpert, *Questioning Police Pursuits in Urban Areas*, 15 J. POLICE SCI. & ADMIN. 298, 299 (1987) (car is a "potentially dangerous weapon"). If police officers' use of a vehicle to pursue a suspect constitutes a potentially deadly force, then one must question whether the fleeing suspect similarly uses potentially deadly force when he flees. Justice O'Connor, during oral argument in *Brower v. County of Inyo*, 489 U.S. 593 (1989), questioned whether the person fleeing was "armed with a deadly weapon in the form of a vehicle." 57 U.S.L.W. 3531, 3532 (Feb. 21, 1989). During a pursuit, both police officers and a fleeing driver are "armed" with a deadly weapon, the speeding vehicle. See, e.g., *Kuhar v. Hanton*, No. 86-4110 (6th Cir. Jan. 8, 1989) (Wellford, J., concurring) (when motorcyclist traveled at high speed, he was "armed" with a deadly weapon). By terminating a pursuit, officer, however, may "disarm" both themselves and the driver because neither the pursued nor the pursuer will continue to speed. See *infra* note 147 and accompanying text for a discussion of how termination of

a shot fired from a gun: sometimes the individual may die as a result of the officers' using deadly force and sometimes he is only injured. Regardless of the injuries, the collision involves the use of potentially deadly force.¹³¹

Although the United States Supreme Court has never detailed what constitutes the use of deadly force, it has implied that "the [f]ourth [a]mendment constrains the use of any police practice that is potentially lethal, no matter how remote the risk."¹³² A pursuit is potentially lethal. Studies document the high risk of physical harm associated with pursuits.¹³³ As one scholar has stated, a pursuit is often as "senseless as shooting at a fugitive on a crowded sidewalk."¹³⁴ Another scholar has similarly emphasized that reckless driving which causes a person to die should constitute "vehicular murder."¹³⁵ Not all pursuits, however, result in accidents.¹³⁶ Police officers may also use physical force when they stop an individual by surrounding him.¹³⁷ This type of physical force is sometimes referred to as a "moving roadblock."¹³⁸ As

a pursuit causes the fleeing driver to reduce his speed.

131. See *supra* note 2 for a discussion of the risks associated with police pursuits.

132. *Tennessee v. Garner*, 471 U.S. 1, 31, 32 (1985) (O'Connor, J., dissenting) (under the majority's standard the fourth amendment would require review of "potentially lethal weapons ranging from guns to knives to baseball bats to rope").

133. See *supra* note 2.

134. A. STONE & S. DELUCA, *POLICE ADMINISTRATION: AN INTRODUCTION* 416 (1985).

135. Luria, *Death on the Highway: Reckless Driving as Murder*, 67 OR. L. REV. 799, 835-36 (1988).

136. An accident, however, may not be the best means of determining whether a pursuit was justified because unjustified pursuits do not always conclude with an accident. See Alpert, *Questioning Police Pursuits in Urban Areas*, 15 J. POLICE SCI. & ADMIN. 298, 303 (1987).

137. See, e.g., *Johnson v. Morris*, 453 N.W.2d 31, 33-34 (Minn. 1990) (officers "boxed in" the pursued driver with their cruisers and stopped him). In this situation, the force used by the officers would not produce a physical injury but may produce a psychological injury. See *generally id.* at 37 n.10 (psychological injury is actionable if officers use an "egregious" amount of force). For example, if cruisers surrounded an individual's car without justification and gradually caused him to stop, the individual may have suffered a psychological injury. The officers would have restricted the individual's freedom of movement and violated his right to personal security. See *generally* *Wright v. District of Columbia*, No. 87-2157 (D.D.C. June 21, 1990) (order granting partial summary judgment) (driver incurred actionable psychological harm because police officers chased her without justification in an unmarked vehicle); *Wisniewski v. Kennard*, 901 F.2d 1276 (5th Cir. 1990) (Goldberg, J., dissenting) (extensive discussion of psychological injuries), *cert. denied*, 111 S. Ct. 301 (1990).

138. See, e.g., U.S. DEPT. OF JUSTICE, *RESTRICTIVE POLICIES FOR HIGH-SPEED POLICE PURSUITS*, 28 (1989) (pursuit policy of Nassau County, New York, defines moving roadblocks as the presence of "two or more department cars in front of [a] pursued vehicle[, which] . . . gradually slow down by allowing no outlet"). Nassau County states that rolling roadblocks are "most effective on limited access highways." *Id.* Police departments disagree as to whether police officers should stop individuals by

more and more police officers encompass the individual's vehicle, the police officers use the physical presence of their cruisers to stop the individual.

2. Use of Psychological Force

Officers also use psychological force during pursuits.¹³⁹ The Su-

boxing them in. *Compare id.* at 29-30 (policy of Phoenix, Arizona, prohibits boxing-in unless the procedure is applied to an "unaware suspect [in order] to avoid pursuit") with *id.* at 31-32 (policy of St. Petersburg, Florida, boxing-in is permissible "only if officer reasonably believes there is substantial risk that violator will cause death or serious physical injury to others if apprehension is delayed").

139. No courts or criminal justice scholars have ever used the term "psychological force" in discussing police pursuits. I have used this phrase to describe the psychological compulsion that police officers exert when they decide to pursue an individual.

The nature of the interaction between the pursuing police officers and the individual reveals that most pursued drivers respond to the psychological force officers present during pursuits. This force is apparent by examining how pursued drivers respond during pursuits and how they respond when police officers terminate pursuits. *See infra* notes 143-46 and accompanying text. When police officers pursue, the pursued driver's speed can be in part measured by the speed of the police officers. *See infra* notes 152-53 and accompanying text. As police officers increase their speed in order to apprehend the driver, the pursued driver increases his speed in order to flee. *See id.* The pursuit also communicates to the pursued driver that the officers will continue the pursuit until the driver stops. This message implicitly compels the driver to continue his flight: by stopping, the pursued driver will probably be charged with speeding, fleeing from an officer, and other offenses; by fleeing, he may escape from being charged with any offense. Once the driver initially refuses to stop and begins his flight, he has little incentive to stop because that initial act of fleeing is the basis for most of the offenses with which the officers will charge him.

Recently one court implicitly questioned whether psychological force was present during a police pursuit. *See Brower v. County of Inyo*, 884 F.2d 1316, 1318 n.1 (9th Cir. 1989). In *Brower*, the Ninth Circuit Court of Appeals, on remand, questioned whether police officers should be allowed to use the danger present in a pursuit as a reason for justifying a pursuit. *Id.* By raising this issue, the court may be recognizing that police officers implicitly create the danger of a pursuit when they decide to pursue.

In other areas, the United States Supreme Court has recognized the use of psychological force by police officers. In determining whether an individual was "seized" within the meaning of the fourth amendment, the Court has considered whether officers stopped an individual by a "show of authority." *See infra* notes 140-70 and accompanying text for a discussion of the use of psychological force during a "seizure." The Court has also recognized that psychological compulsion can invalidate a criminal suspect's confession. *See, e.g., Miranda v. Arizona*, 384 U.S. 436, 467 (1966) (Court designed the *Miranda* warnings as a means to dispel psychological pressure inherent when police officers interrogate an individual in custody); *Watts v. Indiana*, 338 U.S. 49, 53 (1949) (confession is invalid if the product of "sustained pressure" by police, whether that pressure was physical or mental). The Court has also noted that police officers can structure a lineup of suspects in a manner that is psychologically suggestive: the structure of the lineup suggests to the observer which individual to select or it may compel the individual to confess. *See, e.g., Miranda v. Arizona*, 384 U.S. at 453 (Court recognized coercive nature of a "'reverse line-up,' in which the suspect is placed in a line-up, deliberately charged by 'fictitious witnesses' of having committed

preme Court recognized this type of force in *Terry v. Ohio*,¹⁴⁰ in which it discerned that police officers' "show of authority" may cause an individual to stop.¹⁴¹ The focus of this definition was whether officers used psychological force that compelled an individual to stop.¹⁴² In the pursuit context, however, the same actions not only communicate a command to stop, but also that the police will continue to pursue until the individual stops. Courts, however, have not analyzed the psychological effect that police officers have on an individual during a pursuit. An examination of the dynamics of a pursuit reveals the presence of psychological force during all pursuits.

Pursuit experts agree that police officers, when deciding to pursue an individual, exert psychological force, a force that often compels an individual to continue his flight until he crashes or the police officers abandon the pursuit.¹⁴³ Expert Van Blaricom states that this psychological force is similar to the psychological force police officers may sometimes mistakenly apply when responding to domestic violence problems or hostage crises.¹⁴⁴ In all these situations, the use of psychological force can exacerbate the problem confronting police officers.¹⁴⁵ The inappropriate use of psychological force can cause an individual to endanger his life, the lives of others, and the lives of police officers. Although intervention by law enforcement officials is needed, police officers should anticipate the response that psychological force can produce.¹⁴⁶

Van Blaricom maintains that if police officers decide to abandon the pursuit, then the individual will either go home or park his car in an attempt to evade detection by other police officers.¹⁴⁷ In both situations, the potential harm arising from the pursuit is under the control of the police officers. By abandoning the pursuit, the psychological

offenses for the purpose of making him confess "to the offense under investigation"); *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977) (reliability is the "linchpin" in determining whether an identification procedure violates the due process clause of the fourteenth amendment).

140. 392 U.S. 1 (1968).

141. 392 U.S. at 19 n.16 (1968) (a "seizure" occurs when police officers "by means of physical force or show of authority . . . in some way restrain[] the liberty of a citizen"). See *infra* notes 362-380 and accompanying text for a discussion of this "seizure" definition.

142. See *infra* notes 372-79, 385-97 and accompanying text for a discussion of psychological force during a "seizure."

143. Interview with D.P. Van Blaricom, Police Expert (July 1989); telephone interview with Professor Geoffrey P. Alpert, Sociologist and Criminal Justice Scholar (June 1, 1990).

144. Interview with D.P. Van Blaricom, Police Expert (July 1989).

145. *Id.*

146. *Id.*

147. *Id.*

force compelling the driver to continue the pursuit ceases.¹⁴⁸

Similarly, criminal justice scholars have recognized that once police officers decide to pursue an individual, there is no reason for the individual to stop.¹⁴⁹ The individual, who initially responded by fleeing from officers, probably has committed the offenses of fleeing from an officer, speeding, and reckless driving.¹⁵⁰ To continue the pursuit thus poses no increased criminal or traffic penalty for the individual because he has already committed the offenses. In those states that have increased the penalty for fleeing from an officer, the pursued driver has even less incentive to stop the pursuit after it has begun.¹⁵¹ Escape thus may appear to afford freedom from these penalties, but at the risk of bodily harm to himself and others.

Professor Geoffrey Alpert also has affirmed that police officers use psychological force during a pursuit. He believes that the individual who flees initiates the pursuit, but that police officers decide whether to continue the pursuit.¹⁵² According to Professor Alpert, the speed of the officers may control the speed of the individual who is fleeing.¹⁵³ This psychological force arises from the police officers' decision to continue

148. *Id.*

149. *Id.* Telephone interview with Professor Geoffrey P. Alpert, Sociologist and Criminal Justice Scholar (June 1, 1990).

150. *See infra* notes 262-84 and accompanying text for a discussion of these offenses.

151. *See, e.g.,* OHIO REV. CODE ANN. § 2921.331(C) (Anderson 1989). Under Ohio law, fleeing from an officer is a misdemeanor; but it is a felony if a jury makes one of the following possible factual findings:

- (1) in committing the offense, the offender was fleeing immediately after the commission of a felony;
- (2) the operation of the motor vehicle by the offender was a proximate cause of serious physical harm to persons or property;
- (3) the operation of the motor vehicle by the offender caused a substantial risk of harm to persons or property.

Id. Because of the nature of pursuits, under this statute fleeing from an officer would generally constitute a felony. *See supra* note 1 and accompanying text for a discussion of the risks associated with pursuits. Although this statute could generally deter individuals from engaging in vehicular flight, once a pursuit has begun, the statute increases the pursued driver's motivation for fleeing. The police officers' presence during a pursuit could create even more psychological pressure if the pursued driver is aware of this statute.

152. Telephone interview with Professor Geoffrey P. Alpert, Sociologist and Criminal Justice Scholar (June 1, 1990).

153. *Id.* Professor Alpert has analogized the use of psychological force during a pursuit to the use of psychological compulsion during a dog race. *Id.* At a dog race, in order to make the dogs run faster, a metal frame is placed in front of them with the appearance of rabbit on it. The dogs' pace increases as the speed of the frame moves faster. According to Professor Alpert, the police officers' vehicle represents a similar kind of compulsion to the pursued driver, except this time the force is behind the driver. *Id.*

the pursuit.¹⁵⁴

Some courts have recognized the presence of psychological force when police officers in unmarked cars pursue an individual.¹⁵⁵ These courts have recognized that the pursued driver's natural response is increased speed.¹⁵⁶ One court has noted that a pursuing vehicle can "terrorize a civilian."¹⁵⁷ Another court has found that such psychological harm arising from an unjustified pursuit is actionable under the fourth amendment.¹⁵⁸

Some courts, however, have failed to recognize that pursuits involve psychological force.¹⁵⁹ These courts have found that only physical force is actionable under the fourth amendment.¹⁶⁰ In requiring the use of physical force, these courts focus on the individual's decision to flee, not the officers' conduct during the pursuit. They have determined that a pursuit does not involve the use of force because the individual is not restrained during a pursuit.

This viewpoint, however, is similar to the individualist viewpoint¹⁶¹ rejected by the Supreme Court in *Tennessee v. Garner*¹⁶² and *Brower v. County of Inyo*.¹⁶³ In both *Garner*¹⁶⁴ and *Brower*,¹⁶⁵ the Court adopted a communalist viewpoint¹⁶⁶ by emphasizing the officers' conduct, not

154. *Id.*

155. *See, e.g.,* *Checki v. Webb*, 785 F.2d 534, 538 (5th Cir. 1986); *Wright v. District of Columbia*, No. 87-2157 (D.D.C. June 21, 1990) (order granting plaintiff's partial summary judgment on issue of fourth amendment violation).

156. *See, e.g., Checki*, 785 F.2d at 538.

157. *Id.*

158. *Wright v. District of Columbia*, No. 87-2157 (D.D.C. June 21, 1990) (order granting plaintiff's partial summary judgment on issue of fourth amendment violation).

159. *See supra* note 63 and *infra* note 160 and accompanying text for a discussion of how courts have narrowly viewed the force present during police pursuits.

160. *See, e.g., Patterson v. City of Joplin*, 878 F.2d 262, (8th Cir. 1989) ("no evidence that either of the police cars collided with the motorcycle or the innocent victim"); *Brower v. County of Inyo*, 817 F.2d 540, 546 (9th Cir. 1987) (police officers did not restrain the plaintiff, even after they set up a roadblock that stopped him), *rev'd on other grounds*, 489 U.S. 593 (1989); *Galas v. McKee*, 801 F.2d 200, 203 (6th Cir. 1986) ("police used absolutely no force" during pursuits); *Tagstrom v. Pottebaum*, 668 F. Supp. 1269, 1272 (N.D. Iowa 1987) (pursuit involved no restraint), *appeal denied sub nom.* *Tagstrom v. Enockson*, 845 F.2d 1027 (8th Cir. 1988), *rev'd in part*, 857 F.2d 502 (8th Cir. 1988). *See generally* *Roach v. City of Fredericktown*, 882 F.2d 294, 296 (8th Cir. 1989) (no fourth amendment claim because individual's crashing into another car was not intended by the police officer's pursuit); *Easterling v. City of Glennville*, 694 F. Supp. 911, 921 n.11 (S.D. Ga. 1986) (pursuit may involve the use of "indirect" force).

161. *See supra* note 69 and accompanying text for a discussion of the individualist perspective of responsibility.

162. 471 U.S. 1, 11 (1985).

163. 489 U.S. 593, 598 (1989).

164. 471 U.S. at 11.

165. 489 U.S. at 598-599.

166. *See supra* notes 43-46, 63-68, 77-90 and accompanying text for a discussion

the individual's decision to flee when commanded to stop. The *Garner* Court declared, "It is not better that all felony suspects die than that they escape."¹⁶⁷ Instead of determining that the individual had the choice of preventing the shooting, the Court emphasized the unreasonableness of the officer's decision to shoot. The *Brower* Court similarly emphasized the officers' decision to set up a roadblock that fatally stopped a pursued driver, rather than emphasizing the individual's failure to terminate his flight prior to crashing into it.¹⁶⁸ It held that the fourth amendment was implicated even though the individual could have avoided crashing into the roadblock by simply deciding to stop the pursuit.¹⁶⁹ The *Brower* Court rejected the argument that the officers used no force in stopping the individual.¹⁷⁰ By focusing on the officers' conduct during a pursuit, one can thus discern the presence of psychological force.

B. *The Act of Pursuing Can Cause an Individual's Injuries*

Whether the officers' use of physical force and psychological force during a pursuit was the proximate cause of injury to a pursued driver, his passengers, other motorists, or pedestrians depends upon the perspective one adopts.¹⁷¹ A communalist perspective of pursuit claims focuses on the police officers' conduct during a pursuit; it recognizes that the officers' use of psychological force may cause harm, even if the pur-

of the communalist perspective of responsibility.

167. 471 U.S. at 11.

168. 489 U.S. 593, 598-99 (1989). The lower court in *Brower*, with its individualist viewpoint on what conduct constitutes a fourth amendment "seizure," had implicitly determined that the officers had not used force in setting up the roadblock. *Brower v. County of Inyo*, 817 F.2d 540, 546 (9th Cir. 1989), *rev'd on other grounds*, *Brower v. County of Inyo*, 489 U.S. 593 (1989). Although the lower court had erroneously determined that the police officers had not "seized" the driver when he crashed into the roadblock, the court nevertheless recognized that the police officers' conduct could violate the fourteenth amendment if a jury determined that it was egregious. *Id.* at 544, *rev'd on other grounds*, 489 U.S. 593 (1989). The lower court emphasized that the individual had remained free to stop the pursuit that occurred before the officers had established the roadblock. *Id.* at 546-47. The court characterized the pursued driver's options from an individualist perspective by emphasizing his options and by deemphasizing the officers' conduct of establishing the roadblock. The Supreme Court, however, focused on the officers' actions and subjected them to scrutiny under the fourth amendment.

169. *Brower*, 489 U.S. at 598-99. The Court characterized the officers' actions from a communalist perspective by emphasizing the officers' culpable conduct and deemphasizing the pursued driver's option of stopping.

170. *Id.* The Court determined that the police officers had allegedly caused the individual to stop. The second question was whether this force caused the individual's injuries. See *infra* notes 423-30 and accompanying text for a discussion of the two causation issues for pursuit claims.

171. See *supra* note 2 for a discussion of the harm associated with police pursuits.

sued driver's vehicle was the source of injury as it slammed into a tree, another driver, or pedestrians. As discussed above, both physical and psychological force create predictable responses by the pursued driver.¹⁷² If these responses lead to harm, then under the communalistic perspective, the force causing the harmful response may be the source causing the injury. An examination of recent Supreme Court decisions discussing causation under the fourth and fourteenth amendments indicates that the communalist perspective of causation for pursuit claims is appropriate,¹⁷³ but that an individualist perspective is appropriate when analyzing officers' failure to pursue a driver.¹⁷⁴ The difference in perspectives is sound because in acting during a pursuit, police officers increase the risk of harm to individuals, but in failing to pursue, any harm that occurs is directly a result of the driver's conduct. In addition, the communalist perspective of causation in pursuit claims is harmonious with the Court's decisions subjecting law enforcement practices, which can seriously infringe upon an individual's right to personal security, to fourth amendment scrutiny.¹⁷⁵

The Supreme Court has recognized two causation issues for fourth amendment excessive force claims: 1) what caused an individual to stop

172. See *supra* notes 126, 139-70 and accompanying text for a discussion of the use of psychological force.

173. See *infra* notes 214-58 and accompanying text. Some lower courts have also applied a communalist perspective when police officers' conduct creates or increases the danger presented to individuals by third parties. See, e.g., *Wood v. Ostrander*, 879 F.2d 583, 590 (9th Cir. 1989) (because officers allegedly arrested driver, impounded the car, and left the passenger in an unsafe area at 2:30 a.m., the officer acted with deliberate indifference to the passenger's need for personal security and may be held liable for rape committed by a third party), *cert. denied*, 111 S. Ct. 341 (1990); *White v. Rochford*, 592 F.2d 381, 385 (7th Cir. 1979) (officer who allegedly arrested driver and left children stranded on a highway in a car may be held liable for the harm that occurred to the children).

174. See *infra* notes 185-204 and accompanying text.

175. In the following cases, the Court found the challenged police practice unreasonable within the meaning of the fourth amendment: *Minnesota v. Olson*, 110 S. Ct. 1684, 1688-90 (1990) (overnight guest had a reasonable expectation of privacy of dwelling; police officers violated privacy by entering dwelling without consent, without a warrant, or without probable cause and exigent circumstances); *Florida v. Wells*, 110 S. Ct. 1632, 1635 (1990) (failure to have a policy concerning the opening of closed containers during an inventory search violated an individual's expectation of privacy under the fourth amendment); *Tennessee v. Garner*, 471 U.S. 1, 7-22 (1985) (the use of deadly force to stop a fleeing felon); *United States v. Place*, 462 U.S. 696, 703 (1983) (brief detention of luggage at airport); *Florida v. Royer*, 460 U.S. 491, 504-07 (1983) (plurality opinion) (unjustifiable stop of traveler at airport); *Winston v. Lee*, 470 U.S. 753 (1985) (surgery to remove bullet as evidence); *Davis v. Mississippi*, 394 U.S. 721 (1969), *cert. denied*, 409 U.S. 855 (1969) (fingerprinting at station without probable cause). The Court has also protected an individual's interest in personal security by declaring that officials violate the fourth amendment if they use excessive force as they seize an individual, even if the force applied was done in subjective good faith. *Graham v. Connor*, 109 S. Ct. 1865, 1872-73 (1989).

and 2) what caused an individual's injuries.¹⁷⁶ In resolving the first issue, the Court has adopted a communalistic perspective. The Court has refused to focus on the individual's act of failing to stop the pursuit and it has emphasized the police officers' decision, whether it was to shoot a fleeing suspect¹⁷⁷ or to set up a roadblock.¹⁷⁸ When the suspect died, what caused the individual to stop was the shooting¹⁷⁹ or the roadblock,¹⁸⁰ not the individual's act of failing to stop when commanded to

176. *Brower v. County of Inyo*, 489 U.S. 593, 598-99 (1989). See *infra* notes 422-59 and accompanying text for a discussion of these issues.

177. *Garner*, 471 U.S. at 9-11. The Court's characterization of alternatives available to officers strongly reveals its communalist perspective. *Id.* The Court emphasized that the "failure to apprehend at the scene does not necessarily mean that the suspect will never be caught." *Id.* at 9 n.8. The Court could have emphasized the option available to the suspect, stopping when so commanded. In addition, the Court also expressed a communalist perspective by emphasizing the inculpatory facts related to the police officer who shot, not the suspect who fled. *Id.* at 9-10. The Court characterized the harm arising from an officer's shooting as grave. *Id.* The Court stated that even if other alternatives for capture are generally available to officers, shooting under some circumstances is always unconstitutional even if "subsequent arrest is not likely." *Id.* at 9 n.8. The Court could have expressed an individualist perspective by emphasizing the suspect's failure to stop when requested.

178. *Brower*, 489 U.S. at 598. The Court's characterization of the facts reveals its communalist perspective:

[A] roadblock is not just a significant show of authority to induce a voluntary stop, but it is designed to produce a stop by physical impact if voluntary compliance does not occur. It may well be that [the officers] here preferred, and indeed earnestly hoped, that [the driver] would stop on his own, without striking the barrier, but we do not think it practicable to conduct such an inquiry into subjective intent.

Id. at 598. The Court could have described the facts from an individualist perspective by emphasizing the driver's option of stopping during the pursuit and before hitting the roadblock. The Court could have stated that it was the driver's responsibility to make sure that he was in control of his car at all times. The Court instead focused on the police officers' conduct and deemphasized the driver's options.

This communalistic perspective is even more apparent when the Court states that a court should err on the side of protecting an individual from the use of force by police officers:

In determining whether the means that terminates the freedom of movement is the very means that the government intended we cannot draw too fine a line, or we will be driven to saying that one is not seized who has been stopped by the accidental discharge of a gun with which he was meant only to be bludgeoned, or by a bullet in the heart that was meant only for the leg. We think it enough for a seizure that a person be stopped by the very instrumentality set in motion or put in place in order to achieve that result.

Id. In focusing on the effect of the police officers' conduct and not the officers' intentions, the Court strongly expressed a communalist perspective. The Court chose not to emphasize the individual's part in the confrontation between officers and suspects. Instead, it expressed a policy of subjecting the means officers use to inflict personal injury to constitutional scrutiny.

179. *Garner*, 471 U.S. at 9.

180. *Brower*, 489 U.S. at 598.

do so.

Interpreting both causation issues from the same perspective would be harmonious with the Court's recent decisions in *Brower v. County of Inyo*¹⁸¹ and *Tennessee v. Garner*.¹⁸² By broadly interpreting the first causation issue, the Court subjected the practice of using roadblocks and deadly force to stop individuals to scrutiny under the fourth amendment.¹⁸³ To interpret narrowly the causation question, while

181. In *Brower*, the Court did not address whether the roadblock caused the individual's injuries. *Id.* at 599 ("the circumstances of this roadblock, including the allegation that headlights were used to blind the oncoming driver, may yet determine the outcome of this case").

Recently the Ninth Circuit Court of Appeals expressed a communalist perspective as it discussed in detail an analogous causation issue when examining the use of force by prison officials. *White v. Roper*, 901 F.2d 1501, 1502-07 (9th Cir. 1990). The court held that although prison officials had not used excessive force in subduing an unruly prisoner, they nevertheless could be held liable for the injuries that this force produced, because the prisoner's attempted escape was a foreseeable response to their act of trying to put him in the cell of a known violent prisoner. The court emphasized that prison officials should have foreseen that the prisoner would respond by attempting to flee when they brought him to the cell. Although the act of fleeing caused the officials to use force, the intervening act of flight did not relieve the officials from liability. The court explained, "The courts are quite generally agreed that [foreseeable] intervening causes . . . will not supersede the defendant's responsibility. *Id.* at 1506 (quoting W. PROSSER & W. KEETON, *THE LAW OF TORTS* § 44, at 303-04 (5th ed. 1984)). "Courts look to the original foreseeable risk that the defendant created." *Id.* In this context, a jury could find that officials were deliberately indifferent to the prisoner's right to personal security. *Id.*

The Ninth Circuit, in analyzing causation, thus focused on the officials' conduct, not the individual's rebellious act of fleeing. This decision exemplifies a communalistic perspective because it emphasizes the prison officials' original act of taking the prisoner to the cell and deemphasizes the prisoner's responsibility for the harm arising from his flight. By interpreting the facts of a typical pursuit in this manner, one could hold that police officers' use of psychological and physical force foreseeably caused an individual to continue her flight. The intervening act of flight, however, does not necessarily relieve the officers from responsibility for their decision to pursue. The injuries resulting from a crash, whether the cruiser smashes into the individual's car or the individual loses control of his vehicle, could thus be caused by the police officers' decision to pursue. The individual's flight response is thus a foreseeable result from the psychological and physical forces used by police officers. This communalistic perspective thus minimizes the individual's responsibility for his act of fleeing but emphasizes the police officers' act of pursuing.

182. 471 U.S. 1, 11 (1985).

183. As Justice Scalia noted during oral argument, it would be better to draft a fourth amendment "seizure" definition that not only would encourage individuals to stop, but one that would also allow the stopped individual the opportunity to litigate the issue of whether the particular police practice is "reasonable" within the meaning of the fourth amendment. 57 U.S.L.W. 3531, 3532 (Feb. 21, 1989).

The lower court in *Brower*, however, would have addressed whether the force used in establishing the roadblock was disproportionate under the fourteenth amendment. *Brower v. County of Inyo*, 817 F.2d 540, 544 (9th Cir. 1987), *rev'd on other grounds*, 489 U.S. 593 (1989). Because the Supreme Court determined that the officers had

broadly interpreting the "seizure" issue, would be to ignore the Court's preference of subjecting stops to fourth amendment scrutiny.¹⁸⁴

The Court's recent discussion of causation under the fourteenth amendment in *DeShaney v. Winnebago County Department of Social Services*¹⁸⁵ provides support for the proposition that if police officers fail to pursue an offender, they cannot be said to have caused the harm the unapprehended offender later commits. In *DeShaney*, the Court determined that state social workers did not cause the harm a child experienced when his father beat him.¹⁸⁶ The officials did not cause the harm because the Court characterized the facts in the case from an individualist perspective to suggest that the workers had not acted.¹⁸⁷

In its opinion, the *DeShaney* Court generally described the right to

seized the driver, the protections available under the fourteenth amendment would no longer be available. See *Graham v. Connor*, 109 S. Ct. 1865, 1871 (1989) (fourteenth amendment substantive due process claim not available when the plaintiff alleges that the force used during a seizure violated the fourth amendment).

184. See, e.g., *Michigan Dept. of State Police v. Sitz*, 110 S. Ct. 2481, 2485 (1990). In *Sitz*, the Court expressly limited its holding that police officers without reasonable suspicion may stop drivers at a sobriety checkpoint. *Id.* The Court stated, "Detention of particular motorists for more extensive field sobriety testing may require satisfaction of an individualized suspicion standard." *Id.*

185. 489 U.S. 189 (1989).

186. 489 U.S. at 194-95.

187. In characterizing the facts in this manner, the Court implicitly encouraged social agencies to continue to attempt to provide services rather than shutting down out of fear that their services are inadequate and violative of the fourteenth amendment. A commentator has interpreted the *DeShaney* opinion as encouraging state legislators to pass laws that would protect individuals from an official's "reckless omissions." Note, *DeShaney v. Winnebago County: The Narrowing Scope of Constitutional Torts*, 49 MD. L. REV. 484, 508 (1990).

The *DeShaney* decision does, however, express an individualist perspective. The Court, for example, narrowly defined the options available to social services workers and broadly defined the options available to the abused child. 489 U.S. at 203. The Court stated that if social service workers had taken the child from the father's custody, they "would likely have been met with charges of improperly intruding into the parent-child relationship." *Id.* With respect to the child, the Court stated that the workers had not limited "his freedom to act on his own behalf." *Id.* at 200. The Court also characterized the facts in a manner that deemphasized the social service workers involvement in the difficult family relationship, but emphasized the facts relating to the abusive father. *Id.* at 201.

Professor Oren has severely criticized the Court for its individualist perspective. Oren, *The State's Failure to Protect Children and Substantive Due Process: DeShaney in Context*, 68 N.C.L. REV. 659, 697 (1990). She equates individualism with "classical liberalism and the laissez faire ethic." *Id.* Professor Oren argues that the Court has misapplied these perspectives because "children . . . do not fit the model of free agents acting in a free market or free society." *Id.* She also discusses feminist jurisprudence to indicate that the Court's adoption of individualism in this context represents "male thinking," which focuses attention to abstract objectives, in contrast to "female thinking," which focuses more attention to relationships in a particular context. *Id.* at 698.

personal security by intertwining issues of causation and duty.¹⁸⁸ The Court was able to intertwine these issues because it is "possible to state every question which arises in connection with 'proximate cause' in the form of a single question: was the [official] under a duty to protect the [individual] against the event which did in fact occur."¹⁸⁹

The *DeShaney* Court determined that generally there was no duty to protect an individual against "private violence,"¹⁹⁰ that is, harm caused by third parties, as opposed to harm caused by state officials. The Court noted, however, that even when a third party injures an individual, under some circumstances officials have a duty to protect.¹⁹¹ A constitutional duty to protect arises only when the state itself deprives an individual of the means to protect himself.¹⁹² A state deprives an individual of this freedom to protect himself when he is imprisoned, institutionalized, or subject to "other similar restraint[s] of personal liberty."¹⁹³

188. 489 U.S. at 201. In the following passage, the Court discusses both the state's limited duty and its lack of involvement in the harm:

While the State may have been aware of the dangers that [the child] faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them. That the State once took temporary custody of [the child] does not alter the analysis, for when it returned him to his father's custody, it placed him in no worse position than that in which he would have been had it not acted at all; the State does not become the permanent guarantor of an individual's safety by having once offered him shelter. Under these circumstances, the State had no constitutional duty to protect [the child].

Id. The intertwining of the duty issue with causation was logical in this case because the Court characterized the facts of the case in a manner to indicate that the state officials had not acted. With this perspective, the focus of the duty issue was whether the state was liable for its presumed failure to act.

189. W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON TORTS, § 42, at 274-75 (5th ed. 1984).

190. *DeShaney*, 489 U.S. at 197.

191. *Id.* at 198.

192. *Id.* at 199-200. The Court stated, "The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed upon his freedom to act on his own behalf." *Id.*

193. *Id.* at 200. Under these circumstances, mere "private violence" has not occurred because state officials are implicated in the harm: they caused the harm to the individual by breaching their duty to protect her. In drawing the line between state involvement and mere "private violence," the Supreme Court has sometimes described the line in terms of a duty and sometimes in terms of causation. In *DeShaney*, the predominate focus was on the scope of the constitutional duty to protect; yet, the Court also used causation language. See *supra* note 186 and accompanying text. In *Martinez v. California*, 444 U.S. 277 (1980), the Court used causation analysis to describe an act as private. 444 U.S. at 284-85 (1980). The Court also used state action analysis to distinguish private conduct from official conduct. *Id.* at 285. To use state action analysis as a means to distinguish the two, however, is to invite uncertainty because the doctrine produces unpredicable results. See, e.g., L. TRIBE, AMERICAN CONSTITU-

The Court's narrow duty definition is understandable if one also notes that its duty analysis was intertwined with its implicit finding that the officials also were not the cause of the harm. The Court emphasized that the state officials had not done anything that made the child "more vulnerable"¹⁹⁴ to the harm caused by his father. It also noted that the officials had not "created" the danger caused by his father.¹⁹⁵ In using these terms, the Court determined that the social service workers had not acted. Thus, according to the Court, there was no duty to protect because the state was not involved in creating the harm posed by the father. The harm occurred as a result of mere "private violence." Determining that the harm was a result of private violence, however, represents the conclusion, not the process of evaluating the social service workers' actions or inactions.

In characterizing the harmful act as a private one, the *DeShaney* Court also relied on *Martinez v. California*,¹⁹⁶ a case in which it explicitly used causation analysis in deciding whether state officials were liable for the harm committed by a third party.¹⁹⁷ In *Martinez*, the Court determined that parole officials were not liable for the death caused by the prisoner that they had released.¹⁹⁸ The Court noted that the death was only remotely linked to the state officials' decision to release the prisoner and that the officials did not know which individual the parolee would harm.¹⁹⁹

TIONAL LAW § 18-2, at 1691 (2d ed. 1988) (the only way to understand the Court's analysis of state action cases is to ask "why anarchy prevails" and "to construct an 'anti-doctrine,' an analytical framework which, in explaining why various cases differ from one another, [will] paradoxically provide[] a structure for the solution to state action problems") (emphasis in original). Whichever analysis the Court employs, officials may be liable when their actions or inactions cause a third party to harm an individual.

194. *DeShaney*, 489 U.S. at 201.

195. *Id.*

196. 444 U.S. 277 (1980).

197. *DeShaney*, 489 U.S. at 197 n.4 (citing *Martinez v. California*, 444 U.S. 277, 284-85 (1980)).

198. *Martinez*, 444 U.S. at 284-85.

199. The *Martinez* decision, however, as the Court noted in *DeShaney*, later became the basis for analyzing the constitutional duty owed by state officials under the substantive due process clause. *DeShaney*, 489 U.S. at 197 n.4. Lower courts interpreted *Martinez* as imposing a duty upon officials to protect an individual from the harm by a third party if there was a "special relationship" between the officials and the individual in danger. *Id.* A "special relationship" existed if officials knew which individual was in danger and if they had offered to protect the individual. *Id.*

The intertwined nature of duty and causation analysis under the fourteenth amendment is thus apparent by considering the Court's decision in *Martinez* and the lower courts' adoption of a "special relationship" test for determining whether officials had a constitutional duty. The *DeShaney* Court, however, limited the doctrine of "special relationships," which emerged after *Martinez*, to situations in which the state had deprived the individual of the means to protect herself. *DeShaney*, 489 U.S. at 201-

In both *DeShaney* and *Martinez*, the Court determined that state officials had not caused the harm that was committed by a third party. The Court adopted an individualist perspective on the ultimate issue of liability. The Court's discussion of causation, however, does not mandate an individualist perspective of the causation issue for a pursuit claim because during a pursuit, officials are much more closely tied to the resultant harm than the officials were either to the child abuse or the murder caused by the parole. In neither *DeShaney* nor *Martinez* did the officials exert physical or psychological force over the third party that inflicted the harm.

During a pursuit, police officers may use physical force and psychological force.²⁰⁰ When police officers intentionally use their cruisers to collide with the pursued driver, they have used deadly force to stop the driver. When this crash results in injury to other drivers and pedestrians, the act of deliberately stopping the pursued driver often creates a foreseeable risk that others will be injured. In this sense, police officers may have caused the injuries to other drivers and pedestrians.

When police officers use only psychological force and the pursued driver harms others, resolving liability depends upon whether one adopts a communalist perspective or an individualist perspective. Courts with an individualist perspective on the issue of psychological force would not find that police officers caused the harm. Because they do not recognize psychological force, they implicitly determine that the pursued driver caused his own injuries or the injuries of others.²⁰¹

202. To determine the scope of the right to personal security, however, one must also consider the degree of involvement the state played in creating the danger because the *DeShaney* decision also considered whether state actions or inactions had contributed to the danger posed by the third party. *Id.* at 196-202. In short, when a third party causes harm to an individual, whether state officials violated a duty owed to an individual under the fourteenth amendment or caused a violation of the right to personal security depends upon how one characterizes the state's actions or inactions. If officials were involved, then the harm may not be a result of "private violence," but instead a result of the state's breach of its duty to protect. Defining the scope of the fourteenth amendment thus is generally a question of characterizing the officials' actions or inactions. As stated previously, resolution of causation questions and factual characterizations are generally controlled by policy decisions. The scope of protection available under the fourteenth amendment thus ultimately is a question of policy. *See supra* notes 50, 62-70 and accompanying text.

200. *See supra* notes 125-70 and accompanying text for a discussion of the force used during a pursuit.

201. *See, e.g.,* *Sutherland v. Holcombe*, No. 89-1708 (4th Cir. Nov. 17, 1989), *cert. denied*, 110 S. Ct. 1949 (1990); *Patterson v. City of Joplin*, 878 F.2d 262, 262-63 (8th Cir. 1989); *Galas v. McKee*, 801 F.2d 200, 203 (6th Cir. 1986). *But see* *Britt v. Little Rock Police Dept.*, 721 F. Supp. 189, 191, 195 (E.D. Ark. 1989) (police officer admitted that when the pursued driver lost control of his vehicle and crashed, the officer "proximately caused" the death of another motorist; court found that police pursuit was reasonable).

Courts that adopt a communalist perspective on the issue of psychological force have the opportunity to address whether psychological force caused the injuries that occurred. Under the communalist perspective, one discerns the presence of psychological force and may determine that this force was the proximate cause of the pursued driver's loss of control. Unlike the state officials in *DeShaney*, police officers in pursuing drivers place other drivers and pedestrians in greater danger. Their actions make other drivers and pedestrians "more vulnerable"²⁰² to the harm presented by the driver. For example, to pursue a driver allegedly intoxicated is to increase the speed of a driver already out of control. A decision not to pursue can lessen the danger presented by an intoxicated driver.

A decision not to pursue, however, does not subject police officers to liability because, as the *DeShaney* Court determined, there is no general duty to protect the public from harm caused by third parties.²⁰³ A duty only arises if the person harmed was in the custody of the officers. When police officers decide not to pursue, they are not liable for the harm caused by the unapprehended driver to other motorists and pedestrians because the injured individuals were not in the custody of officers. Thus, the *DeShaney* Court's duty analysis is helpful to the extent that it reveals that police officers would not be liable for a decision not to pursue.

The *DeShaney* Court's duty analysis, however, should not be used

202. *DeShaney*, 489 U.S. at 200-01.

203. *Id.* at 200. See generally *Bryson v. City of Edmond*, 905 F.2d 1386, 1392 (9th Cir. 1990) (police officers were not liable for their inactions during a hostage crisis because they "played no part in creating the danger to the victims, nor did they do anything to render them more vulnerable to [the danger]"); Comment, *The Constitutional Duty to Complete a Rescue: An Examination of Archie v. City of Racine*, 23 COLUM. J.L. & SOC. PROBS. 487, 490 (1990) (no constitutional right to protective services, unless "a state initiates rescue").

In *Bryson*, the Ninth Circuit Court of Appeals expressed an individualist perspective in not imposing liability upon officers for their waiting one hour and a half before entering a building with hostages. *Bryson*, 905 F.2d at 1392. The court narrowly described the options available to the officers in a manner similar to the *DeShaney* Court: "It is obvious . . . that believing there was a hostage situation inside, had the police permitted others to rush into the midst of the audible gunfire, there might have been some basis for charging recklessness or indifference towards the public and possibly toward those inside." *Id.* Both the *DeShaney* Court and *Bryson* court stated that if the officials had acted, they may have been sued for their actions. *DeShaney*, 489 U.S. at 203; *Bryson*, 905 F.2d at 1392.

The *Bryson* court, however, expressed a communalist perspective in discussing liability if the police officers had acted during the hostage crisis. It recognized that by entering the building, the officers' mere presence could have exacerbated the situation. In this sense, the officers' presence would have signified the presence of psychological force. See *supra* notes 126, 139-170 and accompanying text for a discussion of psychological force.

to ignore the police officers' own actions during a pursuit.²⁰⁴ As stated above, police officers use psychological force during a pursuit, a force that can cause both the pursued driver and the police officer to lose control and perspective. By focusing on the actions of the police officers, one need not address whether the officers had a duty to protect other drivers and pedestrians from the harm caused by the pursued driver because the officers' actions create or increase the harm presented by a driver.

Even if police officers have caused the injuries incurred by other drivers and pedestrians, whether using physical or psychological force, liability attaches only if the force used was disproportionate. To determine whether the force used was disproportionate requires consideration of the parties' interests.²⁰⁵ This latter inquiry is the one in which courts can best reconcile an individual's right to personal security with society's interest in law enforcement.²⁰⁶

IV. THE DISPROPORTIONALITY STANDARDS OF THE FOURTH AND FOURTEENTH AMENDMENTS

When police officers cause individuals to be injured during pursuits, whether by using physical or psychological force, liability attaches only if the force the officers used was disproportionate to the need for it.²⁰⁷ Both the fourth²⁰⁸ and fourteenth²⁰⁹ amendments balance the interests of the parties to determine whether the force was disproportionate. The fourth amendment, however, only applies to individuals "seized" within the meaning of the fourth amendment,²¹⁰ and the four-

204. See *supra* notes 171-203 and accompanying text for a discussion of applying a communalist perspective to the actions of police officers and an individualist perspective for their inactions. Although rhetorical devices are implicated when a court characterizes the facts to determine whether officials acted or failed to act, the difference between action and inaction in the context of police pursuits is not as susceptible to manipulation. Other issues, such as the presence of force and causation, however, are subject to opposing characterizations.

205. See *infra* notes 214-353 and accompanying text for a discussion of the standard of disproportionality under the fourth and fourteenth amendments.

206. See *infra* notes 214-353 and accompanying text for a discussion of balancing under the fourth and fourteenth amendments.

207. See *infra* notes 214-353 and accompanying text for a discussion of the disproportionality standards of the fourth and fourteenth amendments.

208. See *infra* notes 214-93 and accompanying text for a discussion of the balancing of interests for fourth amendment excessive force claims.

209. See *infra* notes 294-353 and accompanying text for a discussion of the balancing of interests for fourteenth amendment excessive force claims.

210. See, e.g., *Graham v. Connor*, 109 S. Ct. 1865, 1871 (1989) (fourth amendment applies to excessive force used "in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen"); see also *infra* notes 357-459 and accompanying text for a discussion of when individuals are "seized" within the meaning of the fourth amendment.

teenth amendment applies only when an excessive force claim is not actionable under the fourth amendment.²¹¹ Because the pursued driver and her passenger may be "seized" during a pursuit,²¹² the fourth amendment is applicable to them. The fourteenth amendment is applicable to pursuit claims brought by other motorists and pedestrians injured as a result of a pursuit; these individuals are not "seized" within the meaning of the fourth amendment during a police pursuit.²¹³ An examination of the standards under each of these amendments reveals that most pursuits constitute the use of disproportionate force.

A. *The Fourth Amendment Standard of Disproportionality*

The fourth amendment protects the right to personal security. It safeguards "[t]he right of the people to be secure in their persons . . . against unreasonable . . . seizures."²¹⁴ Most pursuits are "unreasonable" within the meaning of the fourth amendment because they minimally further society's interest in law enforcement while significantly infringing upon an individual's right to personal security.²¹⁵ The unreasonableness or disproportionality of force is apparent by balancing an individual's interest in personal security against society's interest in law enforcement.²¹⁶ Although the balancing of interests often produces unpredictable results,²¹⁷ in the context of pursuits the balance tips in

211. See, e.g., *Graham*, 109 S. Ct. at 1871. In *Graham*, the Court recognized that three constitutional amendments protect an individual's interest in personal security: the fourth amendment applies to individuals "seized" during an investigatory stop, an arrest, or "other 'seizure' of a free citizen," *id.*; the eighth amendment applies to prisoners, *id.* at 1870; and the fourteenth amendment protects pretrial detainees, *id.* at 1871 n.10. The Court stated that either the fourth or eighth amendment will apply in "most instances" to excessive force claims. *Id.* at 1870. Many courts have extended the reach of the fourth amendment to apply to claims that officials used excessive force after an arrest but before pretrial detention. See *supra* note 116.

212. See *infra* notes 380, 402-03, 432-33, 436-39 and accompanying text for a discussion of how officers may seize the pursued driver and his passengers during a pursuit.

213. See *infra* notes 380, 402-03, 434 and accompanying text for a discussion of why other motorists and pedestrians are not "seized" within the meaning of the fourth amendment.

214. U.S. CONST. amend. IV.

215. See *infra* notes 259-293 and accompanying text for a discussion of the balancing process under the fourth amendment as applied to pursuits.

216. See *infra* notes 217-58, 294-349 and accompanying text for a discussion of the balancing of interests inherent in excessive force claims.

217. See, e.g., Note, *The Civil and Criminal Methodologies of the Fourth Amendment*, 93 YALE L.J. 1127, 1141 n.73 (1984) ("[f]ourth [a]mendment balancing test operates in almost every new case: Once decided, a particular case need not be reconsidered, but most cases have distinctive variables calling for a new balance"). See generally *Benson v. Allphin*, 786 F.2d 268, 276 n.18 (7th Cir.) (although balancing interests generally does not lead to "clearly established" law, officials may be liable when their "actions are so egregious that the result of the balancing test will be a

favor of protecting an individual's right to personal security.²¹⁸ An examination of the risks and benefits of pursuits indicates that when the pursued driver or his passengers are injured, the force used may violate these individuals' fourth amendment right to personal security.

Although the Supreme Court has never determined whether pursuits are unreasonable, in two cases it has articulated the standard for determining when force is unreasonable under the fourth amendment. In *Tennessee v. Garner*,²¹⁹ the Court established the standard for determining when deadly force is unreasonable,²²⁰ and in *Graham v. Connor*,²²¹ it determined that the *Garner* standard also applies to the use of nondeadly force.²²² An application of the *Garner/Graham* standard indicates that most pursuits are unreasonable.²²³

1. *Tennessee v. Garner* Standard

In 1985 the Supreme Court in *Tennessee v. Garner*²²⁴ articulated a per se rule for determining when police officers may use deadly force to apprehend a fleeing suspect.²²⁵ The rule provided that police officers may use deadly force only when they have "probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others"²²⁶ Under the Court's rule, force was thus automatically disproportionate²²⁷ if the officers did not reasonably believe that the suspect presented a significant danger to the commu-

foregone conclusion"), *cert. denied*, 479 U.S. 848 (1986).

218. See *infra* notes 259-93, 342-53 and accompanying text for a discussion of balancing the interests of the parties in police pursuits.

219. 471 U.S. 1 (1985).

220. *Id.* at 11-12; see also *infra* notes 224-47, 258 and accompanying text for a discussion of the *Garner* case.

221. 109 S. Ct. 1865 (1989).

222. *Id.* at 1871-72; see also *infra* notes 249-58 and accompanying text for a discussion of the *Graham* case.

223. See *infra* notes 259-85 and accompanying text for an application of the *Garner/Graham* standard applied to police pursuits.

224. 471 U.S. 1 (1985).

225. 471 U.S. at 11.

226. *Id.*

227. One commentator has characterized the *Garner* Court as declaring that force that is disproportionate is unconstitutional under the fourth amendment. Comment, *Deadly Force Justifications and the Tennessee v. Garner Proportionality Requirement*, 18 RUTGERS L.J. 191, 196 (1986). The author has noted that when police officers assert that their use of force was "reasonable" within the meaning of the fourth amendment, they are asserting common "defensive force justifications." *Id.* He states that these justifications "follow that same three-pronged theoretical structure": an event in which the suspect signifies the possibility of harm towards others, a "necessary response" by police officers, and a response that was "proportional." *Id.* In *Garner*, the Court specified when an event represents harm toward others, when police officers may respond, and when the use of deadly force is proportionate to the need for it. *Garner*, 471 U.S. at 11-12.

nity.²²⁸ The Court created this rule by balancing the interests of the parties²²⁹ and by rejecting the common law rule, which broadly permitted the use of deadly force to apprehend a fleeing suspect.²³⁰

The Court determined that the suspect's "fundamental"²³¹ interest in personal security outweighed the state's asserted interests.²³² The state had claimed that the practice of killing all fleeing felons furthered its interest in effective law enforcement and its interest in reducing "overall violence."²³³ Its interest in law enforcement related to the two offenses allegedly committed by the fleeing suspect: fleeing from an officer after being commanded to stop and burglary, the original offense prompting the flight. Although the Court determined that the state's interests were "important,"²³⁴ it closely scrutinized the means the state had adopted to further these interests.²³⁵ It found that the use of

228. *Id.* The Court's per se rule is a form of "rule utilitarianism." See Note, *The Civil and Criminal Methodologies of the Fourth Amendment*, 93 YALE L.J. 1127, 1141 n.73 (1984). One scholar has defined "rule utilitarianism" as a form of moral philosophy that "measures the consequences of different types of actions and lays out beforehand a set of rules designed to maximize collective pleasure or happiness." *Id.* In *Garner*, the Court established a rule that informs police officers under what circumstances they may shoot a fleeing suspect. 471 U.S. at 11. The *Garner* decision can be understood as establishing a rule that courts are to apply before they balance the interests of the parties to determine whether the force used was disproportionate to the need for it. If officers did not reasonably believe that the suspect presented a danger to the community, then the shooting signifies the use of disproportionate force under the per se rule and balancing would not be necessary. One scholar has advocated this approach to fourth amendment issues because balancing alone, without any per se rules, fails to protect an individual's interest in personal security. See Note, *supra* note 228, at 1127. In contrast to rule utilitarianism is "act utilitarianism," which "determines the morality of an act by weighing all of its consequences" and considers "the best actions [to be] those that increase the aggregate pleasure or happiness of an entire society." *Id.* at 1141 n.72. When the *Garner* Court first balanced the interests of the parties, it appeared to express the moral philosophy of "act utilitarianism" to create its per se rule. The Court explained that "'the balancing of interests' is the 'key principle of the Fourth Amendment.'" *Garner*, 471 U.S. at 8 (quoting *Michigan v. Summers*, 452 U.S. 692, 700 n.12 (1981)).

229. *Id.* at 9-12.

230. *Id.* at 13-15.

231. *Id.* at 9.

232. *Id.* at 9-10.

233. *Id.* at 9.

234. *Id.* at 10.

235. *Id.* at 10. The Court stated, "we are not convinced that the use of deadly force is a sufficiently productive means of accomplishing them to justify the killing of nonviolent suspects." *Id.*

Recently the Court expressed some reluctance in evaluating the effectiveness of the means chosen by law enforcement agencies. See, e.g., *Michigan Dept. of State Police v. Sitz*, 110 S. Ct. 2481, 2487 (1990). In *Sitz*, the Court allowed officials to establish sobriety roadblocks as a means designed to protect the public from experiencing physical harm caused by an intoxicated driver and noted the following:

Experts in police science might disagree over which of several methods of

deadly force to stop all fleeing felons, and in this case, the burglary suspect, was not sufficiently tailored to the state's interests in law enforcement.²³⁶ In short, the use of force was disproportionate to the need for it, even if the suspect would not have been arrested later.²³⁷

Although the state had an interest in arresting suspects for the act of fleeing, the degree of force permitted under the statute²³⁸ did not relate to the seriousness of the offense committed.²³⁹ Because some states did not outlaw fleeing from an arrest, some made flight only a misdemeanor, and some imposed only a fine for the act of fleeing,²⁴⁰ the offense of fleeing itself was not a serious offense that justified the use of deadly force.²⁴¹ Presumably the state's interest in apprehension is directly related to the seriousness of the offense allegedly committed. The state's interest in apprehension for the act of flight was thus not substantial. Furthermore, its interest in apprehending a burglary suspect was similarly outweighed by the suspect's fundamental interest in personal security because, as the Court determined, the suspect had not committed a serious offense.

Deadly force, however, would properly further the state's interest in law enforcement if the attempt to capture related to a serious offense. The Court defined a serious offense as one in which the suspect

apprehending drunken drivers is preferable as an ideal. But for purposes of Fourth Amendment analysis, the choice among such reasonable alternatives remains with the governmental officials who have a unique understanding of, and a responsibility for, limited public resources, including a finite number of police officers.

Id. When the use of force is in issue, the Supreme Court has not expressed this deference. In *Garner*, the Court did not defer to legislatures the task of determining how best to balance the interests of the parties. *See, e.g.,* Comment, *Criminal Law — The Right to Run: Deadly Force and the Fleeing Felon*: *Tennessee v. Garner*, 11 S. ILL. U.L.J. 171, 183 (1986) (*Garner* Court failed to discern that "legislatures are best able to evaluate all the information and public opinion and come to a proper balancing of public and private interests"); *see also* Wasserstrom, *The Court's Turn Toward a General Reasonableness Interpretation of the Fourth Amendment*, 27 AM. CRIM. L. REV. 119, 148 (1989) (even though the "Rehnquist Court, like the Burger Court before it, has generally been inhospitable toward . . . substantive fourth amendment claims," it nevertheless has evaluated closely fourth amendment claims raising the issue of the reasonableness of force). The Court has frequently subjected police practices to fourth amendment scrutiny. *See supra* note 175.

236. *Garner*, 471 U.S. at 10.

237. *Id.* at 9 n.8. ("we proceed on the assumption that subsequent arrest is not likely").

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

239. *Garner*, 471 U.S. at 11.

240. *Id.* at 10 n.9. The Court aptly noted that the decedent in *Garner* could have received a fine of fifty dollars for his act of fleeing if the officer had not killed him. *Id.*

241. *Id.* at 11.

"poses a threat of serious physical harm, either to the officer or to others" ²⁴² Under this definition, not all felonies would constitute serious offenses. Instead, seriousness is directly related to the harm the individual presents to the community if he is not apprehended. Thus, if the offense prompting the flight was one that involved "the infliction or threatened infliction of serious physical harm," ²⁴³ then using deadly force to apprehend the suspect would be reasonable. Using deadly force under these circumstances would further the state's interest in apprehending a dangerous suspect.

This per se rule for the use of deadly force strikes the appropriate balance between the state's interest in law enforcement and the individual's interest in personal security. The Court recognized that an individual has a fundamental interest in life. ²⁴⁴ When an individual commits a serious offense, however, the state's interest in law enforcement outweighs the individual's fundamental interest. The use of deadly force under these circumstances is reasonable because it allows police officers to protect others whose lives are threatened by the suspect's freedom.

By balancing the interests in this manner, the Court created a per se rule that conflicted with the common law rule, which allowed officers to shoot all fleeing felons. In rejecting the historical context of the fourth amendment, the Court explained that changes in law and in technology indicated that the practice of shooting all fleeing felons was unreasonable. ²⁴⁵

In its analysis of what constitutes the use of disproportionate force,

242. *Id.* The Court explicitly rejected the argument that all felonies are serious and all misdemeanors are not serious. *Id.* at 14. The Court thought the actual danger posed by the suspect was a better measure of the seriousness of the crime. *Id.* at 20.

In the context of determining what constitutes exigent circumstances under the fourth amendment, the Supreme Court has measured the gravity of the offense by considering the penalty that a state imposes for a particular offense. *See, e.g.,* *Welsh v. Wisconsin*, 466 U.S. 740, 753 (1984). The Court determined that the offense of driving while intoxicated was not serious because the state "has chosen to classify the . . . offense . . . as a noncriminal, civil forfeiture offense for which no imprisonment is possible." *Id.* at 754. The dissent, however, appropriately criticized the Court for failing to recognize that the civil classification of this offense was meant to aid the state in securing convictions for the traffic offense. *Id.* at 763 (White, J., dissenting). The dissent thus maintained that the offense was a serious one, rather than a minor offense. *Id.* at 762-63 (White, J., dissenting).

243. *Garner*, 471 U.S. at 11.

244. *Id.* at 9.

245. *Id.* at 13. The Court interpreted the standard of disproportionality under the fourth amendment in light of technological changes, not the common law rule. In doing so, the Court implicitly recognized that reliance on the common law rule would have failed to consider societal values. *See* Winter, *Tennessee v. Garner and the Democratic Practice of Judicial Review*, 14 REV. L. & SOC. CHANGE 679, 700 (1986) ("history was uninformative; at worst, its application would have led to a quite arbitrary rule").

the *Garner* Court thus appeared to express a communalist perspective because it emphasized the police officer's role in the shooting and deemphasized the suspect's culpable act of fleeing and committing burglary. The Court also emphasized the options available to police officers and deemphasized the suspect's options. It stressed "that failure to apprehend at the scene does not necessarily mean that the suspect will never be caught."²⁴⁶ On the other hand, the Court deemphasized the notion that the suspect could have prevented the need for force by complying with the officer's command. Using strong communalist tones, the Court stated, "It is not better that all felony suspects die than that they escape."²⁴⁷

The Court thus strongly protected a suspect's right to personal security under the fourth amendment by closely evaluating the means officers use to apprehend suspects. The fourth amendment safeguards a suspect's right to personal security as long as that right does not infringe upon another individual's right to personal security. Only when the suspect poses a danger to others is the suspect's right to personal security less weighty. The Court similarly expressed the importance of the right to personal security in the recent decision of *Graham v. Connor*.²⁴⁸

2. *Graham v. Connor* Standard

Four years after the *Garner* decision, the Supreme Court clarified in *Graham v. Connor*²⁴⁹ that the *Garner* standard was also applicable to claims involving the use of nondeadly force. Again, the Court focused on the seriousness of the offense that the individual had committed and considered the risk that an individual who evades arrest poses to others.²⁵⁰ For force to be reasonable under the fourth amendment, it must be related to the need to apprehend or control an individual.²⁵¹

In applying the *Garner* standard to a claim alleging the use of nondeadly force, the Court made explicit what was implicit in *Garner*. It articulated three factors to consider in determining the reasonableness of force: "[1] the severity of the crime at issue, [2] whether the

246. *Garner*, 471 U.S. at 9 n.8.

247. *Id.* at 11. Professor Geoffrey Alpert interprets *Garner* as establishing a "moral precedent." G. ALPERT, *THE POLICE USE OF DEADLY FORCE: GUNS, VEHICLES AND OTHER WEAPONS* (1991) (forthcoming). He criticizes the *Garner* Court as providing "no more than rhetoric and ambiguity . . . [to] serve as guideposts for a post-hoc analysis." *Id.*; see also Winter, *supra* note 245 at 692 (*Garner* decision "is essentially a moral pronouncement").

248. 109 S. Ct. 1865, 1871-72 (1989); see *infra* notes 249-58 and accompanying text.

249. *Id.* at 1871-72.

250. *Id.*

251. *Id.*

suspect poses an immediate threat to the safety of the officers or others, and [3] whether he is actively resisting arrest or attempting to evade arrest by flight."²⁵² All three factors compel police officers to measure the need for force in light of the danger posed by the suspect, with the danger being measured by the seriousness of the alleged offense and the risk of harm in not capturing the suspect.

The first factor is similar to the Court's focus in *Garner* on the offense allegedly committed by a suspect. If the offense is a serious offense, then more force would be permissible in apprehending or controlling a suspect than if the offense were minor. The second factor is also present in the *Garner* decision. Both question the danger that the suspect poses to others. In *Graham*, however, the Court questioned whether the suspect posed an "immediate" threat to others.²⁵³ If the individual would not endanger others, then less force is permissible than if the suspect presented imminent harm. Similarly, the last factor questions whether the suspect is attempting to escape. When this factor is read in light of the other two factors in the *Garner* decision, the degree of force reasonable under the fourth amendment relates to the offense that the individual committed and the harm that he presents to others if he remains at large. The last factor thus does not authorize police officers to use an unlimited amount of nondeadly force to apprehend a suspect. Force must be proportionate to the offense, the danger the suspect poses to others, and the suspect's resistance to arrest.²⁵⁴

Force is thus reasonable if it is proportionate to the need for it. Reasonableness of force, according to the Court, is to be measured objectively, not subjectively.²⁵⁵ Even if police officers in good faith applied force in arresting an individual, the force used may not be reasonable.²⁵⁶ Reasonableness is to be determined by considering whether a reasonable officer would have similarly thought the degree of force actually used was reasonable under the circumstances known to the acting police officer.²⁵⁷

The *Graham* standard, like the *Garner* standard, represents a communalist perspective regarding the use of nondeadly force. The *Graham* Court deemphasized a suspect's culpable conduct in failing to comply with the officers' attempt to subdue him, while it emphasized the police officers' role during the altercation. By determining that a

252. *Id.* at 1872.

253. *Id.*

254. *Id.*

255. *Id.* at 1872-73. The Court properly noted, however, that although a plaintiff need not establish that officers maliciously used force to establish a fourth amendment claim, the plaintiff may nevertheless inject into the case the officers' subjective bad faith when he seeks to attack their credibility. *Id.* at 1873 n.12.

256. *Id.* at 1872.

257. *Id.*

suspect need not prove that officers acted maliciously in subduing him, the *Graham* Court subjected the force officers use to greater scrutiny than if it had adopted a good faith standard. As it related the use of force to the seriousness of the offense and the "immediate" risk the suspect presents to others, the *Graham* Court implicitly determined that it is not better that all suspects be subjected to force "than that they escape."²⁵⁸

The *Garner/Graham* standard broadly protects an individual's right to personal security. Although the Court has never applied this standard to pursuits, an application of the *Garner/Graham* standard indicates the unreasonableness of most pursuits.

3. Applying the *Garner/Graham* Standard to Pursuits

The *Garner/Graham* standard applies to the use of force by police officers, whether deadly or nondeadly.²⁵⁹ In the context of pursuits, police officers often use either physical force²⁶⁰ to stop an individual, which constitutes the use of deadly force, or psychological force,²⁶¹ which constitutes the use of potentially deadly force. To determine the reasonableness of pursuits, one must consider the factors specified in the *Garner/Graham* standard. These factors are helpful in balancing the interests of the parties and provide a means of evaluating whether the force applied during a pursuit is disproportionate to the need for it.

The first factor, the seriousness of the offense, compels police officers to evaluate the offenses allegedly committed by a suspect who flees. The typical pursuit often involves a violation of three laws: the original offense prompting the officers to attempt a stop, flight from an officer, and speeding. In most situations, the original offense is a traffic violation.²⁶² For example, police officers have chased individuals for not

258. *Garner*, 471 U.S. at 11; see also *supra* note 247 and accompanying text.

259. See *infra* notes 260-88 and accompanying text for a discussion of the *Garner/Graham* standard.

260. See *supra* notes 125, 128-38 and accompanying text for a discussion of how police officers use physical force during pursuits.

261. See *supra* notes 127, 139-70 and accompanying text for a discussion of how police officers use psychological force during pursuits.

262. One state attorney has stated that although the purported reason for pursuing an individual is a violation of a traffic law, the "offense that precipitated the chase was 'contempt of cop' — that is, the officer's ego says, 'I won't let him outrun me.'" Emory Plitt, an assistant Maryland Attorney General, made the comment during a conference for chiefs of police, *International Association of Chiefs of Police Conference Report*, 44 CRIM. L. REP. 2136 (1988). Studies, however, indicate that young male police officers are more likely to display this attitude than young female officers or more experienced officers. See *supra* note 88. Similarly, even when pursuits do not end because of a collision, officers often use excessive force even after the individual's vehicle has stopped. *Id.* The affront to police authority during a pursuit is real, yet the Court in both *Garner* and *Graham* admonished officers to use force only in relation to

wearing a helmet,²⁶³ for squealing tires,²⁶⁴ for having the wrong license plates on the vehicle,²⁶⁵ for having no license plates,²⁶⁶ for failing to have headlights on, and for not stopping at a stop sign²⁶⁷ or a red light.²⁶⁸ Whether these offenses are serious is to be ascertained by considering the second factor, the risk that these offenses pose to other individuals, because the *Garner/Graham* standard explicitly rejected classifying seriousness on a basis of whether the suspect had committed a felony or a misdemeanor.²⁶⁹

The first and second factors both require consideration of the harm inherent in violating a law. The second factor, however, focuses on the immediacy of harm that the suspect presents to others. An application of these factors indicates that the degree of harm presented by traffic offenses varies depending upon the offense. For example, the failure to wear a helmet may present a risk of harm to the driver, but not to others near him. The failure to stop at a stop sign or a red light may present an immediate risk to others if one assumes that the driver generally fails to stop when he should, rather than assuming that this was an isolated incident.²⁷⁰ Similarly, failing to use headlights can poten-

the seriousness of the crime. *Graham*, 109 S. Ct at 1872; *Garner*, 471 U.S. at 11.

263. *Webbs v. Hyans*, No. 88-3180 (6th Cir. Feb. 7, 1989) (WESTLAW, Federal library, Court of Appeals file). Under a recent decision by the Tenth Circuit Court of Appeals, police officers might be able to pursue individuals for failing to wear a seatbelt. The court held that police officers have the authority to stop drivers who do not appear to be wearing a seatbelt. *Guerrero v. United States*, 58 U.S.L.W. 3646 (10th Cir. April, 10, 1990) (court approves stop of vehicle because the driver, who was wearing a lap belt, did not appear to be wearing a seatbelt).

264. *Reed v. County of Allegan*, 688 F. Supp. 1239, 1243 n.4 (W.D. Mich. 1988).

265. *Roach v. City of Fredericktown*, 882 F.2d 294, 295 (8th Cir. 1989).

266. *Webbs v. Hyans*, No. 88-3180 (6th Cir. Feb. 7, 1989) (WESTLAW, Federal library, Court of Appeals file).

267. *Tagstrom v. Pottebaum*, 668 F. Supp. 1269, 1271 (N.D. Iowa 1987), *appeal denied sub nom.* *Tagstrom v. Enockson*, 845 F.2d 1027 (8th Cir. 1988), *rev'd*, 857 F.2d 502 (8th Cir. 1988).

268. *City of Amarillo v. Langley*, 651 S.W.2d 906, 911 (Tex. Ct. App. 1983).

269. Professor Salken has noted that "[t]raffic offenses, even the most serious, are almost always enforced by fines." Salken, *The General Warrant of the Twentieth Century? A Fourth Amendment Solution to Unchecked Discretion to Arrest for Traffic Offenses*, 62 TEMP. L. REV. 221, 268 (1989). She questioned whether the penalty is inconsistent with the broad arrest powers that states have given police officers during stops for traffic violations. *Id.* at 262. The power to arrest for traffic offenses is "relatively recent . . . it is not justified nor foreshadowed by common law practice." *Id.* at 259. Professor Salken argued that the only traffic offense warranting the arrest power is driving while intoxicated. *Id.* at 271.

270. See generally *id.* at 270 (some states limit a police officer's power to arrest for a traffic violation to situations in which "there is a reasonable likelihood that the offense would continue or resume or that persons or property would be endangered by the arrested person.") (quoting TENN. CODE ANN. § 40-7-118(c)(2) (Supp. 1988)).

One commentator has criticized the *Garner* Court for allowing police officers to

tially place others at risk, but the failure to have the proper license plate does not place other lives in danger; instead, the focus of the stop is probably to apprehend someone who has committed a property crime.²⁷¹ Police officers, however, have pursued individuals for traffic offenses that endanger others in a more obvious manner. For example, police officers have pursued individuals for speeding,²⁷² for drag racing,²⁷³ and for generally driving in an "unsafe manner."²⁷⁴ Because these latter traffic offenses may endanger the lives of others, they are serious offenses.

The second and third offenses common to pursuits, flight and speeding, can also endanger the lives of others. The harm presented by these offenses is "immediate." Studies well document the risk of harm that pursuits engender, not only to the individual, but also to police officers, other drivers, and pedestrians.²⁷⁵ These too are serious offenses.

The threat posed by the second and third offenses, however, arises from the police officers' decision to pursue, rather than from the individual's initial flight.²⁷⁶ By terminating the pursuit, police officers may cause the individual to stop his flight and speeding.²⁷⁷ In this situation, the suspect does not pose an "immediate threat" to others; instead, the

use deadly force to apprehend a suspect who has allegedly committed a serious offense, without considering whether "the suspect might not pose any threat of harm to the officer or others." Comment, *Criminal Procedure — Search and Seizure — Law Officer's Use of Deadly Force Against Nondangerous Fleeing Felon Held Violative of Fourth Amendment*, 17 SETON HALL L. REV. 758, 779 (1987). Implicit in the *Garner* decision, however, is the assumption that someone who has allegedly committed an offense "involving the infliction or threatened infliction of serious physical harm" is a dangerous person, one that continues to present a significant risk of harm to police officers and others until he is apprehended. *Garner*, 471 U.S. at 11.

271. See, e.g., *Brower v. County of Inyo*, 489 U.S. 593, 594 (1989) (stealing a car); *Britt v. Little Rock Police Dep't.*, 721 F. Supp. 189, 190 (E.D. Ark. 1989) (same); *City of Miami v. Harris*, 490 So. 2d 69, 70 (Fla. Dist. Ct. App. 1985) (burglary).

Some police policies allow pursuits to apprehend someone who has allegedly violated another person's interest in property. See, e.g., *City of Overland Park, Kan., High Speed Motor Vehicle Pursuit* (April 13, 1989) ("primary goal of the department is the protection of life and property"); *Macon, Ga., Police Department General Order: Police Vehicle Operations* (Jan. 1, 1988) (same).

272. *Patterson v. City of Joplin*, 878 F.2d 262, 262 (8th Cir. 1989) (per curiam); *Galas v. McKee*, 801 F.2d 200, 201 (6th Cir. 1986); *Jamieson v. Shaw*, 772 F.2d 1205, 1207 (5th Cir. 1985), *reh'g denied*, 776 F.2d 1048 (5th Cir. 1985); *Easterling v. City of Glennville*, 694 F. Supp. 911, 913 (S.D. Ga. 1986).

273. *Allen v. Cook*, 668 F. Supp. 1460, 1461 (W.D. Okla. 1987).

274. *Jones v. Sherrill*, 827 F.2d 1102, 1107 (6th Cir. 1987).

275. See *supra* note 2 and accompanying text for a discussion of the risks associated with police pursuits.

276. See *supra* notes 143-48 and accompanying text for a discussion of how officers' use of psychological force during pursuits can cause the pursued driver to continue to flee and to increase his speed.

277. See *supra* notes 147-48 and accompanying text.

police pose such a threat by continuing the pursuit. Similarly, police officers, by continuing to pursue, may increase the danger presented by the initial offense. The psychological force used during a pursuit may increase the danger presented by an unsafe driver.²⁷⁸ Pursuing an individual is like shooting at an individual's vehicle²⁷⁹— both raise his adrenalin and increase his speed.

The final factor, whether the individual resists arrest, is applicable to all pursuits. This factor focuses on the force the suspect used in attempting to flee. When combined with the other two factors, it does not permit the use of all force to apprehend an individual. The police officers' use of force must still be proportionate to the need for it.

Applying these factors to the typical pursuit reveals that even when the original traffic offense presents a risk of harm to others, pursuit is unjustified because the use of psychological force increases the risk of harm. The common second and third offenses, flight and speeding, also do not justify a pursuit. Although there is a risk of harm to others that arises from the act of fleeing and speeding, police officers can terminate the danger to others by terminating the pursuit. Only a quick termination will lessen the danger to others because injuries occur as frequently in pursuits lasting a minute as they do in pursuits lasting longer than a minute.²⁸⁰ By not pursuing individuals for traffic offenses, police officers thus do not increase the risk of harm nor do they create an unnecessary risk.

Application of the *Garner/Graham* standard indicates that pursuit is generally a means that unduly infringes upon an individual's interest in personal security. Striking the balance in this manner, however, does not ignore the state's important interest in law enforcement. It only signifies that the state may adopt other means that are "reasonable," which is to be ascertained by considering the degree of infringement upon an individual's right to personal security. As the *Garner* Court stated, technological advances are important in determining whether a particular law enforcement practice is reasonable.²⁸¹ The use of helicopters, small airplanes, or spike belts would allow officers to continue pursuit without unduly infringing upon the right to personal security.²⁸² The Supreme Court recently stated that it would not subject a law en-

278. See *supra* notes 143-46 and accompanying text for a discussion of the dangers associated with psychological force.

279. See generally, *Veatch v. Cross*, 532 N.E.2d 1069, 1074 (Ill. App. Ct. 1988) ("the only significance of the alleged shooting was that it may have spurred the fleeing driver to drive even faster").

280. See *supra* note 1.

281. *Garner*, 471 U.S. at 13.

282. See *supra* notes 105-109 and accompanying text for a discussion of alternatives to vehicular pursuits.

forcement practice to close scrutiny²⁸³ nor tell agencies how to allocate resources.²⁸⁴ However, the particular program at issue, the use of road-blocks to determine whether a driver is intoxicated, significantly furthered the right to personal security by attempting to reduce the number of intoxicated drivers on the road.²⁸⁵ This program used a stop to prevent harm to the driver and others on the road; it did not exacerbate the risk of harm as pursuits do.

Many pursuit policies used by law enforcement agencies, however, violate the fourth amendment because they fail to recognize the risk of harm present in all pursuits.²⁸⁶ These unconstitutional policies expose these agencies to costly law suits under section 1983²⁸⁷ brought by indi-

283. *Michigan Dep't. of State Police v. Sitz*, 110 S. Ct. 2481, 2485 (1990). Although the Court rejected the lower court's "searching examination of 'effectiveness,'" it nevertheless did scrutinize the means by considering whether the law enforcement practice reasonably advanced the state's interest. *Id.* at 2487-88. The Court's statement in *Sitz* should not be read to state that the Court will apply only a rational level of review in evaluating the soundness of a law enforcement practice. The Court has frequently subjected means to close scrutiny. *See, e.g., Minnesota v. Olson*, 110 S. Ct. 1684, 1688 (1990) (officers may not enter dwelling to search for "overnight guest" unless they have either a warrant or consent); *Maryland v. Buie*, 110 S. Ct. 1093, 1099 (1990) (protective sweep of dwelling "may extend only to a cursory inspection of those spaces where a person may be found" and must last no longer than "necessary to dispel the reasonable suspicion of danger"); *Tennessee v. Garner*, 471 U.S. 1, 11 (1985) (use of deadly force to stop all fleeing felons is unreasonable); *Winston v. Lee*, 470 U.S. 753, 767 (1985) (Burger, C.J., concurring) (surgery to remove a bullet would be unreasonable).

284. *Sitz*, 110 S. Ct. at 2487 ("governmental officials . . . have a unique understanding of, and a responsibility for, limited public resources, including a finite number of police officers").

285. *Id.* at 2488.

286. Some pursuit policies fail to stress the importance of considering the seriousness of the offense allegedly committed by the driver. *See, e.g., City of Overland Park, Kan., High Speed Motor Vehicle Pursuit* (April 13, 1990) ("Pursuits for person(s) suspected of involvement in serious crime are viewed as more justifiable than those for persons suspected of only traffic or other misdemeanor violations"); *City of West Palm Beach, Vehicle Pursuits* (Apr. 7, 1989) (although policy expresses concern about the danger pursuits represent, it states "that it is not in the best interests of public safety to advocate a policy that would encourage the . . . car thief, or fleeing criminal to proceed without imminent possibility of police intervention"). Some pursuit policies also allow unmarked police vehicles to pursue individuals, a policy that places unwarned motorists in danger. *See, e.g., Macon Police Department, Georgia, Police Vehicle Operations* (Apr. 1, 1988) ("Unmarked police vehicles may engage in hot pursuit only when the fleeing vehicle presents an immediate and direct threat to life or property"); *see also City of Jackson, Tennessee, General Order: Pursuit Procedures* (Mar. 22, 1989). Some policies allow officers to pursue intoxicated drivers, even though pursuit increases the risk of harm to the public. *See, e.g., Montana Highway Patrol, Motor Vehicle Pursuit Policy* (Mar. 1990) (the need to apprehend a driver "under the influence of alcohol or drugs" outweighs the risk of harm presented by a pursuit).

287. *See, e.g., City of Canton v. Harris*, 489 U.S. 378, 390 (1989). In *Harris*, the Supreme Court recognized that a local government may be liable for the harm

viduals "seized" within the meaning of the fourth amendment, the pursued driver and any passengers in the pursued vehicle who were injured.²⁸⁸

A pursuit may also violate the substantive due process component of the fourteenth amendment.²⁸⁹ Individuals not "seized" within the meaning of the fourth amendment may assert claims under the fourteenth amendment.²⁹⁰ Such individuals include other drivers, passengers, and pedestrians injured as a result of a pursuit.²⁹¹ Similarly, the pursued driver and her passengers may assert a fourteenth amendment claim in the alternative as a means of preserving scrutiny of the pursuit if a court rejects their argument that they were "seized" within the meaning of the fourth amendment.²⁹² In the context of a pursuit, protection available under the fourteenth amendment is similar to the protection under the fourth amendment. Both amendments balance the interests of the parties to determine whether force was disproportionate to the need for it.²⁹³

inflicted by officials if the harm was caused by deliberate indifference in training officials. *Id.* at 388. See generally Brown, *Correlating Municipal Liability and Official Immunity Under Section 1983*, 1989 U. ILL. L. REV. 625, 630 (1989) (author criticizes the Court's decision in *Harris* and suggests that local government liability should depend upon "whether the [municipal] agent was at fault and whether the agent was 'caused' by the city to commit the violation") (emphasis in original). The Court expressly stated that if a local government fails to train its officers regarding the proper use of deadly force, the "failure to do so could properly be characterized as 'deliberate indifference' to constitutional rights." *Harris*, 489 U.S. at 390 n.10. The Court stated that the need to train officers in deadly force is "obvious." *Id.*

The *Harris* standard applies, however, not only to training but also to supervision. See, e.g., *Davis v. City of Ellensburg*, 869 F.2d 1230, 1235 (9th Cir. 1989); S. STEINGLASS, SECTION 1983 STATE COURT LITIGATION, §15.2(a), at 15-4 n.17 (1988). But see Brown, *Accountability in Government and Section 1983* (forthcoming) (courts should impose liability upon supervisors when they are negligent in their duties).

288. See *infra* notes 380, 403, 432-33, 436-39 and accompanying text for a discussion of how police officers may "seize" the pursued driver and his passengers during a pursuit.

289. See *infra* notes 294-353 and accompanying text for a discussion of excessive force claims under the fourteenth amendment.

290. See, e.g., *Britt v. Little Rock Police Dep't.*, 721 F. Supp. 189, 190-93 (E.D. Ark. 1989) (other motorist killed when police officers pursued car thief).

291. See *infra* notes 380, 403, 434 and accompanying text for a discussion of why these individuals are generally not "seized" within the meaning of the fourth amendment during police pursuits.

292. See, e.g., *Galas v. McKee*, 801 F.2d 200, 203-05 (6th Cir. 1986) (pursued driver was not "seized"; court also considered whether the pursuit violated the fourteenth amendment). See generally *Checki v. Webb*, 785 F.2d 534, 538 (5th Cir. 1986) (injured passenger in pursued vehicle stated a violation of substantive due process).

293. See *supra* notes 214-292 and *infra* notes 294-353 and accompanying text for a discussion of the balancing interests under the fourth and fourteenth amendments.

B. *The Disproportionality Standard of the Fourteenth Amendment*

The fourteenth amendment to the United States Constitution provides that "[n]o State shall . . . deprive any person of life [or] liberty . . . without due process of law."²⁹⁴ The substantive due process component of this amendment protects a person's right to personal security.²⁹⁵ This amendment safeguards an individual's right to personal security only when the right is not protected either by the fourth amendment,²⁹⁶ which protects against unreasonable seizures, or the eighth amendment, which protects against "wanton and unnecessary" force.²⁹⁷ Because neither the fourth amendment²⁹⁸ nor the eighth amendment²⁹⁹ apply to claims asserted by other drivers, their passengers, or pedestrians who are injured during a pursuit,³⁰⁰ the fourteenth amendment is applicable to these claims. The scope of the right to security under the fourteenth amendment, however, is similar to the scope of the right to personal security under the fourth amendment.³⁰¹

In contrast to personal security claims brought under the fourth amendment³⁰² and the eighth amendment,³⁰³ the Supreme Court has

294. U.S. CONST. amend. XIV, § 1.

295. *See supra* note 7.

296. *See, e.g., Graham*, 109 S. Ct. 1865, 1870 (1989).

297. U.S. CONST. amend. VIII. (prohibits "cruel and unusual punishments"); *see Whitley v. Albers*, 475 U.S. 312, 319 (1986) (" 'unnecessary and wanton infliction of pain . . . constitutes cruel and unusual punishment' ") (quoting *Ingraham v. Wright*, 430 U.S. 651, 670 (1977), which quoted *Estelle v. Gamble*, 429 U.S. 97, 103 (1976)).

298. The fourth amendment is not applicable because these individuals are not "seized" within the meaning of the fourth amendment. *See infra* notes 380, 403, 434 and accompanying text for a discussion of this issue.

299. The eighth amendment is not applicable because these individuals are not prisoners. *See Ingraham*, 430 U.S. at 671 n.40.

300. If a court determines that a pursued driver and passengers were not seized within the meaning of the fourth amendment, then it may need to address the alternative ground of substantive due process. *See, e.g., Galas* 801 F.2d at 202-05; *Tagstrom*, 668 F. Supp. at 1271-73.

301. *See supra* note 214-300 and *infra* notes 302-353 and accompanying text for a discussion of the disproportionality standards under the fourth and fourteenth amendments.

302. *See supra* notes 224-58 and accompanying text for a discussion of the factors applicable to fourth amendment excessive force claims.

303. *See Whitley*, 475 U.S. at 320-21. In *Whitley*, the Supreme Court stated that during a prison riot, only the malicious use of force violates the eighth amendment. *Id.* In deciding whether force was malicious, the Court applied three factors that courts have considered in determining whether force violated the fourteenth amendment: the need for the force, the relationship between the need and the amount of force, and the extent of the injury inflicted. *Id.* (citing *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973), *cert. denied sub nom. John v. Johnson*, 414 U.S. 1033 (1973)). When the exigency of a prison riot is not present, some courts have applied the same factors to determine whether the force used signified "deliberate indifference" to a prisoner's right to personal security. *See, e.g., Bolin v. Black*, 875 F.2d 1343, 1350 (8th Cir. 1989), *cert. denied*, 110 S. Ct. 542 (1989) (deliberate indifference is actionable

not articulated factors for determining when force violates the substantive due process component of the fourteenth amendment. It has, however, generally described the right to substantive due process,³⁰⁴ and lower courts have specified factors to aid them in determining whether force violated the fourteenth amendment.³⁰⁵ An examination of these cases indicates that officials are liable when they use an egregious amount of force, force that is disproportionate to the need for it.

1. The *Rochin/Glick* Standard

When the Supreme Court in 1952 held in *Rochin v. California*³⁰⁶ that conduct which "shocks the conscience" violates the substantive due process component of the fourteenth amendment, the Court generally described the right to personal security.³⁰⁷ In *Rochin*, police of-

because force "occurred *after* any threat to institutional security had been quelled"); *Unwin v. Campbell*, 863 F.2d 124, 135-36 (1st Cir. 1988) (summary judgment not possible because factual dispute as to whether there was a prison disturbance where institutional safety was at stake; if no such disturbance exists, deliberate indifference is the standard).

304. See *infra* notes 306-09 and accompanying text for a discussion of the Supreme Court's interpretation of excessive force claims under the fourteenth amendment.

305. See *infra* notes 319-22 and accompanying text for a discussion of the factors courts have applied to excessive force claims under the fourteenth amendment.

306. 342 U.S. 165 (1952).

307. *Id.* at 172. In determining that the conduct under consideration "shock[ed] the conscience," the Court used its own institutional conscience to determine the lawfulness of the conduct. The Court appeared, however, to rely on social norms to determine what constituted egregious conduct. It stated that the due process clause protects those interests that are "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Id.* at 169 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)). This process was similar to the procedure the Court frequently used to determine whether a right contained in the Bill of Rights was fundamental and was incorporated by the due process clause of the fourteenth amendment. See, e.g., *id.* (whether the conduct "'offend[s] those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses'") (quoting *Malinski v. New York*, 324 U.S. 401, 416-17 (1945)). A right protected by the substantive due process component of the fourteenth amendment is thus a right in essence created by the judiciary.

The right to personal security is an aspect of the right protected by the substantive due process component. See, e.g., *Graham*, 109 S. Ct. at 1871 n.10 (substantive due process component protects pretrial detainees from the use of excessive force). See generally Burnham, *Separating Constitutional and Common Law Torts: A Critique and a Proposed Constitutional Theory of Duty*, 73 MINN. L. REV. 515, 517 (1989) (author distinguishes between incorporated substantive due process, "fundamental rights" substantive due process (e.g., the right to privacy), and "shocks the conscience" substantive due process). One court has stated that "shocks the conscience" substantive due process is workable only in the context of excessive force claims. See *Braley v. City of Pontiac*, 906 F.2d 220, 226 (6th Cir. 1990) (excessive force claims represent the only "area in which the consciences of judges are shocked with some degree of uniformity").

ficers used force in compelling an individual to swallow an emetic in order to make the individual regurgitate incriminating evidence.³⁰⁸ The Court determined that this conduct violated the individual's right to personal security; the government's need for incriminating evidence did not outweigh the individual's interest in bodily integrity.³⁰⁹

This decision, however, provided little guidance in determining when an official's use of force was sufficiently egregious so as to constitute a constitutional violation. Two decades later, Judge Friendly of the Second Circuit in *Johnson v. Glick*³¹⁰ articulated factors to aid courts in determining when force violated an individual's constitutional right to personal security.³¹¹ He stated that courts should consider the following four factors:

[1] the need for the application of force, [2] the relationship between the need and the amount of force that was used, [3] the extent of injury inflicted, and [4] whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.³¹²

These factors require courts to balance an individual's interest in bodily integrity against the government's need for force.

In discussing these interests, the Supreme Court in 1986 recognized in *Daniels v. Williams*³¹³ and *Davidson v. Cannon*³¹⁴ that negligent conduct does not implicate the substantive due process component of the fourteenth amendment.³¹⁵ It stated that the fourteenth amendment protects only against the "affirmative abuse of power"³¹⁶ and that "[h]istorically, [the] guarantee of due process has been applied to de-

308. *Rochin*, 342 U.S. at 166.

309. *Id.* at 171-74 (Court considered society's interests, which "push[] in opposite directions").

310. 481 F.2d 1028 (2d Cir. 1973), *cert. denied sub nom. John v. Johnson*, 414 U.S. 1033 (1973).

311. *Id.* at 1033.

312. *Id.* The lower courts, however, have not uniformly interpreted the factors; not all courts have required malicious conduct nor a serious injury in order to find a violation of substantive due process. *See infra* notes 319-22 and accompanying text.

313. 474 U.S. 327 (1986).

314. 474 U.S. 344 (1986).

315. *Daniels*, 474 U.S. at 332-33; *Davidson*, 474 U.S. at 347.

316. *Daniels*, 474 U.S. at 331 (quoting *Parratt v. Taylor*, 451 U.S. 527, 548-49 (1981) (Powell, J., concurring)). In the context of excessive force claims, the Court's requirement of an affirmative act is not problematic because the use of force constitutes an act. Characterizing officials' responses to a situation as either action or inaction, however, is problematic for other substantive due process claims. *Compare* *DeShaney v. Winnebago County Dep't. of Social Servs.*, 489 U.S. 189, 203 (1989) (majority opinion held that because there was no duty to act officials were not liable for their inaction) *with id.* at 208 (Brennan, J., dissenting) (dissenting opinion characterized actions of officials as creating a duty to protect child from abusive father). *See supra* notes 185-99 and accompanying text for a discussion of this case.

liberate decisions of government officials to deprive a person of life [or] liberty."³¹⁷ In light of the Court's egregious standard in *Rochin* and the lower courts' application of the *Glick* factors to excessive force claims, the Court's rejection of negligence as a basis was not surprising. Of much greater interest was the Court's statement that it left for another day whether gross negligence or recklessness violates the fourteenth amendment.³¹⁸

Since the Court left this question open, the lower courts have disagreed as to whether gross negligence or recklessness is actionable under the fourteenth amendment.³¹⁹ Some have stated that gross negligence is sufficient,³²⁰ some have stated that recklessness is necessary,³²¹ and some have stated that only intentional conduct is actionable.³²² Regardless of the particular state of mind selected, determining the scope of the right to personal security under the fourteenth amendment has required courts to balance the interests of the parties.³²³ This balancing

317. *Daniels*, 474 U.S. at 331 (emphasis in original).

318. *Id.* at 334 n.3. The Court properly recognized that the distinctions between negligence, gross negligence, recklessness, and intention may not be clear. *Id.* at 335. It refused, however, to "trivialize the [d]ue [p]rocess [c]lause in an effort to simplify constitutional litigation." *Id.* The question of whether gross negligence or recklessness is actionable not only depends on how a court interprets the state-of-mind requirement for substantive due process claims, but also on how a court describes the particular standard that it adopts and how it characterizes facts in a case. *See, e.g., Germany v. Vance*, 868 F.2d 9, 18 n.10 (1st Cir. 1989) (court declared that recklessness is actionable under the fourteenth amendment, but its definition of reckless conduct is similar to the definition for intentional conduct: "official believes [or reasonably should believe] that his conduct is very likely but not certain to result in a violation"). In the context of police shootings, courts characterize facts in different manners. *Compare Landol-Rivera v. Cruz Cosme*, 906 F.2d 791, 797-98 (1st Cir. 1990) (officer who shot at hostage in escaping vehicle maybe negligent) *with Fargo v. City of San Juan Bautista*, 857 F.2d 638, 639, 643 (9th Cir. 1988) (officer was grossly negligent when his gun accidentally discharged) *and Dodd v. City of Norwich*, 827 F.2d 1, 8 (2d Cir. 1987) (officer was not negligent when his gun accidentally discharged).

319. *See infra* notes 320-22 and accompanying text for courts' contrasting state-of-mind requirements for substantive due process claims.

320. *See, e.g., Woodrum v. Woodward County*, 866 F.2d 1121, 1126 (9th Cir. 1989); *Taylor ex rel. Walker v. Ledbetter*, 818 F.2d 791, 793 (11th Cir. 1987) (*en banc*); *Nishiyama v. Dickson County*, 814 F.2d 277, 282 (6th Cir. 1987).

321. *See, e.g., Germany*, 868 F.2d at 18.

322. *See, e.g., Hannula v. City of Lakewood*, 907 F.2d 129, 132 (10th Cir. 1990); *Rasmussen v. Larson*, 863 F.2d 603, 605 (8th Cir. 1988). *See generally Freeman v. Elgin Sweeper Co.*, 885 F.2d 825 (11th Cir. 1989) (no liability for killing of bicyclist because conduct was not intentional).

323. Balancing is proper because most courts do not require malice in order to find a violation. *See, e.g., O'Neill v. Krzeminski*, 839 F.2d 9, 11 n.1 (2d Cir. 1988) (malice not necessary to establish a constitutional tort); *Fiacco v. City of Rensselaer*, 783 F.2d 319, 325 (2d Cir. 1986) (liability attaches if force was unreasonable, unnecessary, or violent); *see also supra* notes 320-22 and accompanying text for a discussion of the lesser culpability standards actionable under the fourteenth amendment.

process is similar to the balancing of interests that the Court recognized under the fourth amendment in *Tennessee v. Garner*³²⁴ and *Graham v. Connor*.³²⁵

Like the *Garner/Graham* standard, the *Glick* factors require a similar balancing of interests. The first factor questions the need for force, and the second factor questions whether the force used was disproportionate to the need for it. This is similar to the analysis the Court adopted when it stated that under the fourth amendment the need for deadly force in *Garner* or nondeadly force in *Graham* is to be measured in light of the risks the suspect poses to others.³²⁶ The third factor, the extent of the injury, is a disputed factor. Some courts have used this factor to distinguish between injuries that are of sufficient magnitude to constitute a constitutional violation and those that represent only a state tort.³²⁷ Other courts, however, have appropriately refused to apply this factor because it is irrelevant to the central issue of disproportionality.³²⁸ The last factor, malice, is not necessarily a requirement for substantive due process claims, particularly since the Supreme Court has not decided whether gross negligence and recklessness are actionable under the fourteenth amendment and since not all courts

324. See *supra* notes 224-58 and accompanying text for a discussion of the Court's interest in balancing under the fourth amendment.

325. See *supra* notes 249-58 and accompanying text for a discussion of balancing of interests in this case.

326. *Graham*, 109 S. Ct. at 1871-72; *Garner*, 471 U.S. at 11.

327. See, e.g., *Hannula*, 907 F.2d at 132 (pain from tight handcuffing did not establish a constitutional violation because plaintiff failed to present evidence that she incurred "contusions, lacerations or damage to the bones or nerves"). The third factor, the extent of the injury, may also represent institutional balancing because some courts use this factor to state that unless there was a "serious" or "significant" injury, then the conduct does not rise to the level of a constitutional violation. See, e.g., *White v. Roper*, 901 F.2d 1501, 1507 (9th Cir. 1990) (sufficient showing to establish excessive force claim would be that pretrial detainee "lost consciousness" or suffered a "permanent injury").

328. *Titran v. Ackman*, 893 F.2d 145, 147 (7th Cir. 1990) (court eliminated its previous "severe injury" requirement, "observing that a 'state is not free to inflict . . . pains without cause just so long as it is careful to leave no marks'") (quoting *Williams v. Boles*, 841 F.2d 181, 183 (7th Cir. 1988)); *Robison v. Via*, 821 F.2d 913, 924 (2d Cir. 1987) (injuries need not be permanent or severe under the *Glick* standard). See generally Note, *Graham v. Connor: A Reasonable Approach to Excessive Force Claims Against Police Officers*, 22 PAC. L.J. 157, 180 (1990) (although extent of injury factor is relevant "to the damages issue in a section 1983 action, the fourth amendment standard properly does not require a minimum threshold of injury to establish liability"); Note, *Excessive Force Claims: Is Significant Bodily Injury the Sine Qua Non To Proving a Fourth Amendment Violation*, 58 FORDHAM L. REV. 739, 741 (1990) ("'significant or meaningful' injury requirement does not comport with the Supreme Court's decisions in *Graham* and *Tennessee v. Garner* and thwarts the broad remedial purposes of section 1983"); *Corselli v. Coughlin*, 842 F.2d 23, 26 (2d Cir. 1988) (for eighth amendment claim injuries need not be permanent or severe).

require malice.³²⁹

When courts do not require plaintiffs to establish that officers acted maliciously, balancing interests under the fourteenth amendment is similar to balancing interests under the fourth amendment.³³⁰ Although courts interpret the balancing process under the fourth amendment in light of its standard of reasonableness,³³¹ they balance interests under the fourteenth amendment in light of its egregious standard.³³² When,

329. Balancing of interests under these amendments is similar only if a court interprets the fourteenth amendment as not requiring malicious conduct. A court commits reversible error if it instructs a jury on a fourth amendment claim to consider whether officers acted maliciously. *See, e.g., Graham*, 109 S. Ct. at 1873 ("concepts like 'malice' and 'sadism' have no proper place in [the objective reasonableness] inquiry"); *Hay v. City of Irving*, 893 F.2d 796, 798-99 (5th Cir. 1990); *Calamia v. City of New York*, 879 F.2d 1025, 1035 (2d Cir. 1989). The similarity in balancing the interests of the parties is apparent by considering the history of excessive force claims. Prior to the Court's decisions in *Garner* and *Graham*, individuals subjected to excessive force generally alleged a violation of substantive due process, not the fourth amendment. Plaintiffs began bringing claims under the fourth amendment when lower courts and later the Supreme Court made it clear that the fourth amendment's standard of objective reasonableness does not consider whether police officers acted maliciously in using force. Such individuals no longer need the protection of the fourteenth amendment.

330. *See, e.g., Titran*, 893 F.2d at 147. In *Titran*, the Seventh Circuit Court of Appeals recognized that when an individual is injured while in jail, the substantive due process standard, even with the mental element of malice, is like the fourth amendment standard. *Id.* The court stated, "Most of the time the propriety of using force on a person in custody pending trial will track the [f]ourth [a]mendment: the court must ask whether the officials behaved in a reasonable way in light of the facts and circumstances confronting them." *Id.* The court also rejected having "multiple standards" to evaluate the constitutionality of force because they would "undermine the force of the law" and would "complicate litigation." *Id.* *See also* *Matthews v. City of Atlanta*, 699 F. Supp. 1552, 1557 (N.D. Ga. 1988) ("there is substantial congruity between what violates substantive due process with what is unreasonable under the fourth amendment"); *Abernathy, Section 1983 and Constitutional Torts*, 77 GEO. L.J. 1441, 1491 (1989) (courts should "end their overreliance on disembodied state-of-mind requirements and begin to identify the more precise constitutional duties to which the mental elements attach").

Courts have also applied the fourth amendment standard to individuals arrested and subjected to compelled blood tests. *See, e.g., Hammer v. Gross*, 884 F.2d 1200, 1204 (9th Cir. 1989) (blood test of arrestee taken at hospital); *State v. Lanier*, 452 N.W.2d 144, 145 (S.D. 1990) (blood test of arrestee taken at jail). Courts have also applied the fourth amendment standard to the force used by prison officials to stop a prisoner from escaping. *See, e.g., Henry v. Perry*, 866 F.2d 657, 659 (3d Cir. 1989) (court relies in part on *Garner's* fourth amendment standard to resolve prisoner's eighth amendment excessive force claim); *Clark v. Evans*, 840 F.2d 876, 880-81 (11th Cir. 1988) (same).

331. *See, e.g., Graham*, 109 S. Ct. at 1873 ("[f]ourth [a]mendment inquiry is one of 'objective reasonableness'"); *Garner*, 471 U.S. at 7 ("apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the [f]ourth [a]mendment").

332. *See, e.g., Simpson v. Hines*, 903 F.2d 400, 403 (5th Cir. 1990) (questioned whether conduct was shocking).

however, the interests of both parties under the fourteenth amendment mirror the interests under the fourth amendment, as they do in the unique context of a police pursuit, conduct that is unreasonable under the fourth amendment is, however, also egregious under the fourteenth amendment. Thus, whether force is lawful generally depends upon the interests of the parties, not upon the particular standard applied.

This general focus on the parties' interests arises because balancing is a process of weighing opposing interests. The standard of care, however, does aid courts in evaluating the state's conduct; it focuses attention on how to weigh the state's interest, but not the individual's interest in personal security. For example, the Court has recognized that the eighth amendment to the United States Constitution,³³³ which applies only to prisoners,³³⁴ has two different standards of care that protect a prisoner's right to personal security. During a prison riot, officials violate the right only if they act maliciously,³³⁵ but in failing to provide proper medical care, officials violate the right if they act with "deliberate indifference."³³⁶ In light of these different eighth amendment standards, lower courts have recognized that a prisoner's interest in personal security is constant, but that the level of culpable conduct actionable under the eighth amendment depends upon the circumstances facing officials.³³⁷ When no riot is present, the use of force may violate the eighth amendment if it signifies "deliberate indifference" to a prisoner's right to personal security.³³⁸ These two contrasting stan-

333. U.S. CONST. amend. VIII (prohibits "cruel and unusual punishments").

334. See *Ingraham v. Wright*, 430 U.S. 651, 671 n.40 (1977).

335. See, e.g., *Whitley v. Albers*, 475 U.S. 312, 320 (1986). In *Whitley*, the Supreme Court stated that prisoners injured must prove malice to establish a violation of their eighth amendment right to personal security when officials use force during a riot. *Id.* To determine whether the force was used maliciously, the Court, however, declared that the other *Glick* factors were "relevant to that ultimate determination." *Id.* at 321. By using the other *Glick* factors, the Court was implicitly questioning whether the force used was disproportionate to the need for it.

336. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976).

337. See, e.g., *Bolin v. Black*, 875 F.2d 1343, 1350 (8th Cir.), *cert. denied*, 110 S. Ct. 542 (1989) (deliberate indifference actionable because force "occurred after any threat to institutional security had been quelled"); *Unwin v. Campbell*, 863 F.2d 124, 135-36 (1st Cir. 1988) (summary judgment not possible because factual dispute exists as to whether there was a prison disturbance); *Foulds v. Corley*, 833 F.2d 52, 54-55 (5th Cir. 1987) (applies "unnecessary and wanton" standard because "[t]here was no imminent danger").

338. See *supra* note 335. Some courts, however, have erroneously applied the malice standard when a riot is not present because they have extended the *Whitley* standard to any type of prison disturbance. See, e.g., *Corselli v. Coughlin*, 842 F.2d 23, 26 (2d Cir. 1988); *James v. Alfred*, 835 F.2d 605, 606-07 (5th Cir. 1988), *cert. denied*, 485 U.S. 1036 (1988); *Brown v. Smith*, 813 F.2d 1187, 1188-90 (11th Cir. 1987), *reh'g denied*, 818 F.2d 871 (11th Cir. 1987). These courts may perhaps assume that if officials fail to establish authority with a single prisoner, this failure may lead to a general lack of control over prisoners.

dards both describe conduct that is "cruel and unusual" within the meaning of the eighth amendment.³³⁹

Thus, to recognize "two" standards of care under the fourteenth amendment, that is, to discern that unreasonable conduct during a pursuit constitutes "egregious" conduct within the meaning of the fourteenth amendment, is not inconsistent with the Supreme Court's interpretations of the "cruel and unusual punishments" language of the eighth amendment. Whether one evaluates fourteenth amendment pursuit claims under a standard of reasonableness or egregiousness, resolution of an excessive force claim generally requires a balancing of interests. Balancing the interests of the parties under the fourteenth amendment in the context of police pursuits indicates that many pursuits constitute the use of egregious force.³⁴⁰

2. Applying the Substantive Due Process Standard to Pursuit Claims

When police officers pursue a driver, they may cause individuals in other vehicles³⁴¹ and pedestrians³⁴² to be injured as a result of the pursuit.³⁴³ Whether these individuals may properly assert claims under the substantive due process component of the fourteenth amendment depends upon whether the officers used egregious force under the circumstances.³⁴⁴ The issue requires courts to balance the interests of the par-

339. See, e.g., *Whitley*, 475 U.S. at 320-21 (discussing claims for inadequate medical care and the use of force during a riot).

340. See *infra* notes 341-53 and accompanying text for a discussion of the fourteenth amendment pursuit claims.

341. See, e.g., *Roach v. City of Fredericktown*, 882 F.2d 294, 295-96 (8th Cir. 1989) (pursued driver crashed into other motorists, who were seriously injured); *Jones v. Sherrill*, 827 F.2d 1102, 1104 (6th Cir. 1987) (pursued driver crashed into other motorist, who died); *Britt v. Little Rock Police Dep't.*, 721 F. Supp. 189, 190 (E.D. Ark. 1989) (motorist killed when police pursuit terminated); *Timko v. City of Hazleton*, 665 F. Supp. 1130, 1132 (M.D. Pa. 1986) (pursued driver crashed into other motorist, who died).

342. See, e.g., *City of Miami v. Harris*, 490 So. 2d 69, 70 (Fla. Dist. Ct. App. 1985), *cert. denied*, 479 U.S. 1031 (1987) (police officer's cruiser hooked fenders with pursued driver's bumper, causing the vehicle to go off the road and kill a pedestrian sitting on a bus bench). See generally *Pleasant v. Zamieski*, 895 F.2d 272, 276 n.2 (6th Cir. 1990), *cert. denied*, 111 S. Ct. 144 (1990) (court stated in dicta that third party injured by officers' actions may have a valid substantive due process claim).

343. These individuals have standing to bring fourteenth amendment pursuit claims because they are not "seized" within the meaning of the fourth amendment during pursuits. See *infra* notes 378, 400-01, 432 and accompanying text for a discussion of when the fourteenth amendment is applicable to excessive force claims.

344. See, e.g., *Jones*, 827 F.2d at 1106; *Tagstrom*, 668 F. Supp. at 1273. See generally *Checki*, 785 F.2d at 538 (driver pursued by unmarked car alleged a violation of substantive due process because pursuit may signify egregious conduct).

ties to determine whether the force used was egregious.³⁴⁵ An examination of this issue reveals that many pursuits violate the substantive due process clause.

Determining whether the force used by police officers during a pursuit violates the fourteenth amendment requires weighing the interests of the injured drivers and pedestrians against the state's interests. The individuals' interest is in bodily integrity and the state's interest is in law enforcement. In *Johnson v. Glick*,³⁴⁶ Judge Friendly first articulated the factors used in the process of weighing these interests: the need for the force, the relationship of the need for force and the amount of force used, the extent of the injury, and the state of mind of the officials.³⁴⁷ The first two factors aid in determining whether the use of force during a pursuit constituted the use of egregious force.³⁴⁸ Applying these factors to pursuits indicates that many pursuits constitute the use of disproportionate force.

The first three *Glick* factors compel scrutiny of the means chosen by police officers in furthering their interest in law enforcement. These factors question whether the force used by officers furthered the state's interest in law enforcement but unnecessarily infringed an individual's interest in bodily integrity.

When police officers decide to pursue an individual, regardless of the offense he has allegedly committed, the pursuit places other drivers and pedestrians in greater danger. Pursuit of the alleged violator logically furthers the state's interest in law enforcement. If the public knows that a police department has adopted a policy of not pursuing individuals, then many drivers may feel they have little to lose by attempting to flee. Such actions would clearly diminish the state's interest in law enforcement.

To recognize the need to promote the state's interest in law enforcement is not, however, to approve of pursuits as a means of encouraging people to stop. The need for pursuits is measured in relationship to the harm that pursuits can engender and the availability of other means that can further the state's interest in law enforcement. Although the factors appear to invite courts to second guess the law enforcement decisions of agencies, a practice expressly disfavored by the Supreme Court,³⁴⁹ in the context of excessive force claims such scru-

345. See *supra* notes 310-340 and accompanying text for a discussion of the balancing of interests for fourteenth amendment excessive force claims.

346. 481 F.2d 1028 (2d Cir. 1973), *cert. denied sub nom. John v. Johnson*, 414 U.S. 1033 (1973).

347. *Id.* at 1033. See *supra* notes 319-22 and accompanying text for a discussion of these factors.

348. See *supra* notes 327-329 for a discussion of why courts have refused to apply to other two factors to excessive force claims.

349. See *supra* note 235 and accompanying text for a discussion of the Court's

tiny is the rule, not the exception.³⁵⁰ The right to personal security is of such importance that such scrutiny has occurred under both the fourteenth amendment and the fourth amendment.

Pursuits can cause injuries to other drivers and pedestrians, individuals who have not committed any offense. Their lives may be in danger when police officers pursue a driver and when the driver himself represents a threat to others. The prudence of pursuing a driver, however, depends upon the circumstances confronting an officer. Determining the weight of the state's interests and the individual's interests is similar to weighing the interests of the parties under the fourth amendment. Under both amendments, the interests are similar. The only difference is that the individual's interest in personal security is not diminished because the individual has not allegedly committed any offense. In contrast, the interest of the pursued driver may in some sense be considered diminished.

Applying the *Garner/Graham* standard³⁵¹ to substantive due process pursuit claims would indicate that police officers violate the standard of care under the fourteenth amendment if their conduct also violates the fourth amendment.³⁵² Although the fourteenth amendment measures the state's conduct by a standard of egregiousness and the fourth amendment measures the conduct under a standard of reasonableness, conduct unreasonable under the fourth amendment would be egregious under the fourteenth amendment because of the similar balancing process.

The focus of the *Garner/Graham* standard is on the harm that a suspect presents to others if not apprehended immediately. One measure of the danger requires an evaluation of the offense that the individual has allegedly committed. If the pursued driver has committed a nonserious offense, then pursuit increases the likelihood of harm to other drivers and pedestrians. The standard also implicitly considers whether police officers can use other means to apprehend the driver or deter flight. As stated previously, other means are available to protect a state's interest in law enforcement.³⁵³

Both the fourteenth and fourth amendment thus protect an individual's interest in personal security. When police officers use force that

recent deference to a police department's decision to establish roadblocks to apprehend intoxicated drivers.

350. See *supra* note 175 and accompanying text for the heightened scrutiny that the Court has applied to personal security claims involving excessive force.

351. See *supra* notes 214-93 and accompanying text for a discussion of this fourth amendment standard.

352. See, e.g., *Reed v. Hoy*, 891 F.2d 1421, 1425 (9th Cir. 1989) (in reviewing an officer's use of force, the analysis should examine whether the force they applied is unreasonable, not egregious, even if the fourteenth amendment is applicable).

353. See *supra* notes 105-09 and accompanying text.

is disproportionate to the need for it, they have infringed the individual's interest in personal security. Whether a claim is viable under the fourth or the fourteenth amendment also depends upon whether the injured individual was "seized" within the meaning of the fourth amendment.³⁵⁴ The class of injured individuals seized during a pursuit may allege a violation of the fourth amendment.³⁵⁵ Other individuals may allege a violation of the fourteenth amendment.³⁵⁶

V. DEFINING A FOURTH AMENDMENT "SEIZURE"

The Supreme Court has articulated the following three definitions for determining whether police officers have seized an individual:

- (1) whether "the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen";³⁵⁷ (2) whether "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave";³⁵⁸ and (3) whether there was "a governmental termination of freedom of movement *through means intentionally applied*."³⁵⁹

The third definition, which the Court recently set forth, is dramatically different from the Court's earlier definitions. The Court's most recent definition engrafts upon the fourth amendment a requirement that officers intentionally apply the means of force that cause an individual to stop;³⁶⁰ it requires courts to consider complex causation issues,³⁶¹ and it drastically narrows the protections under the fourth amendment.³⁶² Analysis of the Supreme Court's interpretation of the fourth amend-

354. See *infra* notes 357-459 and accompanying text for a discussion of what constitutes a fourth amendment "seizure."

355. See, e.g., *Graham*, 109 S. Ct. at 1871 ("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 should be analyzed under the [f]ourth [a]mendment and its 'reasonableness' standard, rather than under 'substantive due process' approach") (emphasis in original)).

356. See, e.g., *id.* at 1871 n.10 (pretrial detainees may assert substantive due process as a basis for an excessive force claim).

357. *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968). See *infra* notes 366-77 and accompanying text for a discussion of this definition.

358. *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (opinion for Justices Stewart and Rehnquist); see also *INS v. Delgado*, 466 U.S. 210, 215 (1984). See *infra* notes 384-402 and accompanying text for a discussion of this definition.

359. *Brower v. County of Inyo*, 489 U.S. 593, 597 (1989) (emphasis in original). See *infra* notes 404-59 and accompanying text for a discussion of this definition.

360. See *infra* notes 426-31 and accompanying text for a discussion of the intentionality requirement under the third definition.

361. See *infra* notes 422-31 and accompanying text for a discussion of the causation issue under the third definition.

362. See *infra* notes 423-31 and accompanying text for a discussion of how the third definition narrows the protection of the right to personal security under the fourth amendment.

ment indicates that when police pursue, the pursued driver and any passengers are always "seized" when applying the first two definitions³⁶³ but not always "seized" when applying the third definition.³⁶⁴ Other drivers and pedestrians, however, are not seized within the meaning of the fourth amendment.³⁶⁵ They may, however, seek to protect their right to personal security under the substantive due process component of the fourteenth amendment.³⁶⁶

A. *The First "Seizure" Definition*

The first definition of the word "seizure" occurred when the Court questioned whether the fourth amendment is implicated when police officers do not arrest individuals, but instead demand that they stop and answer questions.³⁶⁷ No one ever questioned whether an arrest was a "seizure" because the infringement of the right to personal security is obvious. In *Terry v. Ohio*,³⁶⁸ the Court determined that when police officers compel an individual to stop, they have seized the person within the meaning of the fourth amendment.³⁶⁹ Although the Court recognized the need for police officers to stop individuals, it held that such stops must be subject to fourth amendment scrutiny because the "inestimable right of personal security belongs as much to the citizen on the streets of our cities as to the homeowner closeted in his study."³⁷⁰ By holding that compelled stops constitute seizures, the Court thus required stops to also be "reasonable" within the meaning of fourth amendment.³⁷¹

The *Terry* Court, however, crafted a definition of a seizure that indicated that not all stops are fourth amendment "seizures." When police officers compel a person to stop, the individual is seized, but when police officers merely ask a person to stop and answer questions, the individual is not seized, even if he stops.³⁷² The latter is only a

363. See *infra* notes 379-80, 403 and accompanying text for an application of the first and second definitions to individuals involved in a police pursuit.

364. See *infra* notes 432-57 and accompanying text for an application of the third definition to police pursuits.

365. See *infra* notes 380, 403, 434 and accompanying text for an application of the definitions to these individuals.

366. See generally *Graham*, 109 S. Ct at 1871 n.10 (individuals not seized may assert substantive due process as a basis for an excessive force claim). But see *Roach*, 882 F.2d at 297 (applied fourth amendment to oncoming motorist's claim); *Britt*, 721 F. Supp. at 190 (applied fourth amendment to bystander's claim).

367. *Terry*, 392 U.S. at 19 n.16.

368. 392 U.S. 1 (1968).

369. *Id.* at 16.

370. *Id.* at 8-9.

371. *Id.* at 20 (although a warrant is not necessary to stop an individual, the officer's conduct must still be reasonable).

372. See, e.g., *id.* at 34 (White, J., concurring) (police officers may ask individu-

consensual encounter.³⁷³ The Court explained, "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' has occurred."³⁷⁴ The first definition thus contains one bright-line marker, the use of physical force, and one more flexible aspect, the "show of authority,"³⁷⁵ which constitutes psychological force.

The "show of authority" aspect of a "seizure" is more difficult to determine because it requires courts to distinguish encounters from stops. An encounter occurs if police officers ask casual questions, questions that are not psychologically coercive. A stop occurs, however, if police officers demonstrate a "show of authority," psychological force that constitutes a restraint of a citizen's liberty.³⁷⁶ Drawing the line between these two types of contact is difficult because resolution of the issue depends upon the degree of psychological force that police officers use. Every individual, unless police officers have reasonable suspicion to believe that an individual has committed an offense, "may refuse to cooperate and go on his way."³⁷⁷ Under the *Terry* definition, a request to stop thus is not a seizure,³⁷⁸ but a command to do so is one because it constitutes a "show of authority."³⁷⁹

Applying this first definition to the context of police pursuits indicates that police officers "seize" the pursued driver and her passengers because the pursuit itself constitutes a "show of authority" directed at

als questions without implicating the fourth amendment); see also *Florida v. Royer*, 460 U.S. 491, 497-98 (1983).

373. See, e.g., *Terry*, 392 U.S. at 32 (Harlan, J., concurring) (a person has a right "to ignore his interrogator and walk away"); see also *Mendenhall*, 446 U.S. at 555 (person could have reasonably believed that she was "free to end the conversation . . . and proceed on her way").

374. *Terry*, 392 U.S. at 19 n.16.

375. *Id.*

376. *Id.*

377. *Id.* at 34 (Harlan, J., concurring).

378. See, e.g., *INS v. Delgado*, 466 U.S. 210, 219-21 (1984) (factory survey of workers did not constitute a seizure, but was an example of consensual encounters); *Royer*, 460 U.S. at 503 n.9 (coercive conduct indicated a seizure); *Terry*, 392 U.S. at 34 (White, J., concurring); see also W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON FOURTH AMENDMENT § 9.2(h), at 408 (2d ed. 1987) (Supreme Court distinguishes stops from encounters by relying "upon the amorphous concept of consent": a person may indicate a lack of consent "by ignoring the officer's summoning or by leaving his presense," . . . and officer would "seize" the person by attempting to "renew the encounter"); Note, *Michigan v. Chesternut and the Investigative Pursuits: Is There No End to the War Between the Constitution and Common Sense*, 40 HASTINGS L.J. 203, 208 (1988) (an encounter occurs when "a police officer accosts an individual and asks questions").

379. See, e.g., *Terry*, 392 U.S. at 16 (fourth amendment is applicable to "seizures" of the person which do not eventuate in a trip to the station house and prosecution for crime — 'arrests' in traditional terminology").

these individuals.³⁸⁰ Other drivers and their passengers and pedestrians, however, are not "seized" because the police officers' show of authority does not communicate to these individuals a command to stop as it does to the pursued driver and his passengers. The command implicit in a pursuit can be discerned by comparing it to the officers' first act of signalling the driver to pull over to the side of the road. The signalling is a request that the driver comply with the officer's suggestion. A pursuit, however, uses psychological force to compel a stop. This force is apparent by the aggressive manner in which officers use their cruisers to stop individuals. This interpretation of the *Terry* "show of authority" definition is supported by the Court's second "seizure" definition, which in essence elaborated on what the Court meant by "show of authority."

B. *The Second "Seizure" Definition*

Applying the Court's *Terry* definition, however, proved to be difficult for the Court. The Court often decided cases by less than a majority.³⁸¹ In 1984, sixteen years after *Terry*, a majority of the Court³⁸² adopted the second "seizure" definition first articulated by Justice Stewart four years earlier.³⁸³ Under this second definition, the focus was on how a reasonable suspect would interpret the police officers' conduct.³⁸⁴ If "'a reasonable person would have believed that he was not free to leave,'"³⁸⁵ then a seizure had occurred. The second "seizure" definition thus appeared to be an elaboration of the *Terry* Court's first "show of authority" standard: if a reasonable person would feel compelled to stop because of the police officers' conduct, the stop was a result of the officers' use of psychological force.

In first articulating this definition, Justice Stewart specified some factors that would be relevant in determining that officers' used their authority to compel a stop: "[1] the threatening presence of several officers, [2] the display of a weapon by an officer, [3] some physical touching of the person of the citizen, or [4] the use of language or tone of voice indicating that compliance with the officers' request might be

380. Professor LaFave has maintained that when police officers engage "in conduct significantly beyond that accepted in social intercourse" they are using coercive conduct that signifies a fourth amendment seizure. W. LAFAVE, *SEARCH AND SEIZURE: A TREATISE ON FOURTH AMENDMENT* § 9.2(h), at 412 (2d ed. 1987). The use of sirens and lights suggests that officers use their authority in compelling an individual to stop, conduct "beyond that accepted in social intercourse."

381. See, e.g., *Florida v. Royer*, 460 U.S. 491 (1983); *United States v. Mendenhall*, 446 U.S. 544 (1980).

382. *Delgado*, 466 U.S. at 211.

383. *Mendenhall*, 446 U.S. at 554 (Stewart, J., concurring).

384. *Delgado*, 466 U.S. at 215.

385. *Id.* (quoting *Mendenhall*, 446 U.S. at 554 (Stewart, J., concurring)).

compelled."³⁸⁶ Although these factors provide guidance in determining whether a person has been "seized," this definition, like the first definition, requires consideration of all the circumstances to assess the degree of psychological compulsion.³⁸⁷

The two similar definitions of "seizure" articulated by the Court occurred in cases in which the suspect actually stopped in response to the police officers' conduct. Not until 1988 in *Michigan v. Chesternut*³⁸⁸ did the Court address whether a person could be "seized" if he had not in fact stopped. In *Chesternut*, an individual standing at an intersection saw a patrol car and began to run.³⁸⁹ When the patrol car followed "him for a short distance,"³⁹⁰ the individual threw away some packets that had been in his jacket.³⁹¹ The Court determined that under these circumstances no seizure had occurred either before or upon the individual's discarding of the packets.³⁹²

In *Chesternut*, the Court quoted the first *Terry* definition³⁹³ but applied the second definition of a seizure.³⁹⁴ In applying the second definition, the Court focused on the circumstances as they appeared to the individual. The issue was whether the police officers' conduct in the particular setting would have "communicated to the reasonable person an attempt to capture."³⁹⁵ In this case, the police officers merely "followed" the individual, a common investigative practice.³⁹⁶ An attempt to capture, however, constitutes a fourth amendment seizure. To distinguish the act of mere following from an act that communicates an attempt to capture, the Court implied that the following factors indicate an attempt to capture: (1) the use of sirens or flashers, (2) the commanding of an individual to halt, and (3) driving a "car in an aggressive manner" in order to block or to control "the direction or speed of

386. *Mendenhall*, 446 U.S. at 554-55.

387. Professor LaFave has aptly noted that the Court could not have meant to create a "seizure" definition that would have made all encounters fourth amendment "seizures." W. LAFAVE, SEARCH AND SEIZURE TREATISE ON THE FOURTH AMENDMENT § 9.2(h), at 411 (2d ed. 1987). He surmised that few individuals feel free to ignore a police officer's request to stop and answer questions. *Id.* at 410. Although psychological pressure is inherent in every confrontation between a citizen and a police officer, a "seizure" occurs, according to Professor LaFave, only if "the officer adds to those inherent pressures by engaging in conduct significantly beyond that accepted in social intercourse." *Id.* at 412.

388. 486 U.S. 567 (1988).

389. *Id.* at 569.

390. *Id.*

391. *Id.*

392. *Id.* at 574.

393. *Id.* at 573.

394. *Id.* at 573-76.

395. *Id.* at 575.

396. *Id.* at 569.

[an individual's] movement."³⁹⁷ Because these factors were not implicated in *Chesternut*, no seizure occurred.

In articulating the factors, the Court reaffirmed the totality of circumstances approach first articulated in the "show of authority" aspect of *Terry* and the second "seizure" definition. The Court explicitly refused to adopt the two contrasting, bright-line "seizure" definitions advocated by the parties.³⁹⁸ It rejected the individual's argument that all "chases" constitute seizures and the state's argument that all seizures require the individual to stop.³⁹⁹ The Court explained that bright-line rules are inappropriate because the focus of the seizure issue is whether the police officers' conduct was "coercive."⁴⁰⁰ To determine whether conduct was coercive requires consideration of all the facts. The Court thus adhered to its two definitions for "seizures" because they are "flexible"⁴⁰¹ in application, even if they are "necessarily imprecise."⁴⁰²

Applying the *Chesternut* decision to police pursuits indicates that the pursued driver and her passengers are "seized" during a pursuit because the pursuit communicates an attempt to capture. Other motorists and pedestrians, however, are not "seized" during a pursuit because the officers' conduct does not signify an attempt to capture these other individuals.

The factors the Court articulated in *Chesternut* are present during pursuits. Police officers use sirens and flashers during pursuits. They also use their car aggressively. By using multiple vehicles, police officers may control the pursued's direction of travel. They also control the pursued's speed. Pursuit experts agree that if police officers were to stop the pursuit, the individual would either soon stop and park the car or return home.⁴⁰³ The typical pursuit thus clearly communicates an attempt to capture the pursued driver and her passengers. It does not, however, communicate an attempt to capture any other motorists or

397. *Id.* at 575.

398. *Id.* at 572-73.

399. *Id.*

400. *Id.* at 573 (quoting *Mendenhall*, 446 U.S. at 554).

401. *Id.*

402. *Id.* The United States Supreme Court recently decided to review a case that may help to define the psychological force aspect of fourth amendment "seizures." *Bostick v. Florida*, 554 So. 2d 1153 (Fla. 1989), *cert. granted*, 111 S. Ct. 241 (1990). The Court has agreed to address the following question: "May the police, without violating the fourth amendment, board an interstate bus and ask for, and receive, consent to search a passenger's luggage where they advise the passenger that he has the right to refuse?" 59 U.S.L.W. (1990). The Florida Supreme Court had determined that police officers had used intimidation to seize the passenger. 554 So. 2d at 1157. An officer had partially blocked the bus exit, had appeared to carry a gun, and had requested to search the passenger's luggage during a brief layover, thus prohibiting the passenger from leaving the bus. *Id.*

403. See *supra* notes 143-54 and accompanying text for a discussion of how police officers may control a pursued driver's speed.

pedestrians.

C. The Third "Seizure" Definition

The Supreme Court's subsequent decision in *Brower v. County of Inyo*,⁴⁰⁴ however, makes it less clear that pursuits generally constitute "seizures" of the pursued driver and her passengers.⁴⁰⁵ In *Brower*, the Court offered a third definition of a seizure: a seizure occurs "only when there is a governmental termination of freedom of movement through means intentionally applied."⁴⁰⁶ In articulating this new definition for a "seizure," the Court never explained whether the third definition replaces or supplements the prior definitions.⁴⁰⁷ In extensive dicta

404. 489 U.S. 593 (1989).

405. *Id.* at 596. In dicta the *Brower* Court discussed whether a pursued driver who stops as a result of losing control of her vehicle is "seized" within the meaning of the fourth amendment. *Id.* It determined that under those circumstances, police officers have not intentionally stopped the individual and therefore have not effectuated a fourth amendment seizure. *Id.* (citing with approval *Galas v. McKee*, 801 F.2d 200, 202-03 (6th Cir. 1986)). The Court, however, characterized these circumstances as involving an "unexpected" loss of control. *Id.* How one characterizes the likelihood of a crash is a question of perspective. *See infra* notes 422-31 and accompanying text discussing the characterization of the causation issue. The Court, however, later stated that the question of what caused an individual to stop should not be narrowly characterized. *Id.* at 1382. It declared that if a person is "stopped by the very instrumentality set in motion or put in place in order to achieve that result," the individual was seized. *Id.* The Court's broad characterization of causation thus appears inconsistent with its narrow characterization of causation regarding a stop by a pursued driver who loses control of her vehicle.

406. *Brower*, 489 U.S. at 597 (emphasis omitted).

407. Since its decision in *Brower*, the Court has applied both the first and third "seizure" definitions. *See Sitz*, 110 S. Ct. at 2485 (applies and quotes third definition); *Graham*, 109 S. Ct. at 1871 n.10 (quotes first definition and cites *Brower*). In neither of these cases, however, did the parties dispute whether the individual had been seized.

Many lower courts have not applied the third definition in determining whether an individual has been seized. *See, e.g., Flowers*, 912 F.2d at 170-12 (applies second definition; person on departing bus was not seized by police officers although the departure may have psychologically constrained the individual); *Jones v. State*, 572 A.2d 169, 172 (Md. 1990) (cites *Brower* but applies the second definition; police officers seized the suspect by commanding him to halt because the statement communicated an attempt to capture).

Some courts, however, have applied the third definition. *See, e.g., Landol-Rivera v. Cruz Cosme*, 906 F.2d 791, 794-96 (1st Cir. 1990) (even though police officers knew the passenger of a pursued driver was a hostage, the passenger was not seized when an officer shot at the driver and hit the passenger); *Sutherland v. Holcombe*, No. 89-1708 (4th Cir. Nov. 17, 1989), *cert. denied*, 110 S. Ct. 1949 (1990) (court applied *Brower* and determined that a pursued driver was not seized when he hit a bump in the road that caused him to lose control of his car).

The Supreme Court recently granted certiorari in a case that may explain how to interpret the third definition. *California v. Hodari*, 59 U.S.L.W. 3209 (U.S. Oct. 2, 1990) (No. 89-1632). The Court agreed to address two issues: "(1) Is physical restraint required for seizure of person under the Fourth Amendment? (2) May citizen who is

the Court limited when pursuits can constitute seizures.⁴⁰⁸

In *Brower*, police officers seized the decedent when he crashed into a roadblock, which they had intentionally set up to stop him.⁴⁰⁹ Thus, in this case, like all the other "seizure" cases previously examined⁴¹⁰ except *Michigan v. Chesternut*,⁴¹¹ the individual had actually stopped. The new definition, although easily applied in this case, in some respects conflicts with prior "seizure" definitions.⁴¹² The new definition of "seizure" has two elements: termination of movement⁴¹³ and causation.⁴¹⁴ Under this definition an individual must always stop in order to be "seized," and the stop must occur as a result of means intentionally applied by police officers.

1. The Stop Requirement

The first element requires the individual to stop.⁴¹⁵ This requirement, however, was explicitly rejected by the *Chesternut* majority opin-

pursued by police officer on public street immunize himself from prosecution by discarding incriminating evidence and asserting that he did so out of fear of unlawful search?" *Id.* In *Hodari*, police officers had chased the defendant on foot and "ran in such a fashion to cut him off and confront him head on." *California v. Hodari*, 265 Cal. Rptr. 79, 83 (Cal. Ct. App. 1989). When the officers were eleven feet from the defendant, the defendant discarded some drugs. *Id.* The court found that *Chesternut*, which involved officers following a suspect, was applicable, rather than *Brower*, which involved officers setting up a roadblock to stop the suspect. See *supra* notes 388-402, 404 and accompanying text and *infra* notes 408-57 and accompanying text for a discussion of these cases. The California Court of Appeals mentioned all three "seizure" definitions. See *Hodari*, 265 Cal. Rptr. at 82-84. The court explicitly rejected using the third definition in favor of applying the second definition. *Id.* at 84. It did not find the third definition applicable to the facts of the case. *Id.*

If the Court were to require actual "physical restraint," a standard requested by the state government, the Court would have to overrule its landmark case of *Terry v. Ohio*, which first established that a "show of authority" constituted a "seizure." Although actual physical restraint would be a bright-line for law enforcement officials, it would drastically curtail the personal liberty of citizens.

408. *Id.* at 1381. See *infra* notes 436-58 and accompanying text for a discussion of the Court's dicta regarding police pursuits.

409. *Brower*, 489 U.S. at 598.

410. See *supra* notes 368-403 and accompanying text for a discussion of fourth amendment "seizures."

411. 486 U.S. 567, 569 (1988). See *supra* notes 388-403 and accompanying text for a discussion of this case and fourth amendment "seizures."

412. See *infra* notes 415-31 and accompanying text for a discussion of the contrasting "seizure" definitions.

413. *Brower*, 489 U.S. at 598-599. See *infra* notes 415-21 and accompanying text for a discussion of the stop requirement.

414. *Id.* See *infra* notes 422-431 and accompanying text for a discussion of the causation requirement.

415. *Brower*, 489 U.S. at 597. The Court stated that a person is seized when there is a "governmental termination of freedom of movement." *Id.*

ion, which had applied the second "seizure" definition.⁴¹⁶ In *Brower*, the Court never cited the cases in which it had established the two prior "seizure" definitions, nor cases that elaborated on these well recognized definitions. To explain the new "seizure" definition, the Court quoted from *Tennessee v. Garner*,⁴¹⁷ which stated, "Whenever an officer restrains the freedom of movement of a person to walk away, he has seized that person."⁴¹⁸ In *Garner*, however, no one ever disputed or would dispute that officers had seized the decedent by intentionally killing him as he fled. The reference to *Garner*, however, supported the two elements of the new definition: in *Garner*, a "seizure" occurred because the bullet stopped the decedent, and a police officer, a governmental actor, intentionally caused the stop.

Aspects of the two prior "seizure" definitions, however, still have applicability to fourth amendment claims, even under the third definition, but only if a stop occurred. For example, in *Graham v. Connor*,⁴¹⁹ the Supreme Court quoted the first definition to explain when the fourth amendment applies, but also cited the *Brower* decision, in which it articulated the third definition.⁴²⁰ In *Graham*, officers used both physical and psychological force in stopping an individual.⁴²¹ The "show of authority" definition may thus aid courts in determining "seizures" under the third definition if the individual has actually stopped. The requirement of an actual stop, however, is clearly inconsistent with the second definition elaborated upon in *Chesternut*.

2. The Causation Requirement

The second element of the third "seizure" definition, causation, is difficult to understand.⁴²² The *Brower* opinion appears to specify two causation questions for fourth amendment claims. Under the third defi-

416. *Chesternut*, 486 U.S. 572-73. Only Justice Scalia, who authored the majority opinion in *Brower*, and Justice Kennedy advocated an actual restraint test. *Id.* at 577 (Kennedy, J., concurring). The *Chesternut* concurrence emphatically rejected the prior two "seizure" definitions because under the actual restraint test no seizure occurs, even if there was "an unmistakable show of authority" (the first "seizure" definition), and even if "the officers' conduct communicates to a person a reasonable belief that they intend to apprehend him" (the second "seizure" definition). *Id.*

417. 471 U.S. 1 (1985).

418. *Brower*, 489 U.S. at 595 (quoting *Garner*, 471 U.S. 1, 7 (1985)). The *Garner* Court used two sentences to explain that a police officer seized a suspect by killing him. 471 U.S. at 7.

419. 109 S. Ct. 1865 (1989).

420. *Id.* at 1871 n.10.

421. *Id.* at 1868. The officers used physical force by handcuffing and beating the suspect. *Id.* They used psychological force by making an "investigative stop."

422. *Brower*, 489 U.S. at 597. The individual must stop as a result of "means intentionally applied." *Id.* (emphasis in original).

dition, the officers' conduct must have caused the individual to stop.⁴²³ This causation question, according to the Court, is different from the question of whether the officers' conduct caused the stopped individual's injuries.⁴²⁴ The question of what caused an injury, as opposed to what caused a stop, is a familiar issue in constitutional litigation. For years the Court has borrowed tort concepts to define the scope of protection available under various amendments.⁴²⁵ To be liable for a person's injuries, officials must have caused them.

The question of what caused a stop, however, is both a familiar and an unfamiliar issue. It is a familiar inquiry in cases in which the individual actually stopped. Prior "seizure" definitions in essence questioned whether the stop was compelled or voluntary; that is, did the police officers' "show of authority" cause the individual to stop or did the individual voluntarily stop.⁴²⁶ The question is also unfamiliar because it appears to suggest that all seizures must be the result of intentional conduct.

What the Court means by intentional conduct is unclear. The Court seems to emphasize the means intentionally used by police officers to stop an individual and deemphasize the individual's culpable behavior in fleeing.⁴²⁷ The Court stated that if police officers "side-swipe[]" a vehicle and the touching causes the individual to lose control and crash, a seizure has occurred, even if the officers did not subjectively intend to cause an "accident."⁴²⁸ "Intent" in this example ap-

423. *Id.*

424. The facts and dicta in *Brower* suggest a method to distinguish these causation issues. *Id.* at 594-598. In *Brower*, police officers chased the decedent for about 20 miles. *Id.* at 594. The officers decided to stop him by setting up a roadblock. *Id.* When the decedent crashed into the roadblock, the police officers caused him to stop. *Id.* at 599. The issue of whether the police officers caused his injuries, according to the Court, may depend upon whether the officers had caused the decedent to crash into the roadblock by blinding him with their headlights. *Id.* The *Brower* opinion thus states that the roadblock allegedly caused the decedent to stop, but that it may not necessarily have caused the decedent's injuries. *Id.*

425. See, e.g., Abernathy, *Section 1983 and Constitutional Torts*, 77 GEO. L.J. 1441, 1445-1459 (1989); Nahmod, *Section 1983 Discourse: The Move from Constitution to Tort*, 77 GEO. L.J. 1719, 1729-30 (1989).

426. See *supra* notes 367-403 and accompanying text for a discussion of these prior definitions.

427. The significance of this focus is apparent by considering the lower court's holding in *Brower*, which emphasized the culpability of the decedent during the chase, not the means the police officers used. *Brower*, 817 F.2d 540, 546 (1987), *rev'd*, 489 U.S. 593, 599 (1989). Even though the decedent crashed into the roadblock, the lower court surprisingly determined that no seizure had occurred. *Id.* at 546-47. The Court drew this erroneous conclusion by stressing that the decedent could have avoided crashing into the roadblock by stopping the chase. *Id.* at 546. Under this interpretation, the reasonableness of the roadblock would thus evade scrutiny because there would have been no "seizure" implicating the fourth amendment.

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

pears to be similar to the traditional tort standard of intent, which states that conduct is nevertheless intentional if the harm that occurred was "substantially certain" to follow from a person's act.⁴²⁹ The officers' subjective state of mind is not controlling. Instead, the focus is on the means the officers' used in effecting a stop.⁴³⁰

Thus, under the third "seizure" definition, the causation question is whether the stop was substantially certain to occur in light of the means used by the officers. "Intent" in this context is an objective question, which focuses on the means the officers used, not the officers' subjective beliefs about how they intended to stop an individual.⁴³¹

3. Applying the Third "Seizure" Definition to Pursuits

The third "seizure" definition articulated in *Brower* is more restrictive than prior definitions because it imposes the requirement that an individual stop. Fleeing from the officers' "show of authority" is insufficient under the third definition, but sufficient under the first two definitions. The third definition is also more restrictive because police officers must intentionally, not recklessly, cause the stop. Under this narrow definition, most pursuits nevertheless implicate the fourth amendment. An application of this definition to four easily identifiable pursuit situations indicates that most pursued drivers and their passengers are seized when they stop, whether voluntarily or as a result of a crash, but that injured pedestrians and other drivers and their passengers are not seized.

First, an individual and any passengers are seized if they stop after abandoning their flight. In this situation, the officers' "show of authority" caused the stop; it communicated an attempt to capture them. One could hardly call the stop a consensual encounter. Flashing lights, sirens, and aggressive driving indicate the officers' use of psychological force, means intentionally applied to cause the individual to stop.

The remaining examples are more complex because they involve crashes: police officers crashing into the pursued driver, police officers crashing into pedestrians and other drivers, and the pursued driver crashing into other drivers or an object. According to the *Brower*

429. W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON TORTS § 8, at 35 (5th ed. 1984).

430. *Brower*, 489 U.S. at 597-598. See generally *Graham*, 109 S. Ct. at 1872-73 (officers' subjective state of mind is not relevant to determining whether force was reasonable).

431. Thus, according to the Court under the third definition, even the "accidental firing" of a gun can constitute intentional conduct only because the emphasis is on the means used by the officers to stop the individual. Some courts, however, have determined that an accidental shooting does not constitute a seizure. See, e.g., *Landol-Rivera v. Cruz Cosme*, 906 F.2d 791, 795-96 (1990); see also *supra* note 114 (collecting cases).

Court, if police officers intentionally crash into the individual's vehicle, then a seizure of the driver and any passengers occurs.⁴³² Although the officers may be unaware that the vehicle has passengers, the intentional act of crashing into the vehicle to stop the driver is an act that is substantially certain to cause any passenger to stop.⁴³³ In this example, both the pursued driver and passengers are "seized."

If police officers accidentally crash into other cars or pedestrians during their pursuit of another individual, then neither pedestrians nor the other drivers and their passengers have been seized.⁴³⁴ The stopping of these other individuals is not substantially certain to occur. In that case, the fourteenth amendment, not the fourth amendment, may protect their right to personal security.⁴³⁵

If the pursued driver stops because he accidentally crashes into another driver or an object, police officers under some circumstances may have seized the driver and his passengers. This seizure issue is difficult because of the *Brower* Court's discussion in dicta of this example.⁴³⁶ The Court stated that if an individual stops during a pursuit because he "unexpectedly" loses control of his vehicle and crashes, then

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

433. The First Circuit has used an individualist perspective in interpreting the intentionality requirement of the third definition. *Landol-Rivera*, 906 F.2d at 795. The court determined that even if police officers shoot a passenger in a vehicle, only the individual they intend to apprehend can be "seized" within the meaning of the fourth amendment. *Id.* The court stated, "A police officer's deliberate decision to shoot at a car containing a robber and a hostage *for the purpose of stopping the robber's flight* does not result in the sort of willful detention of the hostage that the [f]ourth [a]mendment was designed to govern." *Id.* (emphasis in original). This narrow interpretation of the third definition is absurd. It implicitly focuses on an officer's subjective intent in determining whether a person was seized, a focus explicitly rejected by the Supreme Court. *See, e.g., Graham*, 109 S. Ct. at 1873. It also implicitly condones reckless conduct on the part of police officers by shielding this fourth amendment issue from scrutiny. The court should have determined that the passenger was seized and then determined whether the shooting was reasonable under the fourth amendment.

434. *Brower*, 489 U.S. at 597. The *Brower* Court explained that "if a parked and unoccupied police car slips its brakes and pins a passerby against a wall, it is likely that a tort has occurred, but not a violation of the Fourth Amendment." *Id.*

435. *See supra* notes 294-356 and accompanying text for a discussion of the applicability of the fourteenth amendment.

436. *Brower*, 489 U.S. at 595-96. The Court explicitly approved of a Sixth Circuit Court of Appeals decision, in which the circuit court had determined that no seizure had occurred when police officers chased an individual using flashing lights. *Id.* (citing *Galas*, 801 F.2d at 202-203). The Sixth Circuit, however, was unsure of its ruling because it stated that even if the individual had been seized, the police officer's conduct was nevertheless reasonable. *See Galas*, 801 F.2d at 203-204. The Sixth Circuit decision also occurred before the Supreme Court's decision in *Chesternut*, which determined that police officers who chased an individual using flashing lights had not seized him. *See supra* notes 388-403 and accompanying text for a discussion of this case.

no seizure has occurred.⁴³⁷ In this situation, according to the Court, the means of stopping the individual — the “unexpected” accident — was not intentionally used by the officers.⁴³⁸ Crashes, however, during pursuits are frequent. Police officers are often trained to “stay with the individual” because the individual will eventually crash. To continue chasing an individual is to employ means intentionally designed to produce a stop because crashes are generally “expected” stops when police officers pursue. Crashes under these circumstances should thus constitute “seizures.”

The above examples indicate the nature of fourth amendment seizures. Because these examples assume that a crash was or was not intentional, they do not reveal that the issue of what caused a stop is subject to both broad and narrow interpretations. Resolution of any causation issue depends not only upon how one characterizes the facts, but also upon the policies underlying the scope of liability. Because the *Brower* Court adopted a communalist perspective⁴³⁹ in discussing causation to stop, courts should similarly broadly interpret the causation issue.

The Court was able to broadly interpret the causation issue in *Brower* by using five rhetorical devices to express the communalistic viewpoint: (1) general factual characterization to emphasize the responsibility of the police officers and to deemphasize the responsibility of the decedent, (2) narrow characterization of the decedent's free will, (3) broad time frame for inculpatory facts relating to the police and narrow time frame for inculpatory facts relating to the decedent, (4) abstract description of the foreseeability of the stop, and (5) broad linking of the police officers' setting up of the roadblock to the stop.⁴⁴⁰ The Court's adherence to a communalistic perspective is apparent by contrasting its decision with the lower court's decision, which expressed an individualistic perspective.

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

438. Under the third definition, the conduct must be “intentional.” Professor Keeton, however, has stated that “the mere knowledge and appreciation of a risk — something short of substantial certainty — is not intent.” W. KEETON, D. DOBBS, R. KEETON, & D. OWEN, PROSSER AND KEETON ON TORTS, § 8, at 36 (5th ed. 1984). Distinguishing intentional conduct from less culpable conduct is difficult. See, e.g., *Berry v. City of Muskogee*, 900 F.2d 1489, 1494-96 (10th Cir. 1990) (courts have often struggled to distinguish intentional conduct from conduct that represents recklessness, gross negligence, and deliberate indifference).

439. The *Brower* Court used rhetorical devices to further a “communalistic” perspective, one that requires a broad interpretation of the causation issue. See *infra* notes 440-57 and accompanying text for a discussion of how the Court expressed this communalist perspective. See *supra* notes 65-68, 84-90 and accompanying text for a discussion of the communalist perspective.

440. See *supra* notes 65-75 and accompanying text for a discussion of Professor Balkin's theory of communalism and individualism.

In *Brower*, the Supreme Court reversed the lower court's decision, which had determined that no seizure occurred.⁴⁴¹ The Supreme Court described the facts to emphasize the responsibility of the police officers in setting up the roadblock and to deemphasize the decedent's responsibility for his act of fleeing.⁴⁴² The lower court, however, emphasized the decedent's culpable act of fleeing and deemphasized the police officers' act of setting up the roadblock.⁴⁴³

Naturally linked to factual characterization in this context is the issue of free will. The Supreme Court narrowly described the options available to the decedent after the officers established the roadblock.⁴⁴⁴ It never focused on whether the decedent could have stopped in determining whether the officers had seized him. Thus, the Court narrowly viewed the decedent's free will and broadly defined the police officers' choices, which included the option of discontinuing the pursuit. In contrast, the lower court broadly defined the decedent's options. It emphasized that even after the officers had established the roadblock, the decedent could have stopped voluntarily.⁴⁴⁵

The courts' characterizations are also related to the time frame they use to describe the events. The Supreme Court limited the time frame to exclude the decedent's inculpatory act of fleeing. It focused on the decedent's act of approaching the roadblock at a high speed.⁴⁴⁶ The lower court, however, expanded the time frame to include the pursuit that preceded the roadblock. It emphasized that any time prior to the roadblock, the decedent remained free to stop.⁴⁴⁷

Whether the stop was foreseeable depends on whether abstract or concrete terms are used to describe the likelihood of the stop. The Supreme Court used abstract terms to describe the likelihood that the roadblock would stop the decedent.⁴⁴⁸ 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."⁴⁴⁹ The Court did not focus on whether the decedent could have actually stopped to determine the seizure issue.⁴⁵⁰ The Court warned that the issue of what caused a stop should not be

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

442. *Id.*

443. *Brower*, 817 F.2d at 546.

444. *Brower*, 489 U.S. at 598.

445. 817 F.2d at 546-47.

446. 489 U.S. at 598.

447. 817 F.2d at 546.

448. 489 U.S. at 598.

449. *Id.* at 599.

450. The Court, however, in dicta appeared to have a much more concrete approach to determining whether the police officer caused the decedent's injuries. It questioned whether the lights shining into the decedent's eyes caused him not to stop in time. *Id.* at 599. The Court could have similarly decided that no seizure had occurred if the decedent could have seen the roadblock.

determined too narrowly.⁴⁵¹ The issue of foreseeability for a seizure thus does not require officers to perceive exactly how the means used will cause the individual to stop; rather, the abstract setting in motion of these means is sufficient. The Court explained that even if the means employed stops an "unintended person,"⁴⁵² a seizure has occurred. In contrast, the lower court never discussed the foreseeability of the stop but instead stressed the decedent's free will to stop.⁴⁵³ It stated that the police officers never "arrested or restrained" his movement.⁴⁵⁴

The final rhetorical device, characterizing the causal connection between the roadblock and the stop, is similar to the other devices. The Supreme Court broadly characterized the police officers' behavior in setting up the roadblock. It found a causal link between the roadblock and the stop.⁴⁵⁵ The lower court, in contrast, found no link whatsoever. It linked the stop only to the decedent's decision not to stop, not to the officers' establishing of a roadblock.⁴⁵⁶

To resolve the issue of whether an individual has been seized during a pursuit, one should thus emphasize the police officers' conduct during a pursuit and deemphasize the individual's act of fleeing. This emphasis is vital because the causation question presented in the third definition is always subject to two contrasting viewpoints. The *Brower* Court expressed an interest in subjecting police officers' conduct to fourth amendment scrutiny by broadly defining causation.

To broadly view the causation requirement of the third "seizure" definition would thus be to determine that police officers during a pursuit seized the pursued driver and his passengers who crashed when the driver lost control. To find that these individuals were "seized" does not necessarily mean that the challenged conduct violated the fourth amendment. The other issue central to fourth amendment claims is the disproportionality of the force effectuating the seizure.⁴⁵⁷ This latter inquiry is the appropriate place to weigh an individual's interest in personal security against the state's interests, which include an interest in law enforcement.

451. *Id.* at 598-599. The Court explained:

In determining whether the means that terminate the freedom of movement is the very means that the government intended we cannot draw too fine a line, or we will be driven to saying that one is not seized who has been stopped by the accidental discharge of a gun with which he was meant only to be bludgeoned, or by a bullet in the heart that was meant only for the leg.

Id.

452. *Id.* at 596.

453. 817 F.2d at 546.

454. *Id.*

455. 489 U.S. at 599.

456. 817 F.2d at 546.

457. See *supra* notes 214-93 and accompanying text for a discussion of the fourth amendment standard of disproportionality.

Even if one narrowly interprets the causation requirement of the third seizure definition and determines that the dicta in *Brower* is controlling, individuals not seized within the meaning of the fourth amendment are still protected by the fourteenth amendment standard of disproportionality.⁴⁵⁸ This standard, like the fourth amendment standard of disproportionality, requires that police officers use force that is justified by the circumstances.⁴⁵⁹ Whether one asserts a fourth amendment claim or a fourteenth amendment claim, the individual's interest in personal security receives constitutional protection.

VI. CONCLUSION

Police pursuits violate the fourth and fourteenth amendments when they represent the use of excessive force. During every police pursuit, police officers use psychological force, force that causes the pursued driver to increase his speed and the danger to the public. Whether officers use psychological force or direct physical force, such as ramming the pursued driver's vehicle, the constitutionality of their actions depends upon the circumstances of each pursuit. Force is permissible only if it is not disproportionate to the need for it. Disproportionality is measured by balancing the harm presented by the pursuit itself against the officers' need to apprehend the fleeing driver. The need to apprehend is directly related to the seriousness of the offense prompting the pursuit, not to the suspicious act of fleeing.⁴⁶⁰ An examination of some current police pursuit policies reveals that police departments have differently assessed the need for pursuits.

In examining fourth amendment excessive force claims, the United States Supreme Court articulated a standard that is similar to the disproportionality standard for fourteenth amendment pursuit claims. In *Tennessee v. Garner*,⁴⁶¹ the Court explained that officers may use deadly force to apprehend a suspect if he "poses a threat of serious physical harm, either to the officer or to others."⁴⁶² Similarly, in *Graham v. Connor*,⁴⁶³ the Court stated that the degree of nondeadly force

458. See *supra* notes 294-353 and accompanying text for a discussion of the fourteenth amendment standard of disproportionality.

459. *Id.*

460. Some law enforcement officials contend that limiting pursuits of minor traffic offenders would prevent them from effectively protecting the public from criminals. See, e.g., The Police Yearbook, 1990 International Ass'n Chiefs of Police 75 (October 14-19, 1989). They believe that officers should be able to pursue minor traffic offenders because police officers may serendipitously apprehend a driver who has committed a serious, yet unknown, offense. *Id.* This erroneous view ignores the clear commands of *Tennessee v. Garner* and *Graham v. Connor*, in which the Supreme Court held that the use of force must be related to the seriousness of a known crime.

461. 471 U.S. 1 (1985).

462. *Id.* at 11.

463. 109 S. Ct. 1865 (1989).

permissible depends upon "the severity of the crime at issue, [and] whether the suspect poses an immediate threat to the safety of the officers or others."⁴⁶⁴ By focusing on the danger that a suspect presents to others, the Court broadly protected a suspect's right to personal security and limited the degree of force officers may use to apprehend a suspect.

Most pursuit policies recognize that pursuits are inherently dangerous.⁴⁶⁵ Some policies explicitly declare that a pursuit represents the use of deadly force.⁴⁶⁶ Because they directly link deadly force with a pursuit, they authorize pursuits only when officers would be justified in using deadly force to stop the driver.⁴⁶⁷ Similarly, some policies question whether the driver has allegedly committed a "hazardous" offense or a "violent" offense.⁴⁶⁸ These policies properly recognize that the lawfulness of a pursuit is not related to whether an individual has committed a felony or misdemeanor.⁴⁶⁹ The focus is on the offense the suspect

464. *Id.* at 1872.

465. *See, e.g.*, Clark County, Ga., Pursuit Policy, B1.22 (Nov. 1, 1986) ("vehicle pursuit is justified only when the necessity of immediate apprehension outweighs the level of danger created by the pursuit"); Little Rock, Ark., Pursuit Policy, G.O. 17 (Nov. 9, 1989) (pursuits are to be terminated "when the danger created by the pursuit outweighs the necessity for immediate apprehension"); City of Oakdale, Minn., Pursuit Policy, AD-009 (Dec. 15, 1989) (officers are to question whether "the dangers created by the pursuit incident exceed the danger posed by allowing the perpetrator to escape" and whether "a reasonable person [would] understand why the pursuit occurred or was necessary"); Ohio, Pursuit Policy § 12.045-1 (Apr. 12, 1990) (pursuit justified "only when the necessity of apprehension outweighs the level of danger created by the pursuit").

466. *See, e.g.*, Volusia County, Fla., Pursuit Policy, 41.2 (Feb. 15, 1990) (pursuits are prohibited "unless it is for the apprehension of a suspect under the circumstances which would, *at the time the decision is made to pursue*, justify the use of deadly force") (emphasis in original); County of Charleston, S.C., Pursuit Policy, G.O. 81-923(a) (Mar. 23, 1982) ("same judgement must apply to both [pursuits and the use of firearms]").

467. *See, e.g.*, Volusia County, Fla., Pursuit Policy, 41.2 (Feb. 15, 1990). This pursuit policy complies with the fourth amendment standard for using force. *See supra* notes 214-293 and accompanying text for a discussion of the fourth amendment standard. This policy limits pursuits to two circumstances:

1. The apprehension of a person reasonably suspected of committing a felony and the deputy reasonably believes that the fleeing person poses a threat of death or serious injury to others beyond the circumstances directly involved in the pursuit; OR
2. The deputy believes the fleeing person has committed a crime involving the infliction of serious physical harm or death to another person.

Volusia County, Fla., Pursuit Policy, 41.2 (Feb. 15, 1990).

468. *See, e.g.*, Palm Beach County, Fla., Pursuit Policy, 87-5 (Jan. 1, 1977) (pursuit may be initiated only when the driver has allegedly committed a "violent or hazardous" crime or violation); Metropolitan Police, Boston, Mass., 4.4.1 (July, 16, 1990) ("justification for the initiation or continuation of a pursuit shall be judged on the basis of the hazard it poses to the safety of the public").

469. *See, e.g.*, Metropolitan Police, Boston, Mass., 4.4.1 (July, 16, 1990) (hazard

first committed and its dangerousness.

Some policies, however, fail to explain which offenses justify the danger of a pursuit.⁴⁷⁰ Many policies simply state that police officers should consider the "nature of the offense" committed by a suspect as a factor in determining whether to pursue.⁴⁷¹ One policy leaves the decision to the "sound judgment" of the officer.⁴⁷² Other policies authorize officers to pursue individuals who violate traffic laws, without cautioning that the traffic offense must have represented a danger to others.⁴⁷³ In addition to these general policies, some policies explicitly declare that a policy of limited pursuit is not in the public's best interest.⁴⁷⁴ These policies declare that officers may pursue a car thief, an individual who has committed a property offense, even if a pursuit is inherently dangerous.⁴⁷⁵

Even when policies create a distinction between dangerous and nondangerous offenses, they sometimes disagree as to which offenses signify danger. Some policies classify the offense of intoxicated driving as an offense justifying a pursuit.⁴⁷⁶ One state model policy, however, explicitly forbids pursuit under these circumstances.⁴⁷⁷ Although an in-

of a particular offense justifies a pursuit, not whether it is a misdemeanor or felony).

470. See, e.g., Vernon, Conn., Pursuit Policy, D1 (Dec. 1987) (officer is to "weigh the seriousness of the offense committed against the danger to himself and others who may be affected by the pursuit"); Cape Coral, Fla., Pursuit Policy, C-2 (Aug. 11, 1989) (officer is to consider the "seriousness of the crime"); City of Overland, Kan., Pursuit Policy, 100-13 (Apr. 13, 1989) ("Pursuits for person(s) suspected of involvement in serious crime are viewed as more justifiable than those for persons suspected of only traffic or other misdemeanor violations."); City of Jackson, Tenn., Pursuit Policy, 26-89 (Mar. 22, 1989) (officer must consider the "seriousness of the crime").

471. City of New York, N.Y., Pursuit Policy, 85-11 (Nov. 15, 1985) (officer is to consider the "nature of the offense"); Broward County, Fla., Pursuit Policy, G.O. 90-50 (Aug. 20, 1990) (same).

472. See, e.g., Richmond County, Ga., Pursuit Policy, 87-4.8.

473. See, e.g., Macon, Ga., Pursuit Policy, 4.45 (Jan. 1, 1988) (officer may pursue when the "violator has committed or is attempting to commit a serious felony, or when the necessity of immediate apprehension outweighs the level of danger created by the hot pursuit").

474. See, e.g., West Palm Beach, Fla., Pursuit Policy, I-9 (Apr. 7, 1989) ("it is not in the best interests of public safety to advocate a policy that would encourage the dangerous driver, car thief, or fleeing criminal to proceed without the imminent possibility of police intervention"); Clarksville, Tenn., Pursuit Policy, 10-003(b) (same).

475. See *supra* note 474.

476. See, e.g., Boynton Beach, Fla., Pursuit Policy, 517.001 (May 11, 1990) (driving under the influence is a "serious traffic violation" justifying a pursuit); Montana Highway Patrol, Mont., Pursuit Policy, S-41.2.8 (Mar. 1990) (same; reckless driving also justifies pursuit); United States Capitol Police, D.C., Pursuit Policy, III-1 (October 1, 1989) (intoxicated driving justifies pursuit).

477. Florida Police Chiefs Ass'n, Model Pursuit Policy (1989-90) (offenses of "burglary, reckless driving, D.U.I., leaving the scene of an accident with injuries . . . are considered less serious and should only be conducted when such a pursuit is in the

toxicated driver does represent a danger to the public, focus on the police officers' role during a pursuit indicates that pursuit of such a driver increases the risk of harm presented by the driver.

Whether a police pursuit is constitutional under the fourth and fourteenth amendments thus depends upon the danger that the pursued driver represents and the risk of harm associated with the pursuits. One should evaluate the danger that a pursued driver represents, however, before, not after, a pursuit begins because a pursuit itself constitutes the use of force, force that is to be proportionate to the need for it. Such force is permissible only if the offense or offenses allegedly committed by the suspect are dangerous offenses.

The typical police pursuit, however, has occurred because an individual allegedly committed a traffic offense. Even though some traffic offenses may signify serious offenses, pursuits are inherently dangerous. The lawfulness of the force represented by a pursuit, however, is to be evaluated in terms of the disproportionality standards of the fourth and fourteenth amendments. These standards have permitted the use of force when proportionate to the need — a need that not only considers the personal security interest of the pursued individual but also of others. Because pursuits themselves may endanger individuals other than the pursued driver, police officers must also ascertain the need to apprehend in light of the personal security interests of others.

When one considers the risks associated with pursuits and the offenses that justify those risks, one can discern that most police pursuits constitute the use of disproportionate force. Pursuing a serial killer may justify the risks inherent in a high-speed pursuit. Yet, under some circumstances, such as a pursuit in a congested area, one must nevertheless consider whether apprehension of this dangerous person might cause further death, this time to innocent motorists and pedestrians. To avoid further loss to liberty and life, police officers need to use other means to arrest individuals. As the Supreme Court has stated, a police practice may be unreasonable within the meaning of the fourth amendment if it fails to consider modern technology and the need to protect the right to personal security.⁴⁷⁸ The practice of pursuing all individuals, regardless of the offense they have allegedly committed, must now yield, as did the earlier the practice of shooting and killing all fleeing felons.

best interests of public safety).

478. See, e.g., *Garner*, 471 U.S. at 13.