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***Michigan v. Chesternut* and Investigative Pursuits: Is There No End to the War Between the Constitution and Common Sense?**

by
RACHEL A. VAN CLEAVE*

We must not allow our zeal for effective law enforcement to blind us to the peril to our free society that lies in this Court's disregard of the protections afforded by the Fourth Amendment.¹

On December 19, 1984, four Detroit police officers were on routine patrol in a marked police car. At approximately 12:30 p.m., they noticed a car pull up to a corner a few blocks ahead. The driver got out of the car and approached a man, Mr. Chesternut. The two began speaking. Up to this point, the police officers had not observed anything unusual about the behavior of either man.² When the cruiser was approximately one half block away, Mr. Chesternut looked in the direction of the police car, turned, and started running away.³ The police then accelerated and gave chase.⁴ When the cruiser was even with Mr. Chesternut, the defendant "threw a number of packets from his pocket, . . . went about another five feet and just stopped."⁵ The police officers also stopped, examined the packets, determined that they contained illegal narcotics, and arrested Mr. Chesternut. The officers then searched Mr. Chesternut and discovered a package of heroin and a hypodermic needle in Mr. Chesternut's hat-band.⁶

At the preliminary hearing, Mr. Chesternut moved to suppress the needle and heroin found in the hat-band, as well as the packets of drugs Mr. Chesternut threw. Mr. Chesternut claimed that the police violated his fourth amendment right to be free from unreasonable governmental intrusions when they chased him without reasonable suspicion and that the evidence obtained was the fruit of this unlawful conduct and there-

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1. *Florida v. Royer*, 460 U.S. 491, 513 (1983) (Brennan, J., concurring).

2. *Michigan v. Chesternut*, 56 U.S.L.W. 4558, 4559 (1988).

3. Petition for Certiorari, app. at 15, *Michigan v. Chesternut*, 56 U.S.L.W. 4558 (1988) (No. 86-1824) [hereinafter Joint Appendix].

4. No sirens or lights were used, but it is not clear whether the cruiser was so equipped. Respondent's Appellate Brief at 15, *Michigan v. Chesternut*, 56 U.S.L.W. 4558 (1988) (No. 86-1824) [hereinafter Respondent's Brief].

5. Joint Appendix, *supra* note 3, at 15.

6. *Id.* at 17, 25-26.

fore should be suppressed. This motion was granted by the trial court⁷ and affirmed by the Michigan Court of Appeals.⁸ The Michigan Supreme Court denied the application for leave to appeal.⁹ The United States Supreme Court unanimously reversed the Michigan courts' decision, finding that the police did not seize Mr. Chesternut when they chased him; therefore no fourth amendment issue was raised.¹⁰

In his argument before the Supreme Court, Mr. Chesternut relied on the fourth amendment of the United States Constitution,¹¹ which provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.¹²

This amendment guarantees the right to be free from unjustified and unreasonable governmental intrusions, as well as to enjoy privacy and individual autonomy.¹³

When a defendant challenges police behavior on fourth amendment grounds, a court makes two inquiries. The first step is to decide whether the police conduct constitutes a "search" or "seizure"; if it does not, the fourth amendment does not apply.¹⁴ If the police conduct does fall within the realm of the fourth amendment, the second step of the analysis requires a court to decide whether the conduct violates the fourth amendment.¹⁵ Thus, in Mr. Chesternut's case the threshold question would be when, if ever, the police seized Mr. Chesternut. Clearly, the four officers seized Mr. Chesternut when they arrested him upon discovering the illegal narcotics. The Supreme Court, however, has not limited the definition of seizure to this traditional arrest situation.¹⁶ Therefore, since the arrest was based on evidence acquired during the chase, the Court had to decide whether there was a prearrest seizure, that is, whether the police had seized Mr. Chesternut by chasing him. In holding that the police conduct did not constitute a seizure and therefore ending its fourth amendment analysis,¹⁷ the Supreme Court erred. This Comment argues that the Court should have recognized that the chase

7. *Id.* at 9-10.

8. *People v. Chesternut*, 157 Mich. App. 181, 184, 403 N.W.2d 74, 76 (1986), *rev'd.*, 56 U.S.L.W. 4558 (1988).

9. Joint Appendix, *supra* note 3, at 1.

10. *Michigan v. Chesternut*, 56 U.S.L.W. 4558, 4561 (1988).

11. Respondent's Brief, *supra* note 4, at 7.

12. U.S. CONST. amend. IV.

13. See *Olmstead v. United States*, 277 U.S. 438, 463 (1928).

14. *Chesternut*, 56 U.S.L.W. at 4560.

15. *Florida v. Royer*, 460 U.S. 491, 497-98 (1983).

16. See *Dunaway v. New York*, 442 U.S. 200, 210 (1979).

17. *Chesternut*, 56 U.S.L.W. at 4559.

was a seizure and gone on to ask the second question, whether the seizure violated the fourth amendment.

The Supreme Court should have used common sense in applying the definition of seizure, in an effort to maintain broad judicial scrutiny of police conduct, as dictated by *Terry v. Ohio*.¹⁸ Section I of this Comment examines *Terry v. Ohio*, in which the Supreme Court decided that certain on-the-street encounters between police officers and citizens come within fourth amendment scrutiny.¹⁹ Section II traces the development of standards for determining when a seizure has occurred, that is, when a reasonable person would believe he was not "at liberty to ignore the police presence and go about his business."²⁰ In section III, this Comment argues that, when the police chase a citizen, their conduct constitutes a seizure because the citizen is aware of the police's attempt to apprehend him and is therefore not free to ignore the police. Because this type of police conduct is a seizure, it must be subject to fourth amendment control.

Section IV explores the lawfulness of the seizure of Mr. Chesternut. In other cases, the Court has approached this issue by determining whether the seizure was reasonable and therefore justified. In deciding whether a seizure is reasonable, the Supreme Court has balanced the government's need to seize an individual against the invasion that seizure entails.²¹ Among the factors weighed by the Court is the governmental agents' reasons for seizing the citizen involved, and whether these reasons constitute objective facts.²² This Comment concludes that chasing constitutes a significant intrusion upon a citizen's autonomy. Because a citizen's attempt to avoid police is ambiguous, such behavior taken alone is insufficient to justify such an intrusion. Thus, the police violated Mr. Chesternut's fourth amendment right to be free from unreasonable governmental intrusions when they chased him. As a result, the abandoned narcotics and the evidence discovered in his hat-band should have been considered fruit of the constitutional violation and therefore inadmissible.²³

18. 392 U.S. 1, 21-22 (1968).

19. *Id.* at 16.

20. *Chesternut*, 56 U.S.L.W. at 4559.

21. *Camara v. Municipal Court*, 387 U.S. 523, 536-37 (1967).

22. *United States v. Mendenhall*, 446 U.S. 544, 561 (1980) (Powell, J., concurring).

23. *See Mapp v. Ohio*, 367 U.S. 643, 659-60 (1961) (proper remedy for fourth amendment violation is exclusion of the evidence obtained thereby—the poisonous fruit); Williamson, *Dimensions of Seizure: The Concepts of "Stop" and "Arrest,"* 43 OHIO ST. L.J. 771 (1982). Williamson explains that a seizure falling short of an arrest could lead to the discovery of incriminating evidence, and if the seizure does not meet fourth amendment standards, the use of derivative evidence should not be permitted. *Id.* at 773-74.

I. *Terry v. Ohio*

In 1968, the United States Supreme Court determined that a police practice known as a "stop and frisk" comes under the purview of the fourth amendment.²⁴ Before *Terry*, courts had assumed that only a full blown arrest constituted a seizure, and that any police activity falling short of an arrest did not come within the meaning of seizure for fourth amendment purposes.²⁵ The *Terry* Court stated that the word "seizure" encompasses a broad range of police conduct, even if this conduct does not amount to an arrest in the traditional sense.²⁶

In *Terry*, Officer McFadden observed two men pacing along the street, looking into the same shop window and conferring with a third man.²⁷ After watching this activity for approximately ten minutes, the officer believed the three men were "'casing a job, a stick-up,'" and feared that "'they may have a gun.'" ²⁸ Believing that he should investigate, McFadden approached the three men, identified himself, and asked their names. When Terry "'mumbled something'" in response, Officer McFadden spun him around and patted his front pocket.²⁹ He felt a pistol and removed it.

McFadden clearly had probable cause to arrest Terry upon discovering the gun,³⁰ but it was McFadden's preliminary conduct that was at issue. If McFadden's stop and frisk of Terry was unlawful, then the gun was a fruit of the unlawful activity and subject to suppression. Most lower courts assumed that, because this type of activity only amounted to a "stop and frisk" rather than a seizure and search covered by the fourth amendment, no judicial scrutiny was required.³¹ Chief Justice Warren declined to employ such verbal manipulation and determined that this activity, although less intrusive than an arrest and full search incident to the arrest, nevertheless came within the purview of the fourth amendment.

Although the Court held that the fourth amendment applied to a stop and frisk, it did not subject this type of police activity to the traditional warrant and probable cause requirements.³² Consequently, the Court did not look for an exception to the warrant requirement, such as

24. *Terry v. Ohio*, 392 U.S. 1, 16 (1968). A "stop" is an on-the-street stop and brief interrogation of a citizen by a police officer, and a "frisk" is a pat-down for weapons. *Id.* at 12.

25. See LaFave, "Street Encounters" and the Constitution: *Terry*, *Sibron*, *Peters and Beyond*, 67 MICH. L. REV. 39, 43-44 (1968).

26. *Terry*, 392 U.S. at 16-17.

27. *Id.* at 6.

28. *Id.*

29. *Id.* at 7.

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

31. *Id.* at 9-12; LaFave, *supra* note 25, at 43.

32. *Terry*, 392 U.S. at 20.

the presence of exigent circumstances.³³ Instead, the Court considered the fourth amendment's two clauses, the warrant clause and the reasonableness clause, separately.³⁴ Chief Justice Warren described police activity on the streets as "an entire rubric of police conduct," frequently requiring immediate action by police.³⁵ In most on-the-street situations, police have no opportunity to get a warrant; to subject this activity to the traditional requirements of the warrant clause would be impractical and unduly burdensome.³⁶ Therefore, Chief Justice Warren tested Officer McFadden's conduct "by the Fourth Amendment's general proscription against unreasonable searches and seizures"³⁷ and concluded the conduct was justified.³⁸ Chief Justice Warren thus struck a compromise between the competing interests of law enforcement and citizens' fourth amendment rights. The result was to bring more police investigative activity under judicial scrutiny, while subjecting it to a more flexible standard than that requiring probable cause and a warrant.

The *Terry* Court was traveling in uncharted waters and left several questions unanswered. For the purposes of this Comment, the most significant open question is what type of police conduct constitutes a seizure of the person. Chief Justice Warren stated, "Obviously, not all personal intercourse between policemen and citizens involves 'seizures' of persons. 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."³⁹ Yet he admitted uncertainty as to whether McFadden seized Terry when he accosted the defendant, before he made actual physical contact with him.⁴⁰ Stating that the fourth amendment applies to seizures other than full-fledged arrests, Chief Justice Warren wrote, "It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person."⁴¹ Chief Justice Warren, however, did not define the type of police conduct that constitutes restraint of a citizen's freedom. He assumed

33. See *Warden v. Hayden*, 387 U.S. 294, 298-99 (1967).

34. Chief Justice Warren explained:

If this case involved police conduct subject to the Warrant Clause of the Fourth Amendment, we would have to ascertain whether "probable cause" existed to justify the search and seizure which took place. . . . We do not retreat from our holdings that the police must . . . obtain advance judicial approval of searches and seizures through the warrant procedure. . . . [But] the conduct involved in this case must be tested by the Fourth Amendment's general proscription against unreasonable searches and seizures.

Terry, 392 U.S. at 20.

35. *Id.*

36. *Id.*

37. *Id.*

38. The second step of this analysis will be discussed *infra* notes 140-217.

39. *Terry*, 392 U.S. at 19 n.16 (emphasis added).

40. *Id.*

41. *Id.* at 16.

that until McFadden physically seized Terry, "no intrusion upon constitutionally protected rights had occurred."⁴² He failed to evaluate the propriety of McFadden's initial approach.

Justice Harlan, concurring, took a different approach. He stated that before a frisk for weapons may be justified, "the officer must first have constitutional grounds to insist on an encounter, to make a *forcible* stop."⁴³ He reasoned that the right of an officer to make a forcible stop "must be more than the liberty (. . . possessed by every citizen) to address questions to other persons, for ordinarily the person addressed has an equal right to ignore his interrogator and walk away."⁴⁴ Justice Harlan thus acknowledged the need to examine the police officer's initial approach, but he too failed to define what type of activity results in a forcible stop.

The majority and concurring opinions, taken together, addressed three levels of confrontation between police and citizens, each requiring a different degree of justification.⁴⁵ The first is the situation in which a police officer accosts an individual and asks questions. Justice White, concurring in *Terry*, declared that nothing in the Constitution prevents this type of activity.⁴⁶ The second level is the *Terry*-type stop, which the Court determined is not subject to the warrant clause, but which nevertheless constitutes a seizure; this conduct is evaluated under the reasonableness clause. The final level, based on the traditional arrest scenario, requires a warrant based on probable cause.

While these three categories and their requisite justifications are easily stated, the problem arises in determining where to place a particular set of facts. Unfortunately, this determination frequently turns on fine factual distinctions. The *Chesternut* Court had an opportunity to establish brighter lines for the lower courts and the police to use in evaluating the propriety of certain police conduct. The Court declined to do so, however, and instead continued its case-by-case analysis, taking into account the totality of the circumstances.⁴⁷ This Comment argues that the Court should have categorized the police chase in *Chesternut* as a seizure and evaluated it under the test of reasonableness.

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

43. *Id.* at 32 (Harlan, J., concurring).

44. *Id.* at 32-33.

45. See *Florida v. Royer*, 460 U.S. 491, 497-98 (1982).

46. *Terry*, 392 U.S. at 34 (White, J., concurring).

47. *Michigan v. Chesternut*, 56 U.S.L.W. 4558, 4560 (1988) (Court looks to "all the circumstances surrounding the incident") (quoting *INS v. Delgado*, 466 U.S. 210, 215 (1984)).

II. Defining a Seizure of the Person

In *United States v. Mendenhall*,⁴⁸ the Court held that police behavior should be examined to determine when a seizure has occurred. Justice Stewart, writing for the Court, stated that "a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."⁴⁹ This definition is not limited to a physical detention of a citizen.⁵⁰ Justice Stewart explained:

Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled. . . . In the absence of some such evidence, otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person.⁵¹

These factors determine whether the police engaged in a "show of authority," which is the test for a seizure under *Terry*.⁵²

Two factually similar cases illustrate the difficulty in applying this test. In the first, the Court was unable to agree on the issue of seizure. In the second, because of a fine factual distinction, the Court held that the defendant had been seized.

In *United States v. Mendenhall*, two Drug Enforcement Agency (DEA) officials observed a woman in an airport and decided that she displayed characteristics outlined in a drug courier profile.⁵³ They approached her, identified themselves, and asked for her driver's license and airplane ticket. She produced these and when asked about the discrepancy between the name on the ticket and that on the license explained that she "just felt like using that name."⁵⁴ They then asked her to accompany them to the airport police room for further investigation.

48. 446 U.S. 544, 553-54 (1980).

49. *Id.* at 554 (footnote omitted).

50. *Id.*; see Williamson, *supra* note 23, at 792-97 (arguing that the concept of seizure includes situations other than physical restrictions of movement).

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

52. *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968). See *supra* text accompanying note 39.

53. *Mendenhall*, 446 U.S. at 547 n.1. The Court explained:

In this case the agents thought it relevant that (1) the respondent was arriving on a flight from Los Angeles, a city believed by the agents to be the origin of much of the heroin brought to Detroit; (2) the respondent was the last person to leave the plane, "appeared to be very nervous," and "completely scanned the whole area where [the agents] were standing"; (3) after leaving the plane, the respondent proceeded past the baggage area without claiming any luggage; and (4) the respondent changed airlines for her flight out of Detroit.

Id.

54. *Id.* at 548.

Later, in the police room, the defendant consented to a strip search, which yielded packets of heroin. The issue was whether the consent to the search had been coerced or tainted by a previous, unlawful seizure.

These facts generated considerable controversy among the Justices. While a majority agreed that the evidence was properly admitted and that a proper analysis considered the factors outlined above, they could not agree on the result of that analysis. Only Justices Stewart and Rehnquist opined that the defendant had not been seized; the plurality assumed that a seizure had occurred. Justice Stewart stated that, when the DEA agents initially approached her, the defendant did not have "any objective reason to believe that she was not free to end the conversation . . . and proceed on her way."⁵⁵ Nor did Justice Stewart believe that this encounter escalated into a seizure when the agents identified themselves or when they asked for her identification and plane ticket.⁵⁶ As a consequence, Justice Stewart found that Ms. Mendenhall's consent to accompany the DEA agents to the airport police room was not tainted by the previous conduct of the agents.⁵⁷ He found it irrelevant that the agents admitted they would have restrained Ms. Mendenhall had she attempted to leave.⁵⁸

Justice Powell, writing the plurality opinion for the three Justice concurrence, stated that the issue of seizure was "extremely close," and he simply assumed that the stop constituted a seizure.⁵⁹ He then went on to find that the seizure was justified.⁶⁰

The four dissenters criticized Justice Stewart for reversing the case on grounds not raised in the courts below.⁶¹ Justice White argued that perhaps Justice Stewart had not found any objective fact indicating that Ms. Mendenhall was not free to leave because the issue was not argued at the trial court level.⁶² Justice White's dissent emphasized the fact-bound nature of the issue of seizure and concluded that the question is best left to the determination of the trial court.⁶³

Three years later, in *Florida v. Royer*,⁶⁴ the Court was presented with a situation similar to that in *Mendenhall*. Two DEA agents approached the defendant in an airport and asked to see his driver's license and plane ticket.⁶⁵ When the names on the two did not correspond, the

55. *Id.* at 555.

56. *Id.*

57. *Id.* at 557-58.

58. *See id.* at 554 n.6.

59. *Id.* at 560 (Powell, J., concurring).

60. *Id.*

61. *Id.* at 568-69 (White, J., dissenting).

62. *Id.* at 569.

63. *Id.*

64. 460 U.S. 491 (1983).

65. *Id.* at 494.

agents identified themselves and told Mr. Royer they suspected him of transporting narcotics.⁶⁶ Without returning Mr. Royer's license and ticket, the agents asked him to accompany them to a police room for further questioning.⁶⁷ Subsequently, Mr. Royer consented to a search of his luggage, and the Court again had to determine whether the consent was the fruit of an unlawful seizure.⁶⁸

Justice White, now writing for the majority, applied Justice Stewart's standard from *Mendenhall*, but, in contrast to Justice Stewart's conclusion in the earlier case, found that Mr. Royer had been seized. He stated that the request for Mr. Royer's license and ticket was permissible.⁶⁹ Nevertheless, when the agents retained the documents, told Mr. Royer they suspected him of transporting drugs, and asked him to accompany them to the police room without indicating that he was free to refuse, they effectively seized the defendant.⁷⁰ Justice Powell concurred, but emphasized the factual differences between *Royer* and *Mendenhall*.⁷¹

In his concurrence, Justice Brennan placed the moment of seizure at an earlier stage of the encounter. He stated that once the officers identified themselves and asked for Mr. Royer's driver's license and plane ticket, they "engaged in a 'show of authority' and 'restrained [Royer's] liberty.'" ⁷² Justice Brennan continued that "it is simply wrong to suggest that a traveler feels free to walk away" in such circumstances.⁷³ Justices Blackmun and Rehnquist dissented and stated that the defendant's consent to further questioning was valid because no unlawful seizure had occurred.⁷⁴

In both *Mendenhall* and *Royer*, the Justices attempted to apply the factors suggested by Justice Stewart⁷⁵ to determine whether the defendant had reasonably submitted to a "show of authority" and had been seized by the officers. The Justices have been unable to agree, however, on the relative weight of the factors that may constitute a "show of authority," and therefore have failed to apply the *Mendenhall* test⁷⁶ consistently.

This disagreement over what constitutes a "show of authority" has

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.* at 501.

70. *Id.*

71. *Id.* at 508 (Powell, J., concurring) (here defendant was not free to leave: agents took Royer's luggage, license, and ticket and brought him to a small, windowless room for interrogation).

72. *Id.* at 511-12 (Brennan, J., concurring) (quoting *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968)).

73. *Id.* at 512.

74. See *id.* at 515-17 (Blackmun, J., dissenting); *id.* at 523 (Rehnquist, J., dissenting).

75. See *supra* notes 49-52 and accompanying text.

76. See *supra* text accompanying note 49.

yielded some absurd results. For example, in *INS v. Delgado*,⁷⁷ the Court found that an investigative sweep of the Southern California Davis Pleating Company, in a search for illegal aliens, did not amount to a seizure. In *Delgado*, armed and uniformed Immigration and Naturalization Service agents, carrying badges and walkie-talkies, placed themselves near the exits of the factory while other agents went through the factory and questioned employees about their citizenship. Justice Rehnquist, writing for the majority, applied the *Mendenhall* standard and found that the agents' conduct did not amount to a seizure because it gave the workers "no reason to believe that they would be detained . . . if they simply refused to answer."⁷⁸

The *Delgado* majority ignored the significant facts and erroneously considered each interrogation individually rather than examining the entire situation as *Mendenhall* prescribes.⁷⁹ Justice Rehnquist's description of an incident in which one of the agents stationed at an exit attempted to prevent a worker from leaving is an example of the majority's cursory treatment of facts in the record. He did not describe how the agent tried to stop the worker, but noted that the "worker pushed the agent aside and ran away."⁸⁰ In the text accompanying the footnote, Justice Rehnquist stated that because "mere questioning does not constitute a seizure when it occurs inside the factory, it is no more a seizure when it occurs at the exits."⁸¹

Justice Rehnquist seemed to be addressing the question of seizure, but did not reconcile the facts of this situation with the *Mendenhall* standard. Common sense indicates that a reasonable person would feel that his or her freedom of movement was restrained when a government official attempted to block his or her exit from the workplace. The majority instead referred to this as an "ambiguous, isolated incident [that] fails to provide any basis on which to conclude that [the workers] have shown an INS policy entitling them to injunctive relief."⁸² Rather than deciding whether the individual was seized, the Court confused the issue by looking to the relief sought.⁸³ The majority not only found that no seizure of the workplace occurred, but also found consent.⁸⁴ The Court described the individual encounters between the agents and the workers as "classic

77. 466 U.S. 210, 215 (1984).

78. *Id.* at 218.

79. *Id.* at 229 (Brennan, J., dissenting).

80. *Id.* at 218 n.6.

81. *Id.* at 218.

82. *Id.* at 218 n.6.

83. Injunctive relief requires a showing of a policy whose continuance would result in future or continuing harm. See *Rizzo v. Goode*, 423 U.S. 362, 366-67, 370 (1976).

84. The Court suggested that the workers were not restrained by state action at all: "Ordinarily, when people are at work their freedom to move about has been meaningfully restricted, not by the actions of law enforcement officials, but by the workers' voluntary obligations to their employers." *Delgado*, 466 U.S. at 218.

the individual encounters between the agents and the workers as "classic consensual encounters" because the agents, similar to officers on the street, were free to accost and question individuals.⁸⁵

In his concurrence, Justice Powell again found the issue of seizure to be close⁸⁶ and assumed that the workers had been seized. He concluded, however, that the seizure was justified because of the significant governmental interest in detecting illegal aliens and the minimal degree of intrusion on the individual.⁸⁷ Justice Brennan, dissenting, found that although there was no continuous seizure of the workplace,⁸⁸ the agents employed tactics which "demonstrated a 'show of authority' of sufficient size and force to overbear the will of any reasonable person."⁸⁹

Although the *Mendenhall* standard may be appropriate for determining whether a citizen has been seized, the Court has failed to apply the standard consistently, as the preceding cases illustrate. The Court makes fine factual distinctions and is unable to agree on what "show of authority" is sufficient to constitute a seizure.

The ramifications of the Court's classification of a police-citizen encounter are tremendous. When the Court decides that the encounter falls within the realm of the first tier, characterized by the police officer's merely approaching and asking questions, the conduct of the police falls outside the purview of the fourth amendment. If the Court, however, decides that the encounter falls within the second tier, which includes *Terry* stops, the police activity is subject to judicial scrutiny and must be reasonable.⁹⁰

Professor Wayne LaFave argues that an implicit show of force is present whenever an officer approaches a citizen.⁹¹ If the Court were to accept this proposition, first tier, consensual encounters would no longer exist because all police-citizen encounters would pass the threshold "show of authority" test when the officer first approached the citizen.⁹² LaFave further argues that as a policy matter the police should be able to rely on a citizen's instinctive willingness to cooperate with the police and that some additional show of force should be required before the encounter constitutes a seizure.⁹³ The standard that LaFave suggests for determining when this threshold has been passed is the point at which the

85. *Id.* at 221.

86. *Id.* at 221 (Powell, J., concurring).

87. *Id.* at 222-24 (compelling governmental interest in detecting the presence of illegal aliens justified the seizure).

88. *Id.* at 225 (Brennan, J., dissenting).

89. *Id.* at 229 (quoting *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968)).

90. See *supra* notes 45-46 and accompanying text.

91. W. LaFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 9.2(h), at 410 (1987) [hereinafter SEARCH AND SEIZURE TREATISE].

92. See *id.* at 410-11.

93. *Id.* at 411-12.

police behavior could no longer be "viewed as a non-offensive contact if it occurred between two citizens."⁹⁴

LaFave fails, however, to reconcile his proposed standard with his initial acknowledgement of the implicit show of authority in police-citizen encounters. If this implicit show of authority exists, it does not necessarily follow that citizens cooperate as a result of instinct. It is just as likely that citizens comply because they do not feel they may simply ignore law enforcement officials. Although LaFave's standard encompasses a greater range of police conduct than Justice Stewart's definition does,⁹⁵ the problem of determining at what point the encounter becomes offensive still exists. This determination is necessarily fact bound. Fine factual distinctions in no way aid the officer on the street who must decide if and how to approach a citizen. Furthermore, fact-specific decisions provide lower courts with very little guidance in determining when a seizure has occurred.⁹⁶ If the Court continues to adhere to the *Mendenhall* standard, the Justices must apply it consistently, without making insignificant and often confusing factual distinctions. The better route, however, is toward establishing bright lines for police and courts to apply. The Court should categorize specific types of police conduct, including police chases of citizens, as seizures. This approach would be consistent with the policy of *Terry* and would broaden the scope of judicial scrutiny of police-citizen encounters.

III. Pursuit as Seizure

As seen in both *Mendenhall*⁹⁷ and *Royer*,⁹⁸ the police do not necessarily have to physically detain a person to have seized him in a fourth amendment sense. Common sense dictates that when one individual chases another, it is reasonable for the person pursued to believe that the other's intent is to overtake and catch her. It is also reasonable, therefore, for her to feel her freedom is being restricted.

One of the circumstances that signals a seizure, which Justice Stewart listed in *Mendenhall*, is the "threatening presence of several officers."⁹⁹ Justice Stewart did not define the type of conduct that might be considered threatening. Justice Blackmun, writing for the Court in *Ches-*

94. See *id.* at 412.

95. Offensiveness appears to be a lower threshold than that stated in *Mendenhall*. Whether a reasonable person would feel free to walk away is a more difficult standard to apply, due to the implicit force present in an encounter between police and citizens. LaFave's standard appears to be more susceptible to an objective determination.

96. Williamson, *supra* note 23, at 787.

97. United States v. Mendenhall, 446 U.S. 544, 553-54 (1980); see *supra* notes 53-63 and accompanying text.

98. Florida v. Royer, 460 U.S. 491, 501-02 (1982); see *supra* notes 64-74 and accompanying text.

99. See *supra* text accompanying note 51.

ternut, stated that "[w]hile the very presence of a police car driving parallel to a running pedestrian could be *somewhat intimidating*, this kind of police conduct does not, standing alone, constitute a seizure."¹⁰⁰ In a footnote, he continued that a seizure might occur if the police command an individual to stop.¹⁰¹ Despite the lack of verbal communication, however, a reasonable person would feel threatened when chased by police officers. Even if no sirens were used,¹⁰² the vehicle was a marked police car. Simply by chasing him, the police officers implied that they suspected Mr. Chesternut of wrongdoing. Officer Peltier stated that he did not intend to capture Mr. Chesternut, but only wanted "to see where he was going."¹⁰³ The Court explained that "[o]f course, the subjective intent of the officers is relevant to an assessment of the Fourth Amendment implications of police conduct only to the extent that the intent has been conveyed to the person confronted."¹⁰⁴ The Court failed, however, to explain how the officers communicated their intent only to see where Mr. Chesternut was going and, further, how a reasonable person could have understood such an intention when the officers accelerated their car and pursued Mr. Chesternut. When the police chase a citizen whom they suspect of criminal activity, that citizen would reasonably believe that the police intended to catch him, not that the officer only wanted to discover the citizen's destination.

Although the officers may have been denied their opportunity to approach Mr. Chesternut when he began running,¹⁰⁵ members of the United States Supreme Court have stated that citizens have a right to ignore officers.¹⁰⁶ The Court has not made it a prerequisite that a citizen first allow an officer to approach him before exercising his right to ignore the officer. Such a notion contradicts statements by the Court¹⁰⁷ and makes meaningless the right to avoid officers.

Justice Harlan explicitly recognized a right to ignore in his *Terry* concurrence when he stated that, unless officers have some grounds for making a forcible stop, the citizen has the right to "ignore his interrogator."¹⁰⁸ Similarly, in *Mendenhall*, Justice Stewart quoted Justice

100. *Michigan v. Chesternut*, 56 U.S.L.W. 4558, 4560 (1988) (emphasis added).

101. *Id.* at 4560 n.9.

102. *See supra* note 4.

103. *Chesternut*, 56 U.S.L.W. at 4560 n.7 (quoting Joint Appendix, *supra* note 3, at 25).

104. *Id.* (citing *United States v. Mendenhall*, 446 U.S. 544, 554 n.6 (1980)).

105. *See People v. Shabaz*, 424 Mich. 42, 71, 378 N.W.2d 451, 464 (1985) (Boyle, J., dissenting) (arguing that the defendant, by running away, denied the officer the opportunity to question the defendant), *cert. granted*, 475 U.S. 1094, *cert. dismissed*, 478 U.S. 1017 (1986) (dismissed as moot when defendant died).

106. *See Florida v. Royer*, 460 U.S. 491, 498 (1983); *United States v. Mendenhall*, 446 U.S. 544, 553 (1980).

107. *See, e.g., Mendenhall*, 446 U.S. at 553 (A citizen has a "right to ignore his interrogator and walk away.") (quoting *Terry v. Ohio*, 392 U.S. 1, 33 (1968) (Harlan, J., concurring)).

108. 392 U.S. at 33.

Harlan's concurrence in *Terry*, stating that "'ordinarily, the person addressed has an equal right to ignore his interrogator and walk away.'" ¹⁰⁹ In *Royer*, Justice White stated that a person "approached . . . need not answer any question put to him; indeed, he may decline to listen to the questions at all and may go on his way."¹¹⁰

Two other United States Supreme Court cases also implied a right to ignore police officers. In *Brown v. Texas*,¹¹¹ two officers stopped Mr. Brown in an alley without having any suspicion that particular criminal activity was afoot.¹¹² Mr. Brown refused to identify himself, and one of the officers frisked him. After the defendant again refused to identify himself, the police arrested him for failing to identify himself pursuant to a lawful stop, in violation of Texas laws.¹¹³ The Court found that the police had not lawfully stopped Mr. Brown and that a seizure occurred when the officers required him to identify himself despite his initial refusal.¹¹⁴ Furthermore, in *INS v. Delgado*,¹¹⁵ the Court stated that "if the person refuses to answer and the police take additional steps—such as those taken in *Brown*—to obtain an answer, then the Fourth Amendment imposes some minimal level of objective justification to validate the detention or seizure." Thus, individuals have a right to avoid answering police questions where detention is not justified. Implicit in that right is the right to avoid being questioned in the first place. To require a person to wait for a police officer to approach before turning away would suspend the individual's right to go on his way from the time he became aware of the officer's approach until some magic moment when the right reappeared.

The notion that individuals have no obligation to permit an encounter with police to occur unless the police can justify at least a *Terry* stop was suggested in a 1974 Louisiana case. In *State v. Saia*,¹¹⁶ the police observed Ms. Saia exit a residence that the officers knew to be an outlet for drugs and pulled their car alongside her. Ms. Saia turned around, put her hand inside the waistband of her pants, and walked back toward the

109. *Mendenhall*, 446 U.S. at 553 (quoting *Terry*, 392 U.S. at 32-33 (Harlan, J., concurring)).

110. *Florida v. Royer*, 460 U.S. 491, 498 (1983).

111. 443 U.S. 47, 49 (1979).

112. This violates the standard Chief Justice Warren set forth in *Terry* for determining whether a stop is justified: the officer "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry*, 392 U.S. at 21.

113. *Brown*, 443 U.S. at 49 n.1. TEX. PENAL CODE ANN. § 38.02 (Vernon Supp. 1988) states: "Failure to Identify as Witness (a) A person commits an offense if he intentionally refuses to report or gives a false report of his name and residence address to a peace officer who has lawfully stopped him and requested the information."

114. *Brown*, 443 U.S. at 50.

115. 466 U.S. 210, 216-17 (1984).

116. 302 So. 2d 869, 871-72 (La. 1974).

residence. The police then exited their car and overtook the defendant in front of the house. Ms. Saia put her hand to her mouth. The police thought they saw a glassine envelope containing heroin in her hand. They grabbed Ms. Saia, recovered two glassine envelopes (which they determined contained heroin), and arrested her.¹¹⁷

The Supreme Court of Louisiana described the police action as actively creating a "street encounter" and found that "[t]he seizure . . . occurred when the police officers sprang from their car and overtook the defendant."¹¹⁸ The court continued that "police cannot approach citizens under circumstances that make it seem that some form of detention is imminent unless they have . . . reasonable grounds to detain."¹¹⁹ By quoting Justice Harlan, the court implied that Ms. Saia had exercised her right to ignore the police and that their attempt to force an encounter constituted a seizure.

The Court of Appeals of the District of Columbia recently adopted this approach in *In re D.J.* There, the court held that police pursuit of a citizen constituted a seizure for fourth amendment purposes.¹²⁰ The defendant, D.J., was standing on the street when an unmarked police car approached. D.J. placed his hands in his pockets and began walking in the opposite direction. The police then put the car in reverse and drove alongside the defendant.¹²¹ When D.J. changed directions, the car did the same. The defendant again changed directions, and again the car pursued him.¹²² The police then communicated with a second police car, stating the direction in which D.J. was walking. One of the officers in the first car got out and approached D.J., who then began running.¹²³ D.J. encountered an officer from the second car, and turned around only to confront the first officer. D.J. managed to dodge the officers, but ultimately gave up, saying, "Okay, you got me. I'm dirty."¹²⁴ D.J. was placed on the ground and searched. The officers discovered illegal drugs.¹²⁵ The lower court denied a motion to suppress the drugs as evidence obtained by means of an illegal seizure. The court of appeals reversed.¹²⁶ The court applied the *Mendenhall* test for seizure, and

117. *Id.*

118. *Id.* at 873.

119. *Id.*

120. *In re D.J.*, 532 A.2d 138, 140 (D.C. 1987).

121. *Id.* at 139.

122. *Id.*

123. *Id.*

124. *Id.*

125. The officers stated that, upon encountering the second officer, D.J. removed from his pocket a brown vial used to store PCP. D.J. denied this, and the lower court did not resolve this conflicting testimony. *Id.* at 139-40.

126. *Id.* at 143.

concluded that a seizure occurred "at the latest" when the officer began chasing D.J. on foot.¹²⁷

By taking up pursuit, the police communicated emphatically to D.J. that he was not free to leave. This was a communication that no reasonable person could have misinterpreted. . . . [The person pursued] knows also that in effecting his capture, the police will resort to physical force if necessary. When the chase commences, the stop has begun.¹²⁸

The court went on to find that the seizure of D.J. was not justified because flight, by itself, is an unreliable indicator of guilt.¹²⁹

While the Court in *Chesternut* did not deny that citizens have a right to ignore police presence, it failed to reconcile this right with the ultimate finding that no seizure of Mr. Chesternut had occurred.¹³⁰ The Court applied Justice Stewart's standard of whether "a reasonable person would have believed that he was not free to leave," yet the Justices did not explain how they reached their conclusion that a reasonable person in Mr. Chesternut's position would have felt free to leave.¹³¹ The Court seemed to require more than acceleration and pursuit to find that a seizure occurred. Justice Blackmun stated that the officers did not command Mr. Chesternut to stop, nor did they turn on the siren and lights, display any weapons, or "operate the car in an aggressive manner to block respondent's course or otherwise control the direction or speed of his movement."¹³² The Court did not mention the fact that Mr. Chesternut was running down an alley, with the police on one side of him and a building wall on the other. This situation made it unnecessary for the police to operate their car in the manner described by the Court.

Professor LaFave asserts that when a person "indicate[s] his lack of consent by ignoring the officer's summoning or by leaving [the officer's] presence . . . police efforts to renew the encounter constitute a seizure."¹³³ When Mr. Chesternut ran, he exercised his right to leave the presence of the officers. When the officers nevertheless chased Mr. Chesternut, they attempted to force an encounter and thus seized him. Notwithstanding the Court's conclusion that the police did not control Mr. Chesternut's speed, the police forced him to continue running in order to exercise his right to "ignore the police presence and go about his business."¹³⁴

If a police chase of an individual is not considered to be a seizure, it

127. *Id.* at 140.

128. *Id.*

129. *Id.* at 143. See *infra* notes 197-98 and accompanying text.

130. *Michigan v. Chesternut*, 56 U.S.L.W. 4558, 4559 (1988).

131. *Id.* at 4560 (quoting *United States v. Mendenhall*, 446 U.S. 544, 554 (1980)).

132. *Id.*

133. SEARCH AND SEIZURE TREATISE, *supra* note 91, at 408.

134. *Chesternut*, 56 U.S.L.W. at 4559.

must somehow come under the first tier of police-citizen encounters. The activity of the officers, however, clearly goes beyond the threshold stated in *Mendenhall*. A reasonable person, having already decided to avoid the police, would feel restrained when the officers nevertheless chased her. This conduct also goes beyond LaFave's threshold of "non-offensive contact."¹³⁵ Rather than allowing a case-by-case analysis of situations like this, the Court should have stated that a seizure occurs whenever the police chase a citizen, and that this seizure must be reasonable.¹³⁶

The Court, however, declined to draw such a bright line.¹³⁷ By calling the chase "investigatory" and not a seizure, the Court violated the policy stated by Chief Justice Warren in *Terry*. The Chief Justice recognized the danger in making distinctions based on labels, which later may become too technical. He stated that such an approach "seeks to isolate from constitutional scrutiny the initial stages of the contact between the policeman and the citizen."¹³⁸ He continued that "the sounder course is to recognize that the Fourth Amendment governs all intrusions by agents of the public upon personal security, and to make the scope of the particular intrusion . . . a central element in the analysis of reasonableness."¹³⁹ Chief Justice Warren advocated a more sensible approach to defining terms such as search and seizure, rather than relying on technical rules. Common sense indicates that when an officer seeks to force a confrontation with a citizen by chasing him, the officer has intruded upon the citizen's personal security, and that such intrusion occurs the moment the police begin the chase.

IV. Reasonableness of the Seizure

Because this Comment finds that Mr. Chesternut was seized, it continues the fourth amendment analysis by questioning the reasonableness of the officers' seizure of Mr. Chesternut. In *Terry*, the Court based its departure from the fourth amendment's warrant clause and its decision to test this type of on-the-street police conduct "by the fourth amendment's general proscription against unreasonable searches and seizures"¹⁴⁰ on two grounds. First, it recognized that this type of police activity "necessarily [requires] swift action [and is] predicated upon the on-the-spot observations of the officer on the beat."¹⁴¹ Second, the more flexible reasonableness test promotes the safety interest of the officer who

135. SEARCH AND SEIZURE TREATISE, *supra* note 91, at 413.

136. See *infra* notes 140-217 and accompanying text.

137. *Chesternut*, 56 U.S.L.W. at 4560.

138. *Terry v. Ohio*, 392 U.S. 1, 17 (1968).

139. *Id.* at 18 n.15.

140. *Id.* at 20; see *supra* notes 32-37 and accompanying text.

141. *Terry*, 392 U.S. at 20.

stops a citizen by allowing the officer to frisk the citizen for weapons.¹⁴² With respect to analyzing the seizure, however, the Court emphasized the need for immediate action.¹⁴³

In setting out the test for reasonable police conduct, *Terry* relied on *Camara v. Municipal Court*.¹⁴⁴ *Camara* required the balancing of the government's need to seize against the personal invasion such conduct entails.¹⁴⁵ Justice Powell, in *Mendenhall*, distilled the factors to be considered in this balancing: "(i) the public interest served by the seizure, (ii) the nature and scope of the intrusion, and (iii) the objective facts upon which the law enforcement officer relied in light of his knowledge and expertise."¹⁴⁶

A. Public Interest

The first factor considered in a reasonableness analysis is the public interest served by the police conduct. The United States Supreme Court has not expressly specified the type of public interest that justifies a stop. Neither has the Court ever "suggested that all law enforcement objectives, such as the investigation of possessory offenses, outweigh the individual interests infringed upon."¹⁴⁷ In *Chesternut*, the officer's objective was to see where the defendant was going.¹⁴⁸ Even if the police conduct can be characterized as furthering an interest in detecting and apprehending those in possession of illegal narcotics, this Comment argues that such an interest is too attenuated and therefore insufficient to justify chasing an individual, especially without any evidence other than avoiding meeting the police.

Some scholars have stated that the *Terry* doctrine should be limited to investigations for serious offenses, rather than serving a general public interest in crime prevention. The Model Code of Pre-Arrest Procedure allows a stop if the suspected offense is one "involving danger of forcible injury to persons or of appropriation of or damage to property."¹⁴⁹ Similarly, Judge Friendly expressed concern about allowing of-

142. *Id.* at 23-24.

143. *Id.*; see *Sibron v. New York*, 392 U.S. 40, 73 (1968) (Harlan, J., concurring).

144. 387 U.S. 523 (1967). In *Camara*, the Supreme Court refused to allow a warrantless search of defendant's house for housing code violations. The Court stated, however, that a warrant could be obtained without probable cause. In the interest of detecting housing code violations, an inspector need only show that the "reasonable legislative or administrative standards for conducting an area inspection are satisfied," in order to obtain a search warrant. *Id.* at 538.

145. *Id.* at 536-37; *Terry*, 392 U.S. at 21.

146. *United States v. Mendenhall*, 446 U.S. 544, 561 (1980) (Powell, J., concurring).

147. *United States v. Sharpe*, 470 U.S. 675, 689 n.1 (1985) (Marshall, J., concurring) (stop justified when defendants suspected of transporting drugs on a large scale).

148. Joint Appendix, *supra* note 3, at 25.

149. MODEL CODE OF PRE-ARREST PROCEDURE § 110.2(1)(a)(i) (1975) [hereinafter MODEL CODE].

ficers to stop citizens suspected of possessory offenses in *Williams v. Adams*.¹⁵⁰ In that case, the defendant had been searched for weapons based on an informant's tip.¹⁵¹ Judge Friendly emphasized the limited nature of *Terry*, which allows police to act on less than probable cause in situations requiring immediate action. He feared that "instead of the stop being the object and the protective frisk an incident thereto, the reverse will be true."¹⁵² The Supreme Court, however, upheld the search.¹⁵³ Nevertheless, Professor LaFave has suggested that *Adams* may fit within the Model Code's definition due to the danger of injury that exists when an officer believes a citizen may possess a gun.¹⁵⁴ An individual's possession of illegal narcotics involves no such danger of immediate physical injury and therefore does not require immediate action on the part of the officer.

The authors of the Model Code also recognized the need to remove the temptation of police to go on "fishing expeditions for contraband"¹⁵⁵ and stated that the best way to curb police abuse would be to completely remove narcotics offenses from the scope of the *Terry* doctrine.¹⁵⁶ Nevertheless, when the Supreme Court has allowed stops for investigation of offenses not falling under the Model Code definition, it has based its decisions on compelling interests such as the need to curb large-scale drug trafficking¹⁵⁷ and the influx of illegal aliens.¹⁵⁸ Both of these situations involve criminal activity of national concern, and the officials conducting the stops are specially trained so as to avoid infringement of citizens' rights.¹⁵⁹ A single citizen possessing drugs on the street does not pose the same danger as those people transporting large quantities of narcotics. The type of police activity in *Chesternut* is different from that in *Mendenhall* and *Royer* because in airport stops, DEA agents act in accordance with characteristics outlined in drug courier profiles; these guidelines effectively limit the agents' discretion.¹⁶⁰

150. *Williams v. Adams*, 436 F.2d 30, 38 (2d Cir. 1970) (Friendly, J., dissenting), *rev'd*, 441 F.2d 394 (2d Cir. 1971) (en banc), *aff'd*, 407 U.S. 143 (1972).

151. *Id.* at 31.

152. *Id.* at 38. Although the issue in *Adams* was whether the search for the gun based on an informant's tip was justified, as Justice Harlan stated in *Terry*, the officer must first have grounds to make a stop. *Terry v. Ohio*, 392 U.S. 1, 32 (1968) (Harlan, J., concurring).

153. *Adams*, 407 U.S. at 148.

154. SEARCH AND SEIZURE TREATISE, *supra* note 91, § 9.2(c), at 359 (citing MODEL CODE, *supra* note 149, at § 110.2(1)(a)(i)).

155. SEARCH AND SEIZURE TREATISE, *supra* note 91, § 9.2(d), at 361.

156. *Id.* (citing MODEL CODE, *supra* note 149, at 278).

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

158. *INS v. Delgado*, 466 U.S. 210, 222-24 (1984) (Powell, J., concurring) (permitting "investigative sweep" of factory by INS); *United States v. Cortez*, 449 U.S. 411, 418-19 (1981) (permitting a vehicle stop by the Border Patrol).

159. DEA agents are provided with drug courier profiles, which limit their discretion. See *supra* note 53.

160. *United States v. Mendenhall*, 446 U.S. 544, 547 n.1 (1980); see *supra* note 53.

In *Chesternut*, however, when the defendant looked toward the police and then ran away, he did not suggest to the police that he was involved in any specific criminal activity. Therefore, only the most general crime prevention interest could have been served by chasing Mr. Chesternut. Even if such an interest is valid, it still must be considered in conjunction with the two other factors examined by the courts: the nature of the intrusion and the objective facts supporting the police suspicion.

B. Nature of the Intrusion

Even if a public interest arguably exists in curbing the type of possessory offense involved in *Chesternut*, the nature of the intrusion must be "carefully tailored to its underlying justification."¹⁶¹ In *Terry*, the Court permitted a "patting down" of the defendant for the purpose of determining whether he had a gun.¹⁶² Subsequently, the Court has stated that "the investigative methods employed should be the least intrusive means reasonably available"¹⁶³ to the officer. One of the officers in *Chesternut* testified that he and his partners chased Mr. Chesternut because they wanted "to see where he was going."¹⁶⁴ Mr. Chesternut's attorney suggested that following the defendant, rather than accelerating and giving chase, would have been less intrusive.¹⁶⁵ Following would have enabled the police to accomplish their objective of observing Mr. Chesternut, less intrusively.

Because a distinction between following and chasing determines whether an individual has been seized, a variation of the *Mendenhall* standard may be employed to define this distinction. When the conduct of the police reaches a threshold at which a reasonable person who is aware of this conduct would believe police contact or capture to be imminent, the police are no longer following, but are chasing, that individual. This standard takes into account Professor LaFave's observation that an implicit show of force is present when the police approach individuals.¹⁶⁶ Although a reasonable person may feel intimidated or apprehensive when a police officer is present, or is walking or driving nearby and observing the actions of citizens, the officer's conduct does not amount to a chase until a reasonable person would believe his or her own capture was imminent.

Analyzing *In re D.J.*¹⁶⁷ with respect to this standard is helpful.

161. *Florida v. Royer*, 460 U.S. 491, 500 (1983).

162. *Terry v. Ohio*, 392 U.S. 1, 29-30 (1968).

163. *Royer*, 460 U.S. at 500.

164. Joint Appendix, *supra* note 3, at 25.

165. See Respondent's Brief, *supra* note 4, at 9, 28.

166. See *supra* note 91 and accompanying text.

167. 532 A.2d 138 (D.C. 1987); see *supra* notes 120-29 and accompanying text.

Under the test suggested by this Comment, the police conduct of driving back and forth alongside the defendant, while annoying and possibly causing anxiety, was not a seizure. Once one of the officers got out of the car and approached D.J., however, he seized the defendant. The fact that D.J. began running first is immaterial; he was simply exercising his right to avoid the officer.¹⁶⁸

The above standard does not permit police to follow at an increased speed to keep up with the citizen seeking to avoid police contact, for this would constitute chasing. Once the police increase their speed, they begin a pursuit that must be justified. According to this standard, the police conduct in *Chesternut* constituted a seizure the moment the police accelerated and commenced pursuit and Mr. Chesternut was aware of this conduct. Allowing police to chase, when a less intrusive method of investigation is available, ignores the right citizens possess to avoid contact with the police, because chasing forces an encounter.¹⁶⁹ Because chasing is a grave intrusion on an individual's autonomy, it should not be permitted when the public interest is weak or attenuated—such as when the police merely want to ascertain the individual's destination—unless the police can point to objective facts to justify their interest.

C. Objective Facts Relied upon by the Police

Terry requires that an officer “be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.”¹⁷⁰ The facts observed by the officer must objectively indicate the possibility of criminal activity. Otherwise, police will rely solely on their instincts, and the danger of arbitrary intrusions will be greater.¹⁷¹

In *Chesternut*, the sole fact relied upon by the police was Mr. Chesternut's flight, which they perceived as an attempt to avoid contact with the police.¹⁷² Flight or avoidance on the part of citizens in response to the presence of government officials is an especially difficult factor to evaluate. Allowing police to justify stopping or chasing a citizen solely because the individual attempted to avoid police belies the proposition that citizens are free to ignore police.¹⁷³ If the courts accept such a justification by the police, they necessarily fail to support the rights of a citizen who sought to avoid police contact, but was nevertheless apprehended precisely because she attempted to exercise this right. The Court of Appeals of the District of Columbia has stated that “[t]o permit

168. See *supra* notes 105-36 and accompanying text.

169. See *supra* notes 97-139.

170. *Terry v. Ohio*, 392 U.S. 1, 21 (1968).

171. *Brown v. Texas*, 443 U.S. 47, 50-51 (1978).

172. See Joint Appendix, *supra* note 3, at 5-6.

173. See *supra* notes 105-29 and accompanying text.

such justification would be effectively to create a duty to respond to the police, and would seriously intrude upon the liberty and privacy interests which the Fourth Amendment was designed to protect."¹⁷⁴ While it is therefore inappropriate to allow police to base their pursuit solely on an individual's flight, such a reaction is relevant and should be counted as one factor in determining whether to chase. Thus, Professor LaFave states that "[i]t is not to be doubted that such reactions may be taken into account by the police and that together with other suspicious circumstances these reactions may well justify a stopping for investigation."¹⁷⁵ The Supreme Court has recognized that such behavior is an important factor. In *Peters v. New York*,¹⁷⁶ a companion case to *Terry*, the Court upheld a seizure and pat down of Mr. Peters by Officer Lasky, who had reason to believe that the defendant was attempting a burglary. The Court stated that "deliberately furtive actions and flight at the approach of strangers or law officers are a strong indicia of *mens rea*."¹⁷⁷ It is important to note that Mr. Peters' conduct, taken with other "specific knowledge on the part of the officer,"¹⁷⁸ related to the specific crime of burglary. In contrast, the police in *Chesternut* were unable to point to specific criminal activity of which they suspected Mr. Chesternut; rather, the only reason they chased him was because he initially tried to avoid them.¹⁷⁹

The Supreme Court of Colorado, faced with a case factually similar to *Chesternut*, declined to permit police to justify a stop solely on an individual's evasive behavior. In *People v. Thomas*,¹⁸⁰ two narcotics officers were on routine patrol in Denver when they saw Mr. Thomas standing in a parking lot. One of the officers testified that he made eye contact with the defendant, who then turned, put his hand in his pocket, and ran toward a shack.¹⁸¹ The officers pursued Mr. Thomas because they believed that he "was either trying to hide something [or] had something on him."¹⁸² The officers stopped their car and began chasing the defendant on foot into the shack. One of the officers saw Mr. Thomas throw something into a pitcher on top of a vending machine. They then ordered him to stop, drew their guns, and recovered six balloons of cocaine from the pitcher.¹⁸³

The Colorado Supreme Court upheld suppression of the evidence as

174. *In re D.J.*, 532 A.2d 138, 142 (D.C. 1987).

175. SEARCH AND SEIZURE TREATISE, *supra* note 91, § 9.3(c), at 448.

176. *Sibron v. New York* 392 U.S. 40, 67 (1968) (consolidating *Peters v. New York*).

177. *Id.* at 66.

178. *Id.*

179. Joint Appendix, *supra* note 3, at 5-6.

180. 660 P.2d 1272, 1273 (Colo. 1983).

181. The officer stated that this shack was a gambling establishment. *Id.*

182. *Id.* at 1274.

183. *Id.*

the product of an illegal seizure of Mr. Thomas.¹⁸⁴ The court indicated that the police must be able to justify their pursuit of Mr. Thomas and quoted a Massachusetts case:

Stops provoke constitutional scrutiny because they encumber one's freedom of movement. Pursuit that appears designed to effect a stop is no less intrusive than a stop itself. In other words, the officer's right to pursue when a stop appears imminent can be no broader than his right to stop. Thus, the suspicion must be reasonable before the pursuit begins. Were the rule otherwise, the police could turn a hunch into a reasonable suspicion by inducing the conduct justifying the suspicion. . . . [A] stop starts when pursuit begins.¹⁸⁵

This implies that police pursuit of a citizen is a seizure that must meet the requirements of *Terry* by a showing of "articulable facts" giving rise to "reasonable suspicion." The officers' suspicion was aroused solely by Mr. Thomas' "furtive gesture." The court stated this was insufficient to justify the chase because "[t]he problem with the so-called 'furtive gesture' as the basis for a stop is its inherent ambiguity."¹⁸⁶ Absent other factors observed by the police, such citizen conduct does not point to any particular wrongdoing and may be motivated by a number of reasons, "from an unsettling feeling of being watched to an avoidance of what might be perceived as a form of harassment."¹⁸⁷

The court, however, recognized that when efforts to avoid the police are "coupled with an officer's specific knowledge connecting that person to some other action or circumstance indicative of criminal conduct . . . the evasive action, whether running or otherwise, takes on a sufficiently suspicious character to justify a stop."¹⁸⁸ *People v. Thomas* expressly overruled an earlier Colorado case, *People v. Waits*,¹⁸⁹ in which furtive gestures and the defendant's presence in a high crime area were found to be sufficient to arouse reasonable suspicion to justify a seizure.

In *Commonwealth v. Thibau*,¹⁹⁰ the Massachusetts case cited by the *Thomas* court, the defendant was riding a bicycle when two police cars pulled up beside him based upon their belief that many drug transactions were carried out by individuals on bicycles. The defendant turned sharply down another street. One of the police cars turned on its siren and began chasing the defendant.¹⁹¹ When the car caught up with him, the officer reached out and forced the defendant and his bicycle to the

184. *Id.* at 1277.

185. *Id.* at 1275 (quoting *Commonwealth v. Thibau*, 384 Mass. 762, 764, 429 N.E.2d 1009, 1010 (1981)).

186. *Id.* at 1275.

187. *Id.*

188. *Id.* at 1275-76.

189. 196 Colo. 35, 38-39, 580 P.2d 391, 393-94 (1978) (stopping defendant's car reasonable when he made an abrupt and evasive maneuver, though it did not constitute a traffic violation).

190. 384 Mass. 762, 763, 429 N.E.2d 1009, 1010 (1981).

191. *Id.*

sidewalk.¹⁹² The police then searched the defendant and discovered envelopes containing herbs laced with PCP.¹⁹³ The Supreme Judicial Court of Massachusetts found that the seizure of Mr. Thibreau was not justified.¹⁹⁴ In evaluating the reasonableness of the police conduct involved, the court stated that "the defendant's flight from the officer's pursuit," without more, could not justify the chase.¹⁹⁵ The court noted, however, that a citizen's efforts to avoid police "*combined with other circumstances*" could justify a stop.¹⁹⁶ *In re D.J.*,¹⁹⁷ discussed above, also recognized the unreliability of flight, by itself, as an indicator of guilt. The *D.J.* court stated that a citizen's efforts to avoid police must "be corroborated by other suspicious circumstances."¹⁹⁸

In *People v. Shabaz*,¹⁹⁹ the Michigan Supreme Court also recognized that furtive conduct and an attempt to avoid the police must be accompanied by other suspicious circumstances before a seizure is justified. It refined the standard, however, by holding that facts such as the time of night and the high incidence of arrests for concealed weapons and narcotics offenses in the particular building from which the defendant emerged, even combined with his flight, were insufficient to justify the seizure.²⁰⁰ At approximately 9:00 p.m., the officers were on patrol in an unmarked police car when they saw the defendant leave the building carrying a brown paper bag.²⁰¹ Mr. Shabaz looked in the direction of the police car and began "'stuffing a paper bag like under his vest,' " or "'in his pants.' "²⁰² The police car slowed down and passed Mr. Shabaz. When the car was coming to a stop, the defendant took off running.²⁰³ The police put the car in reverse and pursued the defendant, first in the car and then on foot. Mr. Shabaz entered a doorway, but was physically seized by one of the officers upon exiting.²⁰⁴ The officers then discovered a gun in a brown paper bag in the doorway and arrested Mr. Shabaz.²⁰⁵ The court found that the defendant had been seized when the officers pursued him²⁰⁶ and that the seizure was not justified based upon an as-

192. *Id.*

193. *Id.*

194. *Id.* at 763-64, 429 N.E.2d at 1010.

195. *Id.* at 764, 429 N.E.2d at 1010.

196. *See id.*

197. 532 A.2d 138, 141 (D.C. 1987); *see supra* notes 120-35 and accompanying text.

198. 532 A.2d at 142 (quoting *Watkins v. State*, 288 Md. 597, 603-04, 420 A.2d 270, 273 (1980)).

199. 424 Mich. 42, 62, 378 N.W.2d 451, 460 (1985), *cert. granted*, 475 U.S. 1094, *cert. dismissed*, 478 U.S. 1017 (1986) (dismissed as moot when the defendant died).

200. *Id.* at 60-61, 378 N.W.2d at 459-60.

201. *Id.* at 47, 378 N.W.2d at 453.

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.* at 48, 378 N.W.2d at 453.

206. *Id.* at 59, 378 N.W.2d at 458.

assessment of the "whole picture."²⁰⁷ The evidence discovered was suppressed as the fruit of an illegal seizure.²⁰⁸

The above cases indicate a trend that requires officers to demonstrate factors beyond a citizen's attempt to avoid police contact to justify stopping that individual. This trend reflects a general recognition of a citizen's right to ignore an officer without having to wait for the officer to approach him.²⁰⁹ In addition, this trend indicates a desire to discourage police harassment and abuse.

The Massachusetts court expressed an additional concern in *Commonwealth v. Thibault*,²¹⁰ in which the court noted the possibility that the police would "induc[e] the conduct justifying the suspicion." A California case, *People v. Aldridge*,²¹¹ illustrates this problem. The officer involved in *Aldridge* admitted that he made a practice of stopping and questioning anyone he found in a particular liquor store parking lot.²¹² He stated that this lot was frequently used for drug transactions and that people in the lot were usually armed.²¹³ In this particular case, as the officer approached the lot, the defendant slowly walked away, then began running, and was subsequently stopped. The court stated that "[i]n this case, avoiding contact with the police was the only means by which the individuals . . . could protect their right of privacy."²¹⁴ The court went on to find that the seizure was not justified by the fact that the defendant attempted to avoid the police.²¹⁵

To effectively preserve a citizen's right to ignore police officers, the United States Supreme Court must require police to point to factors other than flight, furtive gestures, or avoidance. This would be consistent with earlier Supreme Court dicta. In *Florida v. Royer*,²¹⁶ the Court stated that a citizen "may not be detained even momentarily without reasonable, objective grounds . . . ; and his refusal to listen or answer does not, without more, furnish those grounds." Justice Harlan, in his *Terry v. Ohio* concurrence, stated that citizens have a right to ignore police interrogation that is not supported by reasonable suspicion.²¹⁷ This right does not depend upon the manner in which a citizen exercises it. Whether an individual ducks at the sight of police, turns, runs, or walks

207. *Id.* at 65, 378 N.W.2d at 461.

208. *Id.*

209. See, e.g., *In re D.J.*, 532 A.2d 138 (D.C. 1987); *People v. Aldridge*, 35 Cal. 3d 473, 674 P.2d 240, 198 Cal. Rptr. 538 (1984); *People v. Thomas*, 660 P.2d 1272 (Colo. 1983).

210. 384 Mass. 762, 764, 429 N.E.2d 1009, 1010 (1981).

211. 35 Cal. 3d 473, 674 P.2d 240, 198 Cal. Rptr. 538 (1984).

212. *Id.* at 476, 674 P.2d at 241, 198 Cal. Rptr. at 593.

213. *Id.*

214. *Id.* at 479, 674 P.2d at 243, 198 Cal. Rptr. at 541.

215. *Id.*, 674 P.2d at 242-43, 198 Cal. Rptr. at 541.

216. 460 U.S. 491, 498 (1982) (citing *United States v. Mendenhall*, 446 U.S. 544, 556 (1980)).

217. 392 U.S. 1, 32-33 (1968) (Harlan, J., concurring).

away, he or she has decided to avoid a confrontation with the police. When the police have no other grounds upon which to justify a seizure of a citizen, they must respect this right and leave the person alone. This does not intrude upon legitimate police patrol, because police would still be allowed to follow individuals, as well as to employ other methods of investigation.

The Supreme Court has not defined the relative weight to be given to these factors—public interest, nature of intrusion, and facts relied upon. Assuming that they are of equal weight, the seizure of Mr. Chesternut was unreasonable. The public interest served by detecting possessory offenses or by discovering the destination of a citizen is minimal. Chasing a citizen constitutes a grave intrusion, especially when compared to merely following him. Such an intrusion must be justified by more than an officer's reliance on a single, ambiguous perception. Therefore, the seizure of Mr. Chesternut was not sufficiently justified, and the Supreme Court should have affirmed the suppression of the fruits of the police conduct.

Conclusion

The issue of seizure in the context of police-citizen encounters is a complex one due to the variety of situations involved. The Supreme Court must apply a definition of seizure that encompasses a broad range of confrontations in order to comply with the policies espoused in *Terry*. A police chase of a citizen represents one aspect of this problem. This type of activity would cause a reasonable person to believe physical apprehension was imminent; therefore, it must be considered a seizure. Fine factual distinctions should be left to the second step, in which the Court determines the reasonableness of the seizure. Although defining seizure to include chasing will not completely solve the problems in applying the seizure doctrine, such a step would reaffirm Justice Clark's statement that "[t]here is no war between the Constitution and common sense."²¹⁸

In order to make a citizen's right to ignore officials meaningful, a seizure based solely on the citizen's attempt to avoid an officer should not be permitted. Requiring factors other than flight or avoidance at the sight of officers would not hamper police officers' duties. The police should not chase an individual if they cannot point to other, more objective factors to support that chase. Police could simply follow an individual without creating the same type of fear and anxiety, or they could employ other methods of investigation. It is important for the Court to establish guidelines that limit an officer's discretion in order to protect

218. *Mapp v. Ohio*, 367 U.S. 643, 657 (1961).

every citizen's right to be free from unreasonable governmental intrusions.