THE SUPREME COURT’S SEARCH FOR A DEFINITION OF A SEIZURE: WHAT IS A “SEIZURE” OF A PERSON WITHIN THE MEANING OF THE FOURTH AMENDMENT?

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The Supreme Court has struggled with the definition of “seizure” of a person for purposes of the fourth amendment. The Court has recently returned to the issue, and indications are that a new, restrictive definition has gained a majority of adherents on the Court. This Article details the Court’s efforts to determine when a seizure occurs, focusing on the various tests the Court has utilized and discussing the relative merits of each test. It proposes some modifications to the Court’s current test and discusses the impact that test will have on the actions of suspects and law enforcement officials.

I. INTRODUCTION

The fourth amendment provides: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and


1. See Brower v. County of Inyo, 109 S. Ct. 1378, 1381 (1989) (seizure occurs only when freedom of movement is terminated through means intentionally applied).
seizures, shall not be violated." The essence of the amendment is a balancing test, weighing the individual expectation of privacy against the governmental interest in investigating and preventing crime. The amendment itself draws the line: the seizure must be reasonable. But before reaching the question of reasonableness, it must be determined if there has been a seizure.

The fourth amendment applies to police conduct only when a seizure takes place. If the fourth amendment is inapplicable, a court will not scrutinize the officer's actions, and the exclusionary rule that prevents illegally obtained evidence from contributing to a conviction will not apply. If the fourth amendment is applicable, then the court will determine whether there is sufficient justification for the officer's actions; if justification is lacking, the evidence will be inadmissible in the government's case-in-chief. Therefore, the question of what constitutes a "seizure" is of crucial importance.

The Supreme Court has acknowledged the infinite variety of potential encounters between citizens and police:

Street encounters between citizens and police officers are incredibly rich in diversity. They range from wholly friendly exchanges of pleasantries or mutually helpful information to hostile confrontations of armed men involving arrests, or injuries, or loss of life. All confrontations are not all of a piece. Some of them begin in a friendly enough manner, only to take a different turn upon the injection of some unexpected element into the conversation. Encoun-


4. See Florida v. Royer, 460 U.S. 491, 498 (1983) (plurality opinion) (if no detention — no seizure within the meaning of the fourth amendment — then no constitutional rights infringed); United States v. Mendenhall, 446 U.S. 544, 552-53 (1980) (opinion of Stewart, J.) ("not every encounter between police officer and citizen is intrusion requiring objective justification"). See also INS v. Delgado, 446 U.S. 210, 215 (1984) ("The Fourth Amendment does not proscribe all contact between the police and citizens, but is designed 'to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals.'") (quoting United States v. Martinez-Fuerte, 428 U.S. 543, 544 (1976)). Cf. United States v. Hernandez, 473 U.S. 531, 540-41 (1985) (rejecting intermediate standard between reasonable suspicion and probable cause to justify seizure, stating that subtle gradations may obscure the meaning of the fourth amendment); Dunaway v. New York, 442 U.S. 200, 213-14 (1979) (rejecting multifactor standard to judge reasonableness of extent of detention). But see People v. De Bour, 40 N.Y.2d 210, 386 N.Y.S.2d 375, 352 N.E.2d 562 (1976) (suggesting that there are fourth amendment interests to be protected even when no seizure has occurred); W. LaFave, 3 Search and Seizure § 9.2(h) at 420-22 (2d ed. 1987) (discussing De Bour approach).

ters are initiated by the police for a wide variety of purposes, some of which are wholly unrelated to a desire to prosecute for crime.6

A seizure occurs along the continuum of meetings between police officers and citizens at the point where there is some "meaningful interference, however brief, with an individual's freedom of movement."7 Given the diversity of encounters between police officers and citizens, the Supreme Court has been "cautious" about defining that point too precisely.8 Included in the concept of "seizure," however, are investigatory stops, arrests, and other detentions. As the Court has explained: "It is quite plain that the Fourth Amendment governs 'seizures' of a person which do not eventuate in a trip to the station house and prosecution for crime — 'arrests' in traditional terminology."9 The most minimal seizure triggering fourth amendment protections commonly has been called a "stop."10 A stop, requiring less justification than an arrest,11 is an intermediate step between an investigation not implicating the fourth amendment and an arrest of a suspect based on probable cause.12

As will be discussed in Part II, which outlines the Court's first effort to define when a seizure occurs and catalogues different types of seizures, the Supreme Court has had little trouble concluding that an arrest and other physical detentions are seizures, but has had more difficulty determining at what point investigatory actions of the police short of physical detention become seizures. For detentions short of physical restraint — that is, those involving only a show of authority by the police — the Court developed the "reasonable person" test to determine when a seizure results. That test is discussed in Part III. Apparently, the reasonable person test has been rejected in favor of a new standard, which requires an intentional acquisition of physical control of the subject by the police. Part IV outlines this new test and demonstrates

its inconsistency with the reasonable person test. Part IV also discusses the merits of the new test, which significantly expands the investigative ability of law enforcement officers and, correlativey, dramatically reduces the number of suspects who will be able to successfully suppress evidence. Part IV also proposes some modifications to the new test to better accommodate competing individual and governmental interests. Part V consists of concluding remarks.

II. PHYSICAL RESTRAINTS AND SHOWS OF AUTHORITY

The Supreme Court’s attempts to define the term “seizure” are of surprisingly recent vintage. The Court first confronted this issue in Terry v. Ohio, a case that remains a basic source for understanding the concept of seizure. In Terry, Officer McFadden, walking his beat in plain clothes, observed three men he believed were planning to rob a store. McFadden approached the three men, identified himself as a police officer, and asked their names. One of the three men, Terry, “mumbled something” in reply. McFadden grabbed Terry and patted down the outside of his clothing, recovering a pistol.

Recognizing the fourth amendment’s application to the officer’s actions, the Court provided a broad view of seizure: “Whenever a police officer accosts an individual and restrains his freedom to walk away, he has ‘seized’ that person.” This definition, used repeatedly in subsequent cases, involves two elements: accosting and restraint of freedom. As will be shown, the main controversy is over when a restraint occurs.

In Terry, the Court recognized that a seizure occurred once the officer took hold of Terry and patted down the outside of his clothing. The Court, limited by the record before it, did not determine whether a seizure had taken place prior to the officer’s physical contact with Terry to search for weapons but “assume[d] that up to that point no intrusion upon constitutionally protected rights had occurred.” However, the Court noted:

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.

Thus, in Terry, the Court recognized two ways in which an officer may seize a person: by physical force or by show of authority. In either instance, there must be a restraint on liberty for a seizure to occur.

14. Id. at 7.
15. Id.
16. Id. at 16.
17. Id. at 19.
18. Id. at 19 n.16.
19. Id.
A. Physical Restraint

In cases involving physical restraint, the Court has not hesitated to apply the Terry definition of seizure and find that a seizure has occurred. These are easy cases; to hold that a seizure has occurred is a mere recognition of the verifiable fact that the person was not free to go. Physical seizure, as the term is used in this article, is limited to the bodily detention of the person. Physical seizure can be accomplished by a variety of means, for example: grabbing the person,20 physically preventing the individual from leaving or requiring the person to accompany the police to the station so the police could continue the investigation,21 establishing a roadblock that the suspect’s car slams into,22 or shooting a fleeing suspect.23 In such circumstances, the finding that a seizure has occurred usually has not been seriously contested.

B. Show of Authority

In order to have a seizure short of physical restraint, there must be a show of authority by the police. Rather than bodily restraining the person, a “mental” detention occurs.24 That is, through a show of authority, the police demonstrate that the individual is not free to leave. Within the show of authority category, there are certain cases which are so clear that the Court has had no problem reaching the conclusion that the fourth amendment applied to the police conduct.25 Such cases have included the stopping of cars at the border, by roving patrols, and at roadblocks,26 and other stops of autos.27 In such in-

24. In a companion case of Terry, the Court suggested one situation when a seizure would occur: if the suspect submitted to “a show of force or authority which left him no choice.” Sibron v. New York, 392 U.S. at 63. Concurring in that case, Justice Harlan suggested that a seizure entailed a curtailment of movement. Id. at 77 (Harlan, J., concurring).
25. See, e.g., Adams v. Williams, 407 U.S. at 146 n.1, 148 (no one contended that defendant voluntarily rolled down car window to speak with police).
26. See Pennsylvania v. Bruder, 488 U.S. 9, 11 (1988) (traffic stop); Berkemer v. McCarty, 468 U.S. 420, 439 (1984) (same); United States v. Martinez-Fuerte, 428 U.S. at 546 n.1 (stop at fixed point at border: “all motorists passing through checkpoint are so slowed as to have been
stances, there has been a show of authority, such as a roadblock, and the person to whom the show of authority was directed acceded to the authority. Clearly recognizable seizures by show of authority are distinguished by two elements: unequivocal police action designed to produce a stop, and an actual stop by the person as a result of that action. In such cases, the restraint is as obvious as a physical restraint. 28

On the other hand, beginning with Terry itself, there have been numerous expressions of opinion by members of the Court that certain police behavior, without more, would not be a show of authority implicating the fourth amendment. For example, Justice Harlan, concurring in Terry, expressed his view that a stop would not include such conduct as "address[ing] questions to other persons, for ordinarily the person addressed has an equal right to ignore his interrogator and walk away." 29 Justice White, also concurring, echoed this view: "There is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets." 30 Later cases have demonstrated that these views are accepted by virtually all of the members of the Court. 31 For


28. At some point, the distinction between a show of authority and a physical restraint becomes blurred. See, e.g., United States v. Hensley, 469 U.S. 221, 234 (1985) (turning on emergency lights, causing car to stop, pointing gun in air, and ordering suspect out of car). At bottom, a show of authority is at least an implicit threat to use physical coercion. Cf. Graham v. Connor, 109 S. Ct. 1865, 1871 (1989) (handcuffing diabetic defendant during insulin reaction is show of authority).

29. Terry v. Ohio, 392 U.S. 1, 32-33 (1968) (Harlan, J., concurring). See also Davis v. Mississippi, 394 U.S. 721, 727 n.6 (1969) (police have right to ask questions but no right to compel answers).


31. See Dunaway v. New York, 442 U.S. 200, 222-24 (1979) (Rehnquist, J., dissenting) (question turns on whether officer's conduct is objectively coercive or physically threatening, not on fact that person might feel cowed by fact that request is made by police officer); United States v. Mendenhall, 446 U.S. at 554 (opinion of Stewart, J.) ("As long as the person to whom questions are put remains free to disregard the questions and walk away, there has been no intrusion upon that person's liberty or privacy as would under the Constitution require some particularized and objective justification"); Florida v. Royer, 460 U.S. at 498 (plurality opinion) ("The 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"); Id. at 511 (Brennan, J., concurring) ("policemen may approach citizens on the street and ask them questions without 'seizing' them for purposes of the Fourth Amendment"); Id. at 523 n.3 (Rehnquist, J., dissenting) (detectives' initial approach and questioning of defendant did not constitute fourth amendment seizure); Florida v. Rodriguez, 469 U.S. 1, 5-6 (1983) (per curiam) (officers "simply asking[ing] if [defendant] would step aside and talk with them . . . was clearly the sort of consensual encounter that implicates no Fourth Amendment interest"); INS v. Delgado, 466 U.S. 210, 216-17 (1984) ("While most citizens will respond to a police request, the fact that people do so, and do so without being told they are free to not respond, hardly eliminates the consensual nature of the response."). But see id. at 226 (Brennan, J., dissenting in part) (police questioning, under certain circumstances, "may" amount to seizure).
example, in *Florida v. Royer*, a plurality gave some of the parameters of police conduct that would not be a seizure: approaching persons in public places, identifying themselves as police officers, and asking if the person is willing to answer some questions, and putting questions to him or her if the person is willing to listen.

In other show of authority cases, where the police action and the citizen's response are more ambiguous, the Court has had great trouble determining under what circumstances a seizure has taken place. As will be seen in the next section, the cases have produced a multitude of opinions, and those opinions are full of examples of when, often only in the opinion of the individual justice writing the opinion, a seizure has occurred. In an attempt to provide a tool to determine when a show of authority seizure has developed, the Court embraced the "reasonable person" test, which focuses on the objective belief, in the defendant's circumstances, of a person accosted by the police.

### III. THE REASONABLE PERSON STANDARD

#### A. Development of the Test

For 12 years after *Terry*, the Court had little occasion to discuss when a seizure eventuated short of a physical restraint or an unequivocal show of authority. In *United States v. Mendenhall*, Justice Stewart made the first attempt to formulate a test to measure when a seizure short of a physical restraint occurs, proposing the "reasonable person" test. His analysis began

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33. Justices Marshall, Powell, and Stevens joined in the opinion written by White. Powell also wrote a brief concurring opinion to emphasize the state's interest in combating drug trafficking and to emphasize the distinctions from *Mendenhall*. 406 U.S. at 508-09.
34. *Id.* at 497.
35. *Id.* But see *id.* at 511-12 (Brennan, J., concurring in the result) (criticizing suggestion that person feels at liberty to simply walk away after approached by law enforcement officer).

See also Michigan v. Summers, 452 U.S. 692 (1981), where the court held that detention of a person living in a house when a search warrant for the house was executed was a reasonable seizure. *Id.* at 697. Justice Stewart, joined by Justices Brennan and Marshall, dissented on the ground that the seizure was unreasonable. *Id.* at 707. Stewart's opinion summarized the liberal view that seizures on less than probable cause are justified in only very narrow circumstances. Thus, he took a narrow view of the prior cases upholding seizures. *Id.* at 708-09. This desire to limit when a seizure is justified also explains, at least in part, Marshall's and Brennan's expansive views of when a seizure occurs. See *Florida v. Royer*, 460 U.S. at 510 (Brennan, J., concurring in the result) (any further detention beyond questions asking for the explanation of suspicious circumstances is a seizure and must be based on consent or probable cause).
36. See infra notes 37-53 and accompanying text (discussing formulation of reasonable person test for determining when seizure has occurred).
37. 446 U.S. 544 (1980).
38. *Id.* at 554. The test had been already adopted by numerous lower courts. See, e.g., United States v. Beck, 598 F.2d 497 (9th Cir. 1979) (relevant inquiry is whether reasonable person in the defendant's shoes who had not committed a crime would have thought he was under restraint); United States v. Oates, 560 F.2d 45, 58 (2d Cir. 1977) (fourth amendment issues must be resolved by objective rather than subjective standard); State v. Tsukiyama, 56 Haw. 8, 525 P.2d 1099 (1974) (in determining whether detention rose to level of arrest, test is whether reasonably prudent person, in totality of circumstances, would feel free to go).
by repeating Terry's admonition that a seizure occurred only when an officer, by means of physical force or show of authority, has restrained the liberty of a person.\textsuperscript{39} Stating that he continued to adhere to that view, he emphasized: "Only when such restraint is imposed is there any foundation whatever for invoking constitutional safeguards."\textsuperscript{40} In his opinion, joined in relevant part only by Justice Rehnquist,\textsuperscript{41} he wrote: "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."\textsuperscript{42}

The test gradually gained acceptance.\textsuperscript{43} Finally, in 1984 in INS \textit{v.} Delgado,\textsuperscript{44} all of the members of the Court seemed to agree that the reasonable person standard had been adopted by the Court.\textsuperscript{45} Consistent with Stewart's view of the scope of the use of the reasonable person test, the majority in Delgado began by citing the Terry language as the "test" for when a seizure had transpired.\textsuperscript{46} Applying such a test was "relatively straightforward" in situations re-

\textsuperscript{39} United States \textit{v.} Mendenhall, 446 U.S. at 553.
\textsuperscript{40} \textit{Id.}
\textsuperscript{41} Justice Powell, along with Chief Justice Burger and Justice Blackmun, concurred in the judgment and other parts of Stewart's opinion, but did not reach the question of what constituted a seizure since it was not raised below. Powell assumed that a stop supported by articulable suspicion took place, but noted that he did "not necessarily disagree with" Stewart's approach. \textit{Id.} at 560 n.1. Justice White, joined by Justices Brennan, Marshall, and Stevens, dissented in Mendenhall. Seemingly rejecting Stewart's approach, White wrote that, in previous cases, the Court had concluded that a seizure had occurred "without inquiring into whether a reasonable person would have believed that he was free to leave." 466 U.S. at 570 n.5.

\textsuperscript{42} \textit{Id.} at 554. Stewart listed four circumstances 'that may indicate a seizure even in the absence of an affirmative attempt by the suspect to leave: 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 officers' request might be compelled. \textit{Id.} Stewart stated that, 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. \textit{Id.} at 555.

\textsuperscript{43} See Florida \textit{v.} Royer, 460 U.S. 491, 502 (1983) (plurality opinion) (self identification of narcotics agents combined with retention of defendant's airline ticket and driver's license, expression of suspicion of drug trafficking, and request to accompany agents to police room, without indicating in any way that defendant was free to leave, constituted a seizure); \textit{Id.} at 514 (Blackmun, J., dissenting) (agreeing that fourth amendment applies when "a reasonable person would have believed he was not free to leave").

\textsuperscript{44} 466 U.S. 210 (1984). Justice Rehnquist included the reasonable person standard in his majority opinion and was joined by Chief Justice Burger and Justices White, Blackmun, Stevens, and O'Connor. \textit{Id.} at 211. Concurring in the result, Justice Powell agreed that the reasonable person standard was the appropriate standard to determine if a seizure had occurred. \textit{Id.} at 221. Justice Brennan, with whom Justice Marshall joined, dissented and stated that the majority of the Court had adopted the reasonable person test "as the appropriate standard for determining when inquiries made by the police cross the boundary separating merely consensual encounters from forcible stops to investigate a suspected crime." \textit{Id.} at 228.

\textsuperscript{45} The Court later made the adoption of the reasonable person test more explicit. See Michigan \textit{v.} Chesternut, 486 U.S. 567, 573-74 (1988) (applying reasonable person test to police chase of defendant).

\textsuperscript{46} INS \textit{v.} Delgado, 466 U.S. at 215.
semelning a traditional arrest, Justice Rehnquist wrote for the majority. He noted, however, that the protection against unreasonable seizures extended to brief detentions short of an arrest. He then wrote:

What has evolved from our cases is a determination that an initially consensual encounter between a police officer and a citizen can be transformed into a seizure or detention within the meaning of the Fourth Amendment, "if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."

Thus, the reasonable person test was designed to be a tool to determine when a seizure takes place in situations short of a physical restraint. As discussed, such a limitation on the scope of the use of the reasonable person test is unremarkable; for example, in an arrest situation, a seizure clearly has occurred and no reasonable person would dispute it and reference to what a reasonable person would think would be superfluous.

There have been several attempts to explain what the reasonable person standard means. Most notably, Justice Blackmun, writing for the majority in the recent case of Michigan v. Chesternut, mounted an extensive defense of the standard. Recognizing that the test for a seizure was "necessarily imprecise, because it is designed to assess the coercive effect of the police conduct, taken as a whole, rather than focus on particular details in isolation," he observed that "what constitutes a restraint on liberty prompting a person to conclude that he is not free to 'leave' will vary, not only with the particular police conduct at issue, but also with the setting in which the conduct occurs."

Extolling the test's virtues, Blackmun stated:

While the test is flexible enough to be applied to the whole range of police conduct in an equally broad range of settings, it calls for consistent application from one police encounter to the next, regardless of the particular individual's response to the actions of the police. The test's objective standard — looking to the reasonable man's interpretation of the conduct in question — allows the police

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47. Id. at 215. The Delgado majority thus seemed to limit further the application of the test to initially consensual encounters. But see Michigan v. Chesternut, 486 U.S. at 574-75 (police car driving parallel to running defendant is not seizure under reasonable person test).
48. See Brower v. County of Inyo, 109 S. Ct. 1378, 1383 (1989) (Stevens, J., concurring in result) (no reference to intent needed when physical seizure; therefore, no reference needed to reasonable person test).
49. Referring to the reasonable person test, Justice Brennan has stated: "This rule properly looks not to the subjective impressions of the person questioned but rather to the objective characteristics of the encounter which may suggest whether or not a reasonable person would believe that he remained free during the course of the questioning to disregard the questions and walk away." INS v. Delgado, 466 U.S. at 228 (Brennan, J., dissenting).
51. Id. at 573.
52. Id.
to determine in advance whether the conduct contemplated will im-
plicate the Fourth Amendment... The "reasonable person" stan-
dard also ensures that the scope of Fourth Amendment protection
does not vary with the state of mind of the particular individual
being approached.\textsuperscript{53}

The difficulty in reconciling the reasonable person and \textit{Terry} standards is
that the reasonable person test, in theory, includes a much more expansive
view of a seizure than contemplated by \textit{Terry}. The \textit{Terry} notion requires a
restraint of liberty, either by physical force or show of authority. Under the
\textit{Terry} test, there is an objective examination of the officer's actions and a
conclusion based on those actions, hopefully comporting with objective reality,
whether or not there has been a seizure. The reasonable person test, however,
shifts the focus away from the officer's actions to an examination of the ef-
flect of those actions on the reasonable belief of the person accosted. It thus
adds a step and changes the focus: it first examines the officer's actions but
then asks what effect those actions would have on a reasonable person, result-
ing in a conclusion that, it is hoped, comports with a reasonable person's ob-
jective belief about whether there has been a seizure. The most significant
difference in the two standards is that the former examines objective reality
and the latter examines objective belief. In theory, a reasonable person could
believe that he was being seized even though he was not. The reasonable per-
son test is, therefore, a broader concept of a seizure; depending on the cir-
cumstances, it may be unnecessary to examine whether there has been a
restraint because whether there has been one or not, a reasonable person
would believe he was not free to leave.

\textbf{B. Case Law Applying the Reasonable Person Test}

The reasonable person test has been employed in only four cases and those
cases have disclosed significant disagreement among the justices as to what a
reasonable person would believe. Examining the application of the test to
those four cases, and the examples used as illustrations in those cases, demon-
strates that, rather than promoting clarity and consistency in the development
of the law as to when a seizure occurs, the reasonable person test has done
just the opposite. As will be seen, the reasonable person concept that has
evolved from the majority's use of the term is, at least, misleading and is, in
many ways, divorced from the realities of citizen-police encounters. In addi-
tion, although a majority of the Court has in only one instance found a sei-
zure,\textsuperscript{54} the examples used to illustrate the test have led to an obscured view of
when a seizure takes place. As a result of the ambiguous or misleading use of
the reasonable person test by the Court, the lower courts have misconstrued
its meaning and have inconsistently applied it.

\textsuperscript{53} Id.

probable cause permissible under fourth amendment).

The first case using the reasonable person standard was *United States v. Mendenhall*, which involved a drug courier stopped at Detroit Metropolitan Airport after she arrived on a commercial flight from Los Angeles. Two Drug Enforcement Agency officers observed the courier as she disembarked from the airplane. Because the agents found her conduct to be characteristic of a drug courier, they approached her as she walked through the concourse and identified themselves as federal agents. Responding to the agents' request for some identification and her airline ticket, the courier produced a license issued under one name and an airline ticket issued in another name. After further inquiry, her license and ticket were returned to her. One of the agents then asked her to accompany him to the airport DEA office for further questioning. She did so, but the record did not indicate whether she verbally responded. At the office, the agent asked her to consent to a search but informed her that she had the right to decline if she so desired. She agreed and a policewoman accompanied her to a private room. While in the process of disrobing, she removed two packages of heroin from her undergarments and handed them to the policewoman.

Although it affirmed the conviction, the Court splintered into numerous opinions. In a plurality opinion joined in relevant part only by Justice Rehnquist, Justice Stewart first proposed the reasonable person test and contended that no seizure had taken place prior to Mendenhall's disclosure of the heroin. Stewart illustrated the "distinction between an intrusion amounting to a 'seizure' of the person and an encounter that intrudes upon no constitutionally protected interest" by reference to the facts of *Terry*. He stated that "the officer 'seized' Terry and subjected him to a 'search' when he took hold of him, spun him around, and patted down the outer surfaces of his clothing." Stewart noted that it had not been decided in *Terry* if a seizure happened before the officer physically restrained Terry to search for weapons, and pointed out that the Court assumed that no seizure had resulted. He viewed that assumption as correct, agreeing with the concurring opinions in *Terry* that an officer enjoys the liberty to ask questions of other persons.

Stewart further illustrated the extent to which police officers could accost citizens without seizing them by reference to two other cases. In Stewart's words, the first, *Sibron v. New York*, involved a police officer who approached Sibron in a restaurant and told him to come outside, which Sibron

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55. 446 U.S. 544 (1980).
56. *Id.* at 547.
57. *Id.* at 548.
58. *Id.*
59. *Id.* at 549.
60. *Id.* at 555 (opinion of Stewart, J.).
61. *Id.* at 552.
62. *Id.* (citing *Terry v. Ohio*, 392 U.S. 1, 19 (1968)).
64. *Id.* at 553.
Stewart stated that the Court had no occasion to decide whether there was a seizure in the restaurant but Stewart provided his view that there was not a seizure if Sibron had voluntarily accompanied the officer in the spirit of apparent cooperation. A seizure would occur, Stewart opined, only when "the police officer in some way demonstrably curtailed Sibron's liberty." Stewart also discussed Brown v. Texas. In that case, two police officers approached Brown and asked him to identify himself and explain why he was present in an alley. Brown refused to do so and asserted that the officers had no right to stop him. Stewart opined that, up to that point, there was no seizure.

Stewart turned to examples of when a seizure occurs:

Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the intervening 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.

Turning to the facts in Mendenhall, Stewart noted the absence of the above characteristics and concluded that no seizure occurred because Mendenhall merely had been asked to cooperate. He stated that Mendenhall had no "objective reason to believe that she was not free to end the conversation" and leave. Moreover, according to Stewart, the mere fact that she was not told she was free to go did not change the result.

The other justices in Mendenhall either did not reach the question of whether a seizure developed or dissented from Stewart's view. Justice White, joined by Justices Brennan, Marshall, and Stevens, criticized Stewart's utilization of the reasonable person test:

66. United States v. Mendenhall, 446 U.S. at 553.
67. Id.
68. Id.
70. Id. at 49.
71. United States v. Mendenhall, 446 U.S. at 556.
72. Id. at 554 (citation omitted).
73. Id. at 555-56.
74. Id. at 555.
75. Id.
76. Justice Powell, writing for himself, Chief Justice Burger, and Justice Blackmun, concurred in the judgment and other parts of the opinion, but did not reach the question of what constituted a seizure because, under the facts presented, he believed that any seizure was justified. Id. at 560 (Powell, J., concurring in part and concurring in the judgment). Powell did not specify at what point he assumed the seizure occurred but stated that, when the agents asked for her driver's license and ticket, the question whether Mendenhall reasonably could have thought she was free to walk away was "extremely close." Id. at 560 n.1.
although Mr. Justice Stewart’s opinion purports to make its “seizure” finding turn on objective factors known to the person accosted, in distinguishing prior decisions holding that investigatory stops constitute “seizures,” it does not rely on differences in the extent to which persons accosted could reasonably believe that they were free to leave. 77

White was at least partially correct. Based on Stewart’s analysis of the prior cases and the facts of Mendenhall, he appeared to have a very restrictive view of when a seizure transpired, requiring physical or actual restraint. But some of Stewart’s other examples seemed to allow for a more expansive view of a restraint: the display of a weapon, the tone of voice, or the presence of several officers. 78 Those examples suggested that intimidation alone could serve as the basis of a seizure. Stewart made no attempt to reconcile this apparent contradiction.

In contrast, White assumed that Mendenhall had been seized when first stopped by the agents. 79 Noting that the agents took Mendenhall’s ticket and driver’s license for a time, White also opined that it was doubtful that a “reasonable person about to board a plane would feel free to leave when law enforcement officers have her plane ticket.” 80 White stated that, even if the initial encounter was not a seizure, Mendenhall was seized “when the agents escorted her from the public area of the terminal to the DEA office for questioning and a strip search of her person.” 81 Important factors in reaching this conclusion were the similarity of the event to a traditional arrest, the fact that Mendenhall was not told that she was free to go, and the fact that the agents intended to prevent her from leaving if she had attempted to do so prior to the search. 82

77. Id. at 570 (White, J., dissenting) (footnote omitted).
78. Id. at 554.
79. Id. at 571.
80. Id. at 570 n.3.
81. Id. at 574.
82. Id. at 574-75. In contrast, Stewart rejected an inquiry into subjective intent of the DEA agent, saying that it was irrelevant unless conveyed to Mendenhall. Id. at 554 n.6 (opinion of Stewart). The Court later adopted his view in Michigan v. Chesternut, 486 U.S. at 572. In Reid v. Georgia, 448 U.S. 438 (1980), a DEA agent approached two travelers after they had disembarked from a plane and left the airline terminal. The agent asked them for their ticket stubs and identification. After examining the tickets, the men agreed to accompany the agent back to the terminal and consented to a search of their shoulder bags. As the men entered the terminal, Reid began to run and, before he was apprehended, abandoned his shoulder bag, which contained cocaine. Id. at 440. The majority, per curiam, did not decide whether a seizure occurred but assumed that one had, based on the lower courts’ similar assumption. Id. at 443. Justice Powell, with whom Chief Justice Burger and Justice Blackmun joined, concurred. Powell did not refer to the reasonable person test, but viewed the case as being “remarkably” similar to the facts in Mendenhall. He strongly implied that no seizure had occurred during the initial accosting of the suspects and invited such a ruling on remand. Id. at 443-44. This seemed to represent a slight change of view because in Mendenhall, Powell, also joined by Burger and Blackmun, had suggested that the question of whether a seizure occurred was “extremely close.” United States v.
The next case that clearly presented the question of when a show of authority constituted a seizure was *Florida v. Royer.* That case also involved the propriety of a drug courier stop in an airport. The police officers approached Royer and asked for and examined Royer's ticket and his driver's license. The officers then identified themselves as narcotics agents and told Royer that he was suspected of transporting narcotics. They asked him to accompany them to the police interview room, while retaining his ticket and driver's license, and without indicating in any way that he was free to depart. He accompanied them to the room. Meanwhile, the officers obtained Royer's luggage without his knowledge and brought it to the area where he was being questioned.

Although the case produced five separate opinions, all the justices agreed that a seizure occurred. Writing for a plurality that included Justices Marshall, Powell, and Stevens, Justice White summarized the factors leading the plurality to its conclusion:

What had begun as a consensual inquiry in a public place had escalated into an investigatory procedure in a police interrogation room, where the police, unsatisfied with previous explanations, sought to confirm their suspicions. The officers had Royer's ticket, they had his identification, and they seized his luggage. Royer was never informed that he was free to board his plane if he so chose, and he reasonably believed that he was being detained. At least as of that moment, any consensual aspects of the encounter had evaporated. White noted, however, that if the officers had returned Royer's ticket and driver's license and informed him that he was free to go, they might have obviated any claim that the encounter was anything but consensual.

Justice Powell, although joining White's opinion, wrote a separate concurring opinion. He emphasized the differences of the facts from those in *Mendenhall,* which he characterized as an initially lawful encounter followed by the officers' request that the suspect accompany them to a more private place. In contrast, Powell wrote, Royer found himself in a small room with

Mendenhall, 446 U.S. at 560 n.1. Justice Rehnquist dissented, citing Stewart's opinion in *Mendenhall,* on the ground that no seizure had occurred. Reid v. Georgia, 448 U.S. at 444. The Georgia court accepted Powell's invitation and held on remand that no seizure had occurred. See State v. Reid, 247 Ga. 445, 276 S.E.2d 617 (1981).

84. Id. at 494.
85. Id.
86. Id.
87. Id. at 503.
88. Id. at 504. By holding the ticket, driver's license, and luggage, the case took on significant aspects of physical restraint, similar in character to the physical restraint cases, that is, the police had physical control over the individual's means of travel. See id. at 503 n.9 (investigator returned airline ticket to defendant in *Mendenhall*).
89. Id. at 508-09 (Powell, J., concurring).
two officers who had obtained possession of his checked luggage without his consent and had retained his driver's license and ticket. Powell concluded: "Neither the evidence in this case nor common sense suggests that Royer was free to walk away." 90

Justice Brennan, concurring in the result, opined that Royer had been seized when the officers approached him, identified themselves as officers, and requested his airline ticket and driver's license. 91 He reasoned, consistent with a defendant-oriented view of the reasonable person test, that "[i]t is simply wrong to suggest that a traveler feels free to walk away when he has been approached by individuals who have identified themselves as police officers and asked for, and received, his airline ticket and driver's license." 92 Thus, in Brennan's view, a seizure developed before any physical seizure of Royer's possessions.

The dissenting justices agreed that a seizure occurred but believed that the seizure was justified. Their analysis, therefore, focused on the justification for the seizure rather than when the seizure occurred. Blackmun, for example, believed that, at some point in the encounter, apparently prior to Royer's agreement to go to the police room, a seizure occurred. 93 Justice Rehnquist, joined by Chief Justice Burger and Justice O'Connor, wrote a separate dissent, relying on Terry's definition of a seizure, and finding that a justified seizure had occurred some time after the initial approach to and questioning of Royer. 94

INS v. Delgado 95 next presented the question of what constitutes a seizure and produced the first majority opinion utilizing the reasonable person standard. The case involved the individual questioning of workers concerning their citizenship status by Immigration and Naturalization Service agents during factory surveys. Several named plaintiffs, who were workers in the affected factories, sued the INS. At the beginning of each survey, several agents positioned themselves near the building's exits. 96 Other agents dispersed throughout the factory to question employees at their work stations. The agents displayed badges, carried walkie-talkies, and were armed. 97 The agents approached the employees and, after identifying themselves, asked questions relating to the employee's citizenship. If the employee gave a credible response, the agents moved on; if not, the employee was asked to produce immigration papers. 98 During each survey, employees continued to work and were free to walk around within the factory. 99

90. Id.
91. Id. at 511-12 (Brennan, J., concurring).
92. Id. at 512.
93. 460 U.S. at 517 n.2 (Blackmun, J., dissenting).
94. Id. at 523 n.3.
96. The number of agents in each survey was usually from 15 to 25. Id. at 230 (Brennan, J., dissenting).
97. Id. at 212.
98. Id. at 213.
99. Id.
During one survey, an agent stationed at a door attempted to stop a worker from leaving; the worker pushed the agent aside and fled.\textsuperscript{100} Also during one of the surveys, one of the plaintiffs was tapped on the shoulder by an agent while she was at her work station and asked for her "papers."\textsuperscript{101} She testified that she did not want to identify herself but did so because the men were INS agents.\textsuperscript{102} The surveys resulted in the arrest of between 20% and 50% of the employees of each of the factories.\textsuperscript{103}

The majority, in an opinion written by Justice Rehnquist, rejected the claim that the entire factory work force was seized for the duration of the survey when the INS agents were placed near the exits. The majority reasoned that people at work "[o]rdinarily" have their freedom to move about "meaningfully restricted" by their "voluntary obligations to their employers."\textsuperscript{104} The majority noted that, when the surveys were initiated, people were about their ordinary business; although some disruption was caused, including the efforts of some workers to hide, the workers were not prevented from moving about the factories.\textsuperscript{105} The stationing of agents by the doors did not change the result because the purpose was to insure that all persons were questioned: "If 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."\textsuperscript{106} The majority concluded that, since most workers could have no reasonable fear that they would be detained upon leaving, no seizure of the work force as a whole occurred.\textsuperscript{107}

Nor did seizures of any of the named plaintiffs take place, according to the majority, because the individual plaintiffs were merely approached and asked a few questions concerning where they were from or born, or asked for identification papers.\textsuperscript{108} The majority reasoned that, although the Court had not ruled directly on whether mere questioning of an individual by a police officer, without more, was a seizure, the Royer decision "plainly implies that interrogation relating to one's identity or a request for identification by the police does not, by itself, constitute a Fourth Amendment seizure."\textsuperscript{109} The majority then stated that police questioning, by itself, was "unlikely to result in a Fourth Amendment violation."\textsuperscript{110} The Court continued:

"While most citizens will respond to a police request, the fact that people do so, and do so without being told they are free not to respond, hardly eliminates the consensual nature of the response."

\textsuperscript{100} Id. at 218 n.6.
\textsuperscript{101} Id. at 220.
\textsuperscript{102} Id. at 231 (Brennan, J., dissenting).
\textsuperscript{103} Id. at 223 (Powell, J., concurring).
\textsuperscript{104} Id. at 218.
\textsuperscript{105} Id.
\textsuperscript{106} Id. at 218 (footnote omitted).
\textsuperscript{107} Id. at 219.
\textsuperscript{108} Id. at 219-20.
\textsuperscript{109} Id. at 216.
\textsuperscript{110} Id.
Unless the circumstances of the encounter are so intimidating as to demonstrate that a reasonable person would have believed he was not free to leave if he had not responded, one cannot say that the questioning resulted in a detention under the Fourth Amendment. But if the person refuses to answer and the police take additional steps . . . to obtain an answer, then the Fourth Amendment imposes some minimal level of objective justification to validate the detention or seizure.\textsuperscript{111}

The majority also rejected the idea that the manner in which the surveys were conducted created a "psychological environment" that made the plaintiffs reasonably afraid that they were not free to leave, reasoning that it was "obvious" that the INS agents were only questioning people.\textsuperscript{112}

Only Justices Brennan and Marshall dissented.\textsuperscript{113} Although agreeing that the reasonable person standard applied, Brennan stated in the dissent that the most "striking" aspect of the majority's opinion was its "studied air of unreality."\textsuperscript{114} Brennan said that the Court's avoidance of the conclusion that a seizure resulted was "rooted more in fantasy than in the record of this case."\textsuperscript{115} He believed that a seizure occurred when the factory workers were "accosted by the INS agents and questioned concerning their right to remain in the United States."\textsuperscript{116} He reasoned that the manner in which the surveys were conducted demonstrated a "'show of authority' of sufficient size and force to overbear the will of any reasonable person."\textsuperscript{117} The majority's reasoning was flawed, Brennan believed, based on its failure to consider the circumstances surrounding the questioning: a large number of agents systematically moved through the workers; suspected illegal aliens were handcuffed and taken away; all exits were guarded by agents; and, as the agents moved through the factory, they showed their badges and directed "pointed questions" at the workers.\textsuperscript{118} Brennan also considered the plaintiffs' testimony, which demonstrated their belief that they had to answer the agents' questions. Given the surrounding circumstances, Brennan concluded that those feelings of constraint were

\textsuperscript{111} Id. at 216-17 (citations omitted).
\textsuperscript{112} Id. at 220.
\textsuperscript{113} Id. at 225. Concurring in the result, Justice Powell, although recognizing that the question whether the factory surveys were seizures was a "'close one,'" which turned on "whether a reasonable person in respondents' position would have believed he was free to refuse to answer the questions put to him by INS officers and leave the factory," found that the question did not have to be answered because any seizure was permissible. Id. at 221 (Powell, J., concurring in the result).
\textsuperscript{114} Id. at 226.
\textsuperscript{115} Id. at 229.
\textsuperscript{116} Id. at 229. Brennan, however, agreed with the majority that there was "'no single continuing seizure of the entire work force from the moment that the INS agents first secured the factory exits until the completion of the survey.'" Id. at 225 n.2. He reasoned that "'most of the employees' were generally free to continue work and to move about the workplace." Id.
\textsuperscript{117} Id.
\textsuperscript{118} Id. at 229-30.
reasonable and, therefore, further concluded that seizures had taken place.\textsuperscript{119}

The only other case employing the reasonable person test is \textit{Michigan v. Chesternut}.\textsuperscript{120} In that case, the accused was followed by police officers in a marked police car after he spontaneously fled after observing them approach on routine patrol. As the officers drove alongside Chesternut to determine what he was doing, they observed him discard a number of packets from his pocket.\textsuperscript{121} The officers stopped and recovered the packets, which they suspected contained narcotics. Chesternut, who had stopped of his own accord nearby, then was arrested.\textsuperscript{122}

The Supreme Court unanimously ruled that the police officers' investigatory pursuit did not amount to a seizure cognizable under the fourth amendment.\textsuperscript{123} In an opinion written by Justice Blackmun and joined by six other justices, the Court recognized that, although the "very presence of a police car driving parallel to a running pedestrian could be somewhat intimidating," such a police presence did not, standing alone, constitute a seizure.\textsuperscript{124} According to the majority, the police conduct did not communicate to a reasonable person an attempt "to capture or otherwise intrude upon" freedom of movement.\textsuperscript{125} To be a seizure, according to the majority, more was needed: "The record does not reflect that the police activated a siren or flashers; . . . or that they operated the car in an aggressive manner to block respondent's course or otherwise control the direction or speed of his movement."\textsuperscript{126}

C. Merits of the Reasonable Person Test

From the preceding review of the few Supreme Court cases employing the reasonable person test, several conclusions can be drawn. The reasonable person test has evolved into something other than an examination of what a reasonable person believes.\textsuperscript{127} Moreover, the test, as employed by a shifting

\textsuperscript{119} Id. at 230-31.
\textsuperscript{120} 486 U.S. 567 (1988); cf. Florida v. Rodriguez, 469 U.S. 1 (1984). In Rodriguez, a narcotics officer observed Rodriguez acting suspiciously at an airport. \textit{Id.} at 3-4. As he and a second officer approached Rodriguez and two companions, Rodriguez attempted to flee. \textit{Id.} The officer showed his badge to Rodriguez and asked him if they might talk. Rodriguez agreed and the officer suggested that they move approximately 15 feet to where the second police officer and the two other suspects were standing. \textit{Id.} at 4. The Court, in a per curiam opinion, held that this "initial contact" did not implicate the fourth amendment. \textit{Id.} at 5-6. The decision did not cite the reasonable person test.
\textsuperscript{121} Michigan v. Chesternut, 486 U.S. at 569.
\textsuperscript{122} \textit{Id.}
\textsuperscript{123} \textit{Id.} at 573. Justice Kennedy, with whom Justice Scalia joined, concurred. That opinion substantially rejected the majority's reasoning. See infra notes 139-143 and accompanying text (discussing Kennedy's \textit{Chesternut} concurrence).
\textsuperscript{124} \textit{Id.} at 575.
\textsuperscript{125} \textit{Id.}
\textsuperscript{126} \textit{Id.} (footnotes omitted).
\textsuperscript{127} Clearly, there has been an evolution of the reasonable person test. From the beginning, when Justice Stewart first proposed the test, factors to determine when a seizure occurs have been proposed only to be later rejected. For example, Justice White over time rejected certain factors
majority of justices, has never included a broad view of a seizure, contrary to many of the examples used to illustrate it.

The reasonable person analysis, as employed by the increasingly conservative majority of the Court, has become strained and divorced from the plain meaning of the words of the test itself. In INS v. Delgado, there was no real attempt by the majority to determine if a reasonable person would believe that he or she was not free to leave. Such an analysis would entail determining what a reasonable person in the suspect's position would believe based on the police behavior. Instead, the majority looked to the objective factors of the encounter and focused on the reasonableness of the police's conduct, without regard to the conduct's impact on the mind of a reasonable person in the suspect's position.

This is the same reasonableness test that has been applied in other fourth amendment contexts. It is a balancing test, weighing the competing state and individual interests and then concluding, after determining if the actions were reasonable or not, that a seizure has or has not occurred. The difference is

that he earlier believed were important. In Mendenhall, he stated that the failure to inform the person that he or she was free to go was important in determining whether a seizure occurred. United States v. Mendenhall, 446 U.S. at 574-75. However, in Delgado, he joined the Court's opinion that such information was unimportant. INS v. Delgado, 466 U.S. at 216. See Schneckloth v. Bustamonte, 412 U.S. 218, 249 (1973) (police do not have to tell person that he or she has right to withhold consent). White also viewed the subjective intent of the police as important in Mendenhall. United States v. Mendenhall, 446 U.S. at 575. That view also was rejected later. See supra, note 180. The collective view of the Court also has displayed an evolutionary trend, partly from the personnel changes on the Court and partly as a result of individual justices changing their minds. The result, as Justice Brennan has candidly admitted, is that the cases are not necessarily consistent with each other. INS v. Delgado, 466 U.S. at 226 (Brennan, J., dissenting). See also Florida v. Royer, 460 U.S. at 520 (Rehnquist, J., dissenting) (admitting that cases are "often conflicting").

128. Cf. INS v. Delgado, 466 U.S. at 228 (Brennan, J., dissenting) (reasonable person test looks at the objective characteristics of encounter to determine if reasonable person would believe that seizure occurred). The other-worldliness of the reasonable person test is illustrated by Professor LaFave's observation that, when approached by the police, few if any reasonable persons would believe that they are free to leave. W. LAFAVE, supra note 4, § 9.2(b), at 410-11. "Thus," according to LaFave, "if the ultimate issue is perceived as being whether the suspect 'would feel free to walk away,' then 'virtually all police-citizen encounters must in fact be deemed to involve a Fourth Amendment seizure.'” Id. at 411 (footnote omitted). See supra notes 29-35 (noting that not all police-citizen contacts amount to seizure within fourth amendment).

129. Terry was the Court's first use of the balancing test in a criminal case to uphold a warrantless search based on less than probable cause. Terry v. Ohio, 392 U.S. at 30-31. In the two decades that have followed, the Court has repeatedly used the balancing approach to authorize governmental intrusions on less than probable cause. See, e.g., National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989) (drug testing of customs service employees was reasonable); Skinner v. Railway Labor Executives' Assoc., 489 U.S. 602 (1989) (drug testing of railroad employees was reasonable); Griffin v. Wisconsin, 483 U.S. 868 (1987) (probation officer's search of probationer's home was reasonable); New York v. Burger, 482 U.S. 691 (1987) (administrative inspection of automobile junkyard was reasonable); O'Connor v. Ortega, 480 U.S. 709 (1987) (public employer's search of employee's office subject to reasonableness test); United States v. Montoya de Hernandez, 473 U.S. 531 (1985) (16-hour detention of person at border was reasona-
that in *Delgado*, the balancing analysis was employed to determine whether there was a seizure. In other contexts, the analysis measures if the seizure was reasonable.\(^{130}\) Thus, the real inquiry in *Delgado* was whether society was prepared to accept the investigative actions or conclude that those actions were so intrusive on a person's right to be left alone that they must be called a seizure. By manipulating the conclusion to say that no seizure happened, the majority avoided having to justify the INS agents' actions. Thus, in *Delgado*, the reasonable person test became a misnomer. It did not examine what it claimed to examine, the views of a reasonable person under the circumstances. The true inquiry was masked, resulting in an eschewed view of what a reasonable person would believe, and the analysis became confused.

The *Delgado* majority rejected the idea that a "psychological environment" was created making each factory worker reasonably afraid that he or she was not free to leave, ignoring evidence of fear and intimidation.\(^{131}\) Dissenting Justices Brennan and Marshall believed that such psychological intimidation was at the very heart of the reasonable person test.\(^{132}\) The dissent's mode of analysis, whether or not the ultimate conclusion reached is correct, comports more with the professed goal of the reasonable person test: examining the intimidating effects of the law enforcement actions on the mind of a reasonable person under the circumstances.

*Michigan v. Chesternut* cannot be viewed as a return to a more principled view of the reasonable person test. Instead, it is a transitional case. Although professing to apply the reasonable person test, it is more properly viewed as a reaction to the concurring opinion, which, as will be discussed shortly, essentially advocated abandoning the test. Reference to the reasonable person test was unnecessary in *Chesternut* because there was no accosting prior to the disgorgement of the drugs.\(^{133}\) Under *Terry v. Ohio*, both a restraint and an accosting are necessary for a seizure.\(^{134}\) Police officers have the same rights as

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\(^{130}\) *See supra* note 129 (citing cases deciding whether seizure was reasonable).

\(^{131}\) INS v. Delgado, 466 U.S. at 220. *But see supra* notes 24-28 (discussing seizures resulting from police show of authority).

\(^{132}\) INS v. Delgado, 466 U.S. at 229.

\(^{133}\) *Michigan v. Chesternut*, 486 U.S. at 569.

\(^{134}\) *Terry v. Ohio*, 392 U.S. at 16. It could be argued that *Chesternut* belies this analysis because the Court examined what a reasonable person would have believed in the situation. *See Michigan v. Chesternut*, 486 U.S. at 573-74. However, *Chesternut* is better dismissed as not being a seizure because the events failed to meet the first prong of the *Terry* test: there was no accost-
private citizens to travel on the streets. Thus, in Chesternut, the officers were merely exercising that right and the suspect stupidly disposed of the drugs in their sight.

In addition to the change in the focus of the inquiry from what a reasonable person would believe to whether the police's actions are objectively reasonable, the meaning of the test has been distorted by examples used by the Court. As has been discussed, the opinions are full of illustrations of the types of activity that would constitute a seizure. As recently as the Chesternut case, the majority gave very expansive examples of when a seizure would occur under the reasonable person test, for example, activating the flashing lights on a patrol car. Such examples broadly indicate that some shows of authority are so intimidating that they alone could be a seizure. However, of the cases where the test was employed, only in Florida v. Royer did a majority hold that a seizure occurred short of physical restraint, and that case significantly resembled a physical seizure; by retaining Royer's driver's license and airline ticket and getting his luggage without his consent, the police had physical control over his means of travel.

In contrast, Mendenhall, Delgado, and Chesternut demonstrate that the area of permissible police action that will not be considered a seizure is broad. Looking only to the facts of each of the four cases and to the conclusion that a seizure has or has not occurred, one must conclude that the concept of "seizure" is very restrictive, resulting only when the level of intrusion is similar to physical restraint.

In summary, two currents have been at work in the cases. First, there has not been a consensus of what the reasonable person test means, and Delgado suggests a trend toward a general reasonableness test, divorced from what a reasonable suspect would believe. Second, unusually expansive dicta has obscured the actual results in the cases. These two tendencies have suggested a broader test than is actually employed. Many lower courts, utilizing the dicta emanating from above, have applied the reasonable person test broadly, while others have not. Rather than produce stability and predictability, the
reasonable person test has produced the opposite. It thus has failed as an effective test.

IV. THE INTENTIONAL ACQUISITION OF PHYSICAL CONTROL TEST

A. The New Test

The 1988 decision Michigan v. Chesternut\(^{141}\) seemed to extinguish any lingering doubts about whether the reasonable person test commanded a majority view.\(^{142}\) However, the two newest members of the Court, Justices Kennedy and Scalia, declined to apply the test, and focused instead on whether a "restraining effect" had been achieved:

The case before us presented an opportunity to consider whether even an unmistakable show of authority can result in the seizure of a person who attempts to elude apprehension and who discloses contraband or other incriminating evidence before he is ultimately detained. It is at least plausible to say that whether or not the officers' conduct communicates to a person a reasonable belief that they intend to apprehend him, such conduct does not implicate Fourth Amendment protections until it achieves a restraining effect.\(^{143}\)

 justice Kennedy argued that a seizure occurs "when an individual remains in the control of law enforcement officials because he reasonably believes, on the basis of their conduct toward him, that he is not free to go."\(^{144}\) This formulation of a show of authority seizure presupposes that the person is first in the control of the officers. In contrast, the Chesternut majority used the reasonable person test to determine whether such control had been achieved.\(^{145}\)

The Court in Brower v. County of Inyo,\(^{146}\) decided only nine months after Chesternut, embraced the literalist concept of a seizure expressed by the con-

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\(^{140}\) See, e.g., Richardson v. United States, 520 A.2d 692, 696-97 (D.C. 1987) (no seizure when police said to suspect, "Police, wait a second. We want to talk to you"); United States v. Burrell, 286 A.2d 845, 846-47 (D.C. 1972) (no seizure under reasonable person test when officer put hand on suspect's elbow and said, "Hold it").


\(^{142}\) See W. LaFave, supra note 4, § 9.2(a), at 409-17 (discussing case law interpretations of what type of police contact is seizure).

\(^{143}\) Michigan v. Chesternut, 486 U.S. at 577 (Kennedy, J., concurring). The majority, in a curious footnote perhaps designed to answer the concurring opinion, noted that the United States suggested in an amicus brief that, in some circumstances, a police pursuit would amount to a stop from the outset or from an early point in the chase if the police commanded the person to halt and indicated that he was not free to go. Id. at 575 n.9. The Court resolved to "leave to another day" the determination of when a police pursuit could amount to a seizure. Id. It did, however, reject the petitioner's argument that police conduct, no matter how coercive, does not constitute a seizure "until an individual stops in response to the police's show of authority." Id. at 572. In like fashion, the Court rejected the respondent's view that all chases are seizures, favoring instead a case by case approach that takes into account surrounding circumstances. Id.

\(^{144}\) Id. at 577 (emphasis added).

\(^{145}\) Id. at 575.

\(^{146}\) 109 S. Ct. 1378 (1989).
curring justices in *Chesternut*, but went further and, at least implicitly, rejected the use of the reasonable person test. The majority's opinion, authored by Justice Scalia, proffered a new definition of a seizure: "'[I]ntentional acquisition of physical control.'" The majority explained:

A seizure occurs even when an unintended person or thing is the object of the detention or taking . . . but the detention or taking itself must be willful. This is implicit in the word "seizure," which can hardly be applied to an unknowing act. . . .

Thus, if a parked and unoccupied police car slips its brake and pins a passerby against a wall, it is likely that a tort has occurred, but not a violation of the Fourth Amendment. And the situation would not change if the passerby happened, by lucky chance, to be a serial murderer for whom there was an outstanding arrest warrant — even if, at the time he was thus pinned, he was in the process of running away from two pursuing constables. It is clear, in other words, that a Fourth Amendment seizure does not occur whenever there is a governmentally caused termination of an individual's freedom of movement (the innocent passerby), nor even whenever there is a governmentally caused and governmentally desired termination of an individual's freedom of movement (the fleeing felon), but only when there is a governmental termination of freedom of movement through means intentionally applied.

The *Brower* case was a civil rights action brought by Brower's estate. The complaint alleged, *inter alia*, that the police used unreasonable and unnecessary force in establishing a roadblock, and thus effected an unreasonable seizure. The roadblock consisted of an 18-wheel tractor-trailer placed across both lanes of a two-lane highway. Brower was killed when the stolen car he was driving crashed into the roadblock during a high-speed, nighttime chase. The complaint alleged that the police effectively concealed the roadblock by, among other things, placing it unilluminated around a curve in the road. The Ninth Circuit affirmed the district court's dismissal of the complaint. The Supreme Court held that the complaint sufficiently alleged a seizure because "Brower was meant to be stopped by the physical obstacle of the roadblock" and "he was so stopped." Thus, according to the majority's reasoning, shows of authority are not seizures until the person stops.

147. *Id.* at 1381.
148. *Id.*
149. *Id.* (citations omitted) (emphasis in original). *See also* Graham v. Connor, 109 S. Ct. 1865, 1871 n.10 (1989) (seizure triggering fourth amendment protections occurs only when government actors have, by physical force or show of authority, restrained citizen's liberty) (quoting Terry v. Ohio, 392 U.S. at 19 n.16).
150. Brower v. County of Inyo, 109 S. Ct. at 1380.
151. *Id.*
152. *Id.*
153. *Id.*
154. *Id.* at 1382. According to the majority, the means used to produce the stop will not be
Justice Stevens, joined by Justices Brennan, Marshall, and Blackmun, concurred in the judgment that a seizure had taken place. However, he rejected the majority’s reasoning. Stevens correctly noted that the broadly worded majority opinion seemed “‘designed to decide a number of cases not before the Court and to establish the proposition that ‘[v]iolation of the Fourth Amendment requires an intentional acquisition of physical control.’” Although he agreed that intentional acquisition of physical control is “‘a characteristic of the typical seizure,’” Stevens doubted that it was an essential element of every seizure or that the majority’s definition was particularly helpful in deciding close cases.

In measuring intent, the Brower majority maintained that the subjective intent of the police officer should not be examined. Stevens agreed that a seizure did not turn on an officer’s subjective intent. He argued, however, that a police officer’s objective intent in the vast majority of the cases added little to the “well-established” reasonable person test. Stevens concluded that an examination of an officer’s objective intent added nothing to the analysis of the facts in Brower, as it was undisputed that the roadblock was intended to stop the decedent.

B. Inconsistency With Reasonable Person Test

The reasonable person test and the Brower opinion cannot be reconciled. It could be argued, similar to Justice Stevens’ observation, that Brower was decided without reference to the reasonable person standard because there was

rigidly confined to the actual means intended. The means, however, must produce the stop:

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... Nor do we think it possible, in determining whether there has been a seizure in a case such as this, to distinguish between a roadblock that is designed to give the oncoming driver the option of a voluntary stop (e.g., one at the end of a long straightaway), and a roadblock that is designed precisely to produce a collision (e.g., one located just around the bend). 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.

Id. See Galas v. McKee, 801 F.2d 200, 203 (6th Cir. 1986) (reasonableness of seizure cannot be challenged under fourth amendment unless seizure is completed by means of physical force or show of authority).

155. Id. See Galas v. McKee, 801 F.2d 200, 203 (6th Cir. 1986) (reasonableness of seizure cannot be challenged under fourth amendment unless seizure is completed by means of physical force or show of authority).
156. Brower v. County of Inyo, 109 S. Ct. at 1383 (Stevens, J., concurring).
157. Id.
158. Id. at 1383.
159. Id. at 1382.
160. Id. at 1383.
161. Id.
162. Id.
an actual restraint: Brower's car slammed into the roadblock. In other cases where there has been an actual restraint, the Court has not made reference to the reasonable person test because the seizure was so obvious.\textsuperscript{163} Intent only becomes important when the person has not been physically seized but circumstances suggest that he is not free to go. Unfortunately, a comparison of the mode of analysis in \textit{Chesternut} and \textit{Brower} discredits such an easy explanation. Moreover, at least some of the examples provided by the majority in \textit{Brower} are in direct conflict with the reasoning in \textit{Chesternut} and with examples given by the Court in other cases of when a reasonable person would believe he or she is being seized.

In \textit{Chesternut}, which involved the flight of a suspect upon the appearance of a police car that then followed him, the Court indicated that the result would have been different if there had been a show of police authority that a reasonable person would interpret as an attempt to capture or otherwise intrude upon Chesternut's freedom of movement. As examples of such a show of authority, the Court cited the activation of a siren, the use of flashers, or operation of the police car in an aggressive manner to block the person's course or otherwise control the direction or speed of his movement.\textsuperscript{164} In contrast, the majority in \textit{Brower} believed that no seizure would result if a fleeing suspect unexpectedly lost control of his car and crashed, even if being pursued by police in cars with flashing lights. The \textit{Brower} majority reasoned that, although the flashing lights were a significant show of authority, the suspect would be stopped by a different means — his lost of control.\textsuperscript{165}

Under the reasonable person analysis, the seizure would have occurred when the flashing lights were activated because they represented a show of authority indicating that the person was not free to leave.\textsuperscript{166} It follows that it did not matter if the person lost control of his car after the lights or siren had been activated because a seizure had already resulted. In contrast, the \textit{Brower} majority said that a seizure would take place if a suspect fleeing in a car is intentionally sideswiped by the police,\textsuperscript{167} which is to say that a seizure occurs only when physical control has been achieved.

One of the \textit{Brower} Court's examples deserves special attention. The majority stated that its analysis was "reflected" by its decision in 1924 in \textit{Hester v. United States},\textsuperscript{168} where an armed revenue agent had pursued the defendant and his accomplice after seeing them obtain containers thought to be filled with "moonshine whiskey." During their flight they dropped the containers, which the agent recovered. The defendant sought to suppress testimony concerning the containers' contents as the product of an unlawful seizure. Justice Holmes, speaking for a unanimous Court, concluded that, "the defendant's own acts,
and those of his associates, disclosed the jug, the jar and the bottle — and there was no seizure in the sense of the law when the officers examined the contents of each after they had been abandoned.”169 The Brower Court stated: “Thus, even though the incriminating containers were unquestionably taken into possession as a result (in the broad sense) of action by the police, the Court held that no seizure had taken place.”170

Building on Hester, the Brower majority hypothesized that, if the police saw the moonshiners carrying containers and running away from them and the police shouted “Stop and give us those bottles, in the name of the law!,” then, if the bottles were discarded, “the taking of possession would have been the result of the very means (the show of authority) that the government selected, and a Fourth Amendment seizure would have occurred.”171 In the whiskey example, there was an unmistakable show of authority when the agents yelled “stop.” Under the reasonable person test, such a command would be a seizure because a reasonable person would interpret such an unequivocal command as proof that he or she was not free to go.172 But the Brower majority said that no seizure would occur until the restraining effect of the command took place, that is, the bottles came under the physical control of the authorities. It follows that a seizure of the person would not result until the individual stopped and was also physically controlled by the authorities.

The difference in the two approaches is further illustrated by an examination of the other facts of Hester. Although the revenue agents in Hester were shooting at the suspects as they ran away, the Court did not view the actions as a seizure.173 It is difficult to imagine a more self-evident demonstration that the police want the suspect to stop than a command to halt followed by bullets when the suspect disregards the command. Shooting at a suspect is perhaps the most extreme means of communicating an officer’s intent to seize the person by any means necessary. No doubt any reasonable person would believe that he or she was not free to go. In contrast, the Brower Court cited Tennessee v. Garner,174 wherein an officer intentionally shot a fleeing suspect, as an example of a seizure.175 Based on Hester and Garner, it can only be concluded that the Brower majority would find that, if the police shoot at but

170. Id.
174. 471 U.S. 1 (1985). In Garner, the Court stated that “whenever an officer restrains the freedom of a person to walk away, he has seized that person... While it is not always clear just when minimal police interference becomes a seizure,... there can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment.” Id. at 7 (citations omitted). See also id. at 25 (O’Connor, J., dissenting, joined by Burger, C.J., and Rehnquist, J.) (agreeing that shooting is a seizure).
miss a fleeing suspect, and the suspect continues to run, there is no seizure.\textsuperscript{176} On the other hand, to be a seizure, the police must either have to hit the person with the bullet or the person must stop and come under the officer’s physical control. By using \textit{Hester} and \textit{Garner}, the \textit{Brower} majority was emphasizing the limits of its literalist view that no seizure would result short of the restraining effect taking hold. This is a very restrictive view of when a seizure occurs.

From this analysis several conclusions can be drawn. First, the \textit{Brower} opinion shifts the focus of attention away from the reasonable belief of the suspect to the objective actions of the police to determine when a seizure occurs. Second, the point at which a seizure occurs becomes much later under \textit{Brower}: it is not when the suspect reasonably believes he or she is not free to go but when physical control has been achieved.\textsuperscript{177} Thus, in \textit{Brower}, Kennedy and Scalia achieved what they set out to do in \textit{Chesternut}: eliminate chases from the lexicon of seizures. Scalia’s opinion for the majority in \textit{Brower} produces the bright-line rule that he and Kennedy favored in \textit{Chesternut}: a seizure stemming from a chase will occur only when it has reached a successful conclusion and the person is captured. Taking a broader view of \textit{Brower}, in terms of \textit{Terry}’s concept of a seizure, which required an accosting and a restraint, an unequivocal show of authority now only satisfies the accosting element. Under the reasonable person test, an unequivocal show of authority did both. Thus, the \textit{Brower} test is in direct conflict with the reasonable person analysis.\textsuperscript{178}

\textsuperscript{176} \textit{See Palmer v. Williamson}, 717 F. Supp. 1218, 1223 (W.D. Tex. 1989) (relying on \textit{Garner} and \textit{Brower}, court held that no seizure occurred when police officer, attempting to stop fleeing suspect, fired gun and hit suspect’s car as it pulled away).

\textsuperscript{177} \textit{See Roach v. City of Fredericktown}, 882 F.2d 294, 295 (8th Cir. 1989) (no seizure when police car with flashing lights pursued suspect, who lost control of the vehicle he was driving and collided with oncoming car; \textit{Patterson v. City of Joplin}, 878 F.2d 262, 263 (8th Cir. 1989) (police pursuit of motorcycle driven without safety helmets with flashing lights and siren, culminating in motorcycle crash, was not seizure); \textit{United States v. Gonzales}, 875 F.2d 875, 879 (D.C. Cir. 1989) (use of flashing strobe light to signal boat to stop when boat did stop is seizure); \textit{People v. Robinson}, 257 Cal. Rptr. 772, 777 (Cal. App. 1st Dist. 1989) (paint samples seized when officer intentionally scraped paint off defendant’s car with purpose of obtaining physical control).

\textsuperscript{178} Professor LaFave, an early advocate of the reasonable person test, has sought to reconcile \textit{Brower} with \textit{Chesternut} by arguing that, although language “apparently contrary” to the reasonable person test’s determination of when a seizure occurred was present in \textit{Brower}, “[t]he \textit{Brower} majority merely says [that in \textit{Hester} the police action did not constitute a seizure of the bottles . . . [because] in a \textit{Hester}-type situation the police acquisition of the bottles may constitute the fruit of an earlier manifested police attempt to seize the person.” \textit{W. LaFAVE, supra} note 4, § 9.2, at 39-40 (Supp. 1990).

Another attempt to distinguish \textit{Brower} was made in \textit{State v. Lemon}, 318 Md. 365, 568 A.2d 48 (1990). In that case, the court rejected the idea that “\textit{Brower} ‘refined’ \textit{Chesternut} by flatly holding that ‘no seizure takes place until the restraining effect of a police command actually occurs, i.e., when the person is within the police officer’s physical control.’” \textit{Id.} at 374, 568 A.2d at 53. The court ruled, “in the light of the opinion as a whole,” the \textit{Brower} decision does not stand for the proposition that “there must be an actual taking of the person; there may be a constructive restraint of the freedom to walk away.” \textit{Id.} at 375, 568 A.2d at 53. The \textit{Lemon} court urged that any suggestion that physical control is required by \textit{Brower} must be read in light of \textit{Brower}’s concern with an accidental or unintentional seizure. \textit{Id.}, 568 A.2d at 53. The court concluded that
C. Merits of the New Test

The new test’s main virtue is predictability. That is, the results can be anticipated and the results should be consistent from case to case because it is usually easy to determine when physical control has been achieved. Thus, the test creates a bright-line rule.\(^{179}\) It is workable because law enforcement officers can determine the limits of their freedom to investigate, which is unlimited short of physical control. Moreover, the focus on the objective intent of the law enforcement official\(^{180}\) reduces any temptation of testifying officers to fabricate their motivations.


These attempts to reconcile \textit{Brower} and \textit{Chesternut} are unconvincing. They completely ignore the \textit{Brower} majority’s new test for a seizure, its illustrations of when a seizure occurs, and the facts in \textit{Brower} itself. When those elements are added to the analysis, as done here, it is impossible to escape the conclusion that the "apparently contrary" language is indeed contrary.

In \textit{Hodari D.}, the court rejected the view that the Supreme Court’s citation of \textit{Hester} in \textit{Brower} “compelled” the result that there is no detention until a fleeing suspect is actually caught. 265 Cal. Rptr. at 83. Thus, the \textit{Hodari D.} court applied the reasonable person test and held that a seizure occurred when an officer ran toward the appellant saw him. The court stated: “We have no doubt that it is coercive and intimidating to discover a police officer running directly toward one, some 11 feet away on a public sidewalk.” \textit{Id.} This analysis is unpersuasive. The court first stated that \textit{Hester} has no application to illegal detention cases but incongruously concedes that the Supreme Court held that there was no seizure in \textit{Hester}. \textit{Id.} at 34. Even if the \textit{Hester} Court did not define a seizure, which it did not have to do because one was not presented by the facts, the conclusion that there was \textit{no seizure} in \textit{Hester}, in the face of conduct by revenue officers that was much more intimidating than that presented by the facts of \textit{Hodari D.}, certainly had relevance. Yet the California appellate court simply ignored any factual analogy.

In contrast, Judge McAuliffe, dissenting in \textit{Lemon}, concluded that “it is difficult to reconcile the language of \textit{Brower} with that of \textit{Chesternut} . . . . I would resolve the conflict by accepting the latest word of the Supreme Court on the matter.” \textit{Lemon}, 316 Md. at 383, 568 A.2d at 57 (McAuliffe, J., dissenting). In support of his conclusion, Judge McAuliffe examined the examples set forth in \textit{Brower}, noting in particular that the police pursuit with emergency lights and sirens did not constitute a seizure. McAuliffe stated that, “as the Supreme Court made clear in \textit{Brower} . . . a police command to stop, effectively communicated to a defendant, does not ordinarily constitute a seizure when the defendant refuses to submit and instead takes flight.” \textit{Id.} at 382, 568 A.2d at 57.


\(^{180}\) \textit{See} \textit{Brower v. County of Inyo}, 109 S. Ct. 1378, 1382 (1989) (police officer's subjective intent irrelevant for fourth amendment purposes); \textit{Michigan v. Chesternut}, 486 U.S. 567, 575 n. 7 (1988) (police officer's subjective intent relevant only to extent that such intent is conveyed to suspect (citing \textit{United States v. Mendenhall}, 446 U.S. at 554)). \textit{See also} \textit{Scott v. United States}, 436 U.S. 128, 138 (1978) ("the fact that [an] officer does not have the state of mind which is hypothesized by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action");
However, if the test is designed to apply to all cases where a seizure is alleged, it has at least two serious faults. As will be discussed, one problem is the type of control needed under *Brower*. The test appears to limit seizures to the point when “physical” control is achieved. Yet, a restraint can be achieved in the absence of physical control. The other, related, problem concerns the timing of the seizure. By refusing to recognize seizures based on shows of authority, *Brower* fails to recognize that intimidation or coercion by police officers implicates the fourth amendment.

1. The Type of Control Needed

The *Brower* definition appears to limit seizures to instances where physical control is achieved. By so doing, the test seems to eliminate coercion or intimidation short of a physical seizure as a trigger for fourth amendment applicability, even when words or actions are designed to produce a seizure. Yet, at the heart of the concept of a show of authority seizure is the recognition that intimidation or coercion by police officers triggers the application of the fourth amendment. The word “physical” must be dropped from *Brower*’s formulation of the test because control is as real when it results from a show of authority as when it results from physical restraint.

2. Timing of the Seizure

A broader criticism of *Brower* concerns the point at which a seizure occurs. Under *Brower*, shows of authority do not implicate the fourth amendment until the police have successfully achieved physical control. However, an intrusion designed to produce a stop is no less real in the interim period between the show of authority and the achievement of physical control. Because the *Brower* test does not recognize the significance of intimidating or coercive shows of authority, the test fails to properly balance individual and governmental interests.

The Court in *Terry*, the very first case discussing when a seizure occurs, recognized the need for courts to prevent undue police coercion:

> Under our decision, courts still retain their traditional responsibility to guard against police conduct which is overbearing or harassing, or which trenches upon personal security without the objective evidentiary justification which the Constitution requires. When such conduct is identified, it must be condemned by the judiciary and its fruits must be excluded from evidence in criminal trials.

More recently, Justice Rehnquist has contended that the question of when a seizure takes place turns on whether the officer’s conduct “is objectively coer-

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Maryland v. Macon, 472 U.S. 463, 470-71 (1985) (“Whether a Fourth Amendment violation has occurred ... [does] not [turn] on the officer’s actual state of mind at the time the challenged action was taken.”).
182. *Id*.
183. *Id*.
184. *Id*.
cive or physically threatening.\textsuperscript{186} Despite all of its faults, the reasonable person test recognized such conduct impinged upon individual liberty. There are many ways to intimidate or coerce a person into stopping: verbal commands to halt, flashing lights, sirens, shooting, and hand signals. These all are intrusions on the individual's right to be left alone and all should require justification; that is, it must be concluded that the fourth amendment becomes applicable at that point.

In the interim period between the show of authority and the achievement of actual control, based on the present formulation of the \textit{Brower} test, the results would change depending upon the responses of different individuals to the show of authority. But the applicability of the fourth amendment should not depend on an individual's actions, but rather on the actions of governmental officials.\textsuperscript{187} To strike a proper balance between the competing governmental and individual interests, the response of the suspect should not be taken into account. If police action is an intrusion on individual liberty, that should end the inquiry whether the fourth amendment is implicated.\textsuperscript{188}

In recognition of the fact that coercive activity by the police implicates the fourth amendment, many courts have embraced the doctrine of a forced aban-


\textsuperscript{187} The \textit{Brower} majority at one point seemed to recognize that application of the fourth amendment should turn on government rather than individual conduct. The Court stated: "Brower's independent decision to continue the chase can no more eliminate respondent's responsibility for the termination of his movement effected by the roadblock than Garner's independent decision to flee eliminated the Memphis police officer's responsibility for the termination of his movement effected by the bullet." 109 S. Ct. at 1380. Yet the majority's analysis failed to recognize that the point in time when the fourth amendment becomes applicable should not depend on whether the individual decided to flee.

In \textit{Chesterman}, the Court explicitly rejected the idea that, until an individual stops in response to the police's show of authority, "a lack of objective and particularized suspicion would not poison police conduct, no matter how coercive, as long as the police did not succeed in actually apprehending the individual." Michigan v. Chesterman, 486 U.S. at 572-73 (emphasis added). Implicit in the theory of the reasonable person test is the recognition that applicability of the fourth amendment is not dependent upon an individual's actions because, under that test, it did not matter if the person stopped or not as a result of the intimidating police action. The principle that individual actions are irrelevant to fourth amendment analysis is reflected in the well-established principle that the protection of the fourth amendment generally is not applicable to intrusions on an individual's privacy interests by private parties. See Coolidge v. New Hampshire, 403 U.S. 443, 487-88 (no search or seizure for purposes of the fourth amendment where evidence obtained and given to police by suspect's wife), \textit{reh'g denied}, 404 U.S. 872 (1971); Burdeau v. McDowell, 256 U.S. 465, 475 (1921) (since fourth amendment only protects against unlawful search and seizure by the government, documents unlawfully secured by private individuals without government participation or knowledge are admissible). Further supporting the view that the individual's response to police actions should not be taken into account is the purpose of the exclusionary rule, which is designed to protect against "overreaching governmental conduct" prohibited by the fourth amendment. Davis v. Mississippi, 394 U.S. at 724.

\textsuperscript{188} \textit{Cf.} United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975) (reasonableness of seizure is balance between public interest involved and individual's right to personal security free from arbitrary interference by law enforcement officers).
Under that theory, once the police have coerced or intimidated a suspect with a show of authority designed to produce a stop, the fourth amendment is implicated. If, in response to unjustified police actions, the suspect thereafter abandons the property he or she is carrying, then the property abandoned, be it illegal drugs, stolen goods, or other evidence, normally cannot be used against the accused.

Abandonment after being accosted by the police is very common. The impact of the application of Brower in such situations shows how restrictive the new test is and demonstrates its impact on fourth amendment jurisprudence. For example, suppose a police officer accosts a suspect whom the officer believes is carrying illegal narcotics. The officer does not have articulable suspicion justifying a stop. Assume, however, that the officer unequivocally orders the suspect to stop — undoubtedly coercive conduct. Under Brower, a seizure has not yet resulted. The suspect then does one of two things: he runs and discards the drugs he was carrying or he submits to the authority and stops. If the suspect submits, a seizure takes place. Since it is posited that the officer did not have articulable suspicion to justify the stop, any evidence resulting from that illegal stop will be suppressed. The suspect who runs and throws the drugs is not so lucky. Although his actions are the result of the officer’s order to halt, under Brower the drugs could be retrieved and used in evidence.

This should not be. If in the first instance the evidence must be suppressed, so should it be in the latter instance. The initial conduct of the police in both situations should trigger the protection of the fourth amendment.

189. The general rule is that abandoned property may be obtained by the police and used for evidentiary purposes. See, e.g., United States v. Brady, 842 F.2d 1313, 1315-16 (D.C. Cir. 1988) ("Warrantless searches of abandoned or disclaimed property do not violate the fourth amendment"); United States v. Nordling, 804 F.2d 1466, 1469-70 (9th Cir. 1986) (bag deliberately left on airplane "abandoned" and subject to warrantless search); United States v. Colbert, 474 F.2d 174, 176 (5th Cir. 1973) (abandonment demonstrates intent to relinquish proprietary interest in briefcase, so fourth amendment not invoked). But see generally W. LaFave, supra note 4, § 2.6(b) at 469-75 (such is not the case if the abandonment is coerced by unlawful police action).

In Hawkins v. State, 77 Md. App. 338, 550 A.2d 416 (1988), the defendant abandoned property during a chase by the police. Prior to the abandonment, officers shouted "stop, police." Applying the reasonable person test, the court held that the defendant had been seized when the order to halt was given. Id. at 343-44, 550 A.2d at 418-19. Thus, the evidence discarded after the order was given could not be used to determine if the stop was justified. Under the Brower test, Hawkins would not have been seized until the police had physical control of him. See Brower v. County of Inyo, 109 S. Ct. at 1381 (seizure only occurs once there is "governmental termination of freedom of movement"). Thus, the evidence discarded prior to that point could be used in assessing the validity of the officer’s actions.

190. See, e.g., State v. Lemon, 318 Md. at 369-70, 568 A.2d at 51 (suspect discarded drug vial during chase initiated after police ordered suspect to "come here").

191. See id. at 381-83, 568 A.2d at 56-58 (McAuliffe, J., dissenting) (under Brower test, drugs abandoned during chase not subject to fourth amendment scrutiny).

192. In Lemon, the Maryland Court of Appeals was presented with the issue whether Brower overturned the reasonable person test. As previously discussed, the court held that it did not. See supra note 176 (discussing Lemon). Perhaps part of the reason the court refused to recognize Brower’s significance was that the court would have had to eliminate the forced abandonment doctrine. Faced with that prospect, the court chose to retain the doctrine and misconstrue Brower’s impact.
The intentional acquisition of physical control test, as formulated in Brower, would induce the police to provoke confrontations and flight in the hope that suspects will abandon contraband or provide other evidence, thereby justifying a stop that would not have passed scrutiny if justification was required at the beginning of the confrontation. The significance of such a test is far-reaching: for example, it would allow widespread harassment and intimidation of people in the vicinity of open air drug markets, known areas of prostitution, or other presumably innocent individuals or groups, at will. Since there would be no forced abandonment doctrine, the police could engage in slow pursuits of suspected thieves, drug dealers, and others in the hope that evidence would be disgorged.

D. Modifying The Brower Test

To be consistent with the fourth amendment, the Brower test must be modified to discourage intimidation and harassment designed to result in a seizure. To require justification for such police actions, the test must include attempted acquisitions of control over the individual. A test so modified would recognize that, whether or when the police achieve actual control over the person should not change the result, thereby including shows of authority within the purview of the fourth amendment.

The concept of an “attempt” takes many forms. For example, courts and commentators have approached the crime of attempt in several different ways. These traditional tests are of little help in establishing when an officer

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194. Although the fourth amendment is not the proper vehicle to preclude all harassment or intimidation by the police, it should be applicable to that activity which has the purpose of effecting a seizure. But see Murphy, Encounters of a Brief Kind: On Arbitrariness and Police Demands for Identification, 1986 Ariz. St. L.J. 207, 211-15 (protection against arbitrariness, regardless of the intrusiveness of police action, should be protected by the fourth amendment); United States v. Ortiz, 422 U.S. 891, 895 (1975) (reasonableness requirement of seizures under fourth amendment “may limit police use of unnecessarily frightening or offensive methods of surveillance and investigation”); Camara v. Municipal Court, 387 U.S. 523, 528 (1967) (fourth amendment protects against arbitrary invasion of privacy).

195. Cf. State v. Lemon, 318 Md. at 382, 568 A.2d at 57 (1979) (McAuliffe, J., dissenting) (attempt to seize insufficient to implicate fourth amendment under Brower).

196. See W. LaFave and A. Scott, Criminal Law, § 6.2-6.3, at 495-524 (2d ed. 1986) (discussing acts, mental state, and limitations on crime of attempt). The concept of attempt proposed in text has a purpose similar to the crime of attempt. That crime exists “because there is just as much need to stop, deter and reform a person who has unsuccessfully attempted or is attempting to commit a crime [as] one who has already committed such an offense.” Id. § 6.2(b) at 498 (quoting Stuart, The Actus Reus in Attempts, 1970 Crim. L. Rev. 505, 511). Similarly, to protect fourth amendment privacy rights, there is just as much need to stop and deter police officers who are attempting to seize a person illegally. See Boyd v. United States, 116 U.S. 616, 635 (1886) (“Constitutional provisions for the security of person and property should be liberally construed”).

197. See W. LaFave and A. Scott, supra note 196, §§ 6.2-6.3, at 495-524 (tracing historical development of the crime of attempt and discussing various approaches taken by modern courts).
has attempted to seize a suspect because the concepts of attempted seizure and
the crime of attempt serve very different purposes. The tests to measure
whether there has been an attempted crime are designed to give the suspect
leeway to avoid punishment of innocent behavior and to allow for abandon-
ment of criminal intent. In contrast, by including an attempt to seize within
the concept of a seizure, the citizen is protected early in the police citizen
encounter. Thus, the two different actors are attempting to perform qualita-
tively different acts and should not be equal in the eyes of the law: the at-
ttempted criminal is presumed innocent and protected from premature
determination of guilt, while the police officer is accosting a person who is
presumed to be protected against police coercion. It follows that the timing of
the conclusion that an attempt has occurred must be different: the concept of
an attempted seizure should be more expansive than the concept used to mea-
sure an attempted crime. Therefore, the tests to measure the two different at-
ttempts must also be different to serve the goal of both, the protection of the
individual.

See also Young v. State, 303 Md. 298, 308-12, 493 A.2d 352, 356-58 (1985) (cataloguing various
approaches to measuring an attempt of crime and adopting "substantial step" test); Model Penal
Code § 5.01 (1985) (codification of "substantial step" test).

198. See W. LaFave and A. Scott, supra note 196, §§ 6.3(b), at 518-23 (discussing abandon-
ment of attempt).

199. The "substantial step" approach, which is the predominant test, dictates that a person is
guilty of a criminal attempt if he "purposely does or omits to do anything which, under the
circumstances as he believes them to be, is an act or omission constituting a substantial step in a
course of conduct planned to culminate in his commission of the crime." Young v. State, 303
Md. at 310, 493 A.2d at 358 (quoting Model Penal Code § 5.01(1)(c)). Strictly applying this
approach to attempted seizures would lead to absurd results. For example, "possession of materi-
als to be employed in the commission of a crime" may be conduct considered a substantial step
toward commission of a crime if coupled with the requisite intent to commit a crime. Id. at 311-
12, A.2d at 359 (appeal of conviction for attempted robbery and transporting a handgun). Obvi-
ously, police officers virtually always possess instruments by which they can seize people. As a
practical matter, the mere possession of a gun by a police officer cannot be considered a substan-
tial step toward seizing a person. Instead, it is the utilization of the gun, by pointing it at or
shooting the person, that constitutes the attempt to seize. Thus, the sufficiency of the acts to
satisfy the substantial step test for the two disparate actors would not be the same and using the
substantial step approach would only cause confusion.

The other tests to measure criminal attempts, that is, the dangerous proximity doctrine, the
equivocality approach, the indispensable element approach, the probable desistence test, and the
abnormal step approach, also are inadequate to determine if there has been an attempt to seize.
See Model Penal Code § 5.01 comment 5 (discussing and critiquing each of these models). The
purpose of those tests, to give the prospective criminal leeway to stop before his actions become
criminal, makes the tests inadequate to measure an attempted seizure because different values are
protected by those tests. For example, the equivocality approach finds an attempt at the point
where the accused has done an act that has no other purpose than the commission of the in-
tended crime. Id. Similarly, an attempt to seize would occur when the police officer does an act
that has only the purpose of seizing a person. Under such a test, the inquiry is properly focused
on the character of the officer's actions. Equivocal acts are not considered attempts, thereby inade-
quately protecting individuals from coercive police behavior.
What is meant here by an attempt is an objective overt action or other manifested or expressed intention to seize.\textsuperscript{200} The focus of the inquiry should be whether, in the totality of the circumstances,\textsuperscript{201} the officer has manifested an intent to seize by using the tools he has available: coercive acts or words designed to significantly interfere with a person’s freedom of movement. Consistent with \textit{Brower}, this would be an objective inquiry. Since an attempt must be voluntary, conscious, and intentional,\textsuperscript{202} the word “intentional” could be dropped as superfluous from the \textit{Brower} majority’s definition of when a seizure occurs.

Some attempts to seize through shows of authority are unequivocal.\textsuperscript{203} Such cases should be as easy to decide as when physical control is achieved. For example, if a police officer yells halt and pulls his gun, threatening to fire at a fleeing suspect, the suspect is the intended target of the police conduct and the attempt to seize is unequivocal; there is a demand to halt and a threat to

\textsuperscript{200} An unexpressed or inchoate wish to control is insufficient because probably all law enforcement officers seek to control people they accost. \textit{See, e.g.}, United States v. Pirolli, 673 F.2d 1200 (11th Cir.) (abandonment of goods by defendant not product of police misconduct when defendant removed goods from house as police approached, even though approach may have been for purpose of making illegal arrest), \textit{cert. denied}, 459 U.S. 871 (1982); Jones v. State, 409 N.E.2d 1254 (Ind. App. 1980) (narcotics thrown out window of motel room after occupants observed police officers through front window and after police knocked on door admissible, for “whatever intent or purpose may have been in their minds, no improper or unlawful act of any kind was committed by any of the officers before the abandonment of the heroin”); Mullaney v. State, 5 Md. App. 248, 257, 246 A.2d 291, 298 (1968) (fact that officer intended to make arrest before he knocked on door and saw and smelled evidence of marijuana does not make officer a trespasser, “there being no right of a citizen, constitutional or otherwise, which immunizes him from having a policeman knock on his door during reasonable evening hours”). \textit{See also} Michigan v. Chesterman, 486 U.S. 567, 575 n.7 (1988) (“the subjective intent of the officers is relevant to an assessment of the Fourth Amendment implications of police conduct only to the extent that intent has been conveyed to the person confronted” (citing United States v. Mendenhall, 446 U.S. at 554 n.6)); United States v. Hensley, 469 U.S. 221 (1985) (even if police officer intended to arrest or to hold person for substantial period of time, conduct still lawful as \textit{Terry} stop). \textit{See also} W. \textsc{LaFave} and A. \textsc{Scott}, \textit{supra} note 196, § 6.2(c), at 500 (for crime of attempt, mere intention to engage in criminality does not suffice).

\textsuperscript{201} The totality of the circumstances is taken into account in measuring the sufficiency of an informant’s tip to justify a seizure. \textit{See, e.g.}, Alabama v. White, 110 S. Ct. 2412 (1990) (anonymous telephone tip corroborated by independent police work was reliable enough to provide reasonable suspicion to make investigatory stop of defendant’s vehicle). Just as an attempt to commit a crime is inferred from the surrounding circumstances, W. \textsc{LaFave} and A. \textsc{Scott}, \textit{supra} note 196, § 6.2(c) at 501 n.81, so to would the attempt to seize. This is consistent with the current view that there should be an objective examination of the officer’s intent.

\textsuperscript{202} \textit{See} W. \textsc{LaFave} and A. \textsc{Scott}, \textit{supra} note 196, § 6.2(c)(1), at 501 (attempt “requires intent to bring about that result described by the crime”).

\textsuperscript{203} Society considers certain shows of authority as unequivocal commands and will punish a failure to obey. For example, Maryland makes it illegal to willfully disobey “visible or audible” police commands to halt. \textit{See Md. Transp. Code Ann.} § 21-904 (1987) (prohibiting willfully failing to stop a vehicle, or fleeing when police officer, either in uniform or in marked police car, gives visible or audible signal to stop). Although state law cannot be the basis of fourth amendment applicability, such laws are an expression of societal norms and expected responses to the police’s actions.
use deadly force if the demand is not met. In other cases, the attempt may be more equivocal. The question remains whether the law enforcement officer’s actions are to be interpreted as an attempt to seize. The conclusion should not depend on what a reasonable person would believe under the circumstances. The fourth amendment cannot be expanded just because a person reasonably believes he or she is about to be seized, although the police are not intending to do so.\footnote{For example, in Chestnut, the suspect could reasonably have been in fear that police would seize him, or in Delgado, the workers could have reasonably feared the factory sweeps, yet those fears cannot be dispositive. Instead, the question should be whether police intended to seize. On the other hand, a seizure still occurs even if the suspect did not know he was being accosted by the police. See People v. Cantor, 36 N.Y.2d 106, 112, 365 N.Y.S.2d 509, 515, 324 N.E.2d 872, 876 (1975) (unreasonable seizure when police blocked parked car and approached defendant on sidewalk, even though defendant thought he was being threatened by private citizens).} For example, assume that the police are conducting a drug sweep for \(A; B\), who happens to be in the area, reasonably believes that he is the target and disposes of drugs in plain view of the officers. \(B\)’s belief cannot make the fourth amendment applicable. The applicability of the amendment depends solely on the intentional actions of government agents and not on a suspect’s actions or belief. Since there was no intentional action directed at \(B\), no seizure resulted.\footnote{See State v. Indvik, 382 N.W.2d 623 (N.D. 1986) (to constitute a stop by use of flashing red lights, officer must have intent to stop specific motorist and motorist must be cognizant of officer’s presence). \textit{But cf.} Brower v. County of Inyo, 109 S. Ct. 1378, 1381 (1989) (unintended person can be object of seizure).}

In short, by defining a seizure as an attempted acquisition of control over the person by the police, the proper balance between competing governmental and individual interests is achieved. The definition incorporates the main goal of the reasonable person test, that is, to include shows of authority within the scope of the concept of a seizure. Such a test also would incorporate the positive aspects of the \textit{Brower} test by shifting the focus from an examination of the objective mind of the suspect to an examination of the objective actions of the law enforcement officials. This is as it should be if, as argued, the applicability of the fourth amendment is dependent solely on the actions of the police.

V. CONCLUSION

A seizure occurs along the continuum of meetings between police officers and citizens at the point where there is some “meaningful interference, however brief, with an individual’s freedom of movement.”\footnote{States v. Jacobsen, 466 U.S. at 114 n.5.} The conclusion that a seizure has transpired triggers the applicability of the fourth amendment. In reaching that conclusion, the competing interests of society in effective law enforcement and the individual in privacy must be weighed. Cases near the line between a seizure and a permissible investigative technique short of seizure challenge the effectiveness of any test designed to measure when a seizure occurs. In close cases, perhaps no test can be an effective substitute for judg-
ment. Delgado was such a case and the conclusion that no seizure occurred was a policy choice. Short of such hard cases, tests guide lower courts to achieve predictable, consistent results. If the test utilized is an expression of the proper balance between individual and societal interests, it will serve effectively in the vast majority of cases.

The Supreme Court has utilized three different tests to determine when a seizure results: the Terry standard, which requires an accosting and a restraint; the reasonable person standard, which focuses on the effect of the officer’s actions on a reasonable person’s belief under the circumstances; and the Brower standard, which requires an intentional acquisition of physical control of the suspect by the officer. It remains difficult to determine when a seizure results from a show of police authority in the absence of physical restraint. These cases present the greatest need for a test to be applied in a consistent manner to achieve predictable, uniform results that accommodate the competing individual and law enforcement interests.

The reasonable person test was devised as an aid to determine when a seizure results in situations short of physical restraint. The essential idea of the reasonable person test is that there can be a “mental” restraint of a person by a show of authority. Application of that test, in theory, results in a much broader conception of a seizure than would application of the Terry standard. Under Terry, objective reality is merely reported; the law enforcement officer accosts the person and restrains him. Under the reasonable person test, the focus shifts to the reasonable person’s objective belief whether a seizure has occurred and, if the show of authority is clear enough, it is not necessary to show that a restraint has occurred.

As applied, the reasonable person test has not met the challenge of promoting predictability and consistency in balancing the competing interests, thus failing as a workable test. As the various Supreme Court opinions demonstrate, there are differing views on what the standard means and how to apply it. The actual decisions in the cases have generally demonstrated a restrictive view of when a seizure occurs, but those holdings have been obscured by expansive dicta. Moreover, in Delgado, the analysis actually employed by the majority shifted to one of general reasonableness.

207. In Royer, Justice White, writing for a plurality, cautioned about defining “seizure” too concretely:

We do not suggest that there is a litmus-paper test for distinguishing a consensual encounter from a seizure or for determining when a seizure exceeds the bounds of an investigative stop. Even in the discrete category of airport encounters, there will be endless variations in the facts and circumstances, so much variation that it is unlikely that the courts can reduce to a sentence or a paragraph a rule that will provide unarguable answers to the question whether there has been an unreasonable search or seizure in violation of the Fourth Amendment.

Apparently, the reasonable person test has been abandoned in favor of the *Brower* majority's new, restrictive test. This intentional acquisition of physical control test has several virtues, predictability and consistency of results being chief among them. The test properly shifts the focus away from the suspect's reasonable belief to the actions and intentions of the police.

However, the *Brower* standard fails to strike a proper balance between the competing governmental and individual interests because it fails to recognize the significance of intimidating and coercive actions and words by police officers, which is at the heart of the concept of a show of authority seizure. The test also is deficient because it takes the response of the suspect into account, even though the applicability of the fourth amendment depends not on an individual's actions but on the actions of governmental agents. Thus, when or whether control over a suspect by the police is achieved should not change the result in a given case.

Based on these concerns, the *Brower* test must be modified to include attempted seizures within the ambit of police activities that require justification. To do so, the line requiring justification must be drawn at the moment of intentional coercion and intimidation by the police designed to produce a seizure. Such designs should continue to be measured objectively, based on the totality of the circumstances. Thus, the modified standard, the attempted acquisition of control test, achieves two results: it recognizes that the fourth amendment becomes applicable based solely on the law enforcement officer's conduct; and it seeks to eliminate unwarranted coercion and intimidation of individuals by requiring justification for such conduct at the point when there is an attempt to seize.