California v. Hodari D.: The Demise of the Reasonable Person Test in Fourth Amendment Analysis

While the machinery of law enforcement and indeed the nature of crime itself have changed dramatically since the Fourth Amendment became part of the Nation’s fundamental law in 1791, what the Framers understood then remains true today— that the task of combating crime and convicting the guilty will in every era seem of such critical and pressing concern that we may be lured by the temptation of expediency into forsaking our commitment to protecting individual liberty and privacy.1

I. INTRODUCTION

The Fourth Amendment of the Constitution of the United States states that “[t]he right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated . . . but upon probable cause . . . .”2 The purpose of the Fourth Amendment is to provide a check on unreasonable governmental intrusions of a person’s privacy.3 However, while the Fourth Amendment affirmatively grants an individual “the right to be left alone,”4 this right is not absolute.5 Only when

2. U.S. Const. amend. IV. For purposes of this Note, discussions will be limited to unreasonable seizures, specifically addressing the point at which a seizure occurs. The reasonableness of a search is beyond the scope of this Note.
3. Boyd v. United States, 116 U.S. 616, 630 (1886) (The principles embodied in the Fourth Amendment “apply to all invasions on the part of the government and its employees of the sanctity of a man’s home and the privacies of life. It is not the breaking of his doors . . . but it is the invasion of his indefeasible right of personal security, personal liberty . . . .”).
4. Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting); see also Katz v. United States, 389 U.S. 347, 350 (1967) (“[t]he Fourth Amendment cannot be translated into a general constitutional ‘right to privacy’. That Amendment protects individual privacy against certain kinds of governmental intrusions . . . and often have nothing to do with privacy at all.”); Tracey Maclin, The Decline of the Right to Locomotion: The Fourth Amendment on the Streets, 75 Cornell L. Rev. 1258, 1260 (1990) (arguing that American citizens are losing their
governmental intrusions reach a certain level is an individual’s Fourth Amendment rights violated.\(^6\) Accordingly, not all governmental stops constitute a seizure.\(^7\) The United States Supreme Court has recognized that some stops of citizens are outside the purview of the Fourth Amendment.\(^8\) Therefore, the personal security protected by the Fourth Amendment is only relevant when the government’s behavior falls within the judicial definition of seizure.

Historically, the Supreme Court had held that an individual can be seized either by physical restraint or a show of authority.\(^9\) Over the past decade the Supreme Court has struggled to perfect a test which could consistently be applied in determining when a police-citizen encounter rises to a level of a seizure under the Fourth Amendment.\(^10\) The standard developed to determine whether a seizure had occurred was whether, given all the circumstances, a reasonable person would have felt free to leave.\(^11\) This test has become known as the Fourth Amendment “reasonable person” test.\(^12\) Under this test, if the police-citizen encounter was determined to have been a seizure, then the Fourth Amendment and its constitutionally-guaranteed protections are invoked.\(^13\)

---

5. See infra notes 38-43 and accompanying text for an explanation of how the Court in Terry balanced an individual’s interest to remain free from intrusion against law enforcement’s interest to briefly question citizens.

6. See Terry v. Ohio, 392 U.S. 1, 21 (1968); see infra text accompanying note 47.

7. See Terry, 392 U.S. at 19. As discussed in the Terry decision, it is not a seizure for an officer to approach a citizen and ask a few short questions. Such activity was deemed necessary for effective police work. Id. at 22.

8. Terry, 392 U.S. at 10-12.

9. Id. at 19 n.16. See also infra text accompanying notes 58, 86 for examples of actions which could constitute a show of authority sufficient to invoke the protections of the Fourth Amendment.


12. Id.

13. The protections and remedies for violations of the Fourth Amendment as previously stated are not the focus of this Note. However, one such protection of procedural significance to the case of California v. Hodari D., 111 S. Ct. 1547 (1991), is the judicially created remedy for a violation of the Fourth Amendment known as
In \textit{California v. Hodari D.},\textsuperscript{14} however, the Supreme Court departed from the "reasonable person" test and held that a police-citizen encounter amounted to a seizure only if the suspect, when faced with a show of authority, \textit{yielded} to that show of authority.\textsuperscript{15} Although the Court in \textit{Hodari} claimed that its holding can be harmonized with previous decisions regarding seizure, the requirement that a suspect must yield to a show of authority undermines the spirit of the "reasonable person" test.\textsuperscript{16} By requiring that a citizen must yield, the holding in \textit{Hodari} shifts the focus of inquiry from what a reasonable person perceives to what a person does. In essence, the Court concluded that a reasonable person, faced with an unreasonable show of authority, must always yield to that show of authority in order to be guaranteed constitutional protections.\textsuperscript{17}

A careful examination of \textit{Hodari} demonstrates that the Court utilized a novel definition of seizure; a definition inconsistent with previous decisions. In analyzing the \textit{Hodari} decision, Part II of this Note will trace the origins of the Fourth Amendment and the Supreme Court's previous holdings regarding seizures, including the "reasonable person" test. Part III will examine the facts, procedural history, the exclusionary rule. See \textit{United States v. Calandra}, 414 U.S. 338, 348 (1974) ("the [exclusionary] rule is a judicially created remedy designed to safeguard Fourth Amendment rights . . . "). \textit{But see United States v. Leon}, 468 U.S. 897, 928-48 (1984) (Brennan, J., dissenting) (arguing that the exclusionary rule is implicitly part of the Fourth Amendment, not a remedy to a Fourth Amendment violation). In \textit{Weeks v. United States}, 232 U.S. 383 (1914), the Court employed the exclusionary rule in holding that the Fourth Amendment forbids the use of evidence obtained from an unreasonable search or seizure by a federal officer in a federal proceeding. \textit{Id.} at 392. The holding in \textit{Weeks} was extended to apply to state searches and seizures in \textit{Mapp v. Ohio}, 367 U.S. 643, 660 (1961). However, if the evidence is discovered prior to a "seizure," the evidence is considered to be abandoned and not a result of the unreasonable governmental intrusion and, therefore, not will not be excluded as evidence in the prosecution of the suspect. \textit{Hodari D.}, 111 S. Ct. at 1549.

\begin{itemize}
\item \textsuperscript{14} 111 S. Ct. 1547 (1991).
\item \textsuperscript{16} \textit{Id.} at 1551 ("We did not address . . . if the Mendenhall test was met — if the message that the defendant was not free to leave had been conveyed — a Fourth Amendment seizure would have occurred."); cf. Thomas K. Clancy, \textit{The Supreme Court's Search For a Definition of Seizure: What is a "Seizure" of a Person Within The Meaning of The Fourth Amendment?}, 24 AM. CRIM. L. REV. 619, 640-45 (1990) (arguing that the decision in \textit{Mendenhall} cannot be harmonized with any decision which requires control to invoke the Fourth Amendment).
\item \textsuperscript{17} \textit{See Hodari D.}, 111 S. Ct. at 1551; \textit{cf. Alberty v. United States}, 162 U.S. 499, 511 (1896) ("[M]en who are entirely innocent do sometimes fly from the scene of a crime through fear of being apprehended as the guilty parties, or from an unwillingness to appear as witnesses.").
\end{itemize}
and decision in *Hodari*. Part VI will scrutinize the holding to demonstrate the inconsistencies with previous Supreme Court decisions. Finally, Part V will discuss the practical impact of the *Hodari* decision upon future police-citizen encounters. This Note will conclude that *Hodari* eliminated the reasonable person test, compelling citizens to submit to unreasonable governmental intrusions in order to enjoy the liberties granted under the Fourth Amendment.

II. HISTORY OF DEFINING SEIZURE WITHIN THE FOURTH AMENDMENT

The literal definition of seizure has historically meant the taking of physical control over an object.\(^{18}\) In contrast, the definition of seizure for purposes of the Fourth Amendment has gone through many changes.

A. EARLY DEVELOPMENTS

The first discussion of the language in the Fourth Amendment occurred in *Boyd v. United States*.\(^{19}\) In *Boyd*, the United States Supreme Court held that compelling a suspect to produce private documents to be used in a proceeding against him amounted to a Fourth Amendment seizure.\(^{20}\) In pronouncing its decision, the *Boyd* Court explained that although the practice of compelling production of documents was not a governmental seizure in the literal sense, it was necessary to define it as such in order to provide substance to the protections of the Fourth Amendment.\(^{21}\)

However, in *Olmstead v. United States*,\(^{22}\) the Court explained that although the Fourth Amendment was to be construed liberally, the Court could not “justify enlargement of the language.”\(^{23}\) In *Olmstead*, the Court held that tapping of phone lines did not constitute a seizure of evidence within the meaning of the Fourth Amendment.

---

18. *Hodari D.*, 111 S. Ct. at 1549 (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2057 (1981); 2 J. BOUVIER, A LAW DICTIONARY 510 (6th ed. 1856); N. WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 67 (1828)).
19. 116 U.S. 616, 635 (1886).
21. *Id.* at 635 (“[Unconstitutional practices] can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives [constitutional provisions] of half their efficacy, and leads to gradual depreciation of the right.”).
because it was not obtained by invasion but by the sense of hearing.\textsuperscript{24} The \textit{Olmstead} Court held that a seizure was never anything short of "actual physical invasion."\textsuperscript{25} The language in \textit{Olmstead} seems contradictory because it acknowledges that the Fourth Amendment is to be construed liberally, yet employs the traditional dictionary definition of seizure.\textsuperscript{26} Therefore, the question remained whether the Fourth Amendment served to protect against unreasonable governmental intrusions of a person's security or merely unreasonable physical control of a person.

The rejection of the literal interpretations lay dormant in the Supreme Court for thirty-three years before being resurrected in \textit{Katz v. United States}.\textsuperscript{27} In \textit{Katz}, the Court was called upon again to determine whether a conversation overheard by FBI agents through a listening device attached to a phone booth was protected under the Fourth Amendment.\textsuperscript{28} The Court announced that "the underpinnings of \textit{Olmstead} . . . have been so eroded . . . that the 'trespass' doctrine there enunciated can no longer be regarded as controlling."\textsuperscript{29} In rejecting the approach of \textit{Olmstead}, the Court held that "the reach of . . . [the Fourth] Amendment cannot turn upon the presence or absence of a physical intrusion . . . ."\textsuperscript{30}

The issue framed in \textit{Katz} was whether the FBI agents had intruded into a sphere Katz sought to "preserve as private" thereby violating

\textsuperscript{24} \textit{id.} at 464.

\textsuperscript{25} \textit{id.} at 466. However, a powerful dissent by Justice Brandeis claimed that the Court's decision did not liberally construe the Fourth Amendment, but instead adhered to the literal definition of seizure. In response, Justice Brandeis contended that "[t]ime and again this court, in giving effect to the principle underlying the Fourth Amendment, has refused to place an unduly literal construction upon it." \textit{id.} at 476 (Brandeis, J., dissenting); see also \textit{id.} at 488 (Butler, J., dissenting) ("The direct operation or literal meaning of the words used [in the Fourth Amendment] do not measure the purpose or scope of its provisions.").

\textsuperscript{26} \textit{id.} at 471-80 (Brandeis, J., dissenting) (arguing that constitutional protections should be invoked when one's personal security was violated, however a violation of a person's security need not, in Brandeis' opinion, be determined solely upon physical invasion).

\textsuperscript{27} 389 U.S. 347 (1967).

\textsuperscript{28} \textit{Katz} v. United States, 389 U.S. 347 (1967). While the \textit{Katz} decision did involve a search and not a seizure, the Court's pronouncements in the decision refer to the broad protections guaranteed under the Fourth Amendment, not solely protections against unreasonable searches. \textit{id.} at 350-53.

\textsuperscript{29} \textit{id.} at 353.

\textsuperscript{30} \textit{id.; see also} Silverman v. United States, 365 U.S. 505 (1961) (holding that seizure was not based upon technical trespass, and included the recording of oral statements).
the Fourth Amendment by listening to the defendant’s conversations at a telephone booth. In holding that a violation occurred, the Court stated that the Fourth Amendment was concerned with personal security, not physical invasion. The Court went to great lengths to release the Fourth Amendment from its previous restrictive definition. Unfortunately, the conclusion that the Fourth Amendment was violated upon a governmental intrusion into a sphere preserved as private, was vague and arguably unworkable. While the Katz Court can be commended for refusing to confine the language of the Fourth Amendment, the standard set forth in that decision seemed to have done little to aid in the concrete determination of when a seizure began.

Ironically, the lasting definition of seizure was first enunciated by the Court in Terry v. Ohio. Although the main focus of the Terry opinion concerned the level of suspicion needed for an investigatory stop, the Court set out the definition in dicta. In Terry, an officer was on patrol and saw two men continually walking back and forth on the street looking in a store window. The two men were approached by another man, who spoke with them momentarily and then proceeded around the corner. After ten or twelve minutes of more pacing the two men proceeded around the same corner. The officer, believing that the men were “casing” the store, followed the men around the corner, approached the three men, and proceeded to question the defendant Terry about his presence. After receiving a

32. Id. at 353 ("[T]he Fourth Amendment protects people - and not simply 'areas' - against unreasonable searches and seizures . . . ."); see also Richard L. Aynes, Note, Katz and The Fourth Amendment: A Reasonable Expectation of Privacy, or A Man's Home is His Fort, 23 CLEV. ST. L. REV. 63 (1974); Note, From Private Places to Personal Privacy: A Post-Katz Study of Fourth Amendment Protection, 43 N.Y.U. L. REV. 968, 976 (1968) ("Katz clearly discarded the four walls approach to constitutional privacy") [hereinafter Fourth Amendment Protection].
33. Katz v. United States, 389 U.S. 347, 353 (1967) (rejecting the Olmstead analysis that the Fourth Amendment was only invoked upon governmental "trespass").
34. See Fourth Amendment Protection, supra note 32, at 976; Anthony G. Amersterdman, Perspectives On the Fourth Amendment, 58 MINN. L. REV. 349, 383 (1974) (arguing that while the terms "governmental intrusion" and "sphere of privacy" purport to expand the Fourth Amendment, the vague nature of such terms serves to evade the question of whether the activity in question was an invasion into a citizen's privacy).
35. 392 U.S. 1 (1968).
36. Terry v. Ohio, 392 U.S. 1, 19 n.16 (1968).
mumbled response, the officer grabbed defendant Terry and searched him and found a concealed gun. The issue the Court confronted was whether both the officer’s stop and subsequent search of Terry were reasonable under the Fourth Amendment.

The Court began its analysis by recognizing that the police had an interest in making investigatory stops to protect against dangerous situations which may be unfolding. However, a citizen was still guaranteed the protections against intrusions of liberty and security. Balancing both interests the Court “reject[ed] the notions that the Fourth Amendment does not come into play . . . if the officers stop short of . . . a ‘technical arrest’ or a ‘full-blown search.’” The Court noted that “whenever a police officer accosts an individual and restrains his freedom to walk away, he has ‘seized’ that person.” While the Court refused to hold that the officer’s conduct was outside the Fourth Amendment, it did hold that the officer had reasonable suspicion to stop the men and after receiving the mumbled response to seize Terry and perform a pat-down search.

Finally, in dicta, the Court defined seizure in words that since have been used in Fourth Amendment cases during the past twenty years. The Court stated that “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.” Throughout the Terry opinion the Court was reluctant to examine the seizure issue through rigid analysis, fearing that such thinking “obscures the utility of limitations upon the scope, as well as the initiation,

37. Id. at 4-8.
38. Id. at 19 ("In this case there can be no question, then, that Officer McFadden 'seized' petitioner . . . . We must decide whether at that point it was reasonable . . . .").
39. Id. at 10-11.
41. Id. at 19.
42. Id. at 16. The Court also denounced the use of words such as ‘stop’ and ‘frisk’ to define investigatory procedures which arguably fell outside the Fourth Amendment. Id.
43. Id. at 19, 28-31. Contra Maclin, supra note 4, at 1269 (questioning why the Terry Court acknowledged that a seizure is accosting or restraining a person's freedom, but then failed to examine whether the officer had seized the defendant when he first approached the men).
45. Terry v. Ohio, 392 U.S. 1, 19 n.16 (1968) (emphasis added).
of police action as a means of constitutional regulation.' 46 The point of Terry, however, is that it recognized that a seizure should be defined as the point upon which the citizen's liberties, guaranteed under the Fourth Amendment, become intruded upon by the police. 47

In Terry the Court stated that seizure occurred by either physical control or a show of authority. Physical control will always have a restraining effect, thereby constituting a seizure even in the most literal sense. However, a show of authority will not always restrain a suspect. Under the Terry definition some form of restraint is necessary to constitute a seizure. The most pressing question following Terry was when a show of authority had a sufficient restraining effect so as to constitute a seizure. The Terry Court's failure to define the phrase "a show of authority" added to the confusion in determining when a police-citizen encounter amounted to a seizure. 48

B. DEVELOPMENT OF THE REASONABLE PERSON TEST

Left with the dicta in the Terry decision, Justice Stewart in Mendenhall v. United States 49 fashioned a test to determine when a "show of authority" amounted to a seizure. In Mendenhall, two DEA agents approached the defendant in an airport because she fit a "drug courier" profile. 50 After examining her ticket and identification and noticing that the names on the two did not match, the agents asked the defendant to accompany them to their office for questioning. In the office, the agents asked the defendant if she would consent to a search, to which she agreed. Finding nothing, the agent requested a strip search to which the defendant protested, stating that she had a plane to catch. Ultimately, the defendant did comply with the search during which a bag of heroin was produced. 51 The issue in Mendenhall

46. Id. at 17.

47. Id. at 30; see Edwin J. Butterfoss, Bright Line Seizures: The Need for Clarity in Determining When Fourth Amendment Activity Begins, 79 J. CRIM L. & CRIMINOLOGY 437, 438 (1989) (The author argues that the decision in Terry did little more than define the "brief seizure" category and failed to provide "the precise contours of the 'nonseizure' category . . . ").

48. Later Court decisions offered limited groups of situations which could be considered a "show of authority." See infra text accompanying notes 58, 86 for a discussion of police activities which could constitute a "show of authority."

49. 446 U.S. 544 (1980).


was whether a seizure occurred when the DEA agents first approached the defendant in the concourse of the airport. 52

Applying the dicta set forth in Terry, 53 Justice Stewart found that no seizure had occurred because there was no physical restraint or show of authority. 54 Justice Stewart concluded that when the DEA agents approached the defendant and questioned her, she had no reason to believe that she was not free to walk away. 55 In reaching this determination, Justice Stewart focused on the fact that the defendant was in a large public place, with the ability to disregard the agent’s questions and proceed along her way. 56 Therefore, no seizure occurred prior to her accompaniment of the agents to the office. Hence, a new test was created: “[A] person has been ‘seized’ within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.” 57 Stewart set forth several factors to be used in applying the reasonable person test: the threatening presence of several officers, the display of a weapon by an officer, physical touching, and language or tone of voice indicating that compliance might be compelled. 58 In applying this new test, the Court refused to consider the agents’ intent when they approached the defendant or to draw any inferences from the defendant’s own actions. 59 Justice Stewart’s “reasonable person” test was designed to

52. Id. at 551-57. This issue was only considered by Justices Stewart and Rehnquist. Chief Justice Burger, and Justices Blackmun and Powell did not join Justice Stewart’s opinion regarding when a seizure occurred. They held that the DEA agents had the reasonable suspicion cause throughout the encounter. Id. at 560 (Powell, J., concurring). All five Justices agreed that the defendant voluntarily consented to accompany the agents to the DEA office. Id. at 557-58.

53. See supra notes 44-48 and accompanying text for a discussion of Terry.


55. Id.

56. Id. at 554-56. Justice White, in his dissent, questioned how a reasonable person could have felt free to leave and board a plane after having her ticket and driver’s license taken from her. Id. at 566 (White, J., dissenting); see also Clancy, supra note 16, at 636-40; 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE, § 9.2(h), at 404-05 (2d ed. 1987). Both Clancy and LaFave share Justice White’s concern in Mendenhall, and take it a step further, explaining that a reasonable person always feels restricted when confronted by the police, and therefore never feels free to leave. 57 United States v. Mendenhall, 446 U.S. 544, 554 (1980)

57. Id.

58. Id.

59. Id at 554-56; see also LAFAVE, supra note 56, § 9.2(h), at 407-08 (discussing how the Mendenhall test sought to be solely an objective analysis of the encounter and explaining that the agent’s intent in the encounter should not be the determining factor in deciding whether the encounter amounted to a seizure).
be objectively applied to the facts of the case. Only when the police-citizen encounter reached a level of intrusiveness intolerable to a reasonable person, would the protections guaranteed under the Fourth Amendment be invoked.

The reasonable person test quickly gained acceptance in a case factually similar to *Mendenhall*. In *Florida v. Royer*, the defendant was approached in an airport by two detectives because he fit the drug courier profile. Upon stopping him the detectives asked for his identification and ticket, and discovered a discrepancy between the names on the ticket and on the identification. The detectives told him they were narcotics agents, that they suspected him of drug trafficking, and asked him to accompany them to a room. Without returning Royer’s ticket or identification, one detective led him to the room, while the other retrieved his two pieces of luggage. The defendant consented to the opening of one of the pieces, but claimed he did not know the combination to the other. In order to search both cases the detectives pried open the second piece of luggage. Marijuana was found in both cases.

Although the facts of *Royer* are genuinely similar to those in *Mendenhall*, the Court, employing the same standard, arrived at opposite results. In *Royer*, the Court held that the defendant had been the victim of an unreasonable seizure prior to the search of his luggage. The Court acknowledged that when the detectives first approached the defendant and asked for his ticket and identification, their actions did not fall within the scope of a Fourth Amendment seizure under *Terry*. However, when the detectives did not return the defendant’s items and placed him in a small room, the Court held that, “[t]hese circumstances surely amounted to a show of official authority such that a reasonable person would have believed he was not free to leave.” Arguing the consistency of this opinion with *Mendenhall*, the Court explained that in *Royer* the defendant’s ticket and identification were not returned, and his luggage was in control.

60. 460 U.S. 491 (1983). While only a four justice plurality employed the reasonable person test in finding that Royer had been seized, Justice Blackmun in his dissent also adopted the reasonable person test, thereby establishing a majority of the Court’s adoption of the test. *Florida v. Royer*, 460 U.S. 491, 514 (1983) (Blackmun, J., dissenting).
61. *Id.* at 494-95.
62. *Id.* at 503 n.9.
63. *Id.* at 503.
64. *Id.* at 501.
65. *Id.* at 501-02.
of the police.\textsuperscript{66} Therefore, not only would a reasonable person have not felt free to leave, but the defendant could not leave and board a plane without his ticket.\textsuperscript{67} As in \textit{Mendenhall}, the Court in \textit{Royer} did not look to the intentions or perceptions of either the detectives or the defendant. Upon a careful examination of only the facts, the Court concluded that prior to the search, the actions of the detectives had reached a level of intrusiveness invoking constitutional protections.\textsuperscript{68}

The Court in both \textit{Mendenhall} and \textit{Royer} applied the reasonable person test to a seizure based upon the show of authority.\textsuperscript{69} The central issue the Court was faced with when applying the reasonable person test was when a show of authority reached a sufficient level to make a reasonable person, given all the circumstances, conclude that she was not free to leave.\textsuperscript{70} Justice Stewart, in his opinion in \textit{Mendenhall}, suggested that the threatening presence of several officers, display of a weapon by an officer, physical touching, and language or tone of voice indicating that compliance might be com-

\textsuperscript{66} \textit{Id.} at 503 n.9.

\textsuperscript{67} \textit{Id.} The Court also noted that at no time did the officers explain to the the defendant that he was free to leave. \textit{Id.} at 501.

\textsuperscript{68} Florida v. Royer, 460 U.S. 491, 504-05 (1983). \textit{But see} Clancy, \textit{supra} note 16, at 632 n.88 (arguing that the nature of the encounter in \textit{Royer} was not a seizure based upon show of authority, but effectively was a seizure based on physical control due to the retention of Royer's luggage, his identification, and his ticket).

\textsuperscript{69} In \textit{Mendenhall}, the Court held that when the agents approached the defendant and questioned her, it was not a sufficient show of authority to enable her to reach the conclusion that she was not free to leave. \textit{See supra} notes 53-59 and accompanying text. In \textit{Royer}, the Court determined that the defendant was seized when the detectives withheld his tickets and luggage, and placed him in a small room, because such a show of authority would have made a reasonable person feel that he was not free to leave. \textit{See also} INS v. Delgado, 466 U.S. 210 (1984). In an attempt to search for illegal aliens, INS agents, without a warrant, entered a factory where the defendants worked and moved throughout the workplace questioning the workers on their citizenship and asking some workers to produce proof of citizenship. Agents were also stationed at the exits of the factory. Arrests were made if the subject was an illegal alien. \textit{Id.} at 212-13. The factory workers argued that the presence of the agents effectively seized the entire work force. The Court dismissed this argument claiming that the worker's freedom to leave was not restricted by the agents but by the obligation of work. \textit{Id.} at 218-19.

\textsuperscript{70} INS v. Delgado, 466 U.S. 210, 228 (1989) (Brennan, J., dissenting) Advocating the reasonable person test, Brennan wrote: "[t]he 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 . . . to disregard the questions and walk away." \textit{Id.}
pelled were examples of police actions which might give rise to a seizure under the reasonable person test. In Royer, the Court stated that the mere approach and initial questioning of the defendant was not a seizure based upon a show of authority. When read together both opinions suggest, as did Terry, that a seizure based upon a show of authority requires more than simple questioning or a non-threatening approach by a police officer. Following Royer it was clear that when determining when a seizure based on a show of authority occurred, the analysis must focus on a reasonable person's objective perceptions of the encounter.

In Michigan v. Chesternut, seven members of the Court joined the majority opinion in its strict application of the reasonable person test. Justice Kennedy's concurrence, however, did not adopt the language of the reasonable person test. Instead, his seizure analysis focused upon control.

The encounter in Chesternut began when four police officers, routinely patrolling in a marked police car, noticed a man get out of a car and approach the defendant who was standing on a corner. Upon seeing the patrol car the defendant turned and began to run. The officers pursued the defendant, drove along side him and witnessed the defendant discard a number of packets which turned out to be codeine pills. The defendant proceeded only a few more paces before the police apprehended him. The issue in Chesternut was

---

71. United States v. Mendenhall, 446 U.S. 544, 554 (1980); see supra text accompanying note 58.
72. Florida v. Royer, 460 U.S. 491, 501 (1983) ("Asking for and examining Royer's ticket and his driver's license were no doubt permissible in themselves . . . ").
73. In Delgado the Court stated that "unless the circumstance 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 individual question resulted in a detention under the Fourth Amendment." Delgado, 466 U.S. at 216; see also 3 LAFAVE, supra note 56, § 9.2(h), at 408-18. Professor LaFave noted that questioning will not, under the reasonable person test, constitute a seizure. However, he suggested that employing the reasonable person test to mean that a person is always seized when they feel they are not free to walk away is too literal a reading. Such a standard, he contended, would make almost every encounter a seizure. He believed that people do not generally feel free to walk away from police when encountered. Id. at 408-18.
74. INS v. Delgado, 466 U.S. 210 (1984) marked the first time that the entire court adopted the reasonable person test.
77. Id. at 569-70.
"whether the officers’ pursuit of respondent constituted a seizure implicating the Fourth Amendment protections . . . ." \(^{78}\)

The Court rejected the arguments of both the defendant and the state as to the applicable test for determining when a seizure occurred. The state argued that "the Fourth Amendment is never implicated until an individual stops in response to . . . [a] show of authority." \(^{79}\) Conversely, the defendant contended that any pursuit by the police implicated the Fourth Amendment. \(^{80}\) In rejecting both approaches, the Court announced that "their attempts to fashion a bright-line rule applicable to all investigatory pursuits, have failed to heed this Court’s clear direction . . . ." \(^{81}\)

The Court in *Chesternut* proceeded to base its analysis upon the "reasonable person" test. The Court concluded that the defendant was not seized during the police pursuit. \(^{82}\) In its holding, the Court explained that the police pursuit could not have communicated to a reasonable person that they would be captured or their movement would be restricted. \(^{83}\) The Court took great stock in the fact that the police pursuit was performed in a nonaggressive manner, with the police merely driving alongside the defendant. \(^{84}\) The Court, in holding that no seizure had occurred, stated that "[t]he test is necessarily imprecise, because it is designed to assess the coercive effect of police conduct, taken as a whole . . . ." \(^{85}\) Similar to the opinion in *Mendenhall*, the Court provided examples of situations in which an encounter with the police might constitute a seizure: police activating sirens; police aggressively pursuing; commanding suspect to halt; or displaying weapons. \(^{86}\)

---

78. Id. at 572.
79. Id.
81. Id.
82. Id. at 575 ("[T]he police conduct involved here would not have communicated to the reasonable person an attempt to capture or otherwise intrude upon respondent’s freedom of movement.").
83. Id.
84. Id. ("The record does not reflect that the police activated a siren . . . or commanded respondent to halt, or displayed any weapons."). *But see* Maclin, *supra* note 4, at 1306-07 (arguing that the Court in *Chesternut* was condoning police chases in the streets even where the police lacked probable cause, and stating that "[p]erhaps the result in *Chesternut* [wa]s due to the fact that none of the Justices ha[d] been recently chased down public streets by a police car . . . .").
85. Michigan v. Chesternut, 486 U.S. 567, 573 (1988); *see also* id. at 572 (where the Court refused to adopt a "bright-line" rule in police-citizen encounters).
86. Id. at 574-75.
Justice Kennedy concurred with the result the Court reached in *Chesternut* but approached the question of seizure differently than the majority.\(^7\) His concurrence is important in that his analysis of the *Chesternut* encounter sets the stage for the result in *Hodari*. Justice Kennedy stated that "[t]he case before us presented an opportunity to consider whether even an unmistakable show of authority can result in a seizure of a person who attempts to elude apprehension . . . ."\(^8\) He explained that, "whether or not the officers' conduct communicate[d] to a person a reasonable belief that they intend to apprehend him . . . does not implicate Fourth Amendment protections until it achieves a *restraining effect*."\(^9\)

Justice Kennedy's concurring opinion in *Chesternut* proposed that seizure analysis should focus on restraint of the suspect.\(^10\) He asserted that a seizure, based upon a show of authority will only result when the show of authority has a "restraining effect."\(^9\) The oddity of the concurring opinion is that it seems to deny the Court's rejection of the premise that "the Fourth Amendment is never implicated until an individual stops in response to the police's show of authority."\(^12\)

Justice Kennedy's concurring opinion in *Chesternut* acquired more credence in *Brower v. County of Inyo*.\(^13\) The issue in *Brower* was whether the conduct of the police in setting up a roadblock constituted a seizure.\(^14\) While the Court found that the roadblock was a sufficient show of authority to constitute a seizure, the dicta in the Court's opinion announced that a "[v]iolation of the Fourth Amendment requires an intentional acquisition of physical control."\(^15\)

---

87. *Id.* at 576-77 (Kennedy, J., concurring). Justice Kennedy's concurring opinion was joined by only Justice Scalia.
88. *Id.* at 577 (Kennedy, J., concurring).
89. *Id.* (emphasis added); see also *id.* at 575-76 n.9. As if to respond to Justice Kennedy's concurrence, the majority noted that there are some circumstances in which a police pursuit will amount to a seizure. However, the majority explained, this type of case was not before the Court, and should be left to another day. *Id.*
91. *Id.* ("[C]onduct does not implicate Fourth Amendment protections until it achieves a restraining effect.").
92. *Id.* at 572.
93. 489 U.S. 593 (1989) (This case was a civil action against the county alleging that the police conduct amounted to an unreasonable seizure, causing the decedent's death. The police chased the decedent for 20 miles before setting up a hidden roadblock. The decedent crashed into the roadblock and died.).
95. *Id.* at 596. The *Brower* Court proceeded to explain that "[A] Fourth
Stevens, concurring, disagreed with the above dicta. He believed that while physical control is typical of most seizures, he "[was] not entirely sure that it is an essential element of every seizure . . . ."96 Furthermore, Steven's concurrence criticized the Court's dicta as "decid[ing] a number of cases not before the Court . . . ."97 As the Supreme Court left the 1980's, Justice Kennedy's concurrence in Chesternut, seemingly denounced by a majority of the Court, along with the Court's dicta in Brower, eluded to yet another twist the Court would apply to the definition of seizure. While the reasonable person test had not been outright rejected by the Court, the notion that "intentional acquisition of physical control" was a necessary element of a seizure arguably shifted the focus of seizure analysis away from the perceptions of the citizen to the actions of both the citizen and police during the encounter.

III. CALIFORNIA v. HODARI D.

A. FACTS OF THE CASE

Late one evening, two police officers assigned to a drug task force were patrolling in a high-crime area of Oakland in an unmarked police car. Although dressed in street clothes, the officers were wearing blue jackets with "police" printed on the front and back. As the officers patrolled the area they noticed a group of youths standing around a parked car. Upon sighting the officers, the youths fled in different directions. Becoming suspicious, one officer followed in the car while Officer Pertoso took off on foot. Officer Pertoso took a circuitous route in chasing the youths, whereupon he spotted Hodari. Hodari, although running directly at Officer Pertoso, was unaware of the officer's presence because he was looking back over his shoulder. Not until the two were within eleven feet of one another did the defendant turn his head to see Pertoso. Upon seeing Pertoso, Hodari discarded a single loose rock in an underhand motion. Pertoso

Amendment seizure does not occur whenever there is a governmentally caused termination of an individual's freedom of movement . . . only when . . . [it is] through means intentionally applied." Id. at 596-97 (emphasis in original). The Court, in reference to a hypothetical used by the appellate court, acknowledged that the pursuit of the suspect was not in itself a seizure. Id. 96. Id. at 600 (Stevens, J., concurring).

97. Id. (commenting on the Court's statement that a seizure required intentional acquisition of physical control); see also Clancy, supra note 16, at 640-46 (noting that the dicta regarding whether the pursuit was a seizure, was unnecessary because the decedent was controlled when he hit the roadblock).
tackled Hodari, forced him to the ground, and handcuffed him. 98
Thereafter, Pertoso retrieved the rock he saw Hodari discard, which was later determined to be cocaine. The other officer retraced the route to where the officers originally had seen the group of youths near the car, and found a plastic sandwich bag with fifteen rocks of what was later found to be cocaine. 99

B. PROCEDURAL HISTORY

In a juvenile proceeding for possession of cocaine, Hodari filed a motion to suppress all the physical evidence seized by way of his arrest. 100 The trial court held that the chase of Hodari was illegal because the police did not have a reasonable basis for pursuing him. 101 However, the trial court was unable to find any nexus between the police officers' illegal chase and the evidence. 102 In its holding, the trial court distinguished between actual detention and threatened detention, noting that actual detention did not occur until Hodari had discarded the rock. 103 Therefore, the trial court dismissed Hodari's motion to suppress the cocaine. 104

On appeal, the appellate court reversed, thus suppressing the cocaine as a fruit of an illegal seizure. 105 In its opinion the appellate court focused on three issues. First, the court considered whether Hodari had been seized when he saw Pertoso running towards him. 106 Applying the test set forth in Mendenhall, the court stated that:

We have no doubt that it is coercive and intimidating to discover a police officer running directly towards one, some

98. In re Hodari D., 265 Cal. Rptr. 79, 81 (1989) (Although the officers were suspicious upon seeing the youths flee, at no time did they see an exchange of money, drugs or any other items.); Brief for Petitioner at 12-14, California v. Hodari D., 111 S. Ct. 1547 (1991) (No. 89-1632); Brief for Respondent at 9-11, California v. Hodari D., 111 S. Ct. 1547 (1991) (No. 89-1632); see also Hodari D., 111 S. Ct. at 1549.

99. In re Hodari D., 265 Cal. Rptr. 79, 81 n.1 (1989) (noting that upon searching the defendant the officers also found a pager and $130.00).


101. In re Hodari D., 265 Cal. Rptr. 79, 81-82 (1989) (quoting the trial judge, "I'm not concerned with the illegality of the chase on these facts. I think this was clearly illegal. The cops had no reasonable basis for doing what they did . . . .")

102. Id. at 82.

103. Id. at 82 n.2.

104. Id. at 81.


106. Id. at 82.
[eleven] feet away on a public sidewalk. Indeed, the sight of a running officer . . . would reasonably convince most citizens that they were not free to ignore the officer and leave.107

Responding to the State's argument that a seizure did not occur until there was actual physical control of the suspect, the court held that physical restraint was not required to constitute a seizure.108 Furthermore, the court contended that even if physical restraint was required, the direct pursuit by Pertoso amounted to physical restraint.109

Second, the court examined whether the seizure was reasonable under the Fourth Amendment.110 The court had little trouble concluding that the officer's chase was unreasonable. It held that Hodari's flight, without specific knowledge, did not constitute reasonable suspicion to pursue and detain him.111 The court explained that "[t]he factors of nighttime, high drug activity in the area, and seeking to avoid the police were . . . insufficient to justify detention . . . ."112

Finally, the court found that the discarding of the cocaine was a direct result of the illegal pursuit.113 Therefore, absent any intervening circumstances between the illegal pursuit and the abandonment, the evidence obtained must be suppressed under the exclusionary rule.114

The State, upon having its appeal to the California Supreme Court denied, appealed to the United States Supreme Court, asserting that the cocaine was not a fruit of the unreasonable seizure. The State argued that prior to Officer Pertoso tackling Hodari no seizure had occurred, hence no violation of the Fourth Amendment.115 Due to the inconsistency regarding when a person has been seized, the Supreme Court granted certiorari. The issue to be decided was whether Hodari had been seized at the time he dropped the cocaine.116

---

107. Id. at 83.
108. Id. at 84 (The Court rejected the State's argument that Brower v. County of Inyo required that physical control was necessary to constitute a seizure, arguing that the Brower decision required that the seizure required an intentional act on behalf of the police.); see supra notes 93-97 and accompanying text for a discussion of the Brower holding.
109. Id. at 84 n.4.
111. Id. at 84-85.
112. Id. (citing People v. Alridge, 674 P.2d 240 (Cal. Ct. App. 1984)).
113. Id. at 85 ("Where the police illegality involved is running head on at a suspect in an effort to stop him, we cannot see how the suspect's immediate discard of contraband can be anything other than a direct result of and exploitation of the illegality.").
114. Id.
116. Id.
C. THE COURT DECIDES THAT NO SEIZURE OCCURRED

The Court began its opinion by examining the common law definition of seizure. Acknowledging that the Fourth Amendment applied to a seizure of a person,\(^\dagger\) the Court cited to several dictionary definitions in support of its view that "the word 'seizure' has meant a 'taking of possession.'"\(^\ddagger\) Looking to the common law, the Court stated that a seizure encompassed more than just applying physical force; it required that the object being seized be brought within physical control.\(^\S\)

After defining seizure as an action requiring physical control, the Court seemingly took a step back and recognized that activity short of physical control may implicate Fourth Amendment protections.\(^\S\) For example, an arrest can be effectuated through mere touching.\(^\S\) The Court immediately noted that at common law if the suspect broke away from the officer's touch, there was no continuing arrest.\(^\S\) Henceforth, any subsequent discard of evidence following the escape was not "during the course of an arrest."\(^\S\) The Court acknowledged that if an unlawful common law seizure occurred, then the suspect broke away, and discarded evidence, the discarded evidence would not be the product of an unlawful seizure but rather discarded at the suspect's own will.\(^\S\) The Court explained that they had "consulted

\(^\dagger\) Id.
\(^\ddagger\) Id. at 1549-50 (citing Webster's Third New International Dictionary 2057 (1981); 2 Bouvier, supra note 18, at 510; Webster, supra note 18, at 67).
\(^\S\) California v. Hodari D., 111 S. Ct. 1547, 1549-50 (1991). To support this proposition the Court stated that "[a] ship still fleeing, even though under attack, would not be considered to have been seized as a war prize." Id. at 1550 (citing The Josef Segunda, 23 U.S. (10 Wheat.) 312 (1825)). Hodari D. noted that to effectuate a common law arrest, the "quintessential 'seizure of the person' under the Fourth Amendment," no actual control was needed. Hodari D., at 1550.
\(^\S\) Hodari D., 111 S. Ct. at 1550.
\(^\S\) Id. (citing A. Cornelius, Search and Seizure 163-64 (2d ed. 1930) (explaining that an arrest can be effectuated by a constructive detention when there is merely touching without exercising physical control over the suspect "even for an instant").
\(^\S\) Id. ("To say that an arrest is effectuated by the slightest application of physical force . . . is not to say that for Fourth Amendment purposes there is a continuing arrest during the period of fugitivity.") (emphasis in original).
\(^\S\) Id. (citing Thompson v. Whitman, 85 U.S. (18 Wall.) 457, 471 (1874) ("A seizure is a single act, and not a continuous fact.").)
\(^\S\) Id. Justice Stevens, in dissent, believed that if an officer touches a suspect, and then the suspect drops evidence, the evidence will be a fruit of the unlawful arrest and inadmissible. Hodari D., 111 S. Ct. at 1553 n.5 (Stevens, J., dissenting). This proposition fails to recognize the majority's claim that there is no continuing
the common-law to explain the meaning of seizure — and, . . . to expand rather than contract that meaning (since one would not normally think that the mere touching of a person would suffice)." 125

After sketching the parameters of a common law seizure, the Court reiterated that "[t]he present case, however, is even one step further removed [than a common law arrest]," 126 since the present case did not involve the application of any physical force. 127 Therefore, the focus was whether the officer's pursuit equalled a show of authority. 128 The Court accepted that such a pursuit was a show of authority, but questioned "whether, with respect to a show of authority . . . a seizure occurs even though the subject does not yield." 129 The Court answered that it did not. Therefore, Hodari's failure to submit to Pertoso's show of authority in no way constituted a seizure. 130 The Court reasoned that an arrest, while not requiring touching, cannot occur solely through words. 131 Therefore, the only logical conclusion is that an arrest or seizure, without touching, must include submission to authority. 132

The Court in Hodari D., to further substantiate its decision that a suspect must yield to a show of authority in order to be seized, relied on public policy grounds. To conclude otherwise, the Court argued, would be to encourage disobedience of an officer's arrest for purposes of the Fourth Amendment; therefore, the majority claims that no Fourth Amendment protections exist beyond the touching which constituted the arrest. Id. at 1550.

125. Id. at 1550 n.2 (responding to the dissent's contention that at common law attempted seizures were also unlawful).


127. Id. The Hodari D. Court stated that a common-law arrest occurred through "the mere grasping or application of physical force with lawful authority" regardless of whether the physical force subdued the suspect. Id.

128. Id. (citing Terry v. Ohio, 392 U.S. 1, 19 n.16 (1968) which defined seizure as either physical force or a show of authority).

129. Id.

130. Id. at 1550-51 (The Court analogized this case to a situation in which an officer is yelling "halt" at a fleeing suspect. In their view, neither constitutes a seizure.). But see United States v. Mendenhall, 446 U.S. 544, 554 (1980) ("Examples of circumstances that might indicate a seizure [include] . . . use of language or tone of voice indicating that compliance with the officers request might be compelled.").

131. California v. Hodari D., 111 S. Ct. 1547, 1550 (1991) (explaining that "a policeman yelling '[s]top, in the name of the law!' at a fleeing form that continues to flee" was not a seizure).

132. Id. (citing Rollin M. Perkins, The Law of Arrest, 25 Iowa L. Rev. 201, 206 (1940)).
command. The Court wished to establish a policy in which citizens would always submit to police orders. The Court believed this to be a positive public policy "since the addressee has no ready means of identifying the deficient [orders]." 

After relying upon a common-law definition of seizure, the Court proceeded to discount its prior decisions regarding when a seizure occurred. Hodari argued that the "reasonable person" test set forth in *Mendenhall v. United States* supported his contention that he was seized when he discarded the cocaine. While the Court acknowledged the existence of the test set forth in *Mendenhall*, it explained that Hodari failed to read the *Mendenhall* test properly. The Court read the *Mendenhall* test to say "that a person has been seized 'only if' [the *Mendenhall* test is met], not that he has been seized 'whenever' [the *Mendenhall* test is met] . . . " In other words, the *Mendenhall* test "states a necessary, but not a sufficient condition for a seizure . . . effected through a 'show of authority.'" 

The Court also rejected Hodari's reliance upon *Michigan v. Chesternut* to support his position that he was seized when confronted with the officer's head-on pursuit. The Court claimed that *Chesternut* offered no support because the holding in *Chesternut* was based on the position that the *Mendenhall* test was not ...
met. The Court explained, "[w]e did not address in Chesternut, however, the question whether, if the Mendenhall test was met — if the message that the defendant was not free to leave had been conveyed — a Fourth Amendment seizure would have occurred." Alternatively, the Court felt that the holding in Brower v. County of Inyo was relevant to the present case, since in Brower the Court "did not even consider the possibility that a seizure could have occurred during the course of the chase because . . . show of authority did not produce his stop."

The Court's opinion in Hodari D. is unusual in its attempt to define the point at which a police-citizen encounter becomes a seizure. First, the Court defined a Fourth Amendment seizure by relying on the common-law definitions of seizure and arrest, both of which required physical restraint. Once defined, the Court expanded the definition to include "show of authority." Applying the facts of the case, the Court held that the pursuit of Hodari D. would not fit into the definition of seizure and therefore was outside the scope of the Fourth Amendment. The Court announced its approach was not only logical, but perpetuated necessary public policy goals. Finally, the Court distinguished its precedents and concluded that the proposition that a suspect must yield to a show of authority before invoking the protections of the Fourth Amendment was consistent with previously enunciated standards.

IV. ANALYSIS OF THE Hodari D. DECISION

The Court in Hodari D. announced that it was not prepared "to stretch the Fourth Amendment beyond its words and beyond the meaning of arrest." However, what the Court did instead was

---

142. Id.
143. Id. (citing Michigan v. Chesternut 486 U.S. 567, 577 (1988) (Kennedy, J., concurring)).
144. 489 U.S. 593 (1989); see supra notes 93-97 and accompanying text for a discussion of the Brower opinion.
145. California v. Hodari D., 111 S. Ct. 1547, 1551 (1991). The Court also makes an obscure reference to Hester v. United States, 265 U.S. 57 (1924) in which it was held that during police pursuit there was no seizure of whiskey because the jugs were recovered after being discarded by the defendants. Hester v. United States, 265 U.S. at 58-59.
146. See supra notes 133-45 and accompanying text for a discussion of the "yield" requirement.
147. See generally 3 LAFAVE, supra note 56, § 9.2(h) (Professor LaFave's supplement, which was released after the writing of this Note, engages in an extensive discussion of inconsistencies between California v. Hodari D. and previous decisions.).
confine the Fourth Amendment to a definition which fails to acknowledge a majority of recent case law. Applying the Fourth Amendment, the Court in *Hodari D.* felt compelled to first define "seizure." Ironically, most of the authority the Court cited in defining seizure was outdated. 149 Instead of searching back to the nineteenth century for a definition, the Court could have gone back only twenty-four years to *Terry v. Ohio.* 150 In *Terry*, the Court did not define the term "seizure" in an abstract sense, but defined it in terms of police-citizen encounters. 151 This approach seems more logical than the approach taken in *Hodari D.*, since the protections guaranteed in the Fourth Amendment only arise during police-citizen encounters. 152 The Court’s use of dictionary definitions and common law effectively replaced the constitutional meaning of seizure with common law usage. 153

It was only later in the *Hodari D.* opinion that the Court recognized that the current definition of a seizure encompassed a seizure not recognized at common law — a seizure by a show of authority. 154 One must wonder why the Court would first go to great lengths to discuss seizures based upon physical control when the only issue in *Hodari D.* was whether seizure was effectuated through a

---

149. See *supra* notes 118, 119 and 123; see also Mary Coombs, *Constable Given Free Rein*, N.J. L.J., Aug. 29, 1991, at 72 ("Scalia did not explain precisely the relevance of that common law definition to the meaning of the constitutional term.").

150. The Court in *Hodari D.* did cite to the decision in *Terry* in recognition that a show of authority may constitute a seizure. However, this portion of the opinion, instead of being the starting point for defining seizure, came only after the Court’s inquiry into the common-law definition of seizure. California v. Hodari D., 111 S. Ct. 1547, 1550 (1991). *Contra* Michigan v. Chesternut, 486 U.S. 567, 572-73 (1988) (where the Court began its analysis of seizure first with the definition put forth in *Terry* and then the test pronounced in *Mendenhall*); Florida v. Royer, 460 U.S. 491 (1983) (no mention in the opinion of the common law definition of seizure); United States v. Mendenhall, 446 U.S. 544, 551-53 (1980) (introducing the definition of seizure by discussing *Terry*).


152. If one citizen were to wrongfully grab, accost, search, frisk or otherwise detain another citizen or another’s property there would be no constitutional violation because the Fourth Amendment only protects against governmental intrusions. U.S. CONST. amend. IV.

153. Compare California v. Hodari D., 111 S. Ct. at 1554 (Stevens, J., dissenting) (questioning whether common law "define[s] the scope of the outer boundaries of the constitutional protections," Stevens argued that the majority’s narrow definition of seizure was rejected in *Katz v. United States*, 389 U.S. 347 (1967)) with California v. Hodari D., 111 S. Ct. at 1551 n.3 (where the majority argued that its definition of seizure does not undermine *Katz* because its definition only applies to seizure of a person, and *Katz* involved seizure of telephone conversation).

show of authority. The Court’s strategy in defining seizure may have been in anticipation of the dissent’s criticism that the holding in _Hodari D._ would contract rather than expand the definition of seizure. By first defining seizure in common-law terms and then including the “show of authority” prong of seizure, the _Hodari D._ opinion can be read to expand the definition of seizure. However, such a reading would be flawed since seizure by a “show of authority” was first enunciated in _Terry_ and has been recognized as a part of the seizure definition since the _Terry_ decision.

Before discussing seizure based upon a show of authority the Court examined the common law definitions of arrest. During this portion of the _Hodari D._ opinion the Court effectively decided that the seizure of Hodari could not have occurred until he was tackled. Explaining that a seizure may occur by a mere application of force, the Court recognized that an arrest, “[the] quintessential ‘seizure of the person’ under our Fourth Amendment,” may be “effected by the slightest application of force . . . .” The Court, however, was quick to point out that there is no such thing as a continuing arrest, and therefore, there can be no such thing as a continuing seizure.

Concurrently, the Court explained that any evidence discarded after an unlawful touch, which does not serve to control the suspect, could not be not a product or result of that touch. Immediately

155. _Hodari D._, 111 S. Ct. at 1549-50. Furthermore, by searching and struggling to define seizure through literal construction, the Court ignored the proclamation by Justice Bradley in _Boyd v. United States_, 116 U.S. 616 (1886) that the Fourth Amendment is to be construed liberally in order to guarantee full constitutional protections. _Id._ at 635; see also _Olmstead v. United States_, 277 U.S. 438, 476 (1928) (Brandeis, J., dissenting) (arguing that seizure is to be liberally construed); _Olmstead v. United States_, 277 U.S. 438, 488 (1928) (Butler, J., dissenting).

156. See _supra_ notes 45-48 and accompanying text. The Court also noted that it consulted the common law definitions to “expand rather than contract” the meaning of seizure. _California v. Hodari D._, 111 S. Ct. 1547, 1550 n.2 (1991).

157. See _supra_ notes 119-25 and accompanying text for the Court’s discussion of common law arrests.

158. _Hodari D._, 111 S. Ct. at 1550.

159. _Id._ Physical control, therefore, is not a necessity.

160. _Hodari D._, 111 S. Ct. at 1550. The Court’s discussion of continuing arrest arguably has two purposes. First, the Court points out, if the officer had seized Hodari, and Hodari had broken away then discarded the cocaine, the cocaine could still have been admitted as evidence. _Id._ Second, an acknowledgement that there is no continuing seizure bolsters the Court’s holding that the pursuit of Hodari was not a seizure, since “the present case . . . is even one step further removed.” _Id._; see also _supra_ note 119.

161. _Hodari D._, 111 S. Ct. at 1550 (“If, for example, Pertoso had laid his hands
following this assertion, the Court pronounced that "'[t]he present case, however, is even one step further removed [from a case in which the suspect breaks free from an unlawful touch]."162 The Court reasoned that because evidence discarded after an unlawful touch, not submitted to, can be admitted against the suspect, evidence discarded after an unlawful show of authority, to which the suspect does not yield, can also be admitted.163 The Court's reasoning is flawed because it failed to recognize that when an unlawful act leads to the discovery of evidence, such evidence may be considered "tainted" and inadmissible.164

Not only did the Hodari D. Court fail to acknowledge the premise that an illegal act can taint evidence, thereby rendering it inadmissible, it also failed to follow the holding in Florida v. Royer.165 The Court in Royer held that when Royer consented to the opening of his luggage, there was no break between his consent and the unlawful seizure.166 The Royer holding was based on the idea that the coercive effect of an unlawful show of authority brought about Royer's consent.167 Consistent with this thinking is the argument that the

162. Id. at 1550.
163. It is important to restate that the police pursuit of Hodari was not based on any reasonable suspicion or probable cause. Id. at 1549 n.1; see also In re Hodari D., 265 Cal. Rptr. 79, 84 (1989) ("Respondent [state] does not dispute the trial court's finding that the police had no reasonable cause to chase or detain the appellant.").
164. See, e.g., Wong Sun v. United States, 371 U.S. 471, 488 (1963) (Where the Court held that narcotics which were discovered due to a an earlier illegality were inadmissible because they were "tainted" by the prior illegality such evidence is the "fruit of a poisonous tree."); see also California v. Hodari D., 111 S. Ct. 1547, 1553-54 (1991) (Stevens, J., dissenting) (chiding the majority for utilizing the common law arrest to define a Constitutional provision, yet failing to acknowledge the definition of common law attempted arrest, which provided remedy for unlawful police attempt to arrest).
167. Florida v. Royer, 460 U.S. 491, 507-508 (1983). Contra Clancy, supra note 16, at 632 n.88 (arguing that Royer's detention was effectively taking physical control, and therefore the consent to search was given while he was under the physical control of the detective).
coercive effect of an unlawful touch, or an unlawful show of author-
ity, could bring about the discarding of evidence. However, under the
rationale employed by the Court in Hodari D., any subsequent
movement following a violation of a citizen's constitutional rights will
eliminate all constitutional protections until the movement ceases.168
Dismissing the idea that an unlawful touch may bring about the
discarding of evidence, the Hodari D. Court completely rejected the
notion that an unlawful pursuit, not yielded to, could ever be coercive
enough to bring about the discarding of evidence.169

Finally, the Hodari D. Court acknowledged Hodari's assertion
that the unlawful show of authority, not submitted to, constituted a
seizure.170 The Court quickly dismissed this contention announcing
that "[t]he word 'seizure' readily bears the meaning of a laying on of
hands or application of physical force to restrain movement . . . ."171
Such statements shed light on the Court's earlier discussions regarding
the dictionary definitions of seizure and the common-law definitions
of seizure and arrest. The Court reasoned that if seizure must "readily
bear the meaning of . . . force to restrain" then a seizure based upon
show of authority must, by nature of the word seizure, include
restraint or control.172 However, the opinions in Chesternut and
Mendenhall unequivocally state that a seizure, based upon a show of
authority, could be effectuated through "language or a tone of voice
indicating that compliance . . . might be compelled"173 or when police
"command [a suspect] . . . to halt."174 Neither of the foregoing
examples can be equated with physical force. In fact, it would seem
that both of these examples of seizure would be less likely to have
restraining effect on a suspect than a head-on pursuit, as was the fact
in the Hodari D. case.175

168. See supra note 161.
Chesternut, 486 U.S. 567, 574-75 (1988). Although the Court in Chesternut held that
no seizure occurred prior to this discarding of drugs, the court recognized several
forms of aggressive police conduct which could constitute a seizure, prior to physical
contact. Id. Following this logic, if the suspect in Chesternut had been seized,
evidence discarded following the seizure would have been a product of said seizure.
170. Hodari D., 111 S. Ct. at 1550 (citing Terry v. Ohio, 392 U.S. 1 (1967) to
show that seizure may occur based upon a show of authority).
171. Id.
172. Id. at 1550-51 (noting that a policeman yelling "stop" could not constitute
a seizure because mere words do not constitute a seizure).
The Court in Hodari D. avoided the examples in Mendenhall and Chesternut by holding that the opinions in those two cases are inapplicable to the facts in Hodari D.176 The Hodari D. Court explained that the test set forth in Mendenhall does not “state a sufficient condition for seizure . . . .”177 In no other opinion has any justice stated, or speculated, that if the standards of the Mendenhall test were met there might be a further, unannounced, test before there can be a conclusion of a seizure.178 The Hodari D. Court attempted to explain this unannounced test by referring to its decision in Chesternut.179 The Hodari D. Court implied that had the police-citizen encounter in Chesternut met the standards of the reasonable person test, only a necessary, not a sufficient, condition to constitute a seizure would have been met.180 Yet the Court in Chesternut held that the defendant in that case was not seized because the police had not “activated a siren . . . [or] commanded respondent to halt . . . [or] displayed . . . weapons,”181 actions which might allow a reasonable person to conclude that he was not free to leave. Presumably, had the police in Chesternut performed such activities prior to actually physically restraining the suspect, a seizure would have occurred.

In support of its proposition of the existence of a second test, the Hodari Court cited to Justice Kennedy’s concurrence in Chesternut.

176. Id. at 1551-52.
177. Id. at 1551. But see id. at 1559 (Stevens, J., dissenting). The dissent contended that:

Whatever else one may think of today’s decision, it unquestionably represents a departure from earlier Fourth Amendment case law. The notion that our prior case contemplated a distinction between seizures effected by touching on the one hand, and show of force on the other hand, and that all of our repeated descriptions of the Mendenhall test stated only a necessary, but not sufficient condition for finding seizures in the latter category, is nothing if not creative lawmaking.

Id.


179. Hodari D., 111 S. Ct. at 1551 (noting that the test in Mendenhall was not met in Chesternut).
180. Id.
181. Chesternut, 486 U.S. at 575 (after explaining that the police conduct could not have communicated to a reasonable person that they were not free to leave, Justice Blackmun recited the above examples as illustrations of what the police did not do).
The Court’s citation to Justice Kennedy’s concurrence in *Chesternut* is misleading at best. In support of the contention that *Mendenhall* states only a necessity for seizure, the Court seemingly advocated Kennedy’s position that “conduct [show of authority] does not implicate the Fourth Amendment protections until it achieves a restraining effect.” By embracing Justice Kennedy’s concurring opinion in *Chesternut*, the Hodari D. Court clearly dismissed the holding in the *Chesternut* case.

Recall in *Chesternut* that both the state and the defendant requested that the Court form a bright-line rule defining when a seizure began. Yet, the *Chesternut* Court rejected any bright-line rule explaining that the reasonable person test was “necessarily imprecise” and sought to examine all the circumstances surrounding the incident. Therefore, the *Chesternut* Court found it necessary, in employing the reasonable person test, to look to whether the actions of the police would have communicated a restraining effect. This is quite different from Kennedy’s assertion that the police actions must “achieve a restraining effect.” Similarly, if the Hodari Court sought consistency with the *Chesternut* opinion it should not have focused on the point at which the pursuit achieved restraining effect upon Hodari, but upon the point when the officer’s conduct could have communicated a restraining effect to Hodari.


183. See Clancy, *supra* note 16, at 640. “The 1988 decision *Michigan v. Chesternut* seemed to extinguish any lingering doubts about whether the reasonable person test commanded a majority view. 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’ . . . .”


185. See *California v. Hodari D.*, 111 S. Ct. 1547, 1558-59 (1991) (Stevens, J., dissenting); *LaFave, supra* note 56, § 9.2(h), at 61 (“This later position [advocated by the State of Michigan], which the Court rejected outright, is indistinguishable from that which Justices Kennedy and Scalia mistakenly assert . . . .”); Clancy, *supra* note 16, at 636 n.123.

186. *Chesternut*, 486 U.S. at 572 (explaining that the state requested a rule which would only recognize seizure upon apprehension, whereas the defendant wanted all chases to be considered a seizure); see *supra* notes 79-81 and accompanying text.


188. *Id.* at 572-75.

189. *Id.* at 577 (Kennedy, J., concurring) (stating that a seizure never occurs until a restraining effect is achieved).
While the Hodari D. Court found little precedential value in the Mendenhall and Chesternut decisions, they did believe that Brower v. County of Inyo was “quite relevant.” Hodari D. relied upon the language in Brower that “[v]iolation of the Fourth Amendment requires an intentional acquisition of physical control.” Therefore, a seizure would entail some form of control, or in light of Hodari D., submission which could enable a police officer to exercise physical control. By discounting the relevance of the Mendenhall and Chesternut decisions and instead employing the Brower decision, the Court effectively announced that Brower set a new standard for analyzing seizures.

Such a possibility is distressing for several reasons. First, the Brower decision was a civil action for violation of civil rights brought against the police department. Second, the issue in Brower was whether the pleadings of the decedents’ estate were sufficient to maintain a cause of action against the police department pursuant to 42 U.S.C. § 1983. In Brower, dismissal of the estate’s claim was affirmed by the appellate court, which held that no seizure occurred when the police lead the decedent, blindly, into an eighteen-wheel truck being employed by the police as a roadblock. The Supreme Court in Brower reversed the appellate court, holding that the conduct did constitute a seizure.

The Hodari Court cited to dicta in Brower which announced that a seizure required “intentional acquisition of physical control.” The dicta of the Brower case was a response to a hypothetical used by the appellate court. The Court in Brower explained that in a case where

191. Hodari D., 111 S. Ct. at 1552.
192. Brower v. County of Inyo, 489 U.S. 593, 596 (1989); see supra note 95 and accompanying text.
195. Id. (The appellate court held that where there was no violation of Fourth Amendment rights, there was no police liability.).
196. Id. at 598.
197. Hodari D., 111 S. Ct. at 1552 (citing Brower v. County of Inyo, 489 U.S. 593, 596 (1989)).
198. Brower v. County of Inyo, 489 U.S. 593, 595-96 (1989). The appellate court's hypothetical, which according to the Court does not constitute a seizure, involved a “pursuing police car [which] sought to stop the suspect only by the show of authority represented by flashing lights and continuing pursuit.” Id.
the car crashes on its own, no seizure occurred because the crash would be the result of an accidental effort, not an intentional governmental intrusion. Unlike *Brower*, the facts in *Hodari D.* made it clear that the defendant’s discarding of the cocaine was not an accidental event. Quite the opposite is actually true. Hodari’s discarding of the cocaine was a direct result of Officer Pertoso’s pursuit and impending capture of him. Therefore, since the cocaine in *Hodari D.* was discarded due to the pursuit, and not an accidental event, the *Brower* decision can be distinguished from *Hodari D.*

It is true that Kennedy’s opinion in *Chesternut*, and the dicta of *Brower*, advocate the same rule used in deciding *Hodari D.* However, it is not the rule the Court had employed in previous decisions concerning the criminal seizure of a person. Moreover, it is not the rule Justice Stewart first set forth in *Mendenhall*. The opinion in *Hodari D.* replaced the reasonable person test with a “simpler”

199. Id. at 596-97. The *Brower* Court’s own hypothetical tends to discount the many intervening circumstances which occur to cause an accident (i.e., speed of car, condition of road); see *State v. Lemon*, 568 A.2d 48 (Md. 1990).

A significant part of the Court’s opinion [in *Brower v. County of Inyo*] was with respect to the intentional acquisition of physical control as a characteristic of a seizure, as distinguished from accidental or unintentional control. Any implication that actual physical control is required must be read in the frame of reference of the Court’s concern with that characteristic. We do not see in the Court’s declaration, even if not dicta . . . that there must be an actual laying on of the hands and a taking of a person.

Id. at 53.


201. The Court in *Hodari D.* also makes reference to the decision in *Hester v. United States*, 265 U.S. 57 (1924). In *Hester*, the defendants contended that the seizure of several whiskey bottles was illegal, therefore rendering the evidence obtained inadmissible. Id. at 57-59. However, the issue in *Hodari D.* was whether Hodari was seized, not whether the cocaine was illegally seized, thereby rendering subsequently obtained evidence inadmissible as a fruit of the illegal seizure. *California v. Hodari D.*, 111 S. Ct. 1547 (1991). Since recent decisions have provided the Court with a formula for determining when a seizure of a person occurred it seems illogical for the Court to have searched back over sixty years for a definition. Therefore, the formula in *Hester*, which applied to a seizure of whiskey, is not applicable to the seizure of a person.


203. *Mendenhall*, 446 U.S. at 554 ("[A] reasonable person has been ‘seized’ within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.").
analysis. Under Hodari D., seizure occurs either by way of physical control, or when the subject yields to a show of authority. What a reasonable person faced with a show of authority believes regarding her freedom to walk away is irrelevant. If the person feels they are not free to leave and proceeds to yield, a seizure will occur. If a person does not feel free to leave, yet proceeds to leave, there will be no seizure until the subject yields. The focus in Hodari D. is not the objective reasonable person, as in Mendenhall, but whether the suspect actually yields to a show of authority. Therefore, when a citizen's privacy is restricted or offended by an illegal display of governmental force, the citizen must submit to the illegal force in order to maintain their Fourth Amendment protections. This is necessary to effectuate the Court's command that "compliance with police orders [presumably even unlawful orders] to stop should . . . be encouraged." 

V. PRACTICAL IMPACT

Under the analysis set forth in Hodari D., if a person is physically restrained, a seizure has occurred. However, no reasonable person would feel free to leave while being restrained by the police; the Mendenhall test is unnecessary given such a setting. Furthermore,
if a person is confronted with a show of authority and submits, a seizure has occurred. Finally, if a person is met with a show of authority, yet the person does not submit, a seizure will never occur. The practical impact for the citizen is a restriction of their movement. In *Terry*, the Supreme Court held that a police officer need only have reasonable suspicion to perform a brief investigatory stop. The *Terry* Court recognized that such a procedure may require less than probable cause as long as the procedure is limited in order to dispel or confirm the officer’s suspicions. After *Hodari D.*, however, a police officer can pursue a citizen with no reasonable suspicion or probable cause. If the citizen flees from the pursuit, no protections under the Fourth Amendment will exist until either physical control or submission occurs. The citizen, therefore, is required to submit to an unlawful show of police authority before constitutionally-guaranteed protections can be invoked. Effectively, the *Hodari D.* holding may “isolate from constitutional scrutiny the initial stages of the contact between [sic] the policeman and the citizen.”

If the *Hodari D.* holding proves to “isolate the initial stages” of police-citizen contact, it may mean greater power to the police. The

209. The *Hodari* Court must have believed that if the test set forth in *Mendenhall* is to continue to be part of the seizure analysis, first it must be determined what a reasonable person would have believed, then, upon the belief they were not free to leave, the person must yield. But see *supra* note 204 for a discussion of the proposition that *Hodari D.* eliminates the *Mendenhall* test.

210. *Id.* at 1552 (Stevens, J., dissenting) (“In its decision, the Court assumes that a police officer may now fire his weapon at an innocent citizen and not implicate the Fourth Amendment — as long as he misses his target.”).

211. See generally *Maclin*, *supra* note 4.


213. See *id.* at 30.


Under the facts of Hodari, a suspicionless, hot pursuit of neighborhood youths — which all nine Justices agreed was unsupported by a legal basis to stop or arrest — could not qualify as “inoffensive contact between a member of the public and the police.” Yet, under Justice Scalia’s dialectic, it would pass constitutional muster, in that a chase does not become a seizure until its consummation.

*Id.*

215. *Hodari D.*, 111 S. Ct. at 1562 (Stevens, J., dissenting) (“Today’s qualification of the Fourth Amendment means that innocent citizens may remain ‘secure in their persons . . . against unreasonable searches and seizures’ only at the discretion of the police.”).

216. See, e.g., *Terry v. Ohio*, 392 U.S. 1, 17 (1967). In keeping with the other language of *Terry*, it is not unreasonable to believe that the word “contact,” as used in the textual quote, can be defined as both physical contact and a show of authority.
Hodari D. Court stressed in its opinion that "[s]treet pursuits always place the public at some risk, and compliance with police orders to stop should therefore be encouraged."217 However, the Fourth Amendment grants "the right of people to be secure" from unreasonable governmental intrusions.218 This right is certainly weakened when people may be secure from only unreasonable restraining intrusions, yet have no right to be free from unreasonable demands to stop.

The Hodari D. Court stated that "[u]nlawful orders will not be deterred, moreover, by sanctioning through the exclusionary rule those of them that are not obeyed."219 Maybe the best course of action for a citizen would then be to ignore all police orders whether they be unreasonable or not. Presumably, if the order is ignored the police will pursue the individual. If the individual is then seized, and the officer lacks the requisite suspicion, then any incriminating evidence uncovered could be inadmissible.220 If the officer does have the requisite suspicion and the citizen possesses incriminating evidence, then he is in no worse a position than had he submitted to the officer's original order.221 Furthermore, the holding in Hodari D. may leave the police confused as to what conditions constitute submission to a

217. Hodari D., 111 S. Ct. at 1551. The Court goes on to state that "[o]nly a few of those orders, we must presume, will be without adequate basis ...." Id.
218. U.S. Const. amend. IV.
219. Hodari D., 111 S. Ct. at 1551.
220. Although walking away may be a possibility, the Supreme Court seems to be on the verge of preventing such a situation described above. Responding to the state's concession that the pursuit was unlawful, the Court questioned whether "it would be unreasonable to stop ... young men who scatter in panic upon the mere sighting of the police." Id. at 1549 n.1. Such a proposition, the Court claimed, "arguably contradicts proverbial common sense." Id. These statements were followed by a cite to Proverbs 28:1 "The wicked flee when no man pursueth." Id. The dissent responded to the majority's assertion by describing it as "'ivory-towered analysis of the real world for it fails to describe the experience of many residents, particularly if they are members of a minority.' Hodari D., at 1553 n.1 (Stevens, J., dissenting); see also Cauthen v. United States, 592 A.2d 1021, 1028 (D.C. 1991) (Steadman, J., dissenting) (explaining that the majority's assertion in Hodari D. can be read to sanction the proposition that flight at the sight of police could be reasonable suspicion); Abramovsky, supra note 214 ("it is reasonable to predict that the next Supreme Court case will test whether the retreat of a citizen from the police officer's approach amounts to reasonable suspicion for the purposes of either a Terry stop or a chase.").
221. In Hodari D., had Hodari kept the cocaine in his pocket it would have been discovered after an unlawful seizure, and would have been considered a fruit of that unlawful seizure.
Consequently, the holding in Hodari D. will clearly have an impact on the police-citizen encounter. While it could serve to further undermine the authority of law enforcement, the more practical conclusion is that the holding "will encourage unlawful displays of force that will frighten countless innocent citizens into surrendering whatever privacy rights they may still have." Therefore, effective law enforcement can best be achieved if the police chase all citizens whom they believe show a propensity towards criminal activity, yet do not possess enough of the criminal characteristics which would enable the police to perform an investigatory stop. If the citizen flees, then the police will possess the necessary reasonable suspicion to stop the fleeing citizen from an initially unlawful pursuit.

VI. CONCLUSION

The Court in Hodari D. held that a pursuit of an individual is not a seizure, thereby denying the citizens of the protections under the Fourth Amendment. Only when the individual yields to a governmental pursuit may that citizen enjoy the protections of the Fourth Amendment. The Hodari opinion refused to recognize the right to Fourth Amendment protections at any point prior to submission, no matter how intrusive the pursuit may have been. The reaction that the Hodari D. opinion assigns to the feeling of constraint is submission.

Furthermore, the Hodari D. opinion effectively eliminates the notion that Fourth Amendment protections are entitled when the governmental intrusion reaches a level enabling a reasonable person to conclude that they are not free to leave. The rights granted under the Fourth Amendment are thereby dependent upon the citizen's submission to a governmental intrusion. Therefore, the citizenry's perceptions regarding their freedom of movement are irrelevant. The only perception the Court acknowledged under the Hodari D. analysis

222. Hodari D., 111 S. Ct. at 1560 (Stevens, J., dissenting) (explaining that the holding will hinder police in deciding whether the encounter constituted a seizure, and asserting that much litigation will arise as to what actions are submission).

223. Id. at 1561.

224. See, e.g., United States v. DeLeon, 942 F.2d 794 (Table) (text on Westlaw) (9th Cir. 1991) (employing the reasoning of Hodari D. that pursuit does not constitute a seizure, however, flight from pursuit gives the government agent reasonable suspicion to seize); United States v. Koenings, 951 F.2d 364 (Table) (Text on Westlaw) (9th Cir. 1991) (flight from police pursuit was one of the factors used to decide that the police had reasonable suspicion to arrest and search the defendant's car).
is one which requires the submission to a governmental intrusion. This analysis renders the test espoused by Justice Stewart in Mendenhall irrelevant. Although the Court in Hodari D. purported to leave the Mendenhall test intact, courts attempting to determine the point of a seizure will have no need to examine what a reasonable person perceives given this opinion. In examining whether a person has been seized, courts will only need to look to the actions the person took when confronted with the governmental intrusion; thereby, rendering the citizenry’s reasonable beliefs regarding their freedom of movement immaterial.

The Court in Hodari D. refused to issue an opinion which sanctioned flight from an unlawful show of authority. Admittedly, there is little doubt that this will provide for effective law enforcement. However, this assertion is an un compelling reason to restrict the citizenry’s rights. In a final plea against the Hodari D. decision, Justice Stevens wrote:

Some sacrifice of freedom always accompanies an expansion in the executives unreviewable law enforcement powers. A court more sensitive to the purposes of the Fourth Amendment would insist on greater rewards to society before decreeing the sacrifice it makes today. . . . The Court’s immediate concern with containing criminal activity poses a substantial . . . threat to values that are fundamental and enduring.

PATRICK T. COSTELLO

226. Hodari D., 111 S. Ct. at 1562 (Stevens, J., dissenting).
227. Id.