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# The Right of the People to Be Secure

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# The Right of the People to Be Secure

BY RONALD J. BACIGAL\*

## INTRODUCTION

[The Fourth Amendment m]ore than any other single constitutional provision . . . stands between us and a police state, for its central premise is that police (or other governmental) conduct that interferes with a person's liberty, bodily integrity, or right to exclude others from what is hers shall be subject to judicial control . . . .<sup>1</sup>

The opening words of the Fourth Amendment establish "[t]he right of the people to be secure in their persons."<sup>2</sup> However, the latest word from the Supreme Court is that innocent persons may be confronted, intimidated, and pursued at the whim of police officers.<sup>3</sup> The once lofty goal of regulating governmental power is now pertinent only when police efforts to capture a citizen culminate in physical contact or surrender.<sup>4</sup>

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<sup>1</sup> JAMES BOYD WHITE, *JUSTICE AS TRANSLATION* 177 (1990). "Among deprivations of rights, none is so effective in cowering a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government." *Brinegar v. United States*, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting).

<sup>2</sup> The amendment provides:

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

U.S. CONST. amend. IV.

<sup>3</sup> *California v. Hodari D.*, 499 U.S. 621, 111 S. Ct. 1547, 1562 (1991) (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.").

<sup>4</sup> "An arrest requires *either* physical force [such as a seizure, consisting of 'laying on of hands or application of physical force to restrain movement,' 111 S. Ct. at 1550,] *or*, where that is absent, *submission* to the assertion of authority." *Id.* at 1551.

Although the Fourth Amendment continues to impose restrictions on a police officer's "merely touching, however slightly, the body of the accused,"<sup>5</sup> "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."<sup>6</sup>

This curious constitutional doctrine is the latest manifestation of the Court's "surreal and Orwellian"<sup>7</sup> view of personal security rights in contemporary America. The Court previously revealed its vision of our nation by holding that a traveller entering our country can be held for hours without a warrant or probable cause until she either consents to an x-ray or performs a monitored bowel movement.<sup>8</sup> The Court has also held that motorists who have aroused no suspicion whatsoever can be stopped at sobriety checkpoints<sup>9</sup> or subjected to a high speed pursuit, which may culminate in a fatal crash.<sup>10</sup> This distressing view of individual freedoms in America was most recently manifested in the Court's decisions holding that the amendment does not encompass "accidental" or "attempted" seizures of persons.

Accidental seizures<sup>11</sup> are said to be beyond the scope of a Fourth Amendment that encompasses only those situations in which the government intends to capture a specific individual in a precise manner. In all other situations, government agents do not even need to comply with the amendment's minimal requirement that they act reasonably. Thus, the Fourth Amendment is inapplicable when an innocent citizen is shot by the police, as long as the shot was *intended* for a criminal suspect<sup>12</sup> or was *intended* to mark a suspect's vehicle for later identification.<sup>13</sup>

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<sup>5</sup> *Id.* at 1550 (citation omitted).

<sup>6</sup> *Id.* at 1552 (Stevens, J., dissenting).

<sup>7</sup> In *State v. Quino*, 840 P.2d 358 (Haw. 1992), *cert. denied*, 113 S. Ct. 1849 (1993), concurring Justice Levinson referred to "the surreal and Orwellian world of [*Florida v. Royer*, *California v. Hodari D.*, and *Florida v. Bostick*], in which the fourth amendment [sic] . . . seems to have atrophied to the condition of a vestigial organ." *Id.* at 365 (citations omitted).

<sup>8</sup> *United States v. Montoya de Hernandez*, 473 U.S. 531, 542-44 (1985).

<sup>9</sup> *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 455 (1990).

<sup>10</sup> See *infra* text accompanying notes 113-14 for the Court's discussion of *Tennessee v. Garner* in *Brower v. County of Inyo*, 489 U.S. 593, 595 (1989).

<sup>11</sup> See *Brower*, 489 U.S. at 596-97; see also *infra* text accompanying note 147. See generally Kathryn R. Urbonya, "Accidental" Shootings as Fourth Amendment Seizures, 20 HASTINGS CONST. L.Q. 337 (1993) (discussing the Supreme Court's various definitions of "seizure" in *Terry v. Ohio*, *United States v. Mendenhall*, and *Florida v. Bostick*).

<sup>12</sup> *Rucker v. Harford County, Md.*, 946 F.2d 278, 279 (4th Cir. 1991) (holding that no seizure occurs when a bystander is struck by a bullet intended for a suspect), *cert. denied*, 112 S. Ct. 1175 (1992); *Landol-Rivera v. Cruz Cosme*, 906 F.2d 791, 798 (1st Cir. 1990) (holding that there has been no seizure under the Fourth Amendment unless the restraint of liberty results from an attempt to gain control of the particular individual).

<sup>13</sup> See *Keller v. Frink*, 745 F. Supp. 1428, 1432 (S.D. Ind. 1990) (holding that a

Attempted seizures<sup>14</sup> are viewed as lying beyond the coverage of a Fourth Amendment that remains indifferent to a police officer's initial pursuit, intimidation, or other unsuccessful efforts to seize a citizen.<sup>15</sup> Citizens who walk the streets of America must now accept the possibility that an officer may fire upon them, attempt to tackle them to the ground, or single out a particular citizen and demand identification papers and an explanation of why the individual is in the area. Citizens must anticipate the occurrence of each of these situations despite the absence of any indication that they are engaged in criminal activity.<sup>16</sup>

Faced with conflicting demands for "safe streets" and for freedom of movement on those streets, a conservative Supreme Court indirectly increased law enforcement powers by decreasing the protections of the Fourth Amendment.<sup>17</sup> By creating the novel concepts of accidental seizure and attempted seizure, this avowedly conservative Court has displayed a facility for constitutional interpretation that is simultaneously radical and regressive. The Court's refusal to address police attempts to seize a suspect threatens to overturn *Terry v. Ohio*<sup>18</sup> by reverting to common law concepts of completed arrests. The refusal to recognize accidental seizures stems from an unprecedented and ill-conceived analysis which suggests that a police officer's intent to utilize a particular method of capture is a prerequisite for Fourth Amendment seizures. The

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seizure does not occur when an officer shoots and strikes a vehicle if the vehicle does not stop, even if the officer *meant* to stop a suspect within it); *Palmer v. Williamson*, 717 F. Supp. 1218, 1223 (W.D. Tex. 1989) (holding that although the police fired at and struck the suspect's vehicle, no seizure occurred because the suspect failed to stop).

<sup>14</sup> *California v. Hodari D.*, 499 U.S. 621, 111 S. Ct. 1547 (1991); *see infra* text accompanying notes 212-14.

<sup>15</sup> *Hodari*, 499 U.S. 621, 111 S. Ct. at 1561-62 (Stevens, J., dissenting) ("The Court today defines a seizure as commencing, not with egregious police conduct, but rather, with submission by the citizen."); *Carter v. Buscher*, 973 F.2d 1328, 1332 (7th Cir. 1992) (citations omitted) ("The Fourth Amendment prohibits unreasonable seizures not unreasonable, unjustified or outrageous conduct in general. Therefore, pre-seizure conduct is not subject to Fourth Amendment scrutiny.").

<sup>16</sup> *See infra* text accompanying note 218.

<sup>17</sup> *Hodari*, 499 U.S. 621, 111 S. Ct. at 1552. *Hodari* does more than legitimize demands for safe streets; it removes and protects part of the government's efforts to clean up the streets—certain types of seizures—from regulation by law. Even before *Hodari*, one district court noted the following: "It seems rather incongruous at this point in the world's history that we find totalitarian states becoming more like our free society while we in this nation are taking on their former trappings of suppressed liberties and freedoms." *United States v. Lewis*, 728 F. Supp. 784, 788 (D.D.C.), *rev'd*, 921 F.2d 1294 (D.C. Cir. 1990).

<sup>18</sup> 392 U.S. 1 (1968); *see infra* text accompanying note 219.

Court, however, has erred on both counts because the Fourth Amendment properly encompasses both attempted and accidental seizures. The Court's miscalculation stems from the drawing of an unwarranted distinction between searches and seizures of property, and seizures of a person.

Part I of this Article defines searches and seizures of property and person, discussing the Supreme Court's initially broad interpretation of the Fourth Amendment and its subsequent narrowing in later decisions.<sup>19</sup> Part II discusses several police "chase cases" leading up to the elimination of accidental and attempted seizures from Fourth Amendment protection in *Brower v. County of Inyo*<sup>20</sup> and *California v. Hodari D.*<sup>21</sup> Part III analyzes the *Brower* decision and its effect on accidental seizures, concluding that the analysis set forth therein should be abolished and advocating an alternate test.<sup>22</sup> Part IV confronts the Court's elimination of attempted seizures from Fourth Amendment protections and suggests that physical restraint cannot be the only consideration.<sup>23</sup> Part V offers a new model for defining attempted seizures, one which focuses on a citizen's right of liberty rather than on the physical control of citizens by the police.<sup>24</sup>

## I. DEFINING SEARCHES AND SEIZURES

By insisting that no seizure of a person occurs until a police officer intentionally and successfully touches the citizen or until the citizen submits to police authority,<sup>25</sup> the Court has created an intractable approach to seizures of a person that stands in stark contrast to its relatively malleable treatment of searches and seizures of property. Judicial efforts to define searches and seizures of property have engendered learned debate over the fundamental values underlying a broadly defined conflict between individual freedom<sup>26</sup> and collective

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<sup>19</sup> See *infra* notes 25-85 and accompanying text.

<sup>20</sup> 489 U.S. 593 (1989).

<sup>21</sup> 499 U.S. 621, 111 S. Ct. 1547 (1991); see *infra* notes 86-144 and accompanying text.

<sup>22</sup> See *infra* notes 145-211 and accompanying text.

<sup>23</sup> See *infra* notes 212-351 and accompanying text.

<sup>24</sup> See *infra* notes 352-409 and accompanying text.

<sup>25</sup> See *supra* notes 5-12 and accompanying text.

<sup>26</sup> In the context of Fourth Amendment searches, the debate centers on the right of privacy: in other words, the freedom "of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others." Oscar M. Ruebhausen, *Foreword* to ALAN F. WESTIN, *PRIVACY AND FREEDOM* 7 (1968).

security.<sup>27</sup> In contrast, the Court's definition of seizures of a person, substitutes in place of its examination of these fundamental values, inquiries into the existence of certain factual predicates, such as physical touching, submission, and the officer's intent to capture the citizen through particular means.<sup>28</sup> The language of the Fourth Amendment, which equally prohibits unreasonable searches and seizures of persons, houses, papers, and effects, does not support such a distinction between seizures of the *person* and searches and seizures of a person's *property*.<sup>29</sup>

The seminal decisions defining searches and seizures, *Katz v. United States*<sup>30</sup> and *Terry v. Ohio*,<sup>31</sup> also fail to support the distinction drawn by the current Court. Prior to *Katz*, the Court had held that physical trespass to the defendant's property was a necessary factual predicate for the triggering of the amendment's coverage of governmental searches.<sup>32</sup> When *Katz* shifted the amendment's focus from property rights to the fundamental right of privacy, the requirement of physical trespass was discarded.<sup>33</sup> Despite warnings that "the Fourth Amendment cannot be translated into a general constitutional 'right to privacy,'"<sup>34</sup> post-*Katz* litigation has centered on the privacy issue and the Court's need to

<sup>27</sup> "The fourth amendment [sic] is one of the Constitution's richly generative texts. Its important terms are general. . . . The amendment invites treatment as a broad statement about the relationship between an individual and the government." Lloyd L. Weinreb, *Generalities of the Fourth Amendment*, 42 U. CHI. L. REV. 47, 47 (1974); see also *United States v. White*, 401 U.S. 745, 786 (1971) (Harlan, J., dissenting) (stating that the Court must assess the "impact on the individual's sense of security balanced against the utility of the conduct as a technique of law enforcement"); JACOB W. LANDYNSKI, *SEARCH AND SEIZURE AND THE SUPREME COURT* 13 (1966) (Fourth Amendment issues "bring into sharp focus the classic dilemma of order vs. liberty in the democratic state"). According to Justice Jackson, the Bill of Rights can be viewed as "the maximum restrictions upon the power of organized society over the individual that are compatible with the maintenance of organized society itself." *Watts v. Indiana*, 338 U.S. 49, 61 (1949) (Jackson, J., concurring). See generally Daniel J. O'Hern, *Criminal Law and Procedure: The Conflict Between Order and Liberty*, 1 SETON HALL CONST. L.J. 3 (1990) (discussing how the Constitution embodies a conflict between order and liberty).

<sup>28</sup> See *supra* notes 5-12 and accompanying text.

<sup>29</sup> See *supra* note 2.

<sup>30</sup> 389 U.S. 347 (1967).

<sup>31</sup> 392 U.S. 1 (1968).

<sup>32</sup> *Katz*, 389 U.S. at 352-53.

<sup>33</sup> *Id.* at 353 ("[O]nce it is recognized that the Fourth Amendment protects people—and not simply 'areas'—against unreasonable searches and seizures, it becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure.").

<sup>34</sup> *Id.* at 350.

determine which privacy values are recognized by society as "justifiable" or "legitimate"<sup>35</sup> and, therefore, protected.

While the pre-*Katz* requirement for physical trespass necessitated a factual determination, legitimate expectations of privacy cannot be determined by the factual expectations currently held by a majority of today's society.<sup>36</sup> Because the Constitution protects the individual against the tyranny of the current majority,<sup>37</sup> the Court has tempered popular consensus<sup>38</sup> with history,<sup>39</sup> property rights,<sup>40</sup> natural law,<sup>41</sup> and utilitarian balancing<sup>42</sup> in determining whether there has been governmental interference with a constitutionally protected right of privacy.

When Fourth Amendment analysis turns from searches and seizures of property to seizures of the person, the focal point of judicial scrutiny

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<sup>35</sup> The *Katz* majority overturned the previous requirement that the Fourth Amendment be triggered by a physical trespass and recognized that the amendment protects people, not places. It was left to the concurring opinion to suggest that the people are protected when they hold an expectation of privacy "that society is prepared to recognize as 'reasonable.'" *Id.* at 361 (Harlan, J., concurring). In order to avoid confusing society's reasonable expectations with those of a reasonable person, the Court has substituted the terms "justifiable," *United States v. White*, 401 U.S. 745, 752 (1971), and "legitimate," *Rakas v. Illinois*, 439 U.S. 128, 149 (1978), in place of the word "reasonable."

<sup>36</sup> Rather than asking what we currently expect of government officials, the Fourth Amendment tells us "what we should demand of government." Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 384 (1974).

<sup>37</sup> "[T]he task of the law [is] to form and project, as well as mirror and reflect . . ." *White*, 401 U.S. at 786 (Harlan, J., dissenting). In times of panic or emergency, popular consensus may seek to override individual rights. See Eugene V. Rostow, *The Japanese American Cases—A Disaster*, 54 YALE L.J. 489, 490-91 (1945); see also Tom Wicker, *Rights vs. Testing*, N.Y. TIMES, Nov. 28, 1989, at A25 (reporting that a Washington Post/ABC News Poll found that "52 percent of respondents were willing to have their houses searched and 67 percent to have their cars stopped and searched by police without a warrant. Fifty-five percent supported mandatory drug testing" for the general population, and 67 percent supported testing for all high school students).

<sup>38</sup> The shared understandings of society are relevant in determining legitimate expectations of privacy. See *Rakas*, 439 U.S. at 143 n.12. These shared understandings, however, are more than the current popular consensus. See *supra* note 36. In order to preserve the Constitution as a protection against the tyranny of the majority, the Court must employ some independent standard to distinguish "enlightened" consensus from a current wave of consensus based on emotionalism or prejudice. See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 126 (1977).

<sup>39</sup> See *United States v. Watson*, 423 U.S. 411, 415-16 & n.4 (1976).

<sup>40</sup> See *Rakas*, 439 U.S. at 143 n.12 ("Legitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society.").

<sup>41</sup> See *Warden v. Hayden*, 387 U.S. 294, 312 (1967) (Douglas, J., dissenting).

<sup>42</sup> See *Camara v. Municipal Court*, 387 U.S. 523, 535-39 (1967).

shifts from privacy interests to the citizen's fundamental interests in liberty<sup>43</sup> and freedom of movement.<sup>44</sup> This change in focus merely presents a different context in which the Court must identify those societal values that the Fourth Amendment recognizes as legitimate or justifiable. Because concepts of privacy and liberty often overlap, the methodology utilized to identify legitimate privacy expectations would seem to apply equally to determinations of legitimate expectations of liberty.<sup>45</sup> Yet, when addressing seizures of a person, the Court has abandoned its multi-faceted examination of history,<sup>46</sup> property rights,<sup>47</sup> popular consensus,<sup>48</sup> and utilitarian balancing<sup>49</sup> in favor of narrowly focused inquiries into the factual predicates of common law arrests. The Court has never explained why the *Katz* analysis of legitimate expectations of privacy applies to searches and seizures of property, while an entirely different analysis governs seizures of a person.

*Katz* and *Terry*, decided within a year of one another, share a common characteristic of expanding Fourth Amendment protections beyond common law precedents.<sup>50</sup> Pre-*Terry* analysis had equated seizures of a person with common law arrests.<sup>51</sup> Thus, the Court in *Terry* was asked to make an all-or-nothing determination: either there was an arrest, requiring full compliance with the Fourth Amendment, or there was no arrest, and therefore no seizure, and no Fourth Amendment limitations on a police officer's actions.<sup>52</sup> Just as physical trespass was essential to pre-*Katz* searches,<sup>53</sup> arrest was a necessary linchpin for pre-*Terry* seizures of

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<sup>43</sup> In its broadest context, the term "liberty" encompasses an individual's right of autonomy—the right to live one's life without arbitrary interference by the state. See Louis Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410, 1415 (1974).

<sup>44</sup> See Tracey Maclin, *The Decline of the Right of Locomotion: The Fourth Amendment on the Streets*, 75 CORNELL L. REV. 1258, 1297-1307 (1990).

<sup>45</sup> "Under the principles established and applied by this Court, the Fourth Amendment safeguards against all evils that are like and equivalent to those embraced within the ordinary meaning of its words." *Olmstead v. United States*, 277 U.S. 438, 488 (1928) (Butler, J., dissenting).

<sup>46</sup> See *supra* note 39 and accompanying text.

<sup>47</sup> See *supra* note 40 and accompanying text.

<sup>48</sup> See *supra* notes 36, 38 and accompanying text.

<sup>49</sup> See *supra* note 42 and accompanying text.

<sup>50</sup> See *California v. Hodari D.*, 499 U.S. 621, 111 S. Ct. 1547, 1555 (1991) (Stevens, J., dissenting) ("The expansive construction of the word 'seizure' in the *Katz* case provided an appropriate predicate for the Court's holding in *Terry v. Ohio* . . .") (citation omitted).

<sup>51</sup> See *supra* note 18 and accompanying text.

<sup>52</sup> The Court's decision to deny Fourth Amendment application freed the police officer from any judicial scrutiny of the officer's decision to engage in the exempted practice. See *infra* note 310.

<sup>53</sup> See *supra* note 32 and accompanying text.



the person.<sup>54</sup> *Terry*, however, extended the scope of the amendment to encompass temporary detentions falling short of full custodial arrests.<sup>55</sup> Together, *Katz* and *Terry* emphasized a result—an intrusion upon privacy or liberty—in place of the previous focus on whether a particular means—such as trespass or arrest—had been utilized to bring about that result.

Under the specific facts of *Terry*, the relevant liberty interest was the citizen's "freedom to walk away," unencumbered by any physical restraint imposed by a police officer.<sup>56</sup> While concentrating on that limited issue, the *Terry* Court rose above the precise facts of the case by reaffirming its "traditional responsibility to guard against police conduct which is overbearing or harassing, or which trenches upon personal security"<sup>57</sup> and by recognizing that a seizure occurs "when the officer, by means of physical force or show of authority, has *in some way* restrained the liberty of the citizen."<sup>58</sup> *Terry*, like *Katz*, freed the amendment from restrictive common law factual predicates and evoked the expansive concept of a "right to be let alone—the most comprehensive of rights and the right most valued by civilized men."<sup>59</sup>

Whether or not it is truly the "most valued," the right to be let alone—to be free from arbitrary governmental interference with our lives—undeniably qualifies as a fundamental value underlying the amendment's proscription of unreasonable searches and seizures of both property and persons. The Court's post-*Katz* analysis continues to affirm that this fundamental value extends the protections of the amendment beyond common law definitions of searches and seizures of property.<sup>60</sup> In contrast, however, the Court insists that common law concepts of arrest restrict the definition of seizures of a person.<sup>61</sup> Thus, the Court has discarded *Terry*'s broad pledge to scrutinize the

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<sup>54</sup> See *supra* note 18 and accompanying text.

<sup>55</sup> *Terry*, 392 U.S. at 16.

<sup>56</sup> *United States v. Mendenhall*, 446 U.S. 544, 552 (1980) ("[T]he 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.") (citation omitted).

<sup>57</sup> *Terry*, 392 U.S. at 15.

<sup>58</sup> *Id.* at 19 n.16 (emphasis added); see *California v. Hodari D.*, 499 U.S. 621, 111 S. Ct. 1547, 1556 (1991) (Stevens, J., dissenting) ("The touchstone of a seizure is the restraint of an individual's personal liberty '*in some way*.'").

<sup>59</sup> *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). "[T]he right to be left alone is 'too precious to entrust to the discretion of those whose job is the detection of crime.'" *People v. De Bour*, 352 N.E.2d 562, 569 (N.Y. 1976) (quoting *McDonald v. United States*, 335 U.S. 451, 455 (1948)).

<sup>60</sup> *Hodari*, 499 U.S. 621, 111 S. Ct. at 1551 n.3 ("What *Katz* stands for is the proposition that items which could not be subject to seizure at common law (e.g., telephone conversations) can be seized under the Fourth Amendment.")

<sup>61</sup> 111 S. Ct. at 1551 n.3 (noting that the common law of arrests "defines the limits

diverse ways in which the government may repress a citizen's liberty in favor of giving *Terry* its narrowest reading. Consequently, the precise facts that gave rise to the *Terry* decision—the government's corporeal restraint of the suspect's physical movements—have become the exclusive criteria for defining Fourth Amendment seizures of a person. This constricted reading of *Terry* reduces the Fourth Amendment rights of liberty and personal security to a narrow right of physical locomotion.<sup>62</sup> Now banished from Fourth Amendment jurisprudence are the expansive concept of a "right to be let alone" and the related view that the amendment is applicable to all significant forms of police encounters with citizens.<sup>63</sup>

The sole modification of *Terry's* focus on corporeal restraint occurred in *United States v. Mendenhall*,<sup>64</sup> wherein the Court suggested that seizures of a person could be identified by examining whether the totality of the circumstances would lead a reasonable person to perceive that he was not free to leave.<sup>65</sup> While there is some affinity between the freedom to leave and the right to be let alone, subsequent decisions have not borne out *Mendenhall's* potential for expanding Fourth Amendment coverage beyond a right to physical locomotion.

In a decade of ensuing litigation, the question arose whether *Mendenhall's* reasonable perceptions standard<sup>66</sup> was a supplement to, or a substitute for, *Terry's* emphasis on corporeal restraint.<sup>67</sup> In other words, if there is a conflict between reality and perception, which factor is controlling? The question posed is the Fourth Amendment's variation of the classic query for beginning students of epistemology—if a tree falls in an unoccupied forest, has there been a sound? In the Fourth Amendment context, the riddle consists of a hypothetical situation where police officers surround a suspect's dwelling to insure that he does not depart the premises, but the suspect remains unaware of the officers' presence.<sup>68</sup>

of a seizure of the person").

<sup>62</sup> See Maclin, *supra* note 44, at 1297-1307.

<sup>63</sup> See *infra* note 170.

<sup>64</sup> 446 U.S. 544 (1980).

<sup>65</sup> *Id.* at 554.

<sup>66</sup> *Id.*

<sup>67</sup> See *supra* notes 60-62 and accompanying text.

<sup>68</sup> This hypothetical does not require the Court to inquire into the officer's subjective intent because the external and unequivocal manifestations of control exist. See *infra* note 93. The hypothetical is based on the facts of *State v. White*, 838 P.2d 605 (Or. Ct. App. 1992), where the police surrounded the defendant's dwelling and the defendant complied with the order that he exit the dwelling. The majority and concurring opinions differed as to whether the defendant had been seized while still inside the house, *id.* at 609-12

This hypothetical situation demonstrates that a restriction of the defendant's liberty<sup>69</sup> may occur without his awareness of that fact,<sup>70</sup> just as a clandestine search of the defendant's property may occur without his knowledge.<sup>71</sup> If *Mendenhall's* focus upon reasonable perceptions<sup>72</sup> is the exclusive test for defining seizures of a person, the definitions of seizures of property and seizures of a person are strangely juxtaposed. A covert governmental intrusion upon privacy triggers Fourth Amendment protections, while a covert intrusion upon an individual's liberty or freedom of movement lacks constitutional significance until it is accompanied by perception of the intrusion.<sup>73</sup>

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(Durham, J., concurring), or not until he had exited the dwelling. *Id.* at 608 (majority opinion).

<sup>69</sup> Although the suspect remains free to move about inside his residence, he is not free to depart. *Cf.* *INS v. Delgado*, 466 U.S. 210, 218 (1984) (holding that no seizure occurred by stationing guards at exits because the guards' purpose was not to prevent exit, but to ensure that all persons were questioned).

<sup>70</sup> *Bouldin v. State*, 350 A.2d 130, 133 (Md. 1976) ("[I]t is only where there is no actual manual seizure of the arrested person that his intention or understanding assumes controlling importance."); *City of Seattle v. Sage*, 523 P.2d 942, 945 (Wash. Ct. App. 1974) ("A person is placed under arrest when he is deprived of his liberty by an officer who intends to arrest him. The arresting officer does not need to orally communicate this intent to the person being arrested.").

While the criminal law does not require that one be aware of a restraint on his liberty, "[t]he original Restatement of Torts took the position that there was no false imprisonment unless the victim was aware of the confinement at the time." ROLLIN M. PERKINS & RONALD N. BOYCE, *CRIMINAL LAW* 228-29 (3d ed. 1982) (citing *RESTATEMENT OF TORTS* § 42 (1934)). Dean Prosser brought attention to the unsoundness of this position in William L. Prosser, *False Imprisonment: Consciousness of Confinement*, 55 *COLUM. L. REV.* 847 (1955). The Restatement (Second) of Torts states "in substance that it is false imprisonment if the victim is aware of the confinement at the time 'or is harmed thereby.'" PERKINS & BOYCE, *supra*, at 229 (citing *RESTATEMENT (SECOND) OF TORTS* § 42 (1965)). Because "the purpose of the criminal law is not to compensate the victim for harm suffered . . . but to punish the actor for his misconduct it would seem that false imprisonment as a criminal offense would not require that the victim either be conscious of the confinement at the time or be harmed thereby." *Id.*

Even if the government's act of secretly surrounding a citizen's home is characterized as merely an attempted seizure, the Fourth Amendment should cover such an attempt. *But see infra* note 348 and accompanying text.

<sup>71</sup> Weinreb, *supra* note 27, at 53 ("A person's home is a place that he expects will not be invaded whether he is present or absent.").

<sup>72</sup> *See supra* note 65 and accompanying text.

<sup>73</sup> *But see* EDWIN FISHER, *LAWS OF ARREST*, Chapter IV at 52-53 (1967) ("[A]n unconscious person may be placed under arrest when his body is actually seized and restrained, even though his *understanding* of his plight is delayed until he recovers consciousness.").

The other side of the *Terry/Mendenhall* paradox is whether the amendment applies when there is the perception, but not the reality, of restraint; that is, someone hears a falling tree, but in fact no tree fell. For example, consider a situation in which a motorist observes an officer in a trailing police car activate the car's siren and flashing lights. As the motorist pulls over to the side of the road, believing that the police have constrained his freedom of movement, the police officer passes him in order to stop a vehicle further down the highway.<sup>74</sup> The motorist's mistaken, but perfectly reasonable, perception of government-imposed restraint<sup>75</sup> satisfies the *Mendenhall* test for a seizure of the person, even though the police had no intent to interfere with the defendant's freedom of movement.<sup>76</sup>

Dicta in *Brower v. County of Inyo*<sup>77</sup> implicitly resolved situations like the "mistaken motorist" hypothetical. The Court in *Brower* declared that the Fourth Amendment does not encompass "the accidental effects of otherwise lawful government conduct"<sup>78</sup> and that no seizure occurs unless the police utilize "means intentionally applied"<sup>79</sup> to bring about the seizure. In essence, *Brower* proclaimed that constraint of a person does not reach constitutional significance if the police do not intend for the constraint to occur. While *Brower's* language regarding police intent purports to eliminate accidental seizures<sup>80</sup> from Fourth Amendment coverage, *Brower* does not establish the point at which an *intended* seizure becomes an accomplished seizure. If an officer turns on a police car's siren and flashing lights with the intent to seize a particular motorist, does a seizure occur when the siren and lights are activated or only when the motorist acquiesces to this show of authority by stopping his vehicle?<sup>81</sup> The Court addressed this question in *California*

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<sup>74</sup> See *State v. Indvik*, 382 N.W.2d 623, 627 (N.D. 1986) ("There may be several motorists in the vicinity of an officer when he uses his flashing red lights. To constitute a stop by the use of flashing red lights, the officer must have the intent to stop the specific motorist and the motorist must be cognizant of the officer's presence.").

<sup>75</sup> In the hypothetical there is *self-imposed* restraint, but only an erroneous perception of government restraint.

<sup>76</sup> In *State v. Baldonado*, 847 P.2d 751 (N.M. Ct. App. 1992), a police officer pulled up behind a parked vehicle and turned on the police car's flashing lights. *Id.* at 752. The majority opinion held that no seizure occurred if the trial court, on remand, finds that the police had no intent to seize, but were seeking to provide assistance. *Id.* at 755. The dissent argued that, as a matter of law, whatever the officer's purpose, a motorist in such a situation would not feel free to leave. *Id.* (Apodaca, J., dissenting).

<sup>77</sup> 489 U.S. 593 (1989).

<sup>78</sup> *Id.* at 596.

<sup>79</sup> *Id.* at 597 (emphasis omitted).

<sup>80</sup> See Ronald J. Bacigal, *In Pursuit of the Elusive Fourth Amendment: The Police Chase Cases*, 58 TENN. L. REV. 73, 91 (1990).

<sup>81</sup> Justice Stevens posed another wrinkle to this hypothetical:

v. *Hodari D.* and held that police intent to restrain a defendant lacks constitutional significance until the defendant is successfully apprehended.<sup>82</sup> As a result, the Fourth Amendment does not encompass attempted seizures.<sup>83</sup>

The Court's path to *Brower* and *Hodari*, and its analysis of accidental and attempted seizures, can be traced through a series of cases applying the constitutional standard for seizures within the context of police pursuit of a fleeing suspect.<sup>84</sup> These "chase cases" underscore the difficulties of defining a seizure of the person by forcing the Court to identify the point at which an attempted seizure becomes an accomplished seizure.<sup>85</sup> The chase cases also highlight the Court's consistent refusal to address seizures of a person under the *Katz* mandate of adjudicating the legitimate societal expectations protected by the Fourth Amendment.

## II. THE CHASE CASES

The first of the chase cases, *Tennessee v. Garner*,<sup>86</sup> arose when a police officer fired a fatal shot at a fleeing suspect. The Court resolved the issue of whether a seizure had occurred in a single sentence: "There can be no question that apprehension by the use of deadly force is a

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[T]here will be a period of time during which the citizen's liberty has been restrained, but he or she has not yet completely submitted to the show of force. A motorist pulled over by a highway patrol car cannot come to an immediate stop, even if the motorist intends to obey the patrol car's signal. If an officer decides to make the kind of random stop forbidden by *Delaware v. Prouse*, 440 U.S. 648 . . . (1979), and, after flashing his lights, but before the vehicle comes to a complete stop, sees that the license plate has expired, can he justify his action on the ground that the seizure became lawful after it was initiated but before it was completed?

*California v. Hodari D.*, 499 U.S. 621, 111 S. Ct. 1547, 1561 (1991) (Stevens, J., dissenting).

<sup>82</sup> 111 S. Ct. at 1552.

<sup>83</sup> *Id.* at 1552.

<sup>84</sup> See *Brower v. County of Inyo*, 489 U.S. 593 (1989); *Michigan v. Chesternut*, 486 U.S. 567 (1988); *Tennessee v. Garner*, 471 U.S. 1 (1985).

<sup>85</sup> The Court has never found an attempted but unsuccessful seizure of a person to be covered by the Fourth Amendment. *Garner* and *Brower* involve seizures where the suspect was successfully captured. See *infra* notes 86-90 and accompanying text (discussing *Garner*); *infra* notes 105-22 and accompanying text (discussing *Brower*). *Chesternut* and *Hodari* focus on the seizure of evidentiary items that were obtained before the suspect was captured. See *infra* notes 91-104 and accompanying text (discussing *Chesternut*); *infra* notes 127-40 and accompanying text (discussing *Hodari*).

<sup>86</sup> 471 U.S. 1 (1985).

seizure."<sup>87</sup> After passing quickly over the threshold question of the Fourth Amendment's coverage, the *Garner* Court focused on the amendment's substantive requirement that seizures be reasonable, and that reasonableness hinges upon striking the constitutionally appropriate balance between law enforcement needs and the rights of suspects.<sup>88</sup> By concluding that the need to apprehend fleeing felons did not "justify the killing of nonviolent suspects,"<sup>89</sup> the Court removed the unrestricted use of deadly force from the arsenal of police pursuit.<sup>90</sup> The Court's willingness to address the reasonableness of police pursuit diminished, however, in subsequent chase cases in which the Court invoked a narrow and rigid view of seizures of the person.

*Garner* was followed by *Michigan v. Chesternut*,<sup>91</sup> a chase case that presented the Court with sharply contrasting theories for determining when police pursuit amounts to a Fourth Amendment seizure. The chase in *Chesternut* began when a police patrol car approached an intersection where the defendant was standing.<sup>92</sup> When the defendant turned and ran, the police drove alongside the defendant<sup>93</sup> and retrieved several packets of codeine that the defendant had discarded.<sup>94</sup> In support of his claim that the police had violated the Fourth Amendment, the defendant argued that the initiation of a chase constitutes the litmus test for defining a seizure.<sup>95</sup> Thus, according to the defendant, "any and all police 'chases' are Fourth Amendment seizures, . . . [and] the police may never pursue an individual absent a particularized and objective basis for suspecting that he is engaged in criminal activity."<sup>96</sup> The government, on the other hand, asserted that "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."<sup>97</sup> Anticipating

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<sup>87</sup> *Id.* at 7.

<sup>88</sup> *Id.* at 8.

<sup>89</sup> *Id.* at 10.

<sup>90</sup> *Id.* at 22.

<sup>91</sup> 486 U.S. 567 (1988).

<sup>92</sup> *Id.* at 569.

<sup>93</sup> The officer testified that "the goal of the 'chase' was not to capture [the defendant], 'but to see where he was going.'" The Court noted that "the subjective intent of the officers is relevant to an assessment of the Fourth Amendment implications of police conduct only to the extent that that intent has been conveyed to the person confronted." *Id.* at 576 n.7.

<sup>94</sup> *Id.* at 569.

<sup>95</sup> *Id.* at 572.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

the holding in *Hodari*,<sup>98</sup> the government insisted that successful apprehension of the suspect should be the determinative factor in defining seizures.<sup>99</sup>

Although Justices Kennedy and Scalia adopted the government's position,<sup>100</sup> the majority in *Chesternut* refused to define a seizure by reference to a single factual occurrence, whether the fact be the pursuit itself or the actual apprehension of the suspect.<sup>101</sup> Instead, the Court applied *Mendenhall's* totality of the circumstances test<sup>102</sup> and concluded that the police conduct in question "was not 'so intimidating' that [the defendant] could reasonably have believed that he was not free to disregard the police presence and go about his business."<sup>103</sup> The Court ruled that because no seizure took place, the officers were not required to have a reasonable basis for following the defendants.<sup>104</sup> Therefore, the Court did not even consider whether the chase of the suspect was motivated by idle curiosity or by a legitimate government interest.

The next chase case to reach the Court, *Brower v. County of Inyo*,<sup>105</sup> involved a suspect who was killed when he crashed into a police roadblock following a high speed chase over approximately twenty miles.<sup>106</sup> The suspect's heirs brought a 42 U.S.C. § 1983<sup>107</sup> suit claiming that the police used brutal and unnecessary physical force in establishing the roadblock,<sup>108</sup> thereby effectuating an unreasonable

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<sup>98</sup> See *supra* text accompanying notes 82-83.

<sup>99</sup> *Chesternut*, 486 U.S. at 572.

<sup>100</sup> *Id.* at 576, 577 (Kennedy, J., dissenting); see *infra* text accompanying note 123.

<sup>101</sup> *Chesternut*, 486 U.S. at 574.

<sup>102</sup> See *supra* note 65 and accompanying text.

<sup>103</sup> *Chesternut*, 486 U.S. at 576.

<sup>104</sup> *Id.*

<sup>105</sup> 489 U.S. 593 (1989).

<sup>106</sup> *Id.* at 594.

<sup>107</sup> 42 U.S.C. § 1983 (1988) provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

<sup>108</sup> Petitioners alleged that the police "(1) caused an 18-wheel tractor-trailer to be placed across both lanes of a two-lane highway in the path of [the suspect's] flight; (2) 'effectively concealed' this roadblock by placing it behind a curve and leaving it unilluminated; and (3) positioned a police car, with its headlights on, between [the suspect's] oncoming vehicle and the truck, so that [the suspect] would be 'blinded' on his approach." *Brower*, 489 U.S. at 594.

seizure of the suspect.<sup>109</sup> The Ninth Circuit declined to address the reasonableness of the police conduct because it found that no seizure had taken place.<sup>110</sup> The court stated that “[p]rior to [the suspect’s] failure to stop voluntarily, his freedom of movement was never arrested or restrained, . . . [and h]e had a number of opportunities to stop his automobile prior to the impact.”<sup>111</sup> The Ninth Circuit held that there was no seizure during the chase itself and that any loss of liberty accompanying the crash was attributable to the suspect’s own actions in continuing to flee pursuing authorities.<sup>112</sup>

In reversing the decision of the Ninth Circuit, the Supreme Court cited *Garner*’s holding that a police officer’s fatal shooting of a fleeing suspect constitutes a Fourth Amendment seizure.<sup>113</sup> The Court stated that “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.”<sup>114</sup>

The actual holding of *Brower*—that a motorist is seized at the point that he is stopped by a police roadblock erected for the very purpose of stopping the motorist<sup>115</sup>—is not surprising. Rather, the controversial aspect of *Brower* arises from the Court’s affirmation<sup>116</sup> that no seizure occurred in another chase case, *Galas v. McKee*,<sup>117</sup> in which a fleeing suspect lost control of his vehicle and crashed during a high speed chase with the police. In deciding *Galas*, the Sixth Circuit noted that the suspect’s crash terminated his ability to walk away and held that “[t]his restraint on plaintiff’s freedom to leave . . . was not accomplished by the show of authority but occurred as a result of plaintiff’s decision to disregard it.”<sup>118</sup>

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<sup>109</sup> *Id.*

<sup>110</sup> *Brower v. County of Inyo*, 817 F.2d 540, 547 (9th Cir. 1987), *rev’d*, 489 U.S. 593 (1989).

<sup>111</sup> *Id.* at 546.

<sup>112</sup> *Id.* In *Jamieson v. Shaw*, 772 F.2d 1205, 1207 (5th Cir. 1985), the Fifth Circuit had referred to a similar arrangement as a “deadman” roadblock and held that the use of such a device did constitute a “seizure” within the meaning of the Fourth Amendment. Following the Ninth Circuit’s contrary holding in *Brower*, then, the Supreme Court granted certiorari in order to resolve the conflict among the circuits. *Brower*, 489 U.S. at 594-95.

<sup>113</sup> See *supra* notes 86-90 and accompanying text.

<sup>114</sup> *Brower*, 489 U.S. at 595.

<sup>115</sup> *Id.* at 599.

<sup>116</sup> *Id.* at 595.

<sup>117</sup> 801 F.2d 200, 202 (6th Cir. 1986).

<sup>118</sup> *Id.* at 203.



The Supreme Court agreed that no Fourth Amendment seizure occurred in *Galas* because the police “sought to stop the suspect only by the show of authority represented by flashing lights and continuing pursuit,”<sup>119</sup> whereas the suspect was in fact physically stopped “by a different means—his loss of control of his vehicle and the subsequent crash.”<sup>120</sup> *Galas* and *Brower* were distinguished on grounds that a seizure must be “not merely the result of government action but the result of the very means . . . that the government selected.”<sup>121</sup> While *Brower* had been stopped by a police roadblock erected for the very purpose of stopping him, it was not police conduct, but *Galas*’ own erratic driving, that caused his crash. Thus, if *Brower* had swerved into a roadside ditch instead of crashing directly into the roadblock, he would have fallen under the parameter of *Galas* and would not have been seized for purposes of the Fourth Amendment. By focusing on the immediate cause of each stop of a suspect, which in one case was fatal, the Court implicitly rejected the contention that a seizure occurred prior to the stop or when the chase began.<sup>122</sup>

Justice Scalia’s majority opinion in *Brower* sought to complete the task begun by he and Justice Kennedy in *Chesternut*: eliminate chases from the lexicon of Fourth Amendment seizures.<sup>123</sup> In *Chesternut* the two Justices maintained that “[i]t 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.”<sup>124</sup> The Kennedy/Scalia rationale did not prevail in *Chesternut*<sup>125</sup> and, when it reappeared in *Brower*, a four person concurrence challenged it as dicta

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<sup>119</sup> *Brower*, 489 U.S. at 597.

<sup>120</sup> *Id.* at 597.

<sup>121</sup> *Id.* at 597-98.

<sup>122</sup> In *Brower*, the Court “did not even consider the possibility that a seizure could have occurred during the course of the chase because, as [it] explained, that ‘show of authority’ did not produce [the] stop.” *California v. Hodari D.*, 499 U.S. 621, 111 S. Ct. 1547, 1552 (1991). *But see* *People v. Washington*, 236 Cal. Rptr. 840, 843 (Ct. App. 1987) (“Giving chase after an individual in a manner designed to overtake and detain or encourage the individual to give up his flight is a detention.”); *In re D.J.*, 532 A.2d 138, 140 (D.C. 1987) (“When the chase commences, the stop has begun.”); *Commonwealth v. Thibeau*, 429 N.E.2d 1009, 1010 (Mass. 1981) (“[A] stop starts when pursuit begins.”).

<sup>123</sup> *See* *Michigan v. Chesternut*, 486 U.S. 567, 577 (1988) (Kennedy, J., concurring) (“[N]either ‘chase’ nor ‘investigative pursuit’ need be included in the lexicon of the Fourth Amendment.”).

<sup>124</sup> *Id.*

<sup>125</sup> The majority left “to another day the determination of the circumstances in which police pursuit could amount to a seizure under the Fourth Amendment.” *Id.* at 576 n.9.

“designed to decide a number of cases not before the Court.”<sup>126</sup> However, the issue came squarely before the Court two years later in *California v. Hodari D.*,<sup>127</sup> when a fleeing suspect discarded drugs which were retrieved by the pursuing police officer.<sup>128</sup>

The chase in *Hodari* began when a group of youths fled at the approach of an unmarked police car.<sup>129</sup> An officer left the car in an attempt to cut off the defendant’s escape and, through a circuitous route, came face-to-face with the defendant.<sup>130</sup> Immediately prior to being tackled to the ground, the defendant discarded a small quantity of crack cocaine.<sup>131</sup> The California Court of Appeals suppressed the cocaine as the fruit of an illegal seizure after finding that the defendant “had been ‘seized’ when he saw [the officer] running towards him, [and] that this seizure was unreasonable under the Fourth Amendment” because the State conceded that the officer did not have the reasonable suspicion required to justify stopping the defendant.<sup>132</sup>

In determining the constitutional dimensions of a seizure, the United States Supreme Court reversed the California court by applying the common law definitions of arrest.<sup>133</sup> According to common law, “[a]n arrest requires *either* physical force . . . *or*, where that is absent, *submission* to the assertion of authority.”<sup>134</sup> Neither factual predicate was met in *Hodari* until the officer tackled the suspect. The officer’s initial pursuit did not constitute a seizure by physical force because the defendant “was untouched by [the officer] at the time he discarded the cocaine.”<sup>135</sup> *Hodari* argued that the officer’s pursuit satisfied the *Mendenhall* test for a Fourth Amendment seizure or a show of authority which would cause a reasonable person to believe that he was not free to leave.<sup>136</sup> However, the Court held that no Fourth Amendment seizure

<sup>126</sup> *Brower*, 489 U.S. at 600 (Stevens, J., concurring).

<sup>127</sup> 499 U.S. 621, 111 S. Ct. 1547 (1991).

<sup>128</sup> 111 S. Ct. at 1549.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 1549. The Supreme Court took a gratuitous slap at the State’s concession. “That it would be unreasonable to stop, for brief inquiry, young men who scatter in panic upon the mere sighting of the police is not self-evident, and arguably contradicts proverbial common sense.” *Id.* at 1549 n.1 (citing *Proverbs* 28:1 (“[T]he wicked flee when no man pursueth.”)).

<sup>133</sup> *Id.* at 1549-50.

<sup>134</sup> *Id.* at 1551.

<sup>135</sup> *Id.* at 1550.

<sup>136</sup> *Id.* at 1551.

occurs until the defendant yields to a show of authority.<sup>137</sup> *Mendenhall's* show of authority requirement was identified as "a necessary, but not a sufficient condition for seizure."<sup>138</sup> The remaining necessary condition is the defendant's submission to the show of authority.

Finally, the *Hodari* Court refused, "even as a policy matter, to stretch the Fourth Amendment beyond its words and beyond the meaning of arrest . . . . Street pursuits always place the public at some risk, and compliance with police orders to stop should therefore be encouraged."<sup>139</sup> After presuming that only a few police orders to stop would be issued without adequate justification, the Court offered assurances that unlawful orders to stop, when obeyed, could be adequately deterred through application of the exclusionary rule.<sup>140</sup>

The history of the chase cases suggests that the Court intends to achieve its agenda for enhancing police power by whatever means are necessary.<sup>141</sup> If attempted seizures can be excluded from Fourth Amendment coverage by returning to pre-*Terry* concepts of common law arrests, the Court appears willing to embrace conservative dogma and return to common law traditions that influenced the constitutional framers' original intent. It is unclear, however, which one of several competing common law traditions was ultimately embraced by the framers.<sup>142</sup> Although the present Court appears to be most comfortable espousing a conservative methodology for enhancing police power, when necessary to achieve its purposes the Court is willing to boldly go where no Court has gone before. Excluding accidental seizures<sup>143</sup> from the amendment's coverage necessitated a break with precedent<sup>144</sup> and a peculiar analysis

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<sup>137</sup> "The narrow question before us is whether, with respect to a show of authority . . . , a seizure occurs even though the subject does not yield. We hold that it does not." *Id.* at 1550.

<sup>138</sup> *Id.* at 1551; see also *Carter v. Buscher*, 973 F.2d 1328, 1333 (7th Cir. 1992) ("[A] seizure requires not only that the reasonable person feel that he is not free to leave, but also that the subject actually yield to a show of authority from the police or be physically touched by the police.")

<sup>139</sup> *Hodari*, 499 U.S. 621, 111 S. Ct. at 1551.

<sup>140</sup> 111 S. Ct. at 1551.

<sup>141</sup> See Wayne R. LaFave, *Fourth Amendment Vagaries (Of Improbable Cause, Imperceptible Plain View, Notorious Privacy, and Balancing Askew)*, 74 J. CRIM. L. & CRIMINOLOGY 1171, 1222 (1983) (referring to the nine search and seizure cases decided by the Court during October of 1982, the author stated that "it is almost as if a majority of the Court was hell-bent to seize any available opportunity to define more expansively the constitutional authority of law enforcement officials.")

<sup>142</sup> See *infra* notes 180-86 and accompanying text.

<sup>143</sup> See *supra* text accompanying notes 113-22.

<sup>144</sup> Considerable precedent had established the Court's refusal to inquire into a police

of the police officer's intent to capture by particular means. Whether applying conservative or liberal ideology, the Court has erred in excluding attempted and accidental seizures from Fourth Amendment coverage.

### III. ACCIDENTAL SEIZURES

Applying the *Katz* approach to Fourth Amendment coverage to accidental seizures of a person would require that the Court identify the extent to which citizens legitimately expect that they will not be exposed to accidental injury at the hands of the police.<sup>145</sup> The average citizen would likely agree with the Court's recognition that police are not perfect, and that "room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men . . ." <sup>146</sup> The average citizen, however, might be surprised to learn that the police no longer need to act reasonably when they lack the intent to harm a particular citizen in a particular way, because, in such a case, the citizen is not seized under the Fourth Amendment. For example, the Fourth Amendment is inapplicable when the police shoot an innocent bystander, so long as the shot was *intended* to stop a criminal suspect.<sup>147</sup>

#### A. *Brower v. County of Inyo* and *Objective vs. Subjective Intent*

The *Brower v. County of Inyo*<sup>148</sup> Court insisted that the Fourth Amendment does not encompass "the accidental effects of otherwise lawful government conduct."<sup>149</sup>

It is clear . . . 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* termina-

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officer's subjective intent and its insistence that searches and seizures must be evaluated from an objective perspective. *See, e.g., Graham v. Connor*, 490 U.S. 386, 397 (1989) (holding that subjective motivations of the individual officers have no bearing on whether a particular seizure is unreasonable).

<sup>145</sup> *See supra* text accompanying note 35.

<sup>146</sup> *Brinegar v. United States*, 338 U.S. 160, 176 (1949), *cited with approval in Illinois v. Rodriguez*, 497 U.S. 177, 186 (1990).

<sup>147</sup> *Rucker v. Harford County, Md.*, 946 F.2d 278 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 1175 (1992).

<sup>148</sup> 489 U.S. 593 (1989).

<sup>149</sup> *Id.* at 596.

tion 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*.<sup>150</sup>

The difficulty of translating this cumbersome language into a constitutional principle is exacerbated by the Court's failure to define the type of intent required for a seizure.

In common usage, the word "intention" "simply indicates what one proposes to do or accomplish."<sup>151</sup> In keeping with this meaning, the majority opinion in *Brower* contains a number of terms that connote a subjective state of mind: "willful" detention; results which are "desired," "sought," and "meant"; "designed" and "selected" means.<sup>152</sup> Having authored an opinion replete with allusions to the police officer's subjective state of mind, Justice Scalia then proclaimed that he did not think it "practicable" to inquire into subjective intent.<sup>153</sup> The concurring Justices commended their colleague for avoiding inquiries into subjective intent, although they questioned his introduction of the "concept of objective intent" as a standard for determining Fourth Amendment seizures.<sup>154</sup>

It is not clear that Justice Scalia was formulating a concept of objective intent in *Brower* because he neither employed the term in his majority opinion, nor did he contest or endorse the concurring opinion's use of the term.<sup>155</sup> If objective intent is in fact the new litmus test for Fourth Amendment seizures, this author is unable to locate any clarification of the term itself<sup>156</sup> or any prior discussion by the Court of what role objective intent plays in defining Fourth Amendment seizures. "The reported cases all seem to look to subjective intent. However, the distinction between subjective and objective intent was not in issue in any of those cases."<sup>157</sup>

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<sup>150</sup> *Id.* at 596-97.

<sup>151</sup> WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1176 (Unabridged ed. 1986) [hereinafter WEBSTER'S].

<sup>152</sup> *Brower*, 489 U.S. at 596-99.

<sup>153</sup> *Id.* at 598.

<sup>154</sup> *Id.* at 600 (Stevens, J., concurring).

<sup>155</sup> *Id.* at 594-600 (majority opinion).

<sup>156</sup> See Thomas Clancy, *The Future of Fourth Amendment Seizure Analysis After Hodari D. and Bostick*, 28 AM. CRIM. L. REV. 799, 841 (1991) ("*Brower* demonstrates that the intent to seize is measured objectively but does not specify how that is to be done."). It may be that Justice Scalia is still in the early stages of formulating a more explicit concept of objective intent. During oral arguments in *Hodari*, the Justice "asked counsel what he thought the words 'intentional acquisition of control' in (*Brower*) meant." *Arguments Heard: California v. Hodari D.*, 48 Crim. L. Rep. (BNA) 3131 (Feb. 6, 1991).

<sup>157</sup> *Keller v. Frink*, 745 F. Supp. 1428, 1431 (S.D. Ind. 1990).

Objective intent can best be analogized to the required intent in pretext arrest cases. In these cases, lower courts have focused upon objective facts in establishing probable cause for the arrest, as distinguished from those subjective factors which actually prompted the individual officer to seize the suspect.<sup>158</sup> A clear distinction exists between objective facts upon which a reasonably prudent officer *might* have acted (a hypothetical construct) and subjective factors which *in reality* motivated an individual officer. This distinction between subjective and objective intent, however, is more difficult to comprehend in light of the general understanding that the term "intent" betokens an existing state of mind rather than a hypothetical construct.<sup>159</sup>

The ambiguities in the *Brower* opinion suggest at least three plausible readings of Justice Scalia's allusions to intent. First, despite his disclaimer, the Justice is in fact addressing subjective intent as a requirement for Fourth Amendment seizures.<sup>160</sup> Second, the Justice is formulating a requirement for subjective intent, but is suggesting that the "practicable" way to proceed is to examine the objective circumstances from which subjective intent may be inferred. Third, in place of an inquiry into subjective intent, the Justice is requiring that the Court examine the objective circumstances in order to determine whether a reasonably prudent officer would have realized that his action would result in a seizure.<sup>161</sup>

### B. "Intentional Means" vs. "Intended Results" and Historical Origins

In addition to leaving unresolved the issue of the correct definition and application of objective intent, the Court in *Brower* creates another puzzle in its attempt to formulate a constitutional distinction between an intended result and the intended means of achieving that result. The following hypothetical

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<sup>158</sup> See, e.g., *United States v. Smith*, 799 F.2d 704, 708 (11th Cir. 1986) ("the proper inquiry is whether a reasonable officer *would* have made the seizure in the absence of illegitimate motivation"). See generally John Burkoff, *The Pretext Search Doctrine: Now You See It, Now You Don't*, 17 U. MICH. J.L. REF. 523 (1984) (analyzing application of the objective standard to pretextual search and seizure cases); James Haddad, *Pretextual Fourth Amendment Activity: Another Viewpoint*, 18 U. MICH. J.L. REF. 639 (1985) (discussing treatment of pretext cases by the United States Supreme Court).

<sup>159</sup> WEBSTER'S, *supra* note 151, at 1176.

<sup>160</sup> See *Roach v. City of Fredericktown*, 882 F.2d 294, 296 (8th Cir. 1989) (a post-*Brower* case omitting any discussion of objective intent and holding that no seizure took place because the officer did not intend for his pursuit of the suspect to end by reason of the suspect's collision with an on-coming car).

<sup>161</sup> In the absence of clear guidance as to which of these possible definitions is appropriate, the remainder of this Article addresses both a subjective intent to seize and a reasonably prudent officer's perception of whether a seizure has taken place.

illustrates the problems that the Court's use of the concepts of "intentional means" and "intended results" creates.<sup>162</sup> Assume that the pursuing officer in *Brower* did not order a roadblock, but instead intended to continue the chase until his show of authority convinced the suspect to stop voluntarily. Assume further that in the course of the chase, the officer rounded a blind curve and crashed into the suspect's vehicle, which had stopped due to mechanical failure.

The hypothetical poses the question of whether the Fourth Amendment applies to a result which was not achieved in the precise manner that the government agent intended. *Brower* appears to exclude this type of situation from Fourth Amendment coverage because of the absence of a perfect match between the intended means and the actual means of terminating the suspect's freedom of movement.<sup>163</sup> Had the suspect stopped his car because of the intimidation created by the chase, the intended means and the actual means of apprehension would have coincided and, based on the Court's interpretation of previous chase cases, a seizure would have occurred.<sup>164</sup> Similarly, had the police meant to collide with the suspect's vehicle, a seizure would have occurred because there would again be a perfect match between intent and result.<sup>165</sup> Under

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<sup>162</sup> See *supra* text accompanying note 150.

<sup>163</sup> In a broad sense, the police set an instrumentality (the police car) into motion for the purpose of stopping the suspect. But, in a narrow sense, the police car was intended to intimidate the suspect, not to run him over. As the *Brower* Court noted, "In marked contrast to a police car pursuing with flashing lights, . . . a roadblock is not just a significant show of authority to induce a voluntary stop, but is designed to produce a stop by physical impact if voluntary compliance does not occur." *Brower*, 489 U.S. at 598.

An additional example is Justice Scalia's hypothetical involving a serial murderer running away from two pursuing constables. The suspect is apprehended when "a parked and unoccupied police car slips its brake and pins [the fleeing suspect] against a wall." *Id.* at 596. Justice Scalia maintained that this unintended method of terminating the suspect's freedom of movement would not constitute a seizure. *Id.* Therefore, the result would be the same in the "mechanical failure" hypothetical, as well.

<sup>164</sup> See *id.* at 597. The *Brower* Court also discussed *Hester v. United States*, 265 U.S. 57 (1924), which involved a revenue agent's pursuit of suspects in possession of moonshine whiskey. During their flight, the suspects dropped the containers, which the agent recovered. A unanimous Court in *Hester* held that "there was no seizure in the sense of the law when the officers examined the contents of each [container] after it had been abandoned." *Id.* at 58. The *Brower* Court suggested that the result in *Hester* "would have been quite different, of course, if the revenue agent had shouted 'Stop and give us those bottles, in the name of the law!'" *Brower*, 489 U.S. at 597. According to the *Brower* Court, "[t]hen the taking of possession would have been not merely the result of government action but the result of the very means (the show of authority) that the government selected, and a Fourth Amendment seizure would have occurred." *Id.* at 597-98.

<sup>165</sup> See *Brower*, 489 U.S. at 597 (if a police vehicle "had pulled alongside the fleeing

the facts of the hypothetical above, however, the officer's physical collision with the suspect is contrary to the officer's intent to intimidate the suspect into stopping voluntarily. Thus, according to *Brower*, no seizure has occurred because the intended means did not match the actual means of terminating the suspect's freedom of movement.<sup>166</sup>

As justification for its novel treatment of intentional means and accidental seizures,<sup>167</sup> the *Brower* Court opined that the Fourth Amendment encompasses a willful "detention or taking" and a "misuse of power," but "not the accidental effects of otherwise lawful conduct."<sup>168</sup> Once again, however, the Court neglected to define its terminology. The term "willful detention" could possibly encompass any detention resulting from a volitional act (for example, a willed bodily movement);<sup>169</sup> however, this mundane requirement of volitional conduct adds nothing new to the amendment's jurisprudence and says nothing at all about the accidental or intentional results of deliberate conduct by a government official.<sup>170</sup> After all, the hypothetical posits a

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car and sideswiped it, producing the crash, then the termination of the suspect's freedom of movement would have been a seizure").

<sup>166</sup> The Court observed that the officers in *Galas v. McKee*, 801 F.2d 200 (6th Cir. 1986); *supra* notes 116-22 and accompanying text, "sought to stop the suspect only by the show of authority represented by flashing lights and continuing pursuit[.]" whereas the suspect was actually "stopped by a different means—his loss of control of his vehicle and the subsequent crash." *Brower*, 489 U.S. at 597.

<sup>167</sup> Prior to *Brower*, the Court considered a form of unintended search and seizure under the rubric of inadvertent plain view. A plurality of the Court in *Coolidge v. New Hampshire*, 403 U.S. 443, 446 (1971), suggested that an anticipated (i.e., intended) plain view seizure may taint otherwise lawful actions by the police. However, in promulgating a constitutionally significant link between intended seizures and otherwise lawful conduct, *Coolidge* did not address the reverse question of whether there is a similarly significant relationship between unintended seizures and otherwise unlawful conduct. The full ramifications of the plain view doctrine's "inadvertence" requirement were never addressed by the Supreme Court and the inadvertence requirement was later abandoned in *Horton v. California*, 496 U.S. 128, 138-42 (1990).

<sup>168</sup> *Brower*, 489 U.S. at 596.

<sup>169</sup> There is general agreement that an act should be defined as a movement of a part of the body. See OLIVER W. HOLMES, *THE COMMON LAW* 54 (Boston, Little, Brown and Company 1938) (1881) ("[An act] is a muscular contraction, and something more."); MODEL PENAL CODE § 1.13(2) (1962) ("bodily movement whether voluntary or involuntary"); RESTATEMENT (SECOND) OF TORTS § 2 (1965) ("The word 'act' is used . . . to denote an external manifestation of the actor's will and does not include any of its results, even the most direct, immediate, and intended.").

<sup>170</sup> The amendment restricts only those searches and seizures conducted by government officials. *Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602, 614 (1989) ("[T]he Fourth Amendment does not apply to a search or seizure, even an arbitrary one, effected by a private party on his own initiative . . ."); see also *Walter v. United States*, 447 U.S. 649, 656 (1980) ("a wrongful search or seizure conducted by a private



detention resulting from the officer's volitional conduct in chasing the suspect.<sup>171</sup>

More than volitional conduct is at issue if the terms "willful detention," "misuse of power," or "otherwise lawful conduct" are construed to require that the officer or a reasonably prudent officer be aware that he is unlawfully intruding upon the suspect's liberty interests.<sup>172</sup> It is unlikely that such a construction is the Court's intent, for such an interpretation merely reduces the Fourth Amendment to a prohibition of calculated efforts to violate the Constitution. While *United States v. Leon*<sup>173</sup> created a good faith exception to the amendment's exclusionary rule,<sup>174</sup> the scope of the amendment has never been contingent upon an officer's good or bad intentions.<sup>175</sup>

The *Brower* Court's attempt to distinguish accidental seizures from willful detentions is further flawed by the Court's declaration that the amendment does not address the "accidental effects of otherwise lawful conduct."<sup>176</sup> This assertion is either a mere tautology or a slight of hand machination which assumes away the very issue under consideration. When there is no "unlawful" intrusion upon privacy or liberty, there is no constitutional violation which can contaminate the physical seizure of citizens or their property. Once a court determines that police conduct is constitutionally lawful, it is constitutionally irrelevant whether the effects of that conduct are accidental or intentional.<sup>177</sup>

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party does not violate the Fourth Amendment"); *Burdeau v. McDowell*, 256 U.S. 465, 467 (1921) ("the Fourth Amendment protects only against searches and seizures which are made under governmental authority"), *overruled on other grounds by* *Elkins v. United States*, 364 U.S. 206 (1960).

<sup>171</sup> The detention also results from the suspect's volitional conduct in seeking to avoid apprehension. The allocation of responsibility between the police and the suspect, both of whom played an active role in bringing about the seizure, is discussed in *Bacigal*, *supra* note 80, at 100.

<sup>172</sup> See *supra* text accompanying note 168.

<sup>173</sup> 468 U.S. 897 (1984).

<sup>174</sup> *Id.* at 926.

<sup>175</sup> See *Graham v. Connor*, 490 U.S. 386, 397 (1989) ("An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional."); see also *Tennessee v. Garner*, 471 U.S. 1, 21 (1985) (holding that the seizure was unreasonable despite the officer's reliance upon legal precedents and his good faith belief in the legality of using deadly force).

<sup>176</sup> *Brower v. County of Inyo*, 489 U.S. 593, 596 (1989) (emphasis added).

<sup>177</sup> See *Horton v. California*, 496 U.S. 128, 140 (1990) (Eliminating the inadvertence requirement from the plain view doctrine, the court stated that "no additional Fourth Amendment interest is furthered by requiring that the discovery of evidence be

The *Brower* Court's reference to lawful conduct fails to distinguish between police conduct which is constitutionally lawful because there has been no intrusion upon a privacy or liberty interest (the Fourth Amendment's threshold question) and conduct which is lawful because the intrusion is reasonable (the Fourth Amendment's substantive question). If the latter situation applied in *Brower*, then the Court bypassed the threshold question of the amendment's scope by proceeding directly to an analysis of the reasonableness of the government's conduct.<sup>178</sup> If the former situation applied, *Brower* failed to define a seizure independent of the ultimate question of the seizure's lawfulness or reasonableness. By merging the amendment's threshold and substantive questions in an obscure allusion to "otherwise lawful government conduct,"<sup>179</sup> the Court fails to explain why the scope of the Fourth Amendment does not extend to situations where a police officer's conduct, whether ultimately reasonable or unreasonable, results in an accidental intrusion upon the suspect's freedom of movement.

The only justification offered by the Court for excluding accidental seizures from Fourth Amendment coverage was the historically accurate observation that "[t]he writs of assistance that were the principle grievance against which the Fourth Amendment was directed . . . did not involve unintended consequences of government action."<sup>180</sup> The Court's reading of history, however, does not resolve the issue of accidental seizures. While condemning the intentional seizures associated with writs of assistance, the constitutional framers were never called upon to consider the question of accidental seizures. Given the climate of hostility surrounding writs of assistance and general warrants, it is doubtful that

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inadvertent.").

<sup>178</sup> Oral arguments in *Brower* demonstrate the Court's tendency to blur the existence of a seizure with the reasonableness of that seizure. During presentation of the plaintiff's argument, counsel made it clear that he preferred not to explore the ultimate reasonableness of the seizure. *Arguments Heard: Brower v. County of Inyo*, 44 Crim. L. Rep. (BNA) 4149 (Feb. 1, 1989). However,

[p]eppered with questions about this issue from the very beginning of his presentation, counsel was at pains to assure the justices [sic] that the question was not before them at this time and a reversal of the lower court's decision would mean only that the reasonableness of the seizure could finally be put to the test.

*Id.* at 4149. When the Justices continued to raise questions about the reasonableness of the seizure, counsel pleaded: "All we want, . . . is for you to say that there was a seizure here so that we can explore the question of reasonableness." *Id.* at 4150.

<sup>179</sup> *Brower*, 489 U.S. at 596.

<sup>180</sup> *Id.* (citations omitted).

the framers would endorse the Court's view that no seizure took place in *Galas*.<sup>181</sup> when the suspect crashed while trying to avoid the police.

One of the most "odious features of writs of assistance [was] the unbridled discretion given public officials to choose targets of the searches."<sup>182</sup> Our founding fathers sought protection against the arbitrary exercise of governmental power as well as protection against intentional misconduct by government officials.<sup>183</sup> Either intentional or arbitrary misconduct may result in harm to citizens and, although the link between creation of risk and realization of harm is often fortuitous, the government's freedom to engage in certain conduct is initially restricted in order to avoid potential harm to citizens. When the framers of the Fourth Amendment guaranteed "the right of the people to be secure . . . against unreasonable searches and seizures,"<sup>184</sup> they were not equating the reasonableness of police pursuit with the absence of malicious intent.<sup>185</sup> It is fallacious to impute to the framers a desire to confine the Fourth Amendment to a prohibition of only the most egregious abuses associated with eighteenth century writs of assistance. In light of the Court's acknowledgement that it "has not simply frozen into constitutional law those law enforcement practices that existed at the time of the Fourth

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<sup>181</sup> See *supra* text accompanying notes 117-18. If the facts of *Galas* could have been considered at the time of the writs of assistance controversy, they may have been as follows. A customs inspector directs a royal frigate to stop and board a colonial merchant vessel. In response to the chase, the merchant vessel flees into shallow waters where it crashes on a reef, causing the demise of the crew. Would the founding fathers have been content to ignore the incident because the customs inspector meant no physical harm to the merchant? Or would they have demanded to know the customs inspector's justification for initiating the pursuit of the merchant?

<sup>182</sup> Shirley Hufstедler, *Invisible Searches for Intangible Things: Regulation of Governmental Information Gathering*, 127 U. PA. L. REV. 1483, 1487 (1979).

<sup>183</sup> See Lewis Katz, *Reflections on Search and Seizure and Illegally Seized Evidence in Canada and the United States*, 3 CANADA-U.S. L.J. 103, 109-14 (1980) (the Fourth Amendment proscribed the broad intrusions associated with general warrants and writs of assistance and replaced them with limited intrusions based upon probable cause, the warrant requirements, and an overall requirement of reasonableness); see also Arnold Loewy, *The Fourth Amendment as a Device for Protecting the Innocent*, 81 MICH. L. REV. 1229, 1236 (1983) ("Virtually every significant prerevolutionary search or seizure involved a nonspecific or arbitrarily obtained warrant.").

<sup>184</sup> U.S. CONST. amend. IV.

<sup>185</sup> *E.g.*, *Illinois v. Rodriguez*, 497 U.S. 177, 185-86 (1990) ("It is apparent that in order to satisfy the 'reasonableness' requirement of the Fourth Amendment, what is generally demanded of the many factual determinations that must regularly be made by agents of the government . . . is not that they always be correct, but that they always be reasonable.").

Amendment's passage,"<sup>186</sup> the Court must look beyond specific historical practices in order to discern the broader purposes underlying the creation of the amendment.

C. *The Brower Connection Between Governmental Action and Loss of Liberty*

According to *Katz v. United States*<sup>187</sup> and *Terry v. Ohio*,<sup>188</sup> the fundamental purposes of the amendment are reflected in the twin predicates that trigger its application—(1) intrusions upon privacy or liberty interests that are (2) brought about by governmental action.<sup>189</sup> Both predicates are met when our hypothetical police officer unintentionally crashes into the suspect's vehicle, thereby bringing about a convergence of government action and a resulting intrusion upon the citizen's liberty interests. The *Brower* court surpassed the principles of *Katz* and *Terry* when it suggested that the concurrence of these twin predicates does not constitute a seizure unless the two predicates are linked by an intent to bring about the intrusion "through means intentionally applied."<sup>190</sup> While the Court undoubtedly assumed in *Katz* and *Terry* that the predicates must be linked in some fashion, the Court never addressed the nature of that union. *Brower* is the first Supreme Court case to focus upon the causal connection between governmental action and loss of liberty, and the first case to suggest that the government agent's intent is the vital connection between the two.<sup>191</sup>

The absence of clear precedent<sup>192</sup> for the holding in *Brower* invites speculation as to what prompted the Court to create a requirement that seizures be brought about "through means intentionally applied."<sup>193</sup>

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<sup>186</sup> *Payton v. New York*, 445 U.S. 573, 591 n.33 (1980); see also *Weems v. United States*, 217 U.S. 349, 373 (1910) ("Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. . . . In the application of a constitution, therefore, our contemplation cannot be only of what has been but of what may be.").

<sup>187</sup> 389 U.S. 347 (1967).

<sup>188</sup> 392 U.S. 1 (1968).

<sup>189</sup> See *Amsterdam*, *supra* note 36, at 382-84.

<sup>190</sup> *Brower*, 489 U.S. at 597.

<sup>191</sup> *Id.* at 596-97.

<sup>192</sup> See *Daniels v. Williams*, 474 U.S. 327, 328 (1986) (holding that the Due Process Clause is not implicated by a negligent act of an official causing *unintended* loss of or injury to life, liberty, or property). *Brower*, however, addressed the *unintended* means of bringing about an *intended* loss of liberty. *Brower*, 489 U.S. at 597.

<sup>193</sup> *Brower*, 489 U.S. at 597.

Perhaps the *Brower* Court balked at the prospect of extending the Fourth Amendment to accidental seizures and potentially further punishing the constable for well-intentioned blunders. On the other hand, if the Court's hostility to the exclusionary rule<sup>194</sup> or its reluctance to extend 42 U.S.C. § 1983 to encompass mere negligence<sup>195</sup> influenced its decision in *Brower*, then the Court has lost sight of its limited role of defining the threshold requirements for a seizure. Merely acknowledging that the threshold may be crossed by accidental intrusions upon liberty does not commit the Court to punishing the police for accidents. The coverage of the amendment is only the preliminary inquiry, while the reasonableness of the officer's conduct, the application of the exclusionary rule, and compensation under § 1983 remain separate issues for the Court to address.<sup>196</sup>

If, for example, our hypothetical police officer's crash into the suspect's vehicle were classified as a seizure, the reasonableness of that seizure would hinge upon striking the appropriate balance between the justification for the chase and the potential threat that the chase poses to the suspect's liberty.<sup>197</sup> In the event that the balance is struck in favor of the governmental interest underlying the officer's pursuit, the Court could sanction the reasonableness of his actions. The Court should do so, however, by issuing a limited ruling that condones only this *particular* specimen of accidental seizure. A decision on the substantive reasonableness of a specific form of accidental seizure is fundamentally distinct from *Brower's* universal dictate that the Fourth Amendment never encompasses the unintended consequences of government action. Applying *Brower's* inflexible constitutional dogma to our hypothetical results in the startling conclusion that because the officer did not intend to stop the suspect by the resulting method, no seizure of a person occurred,

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<sup>194</sup> See *infra* note 264 and accompanying text. Although the exclusionary rule is not germane in § 1983 cases such as *Brower*, the constitutional definition of a seizure is applicable to both § 1983 cases and to criminal prosecutions. See *Brower*, 489 U.S. at 595-97 (citing both a criminal case, *Hester v. United States*, 265 U.S. 57 (1924), and a § 1983 case, *Tennessee v. Garner*, 471 U.S. 1 (1985), to support a generic definition of accidental seizures). Since this seizure definition applies to criminal prosecutions, the definition affects the operation of the exclusionary rule. See *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 450 (1990) (citing *Brower's* definition of a seizure within the context of sobriety checkpoints).

<sup>195</sup> See *infra* note 211.

<sup>196</sup> A determination of seizure involves the Court in second-tier issues, such as reasonableness. For example, see *Roach v. City of Fredericktown*, 882 F.2d 294, 297 (8th Cir. 1989), and *Britt v. Little Rock Police Dep't*, 721 F. Supp. 189, 195 (E.D. Ark. 1989), where both courts assumed that a seizure took place and upheld the reasonableness of the seizure.

<sup>197</sup> See *supra* note 196.

even though the officer ran over and killed the very suspect whom the officer was pursuing.

The Court can avoid such nonsensical results by discarding the *Brower* majority's categorical rejection of accidental seizures in favor of the concurring opinion's recognition that "[t]he intentional acquisition of physical control of something is no doubt a characteristic of the typical seizure, but [it is not clear] that it is an essential element of every seizure or that this formulation is particularly helpful in deciding close cases."<sup>198</sup> The concurring Justices refused to join the majority in elevating a characteristic of a typical seizure to the level of a constitutional prerequisite for application of the Fourth Amendment.<sup>199</sup> Unlike the majority opinion, the concurring opinion holds open the possibility of extending the amendment to the atypical accidental seizure whenever necessary to achieve the primary goals of the amendment.<sup>200</sup>

Consider the differing results when the respective approaches of *Brower*'s majority and concurring opinions are applied to our hypothetical, with one last fact added to the situation. Assume that the police officer initiated the chase of the suspect because the officer did not approve of a political bumper sticker on the suspect's vehicle. According to the *Brower* majority, if the officer had intended to run over the suspect, a seizure would occur and *Tennessee v. Garner*<sup>201</sup> would require the Court to balance the *intentional* use of deadly force against the justification for using the force.<sup>202</sup> Under the facts of this hypothetical, however, the officer intended to chase the suspect but did not intend to run over her. Thus, the resulting *accidental* use of deadly force remains beyond the scope of the Fourth Amendment and beyond the scope of judicial review.<sup>203</sup> The *Brower* majority would refuse to

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<sup>198</sup> *Brower v. County of Inyo*, 489 U.S. 593, 600 (1989) (Stevens, J., concurring).

<sup>199</sup> *Id.* at 600-01.

<sup>200</sup> *Id.* Accidental seizures may be atypical, but they are not rare. Numerous accidental injuries arise from the countless incidents in which the state and its citizens interact. *See, e.g., Landol-Rivera v. Cruz Cosme*, 906 F.2d 791 (1st Cir. 1990) (bullet intended for fleeing suspect struck the suspect's hostage); *Roach*, 882 F.2d at 294 (police pursuit of fleeing felon caused the felon to collide with an innocent citizen's vehicle); *Fernandez v. Leonard*, 784 F.2d 1209 (1st Cir. 1986) (shooting of a kidnap victim during pursuit of kidnappers); *Grandstaff v. City of Borger*, 767 F.2d 161 (5th Cir. 1985) (officers mistook innocent victim for a fugitive and killed him); *Britt*, 721 F. Supp. at 189 (citizen killed in car crash following a police officer's pursuit of a car thief).

<sup>201</sup> 471 U.S. 1 (1985).

<sup>202</sup> *Brower*, 489 U.S. at 597.

<sup>203</sup> Absent a violation of the Fourth Amendment, the Court may not invoke its supervisory powers to exclude evidence obtained by offensive police conduct. United

entertain allegations of a blatantly unjustified exercise of deadly force so long as the officer "didn't mean" to hurt anyone. By attaching so much significance to intent, the *Brower* majority ignored the maxim, "Though boys throw stones at frogs in jest, the frogs die in earnest." Regardless of the officer's intent, the injury caused to the suspect is within the risks that the constitutional prohibition against unreasonable seizures seeks to avoid, and thus within the scope of the Fourth Amendment. Applying the *Katz* terminology,<sup>204</sup> "the interest in freedom from bodily harm surely qualifies as an interest in liberty"<sup>205</sup> and undoubtedly qualifies as a legitimate expectation of the citizenry.

In contrast to the *Brower* majority's view of intentional seizures, the concurring opinion suggests that an examination of the officer's intent "adds little to the well-established rule that '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.'"<sup>206</sup> In our hypothetical situation, it is obvious that a person who has been run over by a police cruiser would reasonably perceive that his freedom of movement has been constrained. Having crossed this threshold requirement for the establishment of a seizure, the concurring opinion would examine the substantive reasonableness of the seizure by balancing the suspect's loss of liberty (death) against the underlying justification for the chase (the officer's disdain for the bumper sticker). The *Brower* majority's refusal to examine the underlying justification for police pursuit sanctions what the Court in *Terry v. Ohio* condemned—the government's attempts "to isolate from constitutional scrutiny the initial stages of the contact between the policeman and the citizen."<sup>207</sup>

Exempting law enforcement officials from any requirement to justify pursuit culminating in an accidental seizure impedes the Fourth Amendment's twin goals of avoiding certain harms to citizens<sup>208</sup> and of

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States v. Payner, 447 U.S. 727, 733 (1980). "All claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach." *Graham v. Connor*, 490 U.S. 386, 395 (1989).

<sup>204</sup> See *supra* notes 30-35 and accompanying text.

<sup>205</sup> *Daniels v. Williams*, 474 U.S. 327, 341 (1986) (Stevens, J., concurring).

<sup>206</sup> *Brower*, 489 U.S. at 600 (Stevens, J., concurring) (quoting *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (opinion of Stewart, J.)).

<sup>207</sup> *Terry v. Ohio*, 392 U.S. 1, 17 (1968).

<sup>208</sup> It is inevitable that police response to violent crime will at times create some risk of injury to suspects and innocent bystanders. The reasonableness of creating such risks

regulating police misconduct.<sup>209</sup> The judiciary can be faithful to these goals and can exercise meaningful review of police pursuit by insisting that the police offer the type of substantive justification that the amendment requires: that the chase was prompted by probable cause, reasonable suspicion, or the like.<sup>210</sup> The existence or absence of a constitutionally appropriate justification for police pursuit can be brought to light only if the Court brings accidental seizures and the underlying police conduct within the coverage of the amendment.<sup>211</sup>

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depends upon the totality of the circumstances. *See, e.g.,* *Britt v. Little Rock Police Dep't*, 721 F. Supp. 189, 195 (E.D. Ark. 1989) (holding that it is reasonable for an officer to turn on flashing lights and a siren in an attempt to induce the suspect to stop and that it is reasonable for an officer to follow a fleeing car for a short distance in light traffic to see if the suspect would desist from flight; noting, however, that at some point continued pursuit at high speeds in heavy traffic might become unreasonable). *But see* *Carter v. Buscher*, 973 F.2d 1328, 1332 (7th Cir. 1992) (The Fourth Amendment does not prohibit "creating unreasonably dangerous circumstances in which to affect a legal arrest of a suspect. . . . [I]n *Brower*, for instance, the question on remand was whether it was reasonable to seize a fleeing suspect with a deadman roadblock, not whether it was reasonable to pursue the suspect in a high-speed car chase.").

<sup>209</sup> *See* *Terry*, 392 U.S. at 15 ("Courts still retain their traditional responsibility to guard against police [misconduct that] . . . trenches upon personal security without the objective evidentiary justification which the Constitution requires.").

<sup>210</sup> "Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability." *Brinegar v. United States*, 338 U.S. 160, 176 (1949); *see also* *Illinois v. Rodriguez*, 497 U.S. 177, 185 (1990) (holding that the Fourth Amendment requires not that police always be in concert but "that they always be reasonable").

<sup>211</sup> This author does not suggest that the Fourth Amendment applies to all improper police conduct causing physical harm to a citizen. "[I]t is perfectly clear that not every injury in which a state official has played some part is actionable under" § 1983. *Martinez v. California*, 444 U.S. 277, 285 (1980). For example, a state law tort suit, not federal civil rights litigation, would be the appropriate vehicle for compensation of a citizen accidentally run over by a police car on a frolic to the doughnut shop. *See* *Paul v. Davis*, 424 U.S. 693, 698 (1976) (holding that § 1983 does not create a cause of action for survivors of an innocent bystander negligently killed by a sheriff driving a government vehicle); *see also* *Daniels v. Williams*, 474 U.S. 327, 328 (1986) (finding that negligent acts by government officials, though causing loss of liberty, are not actionable under the Due Process Clause).

What is suggested is that when the police engage in volitional conduct for the very purpose of apprehending a suspect, it is irrelevant that the conduct succeeds in apprehending the suspect in some unintended or unforeseen manner. *See* *Landol-Rivera v. Cruz Cosme*, 906 F.2d 791, 796 (1st Cir. 1990) ("It is intervention directed at a specific individual that furnishes the basis for a Fourth Amendment claim.").



## IV. ATTEMPTED SEIZURES

In the case of accidental seizures, the citizen's loss of liberty is unmistakable, but the police officer lacks an "objective intent"<sup>212</sup> to seize the citizen through particular means. The situation is reversed with attempted seizures, in which the officer's intent to seize is clear, but the point at which the citizen actually loses liberty is more nebulous.

What *Brower v. County of Inyo*<sup>213</sup> achieved in the area of accidental seizures, *California v. Hodari D.*<sup>214</sup> accomplished for attempted seizures. Both cases discarded *Katz v. United States*<sup>215</sup> and *Terry v. Ohio*<sup>216</sup> by eschewing any endeavor to reconcile the fundamental clash between personal liberty and collective security created by encounters between police and citizen. Application of the *Katz* analysis of the amendment's scope<sup>217</sup> to attempted seizures of a person would have required the Court to identify the legitimate expectations of liberty that a citizen holds when traversing the streets and highways of America. For instance, does a pedestrian expect that a police officer will attempt to tackle him to the ground; that police bullets will fly past his head; that an officer may single out a citizen and demand identification papers and an explanation of why the individual is in the area? Do American citizens expect that all of this may occur in the absence of any indication that they are engaged in criminal activity? *Katz* and *Terry* posed these types of questions as "the central inquiry under the Fourth Amendment—the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security."<sup>218</sup>

In *Hodari*, Justice Stevens pointed out that the central inquiry of the Court in *Katz* and *Terry* had expanded the constitutional definition of a seizure beyond common law concepts.<sup>219</sup> The *Hodari* majority, however, insisted that Justice Stevens had failed to grasp the distinction between seizures of property and seizures of a person. The majority explained:

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<sup>212</sup> See *supra* text accompanying note 150.

<sup>213</sup> 489 U.S. 493 (1989).

<sup>214</sup> 499 U.S. 621, 111 S. Ct. 1547 (1991).

<sup>215</sup> 389 U.S. 347 (1967).

<sup>216</sup> 392 U.S. 1 (1968).

<sup>217</sup> See *supra* notes 30-49 and accompanying text.

<sup>218</sup> *Terry*, 392 U.S. at 19.

<sup>219</sup> "Significantly, in the *Katz* opinion, the Court repeatedly used the word 'seizure' to describe the process of recording sounds that could not possibly have been the subject of a common-law seizure." *California v. Hodari D.*, 499 U.S. 621, 111 S. Ct. 1547, 1555 (Stevens, J., dissenting). Furthermore, the *Terry* Court "concluded that the word 'seizure' in the Fourth Amendment encompasses official restraints on individual freedom that fall short of a common-law arrest." *Id.*

The dissent is correct that *Katz v. United States* . . . “unequivocally reject[s] the notion that the common law of arrest defines the limits of the term ‘seizure’ in the Fourth Amendment”. . . . But we do not assert that it defines the limits of the term “seizure”; only that it defines the limits of a *seizure of the person*. What *Katz* stands for is the proposition that items which could not be subject to seizure at common law (e.g., telephone conversations) can be seized under the Fourth Amendment. That is quite different from saying that what constitutes an arrest (a seizure of the person) has changed.<sup>220</sup>

The above quote, contained within a footnote, sets forth but fails to explain the nature of this fundamental distinction between seizures of property and seizures of a person. The essence of *Katz* is its recognition that the amendment “protects people,” not places or things.<sup>221</sup> Thus, the amendment protects items not subject to seizure at common law because they may qualify as extensions of the person’s protected privacy interests.<sup>222</sup> It is difficult to comprehend how the Court can maintain that the amendment protects extensions of the person (e.g., conversations) against incorporeal intrusions (e.g., eavesdropping), but does not protect the person himself against such intrusions. If physical trespass is no longer the essence of Fourth Amendment seizures of property, why would physical restraint be regarded as the benchmark for defining seizures of the person? Once the Court recognizes that governmental action falling short of physical trespass can threaten privacy interests in personal items, it would seem axiomatic that governmental action falling short of physical restraint can threaten personal liberty interests.<sup>223</sup>

Unable to dissuade the majority from its insistence that the common law requirement of corporal restraint “defines the limits of a *seizure of the person*,”<sup>224</sup> Justice Stevens pointed out that the factual situation in *Hodari* involved “an unlawful *attempt* to take a presumptively innocent person into custody.”<sup>225</sup> Thus, the Court was urged to look “not to the common law of

<sup>220</sup> 111 S. Ct. at 1551 n.3 (quoting the dissenting opinion at 1556) (citations omitted).

<sup>221</sup> *Katz*, 389 U.S. at 351.

<sup>222</sup> See *Rawlings v. Kentucky*, 448 U.S. 98, 105-06 (1980) (refusing to extend Fourth Amendment protections on the basis of the defendant’s possessory interest in the item). But see *Soldal v. Cook County, Ill.*, 113 S. Ct. 538, 543-45 (1992) (explaining that the Fourth Amendment protects property interests as well as privacy interests); *Robbins v. California*, 453 U.S. 420, 426 (1981) (plurality opinion) (“[The amendment] protects people and their effects, and it protects those effects whether they are ‘personal’ or ‘impersonal.’”), *overruled by* *United States v. Ross*, 456 U.S. 798, 824 (1982).

<sup>223</sup> See *supra* text accompanying note 218.

<sup>224</sup> *Hodari*, 499 U.S. 621, 111 S. Ct. at 1551 n.3.

<sup>225</sup> 111 S. Ct. at 1553 (Stevens, J., dissenting).

arrest, but to the common law of attempted arrest."<sup>226</sup> Although at common law an accomplished arrest required "either touching or submission,"<sup>227</sup> the common law also recognized that "an officer might be guilty of an assault because of an attempted arrest, without privilege, even if he did not succeed in touching the other."<sup>228</sup> The *Hodari* majority, however, asserted that "neither usage nor common-law tradition makes an attempted seizure a seizure. The common-law may have made an attempted seizure unlawful in certain circumstances; but it made many things unlawful, very few of which were elevated to constitutional proscriptions."<sup>229</sup>

The majority did not or could not explain why it had selectively incorporated common law arrests into Fourth Amendment jurisprudence, while refusing to assimilate common law concepts of attempted arrests. Recognition of a common law arrest as "the quintessential 'seizure of the person' under our Fourth Amendment jurisprudence"<sup>230</sup> does not mean that the Court must banish common law prohibitions of attempted arrests to the trash bin of peculiar historical practices that cannot be "elevated to constitutional proscriptions."<sup>231</sup> After all, while intrusion into residential dwellings is the prototypical search specified in the Constitution,<sup>232</sup> the Court since *Katz* has extended Fourth Amendment coverage to commercial premises,<sup>233</sup> automobiles<sup>234</sup> and quasi-public areas.<sup>235</sup>

Justice Stevens' two-pronged effort to place attempted seizures within the coverage of the Fourth Amendment was frustrated by the majority's facility for using each prong to trump the other. Common law concepts of attempted arrests could not control constitutional interpretation; yet, at the same time, the common law concept of completed arrests prevented an expansive reading of the amendment's prohibition against unreasonable

<sup>226</sup> *Id.* at 1554.

<sup>227</sup> Rollin M. Perkins, *The Law of Arrest*, 25 IOWA L. REV. 201, 206 (1940).

<sup>228</sup> *Id.* at 201 n.3 (citing *Gold v. Bissell*, 1 Wend. 210 (N.Y. Sup. Ct. 1828)).

<sup>229</sup> *Hodari*, 499 U.S. 621, 111 S. Ct. at 1550 n.2.

<sup>230</sup> 111 S. Ct. at 1550.

<sup>231</sup> *Id.* at 1550 n.2; *see, e.g.*, *State v. Oquendo*, 613 A.2d 1300, 1310 (Conn. 1992) ("The distinction between an arrest and an attempted arrest at common law reflected the difference between battery and assault. . . . [W]e are persuaded that the dichotomy between an attempted arrest and an arrest 'should not take on constitutional dimensions.'" (citation omitted).

<sup>232</sup> *See Payton v. New York*, 445 U.S. 573, 585-90 (1980).

<sup>233</sup> *See v. City of Seattle*, 387 U.S. 541, 546 (1967).

<sup>234</sup> *See California v. Carney*, 471 U.S. 386, 390 (1985).

<sup>235</sup> *Katz* extended Fourth Amendment protection to a public telephone booth "whose momentary occupants" had a right to expect "freedom from intrusion." *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

seizures.<sup>236</sup> The majority's inconsistent reliance on common law precedents stifled meaningful debate on the important issue that *Hodari* and the other chase cases raised: does the Fourth Amendment encompass all attempted seizures, no attempted seizures, or only certain types of attempted seizures? Common sense dictates that it is an unnatural limitation of Fourth Amendment coverage to exempt *all* attempted seizures, even those attempts which involve firing weapons at fleeing suspects.<sup>237</sup> Pragmatism also precludes the opposite extreme of extending the amendment to every governmental effort to regulate a citizen's movements.<sup>238</sup> The Court must find the appropriate middle ground between overinclusive and underinclusive coverage by drawing a line of demarcation that identifies which forms of attempted seizures are covered by the Fourth Amendment.<sup>239</sup>

The principal flaw in the *Hodari* Court's categorical rejection of attempted seizures lies in its suggestion that, in the past two hundred years, Fourth Amendment jurisprudence has not progressed beyond common law concepts of arrest.<sup>240</sup> Although history plays an important

<sup>236</sup> In *County of Riverside v. McLaughlin*, 111 S. Ct. 1661, 1677 (1991), Justice Scalia stated that the Fourth Amendment "should not become less than" the common law while, in *Hodari*, the Justice asserts that the amendment can never mean more than the common law. See *California v. Hodari D.*, 499 U.S. 621, 111 S. Ct. 1547, 1550-51 (1991).

<sup>237</sup> "In its decision, the Court assumes, without acknowledging, 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." *Hodari*, 499 U.S. 621, 111 S. Ct. at 1552 (Stevens, J., dissenting); see also *Palmer v. Williamson*, 717 F. Supp. 1218, 1223 (W.D. Tex. 1989) (holding that although the police fired at and struck the suspect's vehicle, no seizure occurred because the suspect failed to stop). But see *Keller v. Frink*, 745 F. Supp. 1428, 1432 (S.D. Ind. 1990) (holding that an issue of material fact existed as to whether a seizure occurred under the Fourth Amendment when the officer's bullet struck the vehicle, causing it to stop).

<sup>238</sup> Otherwise, the amendment must be applied to every policeman who directs the flow of traffic. See, e.g., *Carson v. Commonwealth*, 421 S.E.2d 415, 416 (Va. 1992) (Hassell, J., dissenting) (stating that a Fourth Amendment seizure occurs when a police officer approaches a vehicle required to stop at a toll booth). See *infra* note 338; see also *People v. De Bour*, 352 N.E.2d 562, 567-68 (N.Y. 1976) (stating that the spirit underlying the Fourth Amendment requires the adoption of methods to protect the individual from arbitrary or intimidating police conduct).

<sup>239</sup> See *infra* text accompanying note 348.

<sup>240</sup> As the Court itself has stated:

The common-law rules governing searches and arrests evolved in a society far simpler than ours is today. Crime has changed, as have the means of law enforcement, and it would therefore be naive to assume that those actions a constable could take in an English or American village three centuries ago

role in shaping the amendment, only a shallow view of constitutional law would maintain that the amendment's prohibition of unreasonable seizures of the person has no higher purposes, discernible values, aims or applications beyond that of common law arrests.<sup>241</sup> By focusing upon the common law concepts of physical touching or constraint of the suspect's physical movement, *Hodari* reduces the Fourth Amendment rights of liberty and personal security to a narrow right of physical locomotion.<sup>242</sup> The Court has thoughtlessly discarded both the uniquely American concept of a "right to be let alone"<sup>243</sup> and its implication that the Fourth Amendment encompasses all significant forms of police encounters with citizens.<sup>244</sup> *Hodari's* invocation of common law precedent reveals just how out-of-touch the Court is with modern-day encounters between police and citizens. That "[a] ship still fleeing, even though under attack, would not be considered to have been seized as a war prize"<sup>245</sup> says very little about the need to extend Fourth Amendment protections to citizens fleeing from (that is, seeking to avoid contact with) the police.

In a nation where the right to be let alone is a cherished value, the spirit, if not the specific language, of the Fourth Amendment compels the

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should necessarily govern what we, as a society, now regard as proper. *Stegald v. United States*, 451 U.S. 204, 217 n.10 (1981).

<sup>241</sup> Justice Scalia later characterized *Hodari* as establishing that "the Fourth Amendment's prohibition of 'unreasonable seizures,' insofar as it applies to seizure of the person, preserves for our citizens the traditional protections against unlawful arrest afforded by the common law." *County of Riverside v. McLaughlin*, 111 S. Ct. 1661, 1672 (1991) (Scalia, J., dissenting). By focusing on common law arrests, *Hodari* ignores the important role that the amendment plays in shaping the individual's relationship with government. See *supra* notes 26-27 and accompanying text.

<sup>242</sup> See Maclin, *supra* note 44, at 1264-66.

<sup>243</sup> The framers of our Constitution "conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men." *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). The right to be let alone is "too precious to entrust to the discretion of those whose job is the detection of crime." *McDonald v. United States*, 335 U.S. 451, 455 (1948); see also EDWARD S. CORWIN, *LIBERTY AGAINST GOVERNMENT* at xiii (1948) ("the oldest theme which underlies the history of American constitutional law, that of *Liberty Against Government*"); Arthur L. Goodhart, *The Rule of Law and Absolute Sovereignty*, 106 U. PA. L. REV. 943 (1958) (outlining the conflict between government dictating law and government submitting to the law).

<sup>244</sup> See *Brown v. Texas*, 443 U.S. 47, 52 (1979) (stating that absent evidence of criminality, the Fourth Amendment provides that a citizen's interest in "personal security and privacy" mandates "freedom from police interference").

<sup>245</sup> *California v. Hodari D.*, 499 U.S. 621, 111 S. Ct. 1547, 1550 (1991) (citation omitted).

Court to articulate constitutional standards which protect the individual from arbitrary or intimidating police conduct falling short of physical control over the individual. Unlike common law arrests, there can be no single predicate for defining constitutional seizures of the person, and neither physical touching nor surrender of physical movement should be necessary prerequisites for triggering Fourth Amendment coverage. The Court must supplement its preoccupation with physical restraint with a broader consideration of (1) the existence of incorporeal, but meaningful, infringements upon a citizen's liberty,<sup>246</sup> and (2) the citizen's acquiescence to such infringements.<sup>247</sup>

### A. Physical Restraints

*Hodari's* conclusion that no seizure occurs without physical touching or submission to authority is superficially appealing; it makes the constitutional criteria for seizures of the person contingent upon factual predicates that police officers and lower courts can readily understand.<sup>248</sup> While these factual prerequisites are theoretically less enigmatic than judicial efforts to identify society's legitimate expectations of liberty, in application, the adjudicative simplicity of these predicates is likely to be illusory. Although the *Hodari* Court referred to "the unquestioned seizure that occurred when [the officer] tackled *Hodari*,"<sup>249</sup> the standard for seizures is not so easily applied when considering less emphatic means of controlling the suspect's movements.<sup>250</sup>

Short of complete physical incapacitation, a suspect who is experiencing some restraint will also retain some freedom of movement.<sup>251</sup> Even after being tackled to the ground, *Hodari* retained the power to continue the struggle and potentially break the officer's hold on him. The Court recognized that if "*Hodari* had broken away and had *then* cast away the cocaine, it would hardly be realistic to say that that disclosure had been

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<sup>246</sup> See *infra* note 300 and accompanying text.

<sup>247</sup> See *infra* note 301 and accompanying text.

<sup>248</sup> See generally Wayne R. LaFave, *The Fourth Amendment in an Imperfect World: On Drawing "Bright Lines" and "Good Faith"*, 43 U. PITT. L. REV. 307 (1982) (arguing that the Court must continue to strive for bright lines of permissible police conduct).

<sup>249</sup> *Hodari*, 499 U.S. 621, 111 S. Ct. at 1549.

<sup>250</sup> For example, Justice Stevens queried in *Hodari* whether a seizure occurs if a policeman's bullet wounds and partially incapacitates a suspect who continues to flee. See 111 S. Ct. at 1560 (Stevens, J., dissenting).

<sup>251</sup> *Id.* at 1561 (Stevens, J., dissenting) ("[T]here will be a period of time during which the citizen's liberty has been restrained, but he or she has not yet completely submitted to the show of force.").

made during the course of an arrest.<sup>252</sup> If *Hodari's* continued resistance would negate the existence of a seizure, one might inquire whether Los Angeles motorist Rodney King<sup>253</sup> was seized prior to being beaten into unconsciousness. The police officers who repeatedly struck King justified their actions on the ground that King refused to obey police orders that he lie motionless on the ground.<sup>254</sup> By continuing to move, King arguably demonstrated that he was not under the absolute control of the police. If *Hodari* means that no seizure occurs until the suspect is totally immobilized and incapable of escape or resistance,<sup>255</sup> then the videotape of the Rodney King arrest may spawn a series of sequels depicting increasingly brutal efforts to incapacitate a suspect. Since such brutal efforts would merely constitute an "attempted" arrest, they would be beyond the scope of the Fourth Amendment.<sup>256</sup>

In the event that something less than total incapacitation suffices for a seizure, the Court must delineate what degree of control over the suspect triggers Fourth Amendment protections. A suspect within the grasp of the police simultaneously experiences some restraint and some freedom of movement, just as police pursuit cuts off some of the suspect's avenues of flight while others remain open. The limited control of the

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<sup>252</sup> *Hodari*, 499 U.S. 621, 111 S. Ct. at 1550. *But see* State v. Oquendo, 613 A.2d 1300, 1313-14 (Conn. 1992):

[T]he relevant inquiry is whether the unlawful conduct of the police induced the disposal of the incriminating items by the defendant. We reject the implication of the dicta in *Hodari D.*, that the chain of causation is broken when a suspect escapes from an illegal seizure, thereby allowing the admission in evidence of items subsequently discarded. We are persuaded that following this reasoning could encourage illegal stops by the police.

*Id.*

<sup>253</sup> King is the black motorist whose beating by four white Los Angeles police officers was captured on videotape for all the world to see. The officers' first acquittal by a predominantly white jury sparked three days of rioting, resulting in 60 deaths, more than 16,000 arrests and nearly \$1 billion in property damage in Los Angeles. *See* Seth Mydans, *Tape of Beating by Police Revives Charge of Racism*, N.Y. TIMES, Mar. 7, 1991, at A18; Lance Morrow, *Rough Justice*, TIME, April 1, 1991, at 16; *see also* Darlene Ricker, *Behind the Silence*, 77 A.B.A. J. 45, 47 (July 1991) (quoting Los Angeles civil rights attorney Carol Watson as saying that "beatings happen regularly at the end of a chase").

<sup>254</sup> TIME, May 11, 1992, at 30 ("The defense contended that the officers did not dare simply to seize King and apply the cuffs for fear that the suspect might grab one of their guns. . . . According to the defense, that meant it was all right to keep beating King until he assumed a 'compliance posture' by lying still and putting his hands on his head.")

<sup>255</sup> *See Oquendo*, 613 A.2d at 1309 (government argued that common law arrest required "the effective control over or confinement of the suspect") (emphasis added).

<sup>256</sup> *See Tom v. Volda*, 963 F.2d 952, 956-57 (7th Cir. 1992) (officer's actions prior to "seizure," even if unjustified, are not subject to Fourth Amendment scrutiny).

suspect's path of escape led the California Court of Appeals to conclude in *Hodari* that a seizure occurred because the policeman's pursuit was "a maneuver intended to block or 'otherwise control the direction or speed' of Hodari's movement."<sup>257</sup>

In contrast to the lower court, *Hodari* equates submission to police authority with a complete surrender of physical movement. *Hodari* ignores the fact that flight in response to police pursuit is itself a partial surrender of freedom of movement and a form of subservience to police authority. If the amendment merely recognized a right of physical locomotion, distinguishing between the actions of remaining still and running away might make some sense. If, however, the amendment addresses a fundamental right of liberty—a right to be let alone, to ignore the police and to go about one's business—then physical movement cannot control constitutional interpretation. One's business may be to stay on that street corner from which Hodari felt compelled to flee. Suppose that the youths in *Hodari* had not fled at the approach of the police car but had, instead, remained on the street corner until a police officer told them, "Break it up, move along now." The youths would not only be free to leave, they would be ordered to do so. A coerced decision to vacate a location where one would rather remain is subservience to police authority as much as is a coerced decision to stay in a location when one would rather be free to leave. The relevant Fourth Amendment consideration is the effect that police action has on a citizen's freedom to be let alone and to decide if he wants to move from, or remain in, a particular location.<sup>258</sup>

By focusing on a complete surrender of physical movement, *Hodari* fails to recognize a suspect's coerced or forced movement as the type of submission to police authority which the Fourth Amendment covers. Perhaps the Court feared that attaching constitutional significance to

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<sup>257</sup> *California v. Hodari D.*, 499 U.S. 621, 111 S. Ct. 1547, 1559 n.14 (Stevens, J., dissenting); see also *Hawkins v. State*, 758 S.W.2d 255, 261 (Tex. Crim. App. 1988) (defining a chase as "actions designed to control the direction of [the suspect's] movements by 'closing in' on him"); *Oquendo*, 613 A.2d at 1309 (quoting a former Chief Justice of the Supreme Court of Connecticut, the *Oquendo* court explained that the "sacred and inestimable right" of personal security means that no man can be "prevented from removing himself from place to place, as he chuses [sic]") (citation omitted). But see *State v. Van Ackeren*, 495 N.W.2d 630, 643-44 (Neb. 1993) (holding that when the police deflated the tires on the defendant's vehicle to prevent him from using the vehicle for flight, there was a seizure of the vehicle, but not a seizure of the defendant).

<sup>258</sup> In police-citizen encounters, "the police exercise complete control over the interaction." *State v. Quino*, 840 P.2d 358, 363 (Haw. 1992), cert. denied, 113 S. Ct. 1849 (1993).



varying degrees of control over a suspect's movements would lead more to a slippery slope than to a lucid guideline for defining seizures of a person.<sup>259</sup> Nonetheless, in its effort to establish guidelines for Fourth Amendment coverage, the Court has failed to articulate the constitutionally significant degree of control over a citizen that constitutes a Fourth Amendment seizure.

The Court may have sought to avoid the entire question of "degrees" of control over a suspect by suggesting that a seizure may be accomplished by "merely touching, however slightly, the body of the accused."<sup>260</sup> The consequence of adopting this factual prerequisite for seizures was suggested to the Court during oral arguments in *Florida v. Bostick*,<sup>261</sup> wherein the Court was urged to attach legal significance to the police officer's having "physically touched the defendant's foot to get his attention."<sup>262</sup> The Court's failure to address this contention implies that the *Hodari* decision is supple enough to recognize that certain forms of touching are insufficient for a seizure.<sup>263</sup> If there is this implied elasticity in *Hodari*'s definition of a touching, why did the *Hodari* Court give such short shrift to Justice Stevens' suggestion that the Fourth Amendment is amenable to attempted seizures that occur even before any touching takes place? Surely the Court is saying not that it will accept a modification of the factual predicates for a seizure in order to shrink Fourth Amendment coverage but, rather, that it must reject modifications which expand Fourth Amendment protections.<sup>264</sup>

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<sup>259</sup> See, e.g., *United States v. Lender*, 985 F.2d 151, 155 (4th Cir. 1993) (holding that no seizure occurred as defendant's "momentary halt on the sidewalk [did not] constitute[ ] a yielding to [the police's] authority"); *State v. Van Ackeren*, 495 N.W.2d 630, 641 (Neb. 1993) (holding that no seizure occurred because defendant "failed to effectively submit to the officer's assertion of authority" when the defendant momentarily paused, then subsequently ran).

<sup>260</sup> *Hodari*, 499 U.S. 621, 111 S. Ct. at 1550.

<sup>261</sup> 111 S. Ct. 2382 (1991). In *Bostick*, police boarded a bus and randomly asked passengers for (and received) consent to search several of their bags. *Id.* at 2384-85. The police advised the defendant in this case that he had the right to refuse consent, but the defendant consented nonetheless. *Id.* at 2385.

<sup>262</sup> *Arguments Heard: Florida v. Bostick*, 48 Crim. L. Rep. (BNA) 3161, 3163 (March 6, 1991).

<sup>263</sup> See *United States v. Burrell*, 286 A.2d 845, 846 (D.C. 1972) (stating that physical contact is acceptable if it is "a normal means of attracting a person's attention").

<sup>264</sup> The Court may have said just that in (1) its earlier rejection of the automatic standing provisions of the amendment's exclusionary rule, see *Rakas v. Illinois*, 439 U.S. 128, 138-40 (1978); *United States v. Salvucci*, 448 U.S. 83, 94-95 (1980); *Rawlings v. Kentucky*, 448 U.S. 98, 105-06 (1980); and (2) its recent rejection of the common law governing post-arrest detentions, see *County of Riverside v. McLaughlin*, 111 S. Ct. 1661,

If *Hodari* truly creates an absolute requirement for touching or submission, then the Court has endorsed a bizarre view of individual liberty in which constitutional protections vanish merely because the victim of unlawful governmental action fails to perceive or otherwise experience the violation. For example, reconsider the hypothetical situation where the police secretly surround the suspect's residence.<sup>265</sup> The suspect has not been touched nor has he yielded to a show of authority, yet the government secretly acted to curtail the suspect's liberty<sup>266</sup> in the same manner in which the government may act to violate his privacy rights by conducting a surreptitious search of his dwelling.

That the government may conceal and, thereby, negate its violation of a citizen's constitutional rights is the type of contention that the Nixon White House advanced during the Watergate era. The argument was put forth by White House staffer G. Gordon Liddy, who had engineered the break-in of a psychiatrist's office in an attempt to procure confidential medical records of Daniel Ellsberg, the man credited with leaking the "Pentagon Papers" to the *New York Times*.<sup>267</sup> When prosecuted for conspiracy to infringe upon a citizen's privacy rights, Liddy asserted that the conspiracy statute<sup>268</sup> was inapplicable because of the covert nature of the break-in.<sup>269</sup> Liddy's convoluted defense rested upon the legally correct principle that a break-in by common burglars does not implicate Fourth Amendment rights because the amendment restricts only those

1671-75 (1991) (Scalia, J., dissenting) (discussing the majority opinion).

<sup>265</sup> See *supra* note 68 and accompanying text.

<sup>266</sup> The suspect is free to move about inside his residence, but he is not free to depart. See *supra* note 69 and accompanying text.

<sup>267</sup> The release of the Pentagon Papers had revealed embarrassing aspects of the United States war effort in South Vietnam, thereby making Ellsberg a folk hero to the anti-war movement. In an attempt to discredit Ellsberg, the burglars sought to discover and reveal what was thought to be Ellsberg's sordid psychiatric history. See *United States v. Liddy*, 542 F.2d 76, 78 & n.5 (D.C. Cir. 1976).

<sup>268</sup> 18 U.S.C. § 241 (1970) provided:

If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same;

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They shall be fined not more than \$10,000 or imprisoned not more than ten years, or both; and if death results, they shall be subject to imprisonment for any terms of years or for life.

*Id.*

<sup>269</sup> See *Liddy*, 542 F.2d at 80.

searches conducted by government officials.<sup>270</sup> Because the psychiatrist was unaware at the time of the break-in that any government official had interfered with his right to privacy, Liddy maintained that the burglars' initial success in concealing their government connections removed them from the coverage of the Fourth Amendment.<sup>271</sup> This disingenuous argument was summarily rejected by the courts.<sup>272</sup>

The constitutionality of covert *searches and seizures of property* has not turned upon either the defendant's subjective awareness or a reasonable person's objective perceptions of the government's actions.<sup>273</sup> Because the Fourth Amendment exists to limit and regulate the exercise of governmental power,<sup>274</sup> its coverage properly extends to any unilateral governmental action that infringes upon a citizen's protected right of privacy. It is only when addressing *seizures of the person* that the Court's examination of the government's unilateral action mutates into a bilateral consideration of the government's action and the citizen's perception of that action.<sup>275</sup>

No matter how egregious the government's unilateral conduct, *Hodari* insists that a seizure does not occur until the suspect either consciously submits to authority or experiences some actual touching of his person.<sup>276</sup> It is apparent how the Justices would solve the mystery of whether there is a sound when a tree falls in an unoccupied forest, and how they would resolve the hypothetical in which the police secretly surround a suspect's dwelling.<sup>277</sup> In the forest of the Fourth Amendment, governmental

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<sup>270</sup> *Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602, 614 (1989) ("[T]he Fourth Amendment does not apply to a search or seizure, even an arbitrary one, effected by a private party on his own initiative . . ."); see also *Walter v. United States*, 447 U.S. 649, 656 (1980) (stating that a wrongful search and seizure by a private party does not violate the Fourth Amendment); *Burdeau v. McDowell*, 256 U.S. 465, 467 (1921) (stating that the Fourth Amendment only protects against searches and seizures under governmental authority), *overruled on other grounds by Elkins v. United States*, 364 U.S. 206 (1960).

<sup>271</sup> *Liddy*, 542 F.2d at 80.

<sup>272</sup> *Id.* at 80-81; accord *People v. Cantor*, 324 N.E.2d 872, 876 (N.Y. 1975) (holding that an unreasonable seizure occurred when police blocked the defendant's car and approached him, even though the defendant thought that he was being threatened by private citizens); see also *United States v. Freitas*, 800 F.2d 1451, 1456 (9th Cir. 1986) (holding that citizens must be notified of entries and seizures pursuant to "sneak and peak" warrants which authorize a surreptitious entry for purposes of looking around or taking photographs).

<sup>273</sup> See *infra* notes 297-300 and accompanying text.

<sup>274</sup> See *supra* note 27.

<sup>275</sup> See *supra* notes 219-20 and accompanying text; *California v. Hodari D.*, 499 U.S. 621, 111 S. Ct. 1547, 1550-51 (1991).

<sup>276</sup> *Hodari*, 499 U.S. 621, 111 S. Ct. at 1550-51.

<sup>277</sup> See *supra* notes 65-72 and accompanying text.

intrusions upon personal liberty do not exist until they are perceived by a reasonable person.<sup>278</sup> Furthermore, *Hodari* has distorted the Fourth Amendment's goal of regulating governmental power by refusing to attach constitutional significance to actual but secret restraint imposed by the police.<sup>279</sup>

There are other anomalous results which flow from *Hodari*'s insistence that the amendment's coverage is exclusively dependent upon a physical touching of the suspect or a show of authority that successfully constrains the suspect's physical movement. For example, if a bigoted police officer chases a suspect because he is black,<sup>280</sup> successful capture of the suspect is an illegal seizure.<sup>281</sup> But, if the suspect eludes capture,<sup>282</sup> the very same chase becomes legitimate.<sup>283</sup> This perplexing

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<sup>278</sup> *United States v. Mendenhall*, 446 U.S. 544, 554 (1980).

<sup>279</sup> See Richard A. Williamson, *The Dimensions of Seizure: The Concepts of "Stop" and "Arrest,"* 43 OHIO ST. L.J. 771, 814 (1982) (arguing that "the perception rather than the fact of a restriction on freedom of movement" determines the scope of the Fourth Amendment). *Hodari*'s discussion of physical force (laying on of hands), however, is not dependent upon reasonable perceptions. See *supra* note 276 and accompanying text.

<sup>280</sup> See generally *Developments in the Law—Race and the Criminal Process*, 101 HARV. L. REV. 1472, 1495 n.5 (1988) (stating that "blacks are more likely than whites in similar situations to be stopped by the police on "suspicion"") (quoting Gwynne Peirson, *Institutional Racism and Crime Clearance*, in BLACK PERSPECTIVES ON CRIME AND THE CRIMINAL JUSTICE SYSTEM 111 (R.L. Woodson ed., 1977)); Sheri Lynn Johnson, *Race and the Decision To Detain a Suspect*, 93 YALE L.J. 214 (1983) (addressing the permissible components of probable cause and reasonable suspicion); Tracey Maclin, *"Black and Blue Encounters"—Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?*, 26 VAL. L. REV. 243 (1991).

<sup>281</sup> Thomas Y. Davies, *Denying a Right by Disregarding Doctrine: How Illinois v. Rodriguez Demears Consent, Trivializes Fourth Amendment Reasonableness, and Exaggerates the Excusability of Police Error*, 59 TENN. L. REV. 1, 65 n.263 (1991) ("[T]he Court's view is that an officer does not have to have cause when he leaps at a citizen, although the Court does not dispute that the officer is required to have cause the instant he lands on the citizen.").

<sup>282</sup> Williamson, *supra* note 279, at 813 ("It is not necessary to say that one has a constitutional right to hide from the police; it is sufficient to say that no government right exists to demand the physical presence of the accused at any given time or at any given place, except upon a showing of sufficient justification.").

Although eluding capture, the suspect may discard evidentiary items which are seized by the pursuing officer. If the suspect moves to suppress the items as the fruit of an illegal seizure of his person, *Hodari* would require the Court to rule that there was no seizure of the person prior to the successful capture of the suspect. *California v. Hodari D.*, 499 U.S. 621, 111 S. Ct. 1547, 1550 (stating that "[t]he word 'seizure' readily bears the meaning of a laying on of hands or application of physical force to restrain movement, even when it is ultimately unsuccessful").

<sup>283</sup> The chase is legitimate to the extent that its legitimacy is beyond judicial scrutiny. See *infra* note 348.

result demonstrates that the applicability of the Fourth Amendment must be determined by examining the unilateral actions of government officials; the amendment's coverage should not turn upon an individual's success or failure in eluding the police.<sup>284</sup> A suspect's response to police action is germane only when the government establishes that it did not seek to impose unilateral restraint but, instead, merely invited the suspect's acquiescence to an "encounter" with police.

### B. *Close Encounters of the Non-Fourth Amendment Kind*

"The Fourth Amendment proscribes unreasonable searches and seizures; it does not proscribe voluntary cooperation."<sup>285</sup> The Court has fleshed out this rudimentary principle of Fourth Amendment jurisprudence by articulating its vision of the type of police-citizen encounter that constitutes a nonseizure: one in which a reasonable person would not perceive any physical restraint of his freedom of movement and, thus, a situation in which the defendant voluntarily submits to a police request to stop and answer questions.<sup>286</sup> The flaw in this paradigmatic nonseizure is that the Court has focused upon a hypothesized reasonable person rather than asking whether the particular defendant voluntarily agreed to the encounter with the police.<sup>287</sup>

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<sup>284</sup> The dissent in *Hodari* stated that "the timing of the seizure is governed by the citizen's reaction, rather than by the officer's conduct." *Hodari*, 499 U.S. 621, 111 S. Ct. at 1559 (Stevens, J., dissenting).

<sup>285</sup> *Florida v. Bostick*, 111 S. Ct. 2382, 2389 (1991).

<sup>286</sup> *See id.* at 2386 ("Our cases make it clear that a seizure does not occur simply because a police officer approaches an individual and asks a few questions."); *Florida v. Royer*, 460 U.S. 491, 497 (1983) (plurality opinion) ("[L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions.").

<sup>287</sup> "The danger in reasoning from hypothetical to actual results is that if the supposed facts are not true to life, the judgment drawn from them will be equally artificial." John M. Junker, *The Structure of the Fourth Amendment: The Scope of the Protection*, 79 J. CRIM. L. & CRIMINOLOGY 1105, 1133 (1988-89). In Fourth Amendment cases, the Court has displayed a tendency to discuss hypothetical situations divorced from the actual facts of the case. *See, e.g., New York v. Class*, 475 U.S. 106, 108, 113-14 (1986) (holding that there is no reasonable expectation of privacy in an automobile's vehicle identification number, which can be seen through the windshield, even though the actual search in question involved an entry of the vehicle); *South Dakota v. Opperman*, 428 U.S. 364, 366, 367 (1976) (holding that there is a lesser expectation of privacy in an automobile due to the public nature of cars and automobile travel, even though the inventory search in question involved the closed compartments of a locked car).

When a citizen relinquishes his freedom of movement in response to a police officer's request, the appropriate judicial inquiry is whether that surrender was prompted by government coercion<sup>288</sup> or by the citizen's exercise of freedom of choice.<sup>289</sup> Labeling the citizen's acquiescence as either a consensual seizure (which assumes that a seizure took place) or a voluntary encounter (a nonseizure because of a waiver of the citizen's right to liberty and freedom of movement) is problematic. Both consent and waiver rest upon the assumption that there is a constitutionally recognized liberty interest that would be protected but for the individual citizen's decision to relinquish any claim of this interest.<sup>290</sup> Although the Court may utilize evidence of objective behavior to infer an individual's actual state of mind, the constitutional standards for consent and waiver properly focus on the individual's personalized freedom of choice.<sup>291</sup> By ignoring the individual's actual state of mind<sup>292</sup> in favor of *Mendenhall's*

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<sup>288</sup> *Bostick*, 111 S. Ct. at 2388 ("'Consent' that is the product of official intimidation or harassment is not consent at all. Citizens do not forfeit their constitutional rights when they are coerced to comply with a request that they would prefer to refuse.").

<sup>289</sup> A seizure occurs when the suspect submits to "a show of force or authority which left him no choice." *Sibron v. New York*, 392 U.S. 40, 63 (1968); see also *Bostick*, 111 S. Ct. at 2394 (Marshall, J., dissenting) (stating that "[i]t is exactly because [the suspect's] 'choice' is no 'choice' at all that police engage" in certain confrontational techniques); *Brinegar v. United States*, 338 U.S. 160, 182 (1949) (Jackson, J., dissenting) (denouncing police encounters where "[t]he citizen's choice is quietly to submit to whatever the officers undertake or to resist at risk of arrest or immediate violence").

<sup>290</sup> See *United States v. Mendenhall*, 446 U.S. 544, 552 (1980) (discussing the distinction between a "seizure" and an "encounter" that intrudes upon no constitutionally protected interest). Concepts of consent and waiver are irrelevant, however, when the Court concludes that the citizen does not possess a legitimate liberty interest that need be waived or relinquished. See *infra* note 307. Many of the Court's consent cases resemble cases in which the Court has held that no search or seizure took place. See Peter Goldberger, *Consent, Expectations of Privacy, and the Meaning of "Searches" in the Fourth Amendment*, 75 J. CRIM. L. & CRIMINOLOGY 319, 326-38 (1984).

<sup>291</sup> "In examining all the surrounding circumstances to determine if in fact the consent to search was coerced, account must be taken of subtly coercive police questions, as well as the possibly vulnerable *subjective* state of the person who consents." *Schneckloth v. Bustamonte*, 412 U.S. 218, 229 (1973) (emphasis added). Waiver requires "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (defining waiver in the context of the Sixth Amendment right of counsel).

<sup>292</sup> The *Mendenhall* rule looks, "not to the subjective perceptions of the person questioned, but rather, to the objective characteristics of the encounter that may suggest whether a reasonable person would have felt free to leave." *California v. Hodari D.*, 499, U.S. 621, 111 S. Ct. 1547, 1558 (1991) (Stevens, J., dissenting). Focusing on a hypothesized reasonable person, rather than on the defendant's actual state of mind, permits the police "to accomplish by subterfuge what they could not achieve by relying

hypothesized reasonable person test, the Court has in effect imposed consent or waiver on unwilling citizens.<sup>293</sup>

The usefulness of *Mendenhall's* reasonable person test is exhausted when the insights gained by considering reasonable perceptions are added to other evidence of the suspect's bona fide state of mind.<sup>294</sup> Although reasonable perceptions may indicate that a police officer's request to stop and answer questions would not coerce the average citizen, the Court should not discount evidence that a defendant who had previously been stopped and beaten by police might view such "requests" quite differently than the average citizen. The highly publicized use of grievous force against Los Angeles motorist Rodney King may well alter the public's, if not the Court's, view of the innocuousness of encounters with the police.<sup>295</sup>

[T]hose who have found—by reason of prejudice or misfortune—that encounters with the police may become adversarial or unpleasant

only on the knowing relinquishment of constitutional rights." *Schneckloth*, 412 U.S. at 288 (Marshall, J., dissenting).

To the extent that it is difficult to establish a suspect's subjective state of mind, [t]he only sensible guide for the police is that they should never rely on consent . . . unless they must. If they do . . . [rely] on consent, they should be prepared to meet a heavy burden of proof that consent was in fact meaningfully given. And even then, because of the difficulties of proof, they should expect to be told often that the search was not proper.

Weinreb, *supra* note 27, at 64.

<sup>293</sup> When the Court imposes certain forms of police conduct on unwilling citizens, *see infra* text accompanying note 310, the Court *dictates* which forms of police conduct are acceptable to general society; it does not *ask* whether a particular suspect actually consented to the police conduct. Courts and commentators regard *Mendenhall's* reference to consensual encounters as a mere fiction. *See, e.g.*, *United States v. Notorianni*, 729 F.2d 520, 523 (7th Cir. 1984) (Cudahy, J., dissenting) (the "modest fiction that a person being questioned by a policeman [will feel] free to say nothing and move on . . . makes it possible to cope with drug traffic in a place like O'Hare airport"); Wayne R. LaFave, "Seizures" *Typology: Classifying Detentions of the Person to Resolve Warrant, Grounds, and Search Issues*, 17 U. MICH. J.L. REF. 417, 423 (1983-84) (stating that "it would be a mere fiction to say that [most suspects that do not express a lack of consent] consent").

<sup>294</sup> Consent "is a particularly open concept, which refers to both an 'internal' state of mind and an 'external' performance; consent is unequivocal and unquestioned only when it includes both." Weinreb, *supra* note 27, at 55. Whether consent is voluntary is "a question of fact to be determined from a totality of all the circumstances." *Schneckloth*, 412 U.S. at 227; *see also United States v. Ward*, 961 F.2d 1526, 1533 (10th Cir. 1992) (stating that "the personal traits of an individual are relevant to the issue of coercion"); *United States v. Recalde*, 761 F.2d 1448, 1454 (10th Cir. 1985) (holding that defendant's upbringing in Argentina, which instilled in him an acquiescence to police authority, is relevant to coercion which would make him feel incapable of terminating the encounter).

<sup>295</sup> *See supra* note 253.

without good cause will have grounds for worrying at any stop designed to elicit signs of suspicious behavior. Being stopped by the police is distressing even when it should not be terrifying, and what begins mildly may by happenstance turn severe.<sup>296</sup>

The Court's approach to the hypothetical voluntariness of police-citizen encounters is also inconsistent with its treatment of the secondary actions that normally accompany such encounters. If the police officer's request to stop is followed by a secondary request to inspect identification papers<sup>297</sup> or the suspect's belongings,<sup>298</sup> the Court forgoes an inquiry into the perceptions of a hypothesized reasonable person in order to ascertain whether the particular defendant made a voluntary choice to accede to the secondary request.<sup>299</sup> By allowing a waiver of privacy rights in personal belongings to turn upon the defendant's existing state of mind, whereas a waiver of liberty interests in freedom of movement turns upon the hypothesized perceptions of a reasonable person, the Court

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<sup>296</sup> *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 465 (1990) (Stevens, J., dissenting).

<sup>297</sup> The constitutionality of a police officer's request for identification papers is an unsettled area of law. *See generally* Majorie E. Murphy, *Encounters of a Brief Kind: On Arbitrariness and Police Demands for Identification*, 1986 ARIZ. ST. L.J. 207 (discussing the "undefined and broadening use of police/citizen encounters to identify an individual") (citations omitted). In *Brown v. Texas*, 443 U.S. 47, 50 (1979), the Court suggested that a seizure occurred when uniformed officers approached a suspect and asked him to identify himself and explain his presence in the area. *But see* *INS v. Delgado*, 466 U.S. 210, 216 (1984) ("[O]ur recent decision in *Royer* 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.") (citation omitted).

<sup>298</sup> In *United States v. Analla*, 975 F.2d 119 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 1853 (1993), the Fourth Circuit held that the initial approach by the police towards the suspect was governed by the standard for seizures of the person—"an objective test, not a subjective one." *Id.* at 124. Thus, the fact that the particular suspect "thought, based on his experience with Moroccan police, that he would be restrained or even tortured should he try to leave" was irrelevant. *Id.* The court, finding no seizure, held that the subsequent request to search the suspect's vehicle was governed by the standard for consensual searches—"a factual question determined in light of the totality of the circumstances." *Id.* at 125. Consequently, it was relevant that the defendant was "24 years old . . . , had . . . graduated from high school and had attended some college . . . , appeared intelligent, [and] articulated his views and positions well." *Id.*

<sup>299</sup> A citizen's "decision to cooperate with law enforcement officers authorizes the police to conduct a search without first obtaining a warrant *only* if the cooperation is voluntary." *Florida v. Bostick*, 111 S. Ct. 2382, 2388 (1991); *see also* *United States v. Wilson*, 895 F.2d 168, 171 (4th Cir. 1990) ("[T]he determination of consent to search is subjective.").



is creating an artificial and unprincipled distinction between seizures of property and seizures of a person. Treating the antecedent request to stop as constitutionally distinct from the ancillary request to inspect personal belongings creates unnecessary and confusing distinctions between voluntary searches of property and voluntary seizures of the person. This dichotomy between searches of property and seizures of a person strains credulity and has caused confusion in the lower courts.<sup>300</sup>

When the Court imposes "consensual" encounters on citizens who have not in fact consented, the Court masquerades a prescriptive statement as a descriptive observation of the perceptions of a reasonable person.<sup>301</sup> The Court's duty to prescribe which forms of police power may be imposed on an unwilling citizen is a necessary and proper part of Fourth Amendment interpretation. The Court, however, should face this duty openly<sup>302</sup> by addressing the manner in which the amendment reconciles the clash, inherent in street encounters, between police power and individual freedom. The Court cannot sidestep the Fourth Amendment's applicability to encounters between police and citizens by invoking

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<sup>300</sup> The history of *United States v. Maragh*, 695 F. Supp. 1223 (D.D.C. 1988), illustrates the confusion surrounding consensual seizures of a person and voluntary consent to search the person's belongings. The trial court initially held that the police officers' intimidating approach to the defendant constituted a seizure of the person and, therefore, contaminated the subsequent search of the defendant's handbag. *Id.* at 1225. The D.C. Circuit Court of Appeals reversed the finding as to a seizure of the person, but remanded the case for further consideration of the issue of voluntary consent to search the handbag. *United States v. Maragh*, 894 F.2d 415, 420 (D.C. Cir.), *cert. denied*, 498 U.S. 880 (1990). The D.C. Circuit noted that the trial court had "treated the tests for seizure and voluntary consent as identical. Although there is overlap in these tests, they are *not* identical." *Id.* On remand, the District Court found that the conduct was sufficiently intimidating to cause coerced consent to search the handbag. *United States v. Maragh*, 756 F. Supp. 18, 22 (D.D.C. 1991).

<sup>301</sup> This masquerade has created confusion among the lower courts. The Second, Eighth, Ninth and D.C. Circuits regard the *Mendenhall* test as a question of law to be reviewed *de novo*. *United States v. Montilla*, 928 F.2d 583, 588 (2d Cir. 1991); *United States v. McKines*, 933 F.2d 1412, 1425 (8th Cir.) (en banc), *cert. denied*, 112 S. Ct. 593 (1991); *United States v. Mines*, 883 F.2d 801, 803 (9th Cir.), *cert. denied*, 493 U.S. 997 (1989); *Maragh*, 894 F.2d at 417. However, the Fourth, Sixth and Seventh Circuits appear to apply a "clearly erroneous" standard of review to the lower court's factual finding regarding a seizure. *United States v. Gray*, 883 F.2d 320, 322 (4th Cir. 1989); *United States v. Rose*, 889 F.2d 1490, 1494 (6th Cir. 1989); *United States v. Teslim*, 869 F.2d 316, 321 (7th Cir. 1989).

<sup>302</sup> "A body of law is more rational and more civilized when every rule it contains is referred articulately and definitely to an end which it subserves, and when the grounds for desiring that end are stated or are ready to be stated in words." Oliver W. Holmes, *The Path of the Law*, in COLLECTED LEGAL PAPERS 167, 186 (1920).

a supposedly descriptive observation of a hypothesized reasonable person; nor can the Court silently overturn *Katz v. United States* and *Terry v. Ohio* by reverting to common law requirements for corporeal restraint of a suspect's physical movements.

### C. *Incorporeal Infringements Upon Liberty*

"Talk or walk, it's your choice. But . . . ."<sup>303</sup>

*United States v. Mendenhall*<sup>304</sup> and *California v. Hodari D.*<sup>305</sup> rest Fourth Amendment coverage upon the citizen's response to a police-initiated encounter. Independent of that response, neither case attaches legal significance to the officer's unilateral conduct in initiating the encounter: the officer's approach, his request that the citizen stop, his invitation to the suspect to submit to interrogation.<sup>306</sup> By judicial fiat, police may impose these manifestations of power<sup>307</sup> upon all citizens

<sup>303</sup> See *infra* notes 316-19 and accompanying text (describing this scenario). A "real-life" talk or walk scenario arose in Columbus, Ohio, when the police department utilized "saturation patrols." The police department directed that, under these patrols, numerous officers descend upon high-crime neighborhoods and approach passersby. They would then ask for identification, inquire as to what the pedestrians were doing in the neighborhood, and run warrant checks on suspicious persons. Adrienne L. Meiring, Note, *Walking the Constitutional Beat: Fourth Amendment Implications of Police Use of Saturation Patrols and Roadblocks*, 54 OHIO ST. L.J. 497, 500 (1993). If an individual objected to the questioning, he was free to leave but was told that "'the area [was] one of high crime and if the person [was] there seeking drugs or prostitution, an arrest [was] likely, if not certain.'" *Id.* at 501 (quoting *ACE is Played, Citizens Back Police Clean Sweeps*, COLUMBUS DISPATCH, July 15, 1991, at A6). The officer then filled out field identifier cards which listed the name, age, and physical description of the pedestrian. The card was sent to the narcotics bureau or the crime analysis unit to check possible connections to local crimes. *Id.* at 500-01.

<sup>304</sup> 446 U.S. 544 (1980).

<sup>305</sup> 499 U.S. 621, 111 S. Ct. 1547 (1991).

<sup>306</sup> *Terry v. Ohio*, 392 U.S. 1 (1968), spoke to situations where a "police officer accosts an individual." *Id.* at 16 (emphasis added). WEBSTER'S, *supra* note 151, at 12, defines "accost" as "to approach and speak to" or "speak to without having first been spoken to" or "to confront, usu[ally] in a somewhat challenging or defensive way."

<sup>307</sup> Unlike the Supreme Court, lower courts have struggled to define the point at which an officer's approach triggers Fourth Amendment protections. See *Richardson v. United States*, 520 A.2d 692, 697 (D.C.) (holding the following remarks not to be a seizure: "Police. Wait a second. We want to talk to you."), *cert. denied*, 484 U.S. 917 (1987); *Johnson v. United States*, 468 A.2d 1325, 1327 (D.C. 1983) (holding the call of "come here, police officer" to be a seizure), *and vacated*, 496 A.2d 592 (D.C. 1985). *But see Hodari*, 499 U.S. 621, 111 S. Ct. at 1550 (noting that the Fourth Amendment "does not

without exception. The Court does not invoke *Mendenhall* to ask how reasonable persons perceive the opening stages of a police-citizen encounter; instead, the Court tells us that there are no constitutional restrictions on an officer's confronting a citizen with mere "requests" that the citizen stop and answer questions.<sup>308</sup> In contrast to the nation's seemingly increased sensitivity to sexual harassment in the workplace,<sup>309</sup> the outdated aphorism that "there's no harm in asking" governs street encounters. Thus, there can be no legally significant harassment during incorporeal encounters between police and citizens because the Fourth Amendment is only applicable once the officer's request to stop becomes a demand with which the suspect complies.

By refusing to place constitutional restrictions on an officer's initial approach to a citizen, the Court has decreed that police officers need not justify their desire to single out and confront a particular individual. The hapless, though presumptively innocent, individual must suffer this form of police scrutiny as part of the cost of walking on a public street. If a citizen singled out for an encounter should be bold enough to ask why an officer has approached him,<sup>310</sup> the officer is entitled to respond, "I'm

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remotely apply, however, to the prospect of a policeman yelling 'Stop, in the name of the law!' at a fleeing form that continues to flee. That is no seizure.").

<sup>308</sup> See Maclin, *supra* note 44, at 1302 (opining that the "Court . . . [turns] a blind eye to street encounters . . . [by excluding them from Fourth Amendment coverage] even when these confrontations are perceived as seizures by the citizenry at large").

<sup>309</sup> See generally Polly B. Elliott, *Sexual Harassment Reports up a Year Since Hill Testimony*, STATES NEWS SERVICE, Oct. 26, 1992, available in LEXIS, Nexis Library, Current File (discussing the marked increase in sexual harassment claims after the Clarence Thomas Senate confirmation hearings).

<sup>310</sup> By relieving the police of any burden to justify their approach of a citizen, the Court has forced citizens to bear the burden of challenging or resisting police authority. Such challenges, however,

will not go unnoticed. In fact, they can be seen to push the encounter to a new level wherein any further slight to an officer, however subtle, provides sufficient evidence to a patrolman that he may indeed be dealing with a certifiable [jerk] and that the situation is in need of rapid clarification.

John Van Maanen, *Street Justice*, in POLICE BEHAVIOR 299 (Richard J. Lundman ed., 1980). The officer may clarify the situation by "teaching a lesson" to an uncooperative citizen:

"[T]eaching" occupies a particularly prominent position in the police repertoire of possible responses. Thus, the uncooperative and surly motorist finds his sobriety rudely questioned, or the smug and haughty college student discovers himself stretched over the hood of a patrol car and the target of a mortifying and brusque body search. The object of such degradation ceremonies is simply to reassert police control and demonstrate to the citizen that his behavior is considered inappropriate. Teaching techniques are numerous, with threat,

patrolling this street. You walk my beat and I approach you whenever I want."<sup>311</sup> "Instead of being regarded as a person, whose interests clash with those of the police, the suspect is here told that in some important way he [or the street] belongs to the police and not to himself."<sup>312</sup> In effect, the police, not citizens, are sovereign on the streets of America, and every officer has a roving commission to satisfy his curiosity about anyone he encounters on the street. If *Hodari* seeks to reinstate the common law of arrests,<sup>313</sup> it is returning our nation to the pre-revolutionary period, which has been characterized as placing "the liberty of every man in the hands of every petty officer."<sup>314</sup> In rejecting *Hodari* based on state constitutional law, the Supreme Court of Hawaii concluded:

We cannot allow the police to randomly "encounter" individuals without any objective basis for suspecting them of misconduct and then place them in a coercive environment in order to develop reasonable suspicion to justify their detention. This investigative technique is based on the proposition that an otherwise innocent person, who comes under police scrutiny for no good reason, is not innocent unless he or she convinces the police that he or she is. Such a procedure is anathema to our constitutional freedoms.<sup>315</sup>

ridicule, and harassment among the more widely practiced.

*Id.* at 304.

<sup>311</sup> See Charles A. Reich, *Police Questioning of Law Abiding Citizens*, 75 YALE L.J. 1161, 1161 (1965) ("[T]he officer told me he had the right to stop anyone any place any time—and for no reason . . .").

<sup>312</sup> WHITE, *supra* note 1, at 195. Professor White's comment referred to a search incident to arrest, where the officer testified to the following: "I just searched him. I didn't think about what I was looking for. I just searched him." *Id.* at 187 (quoting *United States v. Robinson*, 414 U.S. 218, 251 (1973)); see also Reich, *supra* note 311, at 1164 (stating that "what is at stake is the respect and dignity due to each individual from his government").

<sup>313</sup> See *supra* note 219 and accompanying text.

<sup>314</sup> John Adams, Abstract of the Argument, in 2 LEGAL PAPERS OF JOHN ADAMS 134, 142 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965) (comments of James Otis). Justice Scalia recently invoked the common law's approval of *stopping*, but not *frisking*, "suspicious night-walkers." *Minnesota v. Dickerson*, 113 S. Ct. 2130, 2140-41 (1993) (Scalia, J., concurring). However, Scalia considered such stops justified as a Fourth Amendment seizure not because of the night-walker's presence on a public street, but because the night-walker was acting suspiciously. In contrast to the stop/seizure of a suspicious night-walker, a police-citizen encounter is classified as a nonseizure and need not be justified by any suspicious activity of the citizen pedestrian.

<sup>315</sup> *State v. Quino*, 840 P.2d 358, 365 (Haw. 1992), *cert. denied*, 113 S. Ct. 1849 (1993).

By endorsing a police officer's unfettered power to single out and approach innocent citizens, the Court has given short shrift to the chilling effects such encounters may have on the citizenry's right to be secure in their persons. Suppose, for example, the interrogating officer states: "Talk or walk, it's your choice. However, if you do walk, we are going to be checking up on you."<sup>316</sup> By offering the option to "talk or walk," the

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<sup>316</sup> A variation on the "talk or walk" hypothetical arose before the Iowa Supreme Court in *State v. Johnson-Hugi*, 484 N.W.2d 599 (Iowa 1992). The court noted that the "defendant was presented with the specific alternative of either cooperating as a confidential informant or being arrested; her decision to cooperate necessarily precluded the possibility of there being an 'arrest.'" *Id.* at 601. The dissent, however, insisted that a Fourth Amendment seizure had occurred because the defendant "was not free to ignore the request of the officers, since had she done so, they would have reinstated criminal proceedings." *Id.* at 603 (Snell, J., dissenting); see also *United States v. Ward*, 961 F.2d 1526, 1532 (10th Cir. 1992) (distinguishing *Florida v. Bostick* on the grounds that a person singled out by the police is more apt to feel that he is the specific target of suspicion than is someone who is one among many being questioned); *United States v. Berry*, 670 F.2d 583, 597 (5th Cir. Unit B 1982) (opining that telling a suspect that an investigation had focused on him and that an innocent person would be willing to cooperate with police is coercive); *State v. Ossey*, 446 So. 2d 280, 285 (La.) (holding that there was a seizure when defendant "was told that he was the focus of investigation"), *cert. denied*, 469 U.S. 916 (1984).

*But see* WAYNE R. LAFAVE & JEROLD H. ISREAL, *CRIMINAL PROCEDURE* § 3.10(b), at 235-36 (2d ed. 1992) (when police threaten to obtain a search warrant, the suspect has not been coerced into consenting to the search; he has simply "been correctly advised of his legal situation").

Situations like the "talk or walk" hypothetical reach the criminal courts only when there is evidence to be suppressed under the Fourth Amendment's exclusionary rule. If the suspect discards evidentiary items while walking away, and if the officer seizes those items, a court may have to determine whether the suspect's decision to discard the property was a wholly voluntary abandonment or one caused by the officer's actions. See *United States v. Beck*, 602 F.2d 726, 729-30 (5th Cir. 1979) ("While it is true that a criminal defendant's voluntary abandonment of evidence can remove the taint of an illegal stop or arrest, it is equally true that for this to occur the abandonment must be truly voluntary and not merely the product of police misconduct.") (citations omitted); see also *State v. Oquendo*, 613 A.2d 1300, 1313 (Conn. 1992) ("The relevant inquiry is whether the unlawful conduct of the police induced the disposal of the incriminating items by the defendant.").

Encounters or pursuits which stop short of a physical touching of the suspect also may give rise to § 1983 suits. See, for example, *Checki v. Webb*, 785 F.2d 534 (5th Cir. 1986), a section 1983 case where the plaintiff claimed that he was "alarmed" and suffered mental anguish after being chased by the police at speeds of up to 100 miles per hour. *Id.* at 535. The court noted that the pursuing officers' actions may have "crossed the constitutional line that would make their pursuit and harassment actionable under section 1983," but held that this was a determination for the trier of fact and remanded the case. *Id.* at 538.

officer has recognized that the citizen is "free to decline the officers' requests or otherwise terminate the encounter."<sup>317</sup> The citizen's freedom, however, is less than an unabridged liberty to depart,<sup>318</sup> although he may terminate the encounter free of physical restraint, the citizen still faces the possible consequences of a threatened investigation.<sup>319</sup>

Of course, the police are entitled to conduct many types of independent investigations which do not implicate Fourth Amendment rights. Only an unrealistically broad reading of the right to be let alone would categorize all investigations of a suspect as searches or seizures. The relevant question is not whether the threatened investigation itself will infringe upon Fourth Amendment rights, but whether the police may explicitly or implicitly threaten to use their legitimate investigative powers in an attempt to limit the citizen's freedom of movement.<sup>320</sup>

The question of the legal significance of the officer's "talk or we investigate" ultimatum cannot be resolved by applying the *Mendenhall* standard of asking how a reasonable person would perceive this caveat.<sup>321</sup> The average citizen will recognize that the officer's threat creates some degree of incorporeal restraint on the unfettered exercise of the citizen's freedom of movement.<sup>322</sup> The question for the Court is

<sup>317</sup> Florida v. Bostick, 111 S. Ct. 2382, 2387 (1991).

<sup>318</sup> "Even though momentary, a seizure occurs whenever an objective evaluation of a police officer's show of force conveys the message that the citizen is not entirely free to leave—in other words, that his or her liberty is being restrained in a significant way." California v. Hodari D., 499 U.S. 621, 111 S. Ct. 1547, 1558 (1991) (Stevens, J., dissenting).

<sup>319</sup> "While [governmental] restraint does not have to be physical, it nonetheless must result in a restriction of the defendant's autonomy." United States v. Madison, 936 F.2d 90, 93 (2d Cir. 1991); see also United States v. Hooper, 935 F.2d 484, 489 (2d Cir. 1991) ("[A] 'seizure' for the purposes of the fourth amendment [sic] is not defined by whether an individual has halted his forward progress in response to police conduct, but rather is defined by the coercive nature of the police conduct.").

<sup>320</sup> "[T]he Fourth . . . Amendment[] require[s] that a consent not be coerced, by explicit or implicit means, by implied threat or covert force. For no matter how subtly the coercion was applied, the resulting 'consent' would be no more than a pretext for the unjustified police intrusion against which the Fourth Amendment is directed." Schneckloth v. Bustamonte, 412 U.S. 218, 228 (1973).

<sup>321</sup> United States v. Mendenhall, 446 U.S. 544, 554 (1980) ("[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.").

<sup>322</sup> Michigan v. Chesternut, 486 U.S. 567, 575-76 (1988) (the Court conceded that the police conduct was "somewhat intimidating," but "not 'so intimidating' that [the defendant] could reasonably have believed that he was not free to disregard the police presence and go about his business").

whether this form of incorporeal restraint is meaningful enough to trigger Fourth Amendment coverage.<sup>323</sup> The answer, according to *Hodari*, is that the only legally significant form of restraint is one that places the citizen under the physical control of the police.<sup>324</sup> Such an answer is surprising in light of the Court's opposite conclusion when considering whether physical trespass is a necessary prerequisite for Fourth Amendment searches and seizures of property.<sup>325</sup> Once *Katz v. United States*<sup>326</sup> recognized that governmental action falling short of physical trespass could threaten privacy interests, it would seem to follow that governmental action falling short of physical restraint could threaten liberty interests. The Fourth Amendment becomes "curioser and curioser" when a police approach to a motor vehicle momentarily stopped at a toll booth is considered a seizure,<sup>327</sup> whereas the amendment is inapplicable to a police officer's decision to single out and intimidate a pedestrian.

As trite as it may seem, there is little harm in categorizing a momentary stop at a toll booth as a seizure of the vehicle. Courts can uphold such seizures as constitutionally reasonable as long as all vehicles are stopped in a nondiscriminatory manner.<sup>328</sup> Labeling the stop a nonseizure, as opposed to a reasonable seizure, however, would force the courts to turn a deaf ear to charges that the government had targeted a particular vehicle for dissimilar treatment. In *Carson v. Commonwealth*,<sup>329</sup> the actual toll booth case, the dissent objected to the further intrusion upon privacy and liberty that occurred

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<sup>323</sup> The Court has stated that "[a] 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property." *United States v. Jacobsen*, 466 U.S. 109, 113 (1984); *see also* *United States v. Karo*, 468 U.S. 705, 712 (1984) ("[I]t cannot be said that anyone's possessory interest [in a can of ether, containing a police beeper] was interfered with in a meaningful way.").

<sup>324</sup> *See* *California v. Hodari D.*, 499 U.S. 621, 111 S. Ct. 1547, 1550 (1991) ("The word 'seizure' readily bears the meaning of a laying on of hands or application of physical force to restrain movement . . ."); *see also* *Brower v. County of Inyo*, 489 U.S. 593, 596 (1989) ("Violation of the Fourth Amendment requires an intentional acquisition of physical control.").

<sup>325</sup> *See supra* note 33 and accompanying text.

<sup>326</sup> 389 U.S. 347, 353 (1967).

<sup>327</sup> *Carson v. Commonwealth*, 421 S.E.2d 415, 417 (Va. 1992) (Hassell, J., dissenting) ("When [the officer] approached [the defendant's] car, a seizure occurred within the meaning of the Fourth Amendment."); *cf.* *State v. Van Ackeren*, 495 N.W.2d 630, 635, 641, 643-44 (Neb. 1993) (holding that the defendant was not seized when he paused and then ran from an officer who ordered him to "hold it a minute," but holding that the defendant's vehicle was seized when police deflated two of the vehicle's tires to prevent him from fleeing in the vehicle).

<sup>328</sup> *See* *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 449-52 (1990). *But see* *Delaware v. Prouse*, 440 U.S. 648, 658-61 (1979) (random stop of vehicle is an unreasonable seizure).

<sup>329</sup> 421 S.E.2d 415 (Va. 1992).

when a policeman at the toll booth peered into selected vehicles.<sup>330</sup> The need to regulate a police officer's potentially discriminatory or arbitrary treatment of selected citizens—a point that the *Hodari* Court missed—is a point particularly relevant in street encounters between police and pedestrians.<sup>331</sup>

A situation similar to the toll booth case arises when a traffic patrolman directs all pedestrians to cross the street at the crosswalk. The officer is interfering with the pedestrians' freedom of movement, but such nondiscriminatory interference is entirely reasonable. The situation changes, however, if the officer singles out a particular pedestrian and asks him to wait on the corner until he answers a few questions. This idiosyncratic treatment of a citizen may or may not be constitutionally reasonable depending upon the officer's justification for targeting the particular pedestrian. However, the reasonableness of the officer's justification will be subjected to judicial scrutiny only if the court first classifies his conduct as a seizure or attempted seizure of the citizen. While *Hodari* concedes that a seizure may occur if the pedestrian complies with the request to wait on the corner,<sup>332</sup> *Hodari* insists that the Fourth Amendment has no application to the officer's potentially discriminatory actions, so long as the citizen refuses to stop his physical movement.<sup>333</sup>

A citizen's refusal to terminate his physical movement forced the Fourth Circuit to probe the possibility of modifying *Hodari* to encompass a "functional equivalent of physical restraint."<sup>334</sup> The defendant in *United States v. Wilson*<sup>335</sup> was approached in an airport terminal, where he consented to a frisk of his person and a search of his carry-on bag. When the defendant sought to leave, however, the DEA agent asked to search the defendant's coat. The defendant refused and started to walk away, but the agent accompanied him and "began to reason with him."<sup>336</sup> When the angry defendant demanded to know why he was being stopped, the agent replied, "I am not stopping you, you are free to leave, you can leave if you like."<sup>337</sup> The defendant walked away on at least four occasions, but each time the agent accompanied him and continued to "reason" with him.<sup>338</sup>

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<sup>330</sup> *Carson*, 421 S.E.2d at 416 (Hassell, J., dissenting).

<sup>331</sup> In police-citizen encounters, "the police exercise complete control over the interaction. The course of the questioning and the insinuating nature of the questions are left entirely to the discretion of the officer." *State v. Quino*, 840 P.2d 358, 363 (Haw. 1992), *cert. denied*, 113 S. Ct. 1849 (1993).

<sup>332</sup> *California v. Hodari D.*, 499 U.S. 621, 111 S. Ct. 1547, 1550-52 (1991).

<sup>333</sup> 111 S. Ct. at 1550.

<sup>334</sup> *United States v. Wilson*, 953 F.2d 116, 123 (4th Cir. 1991).

<sup>335</sup> *Id.*

<sup>336</sup> *Id.* at 118.

<sup>337</sup> *Id.*

<sup>338</sup> *Id.* at 118-19. In *State v. Quino*, 840 P.2d 358 (Haw. 1992), *cert. denied*, 113 S.



Finding that the defendant "was not physically restrained by the police,"<sup>339</sup> the Fourth Circuit faced "an unusual variant on the increasingly common theme of random police-citizen encounters and warrantless searches of persons or their belongings."<sup>340</sup> The Fourth Circuit held that "physical movement alone does not negate the possibility that a seizure may nevertheless have occurred,"<sup>341</sup> and that police persistence in the face of the defendant's "unequivocal unwillingness to engage in further conversation"<sup>342</sup> amounted to "the functional equivalent of physical restraint, which, in the absence of justification, is proscribed by the Fourth Amendment."<sup>343</sup> Although troubled by *Hodari's* insistence upon physical restraint or submission, the court concluded that the coercive nature of the policeman's unilateral actions "is the type of state interference with personal security that the Fourth Amendment proscribes."<sup>344</sup>

The facts of *Wilson* confirm the air of unreality that surrounds the Supreme Court's discussion of situations in which the police accost the defendant, but the defendant refuses to yield to their authority and is then permitted to go on his way. As numerous commentators have noted, this situation rarely occurs because, "in fact, citizens almost never feel free to end an encounter initiated by a police officer and walk away."<sup>345</sup> When the police ask the suspect to stop, he is not likely to ignore them. If an audacious citizen such as the defendant in *Wilson* dares to ignore the police and walk away, a chase is likely to ensue.<sup>346</sup>

A chase, however, is merely the mid-point of the tripartite police action that characteristically occurs when a suspect refuses to submit to a police-

Ct. 1849 (1993), the court condemned the Honolulu Police Department's similar use of a "walk and talk drug interdiction program" in which police are "trained to engage in 'consensual encounters' whereby airline passengers are approached and, in a 'conversational manner,' requested to consent to a search of their luggage or person." *Id.* at 360, 365.

<sup>339</sup> *Wilson*, 953 F.2d at 122.

<sup>340</sup> *Id.* at 120.

<sup>341</sup> *Id.* at 123.

<sup>342</sup> *Id.*

<sup>343</sup> *Id.*

<sup>344</sup> *Id.*

<sup>345</sup> Edwin J. Butterfoss, *Bright Line Seizures: The Need for Clarity in Determining When Fourth Amendment Activity Begins*, 79 J. CRIM. L. & CRIMINOLOGY 437, 439 (1988).

<sup>346</sup> "It would be difficult to find in the annals of the law any instances in which a citizen ha[s] successfully exercised" the right to walk away. *State v. Shy*, 373 So. 2d 145, 149 (La. 1979) (Dennis, J., dissenting). In *Hodari*, the defendant "attempted to end 'the conversation' before it began and soon found himself literally 'not free to leave' when confronted by an officer running toward him head-on who eventually tackled him to the ground." *California v. Hodari D.*, 499 U.S. 621, 111 S. Ct. 1547, 1559 (1991) (Stevens, J., dissenting).

citizen encounter. As demonstrated in *Hodari*, an encounter begins with the officer's initial approach, which often gives rise to a pursuit, which may in turn culminate with the final capture of the fleeing suspect. "The question," Justice Stevens suggested in *Hodari*, "is whether the Fourth Amendment was implicated at the earlier or the later moment."<sup>347</sup> By withholding Fourth Amendment coverage until the final stage of an encounter, when some touching occurs or physical control is achieved, the Court has refused to place constitutional limitations on the earliest manifestations of police power—the approach and the chase.<sup>348</sup>

So long as the courts refuse to apply the Fourth Amendment to the initial stages of police-citizen encounters, police conduct at such stages may be as arbitrary and unreasonable as the police choose.<sup>349</sup> *Hodari* simply ignores the hard reality of street encounters.

The First Amendment remains healthy because possible invasions of it can usually be challenged in a civilized, scholarly way in a dignified appellate court. Constitutional rights that must be defended, if at all, on a lonely street, on a highway at night, in a police station or before a justice of the peace are always in trouble.<sup>350</sup>

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<sup>347</sup> *Hodari*, 499 U.S. 621, 111 S. Ct. at 1559 (Stevens, J., dissenting).

<sup>348</sup> The holding in *Hodari* accepts what *Terry v. Ohio* rejected: the government's attempts "to isolate from constitutional scrutiny the initial stages of the contact between the policeman and the citizen." *Terry v. Ohio*, 392 U.S. 1, 17 (1968); see also Shirley M. Hufstедler, *The Directions and Misdirections of a Constitutional Right of Privacy*, 26 REC. N.Y.B.A. 546, 552 (1971) (stating that government conduct not classified as a search or seizure is immunized from scrutiny, even though it results from such illegitimate, or even malicious, motives as governmental curiosity, a desire to gather and report interesting information, or personal distaste for the political philosophies or lifestyles of certain citizens).

<sup>349</sup> "The Fourth Amendment prohibits unreasonable *seizures* not unreasonable, unjustified or outrageous conduct in general. Therefore, pre-seizure conduct is not subject to Fourth Amendment scrutiny." *Carter v. Buscher*, 973 F.2d 1328, 1332 (7th Cir. 1992) (citations omitted).

<sup>350</sup> Reich, *supra* note 311, at 1169. The Court has also ignored the unpleasant reality that street encounters involve a disproportionate number of one minority group—black teenagers. See *Developments in the Law—Race and the Criminal Process*, *supra* note 280, at 1495 n.5 (citing studies indicating that blacks are more frequently stopped by police on suspicion than are whites). See generally Johnson, *supra* note 280 (discussing impact of race on police officers' decision to detain suspects and potential Fourth Amendment implications); Maclin, *supra* note 280 (discussing impact of race on Fourth Amendment seizure decisions). This group is particularly vulnerable to identification and harassment in public because a lack of access to private facilities often forces black teenagers onto the public streets. The right to be let alone in public may be the only form of privacy or personal security that a black youth possesses. Therefore, a black teenager whom a police officer humiliates in front of others is likely to form a lasting disrespect for law. This

While completed seizures can be addressed after the fact, the Court has exacerbated the arbitrariness of street encounters by spurning the need to prescribe in advance the amendment's restrictions on a policeman's approach and pursuit of citizens. "[E]veryone, including the police, must live under rules. All organizations, and all officials, get out of hand if they do not have rules to guide them, if they do not do their work within limits."<sup>351</sup> Appropriate judicial scrutiny of the manifestations of police power inherent in the earliest stages of police-citizen encounters requires that the Court adopt a sagacious definition of attempted seizures.

## V. A MODEL FOR DEFINING ATTEMPTED SEIZURES

A constitutional definition of attempted seizures<sup>352</sup> may be formulated by drawing upon the approach to defining the scope of the Fourth Amendment in *Katz v. United States*<sup>353</sup> and by drawing upon established concepts

insidious form of social harm cannot be discounted merely because police harassment stops short of what the Court refers to as a "genuine, successful seizure." *Hodari*, 499 U.S. 621, 111 S. Ct. at 1551.

<sup>351</sup> Reich, *supra* note 311, at 1171; see also *New York v. United States*, 342 U.S. 882, 884 (1951) (Douglas, J., dissenting) ("Absolute discretion, like corruption, marks the beginning of the end of liberty."). Professor Reich also explained the lack of effective remedies for controlling the police:

There is always the right to defend against any criminal charge that may result [from a police-citizen encounter]. There is always a tort action for false arrest. Perhaps in some extreme circumstances there might be grounds for an action under one of the civil rights statutes, or for an injunction against a continuing police practice. But these remedies are often costly, time-consuming, and ultimately unsuccessful. No one effectively "polices the police."

Reich, *supra* note 311, at 1163.

<sup>352</sup> The Court may approach failed efforts to achieve physical control over a suspect in one of two ways. If physical control is accepted as the *sine qua non* of seizures, the Court must address whether the Fourth Amendment encompasses failed attempts to achieve physical control. Conversely, the Court may expand the concept of completed seizures by recognizing that an unsuccessful effort to establish physical control achieves another result which triggers Fourth Amendment protections—an infringement upon liberty consisting of "the fear and surprise engendered in law-abiding" citizens. *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 452 (1990). Either approach focuses on the question of extending the amendment to police action that fails to achieve physical control. The difference in the approaches lies in whether the lack of physical control is addressed under the rubric of attempted seizures or under an expanded concept of completed seizures. While it may be largely a matter of semantics, this author has employed the term "attempted seizure" in order to avoid confusion with *Hodari's* definition of "genuine, successful seizures." *California v. Hodari D.*, 499 U.S. 621, 111 S. Ct. 1547, 1551 (1991).

<sup>353</sup> 389 U.S. 347 (1967).

used in defining attempted crimes. The *Katz* approach to the Fourth Amendment and the laws governing attempted crimes share a common concern for the social consequences that flow from an actor's unilateral conduct. Rather than focusing upon purely physical consequences, as *Hodari* does, these seemingly unrelated areas of the law require a judicial determination as to whether the actor's conduct imposes upon society certain undesirable consequences that our legal system seeks to prohibit.<sup>354</sup>

#### A. *Applying the Katz Standard to Attempted Seizures*

If the government places wiretaps on public telephones, a citizen retains the freedom to avoid using the telephones and thereby maintains some control over his privacy. When a pursuing officer points his weapon at a fleeing suspect, the suspect retains the freedom to try to outrun the bullet. In neither extreme example has the government established its complete physical control over the situation by eliminating all vestiges of the citizen's freedom of choice. In both cases, however, the government has significantly narrowed the citizen's options<sup>355</sup> and thus burdened or threatened the citizen's unfettered exercise of Fourth Amendment rights.

When addressing governmental threats to the privacy of personal communications, *Katz* requires the Court to consider whether the government may impose the unrestricted use of a particular form of surveillance upon a free society.<sup>356</sup> By placing a form of police action beyond the control of the Fourth Amendment, the Court permits the police to inflict arbitrary power on citizens.<sup>357</sup> The Court, rightly or

<sup>354</sup> See *United States v. White*, 401 U.S. 745, 786 (1971) (Harlan, J., dissenting): Our expectations, and the risks we assume, are in large part reflections of laws that translate into rules the customs and values of the past and present. Since it is the task of the law to form and project, as well as mirror and reflect, we should not, as judges, merely recite the expectations and risks without examining the desirability of saddling them upon society.

<sup>355</sup> The California Court of Appeals held that the officer's pursuit in *Hodari* was a seizure because the pursuit controlled "the direction or speed" of the suspect's movement. *Hodari*, 499 U.S. 621, 111 S. Ct. at 1559 n.14 (Stevens, J., dissenting). *But cf.* PERKINS & BOYCE, *supra* note 70, at 224 (stating that for purposes of false imprisonment, a person is not confined "merely because he is prevented from going in some one direction, or in several directions, so long as he may freely depart by some other known way").

<sup>356</sup> See *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

<sup>357</sup> When a police activity "is not labeled a 'search' or 'seizure,' it is subject to no significant restrictions of any kind. It is only 'searches' or 'seizures' that the fourth amendment [sic] requires to be reasonable: police activities of any other sort may be as unreasonable as the police please to make them." Amsterdam, *supra* note 36, at 388.

wrongly, has held that citizens may legitimately expect that the government will not eavesdrop on their telephone communications at their pleasure, but must suffer the possibility that their conversations with presumed confidants may in fact be conversations with government spies.<sup>358</sup> The wisdom of the Court's decision in any particular case is subject to debate because the *Katz* standard is not a panacea which ensures a "correct" result.<sup>359</sup> Given the present political and judicial climate, it may be a benefit rather than a drawback of *Katz* that it employs a methodology which can be utilized to either expand or contract individual rights. While *Katz* may not guarantee a correct answer, it does pose the correct question by forcing the Court to look beyond common law conventions in order to resolve the modern-day conflict between personal autonomy and collective security.<sup>360</sup> *Katz* faces this question openly when defining searches and seizures of property that threaten protected rights of privacy.<sup>361</sup> The Court, however, has been less than

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<sup>358</sup> *White*, 401 U.S. at 749 ("However strongly a defendant may trust an apparent colleague, his expectations in this respect are not protected by the Fourth Amendment when it turns out that the colleague is a government agent regularly communicating with the authorities."); *Hoffa v. United States*, 385 U.S. 293, 303 (1966) (stating that the risk of betrayal by one's friends and confidants is "inherent in the conditions of human society" and "[i]t is the kind of risk we necessarily assume whenever we speak") (quoting *Lopez v. United States*, 373 U.S. 427, 465 (1966) (Brennan, J., dissenting)); cf. *McCray v. Illinois*, 386 U.S. 300, 307 (1967) ("[W]e accept the premise that the informer is a vital part of society's defensive arsenal.") (quoting *State v. Burnett*, 201 A.2d 39, 44 (N.J. 1964)).

<sup>359</sup> "Fourth amendment [sic] doctrine is driven by society's attitudes and beliefs about the relative value of autonomy and security. In this continuing struggle between the individual and the collective there is only one rule: neither may utterly dominate the other—chaos and tyranny are equally to be avoided." Junker, *supra* note 287, at 1183; see also *WHITE*, *supra* note 1, at 195 ("the task of the Court under the fourth amendment [sic] is to find a way to talk about an irreconcilable clash of interests that does some real justice to the claims on both sides").

<sup>360</sup> See, for example, Justice Harlan's approach to the constitutionality of unregulated electronic monitoring. Justice Harlan maintained that such practices:

undermine that confidence and sense of security in dealing with one another that is characteristic of individual relationships between citizens in a free society.

. . . Were third-party bugging a prevalent practice, it might well smother that spontaneity—reflected in frivolous, impetuous, sacrilegious and defiant discourse—that liberates daily life. . . . All these values are sacrificed by a rule of law that permits official monitoring of private discourse limited only by the need to locate a willing assistant.

*White*, 401 U.S. at 787-89 (Harlan, J., dissenting).

<sup>361</sup> See *Katz*, 389 U.S. at 350-51. "[E]ffective articulation of the fourth amendment [sic] threshold in the language of 'privacy' assumes a willingness on the part of courts to

forthright in facing its responsibility to define seizures of the person that threaten protected liberty interests.

When addressing governmental threats to individual liberty, the Court has told citizens that any threats to personal autonomy that fail to touch or achieve physical control over the citizen are beyond the coverage of the amendment, beyond judicial scrutiny, and thus a necessary cost of living under our system of government.<sup>362</sup> Again, this result may or may not be "correct," but by resting this view of modern American society on common law definitions of arrest, the Court has failed to balance liberty interests against law enforcement needs in the same manner in which the Court balances law enforcement needs against privacy interests. Although *Katz* expands Fourth Amendment searches and seizures of property beyond common law concepts, *Hodari* merely accepts and adopts the common law approach to seizures of the person,<sup>363</sup> as if the Fourth Amendment's prohibition of unreasonable seizures of the person has no higher purposes, no discernible values, and no aims or context beyond that of common law arrests.

The right of privacy and the right to liberty can be placed on equal footing if the Court discards the inconsistent approaches to Fourth Amendment coverage reflected in *Katz* and *Hodari*. Harmonization of search and seizure law requires that the Court recognize that the Fourth Amendment encompasses those attempted<sup>364</sup> seizures of the person that infringe upon an individual's legitimate expectation of liberty. Further synchronization of search and seizure law will occur when judicial efforts to identify constitutionally protected rights of individual liberty closely parallel the Court's prior efforts to identify legitimate rights of privacy. By substituting the term "liberty" in place of "privacy," the Court can utilize the *Katz* approach to define seizures of the person. That is, legitimate liberty interests are threatened whenever the unrestricted use of a form of government power cannot be imposed on a free society.<sup>365</sup> Borrowing from the type of analysis utilized in *Katz*, the Court may

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deal openly on the plane of human values." Note, *Formalism, Legal Realism, and Constitutionally Protected Privacy Under the Fourth and Fifth Amendments*, 90 HARV. L. REV. 945, 991 (1977).

<sup>362</sup> See *California v. Hodari D.*, 499 U.S. 621, 111 S. Ct. 1547, 1550-52 (1991); *United States v. Madison*, 936 F.2d 90, 93 (2d Cir. 1991).

<sup>363</sup> *Hodari*, 499 U.S. 621, 111 S. Ct. at 1556 (Stevens, J., dissenting) ("The Court mistakenly hearkens back to common law, while ignoring the expansive approach that the Court has taken in Fourth Amendment analysis since *Katz* and *Terry*.").

<sup>364</sup> See *supra* note 352 and accompanying text.

<sup>365</sup> See *State v. Campbell*, 759 P.2d 1040, 1048 (Or. 1988).

conclude that citizens must accede to a society in which police officers may use deception,<sup>366</sup> but not intimidation, when attempting to restrain a citizen's freedom of movement. If Fourth Amendment concepts of privacy force citizens to accept the hard reality of deceptive confidants<sup>367</sup> and good faith intrusions,<sup>368</sup> the amendment's concept of liberty may require citizens to endure certain forms of police deception.<sup>369</sup> Conversely, a Fourth Amendment which does not permit police to tap telephones on a mere whim should refuse to tolerate police firing weapons, chasing, or threatening citizens without reasonable cause. To hold otherwise, as *Hodari* does,<sup>370</sup> encourages police to roam the streets, menacing and intimidating persons, free of constitutional checks.

Distinguishing between liberty interests that are or are not protected by the Fourth Amendment destroys the illusion of certainty created by resting the amendment's coverage upon the factual predicates of touching or submission. The Court must not purchase that illusion of adjudicative certainty, however, by forfeiting its constitutional responsibility to identify the citizenry's legitimate liberty interests; nor must the Court default on its duty to articulate constitutional standards that protect

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<sup>366</sup> For example, an officer who smiles and initiates a conversation about the weather may be deceiving a pedestrian into a street encounter or detention that will not be terminated until the pedestrian dispels the officer's suspicion of criminal activity.

<sup>367</sup> See *supra* note 358 and accompanying text.

<sup>368</sup> See *Illinois v. Rodriguez*, 497 U.S. 177, 184 (1990) (stating that when a magistrate authorizes a search on "seemingly reliable but factually inaccurate information," the homeowner "suffers one of the inconveniences we all expose ourselves to as the cost of living in a safe society"); *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 455 (1990) (holding that the intrusiveness of sobriety checkpoints is a necessary sacrifice in order to advance the state's interest in deterring drunken driving).

<sup>369</sup> "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.'" *INS v. Delgado*, 466 U.S. 210, 215 (1984) (emphasis added) (quoting *United States v. Martinez-Fuerte*, 428 U.S. 543, 554 (1976)).

This author does not suggest that the Court should condone police deception, or that it properly did so in the *White* and *Hoffa* cases. See *supra* note 358. One can certainly question whether the police should be able to accomplish by deception that which they cannot accomplish by force, and whether a policy of deception undermines the public's trust of government officials. The point is this: however the Court resolves the question of official deception and coercion, the methodology for resolving such questions should apply equally to searches and seizures of persons, houses, papers and effects.

<sup>370</sup> California conceded that the police officers did not have the requisite "reasonable suspicion" necessary to lawfully stop *Hodari*. See *California v. Hodari D.*, 499 U.S. 621, 111 S. Ct. 1547, 1549 n.1 (1991). In reaching its opinion, the Court "rel[ie]d" entirely upon the State's concession." *Id.*

individual liberty against arbitrary or intimidating police conduct.<sup>371</sup> Although the task of identifying fundamental constitutional rights is always difficult, the Court is not writing on a blank slate.<sup>372</sup> When called upon to identify legitimate liberty interests, the Court may draw upon twenty-five years of judicial interpretation of the legitimate privacy interests protected by the Fourth Amendment. Despite its many flaws, *Katz*, unlike *Hodari*, allows the Fourth Amendment to evolve beyond the common law conventions that existed at the time of the amendment's passage.<sup>373</sup>

### B. *Applying Models of Attempted Crimes to Attempted Seizures*

The Court's discussion of attempts to seize a person has given birth to nebulous and confusing concepts of subjective/objective intent<sup>374</sup> and the so-called objective perception of a hypothesized reasonable person.<sup>375</sup> The proper blend of subjective and objective perspectives is a familiar theme in the law governing attempted crimes, where the conflicting views of the subjectivists and the objectivists constitute the principle schools of thought.<sup>376</sup>

<sup>371</sup> "The mysterious aspect of judicial doctrine-making is the process by which national values are mediated by the incumbent justices [sic] of the Supreme Court." Junker, *supra* note 287, at 1120. See generally John H. Ely, *Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5 (1978) (discussing the Supreme Court's role in defining social values and proclaiming controlling principles).

<sup>372</sup> This task of identifying basic rights and desirable social values is hardly unique to Fourth Amendment jurisprudence. According to Justice Holmes, the judicial function necessarily and properly involves "considerations of what is expedient for the community concerned." HOLMES, *supra* note 169, at 35; see also BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 112 (1921):

My analysis of the judicial process comes then to this, and little more: logic, and history, and custom, and utility, and the accepted standards of right conduct, are the forces which singly or in combination shape the progress of the law. Which of these forces shall dominate in any case must depend largely upon the comparative importance or value of the social interests that will be thereby promoted or impaired.

<sup>373</sup> In this way, the Fourth Amendment is like the Eighth Amendment's cruel and unusual punishment clause which "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958).

<sup>374</sup> See *supra* notes 146-59 and accompanying text.

<sup>375</sup> See *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) ("a reasonable person would have believed that he was not free to leave").

<sup>376</sup> See generally GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* §§ 3.1-3.1.3, 3.3.1-3.3.5 (1978); Lloyd L. Weinreb, *Manifest Criminality, Criminal Intent, and the*



Subjectivists maintain that classifying attempts as crimes "provide[s] the state with an opportunity to isolate and punish dangerous persons—persons who subjectively intend to cause social harm."<sup>377</sup> Application of this principle to the Fourth Amendment would lead a subjectivist to view the amendment as a device for regulating dangerous governmental conduct—conduct intended to bring about a constitutionally prohibited harm. Thus, the protections of the amendment might apply as soon as a government agent manifests his intent to encroach upon a citizen's liberty interests.<sup>378</sup> There would be no need to wait for the actual infringement upon liberty to occur because legal sanctions for attempts seek to prevent *future* harm.<sup>379</sup> If, as the Court insists, general deterrence is the essence of the Fourth Amendment exclusionary rule,<sup>380</sup> *Hodari* undervalues the importance of deterring police officers from attempting to seize a person illegally.<sup>381</sup>

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"*Metamorphosis of Larceny*," 90 YALE L.J. 294, 294-96, 310-18 (1980) (applying subjective/objective intent analysis to the crime of larceny).

<sup>377</sup> JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 335 (1987); see also WAYNE R. LAFAVE & ASTIM W. SCOTT, JR., CRIMINAL LAW § 6.2(b), at 498 (1986) ("[T]here 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.").

<sup>378</sup> See, e.g., *People v. De Bour*, 352 N.E.2d 562, 567 (N.Y. 1976) ("Any time an intrusion on the security and privacy of the individual is undertaken with intent to harass or is based upon mere whim, caprice or idle curiosity, the spirit of the Constitution has been violated . . ."); Butterfoss, *supra* note 345, at 442 (proposing a *per se* rule based on the officer's purpose in initiating the encounter); Thomas K. Clancy, *The Supreme Court's Search for a Definition of a Seizure: What is a "Seizure" of a Person Within the Meaning of the Fourth Amendment?*, 27 AM. CRIM. L. REV. 619, 655 (1990) (attempted seizures occur "at the moment of intentional coercion and intimidation by the police designed to produce a seizure").

<sup>379</sup> "The deterrent purposes of the exclusionary rule focus on the conduct of law enforcement officers, and on discouraging improper behavior on their part, and not on the reaction of the citizen to the show of force." *California v. Hodari D.*, 499 U.S. 621, 111 S. Ct. 1547, 1561 (1991) (Stevens, J., dissenting). See generally David D. Friedman, *Impossibility, Subjective Probability, and Punishment for Attempts*, 20 J. LEGAL STUD. 179 (1991) (discussing the value of the deterrence objective when there is no probability of succeeding in the attempted crime); Steven Shavell, *Deterrence and the Punishment of Attempts*, 19 J. LEGAL STUD. 435 (1990) (discussing the justification for punishing attempts and the magnitude of such punishment).

<sup>380</sup> *United States v. Calandra*, 414 U.S. 338, 348 (1974) (stating that the Fourth Amendment exclusionary rule is "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved"); see also *United States v. Leon*, 468 U.S. 897, 906-08 (1984) (concluding that indiscriminate application of the Fourth Amendment exclusionary rule may undermine its purpose of deterring future harm).

<sup>381</sup> "[U]nder the Court's logic-chopping analysis, the exclusionary rule has no

Were the Court to adopt the subjectivist's concern for future harm, *Hodari* would have to be overturned because it triggers Fourth Amendment coverage only once the harm has occurred: *after* a citizen's freedom of movement has already been constrained.<sup>382</sup> Adoption of the subjectivist's concern would also raise questions about the holding in *Brower v. County of Inyo*<sup>383</sup> because if the police officer's intent is the linchpin which characterizes accidental seizures,<sup>384</sup> intent should also be the decisive factor in defining attempted seizures. Taken at face value, however, *Brower*, *Mendenhall*, and *Hodari* all implicitly reject the subjectivist's view and more closely approach the objectivist's viewpoint.<sup>385</sup>

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application because an attempt to make an unconstitutional seizure is beyond the coverage of the Fourth Amendment, no matter how outrageous or unreasonable the officer's conduct may be." *Hodari*, 499 U.S. 621, 111 S. Ct. at 1561 (Stevens, J., dissenting). The *Hodari* majority "presumed" that few orders to stop would be issued without adequate basis, and "since policemen do not command 'Stop!' expecting to be ignored, or give chase hoping to be outrun, it fully suffices to apply the deterrent to their genuine, successful seizures." 111 S. Ct. at 1551. The Court's presumption flies in the face of *Kolender v. Lawson*, 461 U.S. 352, 354 (1983), where a black male who often walked late at night in white neighborhoods was stopped or arrested fifteen times. *Id.*; see also Reich, *supra* note 311, at 1161 (Professor Reich recounted his personal experience: "I can count nine or ten times that I have been stopped and questioned in the past few years—almost enough to qualify me as an adjunct member of the Mafia.").

Whatever the past frequency of unjustified orders to stop, the *Hodari* decision encourages police to provoke confrontations and flight in the hope that suspects will abandon contraband or provide other evidence that could not be lawfully seized if reasonable justification were required at the time the officer initiated the confrontation. Police may now use a threatening but sufficiently slow chase as an evidence-gathering technique whenever they lack reasonable suspicion for a *Terry v. Ohio* stop. By provoking confrontation and flight, the officer may also bootstrap himself into a lawful seizure of the suspect, as the sighting of abandoned contraband provides reasonable suspicion for the subsequent seizure of the suspect's person. See *State v. Pressley*, 825 P.2d 749, 752 (Wash. Ct. App. 1992) (defendant's behavior "was susceptible to a number of innocent explanations and [was] insufficient to justify the stop," but the defendant's reaction to the officer's approach provided the basis for a valid *Terry* stop).

<sup>382</sup> "[T]he point at which the interaction between citizen and police officer becomes a seizure occurs . . . only *after* the officer exercises control over the citizen." *Hodari*, 499 U.S. 621, 111 S. Ct. at 1559-60 (Stevens, J., dissenting) (emphasis added). Justice Kennedy previously asserted 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." *Michigan v. Chesternut*, 486 U.S. 567, 577 (1988) (emphasis added).

<sup>383</sup> 489 U.S. 593 (1989).

<sup>384</sup> See sources cited *supra* note 378.

<sup>385</sup> See *California v. Hodari D.*, 499 U.S. 621, 111 S. Ct. 1547, 1551, 1558 (1991);

While subjectivists would invoke legal sanctions as soon as the actor's conduct poses a danger of future harm, objectivists would withhold censure until the conduct has brought about some harmful consequence.<sup>386</sup> The actor must execute "a substantial step" toward commission of his goal,<sup>387</sup> with a substantial step being one that itself causes social harm.<sup>388</sup> Objectivists, however, do not define social harm in the limited fashion of *Hodari*, which focuses on the tangible aspects of constraining physical movement.<sup>389</sup> Even in the absence of tangible injury, objectivists would invoke legal sanctions against conduct which damages some interest deemed socially valuable.<sup>390</sup> For example, objectivists would prohibit conduct that "disturb[s] the public repose,"<sup>391</sup> is "unnerving to the community,"<sup>392</sup> or causes apprehension, fear or alarm in the community because "someone has set out to do serious damage . . . and to break the accepted rules of social life."<sup>393</sup> An objectivist might well spurn the *Hodari* opinion<sup>394</sup> on the ground that the right of the people to be secure in their persons is disturbed when police are permitted to accost and pursue citizens on a mere whim or caprice.<sup>395</sup>

*Brower*, 489 U.S. at 598-600; *United States v. Mendenhall*, 446 U.S. 544, 554 (1980).

<sup>386</sup> DRESSLER, *supra* note 377, at 336 n.10.

<sup>387</sup> MODEL PENAL CODE § 5.01(1) (1962). The Code provides:

A person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for commission of the crime, he:

. . . .  
(c) purposely does or omits to do anything that, 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.

*Id.* (emphasis added).

<sup>388</sup> See DRESSLER, *supra* note 377, at 335.

<sup>389</sup> *Hodari*, 499 U.S. 621, 111 S. Ct. at 1550.

<sup>390</sup> See *supra* notes 377-78.

<sup>391</sup> *Clark v. State*, 8 S.W. 145, 147 (Tenn. 1888).

<sup>392</sup> FLETCHER, *supra* note 376, § 3.3 at 144.

<sup>393</sup> Thomas Weigend, *Why Lady Eldon Should Be Acquitted: The Social Harm in Attempting the Impossible*, 27 DEPAUL L. REV. 231, 264 (1977).

<sup>394</sup> Contrary to what the *Hodari* majority suggests, *California v. Hodari D.*, 499 U.S. 621, 111 S. Ct. 1547, 1549 n.1, fear of police encounters is not solely the lot of the guilty. See *infra* text accompanying notes 438-39.

<sup>395</sup> "Action based merely on whatever may pique the curiosity of a particular officer is the antithesis of the objective standards requisite to reasonable conduct and to avoiding abuse and harassment." *United States v. Martinez-Fuerte*, 428 U.S. 543, 577 (1976) (Brennan, J., dissenting); see also *People v. De Bour*, 352 N.E.2d 562, 567 (N.Y. 1976) ("[A]lthough it might be reasonable for the police at the scene of a crime to segregate and

The fundamental problem for the objectivist is determining whether the actor's conduct has proceeded sufficiently far so that it is proper to invoke legal sanctions against such conduct. Despite *Hodari's* insistence that the police must actually touch or control the suspect,<sup>396</sup> the legal significance of an actor's conduct should not turn upon spatial or temporal factors. To ignore the Fourth Amendment until physical restraint occurs decreases the chances of preventing such occurrences.<sup>397</sup> Invoking the amendment only when the officer has some physical proximity to the suspect—for example, when the chase is one short step away from accomplishing physical control—creates an arbitrary line of demarcation that ignores the possibility that a more physically remote act may infringe upon liberty interests. A prudent definition of attempted seizures must relegate spatial and temporal factors to a subordinate role in order to emphasize the proper balancing of the social interests required to protect individual freedom against the sometimes conflicting interest in effective law enforcement.<sup>398</sup>

The objectivist's desire to strike an appropriate balance between individual freedom and collective security<sup>399</sup> effectively counters the subjectivist's contention that Fourth Amendment protections should be invoked as soon as the officer manifests his intent to interfere with a citizen's liberty.<sup>400</sup> Adoption of the subjectivist's uncompromising view<sup>401</sup> would deny law enforcement officials any opportunity to approach citizens on the street and ask for their cooperation.<sup>402</sup> Some-

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interview witnesses, the same procedures would not be justified if done on a whim or caprice.”).

<sup>396</sup> See *Hodari*, 499 U.S. 621, 111 S. Ct. at 1550.

<sup>397</sup> The more society tolerates unjustified chases, the greater the likelihood that unjustified seizures will occur. The Court did not explain why it “must presume” that only a few orders to stop will be issued without adequate justification. 111 S. Ct. at 1551.

<sup>398</sup> The “impact on the individual's sense of security [must be] balanced against the utility of the [government's] conduct as a technique of law enforcement.” *United States v. White*, 401 U.S. 745, 786 (1971) (Harlan, J., dissenting).

<sup>399</sup> *Id.*

<sup>400</sup> *People v. De Bour*, 352 N.E.2d 562, 567 (N.Y. 1976).

<sup>401</sup> Under this absolutist view, an attempted seizure would occur when a police officer smiles at a citizen in hopes that the citizen will stop and chat, the chat consisting of some questions that the officer would like answered. Although the smiling officer may have attempted to induce a stop, his actions are so trivial that they fail to constitute “meaningful interference” with the citizen's legitimate liberty interests. See *United States v. Jacobsen*, 466 U.S. 109, 114 n.5 (1984).

<sup>402</sup> In fairness, it must be noted that the subjectivist's view states that officers may not approach a citizen *in the absence of* some articulable justification for approaching the citizen. *De Bour*, 352 N.E.2d at 567.

times there is no harm in asking,<sup>403</sup> and there are such things as truly voluntary encounters between police and citizens.<sup>404</sup> An objective analysis of the officer's unilateral conduct when approaching the citizen would illustrate the distinction between truly voluntary encounters and attempted seizures. If the officer's conduct imposes upon the populace the type of unacceptable social conditions that the Fourth Amendment seeks to prohibit—if the officer's conduct disturbs the public repose, is unnerving to the community, or causes apprehension, fear or alarm in the community—such conduct must be subjected to judicial scrutiny.<sup>405</sup> The harm caused by a violation of this conceptualization of the Fourth Amendment is to society's security, making society the aggrieved party rather than the individual selected for police scrutiny. The need to regulate improper police conduct does not retroactively evaporate merely because the particular target of police harassment refuses to surrender his liberty and submit to a "genuine, successful seizure."<sup>406</sup> An individual's courage or luck in avoiding a completed seizure does not dissipate the social harm that flows from the attempt to seize him.

The harm that matters most to society as a whole, is the diminished sense of security that neighbors and friends may feel when they learn of the police misconduct. Totalitarian governments do not cow their citizens by regularly ransacking all their homes; the threat is usually enough. At their worst, illegal searches can represent such threats, sending a signal to the community that people who displease the

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<sup>403</sup> MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 110.1 cmt. at 258 (1975) (suggesting that police should be allowed "to seek cooperation, even where this may involve inconvenience or embarrassment for the citizen").

[T]here is a fundamental difference between the right of an officer to inquire and the right of an officer to pursue and seize . . . . Although an officer is entitled to inquire, he is not in our system of justice entitled to a response and may not pursue or seize a person simply because a response to his inquiry has not been forthcoming . . . . (citations omitted).

*People v. Madera*, 596 N.Y.S.2d 766, 770 (N.Y. App. Div. 1993).

<sup>404</sup> It is clear that a voluntary encounter occurs when the citizen initiates contact with the police officer. *See, e.g.,* *Martinez v. State*, 635 S.W.2d 629, 632 (Tex. Crim. App. 1982) ("appellant was not tracked down, but was free to choose whether to encounter the police and he elected to do so"). *But see* *State v. Saia*, 302 So. 2d 869, 873 (La. 1974) ("Police officers cannot actively create 'street encounters' unless they have knowledge of suspicious facts and circumstances sufficient to allow them to infringe on the suspect's right to be free from governmental interference.").

<sup>405</sup> *See supra* notes 391-93 and accompanying text.

<sup>406</sup> *See* William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881, 902 (1991).

authorities, whether or not they commit crimes, can expect unpleasant treatment.<sup>407</sup>

An objective approach to attempted seizures compels the Court to focus on the officer's unilateral conduct and to identify the point at which the officer's encounter with a presumptively innocent citizen significantly threatens the very liberties that the amendment seeks to protect.<sup>408</sup> Once again, the road leads back to *Katz* and the previous suggestion that the *Katz* approach for identifying protected privacy interests can be utilized to identify protected liberty interests threatened by attempted seizures.<sup>409</sup>

### CONCLUSION

"If the law supposes that, . . . the law is a ass—a idiot!"<sup>410</sup>

With all due respect to the Court, the holding in *California v. Hodari D.*<sup>411</sup> evokes Dickens' caustic comment on rules of law that fail to comport with common sense. Less than three weeks after authoring the opinion in *Hodari*, Justice Scalia criticized the Court in *County of Riverside v. McLaughlin* for subjecting arrested citizens to a "Dickensian bureaucratic machine"<sup>412</sup> that fosters "the image of a system of justice that has lost its ancient sense of priority, a system that few Americans would recognize as our own."<sup>413</sup> Those words can be turned back on the Justice by asking how many citizens would accept that the Fourth Amendment imposes restrictions on a police officer's "merely touching, however, slightly, the body of the accused,"<sup>414</sup> but 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."<sup>415</sup> By failing to deal in intelligible ways with the citizenry's legitimate liberty interests, *Hodari* ignores the role of legal discourse "as an important force of social

<sup>407</sup> *Id.*

<sup>408</sup> See *supra* note 398 and accompanying text.

<sup>409</sup> See *supra* text accompanying notes 356-72.

<sup>410</sup> CHARLES DICKENS, *OLIVER TWIST* 403 (Charles Dickens ed., Bantam Books 1981) (1867).

<sup>411</sup> 499 U.S. 621, 111 S. Ct. 1547 (1991).

<sup>412</sup> *County of Riverside v. McLaughlin*, 111 S. Ct. 1661, 1677 (1991) (Scalia, J., dissenting).

<sup>413</sup> *Id.*

<sup>414</sup> *California v. Hodari D.*, 499 U.S. 621, 111 S. Ct. 1547, 1550 (quoting RESTATEMENT OF TORTS § 41 cmt. h (1934)).

<sup>415</sup> 111 S. Ct. at 1552 (Stevens, J., dissenting).

definition and cohesion, placing the individual . . . in a comprehensible public world in ways that she can respect."<sup>416</sup>

If common sense and logic must sometimes defer to history,<sup>417</sup> the Court must penetrate the surface of common law arrests in order to reach a broader understanding of the full panoply of common law protections against an officer's unjustified show of authority toward citizens. In addition to "genuine, successful arrests,"<sup>418</sup> the common law addressed attempted arrests,<sup>419</sup> false arrests,<sup>420</sup> and assaults<sup>421</sup> committed by police officers and other citizens.<sup>422</sup> If the Court has incorporated something less than the full arsenal of common law restrictions<sup>423</sup> upon police authority into the Fourth Amendment, the Court has failed to explain its process of selective incorporation. The fact that the common law dealt with false arrests and assaults in separate proceedings against the offending police officer is not a determinative factor.<sup>424</sup> In the absence of an exclusionary rule, the officer's misconduct had no bearing on the conviction or acquittal of the arrested citizen. Thus, the propriety of the officer's conduct was necessarily addressed in a separate judicial

<sup>416</sup> WHITE, *supra* note 1, at 178.

<sup>417</sup> See *United States v. Watson*, 423 U.S. 411, 429 (1976) (Powell, J., concurring) (stating that warrantless arrests in public are permitted because "logic sometimes must defer to history and experience").

<sup>418</sup> Stuntz, *supra* note 406, at 902.

<sup>419</sup> "[T]he officer may subject himself to liability if he undertakes to make an arrest without being privileged by law to do so." *Hodari*, 499 U.S. 621, 111 S. Ct. at 1553 n.7 (Stevens, J., dissenting).

<sup>420</sup> The common law misdemeanor of false arrest or false imprisonment "results from any unlawful exercise or show of force by which a person is compelled to remain where he does not wish to remain or go where he does not wish to go." PERKINS & BOYCE, *supra* note 70, at 224.

<sup>421</sup> See *id.* at 179 for examples of common law assaults perpetrated by a show of force or authority which caused the victim to forfeit some right or liberty. Examples include the following: riding after a person in such a manner as to compel him to take shelter in order to avoid being beaten; causing another to change his plans by brandishing a deadly weapon within range; repeatedly accosting a young girl on the street with an improper solicitation, causing her to flee in fright. *Id.*; see also *Hawkins v. State*, 758 S.W.2d 255, 261 (Tex. Crim. App. 1988) ("actions designed to control the direction of [the suspect's] movement by 'closing in' on him"); *People v. Shabaz*, 378 N.W.2d 451, 462 (Mich. 1985) ("As soon as the officers began their pursuit, defendant's freedom was restricted."), *cert. granted*, 475 U.S. 1094, and *cert. dismissed*, 478 U.S. 1017 (1986).

<sup>422</sup> Short of arrest, seizure or assault, the officer's approach to a citizen may fall within the concept of a "common-law inquiry that must be supported by founded suspicion that criminality is afoot." *People v. Hollman*, 590 N.E.2d 204, 210 (N.Y. 1992).

<sup>423</sup> See *supra* notes 419-21 and accompanying text.

<sup>424</sup> See *supra* notes 419-21 and accompanying text.

hearing.<sup>425</sup> *Hodari* once again suggests that the Court's dissatisfaction with the remedy of exclusion has led it to misconstrue the substantive rights embodied in the Fourth Amendment.<sup>426</sup>

When Fourth Amendment interpretation moves beyond common law precedents and is seen as a way of discussing fundamental values<sup>427</sup> and about people,<sup>428</sup> the last decade of Fourth Amendment cases reveals the Court's view of what kind of nation we are. A citizen who erects no trespassing signs on his "open fields" has no protection against police trespass,<sup>429</sup> while a homeowner who fails to build a roof over his yard invites aerial surveillance.<sup>430</sup> A traveller entering our country can be held for hours without a warrant or probable cause until she consents to an x-ray or performs a monitored bowel movement.<sup>431</sup> Motorists who have aroused no suspicion whatsoever can be stopped at sobriety checkpoints<sup>432</sup> or subjected to a high speed pursuit culminating in a fatal crash.<sup>433</sup> *Brower* and *Hodari* complete this troubled view of individual

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<sup>425</sup> See sources cited *supra* note 421.

<sup>426</sup> *California v. Hodari D.*, 499 U.S. 621, 111 S. Ct. 1547, 1559; see also *Rakas v. Illinois*, 439 U.S. 128, 157 (1978) (White, J., dissenting) ("If the court is troubled by the practical impact of the exclusionary rule, it should face the issue of that rule's continued validity squarely instead of distorting other doctrines in an attempt to reach what are perceived as the correct results in specific cases."). See generally Paul R. Joseph & J. Michael Hunter, *Circumventing the Exclusionary Rule Through the Issue of Standing*, 10 J. CONTEMP. L. 57 (1984) (discussing the possibility that prosecutors will abuse the standing rules to avoid exclusion of evidence under the Fourth Amendment); William A. Knox, *Some Thoughts on the Scope of the Fourth Amendment and Standing to Challenge Searches and Seizures*, 40 MO. L. REV. 1 (1975) (clarifying the distinction between use of standing on Fourth Amendment challenges to deny defendant's objection to search and seizure evidence and a challenge to the search or seizure itself).

<sup>427</sup> See *supra* note 26.

<sup>428</sup> See generally James B. White, *The Fourth Amendment as a Way of Talking About People*, 1974 SUP. CT. REV. 165 (identifying the values and policies which underlie the decisions of several Supreme Court cases).

<sup>429</sup> *Oliver v. United States*, 466 U.S. 170 (1984) (remanding the case for application of the open fields doctrine to a search which resulted in the discovery of a marijuana crop).

<sup>430</sup> *Florida v. Riley*, 488 U.S. 445 (1989) (aerial surveillance leading to a search warrant); *California v. Ciraolo*, 476 U.S. 207 (1986).

<sup>431</sup> *United States v. Montoya de Hernandez*, 473 U.S. 531 (1985) ("[D]etention of traveler at the border, beyond the scope of routine customs search and inspection, is justified at its inception if customs agents . . . reasonably suspect that the traveller is smuggling contraband . . .").

<sup>432</sup> *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444 (1990).

<sup>433</sup> See *Brower v. County of Inyo*, 489 U.S. 593 (1989); *Galas v. McKee*, 801 F.2d 200 (6th Cir. 1986) (no seizure results when police chase results in an accident).



freedoms in America by resting the protections of the Fourth Amendment on the slippery concepts of a police officer's "objective intent"<sup>434</sup> and by refusing to require that an officer have a good cause belief that the law has been violated before attempting any seizure of a citizen.<sup>435</sup> Faced with conflicting demands for "safe streets" and freedom of movement on those streets, the Court has opted to increase law enforcement powers by decreasing the protections of the Fourth Amendment.

Although some sacrifice of individual freedom inevitably accompanies an expansion in law enforcement powers, it is not true, as the Court suggests, that the sacrifice falls primarily on the guilty.<sup>436</sup> Each erosion of Fourth Amendment liberties contributes to a collective loss of security experienced by blameworthy and innocent citizens alike.<sup>437</sup> All citizens who walk our streets now expose themselves to arbitrary and unreviewable exercises of police power in the form of encounters, confrontations, or pursuit forced on them by the police. "To be law abiding is not necessarily to be spotless, and even the most virtuous can be unlucky. Unwanted attention from the local police need not be less discomfiting simply because one's secrets are not the stuff of criminal prosecutions."<sup>438</sup> A citizen's desire to avoid discomfiting police scrutiny need not suggest criminality; it may merely reflect a legitimate desire for autonomy and a refusal to submit to unwarranted encounters with police.<sup>439</sup>

The present-day Court also needs to be reminded that the Fourth Amendment was designed to protect the security of all citizens, innocent

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<sup>434</sup> See *supra* notes 148-57 and accompanying text.

<sup>435</sup> See *supra* notes 148-57 and accompanying text.

<sup>436</sup> See, e.g., *Sitz*, 496 U.S. at 452 (Court unconcerned with roadblock generating fear in a motorist who has been drinking); *United States v. Montoya de Hernandez*, 473 U.S. 531, 543 (1985) (guilty defendant "alone was responsible for much of the duration and discomfort of the seizure"). The Court seems to accept that "the police treat people badly; only bad people get into the clutches of the police; bad people deserve what they get." SYBILLE BEDFORD, *THE FACES OF JUSTICE* 242 (1961).

<sup>437</sup> "The right to be free from arbitrary and oppressive governmental interference with one's freedom of person and of place is an essential precondition to the exercise of all the other rights, including those of expression and association, upon which our democratic system of self-government rests." WHITE, *supra* note 1, at 208.

<sup>438</sup> *Sitz*, 496 U.S. at 465 (Stevens, J., dissenting). By placing police "encounters" with citizens beyond the reach of the Fourth Amendment, the courts "leave the individual at the mercy of the police . . . [and] deny the protection [of the amendment] to those most in need of it—those individuals who have not given the police probable cause to act." Edward G. Mascolo, *The Role of Functional Observation in the Law of Search and Seizure: A Study in Misconception*, 71 DICK. L. REV. 379, 418-19 (1967).

<sup>439</sup> See Mascolo, *supra* note 438, at 419.

and guilty alike. After all, the amendment grew out of the American colonists' experience with English customs officials' oppressive searches and seizures of suspected smugglers of tea, molasses and other illegally imported goods.<sup>440</sup> Our nation's founders, innocent and guilty alike, demonstrated that unrestricted search and seizure creates the raw material of alienation and rebellion.<sup>441</sup> The next rebellion, if it comes, will come in the form of inner city riots by blacks and other minorities who are the ones most often subjected to unbridled police efforts to control street crime.<sup>442</sup> The nation's difficult but unavoidable task is to regain control of America's "mean streets" without relinquishing control to the police.<sup>443</sup>

The refusal to accord constitutional significance to attempted and accidental seizures<sup>444</sup> is the latest manifestation of the Court's systematic distortion of the Fourth Amendment in furtherance of the Justices' ideological tilt toward governmental power and oppression at the expense of cherished freedoms such as personal liberty. The right of the people to be secure against unreasonable seizures is an intangible value<sup>445</sup>

<sup>440</sup> "He that would make his own liberty secure must guard even his enemy from oppression; for if he violates this duty he establishes a precedent that will reach to himself." 2 THE COMPLETE WRITINGS OF THOMAS PAINE 588 (P. Foner ed., 1945).

"The Fourth Amendment guarantees that the liberty of even the criminals among us will not be restrained without an objectively reasonable basis." *United States v. Wilson*, 953 F.2d 116, 127 (4th Cir. 1991); see also *United States v. Sokolow*, 490 U.S. 1, 11 (1989) (Marshall, J., dissenting) (the Fourth Amendment applies "to the innocent and the guilty alike"); *United States v. Rabinowitz*, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting) ("the safeguards of liberty have frequently been forged in controversies involving not very nice people"), *overruled by* *Chimel v. California*, 395 U.S. 752 (1969).

<sup>441</sup> See William J. Cuddihy, *Fourth Amendment (Historical Origins)*, in *ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION* 761-63 (Leonard W. Levy ed., 1986).

<sup>442</sup> The crackdown on street crime "encourages greater surveillance and harassment of those black citizens who are most vulnerable to unjustified interference because they resemble the lawbreakers in age, gender, and class." Regina Austin, "*The Black Community, Its Lawbreakers, and a Politics of Identification*," 65 S. CAL. L. REV. 1769, 1773-74 (1992).

<sup>443</sup> "[T]he power structure has been tricked and manipulated into thinking that we have to let the rogue police do what they want to do." Darlene Ricker,  *Holding Out*, 78 A.B.A. J. 48, 50 (Aug. 1992) (quoting Gerard Papa, Esq.).

<sup>444</sup> See *supra* notes 144-211 and accompanying text (discussing accidental seizures); *supra* notes 212-351 and accompanying text (discussing attempted seizures).

<sup>445</sup> See Weinreb, *supra* note 27, at 83.

It is risky business to speculate how human beings will adapt to a changed environment. Without being very precise, experience suggests that if we were to lose the cloak of anonymity in public places, we should be less open, more crafty, more secretive, and more isolated than we are now. There is no way to

which does not carry with it the immediate sense of urgency engendered by tangible evidence of a rising crime rate and a drug crisis in our nation.<sup>446</sup> However, in its rush to enhance law enforcement power the Court has neglected its

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.<sup>447</sup>

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establish that our behavior now is better (more "natural," or more "human," or more pleasant) than it would be if we expected and had less privacy. In the end we must rely on an unproved vision of man in society.

*Id.*

<sup>446</sup> Justice Stevens recently charged that the Court "has become a loyal foot soldier in the Executive's fight against crime." *California v. Acevedo*, 111 S. Ct. 1982, 2002 (1991) (Stevens, J., dissenting) (the Court has upheld the constitutionality of searches in 27 of 30 Fourth Amendment cases involving narcotics). Statistical evidence indicates that the lower courts have also joined in the War on Drugs. The number of defendants charged and convicted of drug law violations increased 134% between 1980 and 1986. The corresponding increase in convictions for non-drug offenses was 27%. Bureau of Justice Statistics Special Report, *Drug Law Violators, 1980-86*, p.1 (June 1988). See generally Peter A. Winn, *Seizures of Private Property in the War Against Drugs: What Process is Due?*, 41 SW. L.J. 1111 (1988); Stephen A. Saltzburg, ANOTHER VICTIM OF ILLEGAL NARCOTICS: THE FOURTH AMENDMENT (AS ILLUSTRATED BY THE OPEN FIELDS DOCTRINE), 48 U. PITT. L. REV. 1 (1986).

If these be hard times in which we live, it may be wise to realize that the times often appear uniquely difficult to those who live them. Some 300 years ago Lord Hale authorized search warrants on the ground of "necessity, especially in these times, where felonies and robberies are so frequent." LANDYNSKI, *supra* note 27, at 26-27.

<sup>447</sup> *Terry v. Ohio*, 392 U.S. 1, 15 (1968).