SEIZURE AND THE FOURTH AMENDMENT:
THE MEANING AND IMPLICATIONS OF
CALIFORNIA V. HODARI

INTRODUCTION

"The Fourth Amendment is under siege." The fourth amendment of the United States Constitution guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures." United States citizens have long enjoyed the right to move about the country freely, without being subjected to arbitrary government intrusion. The Supreme Court of the United States has placed individual liberties in jeopardy by undermining the constitutional foundations of such liberties through narrowly interpreting the fourth amendment.

Our nation is embroiled in a "war on drugs." No one questions that it is the duty of law enforcement officers to contrive effective weapons for fighting this war. But the effectiveness of law-enforcement technique is not demonstrative of its constitutionality. A new and increasingly common tactic in the war on drugs is to single out individuals for search and seizure without particularized suspicion.

In April of 1988, two police officers, patrolling a high crime neighborhood in Oakland, California, in an unmarked car, observed a group of youths fleeing as the car approached. One officer left the car and gave chase. One of the youths was looking behind as he ran and did not turn to see the officer, who was charging at him head-on. At this time, the young man tossed away a small rock of crack cocaine and subsequently was tackled by the officer. The youth

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2. U.S. CONST. amend. IV. The fourth amendment provides: [t]he right of 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.
3. Id.
4. Id.
8. Id.
9. Id.
10. Id.
was charged with possession of cocaine. One of the primary aims of the fourth amendment is to protect citizens from this type of tyranny.

This Note examines *California v. Hodari*, one of the United States Supreme Court's most recent decisions determining what constitutes seizure within the meaning of the fourth amendment. The Supreme Court has not been consistent in determining what constitutes seizure. This Note discusses the development of the tests applied over a number of decades to determine what constitutes seizure. Further, this Note examines the common law of arrest. This Note then determines that the Supreme Court in *Hodari* failed to properly apply the test for seizure to the facts of the case. In conclusion, this Note suggests that the problematic war on drugs played an important role in the result of this case.

**FACTS AND HOLDING**

At approximately ten p.m., on April 18, 1988, a group of young black males in Oakland, California, congregated around a compact car parked on a residential street. Two police officers dressed in street clothes, but wearing jackets with the word "Police" embossed on the front and back, were on patrol in an unmarked car in this high crime area. At the sight of the officers' car, the youths apparently panicked and fled. The officers did not see the faces of the youths, any exchange of drugs or money, or any other suspicious movements. The officers believed, however, that some kind of illegal activity relating to narcotics was taking place. Officer Pertoso left the car and ran around the block in order to intercept one of the youths, Hodari, who had run into an alley. Hodari, however, was looking backward as he ran and did not turn to see Officer Pertoso until the officer was almost upon him, whereupon Hodari tossed

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15. See infra notes 181-83 and accompanying text.
16. See infra notes 184-231 and accompanying text.
17. See infra notes 174-83 and accompanying text.
18. See infra notes 184-231 and accompanying text.
19. See infra notes 232-44 and accompanying text.
22. Id. at 1547, 1549.
24. Id.
25. Id. The officer wanted to find out who he was and what his purpose was for being in the area. Id.
away a small “rock.” Immediately thereafter, the officer tackled Hodari and handcuffed him. The “rock” Hodari had discarded was later determined to be crack cocaine.

In a juvenile proceeding brought against Hodari in a California state court, Hodari filed a motion to suppress the cocaine-related evidence. The court refused to suppress the evidence. However, on appeal, the California Court of Appeals reversed the trial court’s denial of Hodari’s motion to suppress the evidence. Hodari argued that the chase had constituted a seizure and that the cocaine-related evidence should have been suppressed. Hodari also argued that the officers did not have reasonable cause to seize him. The government argued that there had not been a seizure until the officer caught Hodari. The government also argued that without threat of an unlawful police search, Hodari’s discard of the cocaine was not a result of the threatened illegality. The court held that: (1) Hodari had been seized when he saw Officer Pertoso running toward him; (2) this seizure was unreasonable under the law; and (3) the evidence of cocaine had to be suppressed as the fruit of the illegal seizure. The California Supreme Court denied application for review by the state.

On appeal, the United States Supreme Court reversed the California Court of Appeals. The Supreme Court stated that “the only issue presented is whether, at the time he dropped the drugs, Hodari had been ‘seized’ within the meaning of the Fourth Amendment.” The Court determined that this question must be answered in the negative. The Court looked to the common law of arrest to decide the case. The common law of arrest proposes that to constitute a seizure of the person, just as to constitute an arrest, there must be either the application of physical force, however slight, or submission

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26. Id.
27. Hodari, 111 S. Ct. at 1549.
28. Id.
29. Id.
30. Id.
31. Hodari, 265 Cal. Rptr. at 86.
32. Id. at 81.
33. Id.
34. Id.
35. Id.
36. Id. at 84-85.
38. Hodari, 111 S. Ct. at 1552.
39. Id. at 1549. Therefore, the Court stated that if there was a seizure, it was unreasonable. Id.
40. Id. at 1552.
41. Id. at 1550 n.2.
to an officer's "show of authority" to restrain the subject's liberty.\textsuperscript{42} The Court noted that no physical force had been applied in this case because Hodari was untouched by Pertoso before Hodari dropped the drugs.\textsuperscript{43} The Court stated that assuming that Officer Pertoso's pursuit constituted a "show of authority" requiring Hodari to halt, Hodari did not comply with the injunction and, therefore no seizure occurred until he was tackled.\textsuperscript{44} The Court held that because Hodari was not seized, the cocaine was not considered fruit of a seizure.\textsuperscript{45}

Justice Stevens, writing the dissent, challenged the Court's narrow interpretation of the word "seizure."\textsuperscript{46} Justice Stevens noted the expansive view the Court has taken in past decades in interpreting what constitutes seizures.\textsuperscript{47} The dissent expressed the view that under the fourth amendment, "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."\textsuperscript{48}

The dissent found that Officer Pertoso's conduct clearly conveyed to Hodari that he was not "free to leave."\textsuperscript{49} Justice Stevens noted that the timing of a seizure is governed by the officer's conduct and not by the citizen's reaction as the majority would consider.\textsuperscript{50} In addition, the dissent stated that the character of a citizen's response, such as taking evasive action, should not determine the constitutionality of an officer's conduct.\textsuperscript{51} The dissent further stated that the constitutionality of an officer's display of force should be measured by the circumstances present at the time of the officer's action.\textsuperscript{52}

BACKGROUND

SEIZURE AND THE COMMON LAW OF ARREST

At common law, the word "seizure" meant actually bringing an object within physical control.\textsuperscript{53} To constitute an arrest at common law, the mere grasping or the application of any physical force with

\begin{enumerate}
\item Id. at 1551.
\item Id. at 1550.
\item Id. at 1552.
\item Id.
\item Id. at 1552 (Stevens, J., dissenting).
\item Id. at 1556.
\item Id. at 1558. See, United States v. Mendenhall, 446 U.S. 544, 554 (1980) (stating that "a person has been 'seized' . . . if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."). See supra note 2.
\item Hodari, 111 S. Ct. at 1559 (Stevens, J., dissenting).
\item Id. at 1561.
\item Id. at 1560.
\item Id.
\item Id.
\end{enumerate}
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legal justification, whether or not it subdued the arrestee, was sufficient. An arrest requires either physical force or, where that is absent, submission to the assertion of authority. Words alone will not constitute arrest, but no actual physical touching is necessary. A submission by an arrestee, following an assertion of purpose and authority, constitutes an arrest. No arrest can exist without either submission or touching. Therefore, when an officer proclaims words of arrest without physically touching the subject, and the subject immediately runs away, there is no arrest.

SEIZURE AND THE "PHYSICAL FORCE" OR "SHOW OF AUTHORITY" STANDARD

The fourth amendment to the Constitution of the United States guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." Generally, seizure of a person includes not only full-fledged arrests, but also detentions of persons against their will, and any other investigatory detentions. All that is required is that the officer, by physical force or display of authority, has restrained a citizen's liberty in some way.

The United States Supreme Court, in Terry v. Ohio, explained the application of the fourth amendment in regard to street confrontations between citizens and the policemen investigating suspicious circumstances. In Terry, a detective, Joe McFadden, observed two men on a street corner whom he believed to be acting suspiciously. McFadden suspected the men of "casing a job, a stick-up," and he considered it his obligation as a policeman to investigate further.

54. Id. at 1550. See, e.g., Whitehead v. Keyes, 85 Mass. (1 Allen) 495, 501 (1862) (stating that an arrest constitutes any touching for the purpose of arrest, even though the arrestee is not subdued).
56. Id. See also Searls v. Viets, 2 T. & C. 224, 227 (N.Y. Sup. Ct. 1873) (stating that no physical touching of the person is necessary); Gold v. Bissell, 1 Wend. 210, 212 (N.Y. Sup. Ct. 1828) (stating that manual touching is not required for an arrest); Genner v. Sparkes, 91 Eng. Rep. 74 (C.P. 1704) (stating that mere words will not constitute an arrest).
60. U.S. CONST. amend. IV. See supra note 2.
63. 392 U.S. 1 (1968).
64. Id. at 4.
65. Id. at 6.
66. Id. Officer McFadden added that he had feared "they may have a gun." Id.
McFadden approached the men, identified himself as a policeman, and asked them their names. When the men mumbled something in response, McFadden spun Terry around, frisked him, discovered a gun in Terry's possession, and arrested him. The state charged and convicted Terry of carrying a concealed weapon. Terry appealed the admission of the revolver into evidence. The Ohio Court of Appeals for the Eighth Judicial District affirmed his conviction. The Ohio Supreme Court dismissed the appeal on the ground that the case involved no substantial constitutional question. The United States Supreme Court granted certiorari.

In Terry, the Supreme Court concluded that the fourth amendment applies to "seizures" of the person that do not result in being taken to the police station and being prosecuted for a crime. The Court stated that the fourth amendment governs more than just custodial arrests. It must be recognized, the Court stated, that when a police officer confronts an individual and restricts his freedom to walk away, a seizure has occurred. Not all confrontations between policemen and citizens involve "seizures" of persons. A seizure occurs when the officer, by actual force or display of authority, has restrained a citizen's liberty in some way.

The Supreme Court concluded that the gun taken from Terry had been properly admitted into evidence, and that Detective McFadden had reasonable grounds to suspect that Terry was armed and dangerous at the time of seizure. Furthermore, the Court found that to protect himself and others, Detective McFadden had found it necessary to take swift measures to neutralize any threat of harm.

In United States v. Brignoni-Ponce, the United States Supreme Court applied the Terry standard of what constitutes seizure. In Brignoni-Ponce, the defendant was stopped near the Mexican border and questioned by the border patrol about the immigration status and

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67. Id. at 5-7.
68. Id. at 7.
69. Id. at 7, 8.
70. Id. at 8.
71. Id. This decision came from the Court of Appeals for the Eighth Judicial District, Cuyahoga County. Id.
72. Id.
73. Id.
74. Id. at 16.
75. Id.
76. Id.
77. Id. at 19 n.16.
78. Id. at 30.
79. Id.
80. Id.
81. 422 U.S. 873 (1975).
82. Id. at 878.
citizenship of the occupants in his car. Police officers discovered that the passengers were illegal aliens. The defendant was then charged with intentionally transporting illegal immigrants. The Court found that the fourth amendment did not allow the border patrol to stop vehicles near the Mexican border and question the occupants concerning their citizenship when the only ground for suspicion was apparent Mexican ancestry. The Court restated the rule that a police officer "seizes" an individual for purposes of the fourth amendment whenever the officer confronts an individual and restricts his freedom to walk away. Having found that the defendant had been seized, the Court stated that the seizure must have been based on reasonable grounds of suspicion and not on arbitrary conclusions.

Similarly, in Tennessee v. Garner, the United States Supreme Court stated that whenever an officer restricts the freedom of a person to walk away, that person has been seized within the meaning of the fourth amendment. In Garner, an unarmed, fleeing suspect was fatally shot by a police officer. The Court stated that it is not clear exactly when minimal police interference can be deemed a seizure, but there is no question that apprehension with deadly force constitutes a seizure. Noting that all seizures are subject to a reasonableness requirement, the Court held that deadly force used against an unarmed suspect is unreasonable.

Seizure and the "Free to Leave" Standard

In United States v. Mendenhall, the United States Supreme Court condensed the Terry analysis into a refined test to be applied in determining whether a person has been seized within the meaning of the fourth amendment. In Mendenhall, Drug Enforcement Agency ("DEA") agents stopped Sylvia Mendenhall, a young black woman, because she fit the pattern of a drug courier profile. After

83. Id. at 875.
84. Id.
85. Id.
86. Id. at 876.
87. Id. at 877 (citing Terry v. Ohio, 392 U.S. 1 (1968)).
88. Id. at 882.
90. Id. at 7.
91. Id. at 3-4.
92. Id. at 7.
93. Id. at 11, 21.
94. 446 U.S. 544 (1980).
95. Id. at 554. See supra note 78 and accompanying text.
96. Mendenhall, 446 U.S. at 547 n.1. The agents found it relevant that Mendenhall (1) had arrived at the Detroit airport from Los Angeles, a source city for heroine;
examining and returning Mendenhall's airline ticket and identification, the agents asked Mendenhall to accompany them to the DEA office in the airport.97 Mendenhall did not verbally respond to the agents' request, but she did follow them to the office.98

On these facts, Justices Stewart and Rehnquist, delivering the opinion of the Court, found that there had not been a seizure, even though one of the agents testified that he would have stopped Mendenhall if she had tried to walk away.99 Justices Stewart and Rehnquist adhered to the Terry view that a person is "seized" when, by physical force or a display of authority, his movement is restricted.100 The Justices stated that only when imposing such restraint, does any foundation exist for invoking constitutional safeguards.101 Furthermore, "[t]he purpose of the Fourth Amendment is not to eliminate all contact between the police and the citizenry, but 'to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals.' "102 In refining the Terry analysis, Justices Stewart and Rehnquist stated that a person has been "seized" if, in light of all the surrounding circumstances, a reasonable person would conclude that he was not allowed to leave.103 The Court noted examples of circumstances that may indicate a seizure: the threatening presence of officers, the show of a weapon, the physical touching of the person, or the tone of voice or the use of language that indicates that compliance with an officer's request will be compelled.104 Inoffensive contact between the police and members of the public cannot be deemed a seizure of that person as a matter of law.105

The other members of the Mendenhall majority concurred in the judgment, but did not reach the seizure issue because it was not raised in the lower court.106 These Justices reversed the court of ap-
peals because they found the airport stop justified by reasonable sus-
picion. Justice Powell stressed the important governmental
interest in halting drug traffic and the expertise of the Drug Enforce-
ment Agents. The four dissenting Justices found nothing suspi-
cious about Mendenhall's behavior and decided that under the
circumstances, a reasonable person would not have felt free to
leave.

The United States Supreme Court applied the "free to leave"
test in Florida v. Royer, in which a young man was suspected of
transporting narcotics. In Royer, the police stopped Mark Royer, a
nervous young man who had purchased a one-way airline ticket from
Miami to New York. Without returning his airline ticket and
driver's license, one police officer asked Royer to accompany him to a
small police room while the other officer retrieved Royer's luggage
from the airline. Justice White, writing for a plurality of the
court, stated that Royer was effectively seized when he was taken to
the small police room because, in view of all the circumstances sur-
rounding the stop, a reasonable person would not have felt free to
leave. Justice White emphasized that the police officers had re-
tained Royer's license and ticket and did not indicate in any way that
Royer was free to depart.

Justice Brennan, concurring in the result, stated that Royer had
been seized for purposes of the fourth amendment when the officers
had him produce his license and ticket. When applying the "free
to leave" test, Justice Brennan stated that it is wrong to suggest that
an airline traveler believes he is free to walk away after he has been
approached by police officers and they have asked for and received
his airline ticket and driver's license.

Applying the "free to leave" test, the Supreme Court, in INS v.
Delgado, held that factory surveys did not constitute a seizure of

the Court, in which Justice Rehnquist joined. Justice Powell, with whom the Chief
Justice and Justice Blackmun joined, concurred in part and concurred in the judg-
ment. Justice White, with whom Justice Brennan, Justice Marshall, and Justice Ste-
vens joined, dissented. Id. at 544.

107. Id.
108. Id. at 561-62.
109. Id. at 572-73, 575-77 (White, J., dissenting).
111. Id. at 493.
112. Id.
113. Id. at 493-94. The police officer retrieved the luggage to search for narcotics.
Id. at 494-95.
114. Id. at 501-02.
115. Id. at 501.
116. Id. at 511 (Brennan, J., concurring).
117. Id. at 512.
the entire work force.\textsuperscript{119} During the course of the factory surveys, Immigration and Naturalization Service ("INS") agents positioned themselves at the factory exits while other agents moved about the work force.\textsuperscript{120} They identified themselves as INS agents and questioned employees about their citizenship.\textsuperscript{121} During the survey, employees were free to continue their work and walk about the factory.\textsuperscript{122} The Court emphasized that the circumstances of the questioning were not so intimidating that a reasonable person would have believed he was not free to leave if he did not respond.\textsuperscript{123}

\section*{Seizure and the Refined "Free to Leave" Standard}

The United States Supreme Court, in \textit{Michigan v. Chesternut},\textsuperscript{124} further refined the definition of seizure.\textsuperscript{125} The Court stated that the appropriate test is whether a reasonable person, viewing the particular police conduct as a whole and within the setting of all the surrounding circumstances, would have concluded that the police in some way had restrained his liberty, so that he was not free to leave.\textsuperscript{126} In \textit{Chesternut}, police officers on patrol in a marked patrol car observed a man approaching Michael Mose Chesternut.\textsuperscript{127} Upon seeing the patrol car approach the corner where he was standing, Chesternut began to run.\textsuperscript{128} The patrol car accelerated to catch up with Chesternut and then drove alongside him for a short distance.\textsuperscript{129} As they drove alongside him, the officers observed Chesternut discard several packets.\textsuperscript{130} One of the officers got out of the car and examined the packets.\textsuperscript{131} The packets contained pills that the officer believed to be narcotics.\textsuperscript{132} Chesternut was arrested and taken to the

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\textsuperscript{119} Id. at 212. A factory survey is defined as (1) INS agents positioning themselves at factory exits; (2) other agents moving about the work force; and, (3) agents identifying themselves as INS agents and questioning employees about their citizenship. \textit{Id.}
\textsuperscript{120} Id. at 212.
\textsuperscript{121} Id.
\textsuperscript{122} Id. at 213.
\textsuperscript{123} Id. at 220-21.
\textsuperscript{124} 486 U.S. 567 (1988).
\textsuperscript{125} Id. at 572.
\textsuperscript{126} Id. at 572-74.
\textsuperscript{127} Id. at 569.
\textsuperscript{128} Id.
\textsuperscript{129} Id. One of the police officers testified that the purpose of following Chesternut around the corner and driving alongside him was "to see where he was going." \textit{Id.}
\textsuperscript{130} Id. at 569.
\textsuperscript{131} Id.
\textsuperscript{132} Id. The officer based his belief on experience he had gained from being a paramedic. \textit{Id.}
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police station, where he was searched. The search revealed another packet containing pills, heroin, and a hypodermic needle. Chesternut was charged with possession of controlled substances in violation of Michigan law. At a preliminary hearing, the magistrate dismissed the charges on the ground that Chesternut was unlawfully seized during the pursuit prior to his discarding of the packets. The trial court upheld the dismissal and the Michigan Court of Appeals affirmed. The Michigan Supreme Court denied leave to appeal. The United States Supreme Court granted a writ of certiorari.

Before the Supreme Court, the State argued that the fourth amendment does not apply until a person stops in response to a police officer's display of authority. Chesternut argued that all police pursuits are fourth amendment seizures. The Court stated that "any assessment as to whether police conduct amounts to a seizure implicating the Fourth Amendment must take into account 'all of the circumstances surrounding the incident' in each individual case." Justice Blackmun, writing for a unanimous Court, noted that the Mendenhall test is somewhat vague because the test is designed to measure the coercive impact of the police actions, taken as a whole, instead of focusing on specific details of those actions in isolation. Justice Blackmun also stated that what prompts individuals to believe they are not free to leave varies not only with the specific police action in question, but also with the circumstances in which the conduct occurs. However, Justice Blackmun stressed that a whole range of police conduct can be encompassed within this flexible test. Regardless of the specific individual's response to actions of the police, the test requires consistent application to all police encounters. The Court also pointed out that the test applies an ob-

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133. Id. at 569.
134. Id.
135. Id. at 569-70.
136. Id. at 570.
137. Id.
138. Id. at 572.
139. Id.
140. Id.
141. Id.
143. Chesternut, 486 U.S. at 573, see supra note 100 and accompanying text.
144. Chesternut, 486 U.S. at 573. See also Delgado, 446 U.S. at 218 (considering whether a factory survey conducted by INS agents while employees continued to work constituted a seizure); Mendenhall, 446 U.S. at 554 (considering whether a police officer's request to see identification and airline ticket constituted a seizure).
145. Chesternut, 486 U.S. at 574.
146. Id.
jective standard which looks at a reasonable person's interpretation of the police conduct in question.\textsuperscript{147} The Court stated that this test allows the police to know in advance whether or not the conduct in question will implicate the fourth amendment.\textsuperscript{148} The Court also stated that the reasonable person standard ensures that fourth amendment protection does not vary with an individual's state of mind.\textsuperscript{149}

The Court concluded that the police had not seized Chesternut before he disposed of the packets containing the drugs.\textsuperscript{150} The Court decided that the police conduct—a short acceleration to catch up to Chesternut followed by a short drive beside him—was not so threatening as to lead Chesternut to believe he was not free to disregard the police officer's presence.\textsuperscript{151} In a concurring opinion, Justice Kennedy reiterated the view that a seizure occurs when an individual reasonably concludes that he is not free to go, based on the police officer's conduct toward him and therefore, he remains in their control.\textsuperscript{152}

**SEIZURE AND THE "DECLINED REQUEST" STANDARD**

In *Florida v. Bostick*,\textsuperscript{153} the United States Supreme Court set forth a more "appropriate" test in determining what constitutes seizure.\textsuperscript{154} In *Bostick*, two police officers, as part of a drug interdiction effort, boarded a bus in Fort Lauderdale that was in transit from Miami to Atlanta.\textsuperscript{155} The officers picked out Terrance Bostick and asked to inspect his bus ticket and identification.\textsuperscript{156} The officers then requested his consent to search his luggage for drugs, advising him of his right to refuse.\textsuperscript{157} Bostick gave his permission.\textsuperscript{158} The officers found cocaine and arrested him on drug trafficking charges.\textsuperscript{159} Bostick's motion to suppress the cocaine on the ground that it had been seized in violation of the fourth amendment was denied by the trial court.\textsuperscript{160} The Florida District Court of Appeal affirmed, but certified

\textsuperscript{147} Id. (citing 3 W. LAFAVE, SEARCH AND SEIZURE § 9.2(h), at 407-08 (2d ed. 1987 & Supp. 1988)).

\textsuperscript{148} Id.

\textsuperscript{149} Chesternut, 486 U.S. at 574.

\textsuperscript{150} Id. Therefore, the drugs were admissible into evidence. Id. at 576.

\textsuperscript{151} Id. at 576.

\textsuperscript{152} Id. at 577 (Kennedy, J., concurring).


\textsuperscript{154} Id.

\textsuperscript{155} Id. at 2387.

\textsuperscript{156} Id.

\textsuperscript{157} Id. at 2385.

\textsuperscript{158} Id.

\textsuperscript{159} Id.

\textsuperscript{160} Id.
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a question to the Florida Supreme Court. The Florida Supreme Court, stating that a reasonable passenger would not have felt free to leave the bus to avoid questioning, adopted a per se rule that the police officers' practice of "working the buses" was unconstitutional. On appeal, the United States Supreme Court granted certiorari.

Justice O'Connor noted that the Supreme Court has repeatedly held that mere police questioning does not constitute a seizure, as long as the police do not convey a message that compliance with their request is required. In Bostick, the Florida Supreme Court had erred, however, in focusing on whether Bostick was "free to leave" rather than on the principle that those words were intended to capture. Justice O'Connor reasoned that the single fact that Bostick felt that he could not leave the bus did not mean that he was seized. Because Bostick had boarded a bus that was soon scheduled to depart, even if the police officers had not been present, he would not have felt free to depart the bus. The Court concluded that the "free to leave" analysis was inapplicable in this case. Justice O'Connor stated that a more appropriate inquiry in determining what constitutes seizure, "is whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter." The Court remanded the case so the Florida courts could evaluate the seizure question under the correct legal standard.

In a colorful dissent, Justice Marshall agreed with the test the Court set forth, but disagreed with the position suggesting that "bus stops" are fully permissible and constitutional. Justice Marshall stated that the arbitrary and unprovoked stopping and questioning of passengers on interstate buses had gone too far. Justice Marshall declared the "bus stop" presented here

has evoked images of other days, under other flags, when no

161. Id. The certified question was: may the police without reasonable suspicion board a bus and ask at random for consent to search a passenger's luggage, where they inform the passenger that he has the right to refuse to consent to search? Id.

162. Id. at 2385, 2389. The Court stated that the suspicionless police search of buses is a new strategy in the war on drugs. Id. at 2389 (citing United States v. Lewis, 921 F.2d 1294, 1295 (D.C. Cir. 1990).

163. Id. at 2385.

164. Id. at 2386. See Florida v. Rodriguez, 469 U.S. 1, 5-6 (1984); Delgado, 466 U.S. at 220; Mendenhall, 446 U.S. at 554.

165. Bostick, 111 S. Ct. at 2389.

166. Id. at 2387.

167. Id.

168. Id.

169. Id.

170. Id. at 2389.

171. Id. at 2391 (Marshall, J., dissenting).

172. Id.
man traveled his nation's roads or railways without fear of unwarranted interruption, by individuals who held temporary power in the government. . . . If this Court approves such 'bus stops' and allows prosecutions to be based on evidence seized as a result of such 'stops,' then we will have stripped our citizens of basic Constitutional protections.\textsuperscript{173}

ANALYSIS

COMMON LAW OF ARREST

The United States Supreme Court's decision in \textit{California v. Hodari},\textsuperscript{174} is inconsistent with prior precedent.\textsuperscript{175} The Court analogized the common law of arrest.\textsuperscript{176} To constitute common law arrest, the mere grasping or the application of any force with legal justification, whether or not it subdued the arrestee, was sufficient.\textsuperscript{177} Therefore, if Officer Pertosso had touched Hodari before Hodari dropped the "rock," even if Pertoso had not subdued him, then an arrest would have occurred.\textsuperscript{178} Thus, the evidence would have been the fruit of an unlawful common law arrest.\textsuperscript{179} By its definition of seizure, the Court has assumed, without admitting, that a policeman may now fire his gun at an innocent person and still conform with the fourth amendment—as long as the bullet misses the person.\textsuperscript{180} Applying the common law of arrest, the Court held that to constitute seizure, there must be either submission to a police officer's display of authority, or application of physical force.\textsuperscript{181} The Court's holding is unfaithful to a long line of fourth amendment cases.\textsuperscript{182} In light of

\textsuperscript{173} Id. (quoting United States v. Lewis, 728 F. Supp. 784, 789 (D.D.C.), rev'd, 921 F.2d 1294 (D.C. Cir. 1990); State v. Kerwick, 512 So. 2d 347, 348 (Fla. Dist. Ct. App. 1987)).

\textsuperscript{174} 111 S. Ct. 1547 (1991).

\textsuperscript{175} See supra notes 63-173 and accompanying text.

\textsuperscript{176} \textit{Hodari}, 111 S. Ct. at 1548.

\textsuperscript{177} Id. at 1550.

\textsuperscript{178} Id.

\textsuperscript{179} Id. at 1548.

\textsuperscript{180} Id. at 1552 (Stevens, J., dissenting). No seizure exists without an actual touching or submission. Id. at 1550.

\textsuperscript{181} Id. at 1548.

\textsuperscript{182} Id. at 1551-52. See Florida v. Bostick, 111 S. Ct. 2382, 2389 (1991) (holding that a person is seized when a reasonable person would believe he was not free to terminate a police encounter); Michigan v. Chesternut, 486 U.S. 567, 575 (1988) (holding that merely driving alongside a pedestrian does not constitute a seizure); Tennessee v. Garner, 471 U.S. 1, 7 (1985) (stating that when an individual's freedom is restricted, a seizure has occurred); INS v. Delgado, 466 U.S. 210, 215 (1984) (holding that even a consensual encounter will become a seizure if a reasonable person believes he is unable to leave); Florida v. Royer, 460 U.S. 491, 501-02 (1983) (stating that a reasonableness standard determines when a person is seized); United States v. Mendenhall, 446 U.S. 544, 554 (1980) (holding that an individual is seized if a reasonable person would believe he was unable to leave); United States v. Brignoni-Ponce, 422 U.S. 873, 877
several decades of settled precedent, the common law of arrest should not define the outer boundaries of the constitutional protection against unreasonable seizures.\textsuperscript{183}

**HODARI AS APPLIED TO SETTLED PRECEDENT**

In the landmark case of *Terry v. Ohio*,\textsuperscript{184} the Court decided that even lawful restraints on a citizen's freedom that do not amount to a common law arrest constitute seizure under the fourth amendment.\textsuperscript{185} Thus, in *Terry*, the Court expanded the range of encounters between police officers and citizens that are included within the term "seizure."\textsuperscript{186} The Court concluded that the fourth amendment applies to "seizures" of the person that do no result in being taken to the police station and prosecuted for a crime.\textsuperscript{187} The Court stated that it must be recognized that when a police officer confronts an individual and restricts that person's freedom to walk away, a seizure has occurred.\textsuperscript{188} The Court, in *Terry*, stated that a seizure occurs "when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen."\textsuperscript{189} The foundation of a seizure is the restraining of an individual's liberty in some way.\textsuperscript{190}

It is clear that by applying the law set forth in *Terry*, Hodari was seized by Officer Pertoso when Hodari saw Pertoso running toward him.\textsuperscript{191} All that is required under *Terry* is that an officer in some way restrain the citizen's liberty.\textsuperscript{192} A police officer charging a citizen head-on surely constitutes such restraint.\textsuperscript{193} To constitute seizure, a citizen need not yield to the show of authority, as the Court mistakenly concludes.\textsuperscript{194} The Court incorrectly regresses to the common law of arrest, while disregarding the broad approach taken in fourth amendment analysis of seizures since *Terry*.\textsuperscript{195}

\textsuperscript{183} *Hodari*, 111 S. Ct. at 1554 (Stevens, J., dissenting).
\textsuperscript{184} 392 U.S. 1 (1968). See supra note 63 and accompanying text.
\textsuperscript{185} *Terry*, 392 U.S. at 16.
\textsuperscript{186} Id.
\textsuperscript{187} See supra note 74 and accompanying text.
\textsuperscript{188} See supra note 76 and accompanying text.
\textsuperscript{189} *Terry*, 392 U.S. at 19 n.16.
\textsuperscript{190} *Hodari*, 111 S. Ct. at 1555 (Stevens, J., dissenting).
\textsuperscript{191} Id. at 1553.
\textsuperscript{192} *Terry*, 392 U.S. at 19 n.16.
\textsuperscript{193} *Hodari*, 111 S. Ct. at 1559 (Stevens, J., dissenting).
\textsuperscript{194} Id. at 1557. See supra note 177 and accompanying text.
\textsuperscript{195} *Hodari*, 111 S. Ct. at 1556 (Stevens, J., dissenting).
The Supreme Court, in *United States v. Mendenhall*, in formulating a test for seizure, stated that a person has been seized if, in light of all the surrounding circumstances, a reasonable person would conclude that he was not allowed to leave. Under the *Mendenhall* test, it is doubtful that Hodari would have felt free to leave or to ignore Officer Pertoso when the officer was charging him head-on. Therefore, the test from the Court in *Mendenhall* focuses on the objective characteristics of the encounter which may suggest that a reasonable person would not feel free to leave. On the other hand, the *Hodari* majority would consider the subjective perceptions of the person pursued. The Court placed the determining factor on the suspect and asked whether or not the suspect submitted to the officer's show of authority. But according to *Mendenhall*, the determining factor should be the police conduct taken as a whole. A seizure occurs under *Mendenhall*, whenever an objective evaluation of a police officer's show of force conveys the message that the citizen is not entirely free to leave. Again, in objectively evaluating Officer Pertoso's show of force, it would be fair to conclude that the message conveyed to Hodari was that he was not "free to leave." The Court's unwillingness to apply the *Mendenhall* "reasonable person" standard unnecessarily departs from fourth amendment jurisprudence.

In *Michigan v. Chesternut*, the Supreme Court further refined the definition of seizure, stating that the appropriate test is whether a reasonable person, viewing the particular police conduct as a whole and within the setting of all the surrounding circumstances, would have concluded that the police in some way restrained his liberty so that he was not free to leave. In *Chesternut*, the Court specifically noted that one of the virtues of the refined test was that the test focused on the police officer's conduct and not the citizen's conduct. The objective standard, which looks to the reasonable person's evaluation of the conduct, permits the police to conclude in advance whether or not the conduct involved will trigger the fourth amend-

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201. *Id.* at 1552.
203. *Id.*
204. *Hodari*, 111 S. Ct. at 1559 (Stewart, J., dissenting).
205. *Id.* at 1557. *See supra* note 2 and accompanying text.
207. *Id.* at 572-74.
208. *Id.* at 574.
In addition, the reasonable person standard ensures that the purview of fourth amendment protection will not change with the state of mind of the individual being approached. Otherwise, the possible responses to a police officer's display of force and the myriad problems that could arise in concluding whether, and at which moment, a submission occurs, can only create uncertainty and generate substantial litigation.

In Chesternut, the State argued that the fourth amendment should not apply unless a citizen stops because of a policeman's show of authority. In other words, a lack of particularized and objective suspicion on the part of the police would never poison their conduct, regardless of how coercive, as long as the police did not actually succeed in apprehending the individual. This position is similar to the one the Court, in Hodari, endorsed. Justice Blackmun, writing for a unanimous Court in Chesternut, rejected such an attempt to fashion a bright-line rule. Justice Blackmun stated that whether police action constitutes a fourth amendment seizure is dependent on all the surrounding circumstances in each individual case. Furthermore, Justice Blackmun stated that the Court would not adopt a rule which proposes that investigatory pursuits are not necessarily a seizure, as long as the suspect does not submit to a show of authority.

Considering Officer Pertoso’s conduct as a whole, it is apparent that Hodari was effectively seized for fourth amendment purposes. It is certainly intimidating and coercive to see a policeman charging toward one on a public sidewalk. Most citizens would reasonably believe that they are not free to disregard a police officer running toward them, even absent a command to halt. More than a pursuit was involved here because Officer Pertoso ran in such a manner as to cut Hodari off and to confront him head-on. According to Chesternut, this conduct can be perceived as an invasion of Hodari’s freedom of movement and as an attempt to block or control the speed or direction of Hodari’s movement. In light of the law set forth in

209. Id.
210. Id.
211. Hodari, 111 S. Ct. at 1560 (Stevens, J., dissenting).
212. Chesternut, 486 U.S. at 572.
213. Id.
214. Hodari, 111 S. Ct. at 1552.
216. Id. (citing INS v. Delgado, 466 U.S. 210, 215 (1984)).
217. Id. at 572-73.
218. Hodari, 111 S. Ct. at 1550.
220. Id.
221. Id.
222. Id.
Chesternut, it is fair to conclude that giving chase in a manner designed to overtake or encourage an individual to give up his flight is a seizure.\textsuperscript{223}

In Florida v. Bostick,\textsuperscript{224} the Supreme Court refined the test for seizure to fit the particular facts of the case presented.\textsuperscript{225} Justice O'Connor stated that a more appropriate inquiry is whether a reasonable person would feel able to terminate the encounter or decline the police officer's request.\textsuperscript{226} Even under this test, the same result is obtained, because it is highly unlikely that Hodari, after discovering the officer charging him head-on, would feel free to terminate the encounter.\textsuperscript{227}

The message that the majority, in Hodari, conveys is that the common law of arrest limits and defines the latitude of a seizure, as opposed to fourth amendment jurisprudence as it has evolved over the last two and one-half decades.\textsuperscript{228} The dissenting opinion included an appropriate quotation: "many actions of government have two aspects: their immediate, necessarily intended, practical effects, and their perhaps unintended or unappreciated bearing on values we hold to have more general and permanent interest."\textsuperscript{229} The Court's insistence on limiting criminal activity raises a significant, though unintended, danger to values that are enduring and fundamental.\textsuperscript{230} Such values include the right to privacy and protection against unreasonable seizures.\textsuperscript{231}

CONCLUSION

The Court's holding in California v. Hodari,\textsuperscript{232} illustrates its intent to fight the increasingly dangerous war on drugs. Justice Powell, concurring in United States v. Mendenhall,\textsuperscript{233} observed:

The public has a compelling interest in detecting those who would traffic in deadly drugs for personal profit. Few problems affecting the health and welfare of our population, particularly our young, cause greater concern than the escalating use of controlled substances. Much of the drug traffic is highly organized and conducted by sophisticated criminal

\textsuperscript{223} Chesternut, 486 U.S. at 573. See supra notes 144-49 and accompanying text.
\textsuperscript{225} Bostick, 111 S. Ct. at 2387.
\textsuperscript{226} Id.
\textsuperscript{227} Hodari, 111 S. Ct. at 1559 (Stevens, J., dissenting).
\textsuperscript{228} Id. at 1561.
\textsuperscript{229} Id. at 1562 (quoting A. BICKEL, THE LEAST DANGEROUS BRANCH 24 (1962)).
\textsuperscript{230} Hodari, 111 S. Ct. at 1562 (Stevens, J., dissenting).
\textsuperscript{231} See U.S. CONST. amend. IV. See supra notes 2, 53-173 and accompanying text.
\textsuperscript{232} 111 S. Ct. 1547 (1991).
\textsuperscript{233} 446 U.S. 544 (1980).
syndicates. The profits are enormous. And many drugs . . .
may be easily concealed. As a result, the obstacles to de-
tection of illegal conduct may be unmatched in any other area
of law enforcement.234

Even so, we must not infringe on individual constitutional rights
guaranteed by the fourth amendment of the Federal Constitution
when fighting this war.235 The random, indiscriminate pursuit of in-
dividuals on city streets seems to have gone too far.236 If the Court
approves such street chases and permits prosecutions based on evi-
dence seized from such chases, then citizens of this country will be
deprived of basic constitutional protections.237 Such conduct would
be contrary to what this country has stood for throughout its 200
years of existence.238 If citizens on the streets of this country cannot
be extricated from police intrusions for which there is absolutely no
basis for police officers to chase and charge at them, then the police
will be allowed to harass individuals on our streets without cause or
reason.239 “This is not Hitler’s Berlin, nor Stalin’s Moscow, nor is it
white supremacist South Africa.”240 “[B]ut [i]n this ‘anything goes’
war on drugs, random knocks on the doors of our citizens’ homes
seeking ‘consent’ to search for drugs cannot be far away. This is not
America.”241

It is too early to know the consequences of California v. Hodari.242
If extended to its logical result, it will encourage illegal
displays of force that will scare countless innocent individuals into
surrendering what little privacy rights they still have.243 Our inter-
pretation of the fourth amendment as it has grown over the last
twenty-five years should define the scope of a seizure, not the com-
mon law of arrest.244

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234. Id. at 561-62 (Powell, J., concurring).
236. Florida v. Bostick, 111 S. Ct. 2382, 2391 (citing United States v. Lewis, 728 F.
Supp. 784, 788-89 (D.D.C.), rev’d, 921 F.2d 1294 (D.C. Cir. 1990)).
237. Id.
238. Id.
239. Id.
1987)).
241. Id. at 2391 (quoting United States v. Lewis, 728 F. Supp. 784, 789 (D.D.C.,
rev’d, 921 F.2d 1294 (D.C. Cir. 1990)).
243. Id. at 1561 (Stevens, J., dissenting).
244. Id.