THE FUTURE OF FOURTH AMENDMENT SEIZURE ANALYSIS AFTER Hodari D. AND Bostick

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The Supreme Court has recently redefined what constitutes a seizure of a person within the meaning of the fourth amendment. A person is now seized only when the police actions would be an arrest at common law, that is, when the person submits to a show of authority by the police or when the police apply physical force. This new, restrictive definition, announced in California v. Hodari D.,1 will significantly expand the way police permissibly operate and correlativey will restrict the privacy interests of individuals. As illustrated by the facts of Hodari D., the new definition removes the applicability of the fourth amendment to the countless daily occurrences where the suspect flees in response to a police show of authority.2 In Florida v. Bostick,3 the Supreme Court clarified the reasonable person test, which is utilized to determine when a seizure develops as a result of a police accosting when the suspect complies with the directions of the police. These two decisions also intimate that the Court will significantly restrict what will be considered the fruit of an unlawful seizure. Underpinning these decisions is a historic shift in judicial interpretation of the fourth amendment from favoring individual interests to promoting governmental interests. This article examines these developments and discusses their impact on the future of seizure analysis.

I. INTRODUCTION

The first clause of the fourth amendment to the United States Constitution 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."4 The essence of this clause is a balanc-

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2. See Certiorari petition of California at 9, California v. Hodari D., 111 S. Ct 1547 (1991) (flight from police is "a factual scenario which occurs almost every day in this Nation's urban areas").
ing test, in which the individual expectation of privacy is weighed against the governmental interest in investigating and preventing crime. The amendment itself draws the line: the seizure must be reasonable. But before reaching the question of reasonableness, a determination of whether a seizure has taken place must be made.

The conclusion that a seizure has resulted is fundamentally important because only then is the fourth amendment applicable to the law enforcement officer's conduct. If the fourth amendment is inapplicable, a court will not scrutinize the officer's actions, and the exclusionary rule, which is designed to prevent illegally obtained evidence from contributing to a conviction, does not apply. If the fourth amendment is applicable, then the reviewing court determines whether there is sufficient justification for the officer's actions; if justification is lacking, the evidence will be inadmissible in the government's case-in-chief. Given the countless number of daily encounters between citizens and law enforcement officials, the applicability of the fourth amendment is one of the most common constitutional questions. Therefore, the definition of what constitutes a "seizure" is of crucial importance to deciding cases in court and in guiding police officers in determining how they may permissibly interact with citizens.

The Supreme Court has acknowledged the infinite variety of encounters between citizens and police, which "range from wholly friendly exchanges of pleasantries or mutually helpful information to hostile confrontations of armed men involving arrests, injuries, or loss of life." Given this diversity of meetings, the Supreme Court (until these


6. See Florida v. Royer, 460 U.S. 491, 498 (1983) (plurality opinion) (if there is no seizure within the meaning of the fourth amendment, then no Constitutional rights have been infringed); United States v. Mendenhall, 446 U.S. 544, 552-53 (1980) (opinion of Stewart, J.) ("[N]ot every encounter between a police officer and a citizen is an intrusion requiring an objective justification."). Cf. United States v. Hernandez, 473 U.S. 531, 540-41 (1985) (rejecting intermediate standard between reasonable suspicion and probable cause to justify seizure, stating that subtle gradations may obscure the meaning of the fourth amendment); Dunaway v. New York, 442 U.S. 200, 213-14 (rejecting multifactor standard to judge reasonableness of extent of detention). But cf. People v. De Bour, 352 N.E.2d 562, 567-68 (N.Y. 1976) (suggesting that there are fourth amendment interests to be protected even when no seizure has occurred); 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 9.2(h), at 420-22 (2d ed. 1987) (discussing De Bour approach).


8. Terry v. Ohio, 392 U.S. at 13 (footnote omitted).
latest two cases) had been "cautious" about defining too precisely the point when a seizure occurs.10 Beginning with its first effort to define a seizure, the Court recognized two ways in which an officer can seize a person: by physical force or by show of authority.11 Although the Supreme Court in Hodari D. comprehensively — and concretely — redefined the concept of a seizure, the Court continued to recognize that a seizure could result from either physical force or a show of authority.

In section II, this article addresses physical seizures, analyzing the Hodari D. Court's new definition of such seizures and comparing that definition with previous Supreme Court examination of physical seizures. Section III examines show of authority seizures and contrasts the new test used to measure those seizures with previous case law. The section also discusses submission to authority, which is now an explicit element of a show of authority seizure. Section IV addresses the Court's new, restrictive fruit of the poisonous tree analysis. In section V, this article discusses the policy underlying the Hodari D. definition of a seizure. It concludes that the policy, explicitly stated in the opinion and reflected in the new test for a seizure, fails to achieve a proper balance between governmental and individual interests because it fails to recognize the diminution of liberty that results from attempts by law enforcement officers to seize individuals. Section VI consists of concluding remarks.


10. A seizure occurs along the continuum of meetings between law enforcement officers and citizens at the point where there is some "meaningful interference, however brief, with an individual's freedom of movement." United States v. Jacobsen, 466 U.S. 109, 113 n.5 (1984). However, not every governmental interference with an individual's freedom of movement will be considered a seizure. See Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 618 (1989) (because extracting blood sample is a search, it is unnecessary to characterize antecedent interference with freedom of movement as an independent seizure); United States v. Dionisio, 410 U.S. 1, 9-11 (1973) (grand jury subpoena for voice exemplar, although enforceable by contempt, is not seizure); United States v. Mara, 410 U.S. 19, 21 (1973) (grand jury subpoena for handwriting exemplar is not a seizure). Cf. Pennsylvania v. Mimms, 434 U.S. 106, 111 (1977) (order to get out of car "de minimis" intrusion after car lawfully detained for traffic violation).

Included in the concept of a seizure are investigatory stops, arrests, and other detentions. See Terry v. Ohio, 392 U.S. at 16 ("It is quite plain that the fourth amendment governs 'seizures' of the person which do not eventuate in a trip to the station house and prosecution for crime — 'arrests' in traditional terminology."); United States v. Watson, 423 U.S. 411, 428 (1976) (Powell, J., concurring) (arrest is quintessentially a seizure). The most minimal seizure triggering fourth amendment protections commonly has been called a "stop." Terry v. Ohio, 392 U.S. at 10; Kolender v. Lawson, 461 U.S. 352, 365-66 (1983) (Brennan, J., concurring). A stop, requiring less justification than an arrest, is an intermediate step between an investigation not implicating the fourth amendment and an arrest of a suspect based on probable cause. Adams v. Williams, 407 U.S. 143, 145-46 (1972).

11. Terry v. Ohio, 392 U.S. at 19 n.16.
II. PHYSICAL RESTRAINTS

Supreme Court decisions prior to Hodari D. limited physical seizures to include only the actual bodily detention of a person. Such restraints have been accomplished by a variety of means, including grabbing the person,\textsuperscript{12} physically preventing the individual from leaving or requiring the person to accompany the police,\textsuperscript{13} establishing an impassable roadblock to stop a suspect’s car,\textsuperscript{14} or shooting a fleeing suspect.\textsuperscript{15} In such circumstances, the conclusion that a seizure resulted usually has not been seriously contested. Such cases have been easy to decide because it is objectively verifiable when a person is physically restrained and, therefore, not free to go.

The 1989 majority opinion in Brower v. Inyo County\textsuperscript{16} embraced a literalistic concept of a seizure. Brower was a civil rights action brought by Brower’s estate which came to the Supreme Court after the Ninth Circuit had affirmed the dismissal of the complaint.\textsuperscript{17} The complaint alleged, \textit{inter alia}, that the police used unreasonable and unnecessary force in establishing a roadblock, which consisted of an eighteen-wheel tractor-trailer placed across both lanes of a two-lane highway. Brower was killed when the stolen car he was driving crashed into the roadblock during a high-speed nighttime chase. The complaint alleged that the police effectively concealed the roadblock by, among other things, placing it around a curve in the road.\textsuperscript{18} The Supreme Court held that the complaint sufficiently alleged a seizure because

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  \item \textsuperscript{12} See, \textit{e.g.}, California v. Hodari D., 111 S. Ct. at 1552 (fleeing suspect not seized until tackled by police); United States v. Sokolow, 490 U.S. 1, 7 (1989) (defendant seized when DEA agents grabbed him by arm and moved him from street to sidewalk); Sibron v. New York, 392 U.S. 40, 62 (1968) (grabbing by collar constituted seizure).
  \item \textsuperscript{14} Brower v. Inyo County, 489 U.S. 593, 599 (1989) (seizure found where suspect crashed into roadblock created to stop him).
  \item \textsuperscript{15} Tennessee v. Garner, 471 U.S. 1, 7 (1985).
  \item \textsuperscript{16} 489 U.S. 593 (1989).
  \item \textsuperscript{17} \textit{Id.} at 594.
  \item \textsuperscript{18} \textit{Id.}
\end{itemize}
“Brower was meant to be stopped by the physical obstacle of the roadblock” and “he was so stopped.” 19

The majority’s opinion, authored by Justice Scalia, provided the following definition of a seizure: “Violation of the Fourth Amendment requires an intentional acquisition of physical control.” 20 Scalia explained:

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

Thus, if a parked and unoccupied police car slips its brake and pins a passerby against a wall, it is likely that a tort has occurred, but not a violation of the Fourth Amendment. And the situation would not change if the passerby happened, by lucky chance, to be a serial murderer for whom there was an outstanding arrest warrant — even if, at the time he was thus pinned, he was in the process of running away from two pursuing constables. It is clear, in other words, that a Fourth Amendment seizure does not occur whenever there is a governmental caused termination of an individual’s freedom of movement (the innocent passerby), nor even whenever there is a governmental caused and governmental desired termination of an individual’s freedom of movement (the fleeing felon), but only when there is a governmental termination of freedom of movement through means intentionally applied. 21

Intent, according to the Brower Court, was to be measured objectively. 22

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19. Id. at 599.

20. Id. at 596 (emphasis added). Four members of the Court concurred in the judgment that a seizure had taken place but rejected the majority’s reasoning. Id. at 600 (Stevens, J., concurring, with Brennan, Blackmun, Marshall, JJ.). Stevens correctly noted that the broadly worded majority opinion seemed “designed to decide a number of cases not before the Court and to establish the proposition that ‘[v]iolation of the Fourth Amendment requires an intentional acquisition of physical control.’” Id. Although he believed that intentional acquisition of physical control is “a characteristic of the typical seizure,” Stevens doubted that it was an essential element of every seizure or that the majority’s definition was particularly helpful in deciding close cases. Id.

21. Id. at 596-97 (citations omitted) (emphasis in original).

22. Id. at 598. See also Michigan v. Chesternut, 486 U.S. 567, 575 n.7 (1988) (subjective intent of officer irrelevant); Maryland v. Macon, 472 U.S. 463, 470-71 (1985) (“Whether a Fourth Amendment violation has occurred . . . [does] not [turn] on the officer’s actual state of mind at the time the challenged action was taken.”); United States v. Mendenhall, 446 U.S. at 554 n.6
Thus, under Brower, two elements were needed for a seizure: physical control and an intent to seize. As this narrow interpretation of a seizure appeared at odds with prior decisions and the Court took certiorari in Hodari D. to clarify the situation. The Court in Hodari D., with Justice Scalia again writing the majority opinion, "expand[ed]" the Brower definition, encompassing a larger category of instances where it would find a seizure based on the application of physical force. In doing so, the Court relied on the common law definition of an arrest: "To constitute an arrest, . . . the quintessential 'seizure of the person' under our Fourth Amendment jurisprudence — the mere grasping or application of physical force with lawful authority, whether or not it succeeded in subduing the arrestee, was sufficient." Thus,

(opinion of Stewart, J.) (subjective intent of government agent to detain suspect irrelevant unless conveyed to person accosted); Scott v. United States, 436 U.S. 128, 138 (1978) ("[T]he fact that [an] officer does not have the state of mind which is hypothesized by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action.").

23. As the Brower majority stated: "[W]e think it enough for a seizure that a person be stopped by the very instrumentality set in motion or put in place in order to achieve that result." Brower v. Inyo County, 489 U.S. at 599 (emphasis added).


25. Justice Scalia apparently believes that the scope of the fourth amendment protections are generally governed by the common law as it existed in 1791. According to Scalia, the "reasonableness" standard of the Amendment applies only to "novel questions of search and seizure." County of Riverside v. McLaughlin, 111 S. Ct. 1661, 1672 (1991) (Scalia, J., dissenting). Such an approach does not apply in resolving those questions on which a clear answer already existed in 1791 and has been generally adhered to by the traditions of our society ever since. As to those matters, the "balance" has already been struck, the "practical compromise" reached — and it is the function of the Bill of Rights to preserve that judgment, not only against the changing views of Presidents and Members of Congress, but also against the changing views of Justices whom Presidents appoint and Members of Congress confirm to this Court.

26. Id. Thus, in his view, "the Fourth Amendment's prohibition of 'reasonable 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." Id., citing California v. Hodari D., 111 S. Ct. 1547 (1991). See also id. at 1677 ("Justice Story wrote that the Fourth Amendment 'is little more than the affirmation of a great constitutional doctrine of the common law.' It should not become less than that." (citation omitted)).

27. Id. at 1549-50.

28. Id. at 1550 ("[A]n officer effects an arrest of a person whom he has authority to arrest,
according to the Court, the "slightest application of physical force" may result in a seizure. This definition of a physical seizure is broader than the definition given in Brower, which required governmental termination of movement.

The intent aspect of the Brower opinion remains unaffected by Hodari D. Thus, merely touching a person is not enough for a seizure; there must also be an intent to seize. Illustrative is the situation presented in the pre-Brower case of INS v. Delgado. In that case, Francisca Labonte, an employee of a garment factory, was approached at work by INS agents during a survey designed to locate illegal aliens. An agent came up to her from behind, "tapped" her on the shoulder, and asked in Spanish, "where are your papers?" Labonte, who did not wish to answer, turned and responded only because she saw that the questioner was an INS agent. She stated that she had her papers and showed them to the agents, who then left. The Court held, applying the reasonable person test, that this was a "classic consensual encounter[] rather than [a] fourth amendment seizure[]." Missing from the encounter, the Brower opinion teaches, was an intent to seize by the agent. On the other hand, a seizure occurs under the new test when an officer places his hand on a suspect's shoulder and instructs the suspect to "hold it." In such a case, there is physical contact and an objective manifestation of the officer's intent to seize from his spo-

by laying his hand on him for the purpose of arresting him, though he may not succeed in stopping and holding him." (citing Whitehead v. Keyes, 85 Mass. 495, 501 (1862)).

29. Id.

30. The suspect who is physically touched by the police but thereafter escapes receives little solace from the Hodari D. expansion of the Brower definition of a seizure. For the seizure ends when the physical contact is broken unless the suspect has been subdued or has submitted. See infra text accompanying notes 159-61.


32. Id. at 213 n.1.

33. Id. at 220; Id. at 231 (Brennan, J., dissenting).

34. Id. at 231 (Brennan, J., dissenting).

35. Id. at 220.

36. Id. at 221.

37. See Martinez v. Nygaard, 831 F.2d 822, 826-27 (9th Cir. 1987) (during factory sweep, INS agent's grabbing of worker by shoulder to get attention and releasing the worker when turned to face agent not a seizure under reasonable person test); United States v. Collins, 766 F.2d 219, 219-21 (6th Cir. 1985) (no seizure when agent approached defendant from behind, lightly touched defendant on arm, identified himself, and asked if he could ask some questions), cert. denied, 474 U.S. 851 (1985); State v. Reid, 276 S.E.2d 617, 621 (Ga. 1981) ("Assuming the agent did tap the defendant on the shoulder at the outset to get his attention . . . , he simultaneously said excuse me or something similar; in view of all the circumstances this physical contact alone does not constitute a seizure."); State v. Neyrey, 383 So. 2d 1222, 1225 (La. 1980) (no seizure where officer opened car door, shook awake sleeping defendant, and then asked to see identifica-
ken words. Thus, there are two components of a physical seizure by a government agent: physical touching and an intent to seize.

III. SHOWS OF AUTHORITY

A. The Requirement of Submission

Show of authority seizures include all seizures where there is no physical contact. Rather than bodily detaining the person, a mental seizure occurs. That is, through a show of authority, the police demonstrate that the individual is not free to leave. In Hodari D., the majority held that actual restraint of the person accosted was also an element of such seizures.

Within the show of authority category of seizures, there have been some situations prior to Hodari D. where the restraint of the person accosted has been so clear that the Court has had no problem reaching the conclusion that the fourth amendment applied to the police conduct. Such cases have included the stop of cars at the border by roving patrols and at roadblocks, and other stops of ve-

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39. Cf. United States v. Santillanes, 848 F.2d 1103, 1106-07 (10th Cir. 1988) (finding seizure under reasonable person test where officer “physically restrained” defendant by placing hand on defendant’s shoulder as defendant turned to walk away).

40. The Hodari D. Court uses the term physical “force” rather than “contact.” Perhaps implicit in the word “force” is an intended contact. It is clear, however, that the force applied need not be anything more than a touching, that is, contact with the person accosted.

41. The absence of physical contact often has been considered a significant factor in determining that no seizure has transpired. See, e.g., United States v. Garcia, 866 F.2d 147, 152 (6th Cir. 1989) (no seizure under reasonable person test during accosting at airport where “no weapon displayed, there was no physical touching of Garcia, [and] the agents did not raise their voices or threaten Garcia in any way”); United States v. Sanford, 638 F.2d 342, 345 (5th Cir. 1981) (no seizure under reasonable person test when “no physical contact” and words expressed were in form of request), cert. denied, 455 U.S. 991 (1982); State v. Hanna, 628 P.2d 1246, 1249 (Or. App. 1981) (no seizure under reasonable person test when officer asked to speak with defendant, who was not required to alter his course, and “no physical contact”), rev’d denied, 639 P.2d 1280 (Or. 1981). At some point, the distinction between a show of authority seizure and a physical seizure becomes blurred. See, e.g., United States v. Hensley, 469 U.S. 221, 234 (1985) (turning on emergency lights, car stops, pointing gun in air, and ordering suspect out of car). At bottom, a show of authority is at least an implicit threat to use physical force.

42. See, e.g., Adams v. Williams, 407 U.S. 143, 146 n.1, 148 (1972) (Court applied fourth amendment analysis where suspect “acted involuntarily in rolling down the window of his car”).

43. Michigan Department of Police v. Sitz, 110 S. Ct. 2481, 2485 (1990) (seizure occurred
cles.\textsuperscript{44} In such instances, there has been a show of authority, such as a roadblock, and the person to whom it was directed acceded to the demonstration of authority and stopped. These clearly recognizable seizures are distinguished by two elements: unequivocal police action designed to produce a stop and an actual stop by the person as a result of that action.

On the other hand, there have been numerous expressions of opinion by members of the Court that certain police behavior, without more, does not implicate the fourth amendment.\textsuperscript{45} For example, in \textit{Florida v. Royer},\textsuperscript{46} a plurality provided some of the parameters of police conduct that would indicate that a seizure had not taken place: approaching persons in public places, identifying themselves as police officers, asking if the person is willing to answer some questions, and putting ques-

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45. INS v. Delgado, 466 U.S. 210, 216-17 (1984) ("[P]olice questioning, by itself, is unlikely to result in a Fourth Amendment violation"). \textit{But see} id. at 226 (Brennan, J., dissenting in part) (police questioning, under certain circumstances, "may" amount to seizure); Florida v. Rodriguez, 469 U.S. 1, 5-6 (1983) (per curiam) (officer legally approached Rodriguez, showed his badge, and asked him if they might talk; Rodriguez agreed and the officer suggested that they move approximately 15 feet to where the second police officer and two other suspects were standing; held not a seizure); Florida v. Royer, 460 U.S. 491, 497 (1983) (plurality opinion) ("[P]olice officers do not violate fourth amendment by approaching an individual in a public place, asking if that person is willing to answer questions, and asking that person some questions"); \textit{Id.} at 511 (Brennan, J., concurring) (police officers "may approach citizens on the street and ask them questions without seizure them"); \textit{Id.} at 523 n.3 (Rehnquist, J., with whom O'Connor, J., joined, dissenting) (same); United States v. Mendenhall, 446 U.S. 544, 553-54 (1980) (opinion of Stewart, J.) ("As long as the person to whom questions are put remains free to disregard the questions and walk away, there has been no intrusion upon that person's liberty or privacy as would under the Constitution require some particularized and objective justification."); Dunaway v. New York, 442 U.S. at 222-24 (Rehnquist, J., dissenting) (police permitted to ask individual to voluntarily talk to them); Davis v. Mississippi, 394 U.S. 721, 727 n.6 (1969) (police have right to ask questions but no power to compel answers); Terry v. Ohio, 392 U.S. at 32-33 (Harlan, J., concurring) (stop would not include such conduct as "addressing questions to other persons, for ordinarily the person addressed has an equal right to ignore his interrogator and walk away"); \textit{Id.} at 34 (White, J., concurring) ("There is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets.").

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tions to him or her if the person is willing to listen. The majority in *Florida v. Bostick* agreed that such actions would not constitute a seizure and added that requesting consent to search a person’s luggage also would not be a seizure as long as the police do not convey the message that compliance with their request was required.

In other show of authority cases, where the police action and the citizen’s response have been more ambiguous, the Court has had great trouble determining under what circumstances a seizure takes place. In an attempt to provide a tool to determine when a show of authority seizure develops, the Court in the 1980s embraced the “reasonable person” test. Sometimes called the *Mendenhall* test, the test mandated that “a person has been ‘seized’ within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he or she was not free to leave.” The test was applied in only four cases prior

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47. *Id.* at 497. *But see id.* at 511-12 (Brennan, J., dissenting) (criticizing suggestion that person feels at liberty to simply walk away after he or she is approached by law enforcement officer).


49. *See Clancy,* *supra* note 24, at 625-36 (examining cases).


51. The test was first promoted by Justice Stewart. *United States v. Mendenhall*, 446 U.S. at 554 (opinion of Stewart, J.). It gradually gained acceptance in the Supreme Court. *See Florida v. Royer*, 460 U.S. at 502 (plurality opinion) (appropriate test for seizure is whether, in light of all circumstances, a reasonable person would have felt he or she was free to leave); *id.* at 514 (Blackmun, J., dissenting) (same). Finally, it seemingly commanded complete acceptance in *INS v. Delgado*, 466 U.S. 210 (1984) (same). *See id.* at 211 (majority opinion of Justice Rehnquist, joined by Chief Justice Burger and Justices White, Blackmun, Stevens, and O'Connor) (same); *Id.* at 221 (Powell, J., concurring) (same); *Id.* at 228 (Brennan, J., with whom Marshall, J., joined, dissenting) (same). *See also Michigan v. Chesternut*, 486 U.S. at 573-74 (test for determining whether a person has been seized is if, considering all of the circumstances, a reasonable person would have felt free to leave).

52. *United States v. Mendenhall*, 446 U.S. at 554 (opinion of Stewart, J.). There has been several attempts to explain what the reasonable person standard means. *See, e.g.*, *INS v. Delgado*, 466 U.S. at 228 (Brennan, J., dissenting) (the reasonable person test “properly looks not to the subjective impressions of the person questioned but rather to the objective characteristics of the encounter which may suggest whether or not a reasonable person would believe that he remained free during the course of the questioning to disregard the questions and walk away.”). Most notably, at least prior to *Bostick*, Justice Blackmun, writing for the majority in *Michigan v. Chesternut*, 486 U.S. 567, discussed the “reasonable person” standard. Recognizing that the test for determining if a seizure had occurred was “necessarily imprecise, because it is designed to assess the coercive effect of the police conduct, taken as a whole, rather than focus on particular details in isolation,” *id.* at 573, he observed that “what constitutes a restraint on liberty prompting a person to conclude that he is not free to ‘leave’ will vary, not only with the particular police conduct at issue, but also with the setting in which the conduct occurs.” *Id.* Extolling the test's
to Bostick.\textsuperscript{53} Although a majority of the Court found a seizure in only one of those cases,\textsuperscript{54} the numerous opinions in the cases were full of illustrations of the types of activity that would constitute a seizure under the reasonable person test. For example, in Mendenhall, Justice Stewart opined:

Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer’s request might be compelled. \ldots In the absence of some such evidence, otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person.\textsuperscript{55}

This passage at least suggested that submission was not a necessary element of a seizure. Indeed, the emphasized language could be read to

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intimate that an attempt to leave in response to a show of authority was an indication that the show of authority was so coercive as to be considered a seizure, thereby provoking the attempt to depart.

In \textit{INS v. Delgado},\textsuperscript{56} which produced the first majority opinion utilizing the reasonable person standard, the Court indicated that intimidation was sufficient to implicate the fourth amendment.\textsuperscript{57} As recently as \textit{Michigan v. Chesternut},\textsuperscript{58} the majority gave very expansive examples of when a seizure would transpire under the reasonable person test. In \textit{Chesternut}, which involved the unprovoked flight of a suspect upon the appearance of a police car that then followed him, the Court suggested that, although there had been no seizure, the result would have been different if there had been a show of authority that a reasonable person would interpret as an attempt to capture or otherwise intrude upon Chesternut's freedom of movement.\textsuperscript{59} As examples of such a show of authority, the Court cited police action such as activating a siren or flashers or operating the police car in an aggressive manner to block the person's course or to otherwise control the direction or speed of that person's movement. Such examples broadly indicated that some shows of authority are so intimidating that they alone could be a seizure.

Moreover, in \textit{Chesternut}, the State had specifically asked the Court to "rule 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."\textsuperscript{60} The State argued that "the Fourth Amendment is never implicated until an indi-

\textsuperscript{56} 466 U.S. 210 (1984).
\textsuperscript{57} \textit{Id}. The Court stated: "Unless the circumstances of the encounter are so intimidating as to demonstrate that a reasonable person would have believed he was not free to leave if he had not responded, one cannot say that the questioning resulted in a detention under the Fourth Amendment." \textit{Id}. at 216-17 (citations omitted) (emphasis added). See also United States v. Ortiz, 422 U.S. 891, 895 (1975) (main concern of the Fourth Amendment is to protect against "arbitrary and oppressive interference by government officials").
\textsuperscript{58} 486 U.S. 567.
\textsuperscript{59} \textit{Id}. at 575. In \textit{Chesternut}, the accused was followed by police officers in a marked police car after he spontaneously ran upon observing them approach on routine patrol. \textit{Id}. at 569. As the officers followed and then drove alongside Chesternut to determine what he was doing, they observed him discard a number of packets from his pocket. \textit{Id}. The officers stopped and recovered the packets, which they suspected contained narcotics. \textit{Id}. Chesternut, who had stopped of his own accord nearby, was then arrested. \textit{Id}. The Supreme Court unanimously ruled that the police officers' investigatory pursuit did not amount to a seizure cognizable under the Fourth Amendment. \textit{Id}. at 572. In an opinion written by Justice Blackmun and joined by six other justices, the Court recognized that, although the "very presence of a police car driving parallel to a running pedestrian could be somewhat intimidating," such a police presence did not, standing alone, constitute a seizure. \textit{Id}. at 575. According to the majority, the police conduct did not communicate to a reasonable person an "attempt to capture or otherwise intrude upon" freedom of movement. \textit{Id}. (emphasis added).
\textsuperscript{60} \textit{Id}. at 572. See also \textit{California v. Hodari D.}, 111 S. Ct. at 1558-59 (Stevens, J., dissenting) (discussing \textit{Chesternut}).
vidual stops in response to the police's show of authority."

On the other hand, the respondent maintained that all police chases were seizures. The Court explicitly rejected both "attempts to fashion a bright-line rule applicable to all investigatory pursuits."

The Court stated:

Rather than adopting either rule proposed by the parties and determining that an investigatory pursuit is or is not necessarily a seizure under the Fourth Amendment, we adhere to our traditional contextual approach, and determine only that, in this particular case, the police conduct in question did not amount to a seizure.

That rejection was widely interpreted as recognizing that no actual restraint was necessary for there to be a seizure. Thus, under the reasonable person test, it was generally believed that, once a show of authority occurred that a reasonable person would interpret as demonstrating that he or she was not free to leave, a seizure resulted, regardless of whether or not the suspect yielded.

Against this background, the California Appellate Court was confronted with the facts of Hodari D. A youth, Hodari D., was standing with others around a car in a known high crime area. When they observed an unmarked police car approaching, the youths ran. The officers pursued. Anticipating where Hodari D. would run, Officer Pertoso succeeded in getting ahead of him. As Officer Pertoso ran directly

62. Id.
63. Id. The majority stated that the United States, in an amicus brief, had suggested that under some circumstances, a police pursuit would amount to a stop from the outset or from an early point in the chase if the police commanded the person to halt and indicated that he or she was not free to go. Blackmun replied that the Court was leaving to another day the determination of when a police pursuit could amount to a seizure. Id. at 575 n.9.
64. Id. at 572-73.
65. See, e.g., State v. Lemmon, 568 A.2d 48, 53 (Md. 1990) (defendant seized for purposes of the fourth amendment when he was being chased by police officers); Timms v. State, 573 A.2d 397, 399-400 (Md. Ct. Spec. App. 1990) (police officers' conduct in shouting out their identity and pursuing defendant as he fled constituted seizure for fourth amendment purposes), cert. denied, 580 A.2d 219 (Md. 1990); See generally LAFAVE, supra note 6, § 9.2(b), at 409-17.
toward him, Hodari D. saw the officer and then tossed away a rock of crack cocaine. Seconds later, the officer tackled Hodari D. and handcuffed him.

The California Appellate Court rejected the view that there could be no seizure under the fourth amendment until a fleeing suspect is actually caught. Applying the reasonable person test to the encounter, the court held that a seizure occurred when Hodari D. saw the officer run toward him. The court stated: "We have no doubt that it is coercive and intimidating to discover a police officer running directly toward one, some 11 feet away on a public sidewalk." According to the California court, the officer's conduct would convince reasonable persons that Hodari D. was not free to ignore the officer and leave. Therefore, the officer's actions were an intrusion on Hodari D.'s freedom of movement, thus implicating the fourth amendment.

The Supreme Court reversed, with a seven member majority holding that a show of authority does not result in a seizure until the subject submits. The Court stated:

The 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. ("She seized the purse-snatcher, but he broke out of her grasp.") It does not 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. Nor can the result respondent wishes to achieve be produced — indirectly, as it were — by suggesting that Pertosic's uncomplied-with show of authority was a common-law arrest, and then appealing to the principle that all common-law arrests are seizures. An arrest requires either physical force (as described above) or, where that is absent, submission to the assertion of authority.

The majority maintained that its analysis was consistent with the reasonable person test. That test, according to the majority,
saying that a person has been seized "only if," not that he has been seized "whenever"; it states a necessary, but not a sufficient condition for seizure — or, more precisely, for seizure effected through a "show of authority." Mendenhall establishes that the test for existence of a "show of authority" is an objective one: not whether the citizen perceived that he was being ordered to restrict his movement, but whether the officer's words and actions would have conveyed that to a reasonable person. Application of this objective test was the basis for our decision in . . . Chesternut, . . . where we concluded that the police cruiser's slow following of the defendant did not convey the message that he was not free to disregard the police and go about his business. We did not address in Chesternut, however, the question whether, if the Mendenhall test was met — if the message that the defendant was not free to leave had been conveyed — a Fourth Amendment seizure would have occurred.75

The majority's interpretation is an adoption of Justice Kennedy's view of the reasonable person test. In Chesternut, Kennedy concurred, stating 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."76 This formulation of a show of authority seizure presupposes that the person is first in the control of the officers. In contrast, the Chesternut majority used the test to dispense with such control, focusing instead on the coerciveness of the show of authority.77

The Hodari D. majority's requirement of control of the suspect was foreshadowed in Brower, wherein the Court stated that no seizure would result if a fleeing suspect unexpectedly lost control of his car and crashed, even if being pursued by police in cars with flashing lights.78 The Brower majority reasoned that, although the flashing lights were a significant show of authority, the suspect was stopped by a dif-

75. Id. at 1551-52 (citing Michigan v. Chesternut, 486 U.S. at 577 (Kennedy, J., concurring)).
76. Michigan v. Chesternut, 486 U.S. at 577 (Kennedy, J., concurring) (emphasis added).
77. See California v. Hodari D., 111 S. Ct. at 1559 (Stevens, J., dissenting).

The notion that our prior cases contemplated a distinction between seizures effected by a touching on the one hand, and those effected by a show of force on the other hand, and that all of our repeated descriptions of the Mendenhall test stated only a necessary, but not a sufficient, condition for finding seizures in the latter category, is nothing if not creative lawmakers.

Id.

78. Brower v. Inyo County, 489 U.S. at 597.
ferent means — his loss of control. Under the heretofore commonly understood meaning of the reasonable person analysis, the seizure would have occurred when the flashing lights were activated because they represented a show of authority indicating that the person was not free to leave. Therefore, it would not matter if the person lost control of his or her car after the lights or siren had been activated because a seizure had already resulted. In contrast, the Brower majority said that a seizure would take place if a suspect fleeing in a car is intentionally sideswiped by the police, which is to say that a seizure would occur when the law enforcement officer achieved physical control.

One particular element of the Brower Court’s analysis was repeated in Hodari D. and deserves special attention. The Brower majority stated that its analysis was “reflected” by the decision in Hester v. United States, in which armed revenue agents had pursued the defendant and his accomplice after seeing them obtain containers thought to be filled with moonshine whiskey. During their flight, the men dropped the containers, which an agent then recovered. The defendant sought to suppress testimony concerning the containers’ contents as the product of an unlawful seizure. Justice Holmes, speaking for the Court, concluded that the defendant’s own acts, and those of his associates, disclosed the containers and, therefore, there was no seizure within the meaning of the fourth amendment when the officers examined the contents of each after they had been abandoned. The Brower majority opined that, if the agents had ordered the suspects to stop and turn over the bottles and the suspects had “complied,” then a seizure would have transpired.

The Brower Court omitted several of the facts in Hester from its summary of the case. In Hester, a revenue agent pursued the suspects and fired a pistol as they ran away; yet, the Court did not view the actions as constituting a seizure. It is difficult to imagine a more self-evident demonstration that the police want the suspect to stop than a command to halt followed by bullets when the suspect disregards the

79. Id. See also California v. Hodari D., 111 S. Ct. at 1552 (officer’s pursuit of defendant did not constitute seizure where defendant did not comply); Galas v. McKee, 801 F.2d 200, 203 (6th Cir. 1986) (no seizure when suspect in automobile fled in response to officer’s show of authority).
80. United States v. Mendenhall, 446 U.S. at 553-54.
81. Brower v. County of Inyo, 489 U.S. at 597.
82. California v. Hodari D., 111 S. Ct. at 1552.
83. 265 U.S. 57 (1924).
84. Id. at 58.
85. Id.
86. Brower v. County of Inyo, 489 U.S. at 597-98.
87. Hester v. United States, 265 U.S. at 58.
command. Shooting at a suspect is perhaps the most extreme means of communicating an officer's intent to seize the person by using any means necessary. No doubt any reasonable person would interpret such an unequivocal command as proof that he or she was not free to go. In contrast, the Brower Court cited Tennessee v. Garner, wherein an officer intentionally shot a fleeing suspect, as an example of a seizure. Considering Hester and Garner, it appears that the present Court would find that if the police shoot at but miss a fleeing suspect and the suspect continues to run, there is no seizure. On the other hand, to be seizure, the police must either have to hit the person with the bullet or the person must stop and submit to the officer's control. The point at which a seizure occurs now becomes much later in the encounter: it is not when the suspect reasonably believes he or she is not free to go but when physical contact or submission has been achieved. This view, eliminating attempts to seize from the coverage

89. 471 U.S. 1 (1985). In Garner, the Court found:

Whenever an officer restrains the freedom of a person to walk away, he has seized that person. . . . However, it is not always clear just when minimal police interference becomes a seizure, . . . there can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment.

Id. at 7 (citations omitted). The dissenters agreed that shooting is a seizure. Id. at 25 (O'Connor, J., dissenting, joined by Burger, C.J., and Rehnquist, J.).

90. Brower v. Inyo County, 489 U.S. at 595.

91. See California v. Hodari D., 111 S. Ct. at 1552 (Stevens, J., dissenting); Palmer v. Williamson, 717 F. Supp. 1218, 1223 (D. Tex. 1989) (relying on Garner and Brower, court held no seizure when officer fired his gun and hit the suspect's car as it pulled away).

92. Thus, chases have been eliminated from the lexicon of seizures. A bright-line rule has been established: a seizure stemming from a chase will occur only when it has reached a successful conclusion. The only exception to this rule occurs when there is physical contact during the chase. The seizure that results from such contact is, however, momentary and ends if the suspect breaks free. See infra notes 160-62 and accompanying text (examining the impact of momentary seizure on fruits of unlawful seizure). Bright-line rules have been applied in other fourth amendment contexts. See, e.g., New York v. Belton, 453 U.S. 454, 462 (1981) (permissible search incident to arrest includes area within arrestee's immediate control); New York v. Quarles, 467 U.S. 649, 659 (1984) (public safety exception to the warrant requirement). The rationale of such a rule is that "a single familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront." New York v. Belton, 453 U.S. at 458 (quoting Dunaway v. New York, 422 U.S. 200, 213-14 (1979)). The police now know that they can follow any person they choose for however long they desire despite the absence of any justification, so long as there is no physical contact or submission to a show of authority.

93. See Roach v. City of Fredericktown, 882 F.2d 294, 295-96 (8th Cir. 1989) (following Brower: police car with flashing lights pursued suspect, who then collided with oncoming car; held, no seizure because collision not intentionally caused by police); Patterson v. City of Joplin,
of the fourth amendment, is a very restrictive view of when a seizure occurs.

B. Modifying the Language of the Reasonable Person Test

In *Florida v. Bostick*, the Court addressed the situation where the suspect does not flee in response to the show of authority and, instead, complies with the directions of the police.94 Although the Court applied the reasonable person test to the encounter, it modified the language of the test to avoid the confusion engendered from the previous formulation, which focused on whether the person believed he or she was free to leave.95 *Bostick* involved the accosting of a bus traveler by two Broward County Sheriff's Department officers who boarded the bus at a scheduled stop. Without articulable suspicion, the officers questioned Bostick, who was seated in the rear of the bus, and requested his consent to search his luggage for drugs.96 Because there was a dispute over the factual details of the encounter, the Supreme Court remanded the case to Florida courts to evaluate the seizure issue.97

The Court, however, rejected any *per se* rule that bus confrontations were necessarily seizures.98 The majority recognized that, given the constraints inherent in the encounter, including: the cramped confines of the bus; the traveler's unfamiliarity with the area in which he or she was merely passing through; the passenger's financial stake in the bus ticket; and the likelihood that the passenger had luggage stored in the luggage compartment of the bus which would be inaccessible to the passenger, a traveler might not feel "free to leave" the bus to avoid the confrontation with the police.99 However, according to the majority, the traveler was confined due to *his* decision to take the bus. Such confinement, according to the majority, said "nothing about whether or not the police conduct at issue was coercive."100 The appropriate question, according to the Court, was not whether the person was free

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878 F.2d 262, 263 (8th Cir. 1989) (following *Brower*: police cars with flashing lights and siren chased motorcycle until suspect crashed; held, no seizure because suspect lost control); United States v. Gonzalez, 875 F.2d 875, 877 (D.C. Cir. 1989) (citing *Brower*: successful use of flashing strobe light to signal boat to stop constituted seizure); People v. Robinson, 257 Cal. Rptr. 772, 777 (Cal. Ct. App. 1989) (citing *Brower*: seizure when officer obtained physical control of paint samples by intentionally scraping off paint).

95. *Id.* at 2387-89.
96. *Id.* at 2384-85.
97. *Id.* at 2388.
98. *Id.* at 2389.
99. *Id.* at 2386-87.
100. *Id.* at 2387.
to leave, but whether the police activities “were intended to capture.”101 The Court stated:

When the police attempt to question a person who is walking down the street or through an airport lobby, it makes sense to inquire whether a reasonable person would feel free to continue walking. But when the person is seated in a bus and has no desire to leave, the degree to which a reasonable person would feel that he or she could leave is not an accurate measure of the coercive effect of the encounter.102

Instead, according to the majority, “a court must consider all the circumstances surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers’ requests or otherwise terminate the encounter.”103

The majority in Bostick stated that its opinion broke no new legal ground.104 However, the case expressly modified the wording of the reasonable person standard to clarify that a reasonable person’s response to a show of authority indicating that he or she had not been coerced into submission can take many forms. The person does not necessarily have to feel free to leave. Instead, he or she must only feel free to decline the officers’ requests or otherwise terminate the encounter. To illustrate the flexibility of the standard, the Court used several different examples of responses that would indicate that no seizure has occurred: a suspect could refuse to cooperate;105 ignore the police;106 leave the area; or merely go about one’s business.107 Importantly, the Court stated that its formulation of the reasonable person rule applied equally to encounters on the street, in an airport lobby, or on a bus.108 The Court also stated for the first time that the reasonable person test “presupposed an innocent person” in the position of the person accosted.109 Thus, it rejected the argument that no reasonable person would freely consent to a search of luggage he or she knows contains drugs.110

101. Id.
102. Id.
103. Id. at 2389.
104. Id. at 2387.
105. Id.
106. Id.
107. Id.
108. Id. at 2388.
109. Id.
110. Id.
C. Future Analysis of Show of Authority Seizure Claims

As has already been indicated, show of authority seizures require two elements: (1) a show of authority and (2) submission. The submission must be in response to a show of authority that a reasonable person would interpret as a demonstration of the officer’s intent to seize.\textsuperscript{111} In examining show of authority seizure claims, both elements must be present for a seizure to occur but, depending on the facts of the case, there may be need for extended analysis of only one of the elements.

There are numerous responses to a police accosting, including flight, active resistance, consent, or submission. Case law has already determined that certain actions by the police or by the suspect are dispositive of the seizure question. If the show of authority is clear enough to be an obvious command, then complying with that command will be considered a submission.\textsuperscript{112} On the other hand, certain actions by the police are firmly established to be a permissible investigative technique, not rising to the level of a show of authority.\textsuperscript{113} Abbreviated examination is also appropriate in light of certain responses of the person accosted. Where there is no submission, \textit{Hodari D.} teaches that there need not be any determination whether there has been a show of authority. Active resistance, such as by physical force, is also the opposite of submission.\textsuperscript{114}

The reasonable person test focuses on the show of authority element and will continue to serve as a means of distinguishing between com-

\textsuperscript{111} This type of seizure may have a broader intent element than physical seizures — if the reasonable person test is not used for physical seizures — because there are circumstances where a reasonable person could believe that police desire to seize but they are not actually attempting to seize him or her. Yet there may be no practical consequences to this distinction due to the Court’s restrictive fruit analysis: if a person submits without more, then because the police were not intending to seize, presumably, the person would be left alone. However, if the person submits and disgorge drugs ("OK, you got me, I submit, and here are my drugs."), then under traditional fruit analysis, the drugs would be suppressed. If that is still the Court’s view, of which there is much doubt, see infra text accompanying notes 139-55, then resolution of how to measure the intent element of physical seizures is important.

\textsuperscript{112} See, e.g., Martin v. Houck, 54 S.E. 291, 293-94 (N.C. 1906) (arrest occurred when suspect submitted to officers command, "Consider yourself under arrest. You must go . . . with us.").

\textsuperscript{113} See supra notes 46-48 and accompanying text (discussing specified police behavior not implicating the fourth amendment).

\textsuperscript{114} See, e.g., Barnhard v. State, 587 A.2d 561, 568 (Md. Ct. Spec. App.) (attempt to resist, struggle, and puching of officers after officer laid hand on defendant’s shoulder and told him he was under arrest), \textit{cert. granted}, 591 A.2d 506 (Md. 1991); State v. Cooper, 166 S.E.2d 509, 513 (N.C. Ct. App. 1969) (suspect hit officers with fists and elbows, kicked with feet, and told them he was not going any place after being presented with arrest warrant; the court stated: "The words 'submit peacefully to arrest' imply the yielding to the authority of a lawful officer, after being lawfully arrested.").
plying with requests out of a spirit of voluntary cooperation\textsuperscript{115} and submitting to shows of authority. Complying with a request by an officer is neither an arrest\textsuperscript{116} nor, under prior case law, a seizure.\textsuperscript{117} Submission occurs when the person accosted recognizes the power of the officer asserting the authority over that person. Accordingly, submission analysis only becomes important when the actions of the police and the response of the suspect are somewhat ambiguous.\textsuperscript{118} In that event, new central questions under the new test for a show of authority seizure will be determining if and when the person accosted submits.

Submission analysis should not be an unduly burdensome task because it is a familiar question in the law.\textsuperscript{119} It is important in many situations, including cases where it is an element of the offense, such as in cases charging sexual assault,\textsuperscript{120} kidnapping,\textsuperscript{121} false imprisonment,\textsuperscript{122} and extortion;\textsuperscript{123} and as a defense to a criminal charge, such as when duress is asserted.\textsuperscript{124} The question of the voluntariness of consent under the fourth amendment is often litigated in search cases. The Ho-

\begin{footnotesize}
115. See United States v. Mendenhall, 446 U.S. at 553 (discussing Sibron v. New York, 392 U.S. at 63); Faniel v. Chesapeake & Potomac Telephone Co., 404 A.2d 147, 152 (D.C. 1979) ("[i]f the submission is voluntary, as where a suspect voluntarily accompanies his accusers to vindicate himself, then no false imprisonment occurs.").


117. See LaFave, supra note 6, § 9.2(h), at 412-17 (discussing distinction between orders and requests).

118. See, e.g., United States v. Mendenhall, 446 U.S. at 557-60 (plurality opinion) (discussing validity of consent search in response to arguable show of authority).

119. But see California v. Hodari D., 111 S. Ct. at 1560 (Stevens J., dissenting)("The range of responses to a police show of force, and the multitude of problems that may arise in determining whether, and at which moment, there has been 'submission,' can only create uncertainty and generate litigation.").

120. See, e.g., State v. Rusk, 424 A.2d 720, 726-28 (Md. 1981) (lack of consent to sexual relations is a question of fact established through proof that the victim submitted as a result of reasonable fear of imminent death or serious bodily harm); Wayne R. LaFave & Austin W. Scott, Handbook on Criminal Law, § 57, at 408 (1972) (rape defined as unlawful carnal knowledge of woman without her consent).

121. See, e.g., State v. Lowry, 139 S.E. 870, 874 (N.C.), (kidnapping is unlawful taking and carrying away of person by force and against one's will) cert. denied 282 U.S. 22 (1965); Rollin M. Perkins & Ronald N. Boyce, Criminal Law 229-38 (3d ed. 1982) (discussing the definition and elements of kidnapping).

122. See Perkins & Boyce, supra note 121, at 226 ("Confinement is not unlawful if it is with the consent of the person confined, provided the consent was freely and intelligently given by one not subjected to any coercion, intimidation or deception, and not disqualified from giving consent by unsoundness of mind or tender years.").

123. See Perkins & Boyce, supra note 121, at 1077 (discussing submission as an element of extortion).

\end{footnotesize}
dari. D. Court's definition of a seizure of a person equates it with the common law definition of an arrest, thus the common law cases determining the point at which an arrest occurs are directly analogous. The Hodari D. majority refers to the common law action for false imprisonment, by citing the Restatement of Torts. Thus, there are many possible sources of authority to measure when submission has occurred. Submission to asserted legal authority, according to the first Restatement of the Law of Torts, is demonstrated as follows:

The submission necessary to convert the assertion of authority into a custody taken thereunder may be shown by words or conduct. Submission by words may be shown by any language which expresses the other's recognition of the validity of the authority and his willingness to submit to custody. Submission by conduct may be shown by any act or omission indicating the other's recognition that he is within the custody and power of the person asserting the authority although no physical force is exerted or threatened, or by doing or refraining from doing any act which such person commands him to do as a condition for his release from the custody taken under the asserted authority.

The Restatement provides numerous examples of when compliance with authority does not become a false imprisonment. However, none of

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125. California v. Hodari D., 111 S. Ct. at 1551 n.3 (common law of arrest "defines the limits of a seizure of the person") (emphasis in original). "The word 'arrest' is derived from the French word arreter, which means to stop, to detain, to hinder, to obstruct." 1 CLARENCE ALEXANDER, THE LAW OF ARREST § 45, at 353 (1949).

There may be numerous collateral consequences to the Court's definition of a seizure, which, according to the Court, is a momentary act. The Hodari D. Court cites Thompson v. Whitman, 85 U.S. (18 Wall.) 457, 471 (1874), wherein the Court stated: "A seizure is a single act, and not a continuous fact." 111 S. Ct. at 1550. Possession, which follows seizure, is continuous. Given the Hodari D. Court's belief that an arrest equals a seizure of a person, it follows that an arrest is a single act, that is, upon gaining control or upon submission, the arrest ends and detention begins. In Graham v. Connor, the Court stated: "Our cases have not resolved the question whether the Fourth Amendment continues to provide individuals with protection against the deliberate use of excessive physical force beyond the point at which the arrest ends and the pretrial detention begins . . . ." Graham v. Connor, 490 U.S. 386, 395 n.10 (1989). Given the momentary nature of an arrest and the Hodari D. Court's reluctance to expand the concept of a seizure, it is doubtful that it would construe the Amendment to protect individuals beyond the arrest itself. On the other hand, given the momentary nature of the arrest, defendants who begin resistance after the initial detention can now assert that they did not resist an arrest. Cf. Washington v. State, 589 A.2d 493, 494-95 (Wash. 1991) (defendant's claim that he did not resist arrest rejected when, after being arrested and as he was being escorted to a transport vehicle, he struck a police officer and fled).

126. See California v. Hodari D., 111 S. Ct. at 1550 (citing Restatement of Torts § 41 cmt. h (1934)).

127. Restatement of Torts § 41 cmt. c; accord Restatement (Second) of Torts § 41 cmt. c (1965) (duplicating text of first Restatement of Torts).

128. Restatement of Torts, § 41 cmt. e & f, illus. 7-8. The Restatement's position is more
the illustrations discuss what constitutes submission. Moreover, cases discussing false imprisonment causes of action shed little light on what would be an appropriate standard to measure submission. In those cases, the question whether there was a submission typically is not disputed and thus the cases have had little occasion to discuss the question. These cases often merely state the conclusion that the person submitted to the show of authority and discuss other issues, such as whether, based on the words or conduct of the person asserting authority, a confinement has resulted.129

However, the false arrest and false imprisonment cases are important to demonstrate that certain reactions to an assertion of authority are so clearly a submission that little extended analysis is needed. In this regard, the cases are similar to the cases involving physical seizures: the restraint is often so obvious that it will be rarely contested.130 For example, when a police vehicle activated its red light and the defendant stopped his automobile and exited it to speak with the officer, a state court held that those circumstances sufficiently constituted a submission.131 Also, when a police officer stated to the defendant that he was under arrest and the defendant responded, "I will go with you," another state court found submission.132 It follows that there will be a broad class of cases where extended analysis will not be necessary.

There remains that class of cases where the person accosted engages in words or conduct that are more ambiguous. Since voluntary consent and submission are essentially opposing sides of the same coin,133 the

generous to the object of the seizure than the Court's in some ways. The Court requires that the submission be in response to a show of authority by the police that a reasonable person would believe was an attempt to detain. E.g., Florida v. Bostick, 111 S. Ct. at 2387. The Restatement does not seem to require that the person accosted have a reasonable belief. According to the Restatement, "[i]t is immaterial that the other submits to the asserted authority under a mistake of law or of fact." RESTATEMENT OF TORTS § 41 cmt. d.

129. See, e.g., Seligman & Latz of Atlanta, Inc. v. Grant, 158 S.E.2d 483, 484 (Ga. App. 1967) (affirming judgment on basis that jury could find that plaintiff reasonably believed she was being restrained); Kilcup v. McManus, 394 P.2d 375, 378-79 (Wash. 1964) (upholding directed verdict for plaintiff on question whether arrest followed by confinement occurred); Roberts v. Coleman, 365 P.2d 79, 83-86 (Or. 1961) (focusing on whether there was a reasonable apprehension that force would be used to effectuate the confinement).

130. See supra notes 12-15 and accompanying text (citing cases in which physical restraint constituted seizure).


133. See Schneckloth v. Bustamonte, 442 U.S. 218, 233 (1973) ("[i]f under all the circumstances it has appeared that the consent was not given voluntarily — that it was coerced by threats of force, or granted only in submission to a claim of lawful authority — then we have found the consent invalid."); Sibron v. New York, 392 U.S. at 63 (record "barren of any indication whether Sibron accompanied Patrolman Martin outside in submission to a show of force or authority which left him no choice, or whether he went voluntarily in a spirit of apparent cooperation with
standard for measuring consent should be equally satisfactory to determine whether, instead of consenting, the person surrenders to the authority by recognizing that he or she is subject to the will of the police. Following that mode of analysis, submission is a question of fact, measured by the totality of the circumstances, evidenced by the words or conduct of the person accosted, as perceived objectively by a reasonable person. Because consent or submission is a question of fact, appellate review will be severely limited.

Justice Stevens, dissenting in Hodari D., noted one problem with determining when submission occurs. He stated:

the officer’s investigation’’); Bumper v. North Carolina, 391 U.S. 543, 550 (1968) (“Where a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search. The situation is instinct with coercion — albeit colorably lawful coercion. Where there is coercion there cannot be consent.”); Johnson v. State, 333 U.S. 10, 13 (1948) (where entry into living quarters “was demanded under color of office” by police officer, entry “granted in submission to authority”); Amos v. United States, 255 U.S. 313, 317 (1921) (when officers, without warrant, demanded admission into house “to make search of it under government authority,” this is “implied coercion”).

134. But cf. LAFAVE, supra note 6, § 9.2(h), at 408 (the reasonable person test is not intended “to divide police-citizen encounters into their seizure and noneizure categories by reliance upon the amorphous concept of consent”).

135. See United States v. Mendenhall, 446 U.S. at 557 (plurality opinion) (“The question whether the respondent’s consent to accompany the agents was in fact voluntary or was the product of duress or coercion, express or implied, is to be determined by the totality of the circumstances . . . and is a matter which the Government has the burden of proving.”); Schneckloth v. Bustamonte, 412 U.S. at 227-28 (consent is a question of fact measured by totality of the circumstances); Fanie v. Chesapeake & Potomac Telephone Co., 404 A.2d 147, 152 (D.C. 1979) (in false imprisonment case it is a jury question as to what was reasonably to be understood and implied from the defendant’s conduct).

136. RESTATEMENT OF TORTS § 41.

137. See Michigan v. Chesternut, 486 U.S. at 574 (objective test assures “that the scope of the Fourth Amendment protection does not vary with the state of mind of the particular individual being approached”).

138. See, e.g., United States v. Mendenhall, 446 U.S. at 557, 559-60 (plurality opinion) (recognizing that deference must be paid to the trial court’s finding of consent).

139. California v. Hodari D., 111 S. Ct. at 1561 (Stevens, J., dissenting). Stevens also stated:

In some cases, of course, it is immediately apparent at which moment the suspect submitted to an officer’s show of force. For example, if the victim is killed by an officer’s gunshot, as in Tennessee v. Garner, 471 U.S. 1, 11 (1985) . . . . or by a hidden roadblock, as in Brower v. Inyo County, 489 U.S. 693 (1989), the submission is unquestionably complete. But what if, for example, William James Caldwell (Brower) had just been wounded before being apprehended? Would it be correct to say that no seizure had occurred and therefore the Fourth Amendment was not implicated even if the pursuing officer had no justification whatsoever for initiating the chase?

Id. at 1560 (Stevens, J., dissenting) (footnotes omitted). This example by Stevens reflects a misunderstanding of the role of submission under the Hodari D. test. When there is physical contact, be it a gunshot or a roadblock, that contact acts as a substitute for submission and a seizure.
there 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 the 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? 140

Given the amount of vehicular traffic in today’s society, Stevens’ concerns are not unimportant. However, the question that Stevens presents will be rarely addressed if the Court has adopted the restrictive fruit analysis discussed in the next section. That is because any acts that are not consistent with submission are considered independent acts. Thus, the act of disposing of evidence, even if it occurs at the same time the suspect submits to an order to stop, is not the fruit of that order. It follows that Stevens’ concerns are limited to situations truly involving the time between the beginning of the submission and the completing of that submission and will be limited primarily to things that often could have been observable prior to the show of authority. This is to say that the observations made could be derived independently of the illegal seizure.

There are at least two possible approaches to examining the problem posed by Stevens. Under one approach, there could be a meticulous dissection of the process of submission, with the line requiring justification of the officer’s actions drawn at some point in that process. The line could be drawn to require only that the submission be manifested by words or conduct. An example of a manifested submission would be when the brake lights of the person’s car are activated in response to a police command to stop. Accordingly, no observations following that manifested intent to submit could be used to justify the seizure. The line could also be drawn when the words or conduct evidencing submission have become unequivocal. For example, conduct unequivocally evidencing submission may be held to be when the brake lights

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results at that point. Thus, when a person is wounded by police gun fire designed to seize him or her, he or she is seized and justification required at that point. As discussed in the text, unless the suspect submits at that point, the seizure is momentary. As discussed in text, infra text accompanying note 140, unless suspect submits at that point, the seizure is momentary.

140. Id. at 1561.
come on and the car slows down and pulls off the road. A third place to draw the line would be to permit all of the observations of the officer prior to a completed submission to be used to justify the seizure. This latter choice would be consistent with the *Hodari D.* Court’s bright-line seizure rule and would be consistent with the Court’s state-oriented policy. However, it would also encourage police misconduct.

Such dissection of the submission process is necessarily fact dependent and conducive to inconsistent results and hair-splitting decisions. A better rule would be, that once a show of authority is made and the only other events that follow are those necessary to the submission of the person accosted, and the person does submit, any observations made after the show of authority cannot be used to justify the seizure. This would eliminate some of the motivations that provoke unwarranted seizures by eliminating the windfall to the police from unjustified coercive conduct.

There is an ostensible intellectual difficulty with this approach. It could be argued that justification is required prior to submission. That is, the fourth amendment is applicable when the show of authority is made but becomes inapplicable if the submission is not consummated. This is not true because a completed seizure is still required. All that a court would be saying is that, to justify a seizure, as a matter of judicial integrity, the police may not rely on observations made after the show of authority to support the seizure. Such an approach would be entirely faithful to *Hodari D.* and the Court’s admission of the drugs thrown by *Hodari D.* after the officer unjustifiably attempted to seize him because *Hodari D.* never demonstrated an intent to submit. In other words, *Hodari D.*’s requirement of a completed seizure is unaffected. Yet, the difficulty inherent in dissecting the seizure process is avoided and much of the incentive for the police to initiate unjustified seizures is eliminated.

IV. FRUIT OF THE POISONOUS TREE ANALYSIS

"In the event of illegal police conduct, the exclusionary rule serves as an individual’s principal remedy." 141 "Whether the exclusionary sanction is appropriately imposed in a particular case . . . is an ‘issue separate from the question whether the fourth amendment rights of the party seeking to invoke the rule were violated by police conduct.’" 142


Generally, if the causal relationship of the illegal conduct to the evidence is sufficiently close, then the evidence may be excluded as a "fruit" of that conduct. The question is not whether the evidence would not be discovered "but for" the law enforcement officer's illegal conduct; rather, "the more apt question is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'" Thus, despite prior illegal conduct, evidence may be admitted if, inter alia, it has an "attenuated link" to the underlying illegality.

The current Court has restricted the fruit analysis in two significant ways. First, the Court has limited what will be considered a fruit of an unlawful seizure by examining whether the suspect's conduct in response to the police command is appropriate. The scope of the seizure contemplated is limited by the words or actions of the police, and the suspect's response must correspond to that seizure. If it does not, then any evidence disclosed as a result of that inappropriate response will not be considered a fruit of the officer's conduct or command.

Second, the Court has limited what will be considered a fruit of an unlawful seizure by its very definition of a seizure. This has been accomplished by restricting both the on-set and the duration of a seizure. For show of authority and physical seizures, a completed seizure is nec-

143. See Alderman v. United States, 394 U.S. 165, 183 (1969) ("[W]hen an illegal search has come to light, [the government] has the ultimate burden of persuasion to show its evidence is untainted."); Cf. United States v. Ceccolini, 435 U.S. 268, 274 (1978) ("[T]he question of causal connection ... is not to be determined solely through the sort of analysis which would be applicable in the physical sciences. The issue cannot be decided on the basis of causation in the logical sense alone, but necessarily includes other elements as well.").


145. Evidence may also be admitted if it is derived from a source independent of the illegal conduct, Wong Sun v. United States, 371 U.S. at 486, 491, or if the evidence would inevitably have been discovered absent the illegality, Nix v. Williams, 467 U.S. 431 (1984), cert. denied, 471 U.S. 1138 (1985). The recent decisions in Bostick and Hodari D. implicate neither of these two exceptions to suppression.

146. See Brown v. Illinois, 422 U.S. 590, 609 (1975) (Powell, J., concurring) ("The notion of the 'dissipation of the taint' attempts to make the point at which the detrimental consequences of illegal police action become so attenuated that the deterrent effect of the exclusionary rule no longer justified the cost."). Compare LaFave, supra note 6, § 11.4(a), at 373 (the "'question of attenuation inevitably is largely a matter of degree,' and thus application of the test is 'dependent upon the particular facts of each case.'") (citations omitted) with Brown v. Illinois, 422 U.S. at 603-04 (in considering whether a confession was obtained by exploitation of an illegal arrest, inquiry is based on facts of each case, including whether confession was obtained as a product of the defendant's free will, the temporal proximity of the illegality to the confession, the presence of intervening circumstances, and the purpose and flagrancy of the official misconduct).
ecessary to implicate the fourth amendment, which eliminates from fruit analysis any evidence disclosed as a result of an attempt to seize. The duration for physical seizures has been limited by the existence of physical contact. Once that contact has been broken, and assuming there has been no submission, the seizure ends. Thus, according to the Court, any evidence disclosed thereafter is not a product of the prior seizure.

A. Inappropriate Responses

In recognition of the fact that coercive activity by the police implicates the fourth amendment, many courts prior to Hodari D. embraced the doctrine of a forced abandonment.147 Under that theory, if, in response to an unjustified police seizure, the suspect abandoned the property he or she was carrying, then the discarded property, be it illegal drugs, stolen goods, or other evidence, normally could not be used against the accused because it was considered the fruit of the officer's illegal actions.148 Thus, the California Appellate Court, after determin-

147. The general rule is that abandoned property may be obtained by the police and used for evidentiary purposes. See, e.g., United States v. Brady, 842 F.2d 1313, 1315-16 (D.C. Cir. 1988) (abandoned gym bag in train compartment held admissible); United States v. Nordling, 804 F.2d 1466, 1469-70 (9th Cir. 1986) (abandoned tote bag on airplane held admissible); United States v. Colbert, 474 F.2d 174, 176 (5th Cir. 1973) (briefcases abandoned before search held admissible). See generally LaFave, supra note 6, § 2.6(b), at 469-75 (commenting on similar cases involving abandonment theory). That is not so if the abandonment is coerced by unlawful police action. Id. at 471. For example, in Hawkins v. State, 550 A.2d 416 (Md. Ct. Spec. App. 1988), the defendant had abandoned property during a chase by the police. Prior to the abandonment, the police shouted "stop, police." Id. at 418. Applying the reasonable person test, the court held that the defendant had been seized when the order to halt was given. Id. at 418-19. Therefore, the evidence discarded after the order was given could not be used to determine if the stop was justified. Id. at 419.


Similarly, disclaimers of ownership have also been considered the fruit of illegal seizures. See, e.g., United States v. Morin, 665 F.2d 765, 770 (5th Cir. 1982) (denial of ownership after illegal arrest was based on accused's perception of having no other option and therefore not abandonment); State v. Cooke, 282 S.E.2d 800, 807 (N.C. App. 1981), aff'd, 291 S.E.2d 618 (N.C. 1982) ( disclaimer of ownership after illegal stop not abandonment).
ing that Hodari D. had been illegally seized prior to his disgorging the drugs, stated:

Where the police illegality involved is running head on at a suspect in an effort to stop him, we cannot see how the suspect’s immediate discard of contraband can be anything other than a direct result and exploitation of the illegality. There were no intervening circumstances; the officer’s stated purpose in pursuing [Hodari D.] was to stop him because of a hunch that illegal narcotic activity had taken place. . . . [Hodari D.’s] act of abandoning the evidence when confronted with the running officer in his path was not a mere coincidence. To say the police did not obtain the evidence through exploitation of their illegal activity would be a fiction.149

Other courts, however, have dissected such encounters more minutely, holding that the abandonment was voluntary and not the product of the illegality because there was a mere seizure of the person but no attempt to search the person.150 Typical of that view is the following:

The appearance of a police officer, even when unexpected, would not lead an innocent citizen, by whose standards the propriety of all official conduct is to be measured, to attempt to hurl his property into the night. It is only when a person has reasonable cause to believe his possessions will inevitably be exposed to view by improper police practices, that their attempted abandonment will be deemed the fruit of that conduct.151

The Brower Court’s use of Hester as an example indicates that the Court agrees with the view that restricts what will be considered the fruit of a seizure. As previously outlined, the decision in Hester involved armed revenue agents pursuing the defendant and his accomplice after seeing them with containers thought to be filled with moonshine whiskey.152 During their flight, the agents ordered the men to halt and

149. In re Hodari D., 265 Cal. Rptr. at 85-86 (citations omitted).
150. See, e.g., People v. Holloway, 221 Cal. Rptr. 394, 398 (Cal. Ct. App. 1985) (defendant’s “own awareness of the illicit nature of his activities that precipitated his efforts to destroy the proofs thereof”); People v. Patrick, 185 Cal. Rptr. 325, 328 (Cal. Ct. App. 1982) (evidence admissible because “a defendant cannot immunize himself from damning evidence by discarding that evidence on his subjective assumption that an illegal search would follow his detention.”)
151. People v. Holloway, 221 Cal. Rptr. 394, 397-98 (Cal. Ct. App. 1985) (citation omitted) (footnote omitted). See also People v. Patrick, 185 Cal. Rptr. 325, 328 (Cal. Ct. App. 1982) (“Even were we to conclude that defendant, here, was under the threat of an illegal detention, there is no establishment of the fact that there would be an illegal search.”).
shot at them. The men dropped the containers, which an agent then recovered. The Brower Court believed, "even though the incriminating containers were unquestionably taken into possession as a result (in the broad sense) of action by the police," no seizure had taken place as the defendant's and his associates' own actions disclosed the receptacles. Building on Hester, the Brower majority hypothesized that, if the police saw the moonshiners carrying containers while running away from them and the police shouted "Stop and give us those bottles, in the name of the law!," then, if the bottles were discarded, "the taking of possession would have been the result of the very means (the show of authority) that the government selected, and a Fourth Amendment seizure would have occurred." In the whiskey example, when the agents yelled "halt" and shot at the suspects, there was an unmistakable show of authority. Clearly, the Court did not view the discarding of the bottles as an appropriate response to the police's show of authority; discarding of the bottles was not the result of the "very means" selected by the government. The Brower majority said that no seizure would occur unless the bottles were discarded as a result of the specific command to give them to the agents. This analysis is consistent with the just discussed restrictive view of numerous lower courts and indicates that the Court will construe restrictively what will be considered a fruit of an illegal seizure.

Undermining the clarity of this analysis is some troublesome language in Bostick. In Bostick, the Court stated: "The State concedes, and we accept for purposes of this decision, that the officers lacked the reasonable suspicion required to justify a seizure and that, if a seizure took place, the drugs found in Bostick's suitcase must be suppressed as

153. Id. at 58.
154. Id.
156. Id. at 597-98 (emphasis added).
157. The Hodari D. Court relied on much the same analysis of Hester, but held that the cocaine abandoned by Hodari D. preceded any seizure. See California v. Hodari D., 111 S. Ct. at 1552 (cocaine abandoned while running not fruit of seizure because no seizure had taken place).
158. See also Curry v. State, 570 So. 2d 1071, 1073 (Fla. App. 1990) (drugs thrown down by suspect after a law enforcement officer illegally ordered suspect to halt is voluntary abandonment when suspect is not ordered to reveal anything). Cf. People v. Raybourn, 266 Cal. Rptr. 884, 887 (Cal. Ct. App. 1990) (where illegal detention and suspect ordered to remove hand from pocket, removing hand and handing cocaine in pocket to officer was a "direct product of illegal detention."). Contra Spann v. State, 529 So. 2d 825, 826 (Fla. App. 1988) (cocaine packet dropped as a result of officer's direction to "freeze" not abandonment).
159. Florida v. Bostick, 111 S. Ct. 2382. See United States v. Mendenhall, 446 U.S. at 558 (plurality opinion) ("Because the search of respondent's person was not preceded by an impermissible seizure of her person, it cannot be contended that her apparent consent to the subsequent search was infected by an unlawful detention.").
tainted fruit." Bostick, it will be recalled, involved the accosting of a bus traveler by several members of a sheriff's department at a bus stop.

Standing alone, it could be argued that this "acceptance" of Florida's concession intimates that the Court would still broadly construe what is considered a fruit of an unlawful seizure. The dissent in Bostick, however, demonstrates that such a view would be misplaced. Justice Marshall stated:

As far as is revealed by facts on which the Florida Supreme Court premised its decision, the officers did not advise respondent that he was free to break off this "interview." Inexplicably, the majority repeatedly stress the trial court's implicit finding that the police officers advised respondent that he was free to refuse permission to search his travel bag. This aspect of the exchange between respondent and the police is completely irrelevant to the issue before us. For as the State concedes, and as the majority purports to "accept," if respondent was unlawfully seized when the officers approached him and initiated questioning, the resulting search was likewise unlawful no matter how well advised respondent was of his right to refuse it. Consequently, the issue is not whether a passenger in respondent's position would have felt free to deny consent to the search of his bag, but whether such a passenger — without being apprised of his rights — would have felt free to terminate the antecedent encounter with the police.

Justice Marshall's analysis of the majority's position is well reasoned. If the mere illegality of the antecedent seizure was sufficient to suppress the evidence, there was no reason for the majority to go on and discuss whether or not Bostick subsequently consented to the search. However, the majority stated:

The facts of this case, as described by the Florida Supreme Court, leave some doubt whether a seizure occurred. Two officers walked up to Bostick on the bus, asked him a few questions, and asked if they could search his bags. As we

162. Id. at 2392-93 (Marshall, J., dissenting) (citations omitted). One of the authorities cited by Marshall in support of his view was Florida v. Royer, 460 U.S. at 501, 507-08, wherein a plurality stated, without analysis, that the consent to search baggage was the product of an illegal detention and not the result of an independent act of free will.
have explained, no seizure occurs when the police ask questions of an individual, ask to examine the individual’s identification, and request consent to search his or her luggage — so long as the officers do not convey a message that compliance with their requests is required. Here, the facts recited by the Florida Supreme Court indicate that the officers did not point guns at Bostick or otherwise threaten him and that they specifically advised Bostick that he could refuse consent.163

This language could be construed to suggest that the majority was speaking of two seizures: of Bostick’s person and of Bostick’s luggage. From Hester, Brewer, Hodari D., and Marshall’s dissent in Bostick, it can be reasonably concluded that, even if Bostick’s person had been illegally seized, the officers — in addition — would have had to illegally seize the luggage (and perhaps demand that Bostick open it) for the contents of the luggage to be suppressed as a fruit. Indeed, the Bostick majority stated that the question to be decided by the Florida courts on remand was “whether Bostick chose to permit the search of his luggage.”164 If a broad fruit analysis were employed, the question would have been whether Bostick was illegally seized prior to any consent. Then it would have to be decided whether the subsequent consent was tainted by the prior illegality.165

It follows that the suspect’s actions must comply with the specific command given. Any deviance from that strict compliance will not be considered a fruit. Thus, if ordered to halt, and the suspect halts and abandons property, the abandonment will be considered an independent act.166

B. Limiting the Definition of a Seizure

By defining a seizure to require a completed seizure, the Hodari D. Court has eliminated a broad category of show of authority cases from

164. Id. at 2388.
165. Bostick v. State, 554 So. 2d at 1156, 1158.
166. Accord State v. Oliver, 368 So. 2d 1331, 1336 (Fla. App. 1979) (evidence not tainted when, after police illegally ordered two bike riders to stop, rider abandoned evidence, because “[o]nly when the police begin to conduct an illegal search can subsequent abandonment be held involuntary as being tainted by the prior illegal search”); People v. Boodle, 391 N.E.2d 1329, 1332 (N.Y.) (where suspect illegally seized in police car that then drove away, after which suspect threw gun from window, the court stated that, in seeking to rid himself of the gun, the suspect “did not respond directly to the illegal police action”), cert. denied, 444 U.S. 969 (1979); Rodriguez v. State, 689 S.W.2d 227, 230 (Tex. Crim. App. 1985) (court declined to determine if stop lawful, where defendant threw heroin out of car, reasoning that the heroin was not obtained as a result of a search). But see 1 LAFAYE, supra note 6, § 2.6(b), at 472 n.62 (criticizing Oliver and Boodie as encouraging police to engage in illegal stops and arguing that the proper question is whether the prior illegality “has promoted the disposal”).
fourth amendment coverage. In that category, where there has been an attempt to seize, all evidence appearing prior to completing the seizure is not subject to suppression. This means that there is no remedy for coercion and intimidation preceding a completed seizure. Thus, for example, Hodari D.’s disposal of the cocaine prior to Pertoso’s tackling him was his own independent act and recovery of the cocaine and its admission into evidence did not implicate the fourth amendment.

For seizures based on physical force, the Court has restricted the fruit analysis by also limiting the concept of a seizure. Physical seizures are limited by their duration. Assume the following sequence of events. An officer illegally touches a person, intending to seize the person without adequate justification. The person eludes the officer’s grasp and flees, discarding narcotics during the course of his or her flight. Under traditional analysis, the evidence would have been suppressed. However, under current analysis, when a seizure results from mere physical contact with a suspect, such seizures are momentary unless control over the suspect is achieved. Thus, the narcotics would not be suppressed because the disclosure of the drugs is the independent act of the person accosted. The Hodari D. majority left nothing to speculation in this regard:

To say that an arrest is effected by the slightest application of physical force, despite the arrestee’s escape, is not to say that for Fourth Amendment purposes there is a continuing arrest during the period of fugitivity. If, for example, [Officer] Pertoso had laid his hands upon Hodari to arrest him, but Hodari had broken away and had then cast away the cocaine, it would hardly be realistic to say that the disclosure had been made during the course of an arrest.

167. The means used to produce the physical seizure will not be rigidly confined to the actual means intended, but the instrumentality must produce the stop. Brower v. Inyo County, 489 U.S. at 598-99. Thus, the Court stated: “Nor do we think it possible, in determining whether there has been a seizure in a case such as this, to distinguish between a roadblock that is designed to give the oncoming driver the option of a voluntary stop, (e.g., one at the end of a long straightaway) and a roadblock that is designed precisely to produce a collision (e.g., one located just around the bend). In determining whether the means that terminates the freedom of movement is the very means that the government intended, we cannot draw too fine a line, or we will be driven to saying that one is not seized who has been stopped by the accidental discharge of a gun with which he was meant only to be bludgeoned, or by a bullet in the heart that was meant only for the leg.” Id.

168. See California v. Hodari D., 111 S. Ct. at 1553 (Stevens, J., dissenting) (footnote omitted) (“[I]f the officer had succeeded in touching respondent before he dropped the rock — even if he did not subdue him — an arrest would have occurred. . . . In that event (assuming the touching precipitated the abandonment), the evidence would have been a fruit of an unlawful common-law arrest.”).

169. California v. Hodar D., 111 S. Ct. at 1550 (“A seizure is a single act, and not a continuous fact.” (quoting Thompson v. Whitman, 18 Wall. 457, 471 (1874)).
C. Merits of the Current Fruit Analysis

Truncation of the fruit analysis is not unprecedented by the current Court. In *New York v. Harris*, 170 although the accused was arrested in his home in violation of the warrant requirement, the Court declined to apply the attenuation analysis to a later confession made at the police station because

suppressing the statement taken outside the house would not serve the purpose of the rule that made Harris's in-house arrest illegal. The warrant requirement for an arrest in the home is imposed to protect the home, and anything incriminating the police gathered in arresting Harris in his home, rather than elsewhere, has been excluded, as it should have been; the purpose of the rule has thereby been vindicated. 171

Thus, the physical exit from the house "necessarily breaks the causal chain between the illegality and any subsequent statement by the suspect." 172 Similarly, it could be asserted that, given the disparate interests protected by the prohibition against unreasonable stops and the prohibition against unreasonable searches, attenuation analysis should not be applied when evidence is disgorge as a result of an illegal stop when there is no threatened or actual search.

To illustrate how restrictive the current fruit analysis is, assume a police officer accosts a suspect whom the officer believes is carrying illegal narcotics. The officer does not have articulable suspicion justifying a stop. Assume, however, that the officer unequivocally orders the suspect to stop. Although this is undoubtedly coercive conduct, a seizure under *Hodari D.* has not yet resulted. The suspect then does one of three things: runs and discards the drugs she was carrying; submits to the authority and stops without disclosing the drugs; or stops and discloses the existence of the drugs in an attempt to disassociate him or herself from them. All of these actions are the result of the officer's order to halt. 173 Since it is posited that the officer did not have articulable suspicion to justify a stop, in each situation any evidence resulting from the illegal order would have been suppressed under traditional fruit analysis. Now, however, only when the person submits to the show of authority and does not disclose the drugs will the suspect be

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171. *Id.* at 1644.
172. *Id.* at 1647 (Marshall, J., dissenting).
173. See *Brower v. Inyo County*, 489 U.S. at 597 (termination of freedom of movement results through means intentionally applied).
protected under the fourth amendment.\textsuperscript{174} Yet, even that protection is illusory. In the example, the person has been unreasonably stopped. Unless there is a further intrusion, resulting in the disclosure of the evidence, the encounter will not be litigated.\textsuperscript{175} It follows that the fourth amendment has afforded no protection in any of the alternative scenarios, even though the officer's conduct was unreasonable and coercive.

The restrictive fruit analysis is neither logically correct nor the product of sound judicial philosophy. It ignores the entire purpose of fruit analysis: deterrence of constitutional violations requires the suppression not only of evidence derived from the primary illegality, but also "derivative evidence, both tangible and testimonial, that is the product of the primary evidence, or that is otherwise acquired as an indirect result of the unlawful [activity]."\textsuperscript{176} The example described above illustrates that the restrictive fruit analysis ignores the causal relationship between the police activity and the suspect's response. Suspected drug dealers, when accosted, know that the object of the police order to halt is ultimately to recover the contraband they possess. A common response to such a command, therefore, is to dispose of the evidence.\textsuperscript{177} Now, however, the Court imposes several new burdens on those who become the objects of police commands: they must carefully parse the language or meaning of the command and react appropriately, and they must also have nerves of steel, so they comply only with the specific command and do not hastily disclose evidence.

The restrictive fruit analysis is consistent with the Court's new policy of encouraging submission to police authority.\textsuperscript{178} But the detrimental ef-

\textsuperscript{174} Cf. Brown v. Illinois, 422 U.S. at 601 ("The exclusionary rule, \ldots when utilized to effectuate the Fourth Amendment, \ldots is directed at all unlawful searches and seizures, and not merely those that happen to produce incriminating material or testimony as fruits.").

\textsuperscript{175} California v. Hodari D., 111 S. Ct. at 1562 n.21 (Stevens, J., dissenting) (citing Brinegar v. United States, 338 U.S. 160, 189 (1949)).


\textsuperscript{177} See 4 LAFAVE, supra note 6, § 11.4(c), at 459-60 (attempts to dispose of incriminating evidence is a predictable outcome of an illegal arrest). One commentator has stated:

Since the individual cannot possibly know in advance how far the officer will go, he has no way of gauging a prudent course. If the officer continues to close in, the individual has to anticipate a search. To do nothing means certain discovery. To attempt a discard is to invite a retrieve, thereby giving the officer probable cause to arrest.

Edward G. Mascolo, \textit{The Role of Abandonment in the Law of Search and Seizure: An Application of Misdirected Emphasis}, 20 BUFF. L. REV. 416, 417 (1971) (footnote omitted). In the accompanying footnote, the author adds: "Undoubtedly, some individuals will opt in favor of discard, in the mistaken belief that they will not be prosecuted for a possessory offense if the goods are not discovered on their persons." Id. at 417 n.90.

\textsuperscript{178} See infra text accompanying notes 186-189.
fect of such a view on individual rights is far-reaching. It permits widespread harassment and intimidation of presumably innocent individuals or groups at will. 179 Indeed, it encourages police misconduct by inducing the police to provoke confrontations 180 and flight in the hope that suspects will abandon contraband or provide other evidence, 181 thereby justifying a stop that would not have passed scrutiny if justification was required at the beginning of the confrontation. Once flight has been provoked, the police can engage in slow pursuit of suspects in the hope that evidence will be discarded. The Hodari D. majority even suggested that flight itself might justify the subsequent seizure. 182

V. Judicial Philosophy Underlying the Definition of a Seizure

Although the majority in Hodari D. professed to be merely construing the word "seizure," it did not construe the word literally. The majority began its analysis by examining the dictionary definition of a "seizure," which it stated "has meant a 'taking possession'" from the "time of the founding [of the United States] to the present." 183 The Court then noted: "For most purposes of the common law, the word connoted not merely grasping, or applying physical force to, the animate or inanimate object in question, but actually bringing it within


180. For example, Stevens poses this question: "In an airport setting, may a drug enforcement agent now approach a group of passengers with his gun drawn, announce a 'baggage search,' and rely on the passengers' reactions to justify his investigative stops?" California v. Hodari D., 111 S. Ct. at 1561 (Stevens, J., dissenting).

181. See id. (Stevens, J., dissenting) ("We carried to its logical conclusion" the majority's ruling "will encourage unlawful displays of force that will frighten countless innocent citizens into surrendering whatever privacy rights they may still have.").

182. See id. at 1549 n.1 (intimating that flight alone may justify an investigative stop). See also Richardson v. United States, 520 A.2d 692, 696-97 (D.C. 1987) (police saw suspect holding a pill box and shouted, "Police, wait a second. We want to talk to you," at which point, suspect threw pill box and ran; held the officers' conduct did not constitute a seizure, and suspect's flight could be considered as a factor in justifying subsequent stop); Lawrence v. United States, 509 A.2d 614, 616 (D.C. 1986) (police officer who did not have articulable suspicion followed pedestrians in squad car, turned on emergency lights and sounded horn after pedestrians began to walk faster; held, no seizure and suspects' flight in response to police actions could be used to justify stop). But cf. Florida v. Bostick, 111 S. Ct. at 2387 ("We have consistently held that a refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure."). See also Alberty v. United States, 162 U.S. 499, 511 (1896) (It has long been "a matter of common knowledge that men who are entirely innocent do sometimes fly from the scene of a crime through fear of being apprehended as the guilty parties, or from an unwillingness to appear as witnesses. Nor is it true as an accepted axiom of criminal law that 'the wicked flee when no man pursueth, but the righteous are as bold as a lion.").

physical control." Nonetheless, the majority adopted the common law
definition of an arrest to measure when a seizure has occurred, which
requires physical touching or submission. Thus, it cannot be said that
the Court was merely interpreting the term "seizure," because a se-
zure, literally, requires physical control and not mere touching. Instead,
the narrow definition is based on the policy of promoting compliance
with police orders.

The judicial philosophy of the present majority is summed up by two
sentences in Hodari D.: "We do not think it desirable, even as a pol-
icy matter, to stretch the Fourth Amendment beyond its words and be-
\(\ldots\)\)yond the meaning of arrest . . . . Street pursuits always place the public
at some risk, and compliance with police orders to stop should there-
fore be encouraged." Justifying its position, the Hodari D. majority
stated:

Only a few of those orders, we presume, will be without ade-
quate basis, and since the addressee has no ready means of
identifying the deficient ones it almost invariably is the re-
sponsible course to comply. Unlawful orders will not be de-
terred, moreover, by sanctioning through the exclusionary rule
those of them that are not obeyed. 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.

This passage demonstrates how far the Court has come. In prior cases,
the Court generally recognized that, to protect individual liberties, the
fourth amendment's protections against unreasonable searches and sei-
zures must be interpreted expansively. In contrast, the philosophy ex-

184. Id. at 1549-50. Cf. Brower v. Inyo County, 489 U.S. at 596 (a seizure "requires an in-
tentional acquisition of physical control").
186. Id.
187. It cannot be said that there is an unbroken line of precedent liberally interpreting the
fourth amendment in favor of individual interests. There is not. See, e.g., Olmstead v. United
States, 277 U.S. 438, 457-66 (1928) (government's tapping of public phone lines leading to defen-
dants' homes and offices does not violate fourth amendment where no trespass onto defendant's
property occurred). However, from the very first cases interpreting the amendment and through-
out the succeeding decades to the present, the Court has recognized that, as a bulwark against oppres-
sion, the fourth amendment must be interpreted in favor of the individual. See, e.g., California v.
Hodari D., 111 S. Ct. at 1561 (Stevens, J., dissenting) ("The central message of Katz and Terry
was that the protection the Fourth Amendment provides to the average citizen is not rigidly con-
fined by ancient common-law precept."); Olmstead v. United States, 277 U.S. at 476 (Brandeis,
J., dissenting) ("Time and again this Court in giving effect to the principle underlying the Fourth
Amendment has refused to place an unduly literal construction upon it."); Byars v. United States,
pressed by the *Hodari D.* majority is statist and completely foreign to that large body of fourth amendment precedent. Now, the main interest is the protection of order in society; individual interests are subordinate and will be sacrificed to achieve order.

The test for a seizure set forth in *Hodari D.* is a mere reflection of its statist point of view. As a consequence, the *Hodari D.* majority rejected the idea that attempted seizures should be included within the protection of the fourth amendment, eliminating coercion or intimidation short of physical seizure and submission from fourth amendment protection, even when the words or actions are designed to produce a seizure. However, the invasion of the privacy interests protected by the fourth amendment is no less real in the interim period between the show of authority and achieving physical contact or submission. At the heart of the concept of a show of authority seizure should be the recognition that intimidation or coercion designed to produce a stop by police officers triggers the application of the fourth amendment. This was acknowledged by the Court in *Terry v. Ohio*, the very first case discussing when a seizure occurs:

Under our decision, courts still retain their traditional responsibility to guard against police conduct which is overbearing or harassing, or which trenches upon personal security without the objective evidentiary justification which the Constitution requires. When such conduct is identified, it must be

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273 U.S. 28, 32 (1927) (search warrant obtained on basis that affiant "has good reason to believe and does believe defendant has in his possession" liquor and liquor producing instruments invalid); Boyd v. United States, 116 U.S. 616, 635 (1886) ("Constitutional provisions for the security of persons and property should be liberally construed").

In *Katz v. United States*, 389 U.S. 347 (1967), the Court rejected a narrow reading of the protections of the fourth amendment and recognized that one of the things susceptible to seizure by governmental authorities included telephone conversations. *Id.* at 352. The Court thus rejected a common law property definition limitation to the list of items protected by the amendment and recognized that seizures under the amendment were not limited to "a physical intrusion into any given enclosure." *Id.* at 353. Thus, contrary to the *Hodari D.* majority's attempt to limit *Katz* to a discussion of the seizure of "items," *California v. Hodari D.*, 111 S. Ct at 1551 n.3, *Katz's* very essence was its broadening of how a seizure could occur. *Katz v. United States*, 389 U.S. at 353.

188. See *California v. Hodari D.*, 111 S. Ct. at 1550-51 n.2 ("But neither usage nor common-law tradition makes an attempted seizure a seizure.").

189. As Justice Stevens recognized in his dissent in *Hodari D.*, the majority holding fails to recognize the "coercive and intimidating nature" of police behavior designed to produce a seizure, creating "a rule that may allow such behavior to go unchecked." *California v. Hodari D.*, 111 S. Ct. at 1561 (Stevens, J., dissenting). Thus, Stevens wrote, "the exclusionary rule has no 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." *Id.*
condemned by the judiciary and its fruits must be excluded from evidence in criminal trials.\footnote{190}

Despite all of its faults,\footnote{191} the reasonable person test, which was a product of the expansive view of protecting individual rights, routinely had been interpreted to recognize that liberty is impinged upon by such conduct and its goal had been to determine if intimidation or coercion was present in a given case. Thus, many examples of intimidation or coercion directed at a person and designed to produce a stop were given in the cases: verbal and physical commands to halt, flashing lights, sirens, and shooting. These orders are all significant intrusions on the individual’s right to be left alone and should all require justification; that is, it must be concluded that the fourth amendment becomes applicable at the point that the command was given. Because the \textit{Hodari D.} majority does not recognize the significance of such attempts to seize, the point at which a seizure occurs under its test reflects that lack of a proper balance between individual and governmental interests.

The fourth amendment is not coextensive with any right to be left alone and, therefore, is not always implicated when there is an intrusion on privacy. This statement is unremarkable and long recognized.\footnote{192} For example, whenever the police ask questions of a person, there is an interference with a person’s interest in being undisturbed. But such slight intrusions do not mean that a person has been seized.\footnote{193} A sei-

\footnote{190} Terry v. Ohio, 392 U.S. at 15. \textit{See also} INS v. Delgado, 446 U.S. at 215 ("The Fourth Amendment does not proscribe all contact between the police and citizens, but is designed "to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals." (quoting United States v. Martinez-Fuerte, 428 U.S. 543, 544 (1976)); Dunaway v. New York, 442 U.S. at 224 (Rehnquist, J., dissenting) (the question of when a seizure takes place turns on whether the officer's conduct "is objectively coercive or physically threatening."). Cf. Sibron v. New York, 392 U.S. at 63 (seizure would occur if the suspect submitted to "a show of force or authority which left him no choice"); \textit{Id.} at 77 (Harlan, J., concurring) (seizure entailed a curtailment of movement).

\footnote{191} \textit{See} Clancy, \textit{supra} note 24, at 639-40 (discussing the questionable merits of the reasonable person test).

\footnote{192} \textit{See, e.g.,} Katz v. United States, 389 U.S. 347 (1967) (fourth amendment "protects the individual against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all.").

\footnote{193} \textit{See, e.g.,} State v. Neyrey, 383 So. 2d 1222, 1224 (La. 1980) ("While unsolicited assistance, unasked for conversation, and unrequested advice are not always welcome, the Constitution provides no protection from these everyday annoyances whether the source of the irritation is a policeman or a citizen."). \textit{See also} INS v. Delgado, 466 U.S. at 215 ("The Fourth Amendment does not proscribe all contact between the police and citizens, but is designed "to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals." (quoting United States v. Martinez-Fuerte, 428 U.S. 543, 544 (1976)). \textit{But see} Martin, \textit{The Decline of the Right of Locomotion: The Fourth Amendment on the Streets, 18 Search and Seizure Law Report 116 (1991)} (advocating definition of seizure that would include police questioning of individuals on the street).
zure connotes a significant interference with personal liberties. Therefore, a seizure should be defined as occurring at the point when that significant interference begins. However, under Hodari D., the police can unreasonably interfere with a person’s privacy interests (that is, the fourth amendment right to be free from unreasonable seizures) so long as the interference does not rise to a level of an arrest at common law.

The Hodari D. majority premises the applicability of the fourth amendment upon fortuitous responses by different individuals to official attempts to seize. For example, if a person submits to a show of authority, the fourth amendment becomes applicable; if the subject flees, the amendment is inapplicable. However, to strike a proper balance between the competing governmental and individual interests, the response of the suspect should not be taken into account. If po-

194. See supra note 10 (for authorities cited).

195. The Hodari D. test allows the police to engage in intimidation and coercion designed to encourage disgorging evidence. Yet, in other contexts, police officers have been prevented from profiting indirectly from that which they cannot do directly. For example, in Payton v. New York, 445 U.S. 573, 583-603 (1980), the Court held that a warrant must usually be obtained to effect an arrest in a person's home. The police cannot avoid this requirement by coercing the arrestee into leaving the house. See, e.g., United States v. Al-Azzawy, 784 F.2d 890, 892-93 (9th Cir. 1985) (defendant was arrested inside his home, for fourth amendment purposes, when officers surrounded his house, drew their weapons, and, through a bullhorn, ordered him to come out), cert. denied, 476 U.S. 1144 (1986); United States v. Morgan, 743 F.2d 1158, 1166-67 (6th Cir. 1984) (armed police officers who ordered defendant out of his home through a bullhorn and then arrested him violated the warrant requirement of the fourth amendment), cert. denied, 471 U.S. 1061 (1985). Similarly, where the protections of Miranda v. Arizona, 384 U.S. 436 (1966), prohibit interrogation by the police, officers cannot engage in the "functional equivalent" of interrogation, including "any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect." Rhode Island v. Innis, 446 U.S. 291, 301 (1979). The Court in Innis stated: "To limit the ambit of Miranda to express questioning would 'place a premium on the ingenuity of the police to devise methods of indirect interrogation, rather than to implement the plain mandate of Miranda.'" Id. at 299 n.3 (quoting Commonwealth v. Hamilton, 285 A.2d 172, 174 (Pa. 1971)).

196. Cf. United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975) (reasonableness of a seizure is balance between "public interest" involved and "individual's right to personal security free from arbitrary interference by law enforcement officers").

197. See Clancy, supra note 24, at 647-49 (arguing that the initial conduct of the police, without reference to the individual's response, determines the applicability of the fourth amendment); California v. Hodari D., 111 S. Ct. at 1560 (Stevens, J., dissenting) ("[T]he character of the citizen's response should not govern the constitutionality of the officer's conduct"). The Brower majority at one point seemed to recognize this. The Court stated: "Brower's independent decision to continue the chase can no more eliminate respondents' 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." Brower v. Inyo County, 489 U.S. at 595.

In Michigan v. Chesternut, the Court explicitly rejected the idea that, until an individual stops in response to the police's show of authority, "a lack of objective and particularized suspicion
lice action is an intrusion on individual liberty, that should end the inquiry whether the fourth amendment is implicated, because the applicability of the fourth amendment does not depend on an individual’s actions but on the actions of governmental officials. The initial intrusion of law enforcement officers should trigger the protection of the fourth amendment.

To be consistent with the fourth amendment, the Hodari D. test must be modified to discourage intimidation and harassment designed to result in a seizure. To require justification for such police actions,

would not poison police conduct, no matter how coercive, as long as the police did not succeed in actually apprehending the individual." Michigan v. Chesternut, 486 U.S. at 572 (emphasis added). Implicit in the commonly held view of the reasonable person test prior to Hodari D. was the recognition that applicability of the fourth amendment was not dependent upon an individual’s actions because it did not matter if the person stopped or not as a result of the intimidating police action. This is analogous to the well-established principle that the protection of the fourth amendment is applicable to intrusions on an individual’s privacy interests by governmental agents and generally not to those made by private parties. See Coolidge v. New Hampshire, 403 U.S. 443, 487-88 (no search and seizure implications where defendant’s wife voluntarily handed over incriminating evidence and was not acting as instrument or agent of police), reh’g denied, 404 U.S. 872 (1971); Burdeau v. McDowell, 256 U.S. 465, 475 (1921) (government may subpoena incriminating papers if they were in possession of private party).

Further supporting the view that the individual’s response to police actions should not be taken into account is the purpose of exclusionary rule, which is designed to protect against “overreaching governmental conduct” prohibited by the fourth amendment. Davis v. Mississippi, 394 U.S. 721, 724 (1969). See also California v. Hodari D., 111 S. Ct. at 1561 (Stevens, J., dissenting) (“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.”).

198. The fourth amendment cannot be expanded just because a person reasonably believes he or she is about to be seized, although the police are not intending to do so. Thus, for example, in Michigan v. Chesternut, 486 U.S. 567, the suspect could reasonably have been in fear that police would seize him, or in INS v. Delgado, 466 U.S. 210, the workers could have reasonably feared the factory sweeps, yet those fears cannot be dispositive. Instead, the question should be whether police intended to seize. On the other hand, a seizure still occurs even if the suspect did not know he was being accosted by the police. See People v. Cantor, 324 N.E.2d 872, 876 (N.Y. 1975) (when police surrounded car but suspect thought he was being threatened by private citizens, still seizure because deprivation of freedom of movement was crucial factor). Also, for example, assume that the police are conducting a drug sweep for A; B, who happens to be in the area, reasonably believes that he is the target and disposes of drugs in plain view of the officers. B’s belief cannot make the fourth amendment applicable. Since there was no intentional action directed at B, no seizure results. See State v. Indvik, 382 N.W.2d 623, 627 (N.D. 1986) (use of flashing red lights was seizure of intended car but not of other cars in vicinity).

199. Although the fourth amendment is not the proper vehicle to preclude all harassment or intimidation by the police, it should be applicable to that activity which has the purpose of effecting a seizure. But cf. United States v. Ortiz, 422 U.S. 891, 895 (1975) (reasonableness requirement of seizures under fourth amendment “may limit police use of unnecessarily frightening or offensive methods of surveillance and investigation”); Marjorie E. Murphy, Encounters of a Brief Kind: On Arbitrariness and Police Demands for Identification, 1986 Ariz. St. L.J. 207, 211-15 (arbitrariness, regardless of the intrusiveness of police action, should be protected against by the fourth amendment).
the test must include attempted acquisitions of control over the individual.200 Such a modified test would achieve two goals. First, it would recognize that the applicability of the fourth amendment is dependent solely on the actions of the police. Consequently, whether or when actual control over the person is achieved should not change the result, thereby including shows of authority within the purview of the fourth amendment. Second, it protects the citizen early in the police-citizen encounter, which is consistent with the long-established view that the amendment should be construed liberally to protect individual liberty, thus achieving a more proper balance between competing governmental and individual interests.201

VI. CONCLUSION

The conclusion that a seizure has transpired triggers the applicability of the fourth amendment. The Supreme Court, in Hodari D., has given a restrictive meaning to the concept of a seizure. According to the Court, a seizure occurs only when a suspect submits to a show of

200. See Clancy, supra note 24, at 650-53 (arguing that the proper definition of a seizure is the attempted acquisition of control over the person). What is meant here by an attempt is an objective overt action or other manifested or expressed intention to seize. The focus of the inquiry should be, based on the totality of the circumstances, whether the officer's intent to seize has been manifested, through the tools the officer has available: coercive acts or words designed to significantly interfere with a person's freedom of movement.

An unexpressed or inchoate wish to control is insufficient because probably all law enforcement officers seek to control people they accost. See, e.g., United States v. Pirolli, 673 F.2d 1200, 1204 (11th Cir.) (abandonment not product of police misconduct when suspect removed goods from house as police approached, even though approach may have been for purpose of making illegal arrest), cert. denied., 459 U.S. 871 (1982); Jones v. State, 409 N.E.2d 1254, 1259 (Ind. App. 1980) (narcotics thrown out window of motel room after police knocked on door were admissible, for "whatever intent or purpose may have been in their minds, no improper or unlawful act of any kind was committed"); Mullaney v. State, 246 A.2d 291, 298 (Md. Ct. Spec. App. 1968) (police officer knocked on door of motel room; door opened slightly and officer could smell and see marijuana cigarettes, he entered; held, mere fact that officer intended to make arrest when he knocked on door does not, without more, "constitute the officer a trespasser, there being no right of a citizen, constitutional or otherwise, which immunizes him from having a policeman knock on his door during reasonable evening hours"). See also Michigan v. Chesternut, 486 U.S. at 575 n.7 ("[T]he 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."); United States v. Hensley, 469 U.S. 221 (1985) (even if police officer intended to arrest or to hold person for substantial period of time, conduct still lawful as Terry stop). Cf. LAFAYE AND SCOTT, supra note 120, at 423 (for crime of attempt, mere intention alone does not suffice).

201. See Brown v. Illinois, 422 U.S. at 609-10 (Powell, J., concurring):

That police have not succeeded in coercing the accused's confession through willful or negligent misuse of the power of arrest does not remove the fact that they may have tried. The impermissibility of the attempt, and the extent to which such attempts can be deterred by the use of the exclusionary rule, are of primary relevance in determining whether exclusion is an appropriate remedy.
authority or is physically touched by law enforcement officials. The seizure must also be intended.

Seizures from physical contact require two elements: touching and an intent to seize. Bower demonstrates that the intent to seize is measured objectively but does not specify how that is to be done. Presumably, the Bostick formulation of the reasonable person test will be applied to cases of physical seizures: would a reasonable person believe that the physical contact by the officer was made with the intent to seize. Of course, in the vast majority of cases involving physical restraint, the question whether there was an intent accompanying that restraint will be obvious and no extended analysis will be needed.\(^2\)

Show of authority seizures also require two elements: a show of authority and submission. The submission must be in response to a show of authority that a reasonable person would interpret as a demonstration of the officer’s intent to seize. The reasonable person test will no longer be the sole focus of examination in deciding show of authority cases. Absent submission, it matters little whether there has been a show of authority that a reasonable person would interpret as an attempt to seize. Central questions for show of authority seizures will be determining if, when, and how the person accosted submits. However, the reasonable person test will still serve to distinguish between complying with requests and submitting to shows of authority. In the future, determining exactly what the show of authority was conveying to a reasonable person, that is, what the police commanded the suspect to do, will be very important because of the Court’s restrictive fruit of the poisonous tree analysis. If the suspect responds inappropriately to a specific command, that response will not be considered a fruit of that command. Thus, if the police merely command a suspect to halt, through words or action, and, instead, the suspect discloses evidence, the recovery of the evidence will not be considered a product of the police’s actions.\(^3\)

In reaching the conclusion that a seizure within the fourth amendment has transpired, the competing interests of society in effective law enforcement and the individual in privacy must be weighed. The Hodari D. standard fails to strike a proper balance between these interests because it fails to include within the ambit of the fourth amendment unwarranted coercion and intimidation of individuals stemming from

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\(^2\) See supra notes 12-15 (for cases cited).

attempts to seize by requiring justification for such conduct. This results in a diminution of individual liberty. The Hodari D. test is also deficient because it takes the response of the suspect into account; yet, the applicability of the fourth amendment depends not on an individual's actions but solely on the actions of governmental agents. Accordingly, when or whether control over a suspect by the police is achieved should not change the result in a given case. When this principle is recognized, perhaps when new minds are on the Court, the Hodari D. test will be replaced by a test that will more properly balance the competing interests. To do so, the line requiring justification of police actions must be drawn at the moment of intentional coercion or intimidation by the police designed to produce a seizure.