A Conservative Court Says "Goodbye to All That" and Forges a New Order in the Law of Seizure - California v. Hodari D.

Randolph Alexander Piedrahita

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A Conservative Court Says “Goodbye to All That” and Forges a New Order in the Law of Seizure—*California v. Hodari D.*

I. INTRODUCTION

Harsky and Stutch are two famous police officers who have chosen to cruise the steamy streets of downtown “Mall City,” a neighborhood well-known as a high-crime area. While cruising in their marked police car, they notice a group of men standing on a dimly lit street corner. Stutch’s eyes narrow as he recognizes the visage of one Bernhard, a person Stutch remembers arresting on a previous weapons charge. The rumor on the street is that Bernhard has branched into selling stolen pistols to passers-by. Harsky decides to see if this rumor is correct, so he tells Stutch, “Let’s turn on the lights, roar up on them, and see what happens—maybe they’ll panic and do something stupid.” Stutch signals his assent by doing exactly what Harsky wants, and they come to a screeching halt in front of Bernhard and his cohorts.

Bernhard and his cohorts, fearing arrest, break and run. Stutch pursues on foot, and fires ahead of Bernhard, yelling at him to halt. Bernhard hears the gunfire and becomes so afraid that he throws away the pistols that he had been selling. Stutch sees the pistols, and tackles Bernhard. The arrest report will read that Stutch saw the suspect discard the pistols, for which Stutch arrested him. Bernhard’s attorney will claim that a seizure under the Fourth Amendment occurred when the police sped down the street and screeched to a halt in front of him, communicating that he was not free to leave. Bernhard’s attorney will also claim that the police actions before the pistols’ production were excessively overbearing and unreasonable under the Fourth Amendment, since Harsky and Stutch lacked any reason to bear down on Bernhard in the first place. The attorney believes that it is a foregone conclusion that the evidence will be excluded as resulting from a violation of the Fourth Amendment. However, he may be surprised to know that a recent United States Supreme Court case, *California v. Hodari D.*, may have rendered not only his reasoning incorrect, but also the reasoning of over a decade of Supreme Court jurisprudence.

1. With apologies to Robert Graves, author of, among other works, *I, Claudius*, and an autobiography whose title I “borrowed.”

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The importance of making a determination of when the seizure occurs cannot be underestimated. There must be some point at which the Fourth Amendment and its protection against "unreasonable" police intrusions come into play. If the police action is not seen as a seizure, then the police conduct will not come under Fourth Amendment "reasonableness" scrutiny. If a suspect is not viewed as being "seized," then there is no check on police behavior because, until the point of seizure, the police conduct is not considered for exclusionary purposes. Thus, police conduct is not susceptible to reasonableness review until the point that a seizure is deemed to have occurred.

Determining the moment of seizure is particularly critical when speaking of evidence abandoned by the defendant and whether it should be excluded. The Supreme Court of Louisiana explained the reason why courts should pay close attention to the moment of seizure:

When police officers make [a seizure] without the legal right to do so, property abandoned or otherwise disposed of as a result thereof cannot be legally seized. If, however, property is abandoned without any prior unlawful intrusion into a citizen's right to be free from government interference, then such property may be lawfully seized. In such cases, there is no expectation of privacy and thus no violation of a person's custodial rights. It is only when the citizen is actually [seized] without reasonable cause . . . that the "right to be let alone" is violated, thereby rendering unlawful any resultant seizure of abandoned property.\(^2\)

The purpose of this casenote is to briefly explain the state of the law of seizure before \textit{Hodari D.}, how the decision changes the law, and how this change will be received in Louisiana. The note's emphasis will be on determining when a seizure occurs so that the Fourth Amendment and its corresponding "reasonableness" will serve to review the conduct of the seizing police. This note will also attempt to point out and remind the reader of some relevant factors that should be considered in arriving at the decision of when a seizure occurs. Possible alternatives as to how the decision should be made, as well as arguments that the jurisprudence before \textit{Hodari D.} was much more flexible, reasonable, and precedent-minded than the new decision will also be set forth. Finally, this note will endeavor to predict which course Louisiana will take in determination of police conduct as a seizure. However, before any discussion of \textit{Hodari D.} is warranted, the background to that decision must be laid out. In this case, the background that must be constructed is the state of seizure law when \textit{Hodari D.} was handed down.

II. Threshold Requirements for Seizure Before Hodari D.

A. Seizures and Exclusionary Policy Generally

The starting point for any discussion about the constitutionality of law enforcement seizures is, of course, the Fourth Amendment and its means of enforcement, the exclusionary rule. The Fourth Amendment provides, in pertinent part, that the "people" have a "right" to be "secure in their persons . . . against unreasonable . . . seizures." The penalty for any such "unreasonable" seizure is the exclusion of any evidence which results from the "unreasonable seizure" and which is offered as evidence in courts "charged at all times with the support of the Constitution." This is so because "[t]o sanction [an unlawful seizure by admitting the evidence] would be to affirm by judicial decision a manifest neglect, if not an open defiance, of the prohibitions of the Constitution, intended for the protection of the people against such . . . action." Under this rule, a police officer is assumed to be less likely to violate constitutional rights if it is apparent to the officer that the fruits of such violations will be denied him in a subsequent prosecution. This rule has, as its "major thrust," the goal of "deterrence" of odious law enforcement practices. This standard of review and its corresponding threat of exclusion are not present in all citizen/police encounters; they only appear in the encounters labeled "seizures." The
problem at this point is to determine when one of these encounters becomes a seizure and, thus, falls under the aegis of the Fourth Amendment.

B. When an Encounter Becomes a Seizure—The Importance of Being Able to Walk Away

All seizures must be “tested by the Fourth Amendment general proscription against unreasonable searches and seizures.”9 However, if police interaction with a person is not a seizure, it naturally follows that the Fourth Amendment and its corollary rule of exclusion do not apply.10 The Court best asserted this oft-mentioned proposition in Florida v. Royer:11

[Law enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions. . . . [the suspect] may not be detained even momentarily without reasonable, objective grounds for doing so; and his refusal to listen or answer does not, without more, furnish those grounds.12

As the Court noted, the person so approached is not required to answer any questions posed to him by police and can continue to proceed about

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9. Id. at 20, 88 S. Ct. at 1879.
10. As Professor LaFave says in 3 W. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 9.2(h), at 402 (2d ed. 1987) (emphasis added):
"If the police come onto incriminating evidence during a street encounter but are unable to show that they had even the lesser quantum of evidence needed to justify a Terry-type stop [reasonable and articulable basis of suspicion, with the stop being of a limited nature so as to confirm or dispel the suspicion], that evidence will nonetheless be admissible if it is determined that as of the time of that discovery no seizure had yet occurred.

This observation shows the importance of determining exactly when a seizure occurs for exclusionary purposes.

The Supreme Court summed it up in Henry v. United States, 361 U.S. 98, 103, 80 S. Ct. 168, 171 (1959), in which federal agents investigating stolen whiskey claims observed cartons being placed in defendant’s car, followed, and stopped the car. In holding that the officers’ stop of the car was without probable cause and any fruits seized were to be excluded as illegally obtained evidence, the Court said that:

It is, therefore, necessary to determine whether at or before [the time of seizure the police] had reasonable cause to believe that a crime had been committed.

The fact that afterwards contraband was discovered is not enough. An arrest is not justified by what the subsequent search discloses . . . .

his business without fear of police interference. The police actions become a seizure only "when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen." Professor LaFave states that a confrontation is a seizure "only if the officer adds to those inherent pressures [brought on by police/citizen interaction] by engaging in conduct significantly beyond that accepted in social intercourse."

According to Professor LaFave, such socially unacceptable law enforcement conduct would "include such tactics as pursuing a person who has attempted to terminate the contact by departing." The Supreme Court has noted the importance of protecting an individual's right to terminate these encounters by departure. In Brown v. Texas, two officers attempted to stop the defendant in an area known for frequent drug transactions; when the officers attempted to question him, the defendant vehemently refused to give the officers any information other than that the officers had no right to detain and question him. He was subsequently arrested for violating a statute that required him to identify himself to an officer who had lawfully stopped him. The Court held that the defendant was seized for purposes of the Fourth Amendment when the officers had, without reason to suspect Brown of any malfeasance, held him so he could identify himself after he had expressed a desire not to. Thus, the Court found that the police officer did not seize Brown when he asked him to identify himself and his reasons for being there, but rather when the officer did not allow him to leave without answering.

The importance of this decision is its determination that a seizure occurred when the defendant was not allowed to exercise his right to refuse to answer questions and leave. This refusal by police to acknowledge the right of a defendant to leave was apparently the beginning point of the seizure in Brown. Although the Court did not discuss this, it would appear that it was not the physical restraint of Brown that made the seizure, but rather Brown's reasonable realization that the police were not going to recognize his right to depart. Later that year,

15. LaFave, supra note 10, § 9.2(h), at 412.
16. Id. at 413.
18. Id. at 49, 99 S. Ct. at 2639.
19. Id. at 49 n.1, 99 S. Ct. at 2639 n.1.
20. Id. at 52, 99 S. Ct. at 2641 (emphasis added). Also see INS v. Delgado, 466 U.S. 210, 216, 104 S. Ct. 1758, 1762 (1984), where the Court emphasized this principle as follows: "[I]nterrogation relating to one's identity or a request for identification by the police does not, by itself, constitute a Fourth Amendment seizure."
the Court would come out and actually give its opinion as to when a seizure occurred and, by so doing, determine when the Fourth Amendment concept of reasonableness applied to police actions.

C. The Mendenhall Test of "Objective Intimidation"

Later in the same term that produced Brown, the Court finally came to grips with the problem of when a seizure occurred. In United States v. Mendenhall, the defendant, who fit a drug courier profile, was stopped at an airport by federal agents who asked her to produce her identification and her ticket. When the names on both documents did not match, the federal agents asked the defendant to accompany them to the airport Drug Enforcement Agency office for questioning. She accompanied them without protest and consented to a search that yielded narcotics.

The defendant claimed that she had been "seized" when the agents initially approached her and began their interrogation, and because such seizure had been without the "reasonable suspicion" required in order to seize, the fruits of such unconstitutional seizure should be excluded at trial. The Court, rejecting Mendenhall's argument, held that there was no seizure when the agents initially approached and interrogated the defendant:

[A] person is "seized" only when, by means of physical force or a show of authority, his freedom of movement is restrained. Only when such restraint is imposed is there any foundation whatever for invoking constitutional safeguards. . . . As long as the person to whom the 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.

22. Id. at 547-48, 100 S. Ct. at 1873.
23. Id. at 548, 100 S. Ct. at 1874.
24. Id., 100 S.Ct. at 1874.
25. Id. at 549-50, 100 S. Ct. at 1874-75. The minority opinion, authored by Justice White, gave an idea of what the grounds of a permissible stop were, citing Brown v. Texas, 443 U.S. 47, 51, 99 S. Ct. 2637, 2641 (1979):

[W]e have recognized that in some circumstances an officer may detain a suspect briefly for questioning although he does not have "probable cause" to believe that the suspect is involved in criminal activity, as is required for a traditional arrest. However, we have required the officers to have a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity.

446 U.S. at 567, 100 S. Ct. at 1884.
The Mendenhall Court then gave what many perceive to be the test for a seizure:

We conclude 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 was not free to leave. Examples of circumstances that might indicate a seizure . . . 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.27

The Court set out a standard focusing on the state of mind of a suspect which can be summed up as follows: Would the average, reasonable man believe that he would be forcefully detained if he attempted to leave? If that average, reasonable person did believe that under the circumstances he could not leave, he was therefore "seized" under the Fourth Amendment.

By applying the Mendenhall test to the introductory "Harsky and Stutch" hypothetical, a reader can see that Bernhard was seized when Harsky and Stutch's actions communicated to him that he was not free to leave. The actions that communicated that he was not free to leave were the sudden and screeching halt of the police car and the subsequent chase. The Court would go on to apply and refine this test in a series of cases following Mendenhall.

1. Application of Mendenhall

a. Royer and Delgado

The Court applied the Mendenhall standard to a similar set of circumstances in Florida v. Royer,28 in which the defendant Royer, who matched a drug courier profile, was approached by detectives who demanded his identification and driver's license.29 The detectives did not return Royer's license and airline ticket, asked him to go with them to a room away from the concourse, and, "without Royer's consent or agreement," retrieved his luggage using his claim check.30 Royer only unlocked his suitcase, but the detective opened it without "further assent from Royer."31 Marijuana was found and Royer challenged its intro-

27. Id. at 554, 100 S. Ct. at 1877 (emphasis added).
29. Id. at 493-94, 103 S. Ct. at 1322.
30. 1788 Id. at 494, 103 S. Ct. at 1322.
31. Id., 103 S.Ct. at 1322.
duction in court, claiming it was the fruit of a seizure which occurred without any constitutional basis when the agents communicated that Royer was not free to leave by taking his identification, tickets, and luggage. Royer asserted that the agents had not had the requisite probable cause to seize him when they took his tickets and luggage and removed him to an isolated room, thus tainting any evidence that the state received as a result of this seizure. The Court, applying the Mendenhall test, recognized that the seizure occurred when the officers, by taking Royer's identification, ticket, and luggage, caused "any consensual aspects of the encounter [to] evaporate." The Court noted that the "primary interest" of the detectives was not merely to ask questions and have "an extended conversation" with Royer if he so chose, but rather to determine the contents of his luggage. Underlying the decision was the intimidating nature of the police conduct, and its logical effect on the defendant's actions (i.e., unlocking the suitcase). By excluding the evidence, the Court sent out an implicit message that the police would not be allowed to benefit from the intimidating circumstances of a seizure unless the seizure was supported by either probable cause or reasonable suspicion, depending upon the nature and duration of the seizure.

The Court continued to apply this intimidation standard in later cases. In INS v. Delgado, Immigration and Naturalization Service agents went into a factory for a purported survey of employees. The agents blocked the exits and went through the factory asking employees several questions regarding their citizenship. During the survey, the employees were allowed to wander around the factory, but not to go outside. After this survey, four of the surveyed employees filed suit questioning the constitutionality of the survey, and requesting declaratory

32. Id. at 496, 103 S. Ct. at 1323.
33. Florida v. Royer, 460 U.S. 491, 496, 103 S. Ct. 1319, 1323 (1983). Since the police activity in removing and isolating Royer constituted something more than an investigatory stop, the Court cited Dunaway v. New York, 442 U.S. 200, 99 S. Ct. 2248 (1979), for the proposition that "a police confinement which . . . goes beyond the limited restraint of a[n] investigatory stop may be constitutionally justified only by probable cause." Since the marijuana was obtained by (debatably) a free act of will (the consensual search of the suitcase) that would have never occurred but for the detention, the next inquiry is whether the evidence was obtained as a result of the illegal detention. The merits of such an inquiry are beyond the scope of this article, but the nature of the inquiry is best illustrated in Wong Sun v. United States, 371 U.S. 471, 83 S. Ct. 407 (1963).
34. 460 U.S. at 503, 103 S.Ct. at 1327.
35. Id. at 505, 103 S. Ct. at 1328.
37. Id. at 212, 104 S. Ct. at 1760.
38. Id. at 213, 104 S. Ct. at 1760-61.
and injunctive relief. The Court held that the employees were not seized since they could not have left the factory anyway since their jobs required their presence. As for any intimidation-based claims of seizure, the Court said the workers had "no reasonable fear that they would be seized or detained in any meaningful way" since "the mere possibility that they would be questioned if they sought to leave" was not intimidation enough. In dissent, Justice Brennan pointed out rather practically that the actions of the INS agents (blocking the exits and combing the factory) constituted a "show of authority" which was "of sufficient size and force to overbear the will of any reasonable person." This overbearance of the will would make anyone feel compelled to stop and answer any questions, and, thus, he would be seized under the Brown v. Texas rationale, supra. The Court agreed with the basis of Brennan's dissenting argument, the Mendenhall test, saying that:

Unless the circumstances of the encounter are so intimidating as to demonstrate that a reasonable person would have believed he was not free to leave if he had not responded, one cannot say that the questioning resulted in a detention under the Fourth Amendment. But if the persons [sic] refuses to answer and the police take additional steps—such as those taken in Brown—to obtain an answer, then the Fourth Amendment imposes some minimal level of objective justification to validate the detention or seizure.

The Court's disagreement with Justice Brennan came not from his use of the Mendenhall test, but from the results he received based on it. Although Delgado and Royer have different results as to whether or not seizures occurred, the different results stem from how the Mendenhall test is applied and not whether or not it should be applied. Both cases' use of the Mendenhall standard seems to prove that each case recognized the test as valid.

b. Chesternut

The Court had a more recent opportunity to apply the Mendenhall test in Michigan v. Chesternut, in which the defendant, seeing a marked police car, turned and ran; the car caught up to him and followed for a short distance. As the policemen drove beside the defendant, they

39. Id., 104 S.Ct. at 1760-61.
40. Id. at 219, 104 S. Ct. at 1764.
42. Id. at 229, 104 S. Ct. at 1769.
43. Id. at 216-17, 104 S. Ct. at 1763.
45. Id. at 569, 108 S. Ct. at 1977.
saw him toss away some packets he removed from his pocket. The police car stopped, and an officer examined the bags, determining that they held pills. The defendant stopped, and was arrested when the officers determined that the pills had codeine as an ingredient. The defendant claimed he had been seized under the Fourth Amendment when the car began following him, thus communicating to him that he was not free to leave. Thus, because the action of the police in following Chesternut was a seizure, it required at least some constitutional grounds, such as reasonable suspicion or probable cause. Since the facts that were known to the officers at the time of the alleged seizure were insufficient to pass Fourth Amendment reasonableness muster, the seizure was not constitutional and any evidence found as a result would be excluded.

The Court refused to hold that all chases are per se seizures and instead relied on the Mendenhall test to evaluate each chase on a case-by-case basis. The Court pointed out that the car's following of the defendant "would not have communicated to the reasonable person an attempt to capture or otherwise intrude upon [a person's] freedom of movement," and, since this was the extent of the police activity, defendant was not seized at the time he abandoned the evidence. Since there was no seizure requiring constitutional justification, the evidence was abandoned by defendant and therefore admissible. Thus, according to Chesternut, if police actions in following a suspect do not reasonably communicate to him that he is about to become the subject of an "attempt to capture," he is not seized under the Fourth Amendment, and his choice to abandon evidence is independent of any law enforcement activity.

The Court did provide a list of some things it would consider indicative of a seizure, such as a command to halt or motion "in an aggressive manner to block [a suspect's] course or otherwise control the direction or speed of his movement." Most of the these things were
present in *Hodari D.*, and what is fascinating is that the Court completely disregarded its own list in formulating its decision.

These cases and the *Mendenhall* test they embraced comprised the state of the law at the time of the decision of *California v. Hodari D.*\(^{53}\) In summation, they held that a seizure occurred when law enforcement conduct was of such an overbearing type as to communicate to a reasonable person that he was not free to disregard the presence of the law enforcement actors and leave. Little did observers of the Court know that this flexible, fact-specific standard's days were numbered when writs were granted to *Hodari D*.

III. THE CURIOUS CASE OF *CALIFORNIA V. HODARI D.*

A. The Facts and Background of the Case

Late on an April night of 1988, two plainclothes police officers were on patrol in a "high-crime area" of Oakland, California. These officers were wearing jackets emblazoned with "Police" on both the front and back. As they rounded a street corner they saw some youths grouped around a parked car, who upon seeing the officers' car, panicked and fled. The now-suspicious officers gave chase, one in the car, and one on foot. The officer on foot eventually found himself running head-on into the defendant, one Hodari D. Seeing the policeman about to tackle him, Hodari threw away a bag later found to contain crack cocaine. Immediately afterwards, the officer caught up to the defendant, tackled him, and placed him under arrest.\(^{54}\) At this point, it is critical to note that the officers admittedly had no constitutional basis for their pursuit of Hodari until he tossed the drugs.\(^{55}\) In his juvenile proceeding, Hodari attempted to have the crack suppressed as the fruit of an illegal seizure that occurred when the officers pursued him, but his motion was denied.\(^{56}\) This ruling was reversed in an opinion by the California Court of Appeal which held that "Hodari had been seized when he saw [the policeman] running towards him, that this seizure was unreasonable under the Fourth Amendment, and that the evidence of cocaine had to

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\(^{54}\) Id. at 1549. It is assumed that the police officer had already decided to tackle Hodari before he saw the crack. Of course, it can always be argued that he merely was running after the defendant to ask why he fled. However, under *Mendenhall*, such rapid pursuit would communicate an intent to seize.

\(^{55}\) The State of California conceded that there had been no probable cause for the chase, and the Court did not disturb this concession in the majority opinion itself, instead choosing to question this concession in a footnote, which will be discussed at infra note 59.

\(^{56}\) 111 S. Ct. at 1549.
be suppressed as the fruit of that illegal seizure." 57 Although the state's application for review was denied by the California Supreme Court, a writ of certiorari to the United States Supreme Court was requested and granted. 58

B. The Opinion

1. The Court Makes a Surprise Move

It seemed that the United States Supreme Court would follow the framework of the California court and present the issue as one that involved exactly when the seizure occurred. If the seizure was found to have occurred when Hodari saw the police officer chasing him without any constitutional basis, then the crack thrown by Hodari in response should therefore be excluded as the fruit of an unlawful seizure. On the other hand, if the seizure occurred when the officer tackled Hodari and after Hodari had obviously abandoned an illegal drug, then the seizure was with at least reasonable suspicion, if not probable cause, and the evidence would be admissible. Rather than approaching the case in the traditional Mendenhall-based way, Justice Scalia took a whole different tack and threw the customary legal concepts of seizure to the wind. 59 Instead of following the framework of the California court and

59. In a rather foreboding note in California v. Hodari D., 111 S. Ct. 1547, 1549 (1991), Justice Scalia contended that it "contradicts proverbial common sense" to hold that it would be "unreasonable to stop . . . young men who scatter in panic upon the mere sighting of the police," citing as his source Proverbs 28:1 ("The wicked flee when no man pursueth."). This is nothing new for Scalia, who, in Michigan v. Chesternut, 486 U.S. 567, 574, 108 S. Ct. 1975, 1981 (1988), sided with Kennedy's concurrence that "respondent's unprovoked flight gave police ample cause to stop him." Justice Scalia obviously disagrees with holdings like Brown v. Texas, 443 U.S. 47, 99 S. Ct. 2637 (1979), which emphasize a person's right to avoid police encounters unless the police have reasonable suspicion to force the encounter. Scalia is perfectly willing to decide that flight from police is enough, given the circumstances of vicinity and time of the transaction, to justify police pursuit and seizure, whether it occurs (under the Mendenhall test) at the initiation of the pursuit, or when it occurs (under his new test) when force is applied or there is submission to authority.

Scalia is not alone in his views on unprovoked flight as cause enough for a seizure. The Supreme Court of Louisiana said in State v. Belton, 441 So. 2d 1195, 1199 (La. 1983), that "[f]light from . . . approaching officers, coupled with the other facts and circumstances known by the officers, was sufficiently suspicious to justify [a seizure] based on reasonable cause to believe defendant had committed, was committing, or was about to commit a crime." In Belton, the other circumstances that, coupled with the flight, justified the seizure were that defendant had previously had narcotics, he was standing as though he had narcotics on him, and the location was in a similar "high crime area"
its Mendenhall-based determinations of whether or not the police behavior was enough to convince a citizen that he was not free to leave, Justice Scalia characterized the issue as a “narrow question” of “whether, with respect to a show of authority as with respect to application of physical force, a seizure occurs even though the subject does not yield”; the Court’s answer to this query was “no.”

In holding that a seizure does not occur if the suspect does not yield to police authority, i.e., stop running away, the Court pointed out that a seizure “readily bears the meaning of a laying on of hands or application of physical force to restrain movement, even when... unsuccessful.” The Court’s seven-two majority was emphatic in its statement that seizures do not “remotely apply... to the prospect of a policeman yelling ‘Stop, in the name of the law!’ at a fleeing form that continues to flee.” Thus, for there to be a seizure, the majority concluded there must be either a “show of authority” resulting in submission, or physical contact with the suspect.

Under the new test of Hodari D., the introductory Harsky and Stutch hypothetical will have a different resolution. Under Hodari D., Bernhard was not seized until he was tackled by Stutch. Since Stutch made the tackle after he saw the incriminating evidence, the seizure was with probable cause. The seizure was born only at the moment of touching or submission, i.e., cessation of movement, and only the events immediately preceding this touching or submission are considered under Hodari D. A court would not weigh any of the preceding events that led up to the probable cause under Fourth Amendment reasonableness inquiry. A court’s ignorance of hotly aggressive police actions (such as screeching halts, foot pursuits, and gunfire) and subsequent concentration on a suspect’s actions as the trigger for the Fourth Amendment is manifestly unjust.

2. The Injustice of Hodari D.

Justice Scalia and the majority in Hodari D. decided that the Fourth Amendment-based threat of deterrence and its corresponding inquiry

as in Hodari D.

Finally, the use of the Bible as opposed to jurisprudence and legal theory for precedential support in constitutional decision-making is another method that is not new for Justice Scalia. In Coy v. Iowa, 487 U.S. 1012, 1015-16, 108 S. Ct. 2798, 2799-800 (1988), Justice Scalia claimed that the right of confrontation stemmed from ancient sources, citing Acts 25:16 for support of this belief. Although the Bible has great value as a tool for moral and religious instruction, its efficacy and propriety for solving problems of constitutional law is highly questionable.

60. Hodari D., 111 S. Ct. at 1550.
61. Id.
62. Id.
63. Id. at 1551.
into the reasonableness of police actions applied only to "genuine, successful seizures." What Scalia meant by an "unsuccessful seizure" is one in which the suspect is neither touched nor submits to the police presence by staying put. There is an element of unfairness in considering only "successful seizures" as subject to the Fourth Amendment. Limiting the application of deterrence to successful seizures that lack constitutional basis is akin to only applying criminal penalties to successful crimes. Such an application would be in defiance of the criminal law, which punishes attempts to commit crimes, as well as their successful completion. For example, Louisiana has an attempt statute which punishes a person who has the specific intent to commit a crime and "does an act for the purpose of and tending directly toward the accomplishment of his object." Attempts, as the statute says, require an intent to commit a proscribed act. Attempts also have the deterrent punishment of jail time and possible fines.

An attempted violation of the Fourth Amendment should be handled in much the same fashion as any attempt to do a proscribed act, since a violation of the Fourth Amendment is certainly analogous to "misconduct" by a police officer. The deterrence penalty can be compared to a criminal penalty for the policeman who consciously engages in conduct which reflects a disregard for the dictates of the Fourth Amendment. Violations of the Fourth Amendment that merit the deterrent punishment of exclusion require an intent to disregard the Fourth Amendment. Criminal statutes rely on some form of intent, and their penalty is, like evidentiary exclusion, a deterrent of sorts.

A failure to apply a penalty like exclusion to unsuccessful police conduct (which is nevertheless undesirable) would be difficult to reconcile philosophically. It would allow police to endeavor to do something that, if it were successful, would be a violation of the Fourth Amendment. For example, if the police officer in the introductory hypothetical caught up to and tackled Bernhard before he abandoned the incriminating evidence, he would have seized Bernhard without probable cause and

65. La. R.S. 14:27(A) (1987) provides, in pertinent part, that:
   Any person who, having a specific intent to commit a crime, does or omits an act for the purpose of and tending directly toward the accomplishing of his object is guilty of an attempt to commit the offense intended; and it shall be immaterial whether, under the circumstances, he would have actually accomplished his purpose.
66. Police are presumed to "know" the restraints of the Fourth Amendment in much the same way a citizen is "presumed" to know the substantive criminal law. "Good faith" errors in judgment of Fourth Amendment restraints should not be excused (with respect to exclusionary policy). Of course, there are some dubious exceptions to this lack of a "good faith" defense to violations of the Fourth Amendment, as in the case of warrants (see Comment, supra note 3).
the deterrent of exclusion would apply to any evidence that he found. But now, the pursuit's reasonableness turns not on what the policeman knew when he began the chase, but what he found out in the course of the chase. The chase's validity relies now not on the suspect's previous actions, but what he does in the course of the chase. Such a result would condone aggressive police procedures in the hope of "shaking up" evidence. It would also encourage police to pursue aggressively, but not to catch the suspect in the hope that the suspect will discard incriminating evidence.6 Such a result would be unjust and intolerable. Unfortunately, however, injustice is not Hodari D.'s only flaw.

3. Inconsistencies With Past Decisions

Not only does the Hodari D. opinion appear to be unjust, but it seems to be inconsistent, as well. The Hodari D. opinion is clearly inconsistent with Chesternut, discussed supra, where the Court gave examples of activity sufficient to constitute a "show of authority" under which a reasonable person would believe that he was not "free to leave."68 This very activity was present in Hodari D. Further, Chesternut had as its underlying premise the Mendenhall approach. Therefore, a supporter of stare decisis would be heard to exclaim "What of Mendenhall?" The Court had an answer for any stare decisis supporters when it stated that the Mendenhall test of focusing on whether the suspect has a reasonable belief that he is not free to leave merely "states a necessary, but not a sufficient condition for seizure."69 The Court drew on the exact language of Mendenhall,70 claiming that the choice of the words "a person has been seized only if . . . he believed he was not free to leave" was a deliberate choice by the Mendenhall Court over the words "whenever he believed he was not free to leave."71 With this, the Mendenhall test had been reduced to an analysis that merely placed a certain set of circumstances in the "seizure ballpark." After Hodari D., Mendenhall is perhaps only good for deciding when a show of authority has occurred. However, the show of authority is no longer enough in and of itself; there must be a visible effect of this show of authority, and the only acceptable effect appears to be a submission to

67. This pursuit would not have a very effective law enforcement value, since there would always be the risk that the suspect will get away.
70. United States v. Mendenhall, 446 U.S. 544, 554, 100 S. Ct. 1870, 1877 (1980): "[A] person has been seized within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." (emphasis added).
71. Hodari D., 111 S. Ct. at 1551.
the authority. It is plain that this literalistic twisting of the words of the Mendenhall decision turned the law of seizure on its ear.

4. The Erosion of Mendenhall

In response to the Court's literalist approach to reading a decision that was quite clear on its face, it is obvious that the 1980 Court made no such conscious choice in writing Mendenhall, and that its purpose was to create a clear test which "allows the police to determine in advance whether the conduct contemplated will implicate the Fourth Amendment." By making the Mendenhall test a sine qua non for seizure, the Court in Hodari D. has effectively emasculated it as any basis for determining conclusively whether or not a seizure has occurred. One's reasonable belief that he is not free to leave is now a factor in testing if a seizure occurs, not a test in and of itself. Basically, the Court asserted that if Mendenhall was to be the test for determining when a seizure had occurred, the Mendenhall Court would have said so specifically. The fact that the Court used Mendenhall as the only test for over ten years seemed irrelevant to the Hodari D. Court. Further, by saying that a seizure only occurs when force is used or submission occurs, the Court did not only weaken the Mendenhall test, but threw it out altogether; if the birth of a seizure is now a brightline test that only physical activity or submission to the threat of it can satisfy, there is really no place for Mendenhall in future decisions. After all, the suspect's invisible state of mind has no place in a brightline test that only looks to the visible acts of either the police officer (touching) or the suspect (submission).

The Court, in effect, threw out the concept that a show of authority in itself constitutes a seizure, and seems to require "application of physical force" to constitute a seizure. In doing this, the Court drew on some "arcane knowledge of legal history" and compared the seizure of a vessel as a war prize to the seizure of a person, claiming that a person who has fled from the police is, while "still fleeing, even though under attack, . . . not . . . considered to have been seized." The "show

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73. The Court says that in Chesternut, for example, even though the Mendenhall test was used, it was not decided that, if the test was met, "a Fourth Amendment seizure would have occurred." Hodari D., 111 S. Ct. at 1552. If the fact that a meeting of the test's conditions was not equivalent to a seizure, then what was the purpose for the test's use in that case? In 10 years' worth of decisions? This author cannot find a single case dealing with seizures from Mendenhall to Chesternut in which the Mendenhall test was not the basis of inquiry, and after its successful completion, a seizure was held not to have occurred.
75. Id. at 1549-50.
of authority” constituting a seizure was now defined not as conduct sufficient to cause a reasonable person to believe that he was about to be detained regardless of whether he allowed the detention to occur or not, but was instead surprisingly defined to mean a “show of authority” that required an actual result of “submission” to the police officer. Not only was this change in seizure law something of a surprise to students of Fourth Amendment case law, but the change was almost wholly without Supreme Court precedential support.

5. *The Lack of Precedential Support for Hodari D.*

The Court, in another surprising pronouncement, also refused to “stretch the Fourth Amendment beyond its words and beyond the meaning of arrest” as defined in the common law. This literal approach went against the traditional approach of the Court, an approach noted in Justice Stevens’ vigorous dissent in *Hodari D.* Stevens argued that the Court had repeatedly “endorsed” a broad reading of the Fourth Amendment, and, in light of this, such a requirement of actual physical force for a Fourth Amendment seizure was unwarranted. Stevens said that the “test for a seizure [was] formulated by the Court in *Mendenhall,*” and the “Court’s unwillingness . . . to adhere to the ‘reasonable person’ standard, as formulated by Justice Stewart in *Mendenhall,* mark[ed] an unnecessary departure from Fourth Amendment case law.”

The Court used literal meaning to depart from prior case law and as a tool to limit exclusionary policy, and, by doing so, ignored the very words of one of its earlier decisions. *Terry v. Ohio* involved a police officer (one McFadden) who observed some men apparently casing a store for robbery. McFadden approached Terry, asked some questions, and, when McFadden received mumbling as an answer, spun Terry

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76. Id. at 1551.
77. Id.
78. Id. at 1554 (Stevens J., dissenting).
79. Id. at 1554 (Stevens, J., dissenting) citing *Olmstead v. United States*, 277 U.S. 438, 476, 488, 48 S. Ct. 564, 571, 576 (1928):
    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 (Brandeis, J., dissenting), and
    The direct operation or literal meaning of the words used do not measure the purpose or scope of its provisions. Under the principles established and applied by this Court, the Fourth Amendment safeguards against all evils that are like and equivalent to those embraced within the ordinary meaning of its words.
    (Butler, J., dissenting).
80. 111 S.Ct. at 1557.
81. 392 U.S. 1, 88 S. Ct. 1868 (1968).
82. Id. at 5-6, 88 S. Ct. at 1871-72.
around in order to frisk him for a weapon. A weapon was found, and at trial Terry challenged the seizure and resulting search as unreasonable since McFadden lacked probable cause to search him.\textsuperscript{83} The Court held that even though Terry was not arrested, he was seized (but not saying exactly when), and that the non-arrest seizure was reasonable.\textsuperscript{84} The Court realized that it had "broadened the range of encounters between the police and the citizen encompassed within the term 'seizure'":\textsuperscript{85}

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 a crime—"arrests" in traditional terminology. It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has "seized" that person.\textsuperscript{86}

There is other language in \textit{Terry} that goes against the Court's present holding in \textit{Hodari D.}:

"Search" and "seizure" are not talismans. We therefore reject the notions that the Fourth Amendment does not come into play at all as a limitation upon police conduct if the officers stop short of something called a "technical arrest" or a "full-blown search."\textsuperscript{87}

These words and the subsequent decisions that relied upon them were completely disregarded in the Court's holding in \textit{Hodari D.} Instead of looking to their own precedents in making a decision as to when the seizure occurred in \textit{Hodari D.}, the Court forged a new order in determining when a seizure occurred for Fourth Amendment purposes.

The only precedential support that the Court drew for its opinion in \textit{Hodari D.} was \textit{Brower v. County of Inyo}.\textsuperscript{88} In \textit{Brower}, an action under 42 U.S.C. section 1983, the plaintiffs claimed that a police seizure of excessive force resulted in the death of their son, said seizure constituting a chase that ended in a collision with a police roadblock.\textsuperscript{89} The Court decided, in another opinion written by Justice Scalia, that a seizure occurs when "there is a governmental termination of freedom of movement through means intentionally applied."\textsuperscript{90} The Court held that the show of authority (flashing lights, chasing cars) was not enough, and that there must have been actual physical action on the part of police

\begin{itemize}
\item 83. Id. at 6-8, 88 S. Ct. at 1872-73.
\item 84. Id. at 30, 88 S. Ct. at 1884.
\item 86. Terry v. Ohio, 392 U.S. 1, 16, 88 S. Ct. 1868, 1877 (1968).
\item 87. Id. at 19, 88 S. Ct. at 1879.
\item 88. 489 U.S. 593, 109 S. Ct. 1378 (1989).
\item 89. Id at 594, 109 S. Ct. at 1380.
\item 90. Id. at 596, 109 S. Ct. at 1381.
\end{itemize}
to have made the chase a seizure (such as sideswiping Brower's car into the roadblock). The Court dismissed the possibility that a seizure occurred during the car chase because "that 'show of authority' did not produce [the suspect's] stop." The Court paid attention to the roadblock itself as the means of seizure, ignoring the police chase of Brower that led up to the collision. By deciding Brower in this manner, the Court essentially ignored any influence that the law enforcement pursuit may have had on the suspect's actions that resulted in his death; this disregard of the effect of law enforcement behavior would be repeated in the Court's later opinion in Hodari D., where the Court disregarded any influence that the police officer's pursuit may have had on the defendant's so-called independent choice to abandon the contraband.

It is strange that the Court chose to bring up dicta in Brower to support its point in Hodari D., considering that it decided that police conduct was still responsible for his seizure. As Justice Stevens noted in his dissent in Hodari D., "[the Court's opinion in Brower suggests] that the officer's responsibility should not depend on the character of the victim's [response]," citing language from Brower to support his point:

Brower's independent decision to continue the chase can no more eliminate [police] responsibility for the termination of his movement . . . than Garner's independent decision to flee eliminated the Memphis police officer's responsibility for the termination of his movement effected by the bullet.

According to Brower, police still have to account for the effects of their behavior and can still be responsible for a suspect's independent choices. Stranger than the seemingly-flawed reliance on Brower was the Court's revival of not only inapposite cases to support its holding, but of relatively ancient ones, as well.

6. The Rebirth of Hester

Another odd thing to note in both Brower and Hodari D. are the more-than-passing references to a rather old decision as support for the Court's proposition of when a seizure occurs. Hester v. United States

91. Id. at 596-97, 109 S. Ct. at 1381.
93. Id.
94. Id. at 1560.
96. 265 U.S. 57, 44 S. Ct. 445 (1924).
involved a case where an armed revenue agent pursued the defendant after seeing him obtain containers thought to be filled with moonshine whiskey. During the flight, defendant jettisoned the containers, and the agent recovered them. The Court held that no seizure of the bottles had occurred, stating that "[t]he defendant's own acts . . . disclosed [the evidence] and there was no seizure in the sense of the law when the officers examined the contents of each after it had been abandoned." The Court in Brower pointed out that, for there to have been an illegal seizure of the bottles, the agent would had to have asked for the bottles with the defendant submitting to the authority-backed request.

What the Court failed to point out when it resuscitated Hester as a "seizure of the person" case is one critical fact: Hester dealt with the issue of abandoned objects and whether one had a reasonable expectation of privacy in an open field and did not deal with the issue of what to do when an incriminating piece of evidence is abandoned after heavy-handed law enforcement conduct. Mendenhall was decided some fifty-five years later on that very issue. If Hester was the law on police acquiring evidence through shows of authority, was it not implicitly overruled in Mendenhall? If so, this author believes that a Court prudent enough to choose words like "only if," instead of "whenever," in sculpting opinions would have been careful enough to point out this possible contradiction, and then endeavor to distinguish or dismiss it.

The Hodari D. Court's citings of both Brower and Hester seem to forget the problem of the cause of the defendant's actions.

7. The Dilemma of Street Encounters

The Hodari D. Court wrestled with a fundamental tension in Fourth Amendment law. The tension is between individual rights and effective law enforcement. The police should continue to have a vested right to approach a citizen and ask him questions without fear of invoking the Fourth Amendment. Without the ability to do so, the police and the public whom they protect would lose a valuable investigative tool. Imagine the problems that would result if a police officer could not follow his hunches and pursue (but not close with) a suspiciously fleeing individual; the police officer would have his hands tied if the individual later gave him any evidence so as to support probable cause. The policeman would not be able to react to the evidence and seize the suspect: if the suspect was seized when the policeman followed him

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97. Id. at 58, 44 S. Ct. at 446.
98. Id., 44 S.Ct. at 446.
99. 489 U.S. at 598, 109 S. Ct. at 1382.
100. See supra note 70.
(without the visible or even subjective intent to seize), the policeman seized the suspect without constitutional basis and any evidence would have to be excluded so as to deter future similar police action.

On the other hand, a brightline rule saying that no matter what threatening conduct the police committed, the individual, though intimidated, made his choices independently would be absurd as well as unfair. It would protect the police actions that may have led to a so-called independent choice from any Fourth Amendment inquiry. Such a rule could lead to intolerable excesses. The threat of police excesses are the very raison d'être of the Fourth Amendment, and any test that would allow for these excesses is contrary to the Fourth Amendment. In creating such a test in Hodari D., the Court has forgotten this basic tenet and assumes that police will never abuse their powers. Sad to say, common sense tells society that this is not always the case, and giving law enforcement officers such a powerful tool for overly-aggressive and intrusive investigative procedures is simply too dangerous to contemplate. This dilemma is not without solution, however.

8. Is There a Solution?

A more feasible approach to the dilemma of police effectiveness versus individual rights would be as follows: police have the right to approach casually and question; the citizen has the corresponding right to ignore the questions and leave. If, however, in the course of the approach, the suspect reacts and by so doing produces evidence and the probable cause to seize, as in Hodari D., an inquiry by the Court into the cause of the production is in order. A factor in this determination of cause should be the communicated intent of the approaching officer. For any finding that the "legal cause"101 of the defendant's reaction was direct police action constituting a seizure, there should be a communicated intent on the part of the officer not merely to approach, ask, and hope for a reply, but to not allow the defendant to leave if the reply is unsatisfactory. The socially unacceptable behaviors mentioned by Professor LaFave, supra, would serve as a guide to determine if the policeman had communicated the intent to seize. The Mendenhall test took these factors into account, and, by so doing, made good sense. The new test of Hodari D. does not, and it shows a marked inattention to principles of causation and intent as factors in assigning responsibility. The principal flaw in Hodari D. is the Court's removal of any approach that analyzes cause and intent as factors in assigning responsibility for evidence's appearance. By so doing, the Court has made a decision that is legally unsound. It is legally unsound because it ignores basic principles

101. See infra section IV of text.
of legal cause for events that consider not only factual matters, but also certain policy considerations underlying the exclusionary rule. Of course, the next step in this discussion is to set out and explain these policies and what kind of test best protects them.

IV. LEGAL CAUSE IN DECIDING WHEN A SEIZURE HAS OCCURRED

A. Legal Cause In the Context of the Fourth Amendment

1. Legal Causation and Fourth Amendment Policy

   a. "But-For" Causation

   The majority in Hodari D. assumed that the defendant's discarding of the bag of crack was a voluntary act evidencing the defendant's relinquishment of his reasonable expectation of privacy regarding the contents of the bag. What the Court ignored is the fact that "but for" the actions of the police in cases like Hodari D. and Hester, the evidence would never have been abandoned. After all, the defendants did not have a sudden attack of conscience; had the threat of arrest not appeared, the defendants would have retained contraband of some monetary value. In failing to accept this "broad sense of causal connection between the government's action and the defendant's counteraction," the Court significantly diminished the applicability of the exclusionary rule. The Court refused to examine the police conduct prior to the point that the defendant in Hodari D. actually was tackled, and, by so doing, removed many of the facts of the entire incident from the review of Fourth Amendment reasonableness standards. The thrust of exclusionary policy has not been a focus on the defendant's actions, but on police actions, and any test which removes many of these police actions from review limits the application of the Fourth Amendment to these acts.

   b. Legal Cause and Fourth Amendment Policy

   In the past, the Court "acknowledged the requirement for a but for causal connection when formulating the independent discovery ex-

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102. See Hester v. United States, 265 U.S. 57, 44 S.Ct. 445 (1924) and U.S. v. Oswald, 783 F.2d 663 (6th Cir. 1986) for examples of discussion and application of this abandonment/"independent discovery" principle.

ceptions to the exclusionary rule. The Court, like any court that has to apply doctrines of cause (be it for a tort case or for a Fourth Amendment seizure case), limited the doctrine of "but-for" causation by the concept of "legal cause"; this "legal cause" being defined as being the determination of cause that is "not merely fair as between the parties, but socially advantageous, as serving the most important of the competing individual and social interests involved." This rather verbose definition of legal cause can be condensed into the query: "For what purpose is this cause 'legally recognized'?" This "purpose" is a shorthand way of expressing public policy, and the pertinent public policy when discussing the fourth amendment is "protect[ion of] individual rights of privacy and liberty and ... regul[ation of] certain forms of governmental conduct."

In today's conservative, law-and-order-emphasizing society, it is easy to forget the need for the Fourth Amendment. The Fourth Amendment is often seen as a tool for the guilty to escape justice because of some technicality or some minor police mistake. It is also seen as unnecessary for law-abiding citizens, since they will never be hauled before a tribunal on criminal charges. Beliefs like these ignore the possibilities that laws often change quickly, and that today's law-abiding citizen could be tomorrow's white-collar criminal. The protections that the Fourth Amendment gives to actual criminals is incidental, because the Fourth Amendment's prevailing purpose is to protect the average citizen from overbearing police activities. Were it not for the Fourth Amendment, there would be no barrier to such overbearing police activities, and the average, law-abiding citizen would be imperiled by constant and possibly even capricious police interference. The Fourth Amendment public policy of individual protection from police interference is understandably (and lamentably) forgotten by citizenry concerned with a growing crime wave, but it is inexcusable when this policy is forgotten by a court in deciding when the highest level of police interference (a seizure of a person) occurs.

A court's making determinations of any nature requires not just a raw analysis of facts, but a weighing of facts against prevailing policy. This is as applicable in the realm of seizure law as in the realm of tort


law. Courts deciding Fourth Amendment issues should be able to consider as much of the police conduct as possible in making the final determination as to when a seizure occurred. In effect, the Court in *Hodari D.* does not trust the reasoning processes of other courts or even of itself, since it sets out a brightline rule that allows for no factors such as the Fourth Amendment policy to be read into the test. A court that focuses on actions as a result of the suspect’s choices instead of police actions as the legal cause for an event has limited this policy since they have “effectively foreclosed any inquiry into the reasonableness of the police conduct that motivated the suspect’s [actions]”; only when police action is considered a seizure is an inquiry into any justification in order.108 A court’s consideration that a suspect’s choice (to flee or to abandon evidence) serves as a “superseding cause”109 that removes responsibility from law enforcement officials “forces [a court] to ignore the catalyst that prompted a suspect’s decision to flee [or abandon evidence]” in the first place.110

A limitation of the doctrine of legal cause to Fourth Amendment seizures as envisioned by the *Hodari D.* Court’s brightline test would not “serve the Amendment’s purpose of regulating governmental conduct.”111 It has been suggested that:

It is consistent with the Fourth Amendment’s goal of regulating police misconduct and with elemental notions of fairness to require that one whose conduct contributes to another’s loss should justify his actions. When called upon to explain their role in contributing to a suspect’s loss of liberty, the police should offer the type of substantive justification recognized by the amendment, e.g., that the chase was prompted by probable cause, reasonable suspicion, or the like.112

The desirable end of judicial scrutiny of police misconduct can only happen if the United States Supreme Court “brings the chase within the coverage of the fourth amendment by broadly interpreting the nature of the causal link between the police action and the suspect’s reaction.”113 The dissent in *Hodari D.* tended to agree with this proposition, claiming

108. Bacigal, supra note 103, at 105.
109. A “superseding” or “intervening” cause in this case would be one that relies upon an act by the victim to break the chain of causation, a chain that links the act to police conduct. This breaking of the chain of causation would occur in cases where the “victim might easily have avoided the harm [and where it seems just to relieve the defendant [of responsibility for the damaging conduct].” Edgerton, supra note 105, at 362.
110. Bacigal, supra note 103, at 107.
111. Id.
112. Id. at 108-09 (citations omitted).
113. Id.
that "the character of the citizen's response [to law enforcement conduct] should not govern the constitutionality of the officer's conduct." The dissent drew on *Tennessee v. Garner*, in which an unarmed, fleeing thief was shot dead by a police officer. The Court in *Garner* refused to hold Garner responsible for the bullet that ended his life, instead holding the police officer responsible for this excess of force that resulted in the penultimate seizure of a person, by stopping their motion with a bullet. This holding was ignored in *Brower* and *Hodari D.*, however, with the Court saying that the consequences of the encounters/chases were not the responsibility of police actors as in *Garner*, but were the products of independent choices by the suspects. In his dissent, Justice Stevens dismissed the finding that Hodari's tossing of the drug gave the police the probable cause to seize him without consideration of the groundless police pursuit that led to the tossing; instead, Stevens supported a finding that "the constitutionality of a police officer's show of force should be measured by conditions that exist at the time of the officer's action," not by what heavy-handed police conduct later turns up. In the case of *Hodari D.*, no constitutional basis for the show of force, i.e., the chase, existed, and, thus, Stevens would have excluded the evidence seized as a result.

The Court's "double standard" of assigning responsibility in chase cases as opposed to cases where the officer used force on a suspect has also perplexed commentators other than this one. A possible motive could be that perhaps the Court made a policy decision in *Hodari D.* that weighed the individual's right to be let alone against the perceived urgencies of the crime explosion in America. Perhaps the necessity for overturning *Mendenhall* that Justice Stevens found lacking can be found in American society's desire to win the "War on Drugs" at all costs.

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114. California v. Hodari D., 111 S. Ct. 1547, 1560 (1991). The minority opinion, authored by Justice White, goes on to outline a "laundry list" of feared police excesses that will result from the majority's lack of "discouraging improper behavior on their part" by its failure "to recognize the coercive and intimidating nature of such behavior" and its creation of "a rule that may allow such behavior to go unchecked." Some of these possible excesses are: DEA agents approaching passengers in an airport with guns drawn, use of this intimidation to announce a baggage search, reliance upon the passengers' reactions (such as flight, discarding of objects, etc.) to "justify" the stop, and police firing at, but missing, suspects who continue to flee. Remember, it is not a seizure until they are touched by the bullet, or by the policeman, or if they yield to the Wyatt Earp-like display of force. 111 S. Ct. at 1552, 1561.


116. Id. at 4, 105 S. Ct. at 1697.

117. Id. at 7, 105 S. Ct. at 1699.

118. 111 S. Ct. at 1560.


120. See Bacigal, supra note 103, at 101.

121. See supra note 80.
Apparently, the majority decided that individual liberties must yield to the desire that society has for its police to be able to investigate suspects, especially those peddling drugs. *Garner* can be distinguished from *Hodari D.* as not concerning a problem involving the intricacies of when a seizure occurred, but one involving the bigger question of police reasonableness in shooting unarmed fleeing suspects. The threat was that police would have more and more leeway to use deadly force, but, in *Hodari D.*, the threat that the Court must consider is that the police will "merely" harass citizens, not kill them. The choice that the Court makes here is one that society is apparently willing to readily accept: safe streets over individual rights to be free from police interference. But this policy choice is not the only consideration that a court should make when deciding when a seizure has occurred; it should consider other factors before coming to a conclusion.

c. Police Intent to Seize as a Factor in Determination of the Moment of Seizure

One of the factors that a court should take into account when making the decision as to what the legal cause of evidence's abandonment is exhibited police intent to seize. Conditions surrounding the police/citizen interaction are helpful in determining if a seizure has occurred. The dissent in *Hodari D.* applied *Garner*’s holding to say also that, as in *Garner* where the Court evaluated the conditions surrounding the police officer’s actions at the time he decided to seize the suspect, so should a court look at circumstances surrounding police action in other seizures. The emphasis should not be just on whether or not the police action results in a touching or submission-based seizure, but should also consider the state of mind of the officer. In other words, not only should the reasonable belief of the suspect that he is not free to leave be examined, but the subjective intent on the part of the officer should be examined, as well.

This focus on the state of mind (or intent) of the officer as a factor in determining if a seizure occurred was mentioned in other opinions of the Court. In *Chesternut*, the Court stated that "the subjective intent of the officers is relevant to an assessment of the Fourth Amendment implications of police conduct only to the extent that the intent has been conveyed." The Court also pointed out that the subjective intent of the officers was not to "capture respondent, but to see where he was going." It would appear that if the intent and actions of the officers are such as to reasonably communicate to a person that he is

123. Id. at 573 n.6, 108 S. Ct. at 1980 n.6.
the subject of pursuit, that person would be "seized." This is the case because chases are "so intimidating that [a person] could [not] reasonably . . . believe . . . that he was . . . free to disregard the police presence and go about his business."124 The majority in Hodari D. apparently focused not on what a reasonable person would think of a chase, but what the suspect who ran actually thought; the Court apparently thought that if the suspect continues to run, he evidently thinks he is "free . . . to go about his business" and keep running. What the Court ignored is that the mere act of flight is insufficient to show a disregard for the police presence and a maintenance of one's business; if anything, it shows a conspicuous regard for the police presence to the extent that the suspect wishes to free himself of it as soon as possible. One could argue that perhaps the flight is a submission of sorts to police authority, and that the flight is a sign of recognition of the authority; the suspect recognizes that the police officer has the authority to arrest him, but he has no desire to be arrested and flees to avoid the effects of the authority. The distinction between viewing remaining still as submitting or running away as another form of submission is too fine for legal purposes, and, therefore, the chameleon of "submission" should not be a basis for a court's decision. After all this discussion on the problems of Hodari D., perhaps it is time that this author tried to point the way to a solution. In doing this, we will hopefully find the true nature of the right guaranteed by the Fourth Amendment.

\[d. \textit{What Do Precedents Like Mendenhall Protect?}\]

At this point, we must examine what rights are protected by precedents like Mendenhall. Is it the right to leave? If so, the suspect in Hodari D. can arguably be said to have exercised that right by departing from the scene, albeit hurriedly. Could it possibly be the right to be free from police interference? This author believes that this right to be free from police interference is the right protected by Mendenhall. The Fourth Amendment and the decisions that interpret it should have a broad construction in order to secure as many protections from police interference as are possible. In Hodari D., the police interfered with Hodari's right to be on \textit{that section} of the street, and their pursuit denied him access to other parts of the street. The police action did not prevent him from leaving, but it did interfere with his right to "go about his business," even if the business was selling crack to fellow teenagers. Granted, one does not have much sympathy for Hodari D., but take the following possibility: Tannix is sitting on a park bench and Jarnaby Bones, a nosy private eye, tells him to get off the bench

124. Id. at 573, 108 S. Ct. at 1981.
so he can stake out a divorcee going into a seedy motel. Tannix angrily refuses, claiming that he needs the bench for some investigating of his own. Harsky, a known police officer, tells Tannix to get off the park bench he is sitting on, with the command being given for no apparent reason. Tannix sullenly moves in deference to Harsky's command, since, after all, Harsky is a cop. If a court decided that not being "free to leave" is the requisite for seizure, Tannix has not been seized, for he is certainly free to leave. In fact, he was ordered to leave. A court, however, could focus on the interfering effect that the command had on Tannix's right to make his own decisions as to where he stays or goes. Asking Tannix to get up and move without any good reason may seem to be no real intrusion, but what if it happened again when Tannix moved to another bench and sat down? If another police officer told him to move, he still would be free to leave. And if it happened again? This game of "musical benches" could continue so long as there were enough willing officers to keep Tannix moving. Such commands would escape Fourth Amendment reasonableness review if the test for its applicability was a police interference with the right to leave, a right repeatedly exercised by Tannix (albeit at the policemen's insistence). The key is to look at the effect a police action or command has on a defendant's decisional freedom to be left alone or to decide if he wants to move or not, and, if there has been an effect without constitutional basis and with the intent to create such an effect, a court should hold that a seizure has occurred.\textsuperscript{125} Unfortunately, courts before \textit{Hodari D.} were loath to apply this test (as evidenced by \textit{Chesternut}), and, after \textit{Hodari D.}, will be even less likely to apply such a test that focuses on restriction of decisional freedoms.

As mentioned previously, any inquiry should focus on protecting individual rights by examining exactly what made the suspect produce the evidence. Although the present United States Supreme Court may have failed to make this inquiry in such a fashion as to protect individual rights, other courts, including the Supreme Court of Louisiana, have not. In its decision of \textit{State v. Saia},\textsuperscript{126} the Supreme Court of Louisiana handed down the first and possibly most extreme case on intent as an ingredient for the starting point of a seizure.

\textbf{B. Police Intent as an Ingredient of Legal Cause of a Suspect's Actions in the Louisiana Jurisprudence—State v. Saia}

In the landmark case of \textit{State v. Saia}, the Supreme Court of Louisiana was faced with a similar set of circumstances as the United States

\textsuperscript{125} It is only reasonable for a court to treat conduct as "intentionally creating an effect" when the officer knows or should know that his approach will produce a submission to authority, or, alternately, provoke a suspect's flight so as to avoid a physical restriction on his freedom of movement.

\textsuperscript{126} 302 So. 2d 869 (La. 1974).
Supreme Court encountered in Hodari D.. On August 18, 1972, two New Orleans patrolmen were driving by a residence known as an outlet for drugs. The officers saw defendant leave the residence and pulled up beside her, "at which time she put her hand inside the waistband of her pants . . . and walked back toward [the residence]."\(^{127}\) The officers alighted from their car, pursued the walking defendant from behind, and, as they approached the defendant, saw her pull out two envelopes of what appeared to be heroin. At this point, the officers grasped Saia's hand and removed two packets of heroin. At the defendant's trial, she filed a motion to suppress the evidence as the fruit of a seizure that lacked any reasonable suspicion and, thus, any constitutional basis.\(^{128}\)

In an opinion by then-Justice Dixon, the court conceded that the police had probable cause to arrest Saia "when the officers saw the glassine envelope in her hand."\(^{129}\) However, this was not when the defendant was seized; the defendant was seized when the "police officers sprang from their car and overtook the defendant."\(^{130}\) According to the court, the seizure occurred when the police "acted before they saw the envelope" and since they only saw the envelope when they overtook her, it followed that they must have "acted" when they initiated the pursuit.\(^{131}\) The court noted that the officer must have the right "to approach [the suspect] and by so doing intrude on the person's freedom of movement."\(^{132}\) The court said that "[p]olice cannot approach citizens under circumstances that make it seem that some form of detention is imminent unless they have probable cause to arrest the individual or reasonable grounds to detain the individual."\(^{133}\) The court emphasized that "the right to be let alone is of the utmost importance in a free society," and that the mere approach of a police officer so as to communicate that "some form of detention is imminent" should be with good cause since it is a seizure that intrudes upon this right to be "let alone."\(^{134}\) This test of seizure is similar to the ones espoused by the United States Supreme Court in Chesternut\(^{135}\) in that it examines police pursuit as a factor in communicating that a person is seized. However, Saia goes one step further and focuses on when the police officer decides to act, and evidences this intent to seize by initiating a pursuit as the brightline beginning point of a seizure, as opposed to the majority in Hodari D.'s emphasis on when the suspect is brought

\(^{127}\) Id. at 870.
\(^{128}\) Id.
\(^{129}\) Id. at 871.
\(^{130}\) Id. at 873.
\(^{131}\) State v. Saia, 302 So. 2d 869, 871 (La. 1974).
\(^{132}\) Id. at 873.
\(^{133}\) Id. (emphasis added).
\(^{134}\) Id.
to heel. According to the *Saia* test, "it is only when the citizen is actually stopped without reasonable cause or *when that stop is imminent* that the right to 'be let alone' is violated." 136 This holding is even more extreme than *Mendenhall* since it says that the suspect is seized when the seizure is imminent, unlike *Mendenhall*, which only deals with an imminent seizure of which the suspect is aware, and, taken in combination with other factors, would lead him to believe that he is not free to leave. In *Saia*, there is no requirement that the suspect even be aware that the seizure is imminent; the focus being instead upon when police decide that the suspect is not free to leave. Even if the suspect must be aware of the impending seizure, the decision clearly endorsed *Mendenhall* five years in advance as at least the minimum level of protection that an individual has for his right to be "let alone."

This holding came to grips with the reality that police approaches often cause persons to act in a different fashion than they otherwise would act. *Saia* realized that officers are aware of this facet of human nature, and it sought to deter groundless threatening approaches in the hope of "scaring" evidence up by applying exclusion to them. As the court said in a later case discussing *Saia*,137 "[a]l the foundation of *Saia* is the proposition that police officers may not reap the benefits of their unlawful intrusion into a citizen's freedom of movement." 138 It is clear that the United States Supreme Court in *Hodari D.* would take issue with the test of *Saia*, claiming that only when the actions bore fruit, as in a touching of or submission by the suspect, would there be a seizure. More in line with current United States Supreme Court thinking was the dissent in *Saia* by Justice Summers.139 The dissent asserted that the seizure did not occur "until the officers actually laid hands upon the defendant and detained her, announcing that she was arrested." 140 Justice Summers said that "no invasion of defendant’s privacy resulted when the officers drove up alongside her and then alighted from their car to question her." 141 Just as the Court in *Hodari D.* decided that the defendant was not seized until touched, so Summers postulated in *Saia*. Some of the statements made by Summers in *Saia* and Scalia in

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137. *Ryan*, 358 So. 2d 1274.
138. Id. at 1276.
139. *State v. Saia*, 302 So. 2d 869, 875 (La. 1974). It is interesting to note that, in his dissent, Justice Sanders believes that the defendant's evasive maneuvers, coupled with the area being a high-crime area and defendant's alighting from the "drug outlet," were enough to give the police probable cause to stop her. It is an interesting coincidence that many of the same factors existed in *Hodari D.*, and it is another interesting coincidence that Sanders assigns significant weight to the defendant's flight (like the majority in *Hodari D.*). Perhaps Justice Sanders believed that "The wicked flee when no man pursueth."
140. Id. at 877.
141. Id.
Hodari D. are so parallel as to be almost eerie. Both opinions suffer from a similar flaw in that they both ignore the realities of police/citizen encounters.

C. The Realities of Seizure

In the Court's majority opinion in Hodari D., the Court pointed out that a police officer does not give commands expecting to be ignored. The Court was correct in this assessment, but it did not realize that, in past decisions like Brown, discussed supra, it had given the "green light" to citizens to ignore police commands. Despite this judicial endorsement of the "right to be let alone," the realities of the situation are very different. When a policeman commands a person to stop, he has technically seized that person. If the person decides to ignore the command, he is sure to become the subject of a physical touching when the policeman grabs him in anger at his being ignored. Police have always subjectively decided that a suspect is not free to leave when they command him to stop. In State v. Grogan, for example, a suspect attempted to exercise the right to refuse an encounter with police by running away and was caught and arrested for resisting an officer. In State v. Shy, Justice Dennis, commenting upon the arresting officer's intent not to allow the suspect to break off an encounter, noted this reality in a dissenting opinion:

Once the confrontation was forced by the officers, it is fanciful to suppose that the defendant was free to walk away. The officers admitted in their testimony that if the defendant had attempted to leave he would have been stopped by force. If both officers and the defendant knew that the defendant would be physically restrained if he had tried to walk away, it is legalistic, but not realistic, to pretend that an ordinary citizen would be aware of or believe in, much less rely upon, the majority's shibboleth, viz, "the mere fact that police approach a citizen and address him does not compel that citizen to respond

142. Perhaps even more fascinating are conclusions that Justice Summers makes regarding "furtive actions and flight" at the approach of law enforcement officers. Id. at 878, citing Peters v. New York, 392 U.S. 40, 88 S. Ct. 1912 (1968). He notes that these actions are strong indicia of mens rea, and, like the majority in Hodari D., would give them great weight in evaluating a police officer's "reasonable suspicion" to seize a suspect. 302 So. 2d at 877.
144. See supra note 17.
145. 373 So. 2d 1300 (La. 1979).
146. Id. at 1301.
147. 373 So. 2d 145 (La. 1979).
to the inquiries or comply with their request; legally, nothing prevents his choosing not to answer and walking away." It would be difficult to find in the annals of the law any instance in which a citizen had successfully exercised this right . . . .\footnote{Id. at 149.}

If both the police and citizenry believe that a person is not free to leave (seized) when an officer calls out to him, it seems that a court, in view of this reality, should consider that person seized under the Fourth Amendment. If police know that their commands or actions in approaching a citizen (so long as no touching or submission is involved) will cause a citizen to act in a certain way, it defies rationality to allow this potentially powerful police tactic to escape Fourth Amendment scrutiny. The \textit{Hodari D.} Court, however, has pronounced a decision that does just that.

What Justice Scalia meant when he said that police will not give commands "expecting to be ignored" was that, in his opinion, police never give overbearing commands in the hope that they will be disobeyed by panicky suspects and evidence will appear as a result of that disobedience. For example, police in Justice Scalia's perfect world will never yell, "stop right where you are!" at suspicious characters on inner-city streets in the hope of panicking them into abandoning evidence. Justice Scalia, along with the majority of the Court, forgets the reality that most street criminals are nervous people with guilty consciences, whose minds say that when police officers speak to them in this manner, arrest and an ensuing search are imminent, and that, in their opinion, the wisest course of action is to abandon incriminating evidence.

Concerns like the ones previously mentioned have eluded the majority of the United States Supreme Court in \textit{Hodari D.} Justice Summers appears to have proven the old adage "today's dissent is tomorrow's law," and the burning question on everyone's mind is, or at least should be, in light of \textit{Hodari D.}, is \textit{Saia} still good law?

\textbf{V. WHITHER LOUISIANA?}

It is a well-accepted premise that "[t]he traditional guarantee against unreasonable searches and seizures [created by the Fourth Amendment of the United States Constitution] is cemented and expanded by\textsuperscript{149} Article I, section 5 of the Declaration of Rights of the Louisiana

Constitution of 1974.\textsuperscript{150} The clearest example of this "broadening" of guarantees is the section on increased standing (anyone "adversely affected"), as opposed to the federal standard of "anyone with a reasonable expectation of privacy" that has been violated\textsuperscript{151} that "supports a desire to go far beyond federal standards."\textsuperscript{152} The Louisiana courts have not felt limited by the text of the article in granting greater protections from police intrusion to citizens, nor do they feel obligated to follow federal precedent in the realm of search and seizure. A clear example of this was the decision in \textit{State v. Hernandez}.\textsuperscript{153}

\textit{Hernandez} involved a defendant who was arrested as he got out of his car in his driveway after a DWI chase by police. Despite Hernandez's post-arrest demands that no one drive his car, police prepared it for towing by "inspecting" the interior.\textsuperscript{154} This "inspection" yielded marijuana, and the defendant was tried and convicted of possession of marijuana.\textsuperscript{155} Any attempt to justify the search under the then-new rule of \textit{New York v. Belton}\textsuperscript{156} was squelched by the court, which looked not to the Fourth Amendment of the United States Constitution for support, but to Article 1, section 5 of the \textit{Louisiana} Constitution of 1974.\textsuperscript{157} In carving out a new, separate destiny for Louisiana search and seizure law, the court remarked that:

\begin{quote}
We, of course, give careful consideration to the United States Supreme Court interpretations of relevant provisions of the federal constitution, but we \textit{cannot and should not allow those decisions to replace our independent judgment in construing the constitution adopted by the people of Louisiana}.\textsuperscript{158}
\end{quote}

\begin{enumerate}
\item[150.] 1H88 La. Const. art. 1, § 5 provides:
\begin{quote}
\textit{Right to Privacy}
\end{quote}
\begin{itemize}
\item Every person shall be secure in his person, property, communications, houses, papers, and effects against unreasonable searches, seizures, or invasions of privacy. No warrant shall issue without probable cause supported by oath or affirmation, and particularly describing the place to be searched, the persons or things to be seized, and the lawful purpose or reason for the search. Any person adversely affected by a search or seizure conducted in violation of this Section shall have standing to raise its illegality in the appropriate court.
\end{itemize}
\item[152.] Hargrave, supra note 149, at 22.
\item[153.] 410 So. 2d 1381 (La. 1982).
\item[154.] Id. at 1383.
\item[155.] Id.
\item[156.] The "Belton rule" allowed a police officer who has arrested the occupant of a vehicle to search the passenger compartment of the vehicle "as a contemporaneous incident of that arrest." \textit{Hernandez}, 410 So. 2d at 1384. See also \textit{New York v. Belton}, 453 U.S. 454, 101 S. Ct. 2860 (1981) for a more detailed discussion of this search incident to arrest.
\item[157.] \textit{Hernandez}, 410 So. 2d at 1385.
\item[158.] State v. Hernandez, 410 So. 2d 1381, 1385 (La. 1982) (emphasis added).
\end{enumerate}
Referring to Article 1, section 5, the court remarked that:

This constitutional declaration of right is not a duplicate of the Fourth Amendment or merely coextensive with it; it is one of the most conspicuous instances in which our citizens have chosen a higher standard of liberty than that afforded by the jurisprudence interpreting the federal constitution. ¹⁵⁹

*Hernandez* was not the last time that Louisiana courts refused to apply "jurisprudence interpreting the federal constitution" that did not meet with Louisiana approval. *State v. Church* ¹⁶⁰ saw a challenge of the constitutionality of DWI roadblocks on a state level; federally, roadblocks could have been, and later were, decided to be, reasonable invasions of privacy.¹⁶¹ The court held that:

although this . . . DWI roadblock may meet federal constitutional standards, . . . [such] seizure[s are] without reasonable suspicion or probable cause . . . and [are] unconstitutional under Article 1, § 5 of the Louisiana Constitution of 1974.¹⁶²

With these two precedents behind us, it is easy to see that Louisiana has the "gumption" to disregard federal precedent, and to scrutinize police action in the light of the higher standards of the Louisiana Constitution. Given Louisiana's greater emphasis on the "right to privacy" (it is specifically enumerated in our text, but must be inferred to exist from the federal Bill of Rights), the odds are high that Louisiana courts will do their "duty" as they see it and refuse to honor *Hodari D.* as binding precedent in this state. As Justice Watson pointed out in *Church* regarding police infringements on the individual's right to "be let alone":

It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their footing in that way, namely: by silent approaches and

¹⁵⁹. Id.
¹⁶⁰. 538 So. 2d 993 (La. 1989).
¹⁶¹. In Brown v. Texas, 443 U.S. 47, 99 S. Ct. 2637 (1979), the Court decided that seizures are reasonable if a weighing of factors favors their existence, such as the "gravity of the problem, the degree to which the seizure serves the public concern, and the extent of the interference with individual liberty." (Cited in State v. Parms, 523 So. 2d 1293, 1295 (La. 1988)). Michigan v. Sitz, 110 S. Ct. 2481, 2488 (1990), settled DWI roadblocks' constitutionality:

In sum, the balance of the state's interests in preventing drunken driving, the extent to which this system can reasonably be said to advance that interest, and the degree of intrusion upon individual motorists who are briefly stopped, weighs in favor of the state program. We therefore hold that it is consistent with the Fourth Amendment.

¹⁶². *Church*, 538 So. 2d at 997-98.
slight deviations from legal modes of procedure. . . . It is the
duty of courts to be watchful for the constitutional rights of
the citizen, and against any stealthy encroachments thereon.\(^{163}\)

The United States Supreme Court’s decision in \textit{Hodari D.}, allows
for this type of “stealthy encroachment” on individual rights to be “let
alone,” all in the name of law and order, and is, in this author’s
opinion, a symptom of a society that is willing to trade more and more
of its fundamental rights for a sense of security from the shadow of
crime. The opinion in \textit{Hodari D.} is evidence of a phenomenon noted
by past citizens of this great land:

It is not strange . . . that such an exuberance of enterprise
should cause some individuals to mistake change for progress,
and the invasion of the rights of others for national prowess
and glory.\(^{164}\)

Hopefully, in time, this “exuberance” will not yield to the harsh realities
of a citizenry deprived of its freedom from unwarranted police inter-
ference, but instead, will yield to the calm of rational thinking, and a
return to the reasonable approach of \textit{Mendenhall} and its progeny. If
not, the Supreme Court of this land may have said “Goodbye To All
That” freedom from aggressive police interference, and “Hello” to an
era of broad, unreviewable police power.

\textit{Randolph Alexander Piedrahita}

\footnotesize

163. Id. at 997, citing Boyd v. United States, 116 U.S. 616, 635, 6 S. Ct. 524, 535
(1886).
164. M. Fillmore, Third Annual Address, December 6, 1852, as found in Bartlett’s
Familiar Quotations 396 (11th ed. 1939).