

A UNIFIED THEORY FOR SEIZURES OF THE PERSON

*Ronald Bacigal**

INTRODUCTION.....	915
I. THE EVOLUTION OF <i>TERRY</i> AND ITS PROGENY	916
II. THE QUEST FOR UNITY.....	923
III. A PROPOSAL FOR UNIFICATION.....	927
IV. A ROLE FOR <i>MENDENHALL</i> ?	934
CONCLUSION: THE PROPOSED UNIFIED THEORY	936

INTRODUCTION

Perhaps there is something about the final stages of their careers that causes people to resolve conflicts by reconciling the seemingly irreconcilable. Albert Einstein spent the last days of his career searching for a unified field theory that would eliminate the contradictory laws governing relativity and quantum mechanics.¹ Stephen Hawking has taken up this quest which has been renamed a search for the Theory of Everything.²

On a “slightly” more modest level, I find the later stages of my career drawing me toward formulating a unified theory governing seizures of the person. The challenge is to blend three different tests the Supreme Court has applied when defining a Fourth Amendment seizure. These tests were articulated, over a

* Professor of Criminal Law, Criminal Procedure & Evidence, University of Richmond School of Law. B.S., Concord University; LL.B., Washington & Lee University.

¹ James R. Hackney, Jr., *The “End” of: Science, Philosophy, and Legal Theory*, 57 U. Miami L. Rev. 629, 632 (2003) (“Einstein would end his career in science searching for a “unified field theory” that would serve as the type of totalizing theory of the physical world that Newton had been thought to have constructed. It was a failed effort.”).

² See STEPHEN HAWKING & LEONARD MLODINOW, *THE GRAND DESIGN* (2010). A Theory of Everything (TOE) is a putative theory of theoretical physics that fully explains and links together all known physical phenomena, and predicts the outcome of any experiment that could be carried out *in principle*. See *id.*

period of eleven years, in *United States v. Mendenhall*,³ *Brower v. County of Inyo*,⁴ and *California v. Hodari D.*⁵ Before addressing those cases, however, we must begin at the beginning with an examination of *Terry v. Ohio*.⁶ Not to belabor the references to physics, but *Terry* is the big bang that starts the modern world of variable levels of seizures of the person.

I. THE EVOLUTION OF *TERRY* AND ITS PROGENY

All students of the Fourth Amendment can recite the facts of *Terry*:

While on patrol, Officer McFadden observed the action of three men he suspected of “casing a job, a stickup.” He approached the three men, identified himself as a police officer and asked for their names. When the men “mumbled something” in response to his inquiries, Officer McFadden grabbed petitioner Terry, spun him around so that they were facing the other two, with Terry between McFadden and the others, and patted down the outside of his clothing. In the left breast pocket of Terry’s overcoat Officer McFadden felt a pistol.⁷

What is often overlooked when discussing *Terry* is that the opinion actually said very little about defining the initial seizure of the person. This oversight is not the Court’s fault because it cautioned that “[t]he crux of this case, however, is not the propriety of Officer McFadden’s taking steps to investigate petitioner’s suspicious behavior, but rather, whether there was justification for McFadden’s invasion of Terry’s personal security by searching him for weapons in the course of that investigation.”⁸

³ 446 U.S. 544 (1980).

⁴ 489 U.S. 593 (1989).

⁵ 499 U.S. 621 (1991).

⁶ 392 U.S. 1 (1968).

⁷ *Id.* at 4-7.

⁸ *Id.* at 23. Less there be any doubt the Court was dodging the constitutionality of the initial stop, footnote 16 went on to explain:

We thus decide nothing today concerning the constitutional propriety of an investigative “seizure” upon less than probable cause for purposes of “detention” and/or interrogation. . . . We cannot tell with any certainty upon this record whether any such “seizure” took place here prior to Officer McFadden’s initiation of physical contact for purposes of searching Terry for

The *Terry* opinion ignored the officer's initial approach to the suspects—the stop half of stop-and-frisk—and instead focused on the frisk part that occurred when the officer spun the defendant around and patted his outer clothing. The fundamental issue in *Terry* was not whether the government established some physical control of the person—that was undisputed. The issue was the degree of control required for a Fourth Amendment seizure.⁹ Prior to *Terry*, the Amendment had covered only full custodial arrests,¹⁰ and *Terry* had not been arrested when he was patted down. The significance of *Terry* was to shatter the monolithic view that an arrest was the only type of seizure that counted.¹¹ *Terry* adopted the approach that we now take for granted—that the Fourth Amendment is flexible enough to take account of different levels of seizures, which require different levels of justifications. Thus, the frisk in *Terry* constituted a lesser seizure than an arrest, which accordingly could be justified by a lower standard of reasonable suspicion, instead of probable cause.

Following *Terry*, a number of cases touched on the initial seizure of a citizen, but it was not until 1980 in *United States v. Mendenhall*, that the Supreme Court definitively addressed the issue it had sidestepped in *Terry*—the stop half of stop-and-frisk.¹² There was no frisk in *Mendenhall*, which was the first of the airport encounter cases involving DEA agents approaching a suspected drug courier in an airport concourse in order to ask her questions—the stop and interrogate situation that *Terry* ignored.¹³ The *Mendenhall* Court now focused on the initial encounter

weapons, and we thus may assume that up to that point no intrusion upon constitutionally protected rights had occurred.

Id. at 19 n.16.

⁹ *Id.* at 16-31.

¹⁰ *Id.* at 19 (rejecting “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’”).

¹¹ *Id.* at 16 (“It is quite plain that the Fourth Amendment governs ‘seizures’ of the person which do not eventuate in a trip to the station house and prosecution for crime—‘arrests’ in traditional terminology.”).

¹² *United States v. Mendenhall*, 446 U.S. 544, 552-53 (1980) (“What was not determined in [*Terry*], however, was that a seizure had taken place before the officer physically restrained *Terry* for purposes of searching his person for weapons.”).

¹³ *See id.*; *see also* *United States v. Place*, 462 U.S. 696 (1983); *Florida v. Royer*, 460 U.S. 491 (1983).

between police and citizen, and whether that interaction constituted a Fourth Amendment seizure or a wholly voluntary encounter beyond the Amendment's coverage. Unlike Officer McFadden in *Terry*, the DEA agents in *Mendenhall* were not physically spinning the suspect around and patting her down; rather, they were asking for, or demanding, identification and that she submit to interrogation.¹⁴ Based on these facts, the Court formulated its initial definition of a seizure: "[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."¹⁵ The Court concluded that the defendant in *Mendenhall* had not been seized when first approached in the concourse, nor when she voluntarily went to another room and consented to a strip search.¹⁶

Three years later in *Florida v. Royer*, the *Mendenhall* test was applied to a similar airport encounter between the suspect and the police, but with drastically different results.¹⁷ Now, not only had the defendant been seized, he had been arrested,¹⁸ which required full probable cause,¹⁹ not the lower standard of reasonable suspicion established in *Terry*. *Royer* also fleshed out *Mendenhall's* test for seizures by listing the factors that are relevant in determining which of three possibilities had occurred: (1) a wholly voluntary encounter—not covered by the Amendment; (2) a limited detention—covered, but justified by a lower standard of reasonable suspicion; or (3) a full custodial arrest necessitating compliance with all Fourth Amendment requirements.²⁰

¹⁴ Compare *Terry*, 392 U.S. at 7 ("Officer McFadden grabbed petitioner Terry, spun him around so that they were facing the other two [men], with Terry between McFadden and the others, and patted down the outside of his clothing."), with *Mendenhall*, 446 U.S. at 548 ("Agent Anderson asked the respondent if she would accompany him to the airport DEA office for further questions. She did so, although the record does not indicate a verbal response to the request.").

¹⁵ *Mendenhall*, 446 U.S. at 554 (citation omitted).

¹⁶ *Id.* at 557-60.

¹⁷ *Florida v. Royer*, 460 U.S. 491 (1983).

¹⁸ *Id.* at 494-95.

¹⁹ *Id.* at 507 ("We agree . . . that probable cause to arrest Royer did not exist at the time he consented to the search of his luggage.").

²⁰ *Id.* at 497-501.

Even after *Royer's* helpful categorization of varying degrees of encounters between police and citizens, problems remained with *Mendenhall's* reasonable perception test, both in theory and in application. The first question that arose was whether *Mendenhall's* reasonable perceptions standard was a supplement to, or a substitute for, *Terry's* emphasis on the corporeal restraint that occurred when the defendant was frisked. In other words, if there is a conflict between reality and perception, which factor is controlling? The question posed is the Fourth Amendment's variation on a classic query for beginning students of epistemology—if a tree falls in the forest and no one hears it, has there still been a sound? In the Fourth Amendment context, the riddle arises in a situation where police officers surround a suspect's dwelling to ensure that he does not depart the premises, but the suspect remains unaware of the officers' presence.²¹

This hypothetical situation demonstrates that at least a partial restriction of the defendant's liberty²² may occur without his awareness of that fact, just as a clandestine search of the defendant's property, known as a "black bag job," may occur without his knowledge.²³ If *Mendenhall's* focus upon a person's perceptions trumps any actual but secret restraint, the definitions of searches of property and seizures of a person are strangely juxtaposed. A covert governmental intrusion upon privacy triggers Fourth Amendment protections, while a covert intrusion upon an individual's liberty or freedom of movement lacks constitutional significance until it is accompanied by perception of the intrusion.

The other half of the *Terry/Mendenhall* paradox was whether the Fourth Amendment applied when there was the perception,

²¹ The hypothetical is based on the facts of *State v. White*, 838 P.2d 605 (Or. Ct. App. 1992), where police surrounded the defendant's dwelling and the defendant complied with the order that he exit the dwelling. The majority and concurring opinions differed as to whether the defendant had been seized while still inside the house, or not until he had exited the dwelling. Compare *id.* at 609-12 (Durham, J., concurring), with *id.* at 608 (majority opinion).

²² Although the suspect remains free to move about inside his residence, he is not free to depart. Cf. *INS v. Delgado*, 466 U.S. 210, 218 (1984) (holding that no seizures occurred by stationing guards at exits because the guards' purpose was not to prevent exit, but to ensure that all persons were questioned).

²³ See Lloyd L. Weinreb, *Generalities of the Fourth Amendment*, 42 U. CHI. L. REV. 47, 53 (1974) ("A person's home is a place that he expects will not be invaded whether he is present or absent.").

but not the reality, of restraint—that is, someone believes he heard a falling tree, but in fact no tree fell. For example, consider the “mistaken motorist” hypothetical, where a motorist observes an officer in a trailing police car activate the car’s siren and flashing lights. As the motorist pulls over to the side of the road, believing that the police have ordered him to stop, the police pass him by in order to stop a vehicle further down the highway.²⁴ The motorist’s mistaken, but perfectly reasonable, perception of government imposed restraint satisfies the *Mendenhall* test for a seizure of the person, even though the police never exercised any control over the motorist’s freedom of movement.²⁵

This aspect of the riddle—can perception outweigh reality—was partially resolved in *Brower v. County of Inyo*, where the Court answered a variation on the mistaken motorist hypothetical by supplementing the *Mendenhall* test for seizures with a second test.²⁶ *Brower* held that the Fourth Amendment does not encompass “the accidental effects of otherwise lawful government conduct,”²⁷ and that no seizure occurs unless the police utilize “means intentionally applied”²⁸ to bring about the seizure.

The actual holding of *Brower* is not surprising—a motorist eluding pursuing police was seized at the point that he was stopped by a police roadblock erected for the very purpose of stopping him.²⁹ The controversial aspect of *Brower* arose from the Court’s holding that no seizure occurred during the twenty-mile chase leading up to the roadblock, and the Court’s agreement with the Sixth Circuit that no seizure occurred in *Galas v. McKee*, a case in which a fleeing suspect lost control of his vehicle and crashed during a high-speed chase with the police.³⁰ The Sixth

²⁴ See *State v. Indvik*, 382 N.W.2d 623, 627 (N.D. 1986) (“There may be several motorists in the vicinity of an officer when he uses his flashing red lights. To constitute a stop by the use of flashing red lights, the officer must have the intent to stop the specific motorist and the motorist must be cognizant of the officer’s presence.”).

²⁵ In the hypothetical, there is *self-imposed* restraint but only an erroneous perception of *government* restraint.

²⁶ *Brower v. County of Inyo*, 489 U.S. 593 (1989).

²⁷ *Id.* at 596.

²⁸ *Id.* at 597 (emphasis omitted).

²⁹ *Id.* at 599 (Authorities “sought to stop Brower by means of a roadblock and succeeded in doing so. That is enough to constitute a ‘seizure’ within the meaning of the Fourth Amendment.”).

³⁰ *Id.* at 595; see also *Galas v. McKee*, 801 F.2d 200, 203 (6th Cir. 1986).

Circuit explained in *Galas* that no seizure occurred because the “restraint on plaintiff’s freedom to leave [the crash] . . . was not accomplished by the show of authority but occurred as a result of plaintiff’s decision to disregard it.”³¹ The chases in both *Galas* and *Brower* obviously satisfied the *Mendenhall* test because reasonably prudent people certainly understand they are not free to leave when a pursuing police car activates sirens and flashing lights. *Brower*, however, taught that the reasonable perceptions of the *Mendenhall* test are not enough to trigger Fourth Amendment protections.

After *Brower*, there were now two tests for defining a seizure, but they were not inherently inconsistent because both *Brower* and *Mendenhall* can be satisfied by one set of facts, e.g., the very facts of *Brower*. But there are other situations where the two tests may conflict. For example, suppose a citizen thinks he is free to depart from what he perceives to be a wholly voluntary and cordial encounter with police—“Lovely day, isn’t it officers? Who do you think will win the Super Bowl?” But, in fact, this citizen is not free to leave because the police secretly have decided they will stop him should he try to depart. The officers’ intent satisfies *Brower*, but *Mendenhall*’s requirement for a perception of restraint is absent.

Another problem in reconciling *Mendenhall* and *Brower* is that although *Brower*’s language regarding police intent eliminated accidental, or rather unintended, seizures from Fourth Amendment coverage, it did not establish the point at which an *intended* seizure becomes an accomplished seizure. If an officer turns on a police car’s siren and flashing lights with the intent to seize a motorist, does a seizure occur when the siren and lights are activated, where the intent to seize is present and also perceived by the suspect, or only when the motorist acquiesces to this show of authority by stopping his vehicle?³²

³¹ *Galas*, 801 F.2d at 203.

³² Justice Stevens posed another wrinkle to this hypothetical:

[T]here will be a period of time during which the citizen’s liberty has been restrained, but he or she has not yet completely submitted to the show of force. A motorist pulled over by a highway patrol car cannot come to an immediate stop, even if the motorist intends to obey the patrol car’s signal. If an officer decides to make the kind of random stop forbidden by [*Delaware v. Prouse*, 440 U.S. 648 (1979)], and, after flashing his lights, but before the

The Court answered this question in *California v. Hodari D.* by announcing a third test for defining a seizure of the person—police intent to restrain a defendant lacks constitutional significance until the defendant is successfully apprehended.³³ Thus, *Hodari D.* did for attempted seizures what *Brower* had done for accidental seizures. Attempted seizures were placed beyond the coverage of the Fourth Amendment because a seizure occurs only when the government successfully controls the citizen, either by corporeal restraint or by obtaining his submission to a show of authority.³⁴

Hodari D., like *Brower*, involved police pursuit of a fleeing suspect, this time on foot rather than by automobile. Prior to being tackled by a police officer—an undisputed seizure—the fleeing suspect discarded crack cocaine, which the police subsequently retrieved.³⁵ The issue was whether the crack cocaine should be suppressed as the fruit of an illegal seizure—the chase—or whether the crack cocaine was discarded prior to what could be deemed to be the only seizure that occurred—the tackling of the suspect.³⁶ The California courts found that a seizure had occurred during the chase itself because they applied the two existing tests to the facts of *Hodari D.*³⁷ The police clearly intended to seize the defendant—satisfying the *Brower* test—and a reasonably prudent person would perceive he lacked the freedom to leave—satisfying the *Mendenhall* test—even though he still possessed the physical ability to flee.³⁸ But to the United States Supreme Court, neither the reasonable perceptions test of *Mendenhall*, nor the intentional means test of *Brower* were enough to constitute a seizure until police completely eliminated the suspect's physical ability to escape.³⁹ *Mendenhall* and *Brower*

vehicle comes to a complete stop, sees that the license plate has expired, can he justify his action on the ground that the seizure became lawful after it was initiated but before it was completed?

California v. Hodari D., 499 U.S. 621, 645 (1991) (Stevens, J., dissenting).

³³ *Id.* at 629.

³⁴ *Id.* (“In sum, assuming that [Officer] Pertoso’s pursuit in the present case constituted a ‘show of authority’ enjoining Hodari to halt, since Hodari did not comply with that injunction he was not seized until he was tackled.”).

³⁵ *Id.* at 623.

³⁶ *Id.* at 624.

³⁷ *Id.*

³⁸ *See id.* at 625-26.

³⁹ *See id.* at 627-28.

were necessary, but not sufficient, predicates because the Court now explained that so long as the suspect was eluding the police, there was only an attempted seizure, which is not covered by the Fourth Amendment.⁴⁰

With the decision in *Hodari D.*, the Court completed an eleven-year process of fashioning three tests for a seizure of the person. In the twenty years since *Hodari D.*, the Court has either dealt with each of the three tests in isolation, or has addressed cases where there was little question that all three tests were met. The Court, however, has said little about the relationship and possible conflict between these tests. Must all three tests be satisfied in all cases? Are two out of three close enough for government work? Or can any of the three stand alone and be sufficient in the right case? Somehow, *Terry's* initial consideration of seizures evolved into this puzzling patchwork of three tests that are sometimes complementary and sometimes inconsistent.

II. THE QUEST FOR UNITY

Within the legal universe of the Fourth Amendment, lawyers can follow the lead of Einstein, Hawking, and other physicists in searching for a unified theory. At first blush, it appears that the physicists have an advantage over lawyers because physicists need only reconcile two conflicting principles: quantum mechanics and relativity. In contrast, the law must reconcile the three theories set forth in *Mendenhall*, *Brower*, and *Hodari D.* Yet, in the end, the physicists may have the tougher task because they are in uncharted territory, while we lawyers have the benefit of a prototype. In contrast to the multiple definitions of seizures of a person, the Court has provided a more unified theory of Fourth Amendment searches.

In his concurring opinion in *Katz v. United States*, Justice Harlan formulated a single definition of Fourth Amendment searches subsequently adopted by the full Court.⁴¹ Once the defendant subjectively desires privacy, a search occurs when the government intrudes upon an expectation of privacy “that society

⁴⁰ *Id.*

⁴¹ 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

is prepared to recognize as ‘reasonable.’”⁴² *Katz* announced that the Amendment “protects people, not places,”⁴³ and discarded prior definitions of a search that had focused on a factual requirement for a physical trespass.⁴⁴ In place of this factual predicate, *Katz* launched an inquiry into a broad societal view of expectations of privacy.⁴⁵

What makes *Katz* a useful prototype for defining the coverage of the Fourth Amendment is the fundamental difference between *Mendenhall*'s limited focus on a reasonably prudent person's perceptions of freedom to leave—a factual inquiry—versus *Katz*'s expansive focus on society's recognition of reasonable expectations of privacy. The *Mendenhall* approach is descriptive of current perceptions, while the *Katz* approach is proscriptive. *Mendenhall* tells us what we currently expect, while *Katz* tells us what we have a right to expect—“what we should demand of government.”⁴⁶

Consider how the two distinct approaches would apply to this hypothetical: As part of an effort to stem a rising tide of underwear bombers boarding planes, the government announces a new program of strip-searching all passengers. Once that program is in place, no reasonable person could expect privacy at an airport security checkpoint. But under *Katz*, the issue is whether society will tolerate those strip searches.

Katz's unified approach to searches means that all government intrusions upon privacy must be measured against but a single standard—society's reasonable expectations of

⁴² *Id.* at 361.

⁴³ *Id.* at 351.

⁴⁴ The Court stated:

Thus, although a closely divided Court supposed in *Olmstead [v. United States]*, 277 U.S. 438 (1928) that surveillance without any trespass and without the seizure of any material object fell outside the ambit of the Constitution, we have since departed from the narrow view on which that decision rested. . . . [O]nce it is recognized that the Fourth Amendment protects people – and not simply ‘areas’ – against unreasonable searches and seizures it becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure.

Katz, 389 U.S. at 353.

⁴⁵ *Id.* at 361.

⁴⁶ Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 384 (1974).

privacy.⁴⁷ Given this unified theory of searches, we are left to wonder why the seizure of a person involves three separate inquiries: a reasonably prudent person's perceptions; the actual defendant being restrained or submitting to a show of authority; and the government's intent to seize. Conspicuously missing from the three tests is any mention of society's view of what constitutes a seizure. The language of the Fourth Amendment, which equally prohibits unreasonable searches and seizure of "persons, houses, papers, and effects,"⁴⁸ does not support this drastic distinction between seizures of the person and searches of a person's property.

The seminal decisions defining searches and seizures, *Katz* and *Terry*, also fail to support the distinction drawn by the current Court. Prior to *Katz*, the Court had held that physical trespass to the defendant's property was a necessary factual predicate for the triggering of the Amendment's coverage of governmental searches.⁴⁹ When *Katz* shifted the Amendment's focus from property rights to the fundamental right of privacy, the requirement for a physical trespass was discarded. Despite warnings that "the Fourth Amendment cannot be translated into a general constitutional 'right to privacy,'" ⁵⁰ post-*Katz* litigation has centered on the privacy issue and the Court's need to determine which privacy values are recognized by society as "justifiable" or "legitimate" and, therefore, protected by the Amendment. Because justifiable expectations of privacy may differ from expectations currently held by "reasonable" members of society, those current expectations have been supplemented by the Court's examination of history,⁵¹ property rights,⁵² natural law,⁵³ and utilitarian balancing.⁵⁴

⁴⁷ While a search involves privacy considerations, the Fourth Amendment also protects property interests even when privacy or liberty interests are not involved. *See Soldal v. Cook County*, 506 U.S. 56, 58 (1992) (police seized and removed, without entering, the plaintiff's mobile home during an unlawful eviction).

⁴⁸ U.S. CONST. amend. IV.

⁴⁹ *See supra* note 40 and accompanying text.

⁵⁰ *Katz*, 389 U.S. at 350.

⁵¹ *See United States v. Watson*, 423 U.S. 411, 415-16 & n.4 (1976).

⁵² *See Rakas v. Illinois*, 439 U.S. 128, 143 & n.12 ("Legitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society.").

When Fourth Amendment analysis turns from searches of property to seizures of the person, the focal point of judicial scrutiny shifts from privacy interests to the citizen's fundamental interests in liberty⁵⁵ and freedom of movement.⁵⁶ This change in focus merely presents a different context in which the Court might be called upon to identify those societal values that the Fourth Amendment recognizes as legitimate or justifiable. In fact, because concepts of privacy and liberty often overlap, they can be seen as facets of the Amendment's overarching concern with protecting personal autonomy, what *Olmstead* referred to as "the right to be let alone . . . the right most valued by civilized men."⁵⁷ Thus, the methodology utilized to identify legitimate privacy expectations would seem to apply equally to determinations of legitimate liberty expectations.⁵⁸ We are left to wonder why the seizure cases are not following *Katz* in asking whether the government action intruded on an expectation of liberty that society is prepared to recognize as reasonable.

Katz and *Terry*, decided within a year of one another, also share a common characteristic of expanding Fourth Amendment protections beyond historical precedents. Pre-*Terry* analysis had equated seizures of a person with common law arrests. Thus, the Court in *Terry* was asked to make an all-or-nothing determination: either there was an arrest, requiring full compliance with the Fourth Amendment, or there was no arrest and the Amendment was inapplicable. Just as physical trespass had been essential to pre-*Katz* searches, arrest had been a necessary linchpin for pre-*Terry* seizures of the person.⁵⁹ *Terry*, however,

⁵³ See generally *Warden v. Hayden*, 387 U.S. 294, 312-25 (1967) (Douglas, J., dissenting).

⁵⁴ See *Camara v. Municipal Court*, 387 U.S. 523, 535-39 (1967).

⁵⁵ In its broadest context, the term "liberty" encompasses an individual's right of autonomy—the right to live one's life without arbitrary interference by the state. See Louis Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410, 1415 (1974).

⁵⁶ See Tracey Maclin, *The Decline of the Right of Locomotion: The Fourth Amendment on the Streets*, 75 CORNELL L. REV. 1258, 1297-1307 (1990).

⁵⁷ *Olmstead v. United States*, 277 U.S. 438, 478 (1928).

⁵⁸ *Id.* at 488 ("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.").

⁵⁹ See *California v. Hodari D.*, 499 U.S. 621, 634 (1991) (Stevens, J., dissenting) ("Significantly, in the *Katz* opinion, the Court repeatedly used the word 'seizure' to describe the process of recording sounds that could not possibly have been the subject of a common-law seizure."). Furthermore, the *Terry* Court "concluded that the word

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

Under the specific facts of *Terry*, the relevant liberty interest was the citizen's freedom from a pat down. While concentrating on that limited issue, the *Terry* Court rose above the precise facts of the case by reaffirming its "traditional responsibility to guard against police conduct which is overbearing or harassing, or which trenches upon personal security."⁶⁰ *Terry*, like *Katz*, freed the Amendment from restrictive common law factual predicates and evoked the expansive concept of the right to be free from arbitrary governmental interference with our lives. In contrast, the *Hodari D.* Court insisted that common law concepts of arrest restrict the definition of seizures of a person.⁶¹ This holding discards *Terry*'s broad pledge to scrutinize the diverse ways in which the government may repress a citizen's liberty in favor of giving *Terry* its narrowest reading. According to *Hodari D.*, the precise facts that gave rise to the *Terry* decision—the government's corporeal restraint of the suspect's physical movements—have become an absolute requirement for defining Fourth Amendment seizures of a person.⁶² If *Terry* represents the most expansive view of Fourth Amendment protections of liberty, *Hodari D.* constitutes the most restrictive view. Any unified theory of seizures must attempt to resolve this conflict.

III. A PROPOSAL FOR UNIFICATION

One way to unify the various tests for seizures of a person into a single coherent theory is by emulating *Katz*'s unitary approach to searches of property. While the *Katz* approach may not guarantee a correct result, it does pose the proper question by forcing the Court to look beyond common law conventions in order to resolve the modern-day conflict between personal autonomy

'seizure' in the Fourth Amendment encompasses official restraints on individual freedom that fall short of a common-law arrest." *Id.* at 635.

⁶⁰ *Terry v. Ohio*, 392 U.S. 1, 15 (1968).

⁶¹ *Hodari*, 499 U.S. at 629.

⁶² *See id.* at 637.

and collective security.⁶³ Starting with *Katz's* recognition of privacy as the fundamental right to be protected by prohibiting unreasonable searches, we must next ask what is the fundamental right to be protected by prohibiting unreasonable seizures of people. The obvious answer would seem to be that personal liberty is the fundamental right that the Amendment seeks to protect. Thus, the Court could quickly reconcile searches of property with seizures of persons by recognizing that a seizure occurs whenever the government infringes upon a reasonable expectation of liberty. This quick fix does provide a laudable maxim to place on coins of the realm—"We trust in God and in our reasonable expectations of privacy and liberty!" But the "fix" would likely generate much of the same criticism leveled at *Katz* for discarding concrete factors like physical trespass and tangible objects, while replacing them with high sounding but difficult to apply abstractions. The challenge the judiciary has faced in applying *Katz* is apparent from the variety of definitions of privacy suggested to courts—definitions that range from the sublime to the whimsical.⁶⁴

Although defining liberty is likely to prove as difficult as defining privacy, focusing on the fundamental but abstract value of personal liberty does not dictate ignoring all the specific

⁶³ See, for example, Justice Harlan's approach to the constitutionality of unregulated electronic monitoring. Justice Harlan maintained that such practices:

[U]ndermine that confidence and sense of security in dealing with one another that is characteristic of individual relationships between citizens in a free society. . . . Were third-party bugging a prevalent practice, it might well smother that spontaneity – reflected in frivolous, impetuous, sacrilegious and defiant discourse – that liberates daily life. . . . All these values are sacrificed by a rule of law that permits official monitoring of private discourse limited only by the need to locate a willing assistant.

United States v. White, 401 U.S. 745, 787-89 (1971) (Harlan, J., dissenting).

⁶⁴ For example, privacy encompasses the right to "mental and spiritual development . . . happiness, peace of mind, the proper unfolding of personality . . ." John J. Flynn, *Tribute: Daniel J. Dykstra—The Utah Years 1949-1965*, 2000 UTAH L. REV. 831, 839 (2000) (quoting Daniel J. Dykstra, *The Right Most Valued by Civilized Man*, 6 Utah L. Rev. 305 (1959))right "to deviate temporarily from social etiquette when alone or among intimates, as by putting feet on desks, cursing, letting one's face go slack, scratching wherever one itches." Alan F. Westin, *Science, Privacy, and Freedom: Issues and Proposals for the 1970's*, 66 COLUM. L. REV. 1003, 1025 (1966). The most commonly accepted definition is the right of individuals "to determine for themselves when, how, and to what extent information about them is communicated to others." U.S. Dep't. of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 764 n.16 (1989).

practical considerations the Court grappled with in *Mendenhall*, *Brower*, and *Hodari D.* We can learn from the Court's consideration of the specific tests addressed in these cases, so long as these tests are not regarded as the end result, but as the means used to arrive at a general and consistent theory of Fourth Amendment seizures. Thus, it is legitimate to consider, as *Hodari D.* does, the history of common law arrests, but rather as a factor in defining seizures, not the exclusive answer. A meaningful unified theory of seizures must blend practical considerations, including our common law heritage, with broader concerns raised by modern day issues like the war on drugs and the war on terrorism.

In formulating a theory that is both theoretically sound and practical, *Katz* once again serves as a useful model in its rejection of an unrealistically expansive view of the Fourth Amendment that would regulate all government interference with privacy.⁶⁵ The Court must similarly reject an extreme view purporting to regulate all government limitations on liberty, or else we would live in a world where the government could not establish one-way streets, erect traffic signals, or post no-trespassing signs on the White House lawn. If we are to have order, not anarchy, in our society, we must accept some government restraint of our liberty, just as we accept some interference with our privacy. But putting aside any unrealistically expansive view of liberty does not force us to accept *Hodari D.*'s unduly restrictive view of liberty—that the Fourth Amendment is totally inapplicable until the government achieves total control of a citizen's movement.⁶⁶

The problem with *Hodari D.*'s absolutist view of attempted seizures is that it places all unsuccessful government pursuit of citizens beyond the coverage of the Fourth Amendment. As the dissent queried in *Hodari D.*, are police constitutionally free to shoot at a citizen so long as they miss?⁶⁷ Bringing police pursuit and other forms of attempted seizures within the Amendment's coverage means rejecting the rigidity of *Hodari D.* and returning to the flexibility that *Terry* first injected into the Fourth

⁶⁵ See *Katz v. United States*, 389 U.S. 347, 350-51 (1967) (stating that "the Fourth Amendment cannot be translated into a general constitutional 'right to privacy'").

⁶⁶ See *Hodari*, 499 U.S. at 629.

⁶⁷ *Id.* at 629-48 (Stevens, J., dissenting).

Amendment. Police pursuit impacts or limits liberty, even if it does not completely eliminate it. While some limitations on freedom of movement, like one-way streets, must be regarded as constitutionally reasonable, there is a fundamental difference between the minor inconvenience imposed by a one-way street sign and the limitations on liberty imposed by government pursuit of a citizen. The difference lies in the government's purpose because only pursuit manifests the government's intent to completely control all movement by a citizen. Thus, *Brower's* concern for police intent can play a helpful role in defining seizures, although it should not retain its prominence as the sine qua non of that definition. The proper, but limited, role for *Brower's* focus on government intent is to modify *Hodari D.'s* approach to attempted seizures.

A proper blending of *Brower* and *Hodari D.* would mean that when the government intends total control of the citizen and takes action that significantly impacts the citizen's liberty, the Fourth Amendment should be made applicable to this *partial seizure*. Terminology is important here because, by labeling pursuit as a mere *attempted seizure*, the Court fixates on the government's failure to achieve complete control, while ignoring its success in achieving partial control. A partial, but significant, limitation on a citizen's liberty should have constitutional consequences when it is accompanied by government intent to remove all of the citizen's freedom of movement. This blended approach rejects *Hodari D.'s* insistence that there are no constitutional consequences of an attempted, but failed, effort to seize a citizen. By rejecting *Hodari D.*, the Court could return to *Terry's* recognition of the constitutional significance of degrees of control falling short of custodial arrests. In *Terry's* words, a seizure occurs "when the officer, by means of physical force or show of authority, has in *some way* restrained the liberty of a citizen."⁶⁸ The uncompromising approach of *Hodari D.* accepts what the government argued, and what the Court rejected, in *Terry*—short of full arrest, infringements on privacy and liberty are mere petty indignities not covered by the Amendment.⁶⁹

⁶⁸ *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968) (emphasis added).

⁶⁹ *Id.* at 10-11.

This proposed blending of *Brower* and *Hodari D.* would bring attempted seizures within Fourth Amendment coverage whenever there is an intent to totally control the citizen and at least partial success in achieving that control. The next task is to address how a unified theory could alter the Court's approach to *accidental seizures*. In *Brower*, Justice Scalia posed and answered a hypothetical to test any Fourth Amendment theory purporting to cover accidental seizures: "Thus, if a parked and unoccupied police car slips its brake and pins a passerby against a wall, it is likely that a tort has occurred, but not a violation of the Fourth Amendment."⁷⁰ Justice Scalia explained that, "In sum, the Fourth Amendment addresses 'misuse of power,' not the accidental effects of otherwise lawful government conduct."⁷¹

The question Justice Scalia did not address is why he cares so deeply about underlying intent, even when his *Hodari D.* test for a completed seizure has been satisfied. It seems paradoxical to hold in *Hodari D.* that the Amendment is oblivious to the government's intent to seize so long as the government is unsuccessful, yet when the government is successful in eliminating the citizen's liberty, somehow the previously irrelevant intent of the government now suddenly becomes crucial. The Justice's explanation that the Fourth Amendment seeks to control deliberate government conduct, not accidents, is an incomplete answer. This explanation merely invokes one fundamental purpose of the Amendment—the need to control potentially arbitrary government conduct. The legitimacy of this purpose was best illustrated in *Delaware v. Prouse*, where the intrusion upon privacy and liberty was regarded as *de minimis*, but the absence of procedural controls on potentially arbitrary government power made the random stopping of an automobile constitutionally unreasonable.⁷²

In isolation, *Prouse* is an important articulation of the Fourth Amendment's fundamental concern with procedural correctness. But *Prouse* cannot be viewed in isolation. It must be complimented by the considerations raised in *Winston v. Lee*, where all proper procedures were followed, but the intrusion upon privacy was far

⁷⁰ *Brower v. County of Inyo*, 489 U.S. 593, 596 (1989).

⁷¹ *Id.* (citation omitted).

⁷² 440 U.S. 648, 663 (1979).

from de minimis.⁷³ In *Winston*, the government's efforts to remove a bullet from the defendant's body took place only after the defendant was accorded "a full measure of *procedural* protections."⁷⁴ In fact, the government bent over backwards to give the defendant the benefit of procedures exceeding those required by the Amendment—the defendant was present and represented by counsel at several evidentiary court hearings; those hearings were ultimately reviewed by the Virginia Supreme Court and by federal courts⁷⁵—and full probable cause was established as to the likely presence of the sought-after bullet.⁷⁶ Nonetheless, the substantive requirements of the Reasonableness Clause, requirements unrelated to the procedural standards of the warrant clause, rendered the planned operation unconstitutional.⁷⁷ To the *Winston* court, "A compelled surgical intrusion into an individual's body for evidence . . . implicates expectations of privacy and security of such *magnitude* that the intrusion may be 'unreasonable' even if likely to produce evidence of a crime."⁷⁸

By ignoring *Winston*, Justice Scalia's concern for what the government intends and his lack of concern for any harm the government accidentally causes to citizens reduces the Fourth Amendment to procedural protections. Such an approach affords no weight to the magnitude of privacy or liberty interests actually invaded by the government. When addressing accidental seizures, the Justice and his brethren would do well to consider *Winston*

⁷³ *Winston v. Lee*, 470 U.S. 753, 762-63 (1985).

⁷⁴ *Id.* at 763 (emphasis added).

⁷⁵ *Id.* at 763 n.6 (noting that "the State has afforded respondent the benefit of a full adversary presentation and appellate review").

⁷⁶ *Id.* at 763.

⁷⁷ See generally Ronald J. Bacigal, *Dodging a Bullet, but Opening Old Wounds in Fourth Amendment Jurisprudence*, 16 SETON HALL L. REV. 597 (1986).

⁷⁸ *Winston*, 470 U.S. at 759 (emphasis added). The Court went on to say:

In this case, however, the Court of Appeals noted that the Commonwealth proposes to take control of respondent's body, to 'drug this citizen—not yet convicted of a criminal offense—with narcotics and barbiturates into a state of unconsciousness,' . . . and then to search beneath his skin for evidence of a crime. This kind of surgery involves a virtually total divestment of respondent's ordinary control over surgical probing beneath his skin.

Id. at 765 (quoting *Lee v. Winston*, 717 F.2d 888, 901 (1983) (citation omitted)).

and *Ex rel. Francis*,⁷⁹ a case involving what may be the most famous accident in criminal procedure.

In *Francis*, the defendant was placed in the electric chair and the executioner threw the switch, but because of some mechanical difficulty, death did not result.⁸⁰ The defendant was removed from the electric chair, returned to prison, and rescheduled for execution.⁸¹ The defendant then claimed that a second attempt at execution would violate the Fifth Amendment's protection against double jeopardy and the Eighth Amendment's prohibition of cruel and unusual punishment.⁸² When the case reached the U.S. Supreme Court, four Justices lamented the unfortunate circumstances of the case, but anticipating Justice Scalia's approach, they held that "[a]ccidents happen for which no man is to blame."⁸³ Four other Justices insisted that the State of Louisiana was engaging in cruel and unusual punishment because "[t]he intent of the executioner cannot lessen the torture or excuse the result."⁸⁴ The Justices neglected to cite, but gave full effect to, a famous maxim: "Though boys throw stones at frogs in jest, the frogs die in earnest."

Justice Frankfurter broke the four-to-four tie by approving a second attempt at execution—what the four dissenters referred to as "death by installments."⁸⁵ At least to the frogs, Justice Frankfurter clearly got it wrong. The dissenters' focus on results, not intent, serves as a model that should be applied to accidental seizures. If a citizen is under the complete control of government agents, it is difficult to regard this as a non-seizure merely because the government did not mean it. Applying *Brower* to hypothetical facts almost as gruesome as those in *Francis* means that if a pursuing police car accidentally hit and killed a fleeing citizen, there would be no seizure because the police only intended to stop the citizen by means of their siren and flashing lights. The proposed unified theory of seizures would avoid such a result by holding that there is no role for *Brower* when the government

⁷⁹ Louisiana *ex rel. Francis v. Resweber*, 329 U.S. 459 (1947).

⁸⁰ *Id.* at 460.

⁸¹ *Id.* at 461.

⁸² *Id.* at 461-62.

⁸³ *Id.* at 462.

⁸⁴ *Id.* at 477 (Burton, J., dissenting).

⁸⁵ *Id.* at 474.

completely—intentionally or otherwise—eliminates the citizen's freedom of movement.

IV. A ROLE FOR *MENDENHALL*?

So far, *Hodari D.* and *Brower* have been modified and blended into a unified theory of seizures. The remaining task is to address whether *Mendenhall* has any part to play in this unified theory.⁸⁶ At present, it is unclear if the *Mendenhall* test is required when *Brower* and *Hodari D.* are satisfied. Consider this scenario: the police intend to seize a citizen, make a show of authority, and the citizen submits, thus satisfying both *Brower* and *Hodari D.* Has a Fourth Amendment seizure occurred, or is there an additional requirement that the show of authority not only enticed a particular individual to surrender liberty, but also would have convinced a reasonably prudent person that he was not free to leave?

The proposed unified theory would resolve this uncertainty by holding that the reality of actual submission should trump perceptions, thus there would be no need for the *Mendenhall* test. When there is a show of authority⁸⁷ intended to control a citizen, and it successfully achieves that control by the citizen's submission, why should the courts focus on hypothetical persons, while ignoring the very people who surrendered their liberty? The Fourth Amendment should address situations where the government actually succeeded in its planned seizure, even if it would not have succeeded against a hypothetically more reasonable and defiant citizen. If *Mendenhall* remains a vital part of the Court's approach to seizures, then no seizure occurs if a reasonable citizen would be brave enough to walk away from the police show of authority and say, "You don't scare me!" By adopting this image of a reasonably brave citizen as the sole standard to be applied, the Court turns a deaf ear to less assertive

⁸⁶ See *United States v. Mendenhall*, 446 U.S. 544, 554 (1980).

⁸⁷ *Mendenhall's* reasonable perceptions test is only relevant to the submission prong of *Hodari D.*, not the actual touching aspect of *Hodari D.* Perceptions, reasonable or otherwise, are irrelevant when police physically control the defendant. See EDWIN FISHER, *LAWS OF ARREST* 52-53 (Robert L. Donigan ed., 1967) ("[A]n unconscious person may be placed under arrest when his body is actually seized and restrained, even though his *understanding* of his plight is delayed until he recovers consciousness.").

citizens who actually, although perhaps not reasonably or wisely, relinquish their liberty. This cavalier approach encourages the government to take advantage of the weaker members of our society by limiting constitutional protection to those already capable of protecting themselves by standing up to a show of government authority.

In the past few years, a great deal of attention has been given to the problems of bullying. Major initiatives have sought to eliminate or at least reduce bullying in our schools, where young children may not be strong enough to stand up for themselves. What counter-message is being sent when courts permit police to bully our weaker citizens into submission? It is precisely the weaker among us who are most in need of protection from the powerful, and neither private nor public bullies should be tolerated.

Consider the difference when applying the hypothetical reasonably prudent person perspective and the actual person perspective to a famous duo with very different amounts of power and perhaps fortitude—Monica Lewinski and Bill Clinton. Suppose the special prosecutors made a show of authority by stating to each of them, “Come with us now and submit to interrogation or we’ll get the grand jury to indict you.” I am not sure how a hypothetical reasonably prudent person might respond to this show of authority, but I can better appreciate how the actual people might respond. A Rhodes scholar, trained in the law and occupying the most powerful office in the world, is not likely to cave in to such threats. I could understand a quite different reaction from a frightened twenty-three-year-old intern.

Hodari D. requires that the police achieve successful control of the citizen in order to trigger Fourth Amendment protections.⁸⁸ If control is the sine qua non of seizures, why should actual control be disregarded in favor of *Mendenhall*'s musing about hypothetical reasonable persons? Under the proposed unified theory of seizures, there is no need for the *Mendenhall* test. When the government intentionally and successfully intimidates citizens into surrendering their liberty, the Amendment should not distinguish between citizens on grounds of their bravery or

⁸⁸ *California v. Hodari D.*, 499 U.S. 621, 625-26 (1991).

timidity, nor their reasonable or unreasonable fear of government authority.

CONCLUSION: THE PROPOSED UNIFIED THEORY

With apologies to Albert Einstein and Stephen Hawking, here is a concise finalized theory governing seizures of the person.

When the government totally controls a citizen's freedom of movement, in which *Hodari D.* is satisfied, there is no need for the *Brower* or *Mendenhall* tests. The reality of government control of a citizen outweighs both the perceptions of reasonably prudent people and the intent of government agents. Accidental seizures should be covered by the Amendment.

If the government achieves only partial control, such as control that causes the citizen to lose some liberty or freedom of movement by pursuing him, then there is a role for both *Brower* and *Hodari D.* When the government seeks to establish total control of the citizen, in which *Brower* is satisfied, then *Hodari D.* should be modified to recognize that even a partial loss of liberty has constitutional significance. Thus, attempted seizures would be brought within the coverage of the Amendment.

My proposed unified theory discards *Mendenhall*, but utilizes *Brower* and *Hodari D.*, not as separate definitions of a seizure, but as a means of analysis to identify the singular approach first put forth in *Terry*. The proposed unified theory thus comes full circle to end where *Terry* began—the Fourth Amendment applies when the government “has in some way restrained the liberty of a citizen.”⁸⁹

⁸⁹ *Terry v. Ohio*, 392 U.S. 1, 20 n.16 (1968).