



TOURO UNIVERSITY
JACOB D. FUCHSBERG LAW CENTER
Where Knowledge and Values Meet

Touro Law Review

Volume 10 | Number 3

Article 5

1994

People v. Holmes: And Sometimes it's Not a Seizure

Steven A. Pilewski

Follow this and additional works at: <https://digitalcommons.tourolaw.edu/lawreview>



Part of the [Constitutional Law Commons](#), and the [Fourth Amendment Commons](#)

Recommended Citation

Pilewski, Steven A. (1994) "People v. Holmes: And Sometimes it's Not a Seizure," *Touro Law Review*: Vol. 10: No. 3, Article 5.

Available at: <https://digitalcommons.tourolaw.edu/lawreview/vol10/iss3/5>

This Notes and Comments is brought to you for free and open access by Digital Commons @ Touro Law Center. It has been accepted for inclusion in Touro Law Review by an authorized editor of Digital Commons @ Touro Law Center. For more information, please contact lrross@tourolaw.edu.

PEOPLE v. HOLMES: AND SOMETIMES IT'S NOT A SEIZURE

INTRODUCTION

In June, 1993, the New York Court of Appeals decided the case of *People v. Holmes*.¹ The facts of the case are as follows: On the afternoon of December 23, 1989, two uniformed police officers, Frederick Nelthrope and John Moynihan, while patrolling the Upper West Side of Manhattan, observed a group congregating in a "known narcotics location."² Noticing a bulge in the pocket of one of the men, the marked patrol car proceeded toward the group.³ Although Officer Moynihan directed Holmes to approach the police vehicle, he began to walk away.⁴ As Officer Moynihan alighted from the police car, Holmes fled, prompting immediate chase by both officers.⁵ While in hot pursuit, the officers observed Holmes throw a plastic bag through a chain link fence and into a courtyard.⁶ The officers eventually caught and arrested Holmes, recovering the plastic bag, which was later found to contain crack cocaine.⁷

After the hearing court denied Holmes' motion to suppress the drugs, he pleaded guilty to criminal possession of a controlled substance in the fifth degree.⁸ On appeal, the First Department

1. 81 N.Y.2d 1056, 619 N.E.2d 396, 601 N.Y.S.2d 459 (1993).

2. *Id.* at 1057, 619 N.E.2d at 397, 601 N.Y.S.2d at 460.

3. *Id.* This man was later identified as David Holmes, the defendant in this case. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*; see also N.Y. PENAL LAW § 220.06 (McKinney 1992). Section 220.06 states that

[a] person is guilty of criminal possession of a controlled substance in the fifth degree when he knowingly and unlawfully possesses:

1. a controlled substance with intent to sell it; or
2. one or more preparations, compounds, mixtures or substances of an aggregate weight of one-half ounce or more containing a narcotic preparation; or

unanimously reversed the lower court's ruling, granted the motion to suppress, vacated the defendant's guilty plea, and dismissed the indictment.⁹

On appeal, the New York Court of Appeals held that:

While the police may have had an objective credible reason to approach defendant to request information -- having observed him in a "known narcotics location" with an unidentified bulge in the pocket of his jacket -- those circumstances, taken together with defendant's flight, could not justify the significantly greater intrusion of police pursuit.¹⁰

The court of appeals reasoned that "[i]f these circumstances could combine with flight to justify pursuit, then in essence the right to inquire would be tantamount to the right to seize, and there would, in fact, be no right 'to be let alone.' That is not, nor should it be, the law."¹¹ Consequently, the vacatur of the guilty plea, the granting of defendant's motion to suppress, and the dismissal of the indictment were affirmed.¹²

In his dissenting opinion, Judge Bellacosa stated that:

Every individual surely has a right to refuse to cooperate with the police on a street inquiry based purely on suspicion or hunch. However, to then leap to the proposition that flight can be given no legal significance whatsoever in an encounter based on an

-
3. fifty milligrams or more of phencyclidine; or
 4. one or more preparations, compounds, mixtures or substances of an aggregate weight of one-quarter ounce or more containing concentrated cannabis as defined in paragraph (a) of subdivision five of section thirty-three hundred two of the public health law.
 5. five hundred milligrams or more of cocaine.
- Criminal possession of a controlled substance in the fifth degree is a class D felony.

Id.

9. *Holmes*, 81 N.Y.2d at 1057, 619 N.E.2d at 397, 601 N.Y.S.2d at 460.

10. *Id.* at 1058, 619 N.E.2d at 398, 601 N.Y.S.2d at 461.

11. *Id.*

12. *Id.*

objective and credible reason is a major misdirection in these ever-proliferating cases.¹³

These two views expressed by the New York Court of Appeals are diametrically opposed to each other. As this Note will show, the majority and minority opinions expressed in this case reflect the dichotomy existing between a majority of New York State courts and the United States Supreme Court respectively.

In order to effectively analyze this issue, the history of search and seizure jurisprudence of the United States Supreme Court must first be examined. Once this foundation is presented, a better understanding of the New York Judiciary's handling of this issue may be achieved. Since the Fourth Amendment is so broad in its scope, this Note will focus on the "fleeing exception" to an illegal seizure.¹⁴ However, in order to accomplish this task, we must begin with the question: What is a seizure?

The federal analysis will commence with the Fourth Amendment cases stemming from *Terry v. Ohio*¹⁵ and terminate with the most recent case to discuss evidence obtained from a fleeing suspect, *California v. Hodari D.*¹⁶ As this Note will demonstrate, the United States Supreme Court has drastically narrowed the Fourth Amendment protections afforded criminal defendants in cases following *Terry*.¹⁷ Furthermore, a discussion of several tests articulated by the Court over the years¹⁸ will clarify what is meant by an individual's constitutional right "to be secure in their persons, houses, papers, and effects, against

13. *Id.* at 1060, 619 N.E.2d at 399, 601 N.Y.S.2d at 462 (Bellacosa, J., dissenting).

14. Flight, combined with other specific circumstances indicating that the suspect may be engaged in criminal activity, could justify pursuit. *See Holmes*, 81 N.Y.2d at 1058, 619 N.E.2d at 398, 601 N.Y.S.2d at 461.

15. 392 U.S. 1, 9 (1968) ("No right is held more sacred, individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." (quoting *Union Pac. Ry. v. Botsford*, 141 U.S. 250, 251 (1891))).

16. 499 U.S. 621 (1991) (holding that officer's seizure of evidence does not occur until there is a showing of physical force or a showing of authority which causes the defendant to yield).

17. *See infra* notes 109-191 and accompanying text.

18. *See infra* notes 49, 73, 114, and 189 and accompanying text.

unreasonable searches and seizures”¹⁹ Once this foundation is laid, this Note will focus specifically on New York’s position on the “fleeing exception” to search and seizure as articulated in *Holmes*.

I. *TERRY* v. *OHIO* AND ITS PROGENY

The Fourth Amendment states in part: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated”²⁰ Without question, the key to unlocking the protection afforded by this amendment is the phrase “unreasonable searches and seizures.” Absent the “unreasonableness” factor, searches and seizures may be lawfully and necessarily performed through the use of legitimate law enforcement practices.²¹ However, when the “reasonableness” barrier is crossed, the Constitution comes into play and another constitutional dilemma arises.²² A Fourth Amendment question,

19. U.S. CONST. amend. IV.

20. *Id.*

21. See *Florida v. Royer*, 460 U.S. 491, 500 (1983). The Court found that “[t]he [Fourth] Amendment’s protection is not diluted in those situations where it has been determined that legitimate law enforcement interests justify a warrantless search: the search must be limited in scope to that which is justified by the particular purposes served by the exception.” *Id.*; see also *Terry v. Ohio*, 392 U.S. 1, 19 (1968). The cornerstone of Fourth Amendment analysis has always been “the reasonableness in all the circumstances of the particular governmental invasion of a citizen’s personal security.” *Id.*

22. See *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665-66 (1989) (“[W]here a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement, it is necessary to balance the individual’s privacy expectations against the Government’s interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context.”); *United States v. Montoya*, 473 U.S. 531, 541 (1985) (“The ‘reasonable suspicion’ standard has been applied in a number of contexts and affects a needed balance between private and public interests when law enforcement officials must make a limited intrusion on less than probable cause.”); *New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985) (“On one side of the balance are arrayed the individual’s legitimate expectations of privacy and personal security; on the other, the government’s need for effective methods to deal

therefore, necessitates a choice between the rights of the individual and society as a whole.²³

The United States Supreme Court has articulated several standards to be used to determine whether a seizure has occurred in an encounter between a police officer and a private citizen.²⁴ However, the Court appears to narrow the standard each time it decides the issue of whether a police officer has seized an individual within the meaning of the Fourth Amendment.²⁵ Moreover, this standard is tightened further by the Court when pronouncing the definition of “unreasonableness.”²⁶

A. What Constitutes a Justifiable Seizure?

In *Terry v. Ohio*,²⁷ the Supreme Court decided the issue of whether an unreasonable seizure occurs when a police officer confronts an individual on the street and subjects that person to a search, when less than probable cause exists.²⁸ In *Terry*, a police officer noticed two men standing on a street corner acting suspicious.²⁹ The officer suspected that the two men were “casing a job, a stick up,” and after a third man joined in the same behavior, the officer decided to approach them.³⁰ After

with breaches of public order.”); *United States v. Place*, 462 U.S. 696, 703 (1983) (“We must balance the nature and quality of the intrusion on the individual’s Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.”).

23. See *infra* note 52.

24. For the “Show of Authority Test”, see *Terry v. Ohio*, 392 U.S. 1 (1968); for the “Reasonableness Test”, see *United States v. Mendenhall*, 466 U.S. 544 (1980); for the “Intent and Physical Control Test”, see *California v. Hodari D.*, 499 U.S. 621 (1991); *Florida v. Bostick*, 111 S. Ct 2382 (1991); *Brower v. County of Inyo*, 489 U.S. 593 (1989).

25. See *infra* notes 109-191 and accompanying text.

26. See *infra* notes 190-203 and accompanying text.

27. 392 U.S. 1 (1968).

28. *Id.* at 15. The Court stated that “a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest.” *Id.* at 22.

29. *Id.* at 6.

30. *Id.* at 6-7.

identifying himself as a police officer, he asked for both their names and identification.³¹ When Terry, the petitioner, “mumbled something” in response to one of the officer’s questions, the officer grabbed and frisked him, finding a gun on Terry’s person.³² In deciding whether suppression of the evidence was warranted, the Court held that

where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot . . . he is entitled for the protection of himself and others in the area to conduct a carefully limited search . . . in an attempt to discover weapons which might be used to assault him.³³

The definition of a seizure derived from *Terry* is that a person is seized within the meaning of the Fourth Amendment “whenever a police officer accosts [him] and restrains his freedom to walk away”³⁴ The Court noted, however, that they were not deciding

the constitutional propriety of an investigative “seizure” upon less than probable cause for purposes of “detention” and/or interrogation. Obviously, not all personal intercourse between policemen and citizens involves ‘seizures’ of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a ‘seizure’ has occurred. We cannot tell with any certainty upon this record whether any such “seizure” took place . . . prior to [the] Officer[’s] . . . initiation of physical contact for purposes of searching Terry for weapons, and we thus may assume that up to that point no intrusion upon constitutionally protected rights had occurred.³⁵

Thus, a seizure has been effectuated when an officer, by actual force or a display of authority, has restrained an individual’s

31. *Id.* at 7.

32. *Id.* The officer then ordered all three men into a nearby store and patted down the other two, at which time another gun was found. *Id.*

33. *Id.* at 30. However, the Court ultimately held that the seizure had been reasonable, even though unsupported by facts showing probable cause. *Id.*

34. *Id.* at 16.

35. *Id.* at 19 n.16.

liberty.³⁶ While the spectrum of Fourth Amendment issues encompasses many aspects of an individual's personal liberty, the definition articulated in *Terry* deals with cases in which the police officer does not arrest the individual, but only demands that the person stop.³⁷

It is clear that street encounters between private citizens and police officers are diverse in their scope.³⁸ "They range from wholly friendly exchanges of pleasantries or mutually useful information to hostile confrontations of armed men involving arrests, or injuries, or loss of life."³⁹ Thus, the Court has held that "inoffensive contact" between a citizen and a police officer cannot be analyzed as a seizure of the person.⁴⁰ However, the Court has not yet gone so far as to clarify exactly what constitutes inoffensive contact.⁴¹ In other words, there has yet to

36. *Id.* at 16.

37. See Kathryn R. Urbonya, *The Constitutionality of High-Speed Pursuits Under the Fourth and Fourteenth Amendments*, 35 ST. LOUIS U. L.J. 205, 271 (1991). Although the Court in *Terry* recognized the need for police officers to stop individuals, it held that such stops must be subject to Fourth Amendment scrutiny because the "inestimable right of personal security belongs as much to the citizen on the streets of our cities as to the homeowner closeted in his study." *Id.* (citing *Terry*, 392 U.S. at 8-9.).

38. See *Terry*, 392 U.S. at 13. The Court found that "[s]treet encounters between citizens and police officers are incredibly rich in diversity." *Id.*

39. *Id.* The Court also noted that "hostile confrontations are not all of a piece. Some of them begin in a friendly enough manner, only to take a different turn upon the injection of some unexpected element into the conversation." *Id.* The Court further stated that "[e]ncounters are initiated by the police for a wide variety of purposes, some of which are wholly unrelated to a desire to prosecute for crime." *Id.*

40. See *United States v. Mendenhall*, 446 U.S. 544, 555 (1980). The Court held that an individual's Fourth Amendment rights were not violated where Drug Enforcement Agents "observ[ed] the respondent's conduct, which appeared to the agents to be characteristic of persons unlawfully carrying narcotics," approached her and took her for questioning, upon which the agents found heroin on her person. *Id.* at 547-49. The Court noted that when a person's freedom of movement is restrained by means of physical force or a show of authority, a seizure has occurred. *Id.* at 553.

41. See *Mendenhall*, 446 U.S. at 555. The Court found that "[i]n the absence of some such evidence, otherwise inoffensive contact between a

be articulated a “bright line” test in order to determine when the reasonable bounds of the Constitution are broken.⁴²

In order to effectuate a working rule, the Court in *Terry* created a “sliding-scale” test.⁴³ The test calls for a distinction “between a ‘stop’ and an ‘arrest’ (or a ‘seizure’ of a person), and between a ‘frisk’ and a ‘search.’”⁴⁴ The Court stated that in order to justify either, “the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant th[e] intrusion.”⁴⁵ For example, a situation in which a patrolman witnesses what he reasonably suspects to be a drug transaction surely “warrants intrusion.”⁴⁶ As such, any evidence proffered from such an intrusion should be admissible in court.⁴⁷ Moreover, the Court in *Terry* stated that an objective standard is used to determine the constitutionality of a police officer’s actions. Thus, the question to be asked is: “[W]ould the facts available to the officer at the moment of the seizure . . . ‘warrant

member of the public and the police cannot, as a matter of law, amount to a seizure of that person.” *Id.*

42. *See* *I.N.S. v. Delgado*, 466 U.S. 210, 215 (1984) (“Given the diversity of encounters between police officers and citizens . . . the Court has been cautious in defining the limits imposed by the Fourth Amendment on encounters between the police and citizens.”).

43. *Terry*, 392 U.S. at 10. The Court recognized that “in dealing with the rapidly unfolding and often dangerous situations on city streets the police are in need of an escalating set of flexible responses, graduated in relation to the amount of information they possess.” *Id.*

44. *Id.*

45. *Id.* at 21. The Court further stated:

The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances.

Id.

46. *See id.*

47. *See* *United States v. Leon*, 468 U.S. 897, 913 (1984). (“[O]ur evaluation of the costs and benefits of suppressing reliable physical evidence seized by officers reasonably relying on a warrant issued by a detached and neutral magistrate leads to the conclusion that such evidence should be admissible in the prosecution’s case in chief.”).

a man of reasonable caution in the belief that the action taken was appropriate?"⁴⁸ Accordingly, the *Terry* Court set forth a dual test to determine whether a search and seizure is reasonable. It stated that one must determine: (1) whether the police officer's action was justified at its undertaking, and (2) whether the search and seizure were "related in scope to the circumstances which justified the interference in the first place."⁴⁹

The above reference to a drug transaction will suffice to explain this test. Clearly, police intervention in drug activity which an officer witnesses is reasonable and demands intervention.⁵⁰ This would satisfy the first prong of the test. However, the second prong might not automatically be satisfied based on the limited facts given. Suppose the officer merely saw a group of youths standing on the street corner in a high-crime neighborhood. If the officer approaches the youths and demands a search, this is clearly an unreasonable seizure and not within the scope of the circumstances which prompted the interference in the first place. However, *Terry* allows an officer to approach the youths and ask them questions in the hope that voluntary answers might give the officer at least reasonable suspicion that criminal activity might be afoot.⁵¹

B. *Show of Authority*

While an individual who has been physically restrained by an officer cannot reasonably believe he is free to leave, such is not

48. *Terry*, 392 U.S. at 21-22. The Court noted that "[a]nything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result this Court has consistently refused to sanction." *Id.* at 22.

49. *Id.* at 19-20.

50. *See United States v. Place*, 462 U.S. 696, 704 (1983) (permitting the police to make investigative stops at airports increases the likelihood that the police will prevent the flow of drugs).

51. *See Terry*, 392 U.S. at 22. However, the *Terry* Court was not as concerned with the police officer's questioning of the suspects, but, "whether there was justification for [the police officer's] invasion of Terry's personal security by searching him for weapons in the course of that investigation." *Id.* at 23.

always the case when a law officer effectuates a seizure by a means which does not include a physical touching. Therefore, a brief discussion is warranted at this point concerning a law enforcement official's "show of authority."⁵² For a "show of authority" seizure to exist, the officer effectuates a mental detention, instead of physically restraining the individual.⁵³ The officer's conduct thereby causes the individual to believe that he is not free to leave.⁵⁴ However, the officer's conduct must be specifically designed to produce a stop and the individual must in fact stop.⁵⁵ Anything further on the part of the police officer may constitute an unreasonable seizure.⁵⁶

With the above in mind, it is necessary to discuss the differences between a stop and an encounter. Questions posed by an officer to an individual that are casual in nature and not "psychologically coercive" are considered encounters.⁵⁷ In order for interaction between a police officer and a suspect to constitute an encounter, a police officer need not have any reasonable suspicion to approach the individual.⁵⁸ On the other hand, a stop occurs when an officer uses a show of authority which puts a mental restraint on an individual.⁵⁹ While an arrest requires probable cause, the Court has consistently held that a stop

52. See *id.* at 19 n.16. "Obviously, not all personal intercourse between policemen and citizens involves 'seizures' of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred."; see also *Florida v. Bostick*, 111 S. Ct. 2382, 2389 (1991); *California v. Hodari D.*, 499 U.S. 621, 628 (1991); *Florida v. Royer*, 460 U.S. 491, 500 (1983).

53. See *supra* note 52.

54. See *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) ("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."); see also Thomas K. Clancy, *The Supreme Court's Search For A Definition Of A Seizure: What Is a "Seizure" Of A Person Within The Meaning Of The Fourth Amendment?*, 27 AM. CRIM. L. REV. 619, 623 (1990).

55. See Clancy, *supra* note 54, at 624.

56. See Clancy *supra* note 54, at 623.

57. *Terry*, 392 U.S. at 10.

58. *Id.*

59. See Urbonya, *supra* note 37, at 272.

requires less justification than an arrest,⁶⁰ as well as a reasonable suspicion that criminal activity exists.⁶¹ Moreover, the Court has pronounced that a stop and frisk is merely a minor inconvenience which is a legitimate means of accomplishing proper law enforcement when reasonable suspicion is present.⁶²

C. The Reasonableness Test

In *United States v. Mendenhall*,⁶³ the petitioner sought to suppress evidence obtained on “the ground that it had been acquired from her through an unconstitutional search and seizure by agents of the Drug Enforcement Administration”⁶⁴ In that case, federal drug agents spotted the defendant in an airport who matched the profile of a drug courier.⁶⁵ The agents identified themselves and asked her to produce identification and her plane ticket.⁶⁶ When the names on the ticket and driver’s license did not match, the agents became suspicious and asked

60. *Terry*, 392 U.S. at 11.

61. *Id.*

62. *Id.* at 10-11. (“[A] ‘stop’ and a ‘frisk’ amount to a mere ‘minor inconvenience and petty indignity,’ which can properly be imposed upon the citizen in the interest of effective law enforcement on the basis of a police officer’s suspicion.”).

63. 446 U.S. 544 (1980).

64. *Id.* at 547.

65. *Id.* The Court noted that

[t]he agent testified that the respondent’s behavior fit the so-called “‘drug courier profile”— an informally compiled abstract of characteristics thought typical of persons carrying illicit drugs. In this case the agents thought it relevant that (1) the respondent was arriving on a flight from Los Angeles, a city believed by the agents to be the place of origin for much of the heroin brought to Detroit; (2) the respondent was the last person to leave the plane, “appeared to be very nervous,” and “completely scanned the whole area where [the agents] were standing”; (3) after leaving the plane the respondent proceeded past the baggage area without claiming any luggage; and (4) the respondent changed airlines for her flight out of Detroit.

Id. at 548 n.1.

66. *Id.* at 548. The Respondent produced her driver’s license, which was in the name of Sylvia Mendenhall, and her airline ticket, which was issued in the name of “Annette Ford.” *Id.*

her to accompany them to an office for further questioning.⁶⁷ Once in the office, the agents apprised defendant of her right to refuse a further search, and then asked her if they could inspect her "person and handbag."⁶⁸ The subsequent search of defendant revealed that she had heroin on her person, for which she was subsequently arrested.⁶⁹

Based on these facts, the defendant argued that she had been unlawfully seized within the meaning of the Fourth Amendment when the federal drug agents approached her without reasonable suspicion.⁷⁰ Thus, she asserted that the heroin found on her person should be excluded at trial.⁷¹ Finding this argument insufficient, the Court held that

a person is "seized" only when, by means of physical force or a show of authority, h[er] 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.⁷²

Under this holding, the *Mendenhall* Court articulated a new test to determine when a seizure has occurred. The Court concluded

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 [s]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

67. *Id.*

68. *Id.* To this, she responded, "Go ahead", and handed the Agent her purse. *Id.*

69. *Id.* at 549.

70. *Id.* at 549-50.

71. *Id.*

72. *Id.* at 553-54.

citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled.⁷³

Thus, we can see that the Court has shifted the focus from what the officer feels is a suspicious situation⁷⁴ to how the individual being seized perceives the situation.⁷⁵ While the literal definition of seizure articulated in *Terry*⁷⁶ was still applied, the Court examined the totality of the circumstances from the point of view of the person being seized instead of from the officer.⁷⁷ In short, the focus was on how a reasonable suspect would interpret the officer's conduct.⁷⁸

The Court followed the reasonable person test in *Immigration and Naturalization Serv. v. Delgado*,⁷⁹ which held that a person is not seized under the Fourth Amendment "[u]nless the circumstances of the encounter are so intimidating as to demonstrate that a reasonable person would have believed he was not free to leave"⁸⁰ In this case, Immigration and Naturalization Service agents entered a factory in order to

73. *Id.* at 554; see also *Dunaway v. New York*, 442 U.S. 200, 207 (1979); *Terry*, 392 U.S. at 19 n.16.

74. See *Terry*, 392 U.S. at 27. ("[T]here must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime.").

75. See *Mendenhall*, 446 U.S. at 554.

76. See *Terry*, 392 U.S. at 30. ("[W]here a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot, . . . [he] identifies himself as a policeman and makes reasonable inquiries . . . he is entitled . . . to conduct a carefully limited search").

77. *Mendenhall*, 446 U.S. at 554. "The question whether the Respondent's consent to accompany the agents was in fact voluntary or was the product of duress or coercion, express or implied, is to be determined from the totality of the circumstances" *Id.* at 557 (citing *Scheckloth v. Bustamonte*, 412 U.S. 218, 227 (1973)).

78. *Id.* at 554.

79. 466 U.S. 210 (1984). The Court found that "interrogation relating to one's identity or a request for identification by the police does not, by itself, constitute a Fourth Amendment seizure." *Id.* at 216.

80. *Id.*

question employees as to their legal status in this country.⁸¹ During the questioning, employees of the factory were allowed to move about the premises and continue working, but were not permitted to leave the building.⁸² The Court justified its holding by determining that the employees were not seized under the Fourth Amendment.⁸³ Furthermore, the court stated that

the mere possibility that they would be questioned if they sought to leave the building should not have resulted in any reasonable apprehension by any of them that they would be seized or detained in any meaningful way. Since most workers could have had no reasonable fear that they would be detained upon leaving, we conclude that the work forces as a whole were not seized.⁸⁴

Within the purview of the reasonable person test is a balance between “the public’s interest in effective law enforcement as well as each person’s constitutionally secured right to be free from unreasonable searches and seizures.”⁸⁵ It has been a major concern of the Court that the “individual’s reasonable expectation of privacy” is not destroyed by arbitrary invasions at the discretion of a police officer.⁸⁶ In short, the reasonableness of a seizure should depend “‘on a balance between the public interest and the individual’s right to personal security free from arbitrary interference by law officers.’”⁸⁷

The Court made it clear in *Mendenhall* that a person has “not [been] seized simply by reason of the fact that . . . [officers] approached [him or] her . . . and posed to [him or] her a few

81. *Id.* at 212.

82. *Id.* at 213.

83. *Id.* at 219.

84. *Id.*

85. *Mendenhall*, 446 U.S. at 565 (Powell, J., concurring).

86. *See Brown v. Texas*, 443 U.S. 47, 51 (1979) (“A central concern in balancing these competing considerations in a variety of settings has been to assure that an individual’s reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field.”).

87. *Pennsylvania v. Mimms*, 434 U.S. 106, 109 (1977) (quoting *United States v. Brignoni-Spence*, 422 U.S. 873, 878 (1975)).

questions.”⁸⁸ Thereafter, an individual who voluntarily complies with an officer’s reasonable questions is not unreasonably seized in the eyes of the Court.⁸⁹ In his concurring opinion, Justice Powell stated that the reasonableness of a stop depends upon whether the circumstances of each case warrant such a stop.⁹⁰ In particular, Justice Powell stressed “(i) the public interest served by the seizure, (ii) the nature and scope of the intrusion, and (iii) the objective facts upon which the law enforcement officer relied in light of his knowledge and expertise.”⁹¹

The inconsistency of the reasonableness test, however, is apparent in the cases following *Mendenhall*. In *Florida v. Royer*,⁹² officers approached Royer in an airport believing that his “appearance, mannerisms, luggage, and actions fit the so-called ‘drug courier profile.’”⁹³ After asking Royer for identification,⁹⁴ the officers then requested that he accompany them to a room for questioning, and confiscated his baggage “[w]ithout . . . consent or agreement.”⁹⁵ Royer unlocked the suitcase, and without seeking further acquiescence, an officer opened it, and found marijuana.⁹⁶ Arguing that the officers did not have probable cause to seize him, Royer moved to suppress the drugs obtained from the search.⁹⁷ The Court held that since “Royer was being illegally detained when he consented to the search of his luggage . . . the consent was tainted by the illegality and was ineffective to justify the search.”⁹⁸ Moreover, the Court stated that

[t]he predicate permitting seizures on suspicion short of probable cause is that law enforcement interests warrant a limited intrusion

88. *Mendenhall*, 446 U.S. at 555.

89. *Id.* at 555-56.

90. *Id.* at 561 (Powell, J., concurring).

91. *Id.* (Powell, J., concurring).

92. 460 U.S. 491 (1983).

93. *Id.* at 493.

94. *Id.* at 493-94.

95. *Id.* at 494.

96. *Id.*

97. *Id.* at 495.

98. *Id.* at 507-08.

on the personal security of the suspect. The scope of the intrusion permitted will vary to some extent with the particular facts and circumstances of each case. This much, however, is clear: an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop. Similarly, the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time.⁹⁹

The Court preceded to state that it was "not suggest[ing] that there is a litmus-paper test for distinguishing a consensual encounter from a seizure or for determining when a seizure exceeds the bounds of an investigative stop."¹⁰⁰ Nevertheless, the Court, agreeing with the Florida Court of Appeals, found that Royer's "confinement was tantamount to arrest."¹⁰¹

Interestingly, what the Court was saying in *Royer* resembled what Justice Douglas articulated in his dissenting opinion in *Terry*.¹⁰² Justice Douglas stated that a search and seizure will not be constitutionally accepted under Fourth Amendment standards "unless there was 'probable cause' to believe that (1) a crime had been committed or (2) a crime was in the process of being committed or (3) a crime was about to be committed."¹⁰³ The burden, therefore, is on the state to prove that a seizure it wishes to justify is limited in scope to satisfy the reasonableness element.¹⁰⁴ Thus, the scope of the seizure becomes the focal

99. *Id.* at 500.

100. *Id.* at 506.

101. *Id.* at 496. The factors which the Court examined were that Royer had 'found himself in a small enclosed area being confronted by two police officers -- a situation which presents an almost classic definition of imprisonment.' [citation omitted] The detectives' statement to Royer that he was suspected of transporting narcotics also bolstered the finding that Royer was 'in custody' at the time the consent to search was given. [citation omitted] In addition, the detectives' possession of Royer's airline ticket and their retrieval and possession of his luggage made it clear . . . that Royer was not free to leave.

Id.

102. *Terry*, 392 U.S. at 35-39 (Douglas, J., dissenting).

103. *Id.* (Douglas, J., dissenting).

104. *Royer*, 460 U.S. at 500.

point which varies from situation to situation, especially when the facts surrounding the cases are similar.¹⁰⁵

In short, “[the reasonable person] test is necessarily imprecise, because it is designed to assess the coercive effect of police conduct, taken as a whole, rather than to focus on particular details of that conduct in isolation.”¹⁰⁶ Thus, the Court has found that the blatant inconsistencies inherent in the reasonable person test are its major flaw.¹⁰⁷ Furthermore, the Court has failed to set forth a single standard to follow the general rule of the Fourth Amendment: That “a seizure must be based on specific, objective facts indicating that society’s legitimate interests require the seizure of the particular individual, or that the seizure must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers.”¹⁰⁸

II. THE SUPREME COURT’S NARROWING VIEW OF A SEIZURE

A. Intent And Physical Control

The latest United States Supreme Court decisions to define a Fourth Amendment seizure are *Brower v. County of Inyo*,¹⁰⁹ *Florida v. Bostick*,¹¹⁰ and *California v. Hodari D.*¹¹¹

105. *Id.* (“The scope of the intrusion permitted will vary to some extent with the particular facts and circumstances of each case.”).

106. *Michigan v. Chesternut*, 486 U.S. 567, 573 (1988). The Court followed the traditional approach familiar in *Terry* and *Mendenhall*. *Id.* Moreover, it stated that “what constitutes a restraint on liberty prompting a person to conclude that he is not free to ‘leave’ will vary, not only with the particular police conduct at issue, but also with the setting in which the conduct occurs.” *Id.*

107. *Id.* at 573-74.

108. *Brown v. Texas*, 443 U.S. 47, 51 (1979).

109. 489 U.S. 593, 599 (1989) (finding that the conduct of the police, by maintaining a roadblock on the highway which caused the death of fleeing suspect during high speed chase, constituted Fourth Amendment ‘seizure’).

110. 111 S. Ct. 2382, 2388 (1991) (holding that seizure of narcotics from a suspect in a bus terminal was outside Fourth Amendment protection).

In *Brower*, the decedent's estate brought a § 1983¹¹² action alleging that the county used brutal and excessive force in establishing a road-block, thereby effectuating an unreasonable seizure of decedent.¹¹³ The Court found that Fourth Amendment seizures do not occur merely because the government caused a termination of an individual's freedom of movement, rather, a seizure occurs "only when there is a governmental termination of freedom of movement through means intentionally applied."¹¹⁴ Thus, the Court held that "the complaint . . . sufficiently allege[d] that [authorities], under color of law, 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."¹¹⁵ The Court further noted that a mere show of authority would not be sufficient to constitute a seizure of the person and it must be accompanied by actions "designed to produce a stop by physical impact if voluntary compliance does

111. 499 U.S. 621, 628 (1991) (finding that narcotics thrown from fleeing suspect where no probable cause existed did not constitute tainted evidence).

112. 42 U.S.C. § 1983 (1988). Section 1983 states that

[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Id.

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

Id. Consequently, the decedent was involved in a fatal collision with the truck.

Id.

114. *Id.* at 596-97.

115. *Id.* at 599.

not occur.”¹¹⁶ A seizure, according to the *Brower* Court, occurs “even when an unintended person or thing is the object of the detention or taking, but the detention or taking itself must be willful.”¹¹⁷ The intent element in this context is gauged by an objective standard, focusing on the means used, not the officer’s subjective beliefs as to how they intended to stop the person.¹¹⁸ Notwithstanding the above, a seizure, according to the *Brower* analysis, does not occur when the individual reasonably believes that he is not free to leave, but rather, when actual physical control is manifested.¹¹⁹

In the next case, *Florida v. Bostick*,¹²⁰ Justice O’Connor stated that

the Fourth Amendment permits police officers to approach individuals at random in airport lobbies and other public places to ask them questions and to request consent to search their luggage, so long as a reasonable person would understand that he or she could refuse to cooperate. This case requires us to determine whether the same rule applies to police encounters that take place on a bus.¹²¹

Bostick arose as a result of the adoption by the Broward County Sheriff’s Department of a program which permitted law enforcement officers to routinely approach individuals, either randomly or because they were suspected, “in some vague way” of engaging in criminal activity, and to ask them inherently incriminating questions.”¹²² In *Bostick*, two officers with the Broward County Sheriff’s Department boarded a bus on which Terrance Bostick was a ticketed passenger.¹²³ Although the

116. *Id.* at 598.

117. *Id.* at 596; *see also* *Hill v. California*, 401 U.S. 797, 802-05 (1971) (holding that when the police have probable cause to arrest one party, and when they reasonably mistake a second party for the first party, then the arrest of the second party is valid).

118. *See Terry*, 392 U.S. at 3; *see also Urbonya*, *supra* note 37, at 280.

119. *Brower*, 489 U.S. at 596; *see also* *Clancy*, *supra* note 54, at 645.

120. 111 S. Ct. 2382 (1991).

121. *Id.* at 2384.

122. *Id.*

123. *Id.*

officers were dressed in civilian clothing, they did display “badges, [a jacket with an official department] insignia and one of them [held] a recognizable zipper pouch, containing a pistol.”¹²⁴ Without “articulable suspicion,” both officers walked to the back of the bus where Bostick was sitting.¹²⁵ The officers then proceeded to explain their presence on the bus to the passengers, stating that they were narcotics agents on the lookout for illegal drugs.¹²⁶ Pursuant to that goal, they asked the defendant for permission to search his luggage.¹²⁷ After no illegal contraband was found in the first bag, the officers searched Bostick’s suitcase, which was stored in an overhead compartment.¹²⁸ The record indicated that there was a question as to whether the officers received consent from Bostick to search his luggage and whether the officers apprised him of his right to refuse the search.¹²⁹ Regardless, the search of Bostick’s suitcase produced cocaine, for which he was arrested and later charged with drug trafficking.¹³⁰ Bostick moved to suppress the “cocaine on the grounds that it had been seized in violation of his Fourth Amendment rights.”¹³¹ The trial court denied Bostick’s motion.¹³² The issue before the United States Supreme Court was

124. *Id.*

125. *Id.* at 2384-85.

126. *Id.* at 2385.

127. *Id.* Prior to explaining their presence, the police officers asked Bostick for identification and for his ticket. *Id.* Inspection revealed that the name on the ticket matched Bostick’s identification. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.* The Florida Supreme Court held the practice of “working the buses” to be unconstitutional. *Id.* Therefore, the court found the defendant Bostick to have been seized by the officers. *Id.* In coming to its conclusion, the court stated:

During questioning, the Officer . . . stood in a position that partially blocked the only possible exit from the bus. At the time, Bostick testified that the Officer . . . had his hand in a black pouch that appeared to contain a gun. Because Bostick was en route to Atlanta, he could not leave the bus, which was soon to depart. He had only the confines of the bus itself in which to move about, had he felt the officers

whether a police encounter on a bus amounts to a seizure within the meaning of the Fourth Amendment, where the officers lacked reasonable suspicion to justify the seizure.¹³³

In holding that random bus searches are not per se unconstitutional,¹³⁴ the Court stated that

a seizure does not occur simply because a police officer approaches an individual and asks a few questions. So long as a reasonable person would feel free “to disregard the police and go about his business” . . . the encounter is consensual and no reasonable suspicion is required. The encounter will not trigger Fourth Amendment scrutiny unless it loses its consensual nature.¹³⁵

Based on the facts of this case, the Court found that

the mere fact that Bostick did not feel free to leave the bus [did] not mean that the police seized him. Bostick was a passenger on a bus that was scheduled to depart. He would not have felt free to leave the bus even if the police had not been present. Bostick’s movements were “confined” in a sense, but this was the natural result of his decision to take the bus; it says nothing about whether or not the police conduct at issue was coercive.¹³⁶

In spite of the Court’s analysis, it “refrain[ed] from deciding whether or not a seizure occurred in this case.”¹³⁷ The Court concluded its analysis by

would let him do so. Under such circumstances a reasonable traveler would not have felt that he was ‘free to leave’ or that he was ‘free to disregard the questions and walk away’.

Bostick v. Florida, 554 So. 2d 1153, 1157 (1989) (quoting *United States v. Mendenhall*, 446 U.S. 544, 554 (1980)).

133. *Bostick*, 111 S. Ct. at 2386.

134. *Id.* at 2389 (“The Florida Supreme Court erred in adopting a per se rule.”).

135. *Id.* at 2386 (quoting *California v. Hodari D.*, 499 U.S. 621, 628 (1991)). The Court further stated that “obviously, not all personal intercourse between policemen and citizens involves ‘seizures’ of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a ‘seizure’ has occurred.” *Id.* (quoting *Terry*, 392 U.S. at 19 n.16).

136. *Id.* at 2387.

137. *Id.* at 2388.

adher[ing] to the rule that, in order to determine whether a particular encounter constitutes a seizure, a court must consider all the circumstances surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officer's requests or otherwise terminate the encounter. That rule applies to encounters that take place on a city street or in an airport lobby, and it applies equally to encounters on a bus.¹³⁸

In the last case, *California v. Hodari D.*,¹³⁹ the United States Supreme Court was confronted with the issue surrounding the admissibility of evidence discarded by a fleeing suspect during the course of police pursuit.¹⁴⁰ In *Hodari*, a police officer approached a group of youths congregating near a car in a high-crime part of the city.¹⁴¹ Upon seeing the unmarked police car and the plain-clothed officers, the youths ran.¹⁴² While the first officer, Officer Pertoso, chased after Hodari, the second, Officer McGolgin, followed in the car behind them.¹⁴³ While in hot pursuit, Pertoso had almost grabbed the suspect when Hodari "tossed away what appeared to be a small rock."¹⁴⁴ "A moment later, Pertoso tackled Hodari; handcuffed him, and radioed for assistance."¹⁴⁵ The rock turned out to be crack cocaine.¹⁴⁶ Subsequently, Hodari moved to suppress the evidence claiming

138. *Id.* at 2389. The Supreme Court remanded the case back to the Florida Supreme Court to determine whether Bostick reasonably believed that he was not free to decline the officers' request to search his luggage or terminate the encounter with the police. *See id.* Justice Marshall, in his dissenting opinion characterized the Broward County Sheriff's practice of "working the buses" as a tactic that "bears all the indicia of coercion and unjustified intrusion associated with the general warrant," and therefore dishonored the "core values" of the Fourth Amendment. *Id.* (Marshall, J., dissenting).

139. 499 U.S. 621 (1991).

140. *Id.* at 623-24.

141. *Id.* at 622.

142. *Id.* at 622-23.

143. *Id.* at 623.

144. *Id.*

145. *Id.*

146. *Id.*

that it was the result of an illegal seizure.¹⁴⁷ The “issue presented [was] whether, at the time he dropped the drugs, Hodari had been ‘seized’ within the meaning of the Fourth Amendment.”¹⁴⁸

Justice Scalia, writing for the Court, stated that an illegal seizure was not effectuated by Officer Pertoso when he chased Hodari.¹⁴⁹ In defining a seizure, Justice Scalia relied on a dictionary definition, stating that: “For most purposes at common law, the word connoted not merely grasping, or applying physical force to the animate or inanimate object in question, but actually bringing it within physical control.”¹⁵⁰ Moreover, a seizure was likened to a common law arrest.¹⁵¹ “To constitute an arrest . . . the quintessential ‘seizure of the person’ under our Fourth Amendment jurisprudence . . . the mere grasping or application of physical force with lawful authority, whether or not it succeeded in subduing the arrestee, was sufficient.”¹⁵² Thus, in *Hodari*, the Court discarded the prior definitions of a seizure, which included a “show of authority”,¹⁵³ and held that nothing short of physical control or voluntary submission would amount to a seizure.¹⁵⁴

147. *Id.* Hodari argued that a seizure takes place “when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen.” *Id.* at 625 (quoting *Terry*, 392 U.S. at 19 n.16). Thus, he asserted, the officer’s pursuit qualified as a “show of authority” constituting a seizure. *Id.* at 625-26.

148. *Id.* at 623.

149. *Id.* at 626.

150. *Id.* at 624 (citing to WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2057 (1981)).

151. *Id.* at 626.

152. *Id.* at 624. But, since the officer did not apply any physical force to Hodari during the period prior to his abandonment of the cocaine, there was no seizure. *Id.* at 625.

153. See *supra* notes 52-62 and accompanying text.

154. *Hodari*, 499 U.S. at 627.

Notwithstanding the above, the *Hodari* Court appears to backtrack and utilize the pre-*Terry* conception of a seizure.¹⁵⁵ Prior to *Terry*,

the Fourth Amendment's guarantee against unreasonable seizures of persons was analyzed in terms of arrest, probable cause for arrest, and warrants based on such probable cause. The basic principles were relatively simple and straightforward: The term "arrest" was synonymous with those seizures governed by the Fourth Amendment.¹⁵⁶

In *Hodari*, Justice Scalia added to this by finding that where there is no arrest by physical force, voluntary submission to the "assertion of authority" will suffice.¹⁵⁷ In any event, *Hodari* effectively ruled out merely a "show of authority" as a means of effectuating a seizure.¹⁵⁸

While the act of fleeing itself does not rise to the level of reasonable suspicion that criminal activity may be at hand,¹⁵⁹ the *Hodari* Court did not entertain this contention.¹⁶⁰ The Court had previously found that "deliberately furtive actions and flight at the approach of . . . law officers" are strong indications that a crime has been committed, "and when coupled with specific knowledge on the part of the officer relating the suspect to the evidence of crime, they are proper factors to be considered in the decision to make an arrest."¹⁶¹ However, in *Hodari*, there was no such specific knowledge on the part of Officer Pertoso that

155. *Id.* at 627 n.3 ("*Terry* unquestionably involved conduct that would constitute a common-law seizure; its novelty (if any) was in expanding the acceptable justification for such a seizure, beyond probable cause.").

156. *Dunaway v. New York*, 442 U.S. 200, 207-08 (1979).

157. *Hodari*, 499 U.S. at 627.

158. *Id.* The Court found that a seizure "does 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. That is no seizure." *Id.* at 626-27.

159. *See id.* at 624 n.1. The Court relied on the State of California's concessions "[t]hat it would be unreasonable to stop, for brief inquiry, young men who scatter in panic upon the mere sighting of the police is not self-evident, and arguably contradicts proverbial common sense." *Id.*

160. *Id.* at 624.

161. *Sibron v. New York*, 392 U.S. 40, 66-67 (1968).

related any crime committed by Hodari.¹⁶² According to the dissent, the fact that Hodari was in a neighborhood known for its high crime, standing alone, was an insufficient basis for concluding that Hodari was committing a crime himself.¹⁶³

Conversely, there have been arguments made that the totality of the circumstances warrants conduct similar in nature to that of Officer Pertoso.¹⁶⁴ Nevertheless, realizing full well that the need to capture a fleeing suspect is directly related to the severity of the crime, the dissent argued that the act of fleeing does not, in and of itself, necessitate pursuit.¹⁶⁵ Moreover, recalling the test articulated in *Mendenhall* for identifying when a seizure is effectuated,¹⁶⁶ the *Hodari* Court effectively emasculated the *Mendenhall* test as a basis for determining conclusively whether or not a seizure has occurred.¹⁶⁷ Moreover, the Court found that Hodari's dependence on the line of cases utilizing this test was misplaced.¹⁶⁸

Respondent's reliance himself upon the *Mendenhall* test was clearly erroneous, in that he failed to follow the letter of the law. The test states that "a person has been seized 'only if', not that he has been seized 'whenever'; it states a necessary, but not a

162. *Hodari*, 499 U.S. at 630 (Stevens, J., dissenting).

163. *Id.* (Stevens, J., dissenting).

164. *See* United States v. *Mendenhall*, 446 U.S. at 563-64 (Powell, J., concurring).

165. *Hodari*, 499 U.S. at 630, n.4. (Stevens, J., dissenting). "It has long been a matter of common knowledge that men who are entirely innocent do sometimes fly from the scene of a crime through fear of being apprehended as the guilty parties, or from and unwillingness to appear as witnesses. *Id.* (Stevens, J., dissenting).

166. *See Mendenhall*, 446 U.S. at 554. ("[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."); *see also* Michigan v. Chesternut, 486 U.S. 567, 573 (1988); INS v. Delgado, 466 U.S. 210, 215 (1984); Florida v. Royer, 460 U.S. 491, 502 (1983).

167. *Hodari*, 499 U.S. at 628-29; *see also* Randolph Alexander Piedrahita, *A Conservative Court Says "Good-bye To All That" and Forges a New Order in the Law of Seizure - California v. Hodari D.*, 52 LA. L. REV. 1321, 1332-33 (1992).

168. *Hodari*, 499 U.S. at 628.

sufficient condition for seizure--or more precisely, for seizure effected through a show of authority."¹⁶⁹ Specifically,

Mendenhall establishes that the test for existence of a "show of authority" is an objective one: not whether the citizen perceived that he was being ordered to restrict his movement, but whether the officer's words and actions would have conveyed that to a reasonable person.¹⁷⁰

In his dissenting opinion, Justice Stevens stated that "the constitutionality of a police officer's show of force should be measured by the conditions that exist at the time of the officer's action."¹⁷¹ Thus, the mere fact that Officer Pertoso did not touch Hodari before the crack was thrown does not "dissipate the taint" of the evidence.¹⁷² Justice Stevens concluded by stating that the majority's ruling was simply "creative lawmaking."¹⁷³

In deciding the issue presented in *Hodari*, the Court had a duty to strike a "balance between the public interest and appellant's right to personal security and privacy."¹⁷⁴ Therefore, in the absence of probable cause or "any basis for suspecting appellant of misconduct," this balance must tilt in favor of the individual's "freedom from police intervention."¹⁷⁵ However, the *Hodari* Court appeared to minimize the level of police intrusion based on the facts presented in this case. The Court noted that

169. *Id.*

170. *Id.*

171. *Id.* at 645 (Stevens J., dissenting). "A search must be justified on the basis of the facts available at the time it is initiated" *Id.* (Stevens, J., dissenting).

172. *See generally* *Murray v. United States*, 487 U.S. 533, 537 (1988). The Court stated:

[T]he exclusionary rule . . . prohibits the introduction of derivative evidence, both tangible and testimonial, that is the product of the primary evidence, or that is otherwise acquired as an indirect result of the unlawful search, up to the point at which the connection with the unlawful search becomes 'so attenuated as to dissipate the taint.'

Id. (quoting *Nardone v. United States*, 308 U.S. 338, 341 (1939)).

173. *Hodari*, 499 U.S. at 648 (Stevens, J., dissenting).

174. *Brown v. Texas*, 443 U.S. 47, 52 (1979).

175. *Id.*

[s]treet pursuits always place the public at some risk, and compliance with police orders to stop should therefore be encouraged. Only a few of those orders, we must presume, will be without adequate basis, and since the addressee has no ready means of identifying the deficient ones it almost invariably is the responsible course to comply. Unlawful orders will not be deterred, moreover, by sanctioning through the exclusionary rule those of them that are not obeyed. Since policemen do not command "Stop!" expecting to be ignored, or give chase hoping to be outrun, it fully suffices to apply the deterrent to their genuine, successful seizures.¹⁷⁶

Although the facts in *Hodari* were new to the Court's definition of a seizure, this is not the first time that the Court discussed a police officer's limitations during hot pursuit.¹⁷⁷ The Court has previously held that a police officer may not seize every person whom he sees on the street or of whom he makes inquiries.¹⁷⁸ Thus, before an officer "places a hand on the person of a citizen . . . he must have constitutionally adequate, reasonable grounds for doing so."¹⁷⁹ It has been argued that by "narrowing the definition of the term seizure, instead of enlarging the scope of reasonable justifications for seizures, the Court has significantly limited the protection provided to the ordinary citizen by the Fourth Amendment."¹⁸⁰ Moreover, based on the majority opinion, the "free to leave" aspect of the reasonable person test¹⁸¹ appears to no longer exist. According to the *Hodari* Court, a seizure occurs only when an officer physically grabs an individual.¹⁸²

Although the majority stated otherwise, Officer Pertoso's act of chasing the suspect certainly relayed the message to *Hodari* that

176. *Hodari*, 499 U.S. at 627.

177. See *Brower v. County of Inyo*, 489 U.S. 593 (1989) (holding that the placement of a police roadblock which suspect subsequently crashed into constituted a Fourth Amendment seizure).

178. See *Sibron v. New York*, 392 U.S. 40, 64 (1968).

179. *Id.*

180. *Hodari*, 499 U.S. at 642 (Stevens, J., dissenting).

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

182. *Hodari*, 499 U.S. at 627-28.

he was not free to leave.¹⁸³ However, had Officer Pertoso successfully grabbed Hodari before the crack was discarded, a seizure would have taken place.¹⁸⁴ Therefore, if the narcotics had been found on Hodari's person as a result of an unlawful seizure, they would be deemed inadmissible, due to the obvious violation of Hodari's Fourth Amendment rights.¹⁸⁵ According to the majority's analysis, had Officer Pertoso grabbed Hodari, but Hodari managed to escape and then threw the crack away, the evidence would not have been disclosed during an arrest.¹⁸⁶ Adherence to this line of reasoning, therefore, leads to the conclusion that if Officer Pertoso had fired his gun at Hodari, but missed, this would not have amounted to a seizure.¹⁸⁷ That, of course, would be untrue.¹⁸⁸

In essence, the Court has said that an officer may approach an individual where no basis exists for suspecting that person of anything.¹⁸⁹ Nevertheless, the intent behind the intrusion must be examined.¹⁹⁰

It is well established that the Court does not have the power "to suspend Constitutional guarantees so that the Government may more effectively wage a 'war on drugs.'"¹⁹¹ In this author's opinion, the "war on drugs" has, in effect, mandated that law enforcement officials utilize whatever means available to curtail the lucrative drug trade in America. From the holding in *Hodari*, albeit a drastic one, the Supreme Court has given law enforcement officials the means by which to wage their war in that a seizure now "requires either physical force . . . or, where

183. *Id.* at 642 (Stevens, J., dissenting).

184. *Id.* at 630-31 (Stevens, J., dissenting).

185. *Id.* at 625.

186. *Id.*

187. *Id.* at 630 (Stevens, J., dissenting).

188. *Id.* (Stevens, J., dissenting)..

189. *Bostick*, 111 S. Ct. at 2386.

190. *Brower*, 489 U.S. at 597 ("[A] Fourth Amendment seizure . . . occur[s] whenever . . . there is a governmental termination of freedom of movement through means intentionally applied.").

191. *Bostick*, 111 S. Ct. at 2389 ("If that war is to be fought, this Court is not empowered to forbid law enforcement practices simply because it considers them distasteful").

that is absent, submission to the assertion of authority.”¹⁹² As will be shown in the forthcoming discussion, New York has not yet joined the Supreme Court in this effort.

In short, the decision in *Hodari* has gone too far in formulating the definition of when a seizure of the person occurs. Instead, a happy medium must be formulated where valid law enforcement can be achieved, so that the criminal element existing in today’s society can be obliterated.

B. Hodari’s Impact On The Exclusionary Rule

It is well established that evidence obtained by virtue of an unreasonable search and seizure is rendered inadmissible by the Fourth Amendment.¹⁹³ Although the ruling in *Hodari* did not change this “exclusionary rule,” it did, as previously discussed, limit the rule’s use.¹⁹⁴ The Court reasoned that it was *Hodari*’s independent act of throwing the crack which accomplished the disclosure.¹⁹⁵ Relying on a 1924 case, *Hester v. United States*,¹⁹⁶ the majority related the act of relinquishing evidence during a pursuit as a legitimate seizure.¹⁹⁷ In *Hester*, Justice Holmes stated that the “defendant’s own acts . . . disclosed the [jug of illegal moonshine] . . . and there was no seizure in the sense of the law when the officers examined the contents of [the jug] after it had been abandoned.”¹⁹⁸ Accordingly, in *Hodari*, the court found no reason why the crack cocaine which defendant threw away while being chased by the officer was the result of a forced abandonment.¹⁹⁹

192. *Hodari*, 499 U.S. at 626.

193. *Mapp v. Ohio*, 367 U.S. 643, 648 (1961) (“[A]ll evidence obtained by searches and seizures in violation of the Constitution is . . . inadmissible in a state court.”)

194. *Hodari*, 499 U.S. at 625.

195. *Id.* at 629.

196. 265 U.S. 57 (1924).

197. *Hodari*, 499 U.S. at 629. “The cocaine abandoned while he was running was in this case not the fruit of a seizure, and [defendant’s] motion to exclude evidence of it was properly denied.” *Id.*

198. *Hester*, 265 U.S. at 58.

199. *Hodari*, 499 U.S. at 627.

The rule set forth in *Terry* more than adequately sets the standard for invoking the exclusionary rule.²⁰⁰ In *Terry*, the Court held that the exclusionary rule may not be summoned when evidence is obtained by legitimate police procedures; anything less than that, however, warrants the rule's use.²⁰¹ As Justice Stevens points out in his dissent in *Hodari*, "[a seizure] must be justified on the basis of the facts available at the time it is initiated; the subsequent discovery of evidence does not retroactively validate an unconstitutional [seizure]."²⁰²

In short, if the Fourth Amendment is going to be invoked, the Court must first determine whether the officer had sufficient justification for his actions, and if the facts do not suggest such action, the evidence adduced from it may not be admitted against the suspect.²⁰³ If, on the other hand, there is justification for his actions, the officer's seizure of the individual will produce valid evidence.²⁰⁴ However, by its holding in *Hodari*, the Court has significantly broadened the range of circumstances which may render evidence obtained through seizure admissible.²⁰⁵ Consequently, it has been argued that the Court has effectively lessened the rights of individual citizens by allowing the type of evidence specifically protected by the Fourth Amendment to be used against them in a court of law.²⁰⁶

200. *Terry*, 392 U.S. at 13-14. The Court stated that the exclusionary rule "cannot properly be invoked to exclude the products of legitimate police investigative techniques on the ground that much conduct which is closely similar involves unwarranted intrusions upon constitutional protections." *Id.* at 13.

201. *Id.*

202. *Hodari*, 499 U.S. at 645. (Stevens, J., dissenting).

203. *See, e.g., Bostick*, 111 S. Ct. at 2387. The Court has consistently held "that a refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure." *Id.*

204. *See supra* notes 182-188 and accompanying text.

205. *Hodari*, 499 U.S. at 626-27.

206. *Id.* at 629 (Stevens, J., dissenting). "The Court's narrow construction of the word 'seizure' represents a significant . . . unfortunate, departure from prior case law construing the Fourth Amendment." *Id.* (Stevens, J., dissenting).

III. PEOPLE v. HOLMES VERSUS CALIFORNIA v. HODARI D.

New York follows the United States Supreme Court in holding that the Fourth Amendment protects against random, unlawful interference with private individuals.²⁰⁷ However, although in many respects the New York Constitution mirrors the United States Constitution,²⁰⁸ it differs in its application of the facts in a given case.²⁰⁹ Moreover, the Supreme Court has held that states are free to develop their own law of search and seizure in order to meet their individual needs.²¹⁰ Nevertheless, a state "may not . . . authorize police conduct which trenches upon Fourth Amendment rights, regardless of the labels which it attaches to such conduct."²¹¹ It has been further recognized that the language of Article I, section 12, of the New York State Constitution²¹² and the Fourth Amendment²¹³ "not only contain similar language but share a common history."²¹⁴ With this background in mind, it will be shown that New York's

207. *People v. Cantor*, 36 N.Y.2d 106, 112, 324 N.E.2d 872, 876-77, 365 N.Y.S.2d 509, 515 -16 (1975).

208. *See People v. Harris*, 77 N.Y.2d 434, 437, 570 N.E.2d 1051, 1053, 568 N.Y.S.2d 702, 704 (1991) ("[T]he language of the Fourth Amendment of the United States Constitution and section 12 of article I of the New York State Constitution prohibiting unreasonable searches and seizures is identical . . .").

209. *Id.* at 437-38, 570 N.E.2d at 1053, 568 N.Y.S.2d at 704 ("[A] State court may adopt a different construction of a similar State provision unconstrained by a contrary Supreme Court interpretation of the Federal counterpart.").

210. *See generally Sibron v. New York*, 392 U.S. 40, 60-61 (1968). "New York is, of course, free to develop its own law of search and seizure to meet the needs of local law enforcement, and in the process it may call the standards it employs by any names it may chose." *Id.* (citation omitted).

211. *Id.* at 61.

212. N.Y. CONST. art I, §12 ("The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated . . .").

213. *See supra* notes 16-17 and accompanying text.

214. *People v. Harris*, 77 N.Y.2d 434, 438, 570 N.E.2d 1051, 1053, 568 N.Y.S.2d 702, 704 (1991).

interpretation of the definition of a seizure is at odds with that of the United States Supreme Court.

When dealing with the issue of street encounters, the New York Court of Appeals has stated that such

encounters between the patrolman and the average citizen bring into play the most subtle aspects of our constitutional guarantees. While the police should be accorded great latitude in dealing with those situations with which they are confronted it should not be at the expense of our most cherished and fundamental rights. To tolerate an abuse of the power to seize or arrest would be to abandon the law -- abiding citizen to the police officer's whim or caprice -- and this we must not do. Whenever a street encounter amounts to a seizure it must pass constitutional muster.²¹⁵

Recalling the facts of *People v. Holmes*,²¹⁶ the forthcoming section will discuss the treatment that New York courts have given to the question of what constitutes a seizure during a street encounter between the police and private citizens. In *Holmes*, the New York Court of Appeals held that the defendant's act of flight, in and of itself, was insufficient to provide the reasonable suspicion necessary to permit seizure of an individual.²¹⁷ However, one can quickly see that this same behavior on the part

215. *People v. Cantor*, 36 N.Y.2d 106, 112, 324 N.E.2d 872, 877, 365 N.Y.S.2d 509, 516 (1975) (finding an unreasonable seizure where police officers blocked parked car and approached defendant on sidewalk when police observed defendant smoking what the officer believed to be marijuana); *see also* *People v. Chestnut*, 51 N.Y.2d 14, 19, 409 N.E.2d 958, 960, 431 N.Y.S.2d 485, 488 (1980). In *Chestnut*, the court stated that

[s]treet encounters between private citizens and law enforcement officers are inherently troublesome. This is so because two competing, yet equally compelling, considerations inevitably clash, to wit: the indisputable right of persons to be free from arbitrary interference by law enforcement officers and the nondelegable duty placed squarely on the shoulders of law enforcement officers to make the streets reasonably safe for us all. While in an ideal society the two might never clash, a quick glance through our newspapers reveals that our society is far from perfect. Thus, the judiciary is put to the task of balancing these competing considerations, so that they can reasonably coexist.

Id.

216. 81 N.Y.2d 1056, 619 N.E.2d 396, 601 N.Y.S.2d 459 (1993).

217. *Id.* at 1058, 619 N.E.2d at 398, 601 N.Y.S.2d at 461.

of Hodari gave the police in that case sufficient reason to chase.²¹⁸ Based on *Holmes*, it becomes readily apparent that New York will not stretch the authority of police officers beyond the requisite “founded suspicion predicated on specific articulable facts that criminal activity is afoot.”²¹⁹ In fact, the *Holmes* court reaffirmed this proposition by stating that “[p]olice pursuit of an individual ‘significantly impede[s]’ the person’s freedom of movement and thus must be justified by reasonable suspicion that a crime has been, is being, or is about to be committed.”²²⁰ The court continued that “[f]light alone . . . or even in conjunction with equivocal circumstances that might justify a police request for information is insufficient to justify pursuit because an individual has a right ‘to be let alone’ and refuse to respond to police inquiry.”²²¹

A. The De Bour Test

The *Holmes* court relied on several recent New York Court of Appeals cases when formulating its holding. However, in order to appreciate the decision in *Holmes*, it is necessary to understand the standard by which the validity of a seizure is judged in New York.

The seminal case in New York search and seizure law is *People v. De Bour*.²²² That case involved the stopping and questioning by two police officers of Louis De Bour, who was merely walking toward the officers along a city street early one morning.²²³ When De Bour was approximately forty feet from the officers, he crossed the street.²²⁴ The officers followed and

218. See *Hodari*., 499 U.S. at 626.

219. *People v. De Bour*, 40 N.Y.2d 210, 215, 352 N.E.2d 562, 566, 386 N.Y.S.2d 375, 379 (1976).

220. *Holmes*, 81 N.Y.2d at 1057-58, 619 N.E.2d at 397, 601 N.Y.S.2d at 460.

221. *Id.* at 1058, 619 N.E.2d at 398, 601 N.Y.S.2d at 461; see also *People v. May*, 81 N.Y.2d 725, 727-28, 609 N.E.2d 113, 115, 693 N.Y.S.2d 760, 762 (1992).

222. 40 N.Y.2d 210, 352 N.E.2d 562, 386 N.Y.S.2d 375.

223. *Id.* at 213, 352 N.E.2d at 565, 386 N.Y.S.2d at 378.

224. *Id.*

upon reaching De Bour, one of them asked him what he was doing in the neighborhood.²²⁵ That same officer then noticed a bulge in the suspect's jacket.²²⁶ After asking De Bour to undo his coat, the officers noticed a revolver tucked in the waist of his pants.²²⁷ De Bour was subsequently arrested and charged with possession of a weapon.²²⁸

In claiming that the officers acted unlawfully, De Bour argued that "the obvious show of authority and the equally obvious display of force by virtue of his being outnumbered by armed officers" deprived De Bour of his freedom of movement.²²⁹ The prosecution "contend[ed] that De Bour's crossing the street to avoid the officers in an area where there was a high incidence of narcotics crimes triggered a duty to ascertain whether there was any criminal activity afoot."²³⁰ While defining "a seizure of the person for constitutional purposes to be a significant interruption with an individual's liberty of movement,"²³¹ the court found no such infringement in this case.²³² Thus, in holding that this action did not constitute an unlawful seizure, the New York Court of Appeals stated that "a policeman's right to request information while discharging his law enforcement duties will hinge on the manner and intensity of the interference, the gravity of the crime involved, and the circumstances attending to the encounter."²³³

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.* at 213-14, 352 N.E.2d at 565, 386 N.Y.S.2d at 378.

229. *Id.* at 215, 352 N.E.2d at 566, 386 N.Y.S.2d at 379. De Bour relied on *People v. Cantor*, 36 N.Y.2d 106, 324 N.E.2d 872, 365 N.Y.S.2d 509 (1975). In *Cantor*, the court of appeals held that

[w]henever an individual is physically or constructively detained by virtue of a significant interruption of his liberty of movement as a result of police action, that individual has been seized within the meaning of the Fourth Amendment. This is true whether a person submits to the authority of the badge or whether he succumbs to force.

Id. at 111, 324 N.E.2d at 876, 365 N.Y.S.2d at 515 (citation omitted).

230. *De Bour*, 40 N.Y.2d at 215, 352 N.E.2d at 566, 386 N.Y.S.2d at 379.

231. *Id.* at 216, 352 N.E.2d at 567, 386 N.Y.S.2d at 380.

232. *Id.* at 217, 352 N.E.2d at 567, 386 N.Y.S.2d at 380.

233. *Id.* at 219, 352 N.E.2d at 569, 386 N.Y.S.2d at 382.

Regardless of the fact that the *De Bour* court found no constitutional violation, it noted the importance of an individual's freedom to walk the streets.²³⁴ Specifically, the court stated that

[t]he basic purpose of the constitutional protections against unlawful searches and seizures is to safeguard the privacy and security of each and every person against all arbitrary intrusions by government. Therefore, any time an intrusion on the security and privacy of the individual is undertaken with intent to harass or is based upon mere whim, caprice or idle curiosity, the spirit of the Constitution has been violated²³⁵

In enforcing this constitutionally protected right to be left alone, the New York Court of Appeals in *De Bour* articulated a four-part test to determine the validity of a seizure. First, the court stated that "[t]he minimal intrusion of approaching to request information is permissible when there is some objective credible reason for that interference not necessarily indicative of criminality."²³⁶ The next level of police intrusion is the common law right to inquire.²³⁷ The third level, similar to the *Terry* stop and frisk, is valid "[w]here a police officer entertains a reasonable suspicion that a particular person has committed, is committing or is about to commit a felony or misdemeanor"²³⁸ "Finally, a police officer may arrest and

234. *Id.* at 217, 352 N.E.2d at 567, 386 N.Y.S.2d at 381.

235. *Id.* at 217, 352 N.E.2d at 567-68, 386 N.Y.S.2d at 380-81.

236. *Id.* at 223, 352 N.E.2d at 571-72, 386 N.Y.S.2d at 384.

237. *Id.* at 223, 352 N.E.2d at 572, 386 N.Y.S.2d at 385.

238. *Id.*; see also N.Y. CRIM. PROC. LAW § 140.50 (McKinney 1992).

This section provides that:

1. In addition to the authority provided by this article for making an arrest without a warrant, a police officer may stop a person in a public place located within the geographical area of such officer's employment when he reasonably suspects that such person is committing, has committed or is about to commit either (a) a felony or (b) a misdemeanor defined in the penal law, and may demand of him his name, address and an explanation of his conduct.
2. Any person who is a peace officer and who provides security services for any court of the unified court system may stop a person in or about the courthouse to which he is assigned when he

take into custody a person when he has probable cause to believe that person has committed a crime, or offense in his presence.”²³⁹

reasonably suspects that such person is committing, has committed or is about to commit either (a) a felony or (b) a misdemeanor defined in the penal law, and may demand of him his name, address and an explanation of his conduct.

3. When upon stopping a person under circumstances prescribed in subdivisions one and two a police officer or court officer, as the case may be, reasonably suspects that he is in danger of physical injury, he may search such person for a deadly weapon or any instrument, article or substance readily capable of causing serious physical injury and of a sort not ordinarily carried in public places by law-abiding persons. If he finds such a weapon or instrument, or any other property possession of which he reasonably believes may constitute the commission of a crime, he may take it and keep it until the completion of the questioning, at which time he shall either return it, if lawfully possessed, or arrest such person.

Id.

239. *Id.*; see also N.Y. CRIM. PROC. § 140.10 (McKinney 1992). Section 140.10 states that:

1. Subject to the provisions of subdivision two, a police officer may arrest a person for:
 - (a) Any offense when he has reasonable cause to believe that such person has committed such offense in his presence; and
 - (b) A crime when he has reasonable cause to believe that such person has committed such crime, whether in his presence or otherwise.
2. A police officer may arrest a person for a petty offense, pursuant to subdivision one, only when:
 - (a) Such offense was committed or believed by him to have been committed within the geographical area of such police officer's employment; and
 - (b) Such arrest is made in the county in which such offense was committed or believed to have been committed or in an adjoining county; except that the police officer may follow such person in continuous close pursuit, commencing either in the county in which the offense was or is believed to have been committed or in an adjoining county, in and through any county of the state, and may arrest him in any county in which he apprehends him.
3. A police officer may arrest a person for a crime, pursuant to subdivision one, whether or not such crime was committed within the geographical area of such police officer's employment, and he

Since not all encounters between police officers and private citizens rise to the level of that which is protected by the Constitution,²⁴⁰ the New York Court of Appeals has determined that the request for information from a citizen during a street encounter is a "minimal intrusion," which will pass constitutional scrutiny.²⁴¹ Based on this, a police officer may approach an individual on the street and ask questions. At this point of the inquiry, with other facts or circumstances which could rise to the level of reasonable suspicion lacking, the citizen may walk away with no further police intrusion. As the court of appeals stated:

An individual to whom a police officer addresses a question has a constitutional right not to respond. He may remain silent or walk

may make such arrest within the state, regardless of the situs of the commission of the crime. In addition, he may, if necessary, pursue such person outside the state and may arrest him in any state the laws of which contain provisions equivalent to those of section 140.55.

Id.

240. See *People v. Hollman*, 79 N.Y.2d 181, 195, 590 N.E.2d 204, 212, 581 N.Y.S.2d 619, 627 (1992) ("[E]ncounters that fall short of Fourth Amendment seizures still implicate the privacy interests of all citizens and that the spirit underlying those words required the adoption of a State common-law method to protect the individual from arbitrary or intimidating police conduct."); *People v. John B.B.*, 56 N.Y.2d 482, 487, 438 N.E.2d 864, 866, 453 N.Y.S.2d 158, 161 (1982) ("[N]ot every encounter of an inquisitorial nature rises to the level of a seizure within the meaning of the constitutional language"); *De Bour*, 40 N.Y.2d at 216, 352 N.E.2d at 567, 386 N.Y.S.2d at 380 ("[N]ot every encounter constitutes a seizure."); *People v. Cantor*, 36 N.Y.2d 106, 112, 324 N.E.2d 872, 877, 365 N.Y.S.2d 509, 516 (1975). The *Cantor* court stated that

[s]treet encounters between the patrolman and the average citizen bring into play the most subtle aspects of our constitutional guarantees. While the police should be accorded great latitude in dealing with those situations with which they are confronted it should not be at the expense of our most cherished and fundamental rights. To tolerate an abuse of the power to seize or arrest would be to abandon the law-abiding citizen to the police officer's whim or caprice -- and this we must not do. Whenever a street encounter amounts to a seizure it must pass constitutional muster.

Id.

241. *De Bour*, 40 N.Y.2d at 223, 352 N.E.2d at 571, 386 N.Y.S.2d at 384.

or run away. His refusal to answer is not a crime. Though the police officer may endeavor to complete the interrogation, he may not pursue, absent probable cause to believe that the individual has committed, is committing, or is about to commit a crime, seize or search the individual or his possessions, even though he ran away.²⁴²

The second level of the *De Bour* model gives the police a "common-law right to inquire."²⁴³ This prong differs from the first level, the right to request information, in that here an officer must have a founded suspicion that criminal activity is at hand.²⁴⁴ This does not require probable cause. However,

[o]nce the police officer's questions become extended and accusatory and the officer's inquiry focuses on the possible criminality of the person approached, this is not a simple request for information. Where the person approached from the content of the officer's questions might reasonably believe that he or she is suspected of some wrongdoing, the officer is no longer merely asking for information. The encounter has become a common-law inquiry that must be supported by [a] founded suspicion that criminality is afoot.²⁴⁵

Thus, a police officer, witnessing the exchange of envelopes in a high-crime area, may be presented with adequate suspicion, though not probable cause, to pursue and even chase an individual with the outcome being a valid seizure.²⁴⁶ While

242. *People v. Howard*, 50 N.Y.2d 583, 586, 408 N.E.2d 908, 910, 430 N.Y.S.2d 578, 581, *cert. denied*, 449 U.S. 1023 (1980).

243. *De Bour*, 40 N.Y.2d at 223, 352 N.E.2d at 572, 386 N.Y.S.2d at 385.

244. *Id.* at 223, 352 N.E.2d at 572, 386 N.Y.S.2d at 384-85.

245. *People v. Hollman*, 79 N.Y.2d 181, 191, 590 N.E.2d 204, 210, 581 N.Y.S.2d 619, 625 (1992). The court, in reaffirming the *De Bour* model, continued by stating that

[n]o matter how calm the tone of [police] officers may be, or how polite their phrasing, a request to search [an individual on the street] is intrusive and intimidating and would cause reasonable people to believe that they were suspected of criminal conduct. These factors take the encounter past a simple request for information.

Id. at 191-92, 590 N.E.2d at 210, 581 N.Y.S.2d at 625.

246. *See People v. Matienzo*, 81 N.Y.2d 778, 780, 609 N.E.2d 138, 139, 593 N.Y.S.2d 785, 786 (1993) (passing of small plastic bag in exchange for

flight, by itself, is not sufficient to give a police officer reasonable suspicion to seize an individual,²⁴⁷ flight coupled with some indicia of criminal activity is sufficient to procure a lawful seizure.²⁴⁸ If the person approached “might reasonably believe

money was sufficient to give officer founded suspicion that crime was being committed); *People v. Leung*, 68 N.Y.2d 734, 736, 497 N.E.2d 687, 688, 506 N.Y.S.2d 320, 321 (1986) (“The fact that defendant passed what appeared to be a ‘three dollar bag’ in a neighborhood known for its drug activity constitutes, at the least, the ‘objective credible reason’ necessary to support the intrusion attendant to a police approach of a citizen.”).

247. See *Holmes*, 81 N.Y.2d at 1058, 619 N.E.2d at 398, 601 N.Y.S.2d at 461 (“Flight alone . . . or even in conjunction with equivocal circumstances that might justify a police request for information is insufficient to justify pursuit because an individual has a right ‘to be let alone’ and refuse to respond to police inquiry.”) (citations omitted); *People v. Martinez*, 80 N.Y.2d 444, 448, 606 N.E.2d 951, 953, 591 N.Y.S.2d 823, 825 (1992) (“Defendant had a right to refuse to respond to a police inquiry and his flight when the officers approached could not, in and of itself, create a reasonable suspicion of criminal activity.”); *People v. Howard*, 50 N.Y.2d 583, 592, 408 N.E.2d 908, 914, 430 N.Y.S.2d 578, 585, *cert. denied*, 449 U.S. 1023 (1980) (“[W]here . . . there is nothing to establish that a crime has been or is being committed, flight, like refusal to answer, is an insufficient basis for seizure or for the limited detention that is involved in pursuit.”). But see *People v. Jones*, 69 N.Y.2d 853, 854-55, 507 N.E.2d 299, 300-01, 514 N.Y.S.2d 706, 707-08 (1987). In *Jones*, the police, thinking that defendant was the victim of a crime, witnessed defendant running away from them with a skirt in his hands. *Id.* “[T]he police pursued [defendant] and when they caught him they asked why he had run away when they called and asked about the recovered skirt.” *Id.* at 854, 507 N.E.2d at 300-01, 514 N.Y.S.2d at 708. The court of appeals found that defendant’s flight alone constituted a reasonable suspicion to question defendant, for which he was arrested and convicted of robbery. *Id.* at 855, 507 N.E.2d at 301, 514 N.Y.S.2d at 708.

248. See *Howard*, 50 N.Y.2d at 592, 408 N.E.2d at 914, 430 N.Y.S.2d at 585; see also *Matienzo*, 81 N.Y.2d at 780, 609 N.E.2d at 139, 593 N.Y.S.2d at 786 (passing of small plastic bag in exchange for money together with defendant’s flight was sufficient to give officer reasonable suspicion that crime was being committed); *Leung*, 68 N.Y.2d at 736, 497 N.E.2d at 688, 506 N.Y.S.2d at 321.. In *Leung*, the court stated:

The fact that defendant passed what appeared to be a ‘three dollar bag’ in a neighborhood known for its drug activity constitutes, at the least, the ‘objective credible reason’ necessary to support the intrusion attendant to a police approach of a citizen. When coupled with

that he or she is suspected of some wrongdoing, the officer is no longer merely asking information,"²⁴⁹ and reasonable suspicion is then needed in order to permit lawful continuance of the encroachment.

The third level, New York's equivalent of the *Terry* stop and frisk, gives a police officer the power to forcibly stop and detain an individual when there is reasonable suspicion that a crime is either being committed, has been committed, or is about to be committed.²⁵⁰ Without reasonable suspicion, a police officer may not detain an individual, and any evidence acquired by the officer will be excluded from inadmissible at trial.²⁵¹

Finally, at the fourth level, an officer may arrest an individual when there exists probable cause to do so.²⁵²

defendant's immediate flight . . . [it] establishes the necessary reasonable suspicion

Id.

249. *Hollman*, 79 N.Y.2d at 191, 590 N.E.2d at 210, 581 N.Y.S.2d at 625.

250. *De Bour*, 40 N.Y.2d at 223, 352 N.E.2d at 572, 386 N.Y.S.2d at 385; *see also* *People v. Cantor*, 36 N.Y.2d 106, 112, 324 N.E.2d 872, 877, 365 N.Y.S.2d 509, 516 (1975).

251. *See* *People v. Wesley*, 73 N.Y.2d 351, 354-55, 538 N.E.2d 76, 78, 540 N.Y.S.2d 757, 759 (1989). The *Wesley* court stated that

[t]he exclusionary rule has as an objective the social benefit of deterring unlawful police conduct. Given that the basis of the rule is a social policy judgment, it is not surprising that there has been no consensus concerning the contours of the rule. The decision as to who is, or should be, entitled to enforce the prohibition against unreasonable searches and seizures necessarily entails balancing the cost of the loss of probative evidence against the gain in deterring lawless police conduct. Courts in other States have chosen to weigh these factors differently, but in this State, as in the Federal courts, it has long been held that the policy best serving these competing interests is one that -- recognizing the rights protected by the Fourth Amendment as personal rights -- limits invocation of the exclusionary remedy to persons whose own protection has been infringed by the search and seizure.

Id.; *see also* *People v. Drain*, 73 N.Y.2d 107, 110, 535 N.E.2d 630, 631, 538 N.Y.S.2d 500, 501 (1989) ("This court has long recognized, therefore, that the application and scope of the exclusionary rule is ascertained by balancing the foreseeable deterrent effect against the adverse impact of suppression upon the truth-finding process.").

252. *De Bour*, 40 N.Y.2d at 223, 352 N.E.2d at 572, 386 N.Y.S.2d at 385.

In short, “[t]he four-tiered method for analyzing police encounters gives officers acting in their law enforcement capacity leeway in approaching individuals for information. It does not, however, permit police officers to ask intrusive, potentially incriminating questions unless they have founded suspicion that criminality is afoot.”²⁵³

Thus, the crucial factor in determining whether a seizure is lawful requires a balancing of the interests involved in the police inquiry. The factors to take into account are “(1) the nature and scope or severity of the interference with individual liberty, (2) the public interest served, and (3) the objective facts upon which the enforcement officer relied, in light of his knowledge and experience.”²⁵⁴ The court of appeals has recently stated that

[t]he continued vitality of *De Bour* . . . is not contingent upon the interpretation that the Supreme Court gives the Fourth Amendment, because *De Bour* is largely based upon considerations of reasonableness and sound State policy. We still believe that police encounters that are not seizures or arrests for constitutional purposes should be evaluated under the *De Bour* test. The interests in privacy and security that led us to adopt that test as a matter of State common law are no less vital today.²⁵⁵

Based on the foregoing and the fact that the *De Bour* four-part test is still valid law in New York,²⁵⁶ it is readily apparent how greatly the New York courts differ in this area from the United States Supreme Court.

B. The Reasoning in Holmes

The *Holmes* court relied on more recent case law in arriving at the conclusion that Mr. Holmes was unlawfully seized within the meaning of both the State and Federal Constitutions.

253. *Hollman*, 79 N.Y.2d at 192, 590 N.E.2d at 210, 581 N.Y.S.2d at 625.

254. *Howard*, 50 N.Y.2d at 589, 408 N.E.2d at 912, 430 N.Y.S.2d at 583.

255. *Hollman*, 79 N.Y.2d at 195-96, 590 N.E.2d at 212, 581 N.Y.S.2d at 627.

256. *See id.* at 185, 590 N.E.2d at 206, 581 N.Y.S.2d at 621.

In *People v. Martinez*,²⁵⁷ the defendant was observed by police officers removing a "Hide-a-Key" box from a store window.²⁵⁸ Cognizant of the fact that the area was known for its high crime and drug activity, the plain clothes officers approached the defendant.²⁵⁹ Upon seeing the police officers, the defendant ran into a neighboring grocery store.²⁶⁰ Once inside, the officers witnessed the defendant hand the "Hide-a-Key" to the co-defendant.²⁶¹ Subsequently, the officers "retrieved the box and found it contained 17 vials of what later proved to be crack cocaine."²⁶²

The court, relying on settled precedent, held that "the police may pursue a fleeing defendant if they have a reasonable suspicion that defendant has committed or is about to commit a crime."²⁶³ Moreover, the reasonable suspicion necessary to give rise to pursuit "represents that 'quantum of knowledge sufficient to induce an ordinarily prudent and cautious [person] under the circumstances to believe criminal activity is at hand.'"²⁶⁴ Thus, in the case of a fleeing suspect, "flight may be considered in conjunction with other attendant circumstances, namely, the time, location, and the fact that defendant was seen removing an instrument known to the police to be used in concealing

257. 80 N.Y.2d 444, 606 N.E.2d 951, 591 N.Y.S.2d 823 (1992).

258. *Id.* at 446, 606 N.E.2d at 951, 591 N.Y.S.2d at 823.

259. *Id.* at 446, 606 N.E.2d at 951-52, 591 N.Y.S.2d 823-24.

260. *Id.* at 446, 606 N.E.2d at 952, 591 N.Y.S.2d 824.

261. *Id.*

262. *Id.*

263. *Id.*; see also *People v. Leung*, 68 N.Y.2d 734, 736, 497 N.E.2d 687, 688, 506 N.Y.S.2d 320, 321 (1986) ("When coupled with defendant's immediate flight upon the officer's approach, the passing of the manila envelope in this narcotics-prone neighborhood establishes the necessary reasonable suspicion that defendant had committed, or was about to commit a crime, such that pursuit by the officers was justified.").

264. *Martinez*, 80 N.Y.2d at 448, 606 N.E.2d at 953, 591 N.Y.S.2d at 825 (quoting *People v. Cantor*, 36 N.Y.2d 106, 112-13, 324 N.E.2d 872, 877, 365 N.Y.S.2d 509, 516 (1975)).

drugs.”²⁶⁵ In *Holmes*, the court found no such attendant circumstances which would have justified pursuit.²⁶⁶

In *People v. May*,²⁶⁷ also relied on by the *Holmes* court, the defendant was parked with a companion on a deserted street early one morning in a high crime area.²⁶⁸ As two police officers who were patrolling the area approached the car with their “red turret lights and spotlight on, defendant started the engine of the [car] and slowly pulled away.”²⁶⁹ After the defendant complied with the officer’s request that he stop his car, defendant was asked to produce his driver’s license and registration.²⁷⁰ While the officers waited for the documents, “they noticed that a towel was draped over the steering wheel column.”²⁷¹ After calling in the license plate number of the vehicle, the officers were informed that the car was stolen, and thus, the defendant was placed under arrest.²⁷²

The *May* court held “that when the police, using red turret lights, a spotlight and a loudspeaker, ordered defendant to pull the car over, defendant was effectively ‘seized’” within the meaning of the Constitution.”²⁷³ Reasoning that the act of slowly moving the car away from the police did not create the requisite reasonable suspicion to seize, the court found that the police “had no legal basis to stop the car when they did.”²⁷⁴ Instead, had the police continued following the car while checking the license

265. *Id.* at 448, 606 N.E.2d at 953, 591 N.Y.S.2d at 825.

266. *Holmes*, 81 N.Y.2d at 1058, 619 N.E.2d at 398, 601 N.Y.S.2d at 461.

267. 81 N.Y.2d 725, 609 N.E.2d 113, 593 N.Y.S.2d 760 (1992).

268. *Id.* at 727, 609 N.E.2d at 114, 593 N.Y.S.2d at 761.

269. *Id.*

270. *Id.* The officers used the police car’s loudspeaker to order the car to pull over. *Id.*

271. *Id.*

272. *Id.* The defendant was searched and three vials of crack cocaine were found in his pocket. *Id.* Furthermore, the towel was removed, revealing a broken steering column. *Id.*

273. *Id.* at 727, 609 N.E.2d at 114-15, 593 N.Y.S.2d at 761-62.

274. *Id.* at 728, 609 N.E.2d at 115, 593 N.Y.S.2d at 762.

plate number, a lawful seizure could have been effectuated.²⁷⁵ Relying on the settled law of this state, the court stated:

The police may not forcibly detain civilians in order to question them . . . without a reasonable suspicion of criminal activity and once defendant indicated, by pulling away from the curb, that he did not wish to speak with the officers, they should not have forced him to stop without legal grounds to do so.²⁷⁶

The court concluded that any deviation from this rule “would permit police seizures solely if circumstances existed presenting a potential for danger.”²⁷⁷

In order to determine the reasonableness of a seizure, the court of appeals has stated that it must “weigh[] the government’s interest in the detection and apprehension of criminals against the encroachment involved with respect to an individual’s right to privacy and personal security.”²⁷⁸ Moreover, when the court makes such an inquiry, it “must consider whether or not the action of the police was justified at its inception and whether or not it was reasonably related in scope to the circumstances which rendered its initiation permissible.”²⁷⁹ To justify this, “the police officer must indicate specific and articulable facts which, along

275. *Id.*

276. *Id.* (citing *People v. Martinez*, 80 N.Y.2d 444, 606 N.E.2d 951, 591 N.Y.S.2d 823 (1992)).

277. *Id.*

278. *People v. Cantor*, 36 N.Y.2d 106, 111, 324 N.E.2d 872, 876, 365 N.Y.S.2d 509, 514 (1975); *see also* *People v. Rivera*, 14 N.Y.2d 441, 444-45, 201 N.E.2d 32, 34, 252 N.Y.S.2d 458, 461 (1964). The *Rivera* court stated:

The authority of the police to stop [a] defendant and question him . . . is perfectly clear. The business of the police is to prevent crime if they can. Prompt inquiry into suspicious or unusual street action is an indispensable police power in the orderly government of large urban communities. It is a prime function of city police to be alert to things going wrong in the streets; if they were to be denied the right of such summary inquiry, a normal power and a necessary duty would be closed off.

Id.

279. *Cantor*, 36 N.Y.2d at 111, 326 N.E.2d at 876, 365 N.Y.S.2d at 514.

with any logical deductions, reasonably prompted that intrusion. Vague or unparticularized hunches will not suffice.”²⁸⁰

In light of the reasoning in *Holmes*, it is even more evident that the standards of the *De Bour* model have become more stringent in recent years. While there is little doubt that the New York Court of Appeals will allow the police to pursue an individual based solely on that individual’s flight, the dissents in *Holmes* and *May*, both written by Judge Bellacosa, represent a more realistic interpretation of the *De Bour* test, especially in consideration of the current criminal problems which plague this country.

C. *The Dissenter*

Judge Bellacosa, in his dissent in *Holmes*, stated that

[s]omething as elemental as running away from a police officer, after a concededly lawful approach and inquiry, should not be rendered per se legally meaningless, because the law then is propelled beyond reasonable comprehension or acceptance. The new right is then perceived and properly dubbed as a “right to run away.”²⁸¹

He continued by expressing his frustration with the majority’s opinion that flight, coupled with other suspect circumstances, may give a police officer reasonable suspicion that a crime has been committed.²⁸² The “circumstances that should be considered with flight occur before, during and after a lawful police-civilian encounter. All the res gestae of the particular circumstance should govern.”²⁸³ However, the majority has effectively “allow[ed] the facts observed by the police and the immediate and continuing reactive conduct of defendant to a

280. *Id.* at 113, 324 N.E.2d at 877, 365 N.Y.S.2d at 516.

281. *Holmes*, 81 N.Y.2d at 1059, 619 N.E.2d at 399, 601 N.Y.S.2d at 462 (Bellacosa, J., dissenting).

282. *Id.* at 1060, 619 N.E.2d at 399, 601 N.Y.S.2d at 462 (Bellacosa, J., dissenting).

283. *Id.* (Bellacosa, J., dissenting). Res Gestae is defined as “all the facts that form the environment of a litigated issue.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1931 (1981).

lawful approach and inquiry to be automatically thrown out the courthouse door, neutralizing the confluence of circumstances as 'equivocal.'"²⁸⁴

Relying on *People v. Matienzo*,²⁸⁵ where the court of appeals stated that "[i]n the circumstances presented, defendant's flight furnished reasonable suspicion that he had committed or was about to commit a crime such that pursuit by the officer was justified,"²⁸⁶ Judge Bellacosa pointed out the major flaw with the current law in New York; specifically, the inconsistency with the standard by which reasonable suspicion is gauged.²⁸⁷ While in *Matienzo*, defendant's flight was coupled with the officers witnessing a "hand to hand" transaction,²⁸⁸ in *Holmes*, "[o]ne officer recognized several of the men as having been previously arrested for drug transactions at the same location," known for its high drug activity.²⁸⁹ The activity which the officers in *Holmes* witnessed should fall within the "circumstances that should be considered with flight [which] occur before, during and after a lawful police-civilian encounter."²⁹⁰ For we must remember that "[a]ll the res gestae of the particular circumstance should govern."²⁹¹ Thus, based on this analysis, the police in *Holmes* obtained the requisite reasonable suspicion that a "crime has been, [was] being, or [was] about to be committed."²⁹²

As a policy consideration, Judge Bellacosa noted that the majority has "fail[ed] to recognize . . . that rulings like this contribute to the environment and culture that spreads [the

284. *Holmes*, 81 N.Y.2d at 1060, 616 N.E.2d at 399, 601 N.Y.S.2d at 462 (Bellacosa, J., dissenting).

285. 81 N.Y.2d 778, 609 N.E.2d 138, 593 N.Y.S.2d 785 (1993).

286. *Id.* at 780, 609 N.E.2d at 139, 593 N.Y.S.2d at 786.

287. *See Holmes*, 81 N.Y.2d at 1060-61, 609 N.E.2d at 399, 601 N.Y.S.2d at 462 (Bellacosa, J., dissenting).

288. *Matienzo*, 81 N.Y.2d at 779, 609 N.E.2d at 138, 593 N.Y.S.2d at 785.

289. *Holmes*, 81 N.Y.2d at 1059, 619 N.E.2d at 398, 601 N.Y.S.2d at 461 (Bellacosa, J., dissenting).

290. *Id.* at 1060, 619 N.E.2d at 399, 601 N.Y.S.2d at 462 (Bellacosa, J., dissenting).

291. *Id.* (Bellacosa, J., dissenting).

292. *Id.* at 1057-58, 619 N.E.2d at 397, 601 N.Y.S.2d at 460.

unfortunate] 'reality'" that New York is plagued with high drug activity.²⁹³ However, "[t]he bottom line is that [*Holmes*] is a case about experienced police officers acting in a particular, known locale with respect to an all-too typical narcotics transaction circumstance with known actors."²⁹⁴ For these reasons, Judge Bellacosa's interpretation of the law of seizure in New York adequately reflects the harsh reality of our present crime situation, especially where the crime at hand is the illegal sale of narcotics.

CONCLUSION

Critics have argued that "[i]f carried to its logical conclusion, [*Hodari*] will encourage unlawful displays of force that will frighten countless innocent citizens into surrendering whatever privacy rights they may still have."²⁹⁵ Undoubtedly, the same argument can be inferred from the minority opinion in *Holmes*. However, given the problems that this country is faced with concerning crime and drug activity, more is needed on the part of the Judiciary to combat these problems. Perhaps included within the totality of the circumstances is the fact that law enforcement officers sometimes recognize certain individuals to be related to prior drug activity. This, coupled with seemingly suspicious flight, is often sufficient to give the officer reasonable suspicion that criminal activity might be looming. According to Judge Bellacosa, this would not only be a valid seizure, but based on the law in New York, it is mandated.²⁹⁶

Given the tests articulated by the Supreme Court for determining a valid seizure, culminating with *Hodari*, it is only a matter of time before the problem of a fleeing suspect becomes so pervasive that all jurisdictions that now hold as New York, will follow suit. This author is by no means suggesting that the police

293. *Id.* at 1061, 619 N.E.2d at 400, 601 N.Y.S.2d at 463 (Bellacosa, J, dissenting).

294. *Id.*

295. *Hodari*, 499 U.S. at 646-47 (Stevens, J., dissenting).

296. *See Holmes*, 81 N.Y.2d at 1059-60, 616 N.E.2d at 398-99, 601 N.Y.S.2d at 462 (Bellacosa, J, dissenting).

have the right to arbitrarily pursue any individual they wish to pursue and seize that person. Rather, a happy medium can be struck whereby the experienced police officer will be highly scrutinized by the courts in order to determine the validity of the suspicion which prompted the subject pursuit. As previously stated, "experienced police officers acting in a particular, known locale with respect to an all-too-typical narcotics transaction circumstance with known actors"²⁹⁷ obtain the requisite reasonable suspicion when this observance is coupled with the immediate flight of the actor.²⁹⁸ However, without this loosening of the standards in New York, "[o]ne is left to wonder what the result in th[ese] case[s] would be if, instead of the standard ['stop'] direction, the officers had politely announced, 'Please don't [run] away. We wish only to conduct a common-law inquiry and not effect even a partial seizure.'"²⁹⁹

Steven A. Pilewski

297. *Id.* at 1061, 619 N.E.2d at 400, 601 N.Y.S.2d at 463 (Bellacosa, J., dissenting).

298. *Id.* at 1060, 619 N.E.2d at 399, 601 N.Y.S.2d at 462 (Bellacosa, J., dissenting).

299. *People v. May*, 81 N.Y.2d 725, 729-30, 609 N.E.2d 113, 116, 593 N.Y.S.2d 760, 763 (1992) (Bellacosa, J., dissenting).