POLICE SHOOTINGS AFTER *TORRES V. MADRID*: SUSPECTS ELUDING CAPTURE ARE SEIZED UNDER FOURTH AMENDMENT

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I. INTRODUCTION

Imagine two people are shot by police officers. One is immediately apprehended. But the other person flees and eludes capture for a full day. Until the Supreme Court's decision in *Torres v. Madrid*, only when someone shot by police was actually taken into custody could that person sue the police officers for excessive force in violation of the Fourth Amendment—at least in some circuits.[1] In *Torres*, the Court held that the application of physical force to the body of a person with intent to restrain was a seizure even if the person fled and eluded capture.[2] Now, everyone shot by police may pursue claims of excessive force in violation of the Fourth Amendment.[3]

The Court arrived at this result by separating the idea of seizures *by force* from seizures *by acquisition*, detaching its prior Fourth Amendment cases concerning acquisition from its new jurisprudence aimed at expanding the scope of seizures by force.[4] The impact of the Court's decision in *Torres* could be far reaching because it brings within the scope of the Fourth Amendment's protection even a mere touch of a person's body—however slight—if done with the intent to restrain.[5] And this is still true if the person touched does not submit and is not subdued.[6]

As a result, the Court's ruling in *Torres* will impact use of force by police, especially against the backdrop of increased focus on police use of force.[7] After numerous high-profile deaths of Black men during encounters with police officers, the Court has expanded liability against law

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1. *See, e.g.*, Torres v. Madrid, No. 18-2134, slip op. at 6 (10th Cir. May 2, 2019) (holding that even though she had been shot by police officer, the suspect did not stop or otherwise submit to the officers' authority); *Brooks v. Gaenzle,* 614 F.3d at 1220, 1221–22 ("[N]one of our holdings suggest the mere use of physical force or show of authority alone, without termination of movement or submission, constitutes a seizure."; no seizure occurred when police shot at and hit defendant who "continued to flee and elude authorities for days"); *United States v. Bradley,* 196 F.3d 762, 768 (7th Cir.1999) (to constitute a seizure, "the show of authority or use of force must have caused the fleeing individual to stop attempting to escape"); *United States v. Hernandez,* 27 F.3d 1403, 1407 (9th Cir.1994) ("A seizure does not occur if an officer applies physical force in an attempt to detain a suspect but such force is ineffective."). *See also*, *Henson v. United States*, 55 A.3d 859, 865 (D.C. 2012) (noting that "several courts have held that the critical question in determining whether a seizure occurred for purposes of the Fourth Amendment in both show of authority and physical force cases is whether the police officer actually succeeded in restraining the individual."). For a general discussion of the circuit split, see Alexis O'Connor, *Use of Force in Unsuccessful Arrests:* Torres v. Madrid *Tests Scope of Fourth Amendment Protections*, 26 PUB. INT. L. REP. 47, 51–52 (2020).
2. Torres v. Madrid, No. 19-292, slip op. at 17 (U.S. Mar. 25, 2021).
3. 42 U.S.C. § 1983. See also, Jazmine Langley, *Light in A Dark Tunnel? Torres v. Madrid: Recommitment to the Fourth Amendment and One Step Towards Justice for African-American Victims of Police Violence*, 44 N.C. CENT. L. REV. 81, 82 (2022) (noting that *Torres* was a 42 U.S.C. § 1983 action).
4. *Torres*, No. 19-292, at 15 (splitting off *Brower*'s requirement that officers achieve "actual control").
5. *Id.* at 17.
6. *Id.*
7. Jeffrey Belin, *Divided Court Issues Bright-Line Ruling on Fourth Amendment Seizures*, SCOTUS BLOG (Mar. 25, 2021), https://www.scotusblog.com/2021/03/divided-court-issues-bright-line-ruling-on-fourth-amendment-seizures/. For a general discussion of the case's impact, see J. Scott Key, *Criminal Law*, 73 MERCER L. REV. 75, 77 (2021). ("Time will tell whether this case represents a narrow expansion of Fourth Amendment law in the civil arena or a sweeping shift in the area of search and seizure in the criminal realm.").

enforcement officers.[8] The holding in *Torres* is broad enough to capture any touching at all of the body of a person, not just significant restraints on liberty.[9] As such, the ruling expands the parameters for claims against officers and gives police accountability advocates a favorable result for future cases.[10]

II. History of the Development of the Doctrine of Seizures of Persons Under the Fourth Amendment

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."[11] While originally applicable only to the national government, it was made applicable to state and local governments through the Fourteenth Amendment in 1961.[12] As a threshold matter, the Supreme Court has said that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions."[13] A civil action for deprivation of rights against someone acting under color of law is available under federal law.[14]

A. Distinguishing Investigatory Stops from Full Arrests

Since 1975, the Fourth Amendment has applied to seizures of the person, even if "only a brief detention short of a traditional arrest."[15] But investigatory stops—which do not require probable cause—may be appropriate when officers have reasonable suspicion that criminal activity is afoot, and such stops may also involve a frisk of the person, but only "when an officer reasonably believes that 'his safety or that of others was in danger.'"[16]

While "[e]very arrest is a seizure,"[17] just what constitutes a seizure in situations involving less than a full arrest must be analyzed by considering the totality of all the circumstances surrounding the incident.[18] There are no bright-line rules for when there has been a seizure.[19] In fact, the Court has acknowledged that "it is not always clear just when minimal police interference becomes a seizure."[20]

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8. David S. Savage, *Supreme Court Expands Meaning of 'Seizure' Under 4th Amendment* POLICE1 (Mar. 26, 2021), https://www.police1.com/legal/articles/supreme-court-expands-meaning-of-seizure-under-4th-amendment-HUtlW8Yio8zpwzDA/ (noting that the Court has been criticized in recent years for shielding police officers from lawsuits over the use of excessive force); see also Frank Edwards, Hedwig Lee & Michael Esposito, *Risk of Being Killed by Police Use of Force in the United States by Age, Race-Ethnicity, and Sex*, 116 PROC. NAT'L ACAD. SCIS. 34, 1 (2019) (noting that people of color face a greater probability of being killed by law enforcement officers than do white men and women).
9. Belin, *supra* note 7.
10. Savage, *supra* note 8. *See also*, Langley, *supra* note 3, at 92 (calling *Torres* "one step towards justice for African-American victims of police violence").
11. U.S. CONST. amend. IV; *see also Torres*, No. 19-292 at 1 ("The Fourth Amendment prohibits unreasonable "seizures" to safeguard "[t]he right of the people to be secure in their persons.").
12. 2 William J. Rich, Modern Constitutional Law § 28:1 (3d ed. 2020) (citing Mapp v. Ohio, 367 U.S. 643 (1961)).
13. *Id.* (quoting Colorado v. Bannister, 449 U.S. 1, 2-3 (1980)).
14. 42 U.S.C. § 1983.
15. Rich, *supra* note 12 (quoting United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975)).
16. *Id.* (quoting Terry v. Ohio, 392 U.S. 1, 27 (1989)).
17. *Id.* (citing Tennessee v. Garner, 471 U.S. 1, 7 (1985)).
18. *Id.* (citing Michigan v. Chesternut, 486 U.S. 567, 573 (1988)).
19. *Id.*
20. *Id.* (quoting *Garner*, 471 U.S. at 7).

B. Lack of Clarity Before **Torres** *Lead to Circuit Split*

Seizures of persons can be accomplished through physical force or by acquisition of control.[21] Seizures by control and those by force are analyzed separately.[22] But cases before *Torres* did not make clear that seizures by control and seizures by force were treated independently.[23] In *Brower v. County of Inyo*, the Supreme Court held that to find a seizure had occurred, a court must first determine that there had been "an intentional *acquisition* of physical control" by the police officer.[24] In either a seizure by physical force or show of authority, a person was seized when the government actor "terminate[d] or restrain[ed] his freedom of movement through means intentionally applied."[25] A seizure by a show of authority was established when it "in some way restrain[ed] the liberty" of the person.[26]

Thus, since *Brower*, and even after *Hodari D.*, some courts had required that the governmental agent actually acquire physical control over a person's body after intentionally acting to do so.[27] After *Hodari D.* though, some courts had begun to omit the requirement that the police officer actually acquire control over the person's body through the intentional application of force.[28] The circuits were split on whether a "mere touch" was a seizure—even where the suspect was never taken into the officers' custody either through physical force, or by submitting to their show of authority.[29] In fact, in the area of shots fired at or into moving vehicles, federal appellate courts demonstrated conflicting views among one another, and they regularly overturned lower courts.[30]

C. Distinguishing Seizures by Force and Seizures by Control

But *Torres* established two separate paths for analyzing whether a seizure occurred: those accomplished by *control* and those effected by *force*.[31] It seemingly abandoned *Brower*'s requirement that an acquisition occur and fully adopted *Hodari D.*'s suggestion that an arrest—and, thus, a seizure under the Fourth Amendment—was effected where a person was "actually touched" when the government agent was at least attempting to detain him, even if the person fled and was not actually detained.[32] The Court jettisoned the idea that the use of force translated into

21. *Torres*, slip op. at 15.
22. *Id.* at 14 (noting that "each type of seizure enjoys a separate common law pedigree that gives rise to a separate rule").
23. *Id.* ("In all fairness, we too have not always been attentive to this distinction when a case did not implicate the issue."); *see also* Sharon R. Fairley, *The Police Encounter with a Fleeing Motorist: Dilemma or Debacle?*, 52 U.C. DAVIS L. REV. ONLINE 155, 184 (2018) (noting that the Court's guidance concerning police officers shooting at moving vehicles "is not as robust as it could be").
24. Rich, *supra* note 12 (quoting Brower v. County of Inyo, 489 U.S. 593, 596 (1989) (emphasis added)); *see also Torres*, slip op. at 3 (citing *Brower* v. *County of Inyo*, 489 U. S. 593, 596 (1989)).
25. Orin S. Kerr, *What is a Fourth Amendment "Seizure" After* Torres v. Madrid*?* REASON BLOG (Mar. 26, 2021, 4:31 AM) (quoting Brendlin v. California, 551 U.S. 249, 254 (2007)).
26. *Torres*, slip op. at 3 (citing *Terry*, 392 U.S. at 19, n.19); *see also*, *United States v. Beamon*, 576 F. App'x 753, 758 (10th Cir. 2014) (attempted—but unsuccessful—seizure when federal agent grabbed someone who resisted and got away "did not implicate the Fourth Amendment"); *Farrell v. Montoya*, 878 F.3d 933, 937 (10th Cir. 2017) (no excessive-force claim allowed where subjects fled and had not submitted to officers when one fired his gun at them).
27. *See*, *e.g.*, *Torres*, slip op. at 6 (citing Brooks v. Gaenzle, 614 F.3d 1213, 1223-24 (10th Cir. 2010) (finding no seizure where a suspect's continued flight after being shot by police because the gunshot did not end the person's movement or cause the officers to have physical control over her); *see also Torres*, slip op. at 2-3 (Gorsuch, J., dissenting) (noting the "longstanding circuit precedent" in the 10th Circuit that a "'seizure' occurs only when the government obtains 'physical control' over a person").
28. *Torres*, slip op. at 3-4 (Gorsuch, J., dissenting).
29. *Id.*; *Cf.* Brief for Am. C.L. Union at al. as Amici Curiae Supporting Petitioner at 4-5, Torres v. Madrid, No. 19-292 (U.S. Mar. 25, 2021) (noting that the Tenth Circuit's rule was not followed by any other circuit).
30. Fairley, *supra* note 23, at 184-87 (noting that an "[a]nalysis of the federal circuit court cases shows that the Supreme Court's jurisprudence has resulted in a lack of clarity among the lower courts as almost four in ten appellate cases reverse district court findings").
31. *Torres*, slip op. at 14 (noting that "each type of seizure enjoys a separate common law pedigree that gives rise to a separate rule").
32. Kerr, *supra* note 25.

a seizure "only when there is a governmental termination of freedom of movement through means intentionally applied."[33] In its place, the Court adopted an approach wherein each type of seizure is analyzed separately, because "a separate common law pedigree that gives rise to a separate rule."[34]

III. TORRES V. MADRID

Shortly before sunrise on July 15, 2014, four New Mexico State Police troopers went to an apartment complex in Albuquerque to serve an arrest warrant for white collar crimes on someone suspected of involvement in drug trafficking, murder, and other violent crimes.[35] The troopers saw Roxanne Torres standing with someone near a Toyota FJ Cruiser in the parking lot.[36] One of the troopers decided that neither person was the subject of their arrest warrant.[37] Nonetheless, as the troopers walked toward the Cruiser, Torres's companion two took off on foot, while Torres got into the driver's seat of the Cruiser.[38] The troopers tried to talk with Torres, who was on withdrawal from methamphetamine, but she did not notice the officers, who were wearing tactical vests with police identification of them.[39] When Torres heard one of the troopers trying to open her door, she thought they were carjackers trying to steal her car, so she hit the gas pedal to escape.[40] Torres said she did not know the troopers were police officers, but saw they had guns.[41] Troopers Janice Madrid and Richard Williamson then fired their guns to stop her from running them over or pinning them between the Cruiser and the car next to it.[42] The two officers fired 13 rounds at Torres, hitting her twice in the back.[43]

Even though she had been shot twice and her left arm was temporarily paralyzed, Torres continued on for a short distance before stopping in a parking lot, where she told someone about the attempted carjacking.[44] She then stole a vehicle left idling and drove 75 miles to Grants, New Mexico, where she sought medical care.[45] But that hospital airlifted her to an Albuquerque hospital capable of caring for her injuries.[46] She was arrested the next day and later pleaded no contest to aggravated fleeing from a law enforcement officer, assault on a peace officer, and unlawfully taking a motor vehicle.[47]

Torres sued Troopers Madrid and Williamson under 42 U.S.C. § 1983, alleging that the troopers violated her Fourth Amendment right to be free from an unreasonable seizure.[48] The district court granted summary judgment for the troopers because Torres's continued flight after being seized negated her Fourth Amendment claim, and the Tenth Circuit affirmed.[49] If the

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33. *Torres*, slip op. at 6 (noting that such an approach "improperly erases the distinction between seizures by *control* and seizures by *force*").
34. *Id.* at 14 (citing *Hodari D.*, 499 U. S., at 624–625).
35. *Torres*, slip op. at 1.
36. *Id.* at 2.
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*; *see also id.* at 2 (Gorsuch, J., dissenting).
43. *Torres*, slip op. at 2.
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.* at 2-3.
49. *Id.* at 3. The district court and court of appeals relied on circuit precedent in *Brooks v. Gaenzle*, 614 F.3d 1213, 1223 (2010), which had held that "no seizure can occur unless there is physical touch or a show of authority," and that the requisite physical touch must result in the suspect's movement being terminated or somehow give the government agents "physical control over the suspect." Because Torres continued fleeing after being shot, the Fourth Amendment excessive-force claim was negated by the lack of a seizure under *Brooks*.

officers had managed to stop Torres, she would have been able to pursue her claim in the Tenth Circuit.[50] But her ability to flee and elude capture negated her Fourth Amendment claim under Tenth Circuit precedent.[51]

The Supreme Court reversed and held that "[t]he application of physical force to the body of a person with intent to restrain is a seizure even if the person does not submit and is not subdued."[52] The Court reasoned that a police officer seizes someone when the officer uses force in the apprehension.[53] A seizure of a person can be in the form of physical force or a show of authority that in some way restrains the person's liberty.[54] Because Torres continued fleeing and eluded capture by police for a full day after they shot her, the Court considered whether the bullets that entered Torres were themselves a seizure, even though the bullets failed to stop her flight.[55]

The Court found that *Hodari D.* controlled the outcome in this case.[56] Because the common law treated a mere touch as an application of physical force constituting an arrest even if the force failed to subdue the arrestee, the Court adopted *Hodari D.*'s approach.[57] In doing so, the Court divorced the concepts of seizures by physical force from seizures by acquisition of control.[58] And this separate analysis was critical to the Court's ability to find a seizure under the facts in *Torres*, since actual control was necessary in a seizure by acquisition of control.[59] But the *sine quo non* of control or submission in a seizure by acquisition of control did not extend to seizures by force.[60] Because the New Mexico troopers intended to restrain Torres when they shot her, she was seized at the moment the bullets entered her.[61] The Court held that "the application of physical force to the body of a person with intent to restrain is a seizure even if the person does not submit and is not subdued."[62]

In dissent, Justice Gorsuch, joined by Justices Thomas and Alito, argued that the Court's majority had to "conflate a seizure with its attempt and confuse an arrest with a battery" to reach its result.[63] *Hodari D.*'s statements concerning merely touching someone with intent to restrain were dicta, Justice Gorsuch wrote.[64] The very idea that a touch is a seizure even where the suspect flees and eludes capture by police was not only dicta in *Hodari D.*, but it was an improbable result before *Hodari D.*, as well.[65] A seizure, Justice Gorsuch wrote, requires actually taking possession of someone or something.[66]

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50. Adam Liptak, *Sharp Divisions Surface on Police Violence Case*, N.Y. TIMES, Mar. 25, 2021, at A18.
51. *Id.*
52. *Torres*, slip op. at 17.
53. *Id.* at 1.
54. *Id.* at 3 (citing *Terry*, 392 U.S. at 19, n.16).
55. *Id.* at 3.
56. *Id. (citing California v. Hodari D.*, 499 U.S. 621 (1991)).
57. *Id.*
58. *Id.* at 15 ("Unlike a seizure by force, a seizure by acquisition of control involves either voluntary submission to a show of authority or the termination of freedom of movement.").
59. *Id.*
60. *Id.*
61. *Id.* at 10-11, 17.
62. *Id.* at 17.
63. *Torres*, slip op. at 1 (Gorsuch, J., dissenting) ("The majority holds that a criminal suspect can be simultaneously seized and roaming at large.").
64. *Id.* at 5.
65. *Id.* at 5-6.
66. *Id.* at 6 ("A mere touch may be a battery. It may even be part of an attempted seizure. But the Fourth Amendment's text, its history, and our precedent all confirm that "seizing" something doesn't mean touching it; it means taking possession.").

IV. CONSISTENCY OF THE COURT'S REASONING IN *TORRES* WITH PRECEDENT

By divorcing the theories behind seizures *by force* from seizures *by acquisition*, the Supreme Court detached its prior Fourth Amendment cases concerning acquisition from its new jurisprudence aimed at expanding the scope of seizures by force.[67] This division accommodates two distinct lines of analysis—one for each type of seizure of a person.[68] Viewed as the establishment of a new, separate analysis from the "intentional acquisition of physical control" required to trigger a Fourth Amendment seizure under *Brower*, the Court's opinion in *Torres* is consistent with prior decisions.[69] But if viewed as a single line of cases involving a single type of seizure of a person, *Torres* cannot be squared with precedent.[70] Thus, *Torres* can be read in a way that is either consistent or inconsistent with prior Supreme Court decisions on seizures of a person.

The genesis for the new mere-touch doctrine established in *Torres* reaches back only 30 years to a case involving a juvenile who fled at the sight of police officers, discarding evidence in the process.[71] In that case, the Court opened the door for the result in *Torres* by suggesting that the term *seizure* "readily bears the meaning of a laying on of hands or application of physical force to restrain movement, even when it is ultimately unsuccessful."[72] But that statement—and a few others in the opinion—could be seen as dicta because they were not directly necessary to the Court's reasoning in its holding in that case.[73] In fact, a significant part of oral argument was devoted to questions concerning whether *Hodari D.*'s statements that any application of physical force to restrain movement—even when when it is ultimately unsuccessful—was just dicta.[74]

The police officers and their amici argued that *Hodari D.*'s references to the common law mere-touch rule were not essential to the Court's holding on show of authority seizures and should not control the result in *Torres*.[75] Not only were *Hodari D.*'s statements about the mere-touch rule not central to its holding, they were also made without an adversarial briefing.[76] In fact, amici for the officers pointed to other decisions that specifically described seizures as having an element of physical control.[77]

IV. *TORRES* MERE-TOUCH DOCTRINE LIKELY TO HAVE SIGNIFICANT IMPACT ON USE-OF-FORCE CASES

In announcing its new mere-touch rule, the Supreme Court expanded the scope of Fourth Amendment protections for much more than incidents where police officers shoot at or into fleeing vehicles.[78] The impact of the Court's decision in *Torres* could be far reaching if lower courts use

67. *Torres*, slip op. at 15 (splitting off *Brower*'s requirement that officers achieve "actual control").
68. *See id.* at 14 (noting that the dissent's approach to seizures "improperly erases the distinction between seizures by *control* and seizures by *force*").
69. *Id.* at 14.
70. *See*, *e.g.*, *id.* at 1 (Gorsuch, J., dissenting) ("Until today, a Fourth Amendment 'seizure' has required taking possession of someone or something. To reach its contrary conclusion, the majority must conflate a seizure with its attempt and confuse an arrest with a battery.").
71. California v. Hodari D., 499 U.S. 621 (1991).
72. *Id.* at 626.
73. *Torres*, slip op. at 6 (Gorsuch, J., dissenting) (discussing dicta in *Hodari D.*).
74. *See*, *e.g.*, Transcript of Oral Argument at 15, 31-32, 46-47, 58, 60-63, 68 Torres v. Madrid, No. 19-292 (U.S. Mar. 25, 2021) (Justices Kagan, Sotomayor, Thomas, and Gorsuch asking whether *Hodari D.*'s statements about these types of seizures was just dicta).
75. Brief for Nat'l Ass'n of Cntys. at al. as Amici Curiae Supporting Petitioner at 22, Torres v. Madrid, No. 19-292 (U.S. Mar. 25, 2021).
76. *Id.* at 21-22.
77. *Id.* at 22 (citing *Brower*, 489 U.S., at 596; United States v. Mendenhall, 446 U.S. 553 (1980); *Terry*, 392 U.S. at 20).
78. *See*, *e.g.*, *Torres*, slip op. at 13 (discussing the mere-touch rule's applicability where the fleeing person's body is touched "for one moment").

its reasoning to bring more police encounters within the Fourth Amendment's grasp. Plaintiffs' attorneys may seek to grab ahold of the mere-touch rule *Torres* establishes when pursuing claims of excessive force by the police against their clients.[79] Just how far lower courts will allow even minor physical contact from police officers to come within the reach of *Torres* remains to be seen.[80]

A. Possible Impact in Use-of-Force Cases

Lower courts must now consider what constitutes physical force in varying real-world situations, whether force applied to an object within a suspect's control will come within *Torres*, and whether force directed to one person but instead applied to a third party qualifies as a *Torres* touch. First, *Torres* left open for lower courts to decide what constitutes physical force. Because *Torres* expanded Fourth Amendment protection to include situations where an officer applies any physical force to the body a person with intent to restrain—even if the force does not succeed in subduing the person—even the slightest contact may be a *Torres* touch.[81] At the extremes are suspects shot by police officers and those who may be so slightly contacted by a police officer attempting to stop them that they do not even feel or perceive the contact.[82] *Torres* answers the first, but leaves for lower courts to apply the *Torres* mere-touch rule to the other extreme.

Consider two police encounters. In one, Officer A sees a man struggling as he unloads heavy boxes from a moving van. In the second, Officer B responds to a 911 call from a store manager, who describes a man walking down the alley behind her store as having just stolen a couple boxes of merchandise. Each officer taps the men on the back, Officer A to offer help and Officer B to engage a shoplifting suspect in a *Terry*-type encounter based on reasonable suspicion the man was committing a crime.[83] Surely the tap on the shoulder to get the first man's attention would not be a seizure under the Fourth Amendment.[84] But is the second, where Officer B seeks the man's attention to investigate a shoplifting complaint? If a mere touch is enough to amount to a seizure under *Torres*, is a tap on the shoulder aimed at questioning a suspect enough to trigger a seizure? Some legal scholars have questioned whether the concept of arrest in *Torres* will impact *Terry* stops, in which an officer has reasonable suspicion that criminal activity is afoot, but may lack probable cause for an arrest without some additional investigation.[85] The common law lacked *Terry* stops; it was either an arrest or nothing.[86] After Torres, much remains to be seen of the interplay between the *Torres* touch and the *Terry* stop.

Now imagine a police officer working in front of a crowded downtown bar, when a bouncer at the door points at a young man standing with his back to the officer talking to a group of friends. The bouncer tells the officer that the young man is drunk and was denied entry when he tried to use a fake ID. Suppose now that this officer, who has reasonable suspicion that criminal activity

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79. For a discussion of the "growing attention to police brutality, particularly in Black communities" and "[m]ore calls for police reform, or even abolition," see *Fourth Amendment-Search and Seizure-Police Misconduct- Torres v. Madrid*, 135 HARV. L. REV. 363 (2021).
80. *See Fourth Amendment-Search and Seizure-Police Misconduct- Torres v. Madrid*, 135 HARV. L. REV. 363 (2021) ("The majority's unusual interpretation of the word "seizure" could expand avenues for victims of police brutality to seek relief. However, whether that potential is realized in practice remains uncertain, as significant barriers persist that restrict victims' ability to seek redress in court.").
81. *Torres*, slip op. at 1. For a discussion of the "the problem of physical restraint" after *Torres*, especially for those with reformist and abolitionist agendas, see Steven Arrigg Koh, *Policing & the Problem of Physical Restraint*, 64 B.C. L. REV. 309, 310 (2023).
82. Perception of contact may be an area of litigation in some cases involving only slight contact—especially if the plaintiff was highly intoxicated at the time. If a police officer tries to grab onto a drunk suspect, who flees and evades arrest without realizing the officer touched his arm to restrain him, should the suspect's lack of perception of the contact play a role in the court's analysis?
83. *See*, *e.g.*, Rich, *supra* note 12, at § 28:2 (explaining investigatory stops on less than probable cause in *Terry*, 392 U.S. at 27).
84. *Torres*, slip op. at 10 ("A tap on the shoulder to get one's attention will rarely exhibit such an intent.").
85. The Legal Academy with Orin Kerr, *Bonus Ep. Torres v. Madrid with Andrew Crespo* (Mar. 26, 2021), https://anchor.fm/orin.kerr/episodes/Bonus-Ep--Torres-v--Madrid-with-Andrew-Crespo-etjhek ("There are many defense lawyers who will read [*Torres*] and see the equation to arrest and say, 'These are now arrests.'").
86. *Id.*

is afoot, taps the young man on the shoulder in an attempt to investigate these offenses. Is a tap on the shoulder by a police officer physical force?[87] What if the officer wants to get someone's attention for a minute?[88] What if the physical touch is an effort to restrain movement?[89] "While a mere touch can be enough for a seizure, the amount of force remains pertinent in assessing the objective intent to restrain."[90] Here, the officer at least intended to speak with the young man, and perhaps ask for his ID to determine his age, but did the officer intend to restrain his movement? What if the man turns around, and, as soon as he sees the police officer, flees? What if the officer manages to grab the young man's shirt for a fleeting second, but the young man quickly escapes into the crowd never to be seen again?

Moreover, suppose a police officer engages in a legitimate, qualified *Terry* stop with reasonable suspicion that criminal activity is afoot, and that situation quickly changes from a stop-without-frisk encounter to a stop-and-frisk encounter when the officer sees the suspect adjust his waistband and then sees the shape of a handgun. At what point in this situation does *Torres* come into play?[91] Suppose an officer in a jurisdiction allowing the carrying of handguns without permits places hands on this man with the sole purpose of removing the suspected gun—and nothing more. Is the touch aimed only at removing a firearm from the man's waistband during this investigatory stop a *Torres* touch—even if the officer does not intend to restrain the man? Some situations are so clear—like putting handcuffs on a suspect—that there is little question about the implications of *Torres* to liability under the Fourth Amendment. But many other tense, rapidly evolving law enforcement encounters will yield no easy answer as to whether a *Torres* mere-touch seizure occurred. The interplay of police encounters under *Terry* with *Torres* touches remains to be worked out by lower courts. It is entirely likely that more than a few *Terry* encounters may now be arrests under *Torres*.[92] Some scholars consider whether the Torres mere-touch rule will yield another way for protesters who encounter police resistance to pursue § 1983 claims, but one notes that "formidable barriers remain" to these claims.[93]

B. *Lower Court Cases After* **Torres**

Only a handful of cases have yet applied *Torres*. While most have considered whether a seizure occurred, one went on to consider the length of the seizure.

Courts have not found the *Torres* mere-touch rule to apply when officers pushed someone in a bar fight, tugged on someone's shirt to move him away, pushed someone out of a doorway, or pushed someone off his preferred path.[94] Critical in all these cases is that none of the officers intended to apprehend any of these people.

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87. *Torres*, slip op. at 10 ("A tap on the shoulder to get one's attention will rarely exhibit such an intent.").
88. *Id.* at 23 (Gorsuch, J., dissenting).
89. Transcript of Oral Argument at 26, Torres v. Madrid, No. 19-292 (U.S. Mar. 25, 2021) (discussing whether tapping someone on the shoulder to request immigration paperwork is a seizure).
90. *Torres*, slip op. at 10 (citing See *INS* v. *Delgado*, 466 U. S. 210, 220 (1984); *Jones*, 35 N. C., at 448–49).
91. *Compare* Brief for Petitioner at 28, Torres v. Madrid, No. 19-292 (U.S. Mar. 25, 2021) (noting that "if even a brief frisk for weapons constitutes a 'serious intrusion upon the sanctity of the person,' surely shooting bullets into someone does, too.) *with* Brief for Respondents at 8, Torres v. Madrid, No. 19-292 (U.S. Mar. 25, 2021) (noting that not all personal intercourse between police officers and citizens involves 'seizures' of persons under Terry).
92. Kerr, *supra* note 83 ("A whole bunch of stuff in the *Terry* world is potentially—maybe accidentally or unintentionally—but explicitly now, I think, in the arrest world.").
93. Chun Hin Jeffrey Tsoi, *Seizing S 1983 After Your Protest Today: Fourth Amendment and Protest Policing Post-Torres*, 59 AM. CRIM. L. REV. ONLINE 98, 112 (2022).
94. *Pinto v. Collier Cnty.*, No. 21-13064, 2022 WL 2289171, at *6 (11th Cir. June 24, 2022); *United States v. Scott*, No. 21-51084, 2022 WL 17261790, at *2 (5th Cir. Nov. 29, 2022); *Martinez v. Sasse*, 37 F.4th 506, 508-09 (8th Cir. 2022); *Jones v. D.C.*, No. CV 21-836 (RC), 2021 WL 5206207, at *4 (D.D.C. Nov. 9, 2021).

In *Pinto v. Collier County*, the Eleventh Circuit held there was no *Torres* touch when a sheriff's deputy's pushed someone to separate two men fighting outside a crowded bar.[95] In *United States v. Scott*, the Fifth Circuit found there was no *Torres* seizure where a police officer "tugged on" someone's shirt sleeve to move him out of a doorway.[96] Similarly, in *Martinez v. Sasse*, the Eighth Circuit distinguished pushing someone back from a building entrance with the force officers used intending to apprehend a suspect in *Torres*.[97] "*Torres* involved force used to apprehend a suspect, and did not address whether force used only to repel constitutes a seizure."[98] In *Jones v. District of Columbia*, the District Court for the District of Columbia held that two pushes from a police officer in an outdoor public facility were not seizures under *Torres* because the officer did not "intended to restrain" the man with his pushes.[99]

But courts have found the *Torres* mere-touch rule to apply where a motorist fleeing police was shot and a bicyclist fleeing police was struck by a police car during the pursuit.[100] Critical in these cases is that the officers intended to apprehend both people.

In *Jefferson v. Lias*, the Third Circuit held that a motorist who fled from police was "undoubtedly" seized when a police officer shot him in the forearm—even though, just like in *Torres*—the motorist continue to flee and drove himself to a hospital.[101] The court said the "shooting undoubtedly constituted a seizure."[102] In *United States v. Daniels*, the District Court for the Northern District of California found that a bicyclist who fled from a police officer who had his emergency lights activated was "seized at the moment [the officer]'s vehicle collided with the bike."[103] The bicyclist was seized at the instant of the crash because the officer "applie[d] physical force" to the bicyclist "with the intent to restrain."[104]

Finally, courts not only consider where a *Torres* seizure has happened, but, even if so, courts must sometimes determine the length of the seizure.[105] In *United States v. Daniels*, a district court considered how long a seizure lasted after a police car collided with a bicyclist it was pursing.[106] Citing *Torres*, the court said that "a seizure by force—absent submission—lasts only

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95. *Pinto v. Collier Cnty.*, No. 21-13064, 2022 WL 2289171, at *6 (11th Cir. June 24, 2022) ("[The deputy]'s initial push was not a seizure under the Fourth Amendment because it was not done with 'an intent to restrain,' but rather 'for some other purpose'—namely to separate two men engaged in an altercation outside of a crowded bar." (quoting *Torres*, 141 S.Ct. at 998)).
96. *United States v. Scott*, No. 21-51084, 2022 WL 17261790, at *2 (5th Cir. Nov. 29, 2022) ("Not 'every physical contact between' an officer and an individual is 'a Fourth Amendment seizure'; rather, '[a] seizure requires the use of force *with intent to restrain.*'" (quoting *Torres*, 141 S. Ct. at 998)).
97. *Martinez v. Sasse*, 37 F.4th 506, 508-09 (8th Cir. 2022). In Martinez, federal agents "purposefully backed into [someone] to prevent her from entering [a building]. [The agents] then allegedly pushed [her] back and locked the doors to the facility." *Id.* at 508.
98. *Id.* at 509.
99. *Jones v. D.C.*, No. CV 21-836 (RC), 2021 WL 5206207, at *4 (D.D.C. Nov. 9, 2021) ("To be sure, the first push caused [him] to stumble backwards and blocked him from proceeding along his preferred path; [the officer]'s second push also sent [the man] 'backwards.' These facts might well indicate an objective intent to prevent [the man] from entering the area behind [the officer] or to send him back in the direction he came from, but an intent to keep out or to redirect is not an intent to 'restrain' or to 'apprehend.'" (cleaned up)).
100. *Jefferson v. Lias*, 21 F.4th 74, 76-78 (3d Cir. 2021) (citing *Torres, 141* S. Ct. at 999); *United States v. Daniels*, No. 19-CR-00709-BLF-1, 2022 WL 1540035, at *6 (N.D. Cal. May 16, 2022). For a discussion of the impact of *Torres* in the context of high-speed pursuits, see Hayley Bork, *No Need for Speed: The Inherent Unreasonableness of High-Speed Police Chases and A New Approach to Excessive Force Litigation*, 88 BROOK. L. REV. 649, 675–79 (2023). "In high-speed chase scenarios, officers undoubtedly engage in conduct that objectively manifests an intent to restrain the fleeing motorist." *Id.* at 677.
101. *Jefferson v. Lias*, 21 F.4th 74, 76-78 (3d Cir. 2021) (citing *Torres, 141* S. Ct. at 999).
102. *Id.*
103. *United States v. Daniels*, No. 19-CR-00709-BLF-1, 2022 WL 1540035, at *6 (N.D. Cal. May 16, 2022).
104. *Id.* (citing *Torres*, 141 S. Ct. at 998).
105. *See, e.g.*, *United States v. Daniels*, No. 19-CR-00709-BLF-1, 2022 WL 1540035, at *8 (N.D. Cal. May 16, 2022).
106. *United States v. Daniels*, No. 19-CR-00709-BLF-1, 2022 WL 1540035, at *8 (N.D. Cal. May 16, 2022) ("Daniels discarded the contraband of his own volition as he ran down the driveway. This was after the seizure had terminated and Daniels was in a 'period of fugitivity' (citing *Hodari D.*, 499 U.S. at 625)). "If the vehicle–bike collision had, for example, resulted in the contraband flying from Daniels' body and scattering on the ground, this might be a different case. But that did not happen, and Daniels cast away the gun paraphernalia himself as he was running from officers." *Id.*

as long as the application of force."[107] Citing both *Hodari D.* and *Torres*, the court said the seizure concluded when the fleeing suspect got up and began running away again.[108] Considering the "fleeting nature of some seizures by force," the court held that the defendant was in a "period of fugitivity" when he got up and ran away after the collision.[109] Thus when he then discarded contraband, he was not seized.[110]

But regardless of the expansive reading of seizures by force that may result in additional litigation in future cases, Roxanne Torres still faces an uphill climb in her case against the New Mexico state troopers.[111] The Supreme Court's ruling merely revives her case and allows it to go forward in the lower courts.[112] Those courts will have to decide whether the seizure was reasonable, whether the troopers are entitled to qualified immunity, and—if Torres can get past those barriers—what damages she is entitled to.[113]

V. CONCLUSION

Torres v. Madrid is an appropriate extension of the Supreme Court's Fourth Amendment jurisprudence. The Court crafted a suitable divorce from a single line of analysis for all seizures of persons under the Fourth Amendment. No longer is a seizure by force interpretated the same as a seizure by acquisition of control, which had required a police officer to gain actual control over the person seized. Now, the application of physical force to the body of a person with intent to restrain is a seizure even if the person does not submit and is not subdued. Accordingly, someone who flees and eludes capture after bring shot by a police officer now has the ability to pursue a cause of action under 42 U.S.C. § 1983 for excessive force in violation of the Fourth Amendment.[114] Ultimately, though, if lower courts view the mere-touch rule in *Torres* too expansively, a wide variety of law enforcement encounters may come unnecessarily within the Court's newly articulated standard for seizure by force. Such a sweeping expansion would risk capturing even the slightest touches under the mere-touch rule and lead to unnecessary litigation. But for plaintiffs, like Roxanne Torres, who are shot by police officers and nonetheless flee and elude capture, their cases can now be pursued as excessive force claims under the Fourth Amendment.

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107. *Daniels*, 2022 WL 1540035, at *8 (quoting *Torres*, 141 S. Ct. at 999).
108. *Id.*
109. *Id.*
110. *Id.*
111. Belin, *supra* note 7.
112. *Id.*; *see also* Steven S. Schwinn, *Court Says a Shooting by Police is a Seizure, Even if Target Gets Away*, CONST. LAW PROF BLOG (Mar. 27, 2021), https://lawprofessors.typepad.com/conlaw/2021/03/court-says-a-shooting-by-police-is-a-seizure-even-if-target-gets-away.html.
113. Belin, *supra* note 7.
114. For a discussion about the objective analysis used in Fourth Amendment cases, see Juval O. Scott, *The Myth of Objectivity in Fourth Amendment Jurisprudence*, CRIM. JUST., Spring 2021, at 13, 15 ("It is patently unfair to have a standard or test that focuses solely on the police officer's perspective and centers reasonableness through the lens of the affluent white male experience, while ignoring the perspective, experience, and history of the BIPOC community members subject to police power.").