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MERE TOUCHES WITH MASSIVE RAMIFICATIONS:

AN ANALYSIS OF *TORRES V. MADRID* AND ITS POTENTIAL EFFECTS ON POLICE AND SECTION 1983 PLAINTIFFS.

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I. INTRODUCTION

Since its founding, the Supreme Court has often struggled to interpret what constitutes a "search" and a "seizure" under the Fourth Amendment. Although the tests for what constitutes a search are far from perfect, there is no doubt that two sturdy foundations exist from *Katz v. United States*[2] and *United States v. Jones*,[3] which provide a firm basis for future cases and are unlikely to disappear any time soon. The same cannot be said for seizures, specifically seizures of persons. What once had a stable foundation in *Terry v. Ohio*[4] was recently uprooted in 2021 by *Torres v. Madrid*[5]. The majority in this landmark case not only dissolved *Terry*'s requirement that seizures must restrain a citizen's liberty, but it also

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[2] Katz v. United States, 389 U.S. 347 (1967).
[3] United States v. Jones, 565 U.S. 400 (2012).
[4] Terry v. Ohio, 392 U.S. 1 (1968).
[5] Torres v. Madrid, 141 S. Ct. 989 (2021).

implemented the mere-touch rule from common law. Under this rule, any touch from an officer or one of the officer's tools may constitute a seizure. This rule will have devastating effects on police and plaintiffs pursuing 1983 claims that hope to overcome qualified immunity. Instead of siding with existing precedent, the majority produced a rule that disregarded more than half a century of case law, unnecessarily muddied the waters even further, and created uncertainty where there once was stability.

This note will argue that the Court wrongly decided *Torres*, explain why the dissent, who argued for keeping the rules found in *Terry*, *Brower*, and their progeny, was correct, and highlight the mere-touch rule's shortcomings, namely its ramifications on police as well as those suing under Section 1983.

II. PRE-TORRES SEIZURE CASES

Understanding the Court's reasoning in *Torres* and the precedent in place prior to the decision is impossible without first having a firm understanding of the Supreme Court seizure cases that came before. Not only are these cases useful to show what rules have already been implemented, but they lay the groundwork for *Torres* and the dissent's seizure rule—the intentional acquisition of control. Thus, this note must discuss three main cases before addressing *Torres* with any amount of depth.

The case that set modern-day seizure law into motion was *Terry v. Ohio*.[6] In the famous stop-and-frisk case from the waning days of the Warren Court, the Court not only broke away from the Fourth Amendment's reliance on probable cause but also highlighted what the Court believed constituted a seizure. The facts of the case are straightforward. An officer observed three men acting suspiciously outside a store, walking up to the window and peering in multiple times.[7] After inferring that the men intended to rob the store, the officer confronted the men, told them he was a police officer, and asked for their names.[8] The men only mumbled incoherent responses to the officer's requests.[9] Suspecting that the men

[6] Terry, 392 U.S. at 1.
[7] *Id.* at 6.
[8] *Id.*
[9] *Id*. at 7.

were armed, the officer immediately conducted a pat down on Terry and discovered a .38 caliber revolver.[10] Terry was later convicted of possessing a concealed weapon and appealed his conviction.[11]

Although the majority understandably spent most of the opinion supporting their new reasonable suspicion standard for stop and frisks, they also briefly mentioned whether a seizure had taken place under the Fourth Amendment. According to the majority, a seizure took place ". . . only when the officer, by means of *physical force* or *show of authority*, has in some way restrained the liberty of a citizen . . . ."[12] This highlighted two different scenarios where a seizure could occur. First, physically restraining (holding down, tackling, grabbing by the arms, handcuffing) for any amount of time constituted a seizure by force. Second, any time an officer restrained physical movement through words or conduct (verbally threatening individuals with arrest if they attempted to leave or gesturing to them to stay in one spot for any amount of time) also constituted a seizure because, although the individual was not physically restrained, the outcome is the same—their liberty to leave was restrained. Put another way, a seizure occurred when an officer acquired control over an individual under either scenario, whether that control was physical or constructive. Applying this rule to the facts, the majority concluded that Terry was seized when the officer began frisking him for weapons because the officer acquired physical control over Terry in order to search him.[13]

Over the following decades, the Supreme Court heard numerous seizure cases and eventually decided to add an additional element to *Terry*'s rule in *Brower v. County of Inyo* in 1989.[14] In *Brower*, a man was killed after stealing a vehicle and ramming it into an "18-wheel tractor-trailer" that was purposefully placed in the middle of the road by police to end the pursuit.[15] According to the Court, a seizure occurred because the officers forcefully terminated the suspect's freedom of movement (and acquired possession of him) through means

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[10] *Id.*
[11] *Id.* at 8.
[12] Terry, 392 U.S. at 19, n. 16.
[13] *Id.*
[14] Brower v. County of Inyo, 489 U.S. 593 (1989).
[15] *Id.* at 594.

intentionally applied.[16] In the mind of the majority, little difference existed between an officer sideswiping a car and wrecking it and placing a truck in the middle of the road to achieve the same result.[17] Both instances involved means put in place by police with the intent to terminate the suspect's freedom of movement.[18] This added intent element would become commonplace for all seizure cases to come but did not relinquish the requirement that seizures required a complete termination of liberty. These two elements, the termination of liberty (later articulated as the acquisition of control) combined with the added intent element (the subjective intent of the officer), would be what the dissent in *Torres* would unsuccessfully argue as the applicable seizure standard. The majority argued that the mere-touch rule is the appropriate seizure test, which Justice Scalia famously introduced in *California v. Hodari D.* two years after *Brower*.[19]

In 1991, the Court made the last major change to seizures relating to persons until *Torres* thirty years later. In the short majority opinion by Justice Scalia, a simple case seeking to answer the question of whether a juvenile was seized by the police turned modern seizure law on its head and created a circuit split and confusion in the *Torres* decision that followed.

Hodari D. raised a basic question: does a person have to submit to an officer's show of authority to be seized under the Fourth Amendment?[20] With such a basic question, one cannot help but wonder how so much confusion could stem from one case. Even the facts of the case are short and straightforward. After police drove by in a squad car in front of him, Hodari D., a juvenile, fled from officers and threw a baggie of cocaine onto the ground before the officers tackled and handcuffed him.[21] The juvenile believed that the cocaine collected at the scene should have been suppressed because he had been seized by the officers when they chose to pursue him, arguing that the officers' pursuit constituted seizure by a show of authority.[22] First, Scalia correctly pointed out that Hodari D.'s liberty was

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[16] *Id.* at 597.
[17] *Id.*
[18] *Id.*
[19] California v. Hodari D., 499 U.S. 621 (1991).
[20] *Id.* at 625.
[21] *Id.* at 623.
[22] *Id.*

not restrained during the chase as required by *Terry*.[23] Scalia cited how the officers' twenty-mile chase in *Brower* obviously constituted a show of authority but nevertheless was not a seizure because the suspect never submitted to it.[24] As a result, the chase never restrained his liberty.[25] Scalia's analysis then departed from the facts in the case at hand, and he created a new hypothetical case in which the officers touched Hodari D. during the pursuit.

In Scalia's mind, this hypothetical touch constituted a seizure by physical force, despite the possibility that Hodari D. might have continued to flee and eventually escape. This imaginary scenario also ignored the fact that the police never acquired control over him. To Scalia, a simple touch combined with lawful authority was all that was required for a seizure by force to take place.[26] Despite it being abruptly applied to the Hodari D. hypothetical, Scalia's "mere-touch" rule was not made up on the spot. A nineteenth-century Supreme Court case backed his opinion, along with a comment from the Restatement of Torts on common law arrests.[27] Although Scalia's argument lacked much case law to support it, his reasoning seemed to make sense. To Scalia, a common law arrest was a Fourth Amendment seizure. Since common law arrests only required a mere-touch from an officer to effectuate, a seizure resulted anytime the officer touched a person with lawful authority. However, Scalia's adoption of the mere-touch rule flew directly in the face of *Terry* and other seizure cases that followed since restraint of individual liberty was no longer a requirement under the mere-touch rule.

The majority opinion in *Hodari D.* also jumped off the page for many readers because of its blatant double standard between a seizure by force and one by a show of authority. On one hand, a seizure by force now only required a single touch from an officer, regardless of whether the touch restrained the individual or even slowed them down at all. On the other hand, a seizure by a show of authority, exemplified by the real facts in *Hodari D.*, still required the police to restrain an individual's liberty. Scalia's decision to depart from *Terry* also had a grave

[23] *Id*. at 628.
[24] *Id.* at 629.
[25] *Id.*
[26] *Id.* at 623.
[27] *Id.*

unintended consequence for seizures by force. Judges across the country now had to make a decision: they could either choose to apply the mere-touch rule found in the dicta of *Hodari D.* or choose to ignore it and apply *Terry* and *Brower* (the acquisition of control with *Brower*'s new intent element). Despite the mere-touch rule clearly being mentioned only in dicta, *Hodari D.*'s opinion was hot off the press, and many courts chose to apply it to the cases before them and ignore *Terry* and *Brower* altogether. Other judges chose to stand firm in *Terry* and see Scalia's mere-touch discussion as the dicta it was. This lack of uniformity unsurprisingly led to a circuit split, which set the stage for *Torres* thirty years later.

III. *TORRES*

A. THE MAJORITY

On the dawn of July 15, 2014, several New Mexico State Police officers, armed with their handguns and an arrest warrant, approached a Toyota FJ Cruiser parked in an apartment complex in Albuquerque after seeing Roxanne Torres enter the vehicle.[28] Believing that Torres was the suspect listed on the warrant and wanted for involvement in a murder and drug trafficking, the officers drew their weapons and attempted to bring Torres into custody.[29] Unbeknownst to the officers, Torres was not the person they were after—she was actually the subject of a different arrest warrant and was "tripping out bad" on methamphetamine at the time the officers approached her.[30] Claiming to not have seen the officer's tactical vests, which identified them as police, and fearing she was being carjacked, Torres put the vehicle in drive and sped across the parking lot to escape.[31]

After speeding past the officers, two of them fired thirteen times, striking Torres twice in the back.[32] Torres navigated out of the apartment complex and into the lot of a nearby car dealership.[33] There, she stole a Kia Soul and drove it

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[28] Torres v. Madrid, 141 S. Ct. 989, 994 (2021).
[29] *Id.*
[30] *Id.* at 1003.
[31] *Id.*
[32] *Id.* at 994.
[33] *Id.*

seventy-five miles until arriving at a hospital to seek medical attention.[34] Luckily, Torres's wounds were treatable, but there was a catch. The hospital she arrived at could not treat her wounds, but one in Albuquerque could.[35] Torres was life-flighted back to Albuquerque, where she was arrested the following day for aggravated fleeing from law enforcement, assault on a peace officer, and unlawfully taking a motor vehicle.[36]

Following her arrest, Torres sought damages from the two officers under 42 U.S.C. §1983,[37] claiming that her Fourth Amendment rights had been violated.[38] She argued that the officers used excessive force, which amounted to a Fourth Amendment seizure. After having her claim denied by both the federal district court and again on appeal, the Supreme Court granted certiorari to address the circuit split.[39]

The question before the court seemed simple enough on its face: had a Fourth Amendment seizure occurred when police shot a suspect who nevertheless escaped? At first glance, *Torres*'s facts seemed to align with *Hodari D.* Neither suspect was physically touched by the police, and neither submitted to any show of authority, initially leading one to believe that Torres was never seized. However, after citing cherry-picked definitions of "seizure," reviewing centuries-old cases involving English debt collection practices, and ignoring *Terry* and problems with the opinion raised by the dissent, the majority reasoned that a seizure had occurred.[40] To support the majority's decision, Justice Roberts began his analysis with a deep dive into obscure English case law, much like Justice Scalia did in *Hodari D.* While agreeing with Scalia's dicta in *Hodari D.*, yet refusing to acknowledge it as controlling precedent, the majority opinion agreed with Scalia that "[t]he application of physical force to the body of a person with [the] intent to restrain is a seizure, even if the force does not succeed in subduing the person."[41] However, Robert's legal support for the majority's decision left a lot to be desired.

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[34] *See Torres,* 141 S. Ct. at 994.
[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] *Id.* at 1005.
[40] *Id.* at 1003.
[41] *Id.*

First, Roberts picked up where Scalia left off in *Hodari D.* and began his argument by citing how English common law only required a touch (often referred to as the "laying of hands") to effectuate an arrest.[42] Roberts then attempted to show a parallel with American case law by adopting the mere-touch rule as well, but there was a problem. The best examples he could find to support his argument were state trial courts between the years 1852 to 1904.[43] These cases were too new to argue they would have had any influence on the founders and too old to control modern cases, especially after *Terry*'s precedent.

The majority's reasoning contained another major problem: even if the mere-touch rule was rightly the applicable law in the United States, it was still one step removed from *Torres* because Torres was shot and not physically touched by the officers. In an effort to bridge this gap, Roberts searched high and low to find any case that could support his argument. Finally, he pointed to *Countess of Rutland's Case*, a seventeenth-century English case involving "serjeants-at-mace" arresting a countess by touching her with a mace and declaring, "we arrest you, madam."[44] Roberts argued that this case should guide the Court since police in America typically were not equipped with firearms until the latter half of the nineteenth century, explaining the lack of early American cases to support his argument.[45]

After establishing that firearms were weapons that fall under the mere-touch umbrella, Roberts quickly closed the door behind it, refusing to consider Gorsuch's invitation to "opine on other matters not presented here—pepper spray, flashbang grenades, lasers, and more."[46] Even though Roberts agreed that the mere-touch rule was the correct test, he was also aware of the trouble *Hodari D.*'s dicta caused. Perhaps that is the reason why Roberts refused to discuss weapons and other methods of apprehension not present in *Torres*. Instead of stating that the mere-touch rule should only be applied to firearms, Roberts suggested that *Torres* only applied to

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[42] *Id.* at 996.
[43] *Id.*
[44] *Id.* at 997.
[45] *Id.* at 998.
[46] *See Torres*, 141 S. Ct. at 998.

weapons used to apprehend suspects.[47] Thus, any analysis of pepper spray, flashbangs, and lasers was unnecessary because, to Roberts, these weapons were not used to restrain suspects.[48]

Finally, Roberts argued that the new seizure test would also have a different intent element than the one described in *Brower*. According to Roberts, the intent element should be an objective one.[49] Rather than focusing on whether the officer subjectively intended to acquire possession, the majority's rule would look at whether the totality of the circumstances showed an objective intent to restrain.[50] Thus, the final seizure rule for a person is the "application of physical force to the body of a person with [an objective] intent to restrain."[51]

B. THE DISSENT

To counter the majority, Justice Gorsuch, writing for the dissent, began by critiquing the majority's attempt at applying English cases to Fourth Amendment seizures. Gorsuch's argument was simple yet extremely effective. To Gorsuch, at the time of the founding, a seizure required possession. Gorsuch cited numerous dictionary definitions of seizure at the time of the founding to prove his point, along with many early Supreme Court cases from the late eighteenth century.[52] All of these sources reached the same conclusion—whether it was a ship, a home, or a person at issue, a seizure required actual possession, and a mere-touch from an officer was not sufficient.[53] After pointing out that the majority ignored the Constitution's plain meaning of "seizure" at the time of its creation, Gorsuch eviscerated Roberts's reliance on English common law cases to support his argument.[54]

As previously discussed, both Scalia and Roberts cited the same English common law cases to justify applying the mere-touch rule to a Fourth Amendment seizure context. However, Gorsuch quickly pointed out the absurdity of

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[47] *Id.*
[48] *Id.*
[49] *Id.*
[50] *Id.*
[51] *Id.* at 994.
[52] *See* Torres, 141 S. Ct. at 1006.
[53] *Id.* at 998.
[54] *Id.* at 1008.

applying the mere-touch rule to seizures because it was rooted in outdated civil debt collection practices and had never been applied to a criminal case in England or America from the time of the founding until the Civil War.[55] In sixteenth-century England, creditors hired bailiffs to civilly arrest debtors who refused to pay what they owed.[56] However, this practice had a caveat. Since the debt was a civil and not criminal matter, the bailiff could not enter the debtor's home to complete the arrest.[57] Over time, this led to debtors hiding in their homes, or "keeping house," to avoid debt collectors.[58] To provide some fairness to the debtor, the common law allowed a bailiff to enter the home and complete the arrest if he managed to touch the debtor through a window or door.[59] As one might expect, this bizarre exception led to bizarre cases, one of which, as Gorsuch pointed out, involved a bailiff climbing a ladder to touch a debtor through a broken window on the upper story of a home.[60]

To Gorsuch, the only thing more absurd than the mere-touch rule was taking such a bizarre and antiquated practice and then applying it to Fourth Amendment seizures in the modern day.[61] To top it all off, all but one of the English common law and American cases cited by Scalia and Roberts that applied the mere-touch rule only dealt with the outdated debt collection practice and did not apply the rule in a criminal context.[62] How, then, could it possibly be used to support the majority's argument?

Next, Gorsuch directed his attention to *Countess of Rutland's Case,*[63] which was the majority's attempt to extend the mere-touch rule to encompass firearms.[64] That case entailed the question of whether a countess could be arrested at all rather than if she was arrested when the bailiffs touched her with their

[55] *Id.* at 1011.
[56] *Id.* at 1010.
[57] *Id.*
[58] *See* Torres, 141 S. Ct. at 1010.
[59] *Id.*
[60] *Id.* at 998.
[61] *Id.* at 1011.
[62] *Id.* at 1012.
[63] Countess of Rutland's Case, 6 Co. Rep. 52b, 77 Eng. Rep. 332 (Star Chamber 1605).
[64] *See Torres*, 141 S. Ct at 1013.

mace.[65] Further, Gorsuch pointed out that touching the countess with the mace constituted a seizure by submission to a show of authority and not a seizure by force because it was a show of authority followed by compelled detention.[66] Neither Torres nor the officers in the case at hand would deny that these two things together constituted a seizure.[67]

Gorsuch then briefly attacked the majority's new objective intent standard for seizures. Because of the majority's vagueness while describing their new element, it remained unclear what conditions objectively manifested an intent to restrain.[68] To Gorsuch, this could spell disaster for police investigations in the future.[69] What if an officer touches several people walking down the street, and the situation objectively indicates that the officer wanted to "secure a person's attention for a minute, a quarter-hour, or longer?"[70] Would these everyday interactions between officers and citizens turn into hundreds of seizures?[71] The dissent failed to address Gorsuch's questions, leaving many questions about the new rule's ramifications unanswered.

Finally, Gorsuch ended the dissent by advocating for a better seizure rule comprised of essentially the same rule as *Terry* with the added subjective intent element from *Brower*—the intentional acquisition of control. This rule, also purported by the officers, not only followed the definition of "seizure" at the time of the founding and followed the plain meaning of the Constitution (a seizure required the acquisition of control), but it also had over fifty years of Supreme Court case law to support it. While the majority scrambled to find any support for their argument, as evidenced by their attempt to apply the mere-touch rule outside of civil debt collection and citing *Countess of Rutland's Case*, Gorsuch's rule had copious amounts of case law and common sense to support it. Despite its superiority, Gorsuch's rule failed to win out, which leaves one to ponder how the decision's ramifications will affect police and Section 1983 actions going forward.

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[65] *Id.*
[66] *Id.*
[67] *Id.*
[68] *Id.* at 1015.
[69] *Id.*
[70] *Id.*
[71] *Id.*

IV. POST-*TORRES*

A. LASTING EFFECTS ON POLICE

i. EFFECTS ON TRAINING, INTERACTIONS WITH THE PUBLIC, AND PUBLIC RELATIONS

Despite the majority's attempt to produce a hard and fast rule for seizures of persons that clears up confusion, the new rule muddies the waters further when one considers its effect on police. One thing is certain, however: officers will have to be extremely careful with how they interact with the public from now on. While this may sound like a positive outcome from the decision, it might make it extremely hard for police to do their job as the law currently stands. Much of this is thanks to the mere-touch rule and its objective intent element.

Although it was barely discussed in both the majority and dissent, the rules proposed by both sides included different intent elements. As previously discussed, according to Roberts, the intent element should be an objective one based on the circumstance.[72] This adds another layer on top of the ever-evolving mere-touch rule, and the two combined prove to be an unsavory combination for police. To illustrate this point, consider the following scenario. An officer attempts to catch a purse snatcher fleeing down a busy street. During the pursuit, the officer makes brief contact with several pedestrians, placing his hand on them and using them to maneuver through the crowds. Under the dissent's rule, none of these touches would be considered a seizure because they fail both prongs of the test—the officers did not subjectively intend to acquire control of the pedestrians and failed to actually obtain it. Here, there would be no likelihood of the officer seizing any of these people.

With the majority's rule, merely touching a pedestrian is always enough to satisfy the first prong of the analysis. Next, one must examine if there was objective intent to restrain given the circumstance. This gets into dicey territory. If an officer places his hand on a pedestrian's shoulder as he runs by, does this manifest an objective intent to restrain for that brief moment? Maybe the situation objectively appears like the

[72] *See Torres*, 141 S. Ct. at 999.

officer was running towards someone, placed his hands on them, and attempted to restrain them, but subjectively, the officer had no intent to do so and was simply attempting to navigate through the crowded street. It is easy to see how the majority's rule could quickly spiral out of control and produce an unconstitutional seizure with every police pursuit or emergency call.

To avoid this becoming the norm, several changes will have to occur. First, officers must be trained on the mere-touch rule. This will undoubtedly use law enforcement resources across the country and take officers out of the seats of their patrol cars and place them into desks as they learn the new rule in classrooms. Further, it will be difficult for the officers to understand the majority's new rule because of its complexity. The mere touch rule is now law, weapons and other police tools now potentially apply under it, officers do not have to subjectively intend to restrain anyone for a seizure to occur, and the Court offered little detail as to what objective intent even looks like. With so many new layers of complexity added onto seizure law so quickly, it will be interesting to see if the police (and lawyers and judges, for that matter) can keep up.

Next, once educated on the new rule, officers will likely become hesitant to chase the purse snatcher from the hypothetical earlier, worried that an unintentional seizure may occur during the pursuit. If criminals discover that police are less likely to get involved in a situation or pursue them for fear of committing an unreasonable seizure, crime is likely to skyrocket. Further, consider how the majority's rule will impact police in their first responder roles. Patrol officers typically spend around twenty percent of their time on duty responding to non-criminal matters and emergencies.[73] With such a staggering amount of time devoted to assisting the public with non-criminal matters, it is fair to worry that the majority's rule might lead to longer response times for fear of accidentally seizing a bystander with a touch. Will an officer risk potential civil liability by placing his hands on bystanders to get to the victim? In the moments where seconds make the difference between life and death, such hesitation from officers could

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[73] Brad W. Smith, Kenneth J. Novak & James Frank, *Community Policing and the Work Routines of Street-Level Officers,* 26 CRIM. JUST. REV. 17, 27-28 (2001).

produce fatal results. The dissent's rule solves this problem. It is highly unlikely that the officer exhibited the required control element over a bystander simply by touching them, much less the required subjective intent to acquire control over the bystander.

Finally, one should also consider how the public may misinterpret the new rule. The public misunderstands numerous things about their constitutional rights and precedent from chief Supreme Court cases. Two prevalent ones that come to mind are that the police cannot lie to suspects and that officers always have to read off the *Miranda* rights before questioning. Because of the new rule's complexity, the public likely will overlook (or fail to understand) the objective intent element and jump to the conclusion that every touch or any other contact with an officer constitutes a seizure. This could tarnish relations between the community and its officers. It will prove hard for police to de-escalate situations if everyone they encounter believes they have been seized by as much as a finger tap. This will obviously escalate what might already be a tense situation and could prove deadly for misinformed citizens. With the dissent's rule, this misunderstanding would not occur. The Supreme Court has handed down decades of seizure cases applying the dissent's rule with no misunderstanding from the public.

Given that police make contact with about 61.5 million people each year, the majority's rule will mean disaster for police as they attempt to foresee and navigate the ruling's impact on their departments.[74] Resources and effort will have to be used to educate and train officers about what forms of contact are appropriate, which will undoubtedly strain the taxpayers funding those efforts. Once trained, officers will be less likely to make contact with citizens for fear of being sued for unreasonably seizing a person, which will hamper their ability to prevent and solve crimes, as well as pursue and arrest criminals. Likewise, this will have the same negative effect on police responding to non-criminal matters as well, impeding their ability to aid the public. Finally, the majority's rule will confuse the public about what constitutes a seizure, which will lead to more escalated confrontations with officers. Conversely,

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[74] ERIKA HARRELL & ELIZABETH DAVIS, CONTACTS BETWEEN POLICE AND THE PUBLIC, 2018 – STATISTICAL TABLES 3 (2023), https://bjs.ojp.gov/content/pub/pdf/cbpp18st.pdf.

requiring the intentional acquisition of control would solve these problems and ensure police can interact with the public without the fear of violating an individual's constitutional rights and being sued every time an officer makes physical contact with them.

ii. WHAT POLICE TOOLS APPLY UNDER *TORRES* AND THE SLIPPERY SLOPE

As previously mentioned, the mere-touch rule now applies to seizure cases, and shootings now constitute a mere-touch. In the following years, it will be interesting to see if any other police tools are added to the list. After reading the opinion, one would assume that at least a few tools will eventually have to be added. Attempting to limit this obvious slippery slope, Roberts tried to reign in the mere-touch rule to apply only to police tools that were used to apprehend.[75] However, this attempt was a bizarre one and far from being clear.

First, it is difficult to say that firearms would always fit into this category. Firearms are primarily used to protect officers and the public from criminals, not to restrain them. Thus, firearms only fall under the mere-touch rule when they are being used to restrain individuals. However, the argument can almost always be made in any shooting that the officer used their firearm to restrain, adding yet another layer of needless complexity. Consider the *Torres* facts. The majority jumps to the conclusion that the officers shot Torres to restrain her, with little analysis to support their claim.[76] Arguably, the primary reason for the shooting could have been to protect the public from the threat of being run over like the officers themselves narrowly escaped.

The dissent's rule does away with this unnecessary line-drawing between what weapons can and cannot be used to control. Any weapon, tool, or, as shown in *Brower*, impediment used by police is all fair game for seizures. The *Terry-Brower* analysis is different because it ignores the tool or method being used and instead focuses on whether the officers attempted to gain control over the suspect. Guns still apply under *Terry*, but only when they give the officer control over the suspect. The

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[75] *See Torres*, 141 S. Ct. at 998.
[76] *Id.* at 999.

majority's rule becomes even more bizarre when you consider other tools used by police, and it is helpful to compare the two rules side by side with each tool to see the different outcomes. Now that firearms apply under the mere-touch rule, arguing that other tools should be excluded is difficult, especially ones that are more commonly used to apprehend suspects.

Tasers, for instance, will fall under this umbrella even if it fails to stop or slow down the suspect. The barbs entering the suspect will be enough to constitute a mere touch, and a taser's sole purpose is to immobilize the suspect and place them under the officer's control. Compare this analysis under the majority's rule to the dissent's rule. Tasers, under the dissent's rule, can effectuate seizures only if they terminate the suspect's freedom of movement, focusing on the result of the officer's conduct instead of the weapon used or whether there was a touch from the weapon.

The analysis gets trickier when it comes to tools such as pepper spray, tear gas, and flashbang grenades. Arguably, all of these tools have a purpose other than apprehension, but despite what Justice Roberts argued in the opinion, these tools are often used by police to gain control of suspects.[77] For example, pepper spray is just as capable of making contact with a suspect as a bullet. Although not every deployment of it is intended to apprehend, pepper spray is predominantly used to allow police to gain control of a suspect, whereas a gun is primarily used for defense and neutralizing threats to officers. Under the dissent's rule, the analysis looks at whether the pepper spray allowed the officer to gain control over the suspect. If so, a seizure occurred and must be justified. However, when the mere-touch rule is applied, the outcome is trickier to predict. Does the mist that the suspect inhales constitute an extension of the officer like a bullet? If so, how much pepper spray is required to equal a touch? One can easily see how applying the mere-touch rule to pepper spray could produce problems for police and lead to more questions than answers when it comes to seizures. Since being introduced, pepper spray has reduced the number of injuries to both officers and suspects, as well as diminished the number of excessive force claims.[78] With the mere-touch rule's slippery

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[77] *See Torres*, 141 S. Ct. at 998.

[78] MICHAEL BOWLING ET AL., THE EFFECTIVENESS AND SAFETY OF PEPPER SPRAY 1 (2003), https://www.ojp.gov/pdffiles1/nij/195739.pdf.

slope looming over it, only time will tell if pepper spray's effectiveness persists after *Torres*, or if many officers will likely read the writing on the wall and choose not to use it rather than face a potential lawsuit.

Flashbangs and tear gas are like pepper spray. Arguably both make contact with suspects either by inhaling it or by sending out a concussive blast that temporarily blinds and deafens anyone within its range. Both of these methods are also more commonly thought to be means of apprehending suspects than firearms, even though they can be used for other purposes. While these might be further removed from tasers and pepper spray, one can quickly notice a slippery slope beginning to form through these examples.

With the dissent's rule, the only question to ask remains the same no matter what type of seizure is alleged: did the officer intentionally acquire control of the person? If the answer is "no," then no further analysis is needed for what tools can be used to effectuate a seizure. If the answer is "yes," then a seizure did, in fact, occur. This simple, streamlined approach to seizures will save time and headache that will be wasted by future courts attempting to determine if an obscure tool, such as a laser beam striking a suspect's eye, constitutes a mere touch. By stating that a bullet striking a fleeing suspect can constitute a seizure, even though no control was exerted over the individual, the Supreme Court opened Pandora's box for what other tools may apply under the rule, and cases involving all types of absurd tools will soon flow from it. It remains to be seen how slippery of a slope *Torres* creates, but one thing is certain. Soon, the mere-touch rule will extend to other commonly-used police tools as well. This is the only logical conclusion given that the Court considers any tool used to apprehend to be an extension of the officer. Since police use many tools that make physical contact with suspects in some form or fashion, the mere-touch rule may eventually apply to almost every conceivable police tool. *Torres*'s impact, although already felt by police, may devastate them even further in years to come.

B. TORRES GIVES SECTION 1983 PLAINTIFFS FALSE HOPE OF SUCCESS

Not only will the majority's decision negatively impact police, but it will also negatively affect private citizens pursuing

Section 1983 claims because it will provide them with false hope of success just to have their cases quashed by qualified immunity. This stems from the lack of cases that cite the mere-touch rule, especially those dealing with weapons, and how it will make the already daunting hurdle of qualified immunity an impassible barrier between the plaintiff and their relief sought for mere-touch seizure cases.

Almost everyone in the legal community has heard about qualified immunity at some point, but few understand how it works. Today, qualified immunity is mainly thought of as an implied, unwritten common law defense to Section 1983 actions. Section 1983 was enacted after the Civil War to give citizens a federal cause of action against state actors who violated the Fourteenth Amendment.[79] After all, it makes no difference how many Constitutional rights are guaranteed if there are no practical means to enforce them and keep government officials in check. However, in *Pierson v. Ray,* a 1967 Supreme Court case, the Court decided to reel in Section 1983 actions by allowing government defendants to raise the common law defenses of the underlying tort alleged in the action.[80] In *Pierson*, the alleged underlying tort was a false arrest, which had a good-faith common law defense.[81] The Court allowed the defendant the opportunity to argue this defense, and qualified immunity in the modern sense was born (really revived) from common law. From there, qualified immunity would expand over the following decades and pose a significant threat to nearly every Section 1983 action.

In seizure cases, qualified immunity boils down to an objective reasonableness standard and seeks to determine if the government agent acted reasonably in the situation.[82] The test can be summarized by a single question: did the agent violate clearly established law?[83] If the agent is deemed to have acted in accordance with the established law, they are deemed to have acted in an objectively reasonable fashion.[84] Thus, qualified immunity would shield the agent from liability. However, if the

[79] Richard Briffault, *Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1138 (1977).
[80] Pierson v. Ray, 386 U.S. 547, 557 (1967).
[81] *Id.* at 557.
[82] Martin A Swartz, *Fundamentals of Section 1983 Litigation*, 17 TUARO L. REV. 525 (2001).
[83] *Id.* at 539.
[84] *Id.*

agent acted outside the established law, they are deemed to have not acted in an objectively reasonable fashion, and qualified immunity will not bar suit.[85]

Determining what constitutes established law is tricky. Essentially, there must be a Supreme Court, state supreme court, or another high court case whose issues and facts closely mirror the case at hand. If the issues and facts are close enough, then the government agents are considered to have notice of the case and its outcome. Committing the same violation as another agent in similar circumstances exposes the agent to suit. What makes this challenging is that most courts have interpreted this to mean the facts and circumstances of the two cases must be almost exact for the officers to be put on notice. Take the infamous case, *Baxter v. Bracey*.[86] After a brief chase, a Nashville police officer allowed his police dog to attack a homeless man who was sitting on the ground with his hands in the air.[87] Baxter brought his Section 1983 action in the Sixth Circuit Court of Appeals, where a prior case established that an officer in a similar situation violated a previous suspect's Fourth Amendment rights by allowing his dog to attack the suspect as he lay on the ground with his hands at his side.[88] Despite this precedent, the Sixth Circuit claimed the prior case was not analogous to Baxter's because Baxter surrendered by sitting up with his hands in the air instead of lying on the ground with his hands at his side.[89] Furthermore, the Court granted qualified immunity to the officer.[90]

Baxter perfectly illustrates how daunting it can be for plaintiffs to prove the violation in their case fell under clearly established law. Thanks to *Torres*, something that was once difficult may prove impossible to overcome for many plaintiffs who claimed they were seized under the mere-touch rule. First, consider how many seizure cases involve the acquisition of control. Nobody during the founding era through the present day, even the majority, would argue that a seizure does not occur when an officer intentionally restrains an individual. Thus, courts have been in unanimous agreement that a seizure

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[85] *Id.* at 540.
[86] Baxter v. Bracey, 751 F. App'x. 869 (6th Cir. 2018).
[87] *Id.* at 870.
[88] *Id.*
[89] *Id.*
[90] *Id.* at 873.

occurs under that circumstance, creating an unfathomably large body of case law that can be used to argue what the established law is. Further, *Terry* and the cases that followed additionally gave over fifty years of detailed case law that expounded on this premise, creating detailed scenarios which can be argued to have established federal law.

The same cannot be said for the mere-touch rule. Recall that the majority could only locate several obscure early state court cases for legal support in applying the mere-touch rule to Fourth Amendment seizures.[91] Given that the majority struggled to find cases to support the mere-touch rule, plaintiffs will struggle to find an analogous case that cites the rule to prove the law underlying their case was clearly established. Even if plaintiffs somehow found a similar case to their own, judges may refuse to acknowledge it as clearly established law since very few, if any, cases apply the mere-touch rule in a criminal context.

Problems are further compounded by cases where the mere-touch rule applies to guns or other police tools. Recall that the majority cited *Countess of Rutland's Case* to expand mere-touch to guns.[92] With such weak support for the majority's argument, one can only imagine the difficulty plaintiffs will have in finding *any* case with similar facts to their own when a case involves a shooting in a mere-touch context. Further, the majority and dissent agree that there were no common law cases involving police seizing a suspect with the use of a handgun because they did not become a standard part of an officer's equipment until after the Civil War, narrowing the applicable case law pool even further.[93] Perhaps the best example of how difficult it is to overcome the clearly established law hurdle when it comes to handguns can be found by examining what came of Torres's case on remand.

Unfortunately for Torres, the New Mexico District Court was nowhere near as sympathetic to her claim as the Supreme Court.[94] One of the main issues before the Court was whether the officers were entitled to qualified immunity, and the case highlighted how difficult the majority's rule would be

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[91] Torres v. Madrid, 141 S. Ct. 989, 996-97 (2021).
[92] *Id.* at 997.
[93] *Id.* at 998.
[94] Torres v. Madrid, 2021 U.S. Dist. LEXIS 248358 (D.N.M. Dec. 30, 2021).

on a plaintiff who sought to invoke it moving forward.[95] The Court pointed to when the Tenth Circuit Court of Appeals first heard the case in 2019.[96] There, the three-judge panel decided that no seizure had occurred because "an officer's intentional shooting of a suspect does not effect a seizure unless the 'gunshot . . . terminate[s] [the suspect's] movement or otherwise cause[s] the government to have physical control over him.'"[97] Given the law in 2014 (the *Terry-Brower* standard), the Court ruled it was not evident to a reasonable officer that shooting a suspect who escaped could be grounds for an unreasonable seizure since seizures up to that point all required possession.[98] In short, qualified immunity was granted because the mere-touch rule was not the established law when Torres was shot by police; rather, the dissent's seizure rule was.

The majority may have expected this result. After all, Justice Gorsuch briefly mentioned how qualified immunity could spell disaster for plaintiffs attempting to claim they had been seized under the new rule in the dissent.[99] If they expected Torres's claim to overcome qualified immunity, surely they could have pointed to better case law to support their argument, if any existed. Either way, two things are certain about Section 1983 claims involving the mere-touch rule going forward. First, plaintiffs that wish to succeed in mere-touch cases involving firearms will need (possibly several) decades for there to be enough case law to pass the clearly established law test. Whenever that time finally comes for the lucky plaintiff, it will be important to remember that their success was built off all the failed claims that came before it, like *Torres*, which paved the way for its success. However, it is hard to imagine that Torres and plaintiffs like her will see their case's defeat as a victory in the long run.

Second, it is important to point out that Torres's claim failed because the mere-touch rule was not the established law at the time of the shooting. As a result, the New Mexico District Court was not able to compare *Torres*'s facts to successful excessive force claims. Even if the Court had, due to the case's

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[95] *Id.* at *6.
[96] Torres v. Madrid, 769 F. App'x 654, 657 (10th Cir. 2019).
[97] *Id.* (quoting Brooks v. Gaenzle, 614 F.3d 1213, 1224 (10th Cir. 2010)).
[98] Torres v. Madrid, 2021 U.S. Dist. LEXIS 248358 at *12 (D.N.M. Dec. 30, 2021).
[99] Torres v. Madrid, 141 S. Ct. 989, 1016 (2021).

far-fetched facts, *Torres*'s claim likely would have failed. Even if it had succeeded, it would do little to help others wrongly shot by police, given the strict standard for how similar cases must be to put officers on notice. Even if it were successful, Torres *may* have helped plaintiffs who saw the police approaching, believed they were about to be carjacked (or something similar), sped off from officers unarmed, and were shot while fleeing. Clearly, years of case law and unsuccessful Section 1983 plaintiffs will be required to flesh out what constitutes clearly established law as it relates to firearms under the mere-touch rule.

Finally, numerous other cases will fail due to qualified immunity when it comes to mere touches with other police tools that will undoubtedly follow. They will likely have to go through something similar to Torres. An appellate court or the Supreme Court will determine that the mere-touch rule now applies to the tool, but there was no way the officers could have been on notice, so qualified immunity will be granted without even getting into an excessive force analysis. With each tool added to the mere-touch list, thousands of litigants will have their cases dismissed thanks to the majority's near-sightedness.

While the police will be negatively impacted by the majority's decision, Section 1983 plaintiffs will also suffer from the false hope that the majority provides. Proving what is the established law results in a daunting task for any plaintiff, but it is much harder when a claim has almost no case law to support its newly implemented rule. While many may rejoice that the mere-touch rule is the seizure test for people now, it will be interesting to see if future plaintiffs feel the same way. Despite the majority's best effort to help Section 1983 plaintiffs, they may have only given them false hope as numerous claims will fail due to qualified immunity. The mere-touch rule failed to save Torres's case. Only time will tell how many other plaintiffs it must fail before being deemed as clearly established law, successfully overcoming qualified immunity.

V. THE INTENTIONAL ACQUISITION OF CONTROL IS THE CORRECT SEIZURE ANALYSIS FOR SEIZURES OF PERSONS

Although the majority disagrees, the correct analysis for seizures of persons is rooted in the line of thinking found in *Terry* and *Brower*. As argued by the dissent, the holdings of these two cases should have won the day because they more

closely align with the founders' intent, the text of the Constitution, and copious amounts of case law. However, due to the majority's near-sightedness, seizure law has devolved to the point where actual possession is no longer required—only a mere touch from an officer or one of his tools will suffice. The new rule not only muddied the waters of seizure law by destroying decades of precedent, but it will also negatively affect police and Section 1983 plaintiffs in the years to come.

Police offices will be negatively affected by the mere-touch rule in ways ranging from training expenses to their relationships with the community. Common, everyday interactions with the community may turn into seizures if intent to restrain is objectively manifested, which will lead to confusion from officers and an unwillingness to engage with the public for fear of facing a lawsuit. Requiring the intentional acquisition of control for seizures of people would fix this problem. No additional training is necessary because officers already know that taking away an individual's liberty is a seizure, and over fifty years of Supreme Court precedent exists to support this. This gives officers the ability to interact with the public without fear of seizing citizens with every tap on the shoulder, while also protecting the citizen from having their liberty restrained without the officer having probable cause to do so. Finally, given that the dissent's rule has been the controlling seizure law for decades, no possibility that the public could misinterpret the rule is presented since the intentional acquisition of control was the test prior to *Torres*.

The majority argued that the dissent's rule complicated seizures because it was not a hard and fast rule like the mere-touch rule and, thus, was more likely to be misapplied by judges.[100] However, the majority failed to recognize the decision's future ramifications, specifically, what tools can be considered under the mere-touch rule. Was the tractor-trailer placed in the middle of the road in *Brower* a tool intended to restrain? What about pepper spray, flashbangs, tear gas, and lasers? Are they all applicable tools as well? Clearly, the mere-touch rule's application to other police tools could become dicey territory for future courts and is certainly not as seamless as the majority made it out to be in the opinion. Compare this unnecessary line drawing to the dissent's analysis. If the officer intentionally acquired control of the suspect through any

[100] *See Torres*, 141 S. Ct. at 1003.

means, a seizure occurred. A seizure may result from a tractor-trailer, taser, gun, pepper spray, or a polite request issued by an officer. The tool or the means that achieve the seizure are irrelevant. The court instead looks to the result of the officer's conduct, which provides more reliable results and does away with artificial line drawing under the mere-touch rule.

Not only will the majority's new rule hurt police departments around the country, but it will also give false hope to Section 1983 plaintiffs, who will only have their claims fail due to qualified immunity. As *Torres* demonstrated on remand, courts will grant qualified immunity to officers in mere-touch cases due to the fact that they had no notice that the mere-touch rule was the controlling law. Even when courts deem the mere-touch rule to be the established law for seizure purposes, it is impossible to predict how judges will rule on the claims now that *Torres* has muddied the waters. The opposite can be said for the dissent's rule. It provides clarity and years' worth of precedent that plaintiffs can point to in order to prove what the established law is and overcome qualified immunity more easily. Although qualified immunity is a daunting hurdle to overcome for all plaintiffs, the dissent's rule, backed by decades of precedent, gives a higher likelihood of success. The mere-touch rule looks good on paper, but its lack of case law to support it makes success almost impossible for 1983 plaintiffs.

When the Supreme Court disregards prior precedent, it needs to have a good reason for doing so. The only positive thing to come from *Torres* was the dissent's willingness to argue for the correct seizure standard—the intentional acquisition of control. Although it may not have won the day, the dissent's rule eloquently summarizes the holdings in *Terry*, *Brower*, and their progeny into an easy-to-understand and straightforward analysis that can apply to *all* seizure tools used by officers without having to go back and analyze each tool under the mere-touch rule. Hopefully, in the future, the Supreme Court will see the hardship the mere-touch rule brings to police and the public and look for a better seizure rule. Thanks to Justice Gorsuch and the dissent, a rule that abides with the text of the Constitution, the intent of the founders, and has decades of precedent and common sense to support it will be at the forefront when the time comes.