Fourth Amendment — Search and Seizure — Police Misconduct — Torres v. Madrid

Police misconduct is not a new phenomenon, nor is the shelter that law enforcement officers enjoy in the courts.[1] As police officers "rarely face criminal charges or even internal disciplinary measures when they engage in misconduct," they may be incentivized to "continue to abuse their powers."[2] What is relatively new is a growing attention to police brutality, particularly in Black communities. More calls for police reform, or even abolition,[3] are at the forefront of national conversation, and the role of the courts in immunizing police malfeasance is a central part of the story. Last Term, in *Torres v. Madrid*,[4] the Supreme Court reviewed a wild encounter in which police officers sprayed a fleeing person's car with bullets, hitting her in the back as she drove away.[5] The Supreme Court held that the application of physical force to the body of an individual with the intent to restrain constitutes a seizure under the Fourth Amendment,[6] even if the person "does not submit and is not subdued."[7] 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.

On July 15, 2014, four police officers arrived at an apartment building in Albuquerque, New Mexico, to execute a warrant for a woman accused of several crimes, including white collar crimes, drug trafficking, murder, and additional violent crimes.[8] After observing Roxanne Torres and her companion standing by a car, one of the police officers concluded that neither individual was the subject of the warrant.[9]

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[1] *See* Anna Lvovsky, *The Judicial Presumption of Police Expertise*, 130 HARV. L. REV. 1995, 1997–98 (2017).

[2] *See, e.g.*, Daniele Selby, *New Mexico Is the Second State to Ban Qualified Immunity*, INNOCENCE PROJECT (Apr. 7, 2021), https://innocenceproject.org/new-mexico-bans-qualified-immunity-police-accountability [https://perma.cc/E2HQ-XCMJ].

[3] *See* Derecka Purnell, *How I Became a Police Abolitionist*, THE ATLANTIC (July 6, 2020), https://www.theatlantic.com/ideas/archive/2020/07/how-i-became-police-abolitionist/613540 [https://perma.cc/YJB9-96HT] ("We never should have had police.").

[4] 141 S. Ct. 989 (2021).

[5] *Id.* at 994.

[6] *Id.* at 999. The text of the Fourth Amendment reads: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.

[7] *Torres*, 141 S. Ct. at 1003.

[8] *Id* at 994.

[9] *Id.*

Torres's companion departed as the police officers approached the car.[10] Torres, experiencing methamphetamine withdrawal at the time, climbed into the driver's seat.[11] Although the officers were wearing vests displaying police identification, Torres only saw their guns and assumed that they were carjackers.[12] When one of the officers attempted to open her car door, she drove away.[13] The officers fired a total of thirteen bullets at Torres, hitting her in the back twice and leaving her left arm temporarily paralyzed.[14] Torres drove to a parking lot where she stole an idling car; she then drove seventy-five miles to Grants, New Mexico, and went to a hospital for care.[15] The hospital in Grants airlifted her to another hospital in Albuquerque where she was arrested the next day.[16] Torres pleaded no contest to several crimes: aggravated fleeing from law enforcement officers, assaulting a peace officer, and unlawfully taking a motor vehicle.[17] Torres later brought a 42 U.S.C. § 1983 excessive force action against the two officers who had fired at her.[18]

In the District of New Mexico, Judge Fashing granted the police officers' motion for summary judgment, asserting qualified immunity and absence of a seizure giving rise to a Fourth Amendment claim.[19] The court began by explaining that to overcome the officers' claim of qualified immunity, Torres needed to show that their conduct violated a clearly established constitutional or statutory right — here, the use of excessive force in violation of the Fourth Amendment.[20] Torres thus had to show both that she had been seized and that the seizure was unreasonable.[21] The court found that the undisputed facts demonstrated that Torres had not in fact been seized by the officers, and therefore she could not establish a constitutional violation.[22] Torres appealed.[23]

The Tenth Circuit affirmed.[24] The court stated that "an officer's intentional shooting of a suspect does not effect a seizure unless the

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10 *Id.*
11 *Id.*
12 *Id.*
13 *Id.*
14 *Id.*
15 *Id.*
16 *Id.*
17 *Id.*
18 *Id.* Torres alleged that the officers had exercised excessive force by intentionally discharging their weapons at her and that the officers had conspired to use such excessive force against her. Torres v. Madrid, No. 16-cv-01163, 2018 WL 4148405, at *2 (D.N.M. Aug. 30, 2018).
19 *Torres*, 2018 WL 4148405, at *2, *4.
20 *Id.* at *3.
21 *Id.*
22 *Id.* at *2.
23 Torres v. Madrid, 769 F. App'x 654, 655 (10th Cir. 2019).
24 *Id.*

'gunshot . . . terminate[s] [the suspect's] movement or otherwise cause[s] the government to have physical control over him.'"[25] Torres had not demonstrated that she was seized by the police because she resumed flight after she was shot and was not arrested until a day later when she was airlifted back to Albuquerque.[26]

The Supreme Court vacated.[27] Writing for the majority,[28] Chief Justice Roberts held that "application of physical force to the body of a person with the intent to restrain" constitutes a seizure, even when the force does not subdue the person.[29] The Chief Justice emphasized two important lessons from the Court's decision in *California v. Hodari D.*[30]: common law arrests are seizures, and the common law treated "application of force to the body . . . with intent to restrain" as an arrest, even when the arrestee escaped.[31] Relying on a dictionary definition at the time of the Fourth Amendment's adoption, the Chief Justice noted that the term "seizure," while ordinarily conveying the idea of taking possession, is a term that the Framers selected to be broad enough to cover "persons" in addition to property.[32] The opinion continued to explain that because arrests are seizures of a person, *Hodari D.*'s historical analysis of the common law governing arrests was the correct approach for the case at hand.[33]

Citing early English cases, Chief Justice Roberts explained that even the "slightest touch"[34] constituted an arrest without requiring that the officer keep "the party so arrested under restraint."[35] After analyzing the "mere-touch rule," Chief Justice Roberts demonstrated that early American courts adopted this rule from the English.[36] While conceding that *Torres* did not involve "laying hands,"[37] the Court nevertheless insisted that there was "no basis for drawing an artificial line" between physical touch made by a hand and physical touch made by other means to arrest an individual.[38] Furthermore, the majority explained that the lack of Founding era precedent for a shooting constituting a seizure

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[25] *Id.* at 657 (alterations in original) (quoting Brooks v. Gaenzle, 614 F.3d 1213, 1224 (10th Cir. 2010)).

[26] *Id.*

[27] *Torres*, 141 S. Ct. at 1003.

[28] Joining the opinion were Justices Breyer, Sotomayor, Kagan, and Kavanaugh.

[29] *Torres*, 141 S. Ct. at 994.

[30] 499 U.S. 621 (1991).

[31] *Torres*, 141 S. Ct. at 995 (citing *Hodari D.*, 499 U.S. at 626).

[32] *Id.* at 996 (citing *Arrest*, 1 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 1773)).

[33] *Id.*

[34] *Id.* at 997 (quoting Nicholl v. Darley (1828) 148 Eng. Rep. 974, 976).

[35] *Id.* (quoting Sandon v. Jervis (1858) 120 Eng. Rep. 758, 760).

[36] *Id.* at 996–97.

[37] *Id.* at 997 (quoting Sheriff v. Godfrey (1739) 87 Eng. Rep. 1247, 1247).

[38] *Id.*

could be explained because even though guns did exist during the Founding era, they were not used by law enforcement to apprehend.[39] Synthesizing this analysis, Chief Justice Roberts concluded that the appropriate inquiry was whether the conduct in question "*objectively* manifests an intent to restrain."[40] Because the Court concluded that the officers objectively manifested such an intent when they fired at Torres, it held that they had seized her in the instant that the bullets hit her.[41]

In response to the officers' contention that the doctrine outlined in *Hodari D.* applied narrowly to civil cases involving debtors and not to criminal cases involving felons, the Chief Justice concluded that the common law did not differentiate between the arrest of a debtor versus the arrest of a felon.[42] Likewise, because control was often difficult to establish in cases involving application of force, the Court declined to limit seizures to the definition proffered by the officers, which would require control over that being seized.[43] Instead, in deciding that seizure should be considered "a single act, and not a continuous fact,"[44] the Court noted that the common law rule avoided drawing lines that would be hard to administer.[45] Finding neither of the officers' arguments persuasive, the Court vacated the judgment of the Court of Appeals and remanded.[46]

Justice Gorsuch dissented,[47] arguing that the majority erred both by misconstruing a seizure that was actually an attempted seizure and an arrest that was actually an attempted battery, as well as by misinterpreting historical precedent on seizures.[48] Justice Gorsuch raised three principal objections to the majority's core holding that a seizure occurs when an officer touches a suspect with the intent to restrain. First, the majority's interpretation of the word "seizure" ran afoul of the semantic canon that dictates that verbs must hold the same meaning for all direct objects in a sentence.[49] The dissent rejected the majority's conclusion that persons should be treated differently than objects, such as houses, papers, and effects,[50] when acting as direct objects to the verb "seize."[51] Because seizure of objects requires possession, seizures of persons should

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[39] *Id.* at 998.
[40] *Id.*
[41] *Id.* at 999.
[42] *Id.*
[43] *Id.* at 1001.
[44] *Id.* at 1002 (quoting California v. Hodari D., 499 U.S. 621, 625 (1991)).
[45] *Id.*
[46] *Id.* at 1003.
[47] Joining his dissent were Justices Thomas and Alito.
[48] *Torres*, 141 S. Ct. at 1003 (Gorsuch, J., dissenting).
[49] *Id.* at 1007.
[50] These are the other three objects, in addition to "persons," used in connection with the word "seizures" in the Fourth Amendment. U.S. CONST. amend. IV.
[51] *Torres*, 141 S. Ct. at 1007 (Gorsuch, J., dissenting).

do so as well.[52] Second, the dissent noted that insofar as *Hodari D.* endorsed the "mere-touch" rule, that portion of the opinion constituted dicta and was therefore nonbinding on future courts.[53] According to the dissent, Fourth Amendment seizures had always required the possession of someone or something.[54] Third and finally, the dissent accused the majority of a poor understanding of common law history, suggesting that even at common law, arrests required possession.[55] The mere-touch rule instead existed only in civil cases, such as bankruptcy proceedings, but never in criminal cases.[56] According to the dissent, the only way to describe such a "schizophrenic" interpretation of the word "seizure"[57] would be if the majority were committed to creating a remedy for individuals like Torres — regardless of whether the law prescribed one.[58]

As recent events have brought police brutality to the forefront of the nation's eye,[59] many have looked to the Fourth Amendment for relief. Qualified immunity,[60] the power of police unions,[61] and judicial deference given to law enforcement[62] have dissuaded many from believing that the courts will provide any sort of relief to those abused by police. Before *Torres*, there were two ways that an officer could seize an individual. First, the officer could demonstrate authority showing that they have "restrained the liberty" of an individual.[63] Second, the officer could use physical force that actually restrained or terminated the freedom of the person.[64] After *Torres*, there is no doubt that the application of physical force to the body of a person with the intent to restrain constitutes a seizure, even if the force does not actually subdue the person. The majority's understanding of the word "seizure" could dramatically

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[52] *Id.* at 1006–07.

[53] *Id.* at 1005.

[54] *Id.* at 1006.

[55] *Id.* at 1008.

[56] *Id.* at 1011.

[57] *Id.* at 1006.

[58] *See id.* at 1015.

[59] *See* Hannah Fingerhut, *Wide Shift in Opinion on Police, Race Rare in US Polling*, AP NEWS (July 2, 2020), https://apnews.com/article/8a0269689d3f981e8db1620adbde4b95 [https://perma.cc/QBR8-ZEC5] ("[I]n the wake of George Floyd's death, Americans' opinions about police brutality and racial injustice have moved dramatically.").

[60] *See* Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1799–800 (2018) ("Research examining contemporary civil rights litigation against state and local law enforcement shows that qualified immunity . . . fails to achieve its intended policy aims." *Id.* at 1799.).

[61] *See* Noam Scheiber et al., *How Police Unions Became Such Powerful Opponents to Reform Efforts*, N.Y. TIMES (Apr. 2, 2021), https://www.nytimes.com/2020/06/06/us/police-unions-minneapolis-kroll.html [https://perma.cc/C9TE-UQAM].

[62] *See* Lvovsky, *supra* note 1, at 1997–98.

[63] Terry v. Ohio, 392 U.S. 1, 19 n.16 (1968).

[64] *Id.* The force has to be intentionally applied. Brower v. County of Inyo, 489 U.S. 593, 596–99 (1989).

expand avenues for victims of police brutality to seek relief. Whether that transformative potential is realized in practice is uncertain, however, as significant barriers remain for victims seeking redress in court.

The Court's expansion of what constitutes a seizure is an important and encouraging development in Fourth Amendment jurisprudence regarding police use of force. In *Graham v. Connor*,[65] the Supreme Court held that excessive force claims arising from investigatory stops or arrests (as opposed to pre- or post-trial detentions) are governed by the Fourth Amendment right against unreasonable seizures.[66] Plaintiffs like Torres are therefore required to establish a seizure as a threshold matter in their excessive force claim. Because the majority of recent police uses of deadly force have occurred in the course of arrests, investigatory stops, and similar encounters,[67] a narrow definition for what constitutes a Fourth Amendment seizure would operate as a significant bar to a majority of potential excessive force claims.

Torres is further encouraging because ensuring access to federal courts is particularly important for victims of police use of excessive force. Section 1983, the federal law that allows individuals to sue the government for civil rights violations,[68] originated as a federal supplement to inadequate state enforcement against the Ku Klux Klan and other racist violence.[69] A century and a half later, contrary to the dissent's suggestion that individuals like Torres can seek redress under state law,[70] state remedies still do not provide adequate relief for victims of state violence. While data on police prosecutions can be challenging to gather due to the secrecy of prosecutors and police offices, the limited data available suggests that police officers are rarely prosecuted under state law.[71] Furthermore, simply because a state law claim could exist does not preclude federal courts from providing relief separately. Absent robust support in state courts, the federal courts remain an important forum for bringing excessive force claims.

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[65] 490 U.S. 386 (1989).

[66] *Id.* at 395. *Graham* held "that *all* claims that law enforcement officers have used excessive force — deadly or not — in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard." *Id.*

[67] MAPPING POLICE VIOLENCE, 2020 POLICE VIOLENCE REPORT, https://policeviolencereport.org [https://perma.cc/FMG3-Q635] ("Most killings began with police responding to suspected non-violent offenses or cases where no crime was reported. 120 people were killed after police stopped them for a traffic violation." (emphasis omitted)).

[68] *See* 42 U.S.C. § 1983.

[69] Theodore Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 CORNELL L. REV. 482, 484–85 (1982).

[70] *Torres*, 141 S. Ct. at 1004 (Gorsuch, J., dissenting).

[71] *See* HUM. RTS. WATCH, LOCAL CRIMINAL PROSECUTION 31, https://www.hrw.org/legacy/reports98/police/uspo31.htm [https://perma.cc/D3T2-DYLH] ("[O]ur investigation leads us to conclude that local prosecutions of police officers on charges relating to the excessive use of force are rare.").

Torres's implications extend beyond police use of lethal force, despite the Court's refusal "to opine on matters not presented here — pepper spray, flash-bang grenades, lasers, and more."[72] The test created in *Torres* consists of two elements. First, there must be application of physical force, and second, there must be an intent to restrain.[73] The Court in *Torres* made clear that the scope of "physical force" is broad, encompassing "methods of apprehension old and new."[74] The Court further suggested that, between the two elements of the *Torres* test, the narrowing role is performed by the second requirement of an objective intent to restrain, not the first requirement of "physical force."[75] The use of nonlethal tools like tasers, pepper spray, batons, rubber bullets, or police dogs should thus satisfy the *Torres* test for a seizure where their use manifests an objective intent to subdue the target.

Even with an expanded definition of seizure under the Fourth Amendment after *Torres*, plaintiffs will continue to face a significant challenge in mounting a successful 1983 claim. Some have observed that "[t]he gap between having a legal right and having an effective remedy for that right rarely has been wider than in litigation under section 1983."[76] This gap between the law and the ability of plaintiffs to vindicate their rights under 1983 is due to the Supreme Court's creation of the qualified immunity doctrine.[77] To prove an excessive force claim under 1983, Torres must overcome the officers' claim of qualified immunity in two steps. First, she must demonstrate that her seizure was unreasonable and thus violated a constitutional right, a question that the Court explicitly chose not to decide.[78] Second, she must show that what was violated was a clearly established right "of which a reasonable person would have known."[79] In the forty years since the Court created the qualified immunity doctrine, plaintiffs have rarely satisfied these requirements in the more than thirty cases reviewed by the Court.[80] With

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[72] *Torres*, 141 S. Ct. at 998.

[73] *Id.* at 999.

[74] *Id.* at 998.

[75] *See id.* ("We stress, however, that the application of the common law rule does not transform every physical contact between a government employee and a member of the public into a Fourth Amendment seizure. . . . Accidental force will not qualify.").

[76] THEODORE EISENBERG, CIVIL RIGHTS LEGISLATION 9 (3d ed. 1991).

[77] *See* William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 45 (2018) (arguing that "the qualified immunity doctrine is unlawful and inconsistent with conventional principles of statutory interpretation").

[78] *Torres*, 141 S. Ct. at 1003.

[79] Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); *see also* Torres v. Madrid, No. 16-cv-01163, 2018 WL 4148405, at *3 (D.N.M. Aug. 30, 2018) (citing Baptiste v. J.C. Penney Co., 147 F.3d 1252, 1255 (10th Cir. 1998)).

[80] *See, e.g.*, Taylor v. Riojas, 141 S. Ct. 52, 53 (2020) (per curiam); Groh v. Ramirez, 540 U.S. 551, 563 (2004); Hope v. Pelzer, 536 U.S. 730, 742 (2002); *see also* Baude, *supra* note 77, at 82.

the current Supreme Court doctrine on qualified immunity, plaintiffs like Torres will continue to struggle to find relief.[81]

The obstacle posed by the qualified immunity doctrine is nowhere as great as it is in excessive force claims. Courts are guilty of deferring to police officers when evaluating the reasonableness of a seizure under *Graham*'s framework.[82] But even if a plaintiff establishes an unreasonable seizure, a police officer can still escape liability under 1983 if his conduct was "objectively reasonable," notwithstanding the constitutional violation.[83] In other words, the Court has read a defendant-friendly standard of reasonableness into two stages of the inquiry: once for the constitutional claim, and another time for the statutory claim. The result is a practically insurmountable bar to recovery for victims of police violence.[84]

Although recently there have been encouraging signs that the Court might reconsider the glaring imbalance it has struck in its qualified immunity decisions, victims of police violence are ultimately unlikely to find their redress in courts. This Term, in *Taylor v. Riojas*,[85] the Court in a per curiam decision held that an obvious violation of a constitutional right can alone amount to a violation of "clearly established" law, regardless of qualified immunity.[86] The outcome in *Riojas* advanced a cause with broad bipartisan support[87] and is a significant development when viewed against the Court's historical refusal to reevaluate its qualified immunity jurisprudence.[88] Nonetheless, given the current state of qualified immunity, meaningful judicial relief for police violence would require "a radical modification of the doctrine."[89] While *Torres* ensures that victims of police violence will not face an additional Fourth Amendment hurdle, it does not provide relief but only the *possibility* of it. Still, for what it is worth, *Torres* represents a meaningful and necessary stride in the right direction.

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[81] *See* Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 6 (2017) ("The United States Supreme Court appears to be on a mission to curb civil rights lawsuits against law enforcement officers, and appears to believe qualified immunity is the means of achieving its goal.").

[82] *See* Diana Hassel, *Excessive Reasonableness*, 43 IND. L. REV. 117, 122 (2009) ("[T]he benefit of the doubt goes to the defendant police officer. If there is any way his actions could have been believed to be a reasonable response to the situation, as perceived by the officer at the time, the Fourth Amendment is not violated.").

[83] *Id.* at 117.

[84] *Id.* at 119.

[85] 141 S. Ct. 52 (per curiam).

[86] *See id.* at 53.

[87] *See* Alan Feuer, *Advocates from Left and Right Ask Supreme Court to Revisit Immunity Defense*, N.Y. TIMES (July 11, 2018), https://www.nytimes.com/2018/07/11/nyregion/qualified-immunity-supreme-court.html [https://perma.cc/63GN-LA2W].

[88] *See* Baude, *supra* note 77, at 82; Rui Kaneya, *The Supreme Court's Subtle Hint on Police Accountability*, CTR. FOR PUB. INTEGRITY (July 16, 2021), https://publicintegrity.org/inside-publici/newsletters/watchdog-newsletter/supreme-court-police-accountability-qualified-immunity [https://perma.cc/2262-2UYK].

[89] Hassel, *supra* note 82, at 119.