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Unintentional Destruction: *Torres v. Madrid*, in Defining a Fourth Amendment Seizure of the Person as a Common Law Arrest, Turned *Terry v. Ohio* into Collateral Damage

BY GEORGE M. DERY III*

Abstract

This article analyzes *Torres v. Madrid*, in which the Supreme Court ruled an officer seized a person when he shot her, even though the suspect temporarily eluded capture after the shooting. This work examines the logical implications of *Torres*'s reasoning. *Torres* equated a Fourth Amendment seizure of the person with a common law arrest and defined an arrest to include an officer's slightest touching of a person, even with only a finger. This article asserts that the force of *Torres*'s logic has elevated the *Terry* stop and frisk to a full arrest because *Terry*'s intrusion involves official touching and control beyond *Torres*'s common law minimum. Since *Terry* allowed officers to perform a stop and frisk on reasonable suspicion, a level of certainty below the probable cause needed for an arrest, logical consistency would require the Court to either disapprove *Terry* stops and frisks based on reasonable suspicion or forgo the strict application of common law to the Fourth Amendment. Finally, this article suggests that, with the dramatic changes in policing and society occurring since the common law era, true fealty to Fourth Amendment values requires that the Court broaden its approach while respecting the precedent of the last fifty years.

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I. Introduction

In *Torres v. Madrid*, the U.S. Supreme Court held that an officer seizes a person when he shoots her, even if the person shot "temporarily eludes capture after the shooting."[1] The justices who took part in the *Torres*'s decision hotly contested the issue in the case. The dissent accused the Court of expanding on dicta, violating canonical rules of interpretation, and reengineering long-abandoned precedent.[2] All justices considering the case, however, agreed that the question of Fourth Amendment protection hinged on the proper understanding of English common law cases dating as far back as four centuries ago.[3] The *Countess of Rutland's Case*, which generated particular disagreement between the majority and dissent, was decided by the Star Chamber in 1605.[4] The majority likened the arrest the serjeants-at-mace made by touching Isabel Holcroft, Countess of Rutland, with a mace to the officers' seizure of Torres by shooting her.[5] The dissent in *Torres* deemed these "mere-touch" arrests to be a "farce."[6]

The definition of seizure that the Court unearthed relied on the common law definition of arrest as the "quintessential 'seizure' of the person under our Fourth Amendment jurisprudence."[7] The reasoning behind the *Torres* decision equated a Fourth Amendment seizure with common law arrest, which directly undermined the constitutional viability of the stop and frisk recognized in *Terry v. Ohio*.[8] A *Terry* stop and frisk, involving as it does the thorough pat down of a person under the officer's control,[9] would certainly fulfill, and even exceed, the "slightest application of force" occasioned by the tap of a mace that amounts to a full arrest under the *Torres* definition of a seizure of a person.[10] However, since our nation's founding, arrests have required probable cause rather than the reasonable suspicion crafted in *Terry* for a stop and frisk.[11] Thus, *Torres*'s novel "slightest touch" arrest elevates

1. Torres v. Madrid, 141 S. Ct. 989, 993-94 (2021).
2. *Torres*, 141 S. Ct. at 1005, 1007, 1017, 1011 (Gorsuch, J., dissenting).
3. *Id.* at 997, 1013. Only eight justices decided the case because "Justice Barrett took no part in the consideration or decision of this case." *Id.* at 1003.
4. *Id.* (citing *Countess of Rutland's Case*, 6 Co. Rep. 52b, 77 Eng. Rep. 332 (Star Chamber 1605)).
5. *Id.* at 997-98.
6. *Id.* at 1011.
7. *Id.* at 995.
8. Terry v. Ohio, 392 U.S. 1, 19, n. 16, 30 (1968).
9. *Id.* at 17, n. 13.
10. *Torres*, 141 S. Ct. at 996.
11. As noted by Justice Douglas in his dissenting opinion in *Terry*, "[O]fficers up to today have been permitted to effect arrests or searches without warrants only when the facts within their personal knowledge would satisfy the constitutional standard of probable cause. At the time of their 'seizure' without a warrant they must possess facts concerning the person arrested that would have

a *Terry* stop and frisk to an arrest, which occurs countless times a day in our nation without the legal backing of probable cause.[12] If *Terry* went out on a limb in justifying a stop and frisk on reasonable suspicion, *Torres* built the saw to cut that limb off.

Given the danger that *Torres* poses to *Terry*, will the Court follow *Torres*'s logic to its conclusion and end the *Terry* stop and frisk? True adherence to the common law of our Founders might require such a drastic measure. Or will the Court flinch at the originalist implications of its reasoning and maintain *Terry*, a seminal case which has been recognized as precedent for over half a century? This article considers these questions and offers a measured solution that acknowledges the importance of the common law while respecting the Court's major precedent.

II. *California v. Hodari D.*'s Determination that an Arrest at Common Law Was a Quintessential Fourth Amendment Seizure of the Person Launched the Court on a Rigidly Cramped Interpretation of the Constitution.

Torres v. Madrid was not the first case to define a Fourth Amendment seizure of the person in terms of common law arrest. Thirty years earlier, in *California v. Hodari D.*, the Court consulted the common law definition of arrest to determine when a seizure of a person occurred.[13] In *Hodari D.*, officers on patrol in Oakland, California saw a group of juveniles huddling around a parked car.[14] When the youths took flight upon seeing the police, Officer Jerry Pertoso left his police car and pursued one of the juveniles, Hodari D., on foot.[15] Hodari D. did not actually see Officer Pertoso "until the officer was almost upon him, whereupon he tossed away what appeared to be a small rock."[16] Only a "moment later," the officer tackled and handcuffed Hodari D.[17] Police found that the rock Hodari D. had discarded was crack cocaine.[18]

These facts presented the Court with the issue of "whether, at the time he dropped the drugs, Hodari D. had been 'seized' within the meaning of the

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satisfied a magistrate that 'probable cause' was indeed present. The term 'probable cause' rings a bell of certainty that is not sounded by phrases such as 'reasonable suspicion.'" *Terry*, 392 U.S. at 37 (Douglas, J., dissenting).

12. *Torres*, 141 S. Ct. at 997.
13. California v. Hodari D., 499 U.S. 621, 624 (1991).
14. *Id.* at 622.
15. *Id.* at 623.
16. *Id.*
17. *Id.*
18. *Hodari D.*, 499 U.S. at 623.

Fourth Amendment."[19] If Pertoso had seized Hodari D. merely by chasing him, then that seizure, lacking sufficient justification, would taint the drugs as fruit of an illegal seizure.[20] If, instead, Pertoso had only seized Hodari D. when he tackled him after the cocaine was discarded, then Hodari D. merely abandoned the drugs.[21] *Hodari D.*'s issue thus focused on whether the officer's pursuit amounted to a seizure by a "show of authority." The Court itself noted that its case did "not involve the application of any physical force" because "Hodari was untouched by Officer Pertoso" at the time he disposed of the cocaine.[22] Despite the lack of physical contact, *Hodari D.* began its analysis by first defining a Fourth Amendment seizure of the person by "physical force" before considering "show of authority."[23]

Hodari D. analyzed a Fourth Amendment seizure of a person through force by focusing on the definition of an "arrest," which it deemed "the quintessential 'seizure of the person' under our Fourth Amendment jurisprudence."[24] To be "quintessential," according to *Merriam Webster*, is to be "perfectly typical or representative of a particular kind of person or thing."[25] In the Court's hands, however, an arrest evolved from being a typical example of a seizure to being the definition of all seizures, for *Hodari D.* created its current boundaries of a seizure by reference to common law arrest.[26] First, the Court noted, "[t]o constitute an arrest … under our Fourth

19. *Id.*

20. *Id.* at 624.

21. *Hodari D.*, 499 U.S. at 624.

22. *Id.* at 625.

23. *Id.* at 624. The Court acknowledged that its case was "removed" some steps away from its physical force discussion because of the lack of any physical force being applied to Hodari D. when he dispensed with the drugs, *id.* at 625. The dissent in *Torres* noted the contact or touch discussion was, by, "any account, … Dicta," *Torres*, 141 S. Ct. at 1005 (2021) (Gorsuch, J., dissenting).

24. *Hodari D.*, 499 U.S. at 624.

25. Quintessential means the "most typical example or representative," *Quintessential*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/quintessential. In using the "quintessentially a seizure" quotation, *Hodari D.* made a little go a long way. The Court had retrieved the passage from Justice Powell's concurrence in *United States v. Watson*. United States v. Watson, 423 U.S. 411, 428 (1976) (Powell, J., concurring). The full quotation of Justice Powell is, "[s]ince the Fourth Amendment speaks equally to both searches and seizures, and since an arrest, the taking hold of one's person, is quintessentially a seizure, it would seem that the constitutional provision should impose the same limitations upon arrests that it does upon searches," *id.* Here, Justice Powell, despite accepting the Court's holding in *Watson* that police need not obtain an arrest warrant when arresting a person in a public place, was suggesting that logic would require a warrant for an arrest since the Fourth Amendment requires a warrant for a search, which in the abstract, is a less intrusive official invasion on the individual. *Id.* at 423-28. Thus, Justice Powell, in simply noting that the Court places less restrictions on a seizure, even though it is a more intrusive government action than a search, mentioned that an arrest is a kind of a seizure, *id. Hodari D.* then employed this unremarkable assertion to make an arrest *the* definition of a Fourth Amendment seizure of a person, *Hodari D.*, 499 U.S. at 624, 626.

26. *Hodari D.*, 499 U.S. at 624, 626.

Amendment jurisprudence—the mere grasping or application of physical force with lawful authority, whether or not it succeeded in subduing the arrestee, was sufficient."[27] The Court then employed this definition of arrests to all seizures by stating, "[t]he word '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."[28] The Court clarified that "merely touching" one who breaks free did not constitute "a continuing arrest during the period of fugitivity."[29] Thus, according to *Hodari D.*, to be seized under the Fourth Amendment was to be arrested.[30]

The Court had committed to viewing a Fourth Amendment seizure of the person through a common law lens even before it reached the actual issue presented in the case—"whether, with respect to a show of authority as with respect to application of physical force, a seizure occurs even though the subject does not yield."[31] In answer to this second question, the Court held that no seizure occurs with show of authority if the suspect refuses to "yield" because, "[a]n arrest requires *either* physical force … or, where that is absent, *submission* to the assertion of authority."[32] Hodari D.'s failure to stop when chased did not trigger the Fourth Amendment because there simply is no seizure when, despite an officer "yelling 'Stop, in the name of the law!'" the suspect "continues to flee."[33] The Court concluded, "since Hodari did not comply with that injunction he was not seized until he was tackled."[34]

In defining a Fourth Amendment seizure of a person, whether by force or by show of authority, *Hodari D.* harkened back to common law, which limited a seizure to an arrest.[35] Such a conclusion was a necessary result of the Court's approach because, at common law, an arrest was the only recognized form of seizure. The lesser seizure of a stop and frisk would only

27. *Hodari D.*, 499 U.S. at 624.

28. *Id.* at 626.

29. *Id.* at 625.

30. *Id.* at 624. By focusing on common law cases, *Hodari D.* necessarily limited itself to arrests. The only seizure in existence at the time of common law was the arrest—*Terry v. Ohio*, with its recognition of the lesser form of a seizure known as a "stop," would only occur nearly two centuries after the American Revolution. *Terry*, 392 U.S. at 16, 30. "Until *Terry*, the Supreme Court's cases suggested that the only seizure of the person by the Fourth Amendment was an arrest." CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE: AN ANALYSIS OF CASES AND CONCEPTS 217 (Foundation Press, 7th ed. 2020).

31. *Hodari D.*, 499 U.S. at 626.

32. *Id.*

33. *Id.*

34. *Id.* at 629.

35. *Hodari D.* explained, "We have consulted the common-law to explain the meaning of seizure…," *id.* at 626, n. 2. Also please note the sentence referring to footnote 24, which states, "…"arrest," which it deemed "the quintessential 'seizure of the person…'"

be formally recognized by the Court in *Terry v. Ohio*.[36] The full consequences of restricting Fourth Amendment seizures of a person to common law rules would not be fully realized until *Torres v. Madrid*.

III. *Torres v. Madrid*

A. Facts

On July 15, 2014, Officers Janice Madrid and Richard Williamson of the New Mexico State Police force went to an apartment complex in Albuquerque attempting to execute an arrest warrant for a woman accused, among other crimes, of drug trafficking and murder.[37] When the officers observed Roxanne Torres standing near a Toyota FJ Cruiser, they determined that she was not the "target of the warrant."[38] However, Torres, either suffering methamphetamine withdrawal or actively "tripping out bad" on the drug, and also being the subject of another arrest warrant, got into the vehicle's driver's seat as the officers approached.[39] When the officers tried to speak with Torres, going so far as to attempt to open her car door, "she hit the gas to escape them."[40] Despite the officers' "tactical vests marked with police identification," Torres believed they were armed carjackers.[41] While Torres claimed that neither Madrid nor Williamson stood in the path of her car,[42] the officers feared the "oncoming car was about to hit them."[43] Both officers responded to *Torres*'s flight by firing "13 shots at Torres, striking her twice in the back and temporarily paralyzing her left arm."[44] "Steering with her right arm, Torres accelerated through the fusillade of bullets, exited the apartment complex," and drove until she stopped to ask a bystander to report an attempted carjacking.[45] Torres then stole a Kia Soul idling nearby and drove 75 miles to Grants, New Mexico.[46] The hospital in Grants airlifted Torres back to a hospital in Albuquerque, where she was arrested.[47]

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36. Terry v. Ohio, 392 U.S., 1, 30 (1968). "Until *Terry*, the Supreme Court's cases suggested that the only seizure of the person by the Fourth Amendment was an arrest," WHITEBREAD, *supra* note 30.

37. *Torres*, 141 S. Ct. at 994.

38. *Id.*

39. *Id.* at 989, 994, 1003 (J., Gorsuch, dissenting).

40. *Id.* at 1003 (J., Gorsuch, dissenting).

41. *Id.*

42. *Id.*

43. *Torres*, 141 S. Ct. at 1003.

44. *Id.* at 989, 994.

45. *Id.*

46. *Torres*, 141 S. Ct. at 989, 994.

47. *Id.*

Torres pleaded no contest to "aggravated fleeing from a law enforcement officer, assault on a peace officer, and unlawfully taking a motor vehicle."[48] Afterwards, Torres sued Officers Madrid and Williamson under Section 42 U.S.C. 1983 for "the deprivation of constitutional rights by persons acting under color of state law."[49] Torres argued that the officers used excessive force when seizing her person under the Fourth Amendment.[50]

B. The Court's Opinion

The *Torres* Court, in an opinion delivered by Chief Justice Roberts, framed the issue as "whether a seizure occurs when an officer shoots someone who temporarily eludes capture after the shooting."[51] The Court held, "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."[52] *Torres* reached this conclusion in stages. The Court began its analysis by speaking of a Fourth Amendment seizure in the most general terms of force, noting, "an officer seizes a person when he uses force to apprehend her."[53] *Torres* then turned to *Terry* to explain that a "seizure" of a person could take two forms: 1) "physical force" or 2) "a 'show of authority' that 'in some way restrain[s] the liberty' of the person."[54] Finally, the Court consulted *Hodari D.*'s common law arrest version of a Fourth Amendment seizure.[55] *Torres* followed *Hodari D.*'s lead in deeming an arrest at common law to be the "quintessential 'seizure of the person' under our Fourth Amendment jurisprudence."[56]

Torres reiterated that *Hodari D.* viewed "the mere grasping or application of physical force with lawful authority" as an arrest.[57] Whether *Hodari D.*'s approach had the force of law under stare decisis was an open question, however, since it based its holding on a different means of performing a Fourth Amendment seizure—the suspect's submission to the

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Torres*, 141 S. Ct. at 1004. *Torres* restated this conclusion slightly differently as, "[t]he application of physical force to the body of a person with intent to restrain is a seizure, even if the force does not succeed in subduing the person," *id.* at 994.

53. *Id.* at 993.

54. *Id.* at 995.

55. *Id.*

56. *Id.* A page later in its opinion, the Court reiterated, "[a]s we have repeatedly recognized, 'the arrest of a person is quintessentially a seizure,'" *id.* at 996.

57. *Torres*, 141 S. Ct. at 995.

officer's show of authority—rather than on an application of physical force.[58] In search of firmer legal footing, *Torres* deeply explored the common law, reaching as far back as 1604 to establish an independent basis for its holding.[59]

When *Torres* ventured into the common law without *Hodari D.*'s aid, it declared that the "'seizure' of a 'person' plainly refers to an arrest."[60] The Court turned to no less an authority than the famous Samuel Johnson, whose 1773 dictionary defined an arrest as "[a]ny … seizure of the person."[61] *Torres* thus found a "linkage" between "seizure" and "arrest" since the nation's founding.[62] The equation of a Fourth Amendment seizure with a common law arrest provided "historical understanding" of "what was deemed an unreasonable … seizure when the Fourth Amendment was adopted."[63] *Torres* viewed the common law definition of an arrest as universal, for all authorities, "from the earliest time to the present, establish that a corporal touch is sufficient to constitute an arrest, even though the defendant d[id] not submit."[64] An officer's mere touch was so central to determining a seizure that, "[t]he slightest application of force could satisfy this rule."[65] The common law's bar was so low that an officer could perform an arrest "if he 'had but touched the defendant even with the end of his finger,'" or performed a "laying of hands."[66] *Torres* argued that American courts adopted England's "mere-touch rule," with one court concluding, "any touching, however slight, is enough."[67] Even after the Civil War, "the cases 'abundantly shew that the slightest touch [was] an arrest in point of law.'"[68] An officer's touch did not even need to demonstrate control over the arrestee, for, "it was not even required that the officer have, at the time of such an arrest, 'the power of keeping the party so arrested under restraint.'"[69]

Torres conceded that the case before it involved a shooting rather than "laying hands."[70] To address this problem, the Court turned to *Countess of*

58. *Id.*

59. *Id. Torres*'s exploration of common law took it back to the seminal case, **Semayne's Case**, 5 Co. Rep. 91a, 91b, 77 Eng. Rep. 194, 196 (K. B. 1604); *Id.* at 1000.

60. *Id.* at 996.

61. *Id.*

62. *Id.*

63. *Torres*, 141 S. Ct. at 996.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at 997.

69. *Torres*, 141 S. Ct. at 997.

70. *Id.*

Rutland's Case, a Star Chamber matter in 1605, where "serjeants-at-mace tracked down Isabel Holcroft … shewed her their mace, and touching her body with it, said to her, we arrest you, madam."[71] Analogizing an arrest by the indirect touching of a mace to the indirect contact from a shooting, *Torres* concluded that police could seize a person by a bullet as much as by a finger.[72] The Court then limited its mere-touch rule to applications "of force with intent to restrain" or "to apprehend," and not for "for some other purpose."[73] *Torres* assessed this intent by focusing on "whether the challenged conduct *objectively* manifests an intent to restrain."[74] *Torres*'s facts, where officers first ordered Torres to stop and then shot at her to "restrain her movement," satisfied the objective intent requirement for seizure of the person.[75]

The Court thus created a new Fourth Amendment definition of a seizure based on force: 1) "application of physical force," whether by hand or bullet, upon "the body of a person," when coupled with 2) an "intent to restrain," amounts to a seizure of a person.[76] Since the officers in this case 1) fulfilled an application of force by successfully shooting Torres, and did so 2) "with intent to restrain her movement," they performed a Fourth Amendment seizure.[77] *Torres* therefore 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."[78]

C. The Dissent

Justice Gorsuch, in a dissent covering fourteen pages, aimed to educate the Court about the "vast legal library" of common law defining a Fourth Amendment seizure of the person.[79] Accusing the Court of rewriting legal

71. *Id.* The Star Chamber is hardly a worthy model for constitutional propriety. The *Oxford Dictionary of British History* noted that the Star Chamber "became hated because of its increasingly draconian rulings on libel and sedition and its savage punishments. A byword for tyranny, it was abolished by the Long Parliament in 1640." JOHN CANNON, THE OXFORD DICTIONARY OF BRITISH HISTORY (Oxford University Press, 2009).

72. *Torres*, 141 S. Ct. at 997-98.

73. *Id.* The Court further noted, "[a]ccidental force will not qualify," *Id*.

74. *Id.* at 997. (emphasis in original). The Court declared, "only an objective test 'allows the police to determine in advance whether the conduct contemplated will implicate the Fourth Amendment.'" *Id.* Therefore, neither the subjective viewpoint of the officer nor the "seized person" was determinative. *Id.*

75. *Id.* at 999. The Court emphasized the narrowness of its ruling by noting that, "a seizure by force—absent submission—lasts only as long as the application of force." *Id.* Therefore, there was no "*continuing* arrest during the period of fugitivity" should the person touched flee. *Id.*

76. *Id.* at 1003.

77. *Id. Torres* therefore concluded, "the officers seized Torres for the instant that the bullets struck her." *Id.* at 999.

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

79. *Id.* at 1014 (Gorsuch, J., dissenting).

history rather than respecting it, the dissent envisioned the justices in the majority "wandering about" the library "randomly grabbing volumes off the shelf, plucking out passages" they liked, "scratching out bits" they disliked, and then pasting this "pastiche into the U. S. Reports."[80] Justice Gorsuch went so far as to claim that the majority's "schizophrenic reading of the word 'seizure'"[81] disregarded "the Constitution's original and ordinary meaning" and bypassed "the main currents of the common law."[82] Justice Gorsuch reproached the Court for avoiding the true meaning of common law by committing a variety of misdeeds, including repurposing "an abusive and long-abandoned English debt-collection practice,"[83] and expanding on dicta.[84] Further, Gorsuch viewed this as a violation of canonical rules of textual interpretation,[85] disparagement of "the dominant rule of common law,"[86] and an alteration of the meaning of authorities through selective quotation.[87] As a result, the dissent declared, the Court upended "a 230 year-old understanding of our Constitution."[88]

Such criticism seemed especially sharp considering every justice who considered the case agreed to rely on common law as the guide for analyzing a Fourth Amendment seizure.[89] Justice Gorsuch aimed to remedy the Court's error by offering what he considered to be the true common law rule. For the dissent, a Fourth Amendment seizure necessitated "taking possession of someone or something"[90] because, at common law, "an arrest normally meant taking possession of an arrestee."[91] Justice Gorsuch concluded that the police failed to seize Roxanne Torres by shooting her, since, after being shot, she "drove 75 miles to another city" and, therefore, was "roaming at large."[92]

Thus, both the Court and the dissent took it as a given that the common law defined a Fourth Amendment seizure of the person. Further, the Court

80. *Id.*

81. *Id.* at 1006.

82. *Id.* at 1003.

83. *Id.*

84. *Torres*, 141 S. Ct. at 1005.

85. *Id.* at 1007.

86. *Id.* at 1017.

87. *Id.* at 1010.

88. *Id.* at 1016.

89. The Court expressly referred to the common law to interpret the Fourth Amendment, as when declaring, "[f]irst, common law arrests are Fourth Amendment seizures." *Id.* at 995. The dissent deemed the common law to be one of the "traditional sources of authority" in interpreting the Fourth Amendment, *Id.* at 1003.

90. *Torres*, 141 S. Ct. at 1003.

91. *Id.* at 1011.

92. *Id.* at 1003-04.

and the dissent each believed that an arrest provided the test for a seizure. The justices feuded, however, over the narrow question of whether a seizure required the successful taking of possession.[93] As will be discussed below, neither the Court nor the dissent offered protection for the *Terry* stop and frisk.

IV. The Logical Implications of *Torres v. Madrid*'s Common Law Definition of Seizure of a Person

A. *Terry* Based its Analysis on Balancing the Competing Concerns of the Government and Citizens Rather than on Constitutional Text, Leaving its Ruling Vulnerable to *Torres v. Madrid*'s Common Law Definition of a Fourth Amendment "Seizure of a Person"

As previously noted, *Torres* equated a Fourth Amendment seizure with an arrest,[94] emphasized that an arrest could occur with the slightest touch,[95] and found that an arrest could occur even if it failed to subdue the arrestee.[96] Such bold pronouncements would have been news to the justices who decided *Terry*, the holding of which *Torres* placed in jeopardy.[97] If *Torres* is correct that a seizure is defined by an arrest, then what is a *Terry* stop, which the *Terry* Court viewed as a Fourth Amendment seizure separate from arrest[98] Moreover, since arrests can only be justified by probable cause, how may police lawfully perform *Terry* frisks when the *Torres* threshold of "slightest force" and "laying of hands" requires only reasonable suspicion?[99]

A full understanding of the precarious position *Torres* placed *Terry* in starts with a close examination of the *Terry* opinion. Chief Justice Warren, who wrote the opinion in *Terry*, fully understood the profound importance of the issue facing the Court.[100] He began the Court's analysis with the acknowledgement that, "[t]his case presents serious questions concerning the

93. The dueling opinions resulting from this focused inquiry demonstrate the notion that it is the civil wars that are the bloodiest. Bethany Lacina, *Explaining the Severity of Civil Wars*, 50 J. CONFLICT RESOL., 276, 289 (2006).

94. *Torres*, 141 S. Ct. at 996.

95. *Id.*

96. *Id.*

97. We have an indirect clue that *Terry*'s justices would have viewed *Torres* as problematic because Justice Stevens, one of the longest serving justices on the Court, balked at the reasoning in *Hodari D.*, where the Court offered a less fully formed version of *Torres*'s reasoning, *Hodari D.*, 499 U.S. at 635-38 (Stevens, J., dissenting).

98. *Terry*, 392 U.S. at 22-23.

99. *Terry*, 392 U.S. at 21.

100. *Terry* noted, "[w]e would be less than candid if we did not acknowledge that this question thrusts to the fore difficult and troublesome issues regarding a sensitive area of police activity—issues which have never before been squarely presented to this Court," *id.* at 9-10.

role of the Fourth Amendment in the confrontation on the street between the citizen and the policeman investigating suspicious circumstances."[101]

The high stakes caused the Court to spend considerable effort in reviewing the facts. The case began during the afternoon of Halloween, 1963, when Cleveland Police Detective Martin McFadden noticed two men, Terry and Chilton, who "didn't look right."[102] Drawing on experience gained from being an officer for 39 years, a detective for 35 years, and patrolling "this vicinity of downtown Cleveland for shoplifters and pickpockets" for 30 years, McFadden carefully observed Terry and Chilton.[103] He saw both men taking turns in walking by a store, pausing to look in the store window, walking on a short distance, turning around and walking back, and pausing once again to look in the same store window.[104] The two would then confer at the corner between visits past the store.[105] Moreover, they "repeated this ritual alternately between five and six times apiece—in all, roughly a dozen trips."[106] Suspecting "the two men of 'casing a job, a stick-up," and fearing they might have a gun, the detective approached the two men, who by this time had been joined by a third man, Katz.[107] When the three "mumbled something" after McFadden had identified himself as an officer and asked for their names, the detective grabbed Terry, "spun him around so that they were facing the other two, with Terry between McFadden and the others, and patted down the outside of his clothing."[108] Feeling a pistol in the breast pocket of Terry's overcoat, McFadden reached in, recovering ".38-caliber revolver."[109] The detective then patted down Chilton, finding another gun.[110]

At the motion to suppress the guns, the trial court found that McFadden had no probable cause to support an arrest.[111] The trial judge, however, found the frisk reasonable because "without it 'the answer to the police officer may be a bullet.'"[112] In considering the issue "whether it is always unreasonable for a policeman to seize a person and subject him to a limited search for weapons unless there is probable cause for an arrest," *Terry* was keenly aware of the weighty concerns the case involved.[113] For the

101. *Id.* at 1, 5.
102. *Id.* at 5.
103. *Id.*
104. *Id.* at 6.
105. *Terry*, 392 U.S. at 6.
106. *Id.*
107. *Id.* at 6-7.
108. *Id.* at 7.
109. *Terry*, 392 U.S. at 7.
110. *Id.*
111. *Id*. at 7-8.
112. *Id.* at 8.
113. *Id.* at 15.

government, the case implicated interests beyond the investigation and prevention of crime, to the very life of the officer on patrol.[114] Against this concern the Court had to weigh the "inestimable," even "sacred" right "of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."[115] Further, *Terry* emphasized that the right of "personal security belongs as much to the citizen on the streets of our cities as to the homeowner closeted in his study to dispose of his secret affairs."[116]

The parties presented the Court with a choice between extremes. The government, urging that a stop and a frisk "amounted to a mere 'minor inconvenience and petty indignity,"[117] suggested that these official actions fell "outside the purview of the Fourth Amendment" because neither act rose to the level of a search or seizure.[118] Against this argument, the defense contended that there was no "variety of police activity which does not depend solely upon the voluntary cooperation of the citizen and yet which stops short of an arrest based upon probable cause to make such an arrest."[119] The Court rejected both the position that a stop and frisk was a constitutional non-event[120] and the claim that these intrusions must be "strictly circumscribed by the law of arrest and search."[121] Instead of "a rigid all-or-nothing model," *Terry* charted a new, middle course.[122] The Court recognized that the officer did implicate Terry's Fourth Amendment rights with intrusions that fell short of a traditional arrest and search incident to arrest, but it also decided that these limited intrusions merited only limited protections.[123]

The Court declared that there was no question Terry "was entitled to the protection of the Fourth Amendment as he walked down the street in

114. The Court recognized that, "there is the more immediate interest of the police officer in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him," *id.* at 23.

115. *Terry*, 392 U.S. at 8-9.

116. *Id.*

117. *Id.* at 10.

118. *Id*. at 16.

119. *Id.* at 11.

120. In fact, the Court "emphatically reject(ed)" such a notion, *Id.* at 16. *Terry* declared, "[w]e therefore reject the notions that the Fourth Amendment does not come into play at all as a limitation upon police conduct if the officers stop short of something called a 'technical arrest' or a 'full-blown search,'" *Terry*, 392 U.S. at 19. The Court also noted, "Courts which sit under our Constitution cannot and will not be made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions." *Terry*, 392 U.S. at 13.

121. *Id.* at 11.

122. *Hodari D.*, 499 U.S. at 637 (Stevens, J., dissenting).

123. *Id.*

Cleveland."[124] This was because, "the Fourth Amendment governs 'seizures' of the person which do not eventuate in a trip to the station house and prosecution for crime—'arrests' in traditional terminology."[125] To hold otherwise would "isolate from constitutional scrutiny the initial stages of the contact between the policeman and the citizen."[126] *Terry* declared, "whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person."[127] *Terry* then provided the following definition of a Fourth Amendment seizure of a person: "[o]nly when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred."[128]

The Court determined that McFadden had also searched Terry within the Fourth Amendment because, "it is nothing less than sheer torture of the English language to suggest that a careful exploration of the outer surfaces of a person's clothing all over his or her body in an attempt to find weapons is not a 'search.'"[129] Since McFadden had triggered Fourth Amendment application with both a seizure and a search, the Court considered the reasonableness[130] of these actions by conducting two inquiries: 1) whether the officer's action "was justified at its inception," and, 2) whether the intrusion "was reasonably related in scope to the circumstances which justified the interference in the first place."[131] Such a test set up a sliding scale where a lesser intrusion needed lesser justification. Here, reasonableness involved a balancing of two competing interests: the government's need to seize or search against the degree of the intrusion on the individual.[132] For the first part of the test, the initial intrusion in the form of a stop, the officer's seizure of Terry did not constitute an arrest, so no probable cause was needed.[133] Instead, McFadden needed to point to "specific and articulable facts" that would "warrant an objectively

124. *Terry*, 392 U.S. at 9.

125. *Id.* at 16.

126. *Id.* at 17.

127. *Id.* at 16.

128. *Id.* at 19, n. 16.

129. *Id.* at 16.

130. The Court applied a general "reasonableness" test since it was confronted "with an entire rubric of police conduct—necessarily swift action predicated upon the on-the-spot observations of the officer on the beat—which historically has not been, and as a practical matter could not be, subjected to the warrant procedure." *Terry*, 392 U.S. at 20.

131. *Terry*, 392 U.S. at 20.

132. *Terry* explained, "there is 'no ready test for determining reasonableness other than by balancing the need to search (or seize) against the invasion which the search (or seizure) entails," *Id.* at 21.

133. *Id.* at 22.

reasonable person to believe 'that the action taken was appropriate.'"[134] McFadden's detailed rendition of the specific acts he saw Terry and Chilton perform demonstrated that his initial approach was reasonable; in fact, it "would have been poor police work indeed" if he had failed to investigate.[135] The "governmental interests" supported the detective's efforts in "effective crime prevention and detection."[136]

The second part of *Terry*'s reasonableness inquiry, dealing with the "scope" of the intrusion, considered McFadden's frisk of Terry for weapons.[137] Here, the balance of interests tilted in the government's favor because, with McFadden's suspicions of a "stick up" and the propensity of American criminals for armed violence, the Court could not "blind" itself "to the need for law enforcement officers to protect themselves and other prospective victims of violence in situations where they may lack probable cause for an arrest."[138] In contrast to the high interests of the state, the defendant's interests were less than they would be in a full search incident to arrest because the "protective search for weapons" amounted to "a brief, though far from inconsiderable, intrusion upon the sanctity of the person."[139] *Terry* thus concluded that McFadden conducted a lawful seizure and search, therefore upholding the admission of the weapon.[140]

In assessing the stop and frisk, a practice which, if abused, could lead to "wholesale harassment"[141] and, if denied, could cause an officer's injury of death,[142] *Terry* meant to carefully craft a Solomonic test that would maintain both judicial oversight and officer safety.[143] The *Terry* test wove together two rules: 1) the Fourth Amendment expanded to apply to stops and frisks,[144] and 2) these intrusions would be judged by a less demanding standard than those used for arrests.[145] Justice Stevens noted that *Terry* "necessarily concluded that the word 'seizure' in the Fourth Amendment encompasses official restraints on individual freedom that fall short of a common-law arrest." [146] *Terry* thus expanded the Fourth Amendment by

134. *Id.* at 21-22.
135. *Id.* at 22, 23.
136. *Id*. at 22.
137. *Terry*, 392 U.S. at 23.
138. *Id.* at 23-24.
139. *Id.* at 26.
140. *Id.* at 30.
141. *Terry*, 392 U.S. at 14.
142. *Id*. at 8.
143. *Id*. at 12.
144. *Id.* at 19.
145. *Id.* at 21-22.
146. *Hodari D.*, 499 U.S. at 635 (Stevens, J., dissenting).

broadening "the range of encounters between the police and the citizen" that would be defined as a "seizure."[147]

At "the same time," however, *Terry* necessarily lowered the standard of proof needed "to justify a 'stop' in the newly expanded category of seizures."[148] Due to the need for flexibility, *Terry* "held that 'reasonable' suspicion—a quantum of proof less demanding than probable cause—was adequate to justify a stop for investigatory purposes."[149] Justice Stevens saw one rule as the "corollary" of the other.[150] With *Torres*, the Court pulled at one of *Terry*'s strings, threatening to unravel the entire rule. If *Torres* is correct that a seizure is an arrest at common law, then there is no longer any Constitutional basis for a seizure that does not rise to an arrest. With no *Terry* stop and frisk, there is no need to accept the lesser justification of reasonable suspicion for any Fourth Amendment seizure.

Such a result would have pleased Justice Douglas, who vehemently dissented in *Terry*.[151] He was mystified that the Court could find McFadden's seizure and search of Terry to be Constitutional under the Fourth Amendment even though these intrusions lacked probable cause.[152] Douglas explained, "police officers *up to today* have been permitted to effect arrests or searches without warrants only when the facts within their personal knowledge would satisfy the constitutional standard of probable cause."[153] He continued, "[r]espect for our constitutional system and personal liberty demands" adherence to probable cause[154] because this traditional standard rang "a bell of certainty" deeply embedded in the nation's history that reasonable suspicion did not.[155] Rumors, or even "strong reason to suspect," did not provide early American officers with the authority to arrest.[156] *Terry*, by diluting the standard of certainty for a seizure or search, endowed police with "greater authority to make a 'seizure' and conduct a 'search' than a judge has to authorize such action."[157] Douglas viewed *Terry*'s reasonable suspicion standard in the starkest terms, declaring it a "long step down the

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *Terry*, 392 U.S. at 35 (Douglas, dissenting).

152. Justice Douglas declared, "[b]ut it is a mystery how that 'search' and that 'seizure' can be constitutional by Fourth Amendment standards, unless there was 'probable cause,'" *Id*. (Douglas, dissenting).

153. *Terry*, 392 U.S. at 37 (emphasis added).

154. *Id.* at 35, n. 1.

155. *Id.* at 37.

156. *Id.* at 37-38.

157. *Id.* at 36. Justice Douglas contended that such a ruling was "precisely the opposite" of repeated rulings of the Court. *Id.*

totalitarian path" where the individual, no longer sovereign, could be picked up by any officer who did "not like the cut of his jib."[158]

Thus, *Terry*, aiming to strike a balance between the need to maintain judicial supervision over officers' actions falling short of arrest and officers' concerns for effective investigation and personal safety, both recognized the "stop" as a Fourth Amendment seizure and lessened the justification for this lesser intrusion.[159] As demonstrated by Justice Douglas's dissent, this framework was controversial from the start. The Court, in creating the stop and frisk to address the practical realities of policing in a modern society, did not focus on common law crafted centuries ago. Lacking textual support from the Fourth Amendment or precedent from common law, *Terry* was vulnerable to challenge.[160]

B. Logical Consistency, in the Wake of *Torres v. Madrid*'s Reasoning, Would Require the Court to Choose Between the Unpalatable Options of Overturning *Terry* or Divorcing Itself from Strict Adherence to the Common Law Interpretation of the Fourth Amendment

The force of *Torres*'s logic presents the Court with a stark choice: either acknowledge that *Terry* is no longer good law or abandon an unduly strict adherence to common law in recognition of evolving societal needs, such as the citizenry's expectation of effective crime prevention and officers' concern for personal safety from firearms. The first option would result in wrenching change caused by overturning over half a century of precedent. The second option might be no more palatable, for it would call into question a judicial philosophy that forms the bedrock for many members of the current Court.

Ultimately, if the Court believes in the need to view today's Fourth Amendment issues only through the lens of common law crafted centuries ago, this principle will require the Court to demonstrate the courage of its convictions in reassessing, if not overturning, *Terry*. Such an approach seems doctrinally unavoidable. *Torres*'s definition of a Fourth Amendment seizure as a common law arrest raises two fundamental questions. First, is a stop and frisk, in which an officer lays hands on a person over which he or she exercises control, now an arrest? If so, does a *Terry* stop and frisk,

158. *Id.* at 38-39.

159. *Terry* declared, "[i]t is quite plain that the Fourth Amendment governs 'seizures' of the person which do not eventuate in a trip to the station house and prosecution for crime—'arrests' in traditional terminology. It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person," *Terry*, 392 U.S. at 16.

160. As Justice Stevens explained, "*Terry* unequivocally rejected the notion that the common law of arrest defines the limits of the term "seizure" in the Fourth Amendment," *Hodari D.*, 499 U.S. at 637.

performed on mere reasonable suspicion, now violate the Fourth Amendment?

Torres's language in defining a seizure as a common law arrest was hardly circumspect. The Court, stating that the common law deemed an arrest as any "seizure of the person,"[161] identified a link between seizure and arrest that went back to the "nation's very founding."[162] Such an equation between arrest and seizure left no room for a *Terry* stop and frisk, which was neither an arrest nor known to our Founders. *Terry*'s viability was further eroded by *Torres*'s description of the minimum force that could trigger an arrest as "any touching, however slight," with a "laying of hands," or even "the end of [a] finger."[163] *Terry*'s frisk would easily fulfill this minimal standard, as demonstrated by *Terry*'s own description of a frisk:

[T]he officer must feel with sensitive fingers every portion of the prisoner's body. A thorough search must be made of the prisoner's arms and armpits, waistline and back, the groin and area about the testicles, and entire surface of the legs down to the feet.[164]

The *Terry* Court deemed such a probing search to be "a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly.[165] Seen through *Torres*'s eyes, an officer's feeling with "sensitive fingers" every part of a person's body, including the groin, certainly clears an arrest's standard of a tap by a mace or "any touching, however slight" with the end of a finger.[166]

Torres, however, included an objective "intent to restrain" or "to apprehend" requirement in its arrest definition, noting that mere accidental contact would not qualify as an arrest.[167] Here, *Terry*, once again, fulfills *Torres*'s arrest standard because a frisk, especially of a person's sensitive places, cannot be effectively done without first apprehending and restraining a person; frisks are not effectively performed on those who are resisting or fleeing. A *Terry* frisk, necessitating the suspect to be under the officer's control, exceeds the requirements of a *Torres* arrest, which can be accomplished even when the suspect succeeds in fleeing.[168] *Torres* emphasized that some arrests, "did not culminate in actual control of the individual, let alone a trip to the goal," because an arresting officer need only,

161. *Torres*, 141 S. Ct. at 996.

162. *Id.*

163. *Id.*

164. *Terry*, 392 U.S. at 17, n. 13.

165. *Terry*, 392 U.S. at 17.

166. *Torres*, 141 S. Ct. at 996.

167. *Id.* at 998.

168. An officer fulfills a *Torres* arrest "even if the person does not submit and is not subdued," *id.* at 1003.

"for one moment," take possession of the suspect's person.[169] Therefore, Officers Madrid and Williamson satisfied *Torres*'s common law arrest rule even though Torres continued to flee for 75 miles.[170] In *Terry*, McFadden spun Terry around, patted him down, and reached into the breast pocket of his coat to recover a gun.[171] *Terry*'s seizure, in spinning an individual around and changing the direction that the person is facing, and then probing the surfaces of clothing for a weapon, involved unquestioned control of another person. Thus, even with the intent requirement, there exists a clear answer to our first question about the severity of the *Terry* stop and frisk—after *Torres*, a stop and frisk would now clearly satisfy the definition of an arrest.

Deeming a *Terry* stop and frisk to be an arrest prompts exploration of the second question about whether a *Terry* stop and frisk based on mere reasonable suspicion violates the Fourth Amendment. A *Terry* stop and frisk, amounting to a *Torres* arrest, needs the support of probable cause because any arrest, to be constitutionally valid, requires that the arresting officer, "at the moment of arrest," have the "probable cause to make it."[172] Quite simply, *Terry*'s reasonable suspicion no longer satisfies this fundamental Fourth Amendment mandate.[173]

The current Court could overrule *Terry* because *Terry*'s own reasoning gave the Court an opening to do away with the stop and frisk. While *Terry* did reference common law by noting the sacredness of an individual's right to control one's own person,[174] the Court meant to address modern concerns, such as "police-community tensions in the crowded centers of our Nation's cities."[175] To rule on these contemporary troubles, *Terry* weighed the competing interests of the government and the citizen.[176] *Terry*, which Justice Scalia described as representing "the original-meaning-is-irrelevant,

169. *Id.* at 1000.

170. *Id.* at 1004.

171. *Terry*, 392 U.S. at 7.

172. Justice Stevens noted, "[p]rior to ***Terry*,** the Fourth Amendment proscribed any seizure of the person that was not supported by the same probable-cause showing that would justify a custodial arrest," *Hodari D*., 499 U.S. at 635 (Stevens, J., dissenting). He continued, "in ***Terry*,** the Court abandoned its traditional view that a seizure under the Fourth Amendment required probable cause, and, instead, expanded the definition of a seizure to include an investigative stop made on less than probable cause," *Terry*, 392 U.S. at 637. The Court has required probable cause for arrest; "Whether that arrest was constitutionally valid depends in turn upon whether, at the moment the arrest was made, the officers had probable cause to make it—whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense." Beck v. Ohio, 379 U.S. 89, 91 (1964).

173. Once a *Terry* stop graduates into an arrest, police need probable cause to support this greater intrusion, Florida v. Royer, 460 U.S. 491, 507 (1983).

174. *Terry*, 392 U.S. at 9.

175. *Id.* at 9, 12.

176. *Id.* at 22-25.

good-policy-is-constitutional-law school of jurisprudence," did not bother to consider authorities such as the *Countess of Rutland's Case*.[177] Ironically, this once modern approach has lost much of its currency with today's Court.

The Court has repeatedly turned to the Founding era, in a variety of contexts, to analyze Fourth Amendment issues. *Carpenter v. United States* harkened back to the "Founding generation," and the colonial era when considering something as modern as government surveillance of cell-site location information.[178] *Atwater v. City of Lago Vista* turned the clock all the way back to the Statute of Winchester in 1285 to assess the lawfulness of an arrest.[179] In *Virginia v. Moore*, the Court "look[ed] to the statutes and common law of the founding era to determine the norms that the Fourth Amendment was meant to preserve" to decide whether to suppress evidence obtained during an arrest in violation of state law.[180] These cases offer examples of the Court's turn to originalism, a judicial philosophy championed by Justice Bork a mere eight years after *Terry* was handed down.[181] As noted by Brandon J. Murrill, "[f]or many years, some prominent scholars (such as Robert Bork) argued that in interpreting the Constitution, one should look to the original intent of the people who drafted, proposed, adopted, or ratified the Constitution to determine what those people wanted to convey through the text."[182] Originalism has become so accepted at the Court that even Justice Elena Kagan, hardly known as a conservative justice, has conceded that "we [the Justices] are all originalists."[183]

One member of the Court has already explicitly questioned the viability of the *Terry* stop and frisk. Justice Scalia, concurring in *Minnesota v. Dickerson*, announced that he was unaware "of any precedent" to support *Terry*'s "physical search of a person thus temporarily detained for questioning."[184] The common law would only allow a "frisk" during "a full custodial arrest on probable cause," and this search would be allowed only because "a full physical search incident to the arrest" is justified during an

177. Minnesota v. Dickerson, 508 U.S. 366, 382 (1993) (Scalia, J., concurring).

178. Carpenter v. U.S. 138 S. Ct. 2206, 2213, 2214, 2211 (2018). Justice Thomas, in dissent, even considered "Locke and the English legal tradition," *id.* at 2239 (Thomas, J., dissenting).

179. Atwater v. City of Lago Vista, 532 U.S. 318, 333 (2001).

180. Virginia v. Moore, 553 U.S. 164, 168 (2008).

181. Robert H. Bork offered his originalist views in a 1984 lecture series, BRANDON J. MURRILL, MODES OF CONSTITUTIONAL INTERPRETATION 7 (Congressional Research Service, 2018), citing ROBERT H. BORK, TRADITION AND MORALITY IN CONSTITUTIONAL LAW: THE FRANCIS BOYER LECTURES ON PUBLIC POLICY 10 (1984).

182. *Id.* at 7.

183. *Id.* at 9 (citing THE NOMINATION OF ELENA KAGAN TO BE AN ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES: HEARING BEFORE THE S. COMM. ON THE JUDICIARY PART 1, 111th Cong. 62 (2010)).

184. Minnesota v. Dickerson, 508 U.S. 366, 381 (1993) (Scalia, J., concurring).

arrest.[185] Ominously for *Terry*, since a "detention did not rise to the level of a full-blown arrest (and was not supported by the degree of cause needful for that purpose), there appears to be no clear support at common law for physically searching the suspect."[186] Finally, Justice Scalia "frankly doubt(ed)":

[W]hether the fiercely proud men who adopted our Fourth Amendment would have allowed themselves to be subjected, on mere *suspicion* of being armed and dangerous, to such indignity—which is described as follows in a police manual:

Check the subject's neck and collar. A check should be made under the subject's arm. Next a check should be made of the upper back. The lower back should also be checked. "A check should be made of the upper part of the man's chest and the lower region around the stomach. The belt, a favorite concealment spot, should be checked. The inside thigh and crotch area also should be searched. The legs should be checked for possible weapons. The last items to be checked are the shoes and cuffs of the subject.[187]

What if, after *Torres*, the Court came to share Justice Scalia's doubt, substituting the mace that touched the countess for the balancing scales *Terry* so carefully employed? *Terry* itself understood the dangers that would be unleashed in dooming the stop and frisk. The *Terry* Court realized that the frisk protected an interest beyond the mere investigation of crime—the safety and even the life of the officer.[188] Outlawing the frisk would be "clearly unreasonable" because it would unnecessarily deny the officer the means to neutralize a threat that kills many officers and wounds thousands more.[189] The argument that officers could perform a search once they had probable cause ignored a harsh reality; "a perfectly reasonable apprehension of danger may arise long before the officer is possessed of adequate information to justify taking a person into custody for the purpose of prosecuting him for a crime."[190]

Doing away with the *Terry* stop and frisk would place the Court in a terrible bind, for the stop and frisk enables an officer to perform functions to which even Terry, as the petitioner, did not object. The Court in *Terry* stated:

Petitioner does not argue that a police officer should refrain from making any investigation of suspicious circumstances until such time as he

185. *Id.*

186. *Id.*

187. *Dickerson*, 508 U.S. at 381-82.

188. *Terry* noted, "[w]e are now concerned with more than the governmental interest in investigating crime; in addition, there is the more immediate interest of the police officer in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him," *Terry*, 392 U.S. at 23 (1968).

189. *Id.* at 23-24.

190. *Id.* at 26-27.

has probable cause to make an arrest; nor does he deny that police officers in properly discharging their investigative function may find themselves confronting persons who might well be armed and dangerous. Moreover, he does not say that an officer is always unjustified in searching a suspect to discover weapons.[191]

Even Justice Scalia, a "*leading practitioner*" of originalism,[192] was in no rush to remove the *Terry* stop and frisk outright. He surmised that the frisk, even if impermissible in 1791, might be considered Constitutional in 1868, with the passage of the Fourteenth Amendment.[193] He considered that *Terry* could survive by reason of the advent of "concealed weapons capable of harming the interrogator quickly and from beyond arm's reach."[194] Justice Scalia even flirted with the idea of adhering to *Terry*'s ruling that police may perform a frisk while at the same time excluding, "the evidence incidentally discovered, on the theory that half a constitutional guarantee is better than none."[195] Ultimately, the best Justice Scalia could say about *Terry*'s creation of the frisk was that while, "I do not favor the mode of analysis in *Terry,* I cannot say that its result was wrong."[196] Thus, in the wake of *Torres*, *Terry* is vulnerable. The Court is faced with a pressing need to clarify the law by either swapping the *Countess of Rutland's Case* for *Terry* in pursuit of

191. *Id.* at 25.

192. Jeremy Telman, *Originalism: A Thing Worth Doing*, 42 OHIO N.U. L. REV. 529, 529 (2016).

193. *Dickerson*, 508 U.S. at 382 (Scalia, J., concurring).

194. *Dickerson*, 508 U.S. at 382.

195. *Id.*

196. *Id*. However, following the force of *Torres*'s logic to deem the *Terry* stop and frisk unreasonable without the common law's probable cause would address the concerns of reformers who see in *Terry* an invitation to limitless intrusions, exacerbation of community tensions, racial profiling, and an attack on dignity, *see* Michael S. Klein, *Plain Touch and Stop-and-Frisk Policing: The Intersection of Race, Drugs, and Disorder,* 53 CRIM. LAW BULL. 1189 (2017). The *Terry* Court itself understood the costs of a stop and frisk, declaring, "[e]ven a limited search of the outer clothing for weapons constitutes a severe, though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience," *Terry*, 392 U.S. at 24-25. Further, encounters with police, whether by *Terry* stops or arrests, can turn deadly. "American police forces killed three people per day in 2019, for a total of nearly 1,100 killings," Tucker Higgins & John W. Schoen, *These 4 charts describe police violence in America*, CNBC POLITICS (June 1, 2020), https://www.cnbc.com/2020/06/01/george-floyd-death-police-violence-in-the-us-in-4-charts.html. Reformers could take a page out of *Torres*'s book by referring to the understanding of the Founders in quoting *Dunaway v. New York*: "Hostility to seizures based on mere suspicion was a prime motivation for the adoption of the Fourth Amendment, and decisions immediately after its adoption affirmed that "common rumor or report, suspicion, or even 'strong reason to suspect' was not adequate to support a warrant for arrest," Dunaway v. New York, 442 U.S. 200, 213 (1979). The Court's unlikely abandonment of the *Terry* stop and frisk would amount to a dramatic about-face for a Court which has repeatedly eroded Fourth Amendment protection against *Terry*'s intrusions. For instance, "[s]ince the Court created reasonable suspicion, it has authorized police to consider your ethnicity, where you live, what you wear, and how you behave as factors for consideration," Thomas B. McAffee, *Terry, Traffic Stops, and Tragedy: Conflicts and Concerns in the Wake of Kansas v. Glover*, 19 SEATTLE J. FOR SOC. JUST. 251, 271 (2020).

consistent originalism or holding its nose, acknowledging the evolution of the law, and reaffirming *Terry*'s legitimacy.

C. Application of Common Law Rules to Policing Today Should Be Performed with a Recognition that Centuries-Old Institutions and Norms Cannot Supply Every Answer to Fourth Amendment Issues.

In the first line of his novel, *The Go-Between*, L. P. Hartley writes, "[t]he past is a foreign country: they do things differently there."[197] While the law during the time of the Founders rightly informs constitutional inquiry, perhaps application of legal rules crafted centuries ago should be tempered with a recognition that the concerns facing both the citizenry and the police have changed drastically since English common law was defining a seizure of a person. In a time when police can employ a robot wielding a C4-bomb to end a standoff[198] and can hunt down a serial killer with genealogical DNA,[199] arguing over whether a countess was "seized" by the tap of a mace might demonstrate rigidity rather than fidelity. Even a brief overview of the times of common law reveals the chasm between England's Edward I and the present day.[200]

Today's police likely would not even recognize as fellow officers the persons making arrests in some of the cases cited by *Torres*. The *Torres* Court heavily relied on the *Countess of Rutland's Case*, which dated from 1605,[201] while the dissent went as far back as *Seint John's Case* in 1592 to counter the Court's claims.[202] The Statute of Winchester, in 1285, defined law enforcement's obligations in the 1500's and 1600's in England.[203] The

197. L.P. HARTLEY, THE GO-BETWEEN 17 (New York Review Books, 1953).

198. Alina Selyukh & Gabriel Roseneberg, *Bomb Robots: What Makes Killing In Dallas Different And What Happens Next?*, NAT'L. PUB. RADIO (July 8, 2016), https://www.npr.org/sections/thetwo-way/2016/07/08/485262777/for-the-first-time-police-used-a-bomb-robot-to-kill.

199. Aja Romano, *DNA Profiles from Ancestry Websites Helped Identify the Golden State Killer Suspect: He Wasn't the First Criminal to Fall to Familial DNA Matching, and He Won't Be the Last*, VOX (Apr. 27, 2018), https://www.vox.com/2018/4/27/17290288/golden-state-killer-joseph-james-deangelo-dna-profile-match.

200. King Edward I (1272-1307), who enacted the Statute of Winchester (1285), has been called "the English Justinian" for reigning over "one of the most important eras of legal reform in English legal history," Jonathan Rose, *The Legal Profession in Medieval England: A History of Regulation*, 48 SYRACUSE L. REV. 1, 34-35 (1998). "The Statute of Winchester, 1285, was "the great legislative landmark which crystallized then current rules and practices. For several centuries it afforded authoritative guidance to courts and writers," Jerome Hall, *Legal and Social Aspects of Arrest Without Warran*t, 49 HARV. L. REV. 566, 579 (1936).

201. *Torres*, 141 S. Ct. at 997.

202. *Id.* at 1013 (Gorsuch, J., dissenting).

203. J.M. BEATTIE, POLICING AND PUNISHMENT IN LONDON, 1660—1750: URBAN CRIME AND THE LIMITS OF TERROR, 114 (Oxford University Press, 2001). The Court, in *Atwater v. City of Lago Vista*, has referred to the Statute of Winchester in analyzing the Fourth Amendment seizure

Statute of Winchester provided the legal basis for the night watch[204] which, in the era before electricity, dealt with the "heightened threat of danger" that came with darkness.[205] The rules of the day required that, should anyone commit a serious crime, villagers were to "raise a 'hue and cry,' and, upon hearing the call, to bring their own weapons and pursue the criminal."[206] As late as 1660, the constables keeping order were not the career officers of today. Instead, these officials "were expected to be neither paid nor experienced, but ordinary citizens, serving for a year in turn."[207] Even in 1700, England did not have a "public body" that investigated crimes or gathered evidence for criminal prosecution; such tasks were "left to the victim."[208] Into this vacuum came the "thief-taker," who would seek out and prosecute criminals for profit.[209] The profit motive distorted thief-takers' incentives, causing them to commit "shady," "illegal," and even "vicious" practices, such as entrapment[210] or the planting of evidence.[211] In short, England did not create professional police forces "until the mid-nineteenth century."[212]

Even the officers who enforced the laws at the time of the framers—the era informing the Fourth Amendment—performed seizures of persons in a context importantly different from today. As in England, there were neither police departments nor professional law enforcement officers in the North American colonies or early states.[213] Law enforcement in the new nation consisted of unsalaried freemen pressed into service for one year.[214] Rather than investigate crimes, a constable, typically only numbering one per parish

of a person in the specific context of arrest, Atwater v. City of Lago Vista, 532 U.S. 318, 333 (2001).

204. BEATTIE, *supra* note 203, at 173.

205. *Atwater*, 532 U.S. at 333-34. As J. M. Beattie noted, "[r]obbery and murder were 'the most vile Works of Darkness.'" Therefore, "the anxieties that darkness gave rise to had been met by the formation of a night watch in the thirteenth century, and by rules about who could use the streets after dark," BEATTIE, *supra* note 203, at 169. The Statute of Winchester (1285) provided for the hue and cry duty, Jerome Hall, *Legal and Social Aspects of Arrest Without Warrant*, 49 HARV. L. REV. 566, 579-80 (1936).

206. David B. Kopel, *It Isn't About Duck Hunting: The British Origins of the Right to Bear Arms*, 93 MICH. L. REV. 1333, 1337 (1995).

207. BEATTIE, *supra* note 203, at 114.

208. *Id.* at 226.

209. *Id.* at 217.

210. *Id.*

211. 53 Brian K. Pinaire, *Who Let (The) Dog Out? On the British Roots of American Bounty Hunting*, 47 CRIM. LAW BULL. 1169, 1176 (2011).

212. Kopel, *supra* note 206, at 1337.

213. Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 620 (1999).

214. *Id.* at 620-21.

or ward, would watch taverns for drunks or fights.[215] In most cases, victims, rather than police, initiated the criminal justice process by raising the "hue and cry" or swearing out a complaint.[216]

Therefore, the *Torres* Court, in limiting the definition of today's seizures within the confines of common law, are jamming a square peg into a round hole. The Court relied on the norms of a preindustrial society oppressed each night by darkness to determine the rights of a postindustrial age that never sleeps. *Torres* employed rules meant for unsavory thief takers or civilians mandated to respond to a hue and cry to professionals spending their entire careers in government. The Court used rules meant to govern annual placeholders who reacted as crimes occurred to organized departments who aim to proactively prevent crime. As the legal commentator, Thomas Y. Davies, noted, applying "the original meaning of the language of the Fourth Amendment in a completely changed social and institutional context would subvert the purpose the Framers had in mind when they adopted the text."[217] He further warned:

[E]ven constitutional standards cannot remain static when everything to which they relate undergoes change. Even constitutional law is not autonomous from larger social, institutional, and political changes. The reality of deep change since the framing means that the original meaning generally cannot directly speak to modern issues.[218]

The Court itself has recognized the limits of originalism. Even *Hodari D.* conceded that not every common law rule should be "elevated to constitutional proscription."[219] Indeed, in *Tennessee v. Garner*, another case involving a seizure by shooting, the Court explicitly stated that the common law could not "be directly translated to the present day."[220] *Garner* refused to constrain its ruling to common law because it recognized the change in circumstances that had accrued over the centuries.[221] While *Garner*'s changed circumstances involved the increasing sophistication in firearms and evolution in the law of arrest, the changes confronting *Torres* span not only advancing technology and law, but also the very character of law enforcement and society's expectations regarding crime prevention.[222]

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215. *Id.*

216. *Id.* at 622.

217. Davies, *supra* note 213 at 740-41.

218. *Id.* at 741.

219. *Hodari D.*, 499 U.S. at 626, n. 2 (1991).

220. Tennessee v. Garner, 471 U.S. 1, 14 (1985).

221. *Id.*

222. *Garner* noted, "In short, though the common-law pedigree of Tennessee's rule is pure on its face, changes in the legal and technological context mean the rule is distorted almost beyond recognition when literally applied," *id.* at 15.

If the Court should again acknowledge that there are limits to the constitutional guidance provided by common law, where could it turn? Can the Court release itself from the grip of common law without risking wrenching change? As noted in Part IV.D. below, a solution exists near at hand that will allow the Court to avoid the extreme of overturning fifty years of precedent due to the touching of a countess with a mace.

D. The More Practical, and Less Radical, Solution for the Court Would Be to Recognize *Terry* as Valid Precedent in the Long Evolution of Fourth Amendment Interpretation

The Court, instead of provoking the uncertainty that would come with overturning a half-century of precedent that has occurred since its decision in *Terry*, should loosen its grip on originalism, or more properly, free itself from the grip of this judicial philosophy. As noted on the Supreme Court's own website, Chief Justice John Marshall, cousin of the author of the Declaration of Independence, understanding that the Constitution was not stuck in the amber of common law, declared, "[w]e must never forget that it is a constitution we are expounding … intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs."[223] The wisest course for the Court would be to ensure that *Torres*'s cleaving to the common law of arrest not limit Fourth Amendment protection against unreasonable seizures of the person.

Instead, the Court should do something utterly unremarkable—adhere to precedent. *Torres*'s reliance on common law, to the virtual exclusion of all other authority, amounted to an extension of *Hodari D.*, a case in which Justice Stevens identified the danger of the Court's self-imposed common law blinders. Justice Stevens noted that *Hodari D.*'s "narrow construction" of a Fourth Amendment seizure represented a "significant" and "unfortunate departure" from, and unfaithfulness to, prior case law.[224] He explained that the Court "ignor[ed]" *Terry*, which simply ruled that officers seized a person "when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen."[225] Thus, the "touchstone of a seizure is the restraint of an individual's personal liberty '*in some way.*'"[226] This broad language provides more extensive protection because it applies the Fourth Amendment when liberty is restrained in simply "some way."[227]

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223. Supreme Court of the United States, *The Court and Constitutional Interpretation*, https://www.supremecourt.gov/about/constitutional.aspx.

224. *Hodari D.*, 499 U.S. at 629-30 (Stevens, J., dissenting). Justice Stevens argued, "the major premise underpinning the majority's entire analysis today—that the common law of arrest should define the term "seizure" for Fourth Amendment purposes … is seriously flawed," *id.* at 637.

225. *Id.* at 637.

226. *Id.* (emphasis in original).

227. *Id.*

The Court, applying *Terry* in *United States v. Mendenhall*, noted that a seizure occurred when, "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."[228] *Mendenhall* declared, "[a]s long as the person to whom questions are put remains free to disregard the questions and walk away, there has been no intrusion upon that person's liberty or privacy as would require some particularized and objective justification."[229] The Court, in *Florida v. Bostick*, refined the seizure definition to account for those situations where a person's freedom to "walk away" is constrained by circumstances other than police action, such as when officers approach a person already seated on a bus.[230] When the *Terry/Mendenhall* "free to leave" analysis is inapplicable, *Bostick* deemed the appropriate inquiry was "whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter."[231] "Free to decline" appears as broad as freedom to "disregard." *Bostick*, however, offered even broader language for determining a seizure: when officers "communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business."[232] Since it is a rare situation when a person feels that he or she can simply ignore an officer who is attempting to make contact, this definition should cover much police behavior indeed.

A return to the earlier "free to disregard the questions and walk away" seizure definition, if fully honored, would offer a series of benefits. First, faithfully applying this precedent would genuinely fulfill the Fourth Amendment's purpose of preserving "the right to be let alone—the most comprehensive of rights and the right most valued by civilized men."[233] If the Court today truly found a seizure whenever a reasonable person in the citizen's shoes felt unable to walk away or even to disregard questions an officer put to the person, Fourth Amendment reasonableness would become a part of many more police citizen contacts. Further, this rule would simplify Fourth Amendment seizure issues by removing the common law distinction between seizures by force and seizures by asserted authority. While *Mendenhall* noted that a person could be seized by either "means of physical force or a show of authority," it did not offer a separate definition for these two methods of restraining liberty.[234] The notion, started in *Hodari D.* and deepened in *Torres*, that "our prior cases contemplated a distinction between

228. *Mendenhall*, 446 U.S. at 554.
229. *Id.*
230. Florida v. Bostick, 501 U.S. 429, 436 (1991).
231. *Bostick*, 501 U.S. at 436.
232. *Id.* at 437.
233. Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).
234. *Mendenhall*, 446 U.S. at 553.

seizures effected by a touching on the one hand, and those effected by a show of force on the other hand" is "nothing if not creative lawmaking" which needlessly complicates Fourth Amendment analysis.[235] Finally, the "free to disregard the questions and walk away" seizure definition would properly place the power back with the individual citizen because, unless a reasonable person in the situation felt he or she could disregard the officer, Fourth Amendment protection would limit official conduct.

The *Terry* stop and frisk is hardly without problems.[236] Further, the Court's own extensions of official powers in the decades since *Terry* created the stop and frisk have only exacerbated troubles.[237] However, the precipitous destruction of over fifty years of case law, based on expansive language from a narrowly applied judicial philosophy, could have profoundly disturbing consequences.

V. Conclusion

Akhil Amar, in his book, *The Bill of Rights: Creation and Reconstruction*, asked whether "many of us are guilty of a kind of curiously selective ancestor worship—one that gives too much credit to James Madison and not enough to John Bingham."[238] John Bingham was "the main

235. *Hodari D.*, 499 U.S. at 642 (1991) (Stevens, J., dissenting).

236. The full extent of *Terry*'s troubles is an issue beyond the scope of this Article. However, several genuine concerns have been identified. A disproportionate number of those subjected to *Terry* stops have been people of color, Paul J. Larkin, *Flight, Race, and Terrys Stops: Commonwealth v. Warren*, 16 GEO. J.L. & PUB. POL'Y 163, 190 (2018). Moreover, as Wayne R. LaFave, has noted, "police are on the watch for 'suspicious' travelers, and when a modicum of supposedly suspicious circumstances are observed—or, perhaps, even on a hunch or pursuant to such arbitrary considerations as the color of the driver's skin—it is only a matter of time before some technical or trivial offense produces the necessary excuse for a traffic stop," Wayne R. LaFave, *The "Routine Traffic Stop" from Start to Finish: Too Much "Routine," Not Enough Fourth Amendment*, 102 MICH. L. REV. 1843, 1844-45 (2004). Many of these traffic stops, based on reasonable suspicion, are *Terry* stops, *id.* at 1848. Further, "[n]early five decades after the Supreme Court's decision in *Terry v. Ohio*, courts find it difficult to explain what level of detail constitutes reasonable suspicion to stop a potential suspect following a completed crime," Aliza Hochman Bloom, *When Too Many People Can Be Stopped: The Erosion of Reasonable Suspicion Required for a Terry Stop*, 9 ALABAMA C.R. & C. L. L. REV. 257, 258 (2018).

237. I have addressed the Court's improper expansion of officers' powers in performing *Terry* stops in other articles, including, George M. Dery III, *Allowing "Lawless Police Conduct" in Order to Forbid "Lawless Civilian Conduct": The Court Further Erodes the Exclusionary Rule in Utah v. Strieff*, 44 HASTINGS CONST. L.Q. 393 (2017); George M. Dery III and Jacklyn R. Vasquez, *Why Should an "Innocent Citizen" Shoulder the Burden of an Officer's Mistake of Law? Heien v. North Carolina Tells Police to Detain First and Learn the Law Later*, 20 BERKELEY J. CRIM. L. 301 (2015); George M. Dery III and Kevin Meehan, *The Devil is in the Details: The Supreme Court Erodes the Fourth Amendment in Applying Reasonable Suspicion in Navarette v. California*, 21 WASH. & LEE J. C. R. & SOC. JUST. 275 (2015).

238. AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION, 293 (Yale University Press, 1998).

author of Section I" of the Fourteenth Amendment.[239] The Court eventually interpreted the Fourteenth Amendment's Due Process Clause as incorporating most of the protections in the Bill of Rights, including the rights and remedies of the Fourth Amendment, to limit abuse by officials in the states.[240] The fact that John Bingham needs to be identified as a drafter of the Fourteenth Amendment while James Madison is generally known as the father of our Constitution neatly illustrates Amar's point.[241] Amar argued that, in our telling of the "stock stories" about the Bill of Rights, we have "exaggerated the Creation and diminished the Reconstruction;" we have focused on the Bill of Rights when they were first ratified without appreciating the changes these rights underwent in the wake of the Civil War.[242] The lesson here is crucial. While there is no gainsaying that the intentions of the Founders provide invaluable insight into Fourth Amendment rights, such evidence cannot be viewed in a vacuum sealed shut in 1605.[243] Instead, true fealty to the Fourth Amendment right against unreasonable seizure of the person requires recognition of the profound changes that have occurred since the "1789 Bill of Rights."[244]

The common law of England, rather than trapping the Court in squabbles over competing interpretations about the touch of a mace,[245] should be providing guidance on the larger purpose of the Fourth Amendment. The fundamental point of the Fourth Amendment is to protect the right "to be let alone," the "right to one's person."[246] The Court has long recognized that, "[n]o right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."[247] *Terry*, sensitive to the "difficult and troublesome issues"[248] implicated by seizures, and wary of

239. *Id.* at 171.

240. Mapp v. Ohio, 367 U.S. 643, 655 (1961).

241. *Encyclopedia Britannica*, "The father of the Constitution, James Madison," https://www.britannica.com/biography/James-Madison/The-father-of-the-Constitution.

242. AMAR, *supra* note 238, at 293. Amar contended that, "in the very process of being absorbed into the Fourteenth Amendment, various rights and freedoms of the original Bill may be subtly but importantly transformed," *id.* at 223. Amar suggested that Fourth Amendment unreasonableness, when incorporated into the Fourteenth Amendment, was informed by its proximity to the Equal Protection Clause, *id.* at 268.

243. *Torres*, 141 S. Ct. at 997 (citing *Countess of Rutland's Case*, 6 Co. Rep. 52b, 77 Eng. Rep. 332 (Star Chamber 1605)).

244. AMAR, *supra* note 238, at 3.

245. *Id.* at 997, 1013.

246. Union Pac. R. Co. v. Botsford, 141 U.S. 250, 251 (1891).

247. *Id.*

248. *Terry*, 392 U.S. at 9.

"rigid and unthinking application" of rules,[249] appreciated the fundamental Fourth Amendment value of security over one's body.[250] The Court in *Torres*, seeking the timeless purity of an arrest at common law, missed the Fourth Amendment's larger meaning.

249. *Id.* at 15.
250. *Id.* at 9.

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