

NOTES

NO CHOICE BUT TO COMPLY: IMAGINING AN ALTERNATIVE HOLDING WHERE ATTEMPTED & TOUCHLESS SEIZURES IMPLICATE THE FOURTH AMENDMENT

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Torres v. Madrid is a seminal Supreme Court decision that was decided during the 2021 Supreme Court term. Torres centered on whether a woman who was shot in the back by the police but managed to escape was seized under the Fourth Amendment. This was a decision that garnered widespread attention because it was decided during a national reckoning with police violence following the George Floyd protests. The Court ultimately held that Ms. Torres was seized the instant the bullet punctured her body. This was a win for the civil rights groups as it allowed Ms. Torres to pursue a remedy, but the decision did not go far enough. This Note focuses on a special class of seizures called attempted and “touchless” seizures, and argues that recognizing both attempted and touchless seizures under the Fourth Amendment will open the door to redressing a broader range of police misconduct.

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INTRODUCTION

The Fourth Amendment provides that “[t]he right of the people to be *secure in their persons*, houses, papers, and effects, against *unreasonable searches and seizures*, shall not be violated.”¹ This Amendment has traditionally been applied via a balancing test that weighs an individual’s expectation of privacy against the governmental interest in investigating and apprehending those suspected of crimes.² Ideally, the balancing test prohibits law enforcement from invading people’s privacy, protects those unfairly suspected of crimes from being importuned, and prevents harassment by overzealous police officers.

Yet before applying the balancing test to determine whether a police officer’s conduct was reasonable, a court must first determine whether there has been a seizure at all. Whether the court finds that there has been a seizure is of huge importance. If the court finds that there is no seizure, it will not scrutinize the officer’s conduct. This means, in effect, that no matter how unreasonable the officer’s conduct was, evidence the officer obtained by means of that behavior will not be excluded at trial, and the suspect will not be able to file a

¹ U.S. CONST. amend. IV (emphasis added).

² See *Terry v. Ohio*, 392 U.S. 1, 21–27 (1968) (emphasizing that the reasonableness of a search and seizure is based on the totality of the circumstances).

Section 1983 claim against the officer for violating their Fourth Amendment rights. If, on the other hand, there was a seizure, the court is free to examine the officer's conduct, and, if the court finds proof of misconduct, to exclude the fruits of the seizure.³ In other words, the way the court chooses to define "seizure" can directly limit their ability to scrutinize and disincentivize improper police behavior.

The court currently follows a three-prong test to determine whether there was a seizure. First, in order for there to be a seizure, the officer's conduct must be such that a reasonable person would not feel free to leave⁴ (e.g., by surrounding the suspect with several officers, drawing a weapon, touching the suspect, or verbally demanding compliance).⁵ Second, the police conduct must be intentional.⁶ Third, the person must be stopped, even just for a moment.⁷

This Note will focus on the third factor—whether a person should truly need to be stopped to be seized—by examining the ramifications of two key decisions: *California v. Hodari D.* and *Torres v. Madrid*. In *California v. Hodari D.*, the Court first held that a seizure occurs "when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen."⁸ Physical force seizures are the easy case. They include grabbing a person,⁹ establishing a roadblock to force a car collision,¹⁰ or shooting a fleeing sus-

³ See *id.* at 12–13. *But cf.* *United States v. Havens*, 446 U.S. 620, 628 (1980) (holding that a defendant can be cross examined with suppressed evidence).

⁴ See *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) ("We conclude that a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.").

⁵ See, e.g., *id.* ("[T]hreatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled."); *United States v. Drayton*, 536 U.S. 194, 204 (2002) (noting that the officers did not seize the respondents because the officers "did not brandish a weapon or make any intimidating movements," and "left the aisle free so that respondents could exit").

⁶ See *Brower v. Cty. of Inyo*, 489 U.S. 593, 597 (1989) (writing that a Fourth Amendment seizure only occurs "when there is a governmental termination of freedom of movement *through means intentionally applied*").

⁷ See *California v. Hodari D.*, 499 U.S. 621, 629 (1991) (finding that Hodari was not seized until the moment he was tackled by the officer); *Torres v. Madrid*, 141 S. Ct. 989, 999 (2021) (holding that Torres was seized the "instant" that the bullets struck her) (emphasis added).

⁸ *Hodari D.*, 499 U.S. at 621, 625 (quoting *Terry*, 392 U.S. at 19 n.16).

⁹ See, e.g., *Sibron v. New York*, 392 U.S. 40, 67 (1968) (grabbing a suspect by the collar is a seizure). *But cf.* *INS v. Delgado*, 466 U.S. 210, 220 (1984) (touching a person on the shoulder is not a seizure).

¹⁰ See *Brower*, 489 U.S. at 599 (holding that the intentional placing of a roadblock for the defendant to crash into was a seizure).

pect.¹¹ By contrast, a show of authority seizure requires communicating to a suspect that they are not free to leave. Examples include the use of flashers, the operation of a vehicle in an aggressive manner, a command to halt, a roadblock, a display of a weapon or the presence of a large number of officers.¹² *Hodari D.* further required that in response to an officer's show of authority, a person must submit in order for the officer's conduct to be considered a seizure.¹³ In other words, it turned the focus away from police conduct and towards the effect that conduct has on a particular suspect.

Lower courts have criticized the submission requirement because it allows illegal police conduct to slip by without consequence.¹⁴ In essence, it permits stops made without probable cause or reasonable suspicion.¹⁵ Imagine, for example, an officer does not have reasonable suspicion to stop a driver, but they flash their lights to order them to pull over anyway. At this point, the officer has behaved inappropriately. However, imagine the driver does not stop as a result of the flashing lights and instead flees, throwing drugs out the window as he goes. The officer then catches up and runs him to the ground. According to the *Hodari D.* standard, the driver was not seized until the officer ran him to the ground, apprehending him by force—the officer's initial misconduct, by contrast, did not constitute a seizure because it did not result in submission. As a result, the drugs will not

¹¹ See *Tennessee v. Garner*, 471 U.S. 1, 7 (1985) (stopping by use of deadly force is a seizure).

¹² See *Michigan v. Chesternut*, 486 U.S. 567, 575 (1988) (“The record does not reflect that the police activated a siren or flashers; or that they commanded respondent to halt, or displayed any weapons; or that they operated the car in an aggressive manner to block respondent’s course or otherwise control the direction or speed of his movement.”); see also *United States v. Mendenhall*, 446 U.S. 554, 554 (1980) (seizure by display of weapon or large presence of officers); *Brower*, 489 U.S. at 599 (seizure by roadblock).

¹³ See *Hodari D.*, 499 U.S. at 626 (“The narrow question before us is 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. We hold that it does not.”).

¹⁴ E.g., *United States v. Swindle*, 407 F.3d 562, 570 (2d Cir. 2005) (“[W]e believe that it was an abuse of authority for which Swindle and others like him might seek redress under a source of authority such as the Fourteenth Amendment or some provision of state law.”); *State v. Young*, 717 N.W.2d 729, 755 (Wis. 2006) (Bradley, J., dissenting) (summarizing criticisms of *Hodari D.*); see also *Hodari D.*, 499 U.S. at 644 (Stevens, J., dissenting) (“The range of possible responses to a police show of force, and the multitude of problems that may arise in determining whether, and at which moment, there has been ‘submission,’ can only create uncertainty and generate litigation.”).

¹⁵ See *Swindle*, 407 F.3d 562 at 570; *Lewis R. Katz, Terry v. Ohio at Thirty-Five: A Revisionist View*, 74 Miss. L.J. 423, 462 (2004) (noting that the effect of the Supreme Court opinions following *Terry* was “to eliminate very coercive police encounters from the scope of the Fourth Amendment guarantee of reasonableness, freeing the police on those occasions from all judicial oversight”).

be suppressed, and the officer will not be deterred from continuing to make inappropriate stops.

There was hope that *Torres v. Madrid*—a seminal excessive force case decided in the 2021 Supreme Court term—would be an answer to this loophole.¹⁶ It centered on whether Roxanne Torres, who was shot in the back but managed to escape the police, was “seized” under the Fourth Amendment. This case garnered substantial attention following the George Floyd protests and the associated nationwide reckoning with police violence in the United States.¹⁷ The stakes of the case were high: There was concern among civil rights groups that, if the Court found that Roxanne was not seized, victims of many police shootings would be left without constitutional recourse.¹⁸

In a 5-3 decision, the Court ruled that Torres had been seized and could, therefore, proceed with an excessive force claim against the officer who shot her.¹⁹ Chief Justice Roberts, writing for the majority, stated that the “application of physical force to the body of a person

¹⁶ See, e.g., Petition for Writ of Certiorari at 9, *Torres v. Madrid*, 141 S. Ct. 989 (2021) (No. 19-292) (citing the Eighth, Ninth and Eleventh Circuits and the New Mexico Supreme Court as authorities holding that an unsuccessful use of force is a Fourth Amendment seizure); Mark Joseph Stern, *The Supreme Court Closes a Police Shooting Loophole*, SLATE (Mar. 25, 2021), <https://slate.com/news-and-politics/2021/03/torres-v-madrid-supreme-court-closes-a-police-shooting-loophole.html> [<https://perma.cc/TZ9P-U9L9>]; see also Thomas K. Clancy, *The Supreme Court's Search for a Definition of a Seizure: What Is a "Seizure" of a Person Within the Meaning of the Fourth Amendment?*, 27 AM. CRIM. L. REV. 619, 621 (1990) (“Supreme Court has had little trouble concluding that an arrest and other physical detentions are seizures, but has had more difficulty determining at what point investigatory actions of the police short of physical detention become seizures.”).

¹⁷ See Adam Liptak, *A Timely Case on Police Violence at the Supreme Court*, N.Y. TIMES (July 20, 2020), <https://www.nytimes.com/2020/07/20/us/politics/supreme-court-police-brutality.html> [<https://perma.cc/NF7J-VZ6F>]; see also ACLU, *THE OTHER EPIDEMIC: FATAL POLICE SHOOTINGS IN THE TIME OF COVID-19* (2020), https://www.aclu.org/sites/default/files/field_document/aclu_the_other_epidemic_fatal_police_shootings_2020.pdf [<https://perma.cc/9JBW-RMP3>].

¹⁸ See Brief of Amicus Curiae NAACP Legal Defense & Educational Fund, Inc. in Support of Petitioner at 10–11, *Torres v. Madrid*, 141 S. Ct. 989 (2021) (No. 19-292) (“Given the exclusive nature of the civil damages remedy under the Fourth Amendment for victims of police misconduct like Ms. Torres, which are already limited by various judicial constraints, the question before the Court takes on particular importance: . . . courts should not sidestep the ‘reasonableness’ analysis by categorically removing certain uses of force from Fourth Amendment scrutiny.”); see also Nick Sibilla, *Supreme Court Could Create New Fourth Amendment Loophole for Police Shootings*, FORBES (Oct. 12, 2020 7:00 PM EDT), <https://www.forbes.com/sites/nicksibilla/2020/10/12/supreme-court-could-create-new-fourth-amendment-loophole-for-police-shootings/?sh=E08565f58421> [<https://perma.cc/A89E-MCE2>].

¹⁹ *Torres v. Madrid*, 141 S. Ct. 989, 1003 (2021) (“We leave open on remand any questions regarding the reasonableness of the seizure, the damages caused by the seizure, and the officers’ entitlement to qualified immunity.”).

with intent to restrain is a seizure, even if the force does not succeed in subduing the person.”²⁰

Despite this apparently positive development, this Note will argue that *Torres* missed the mark in a major way. True, the Court reached the right outcome, but it failed to seize the opportunity to hold that a wider range of conduct fell under the purview of the Fourth Amendment.²¹ In particular, this Note will focus on two kinds of seizures: attempted seizures and touchless seizures. This Note coins “touchless seizures” as an umbrella term for seizures where a reasonable person’s movement is restrained by an officer’s conduct, but the person never physically comes in contact with the police. Attempted seizures are a subcategory of touchless seizures where the officer has the intent to seize by force or show of authority, but the suspect escapes.²² Importantly, not all touchless seizures require that an officer intends to stop the suspect. Touchless seizures can also include behaviors like surveillance or harassment, where an officer does not intend to stop a suspect but causes them to reasonably feel restrained nonetheless.

Curbing police violence and harassment requires a broad reading of the term “seizure.” The broader the definition, the more opportunity for the court to evaluate the reasonableness of police conduct and redress misconduct. Recognizing attempted and touchless seizures under the Fourth Amendment would allow for more successful Section 1983 claims in cases where police shoot at suspects, and it would provide remedies for individuals subjected to police chases or harassment.²³ While it will not solve the root causes of police brutality, it may make a difference in our ability to remedy instances of brutality after the fact. Black people are disproportionately more likely to be shot than any other group. Providing the opportunity to assert a Section 1983 claim is a step towards rectifying police violence and promoting racial justice.

²⁰ *Id.* at 994.

²¹ *See, e.g.,* *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 845 n.7 (1998) (“Attempted seizures of a person are beyond the scope of the Fourth Amendment.”). As Ronald J. Bacigal notes, attempted seizures are not covered by the Fourth Amendment, which is “indifferent to a police officer’s initial pursuit, intimidation, or other unsuccessful efforts to seize a citizen.” Consequently, and notwithstanding a lack of evidence they’re engaged in criminal activity, individuals must “accept the possibility that an officer may fire upon them, attempt to tackle them to the ground, or single [them] out . . . and demand identification papers and an explanation of why [they are] in the area.” Ronald J. Bacigal, *The Right of the People to Be Secure*, 82 *KY. L.J.* 145, 147 (1993).

²² For a discussion of attempted seizures post-*Hodari D.*, see Seth W. Stoughton, *How the Fourth Amendment Frustrates the Regulation of Police Violence*, 70 *EMORY L.J.* 521 (2020).

²³ *See* 42 U.S.C. § 1983 (providing for civil actions for deprivation of rights).

The Court has acknowledged in other contexts that it is important to consider common sense in defining the bounds of the Fourth Amendment. For example, the Court has recognized that the shifting circumstances created by modern policing require an updated Fourth Amendment test for *searches*.²⁴ In doing so, it eschewed the common law of search in favor of a “reasonable expectation of privacy” test which factors in concerns about the scope of modern, technologically enhanced searches. This Note calls for the Supreme Court to do the same for the definition of *seizure*. The Supreme Court should hold that all attempted or touchless seizures fall within the purview of the Fourth Amendment by adopting a new test this Note will call the no choice but to comply test.²⁵

This Note will proceed in five parts. Part I examines pivotal historical Fourth Amendment seizure decisions. Part II explains how the Court in *Torres* misapplied common law doctrine and argues that the correct reading of common law supports a broader definition of seizure. Part III examines the negative consequences of the *Torres* decision. Part IV proposes a new standard for show of authority seizures which addresses the concerns in Parts II and III: the no choice but to comply test. Part V explains how this new standard can serve to further protect American citizens’ right to privacy and their right to be “secure in their persons.”²⁶

I

BACKGROUND

A. *Seizure and the Common Law of Arrest*

The Supreme Court has embraced the common law understanding of arrest to define what constitutes a Fourth Amendment seizure of a person.²⁷ In order to understand their reasoning, therefore, we must look to the common law of arrest (although, as I will explain later, their reliance on it is not wholly proper in the context of seizures).

²⁴ See *Katz v. United States*, 389 U.S. 347, 353 (1967). *Katz* held that electronic surveillance by the police is a search under the Fourth Amendment. It further recognized that governing norms required a new definition of search to include intangible objects like oral conversations because the Framers could not have foreseen how easily police officers can now eavesdrop on phone calls.

²⁵ This Note will not focus on accidental seizures where officers use force without an intent to restrain.

²⁶ U.S. CONST. amend. IV.

²⁷ See *California v. Hodari D.*, 499 U.S. 624, 626 n.2 (1991) (finding that at common law, an arrest was the “quintessential ‘seizure of the person.’”); see also *Payton v. New York*, 445 U.S. 573, 585 (1980) (“[T]he arrest of a person is ‘quintessentially a seizure.’”) (quoting *United States v. Watson*, 423 U.S. 411, 428 (1976)).

In adopting the common law standard, the Supreme Court has traditionally looked to Founding Era dictionaries and colonial constitutions.²⁸ The common law of arrest proposes that an arrest must include either physical force or submission to an assertion of authority.²⁹ Common law courts recognized that merely touching a person was physical force for the purposes of an arrest.³⁰ For example, in *Genner v. Sparks*, Genner was a bailiff who had an arrest warrant for Sparks and “pronounced the word *arrest*, but did not lay his hands on [Sparks].”³¹ The court explained that “if [the bailiff] had but touched the defendant even with the end of his finger, there would have been an arrest.”³² This “mere touch” rule was developed as a consequence of Founding Era law enforcement being handled by private citizens.³³ Given the inherent difficulties of a non-professional police force, a bright-line rule was necessary if courts were going to penalize law enforcement officers who arrested people improperly. This need was even more urgent given the contemporary policy of penalizing individuals who allowed arrested suspects to escape.³⁴

²⁸ See, e.g., SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (5th ed. 1773) (defining the verb “arrest” as including “[t]o seize any thing by law,” “[t]o seize by a mandate from a court or officer of justice,” and “to seize; to lay hands on; to detain by power”); NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828) (defining an arrest as “[a]ny . . . seizure, or taking by power, physical or moralseizure of the person”); THOMAS DYCHE & WILLIAM PARDON, A NEW GENERAL ENGLISH DICTIONARY (14th ed. 1771) (defining “seizes” as “to lay or take hold of violently or at unawares, wrongfully, or by force”); *Atwater v. City of Lago Vista*, 532 U.S. 318, 329–30 (2001) (referencing colonial legal treatises and dictionaries to interpret officers’ warrantless misdemeanor arrest power).

²⁹ In *Simpson v. Hill*, Chief Justice Eyre explained that an arrest would have occurred “if the constable . . . had for one moment taken possession of the plaintiff’s person, it would be . . . an imprisonment, as, for example, if he had tapped her on the shoulder, and said ‘You are my prisoner’; or if she had submitted herself into his custody” *Simpson v. Hill* [1795] 170 Eng. Rep. 409, 409; 1 Esp. 431.

³⁰ See, e.g., BENJAMIN VAUGHAN ABBOTT, DICTIONARY OF TERMS AND PHRASES USED IN AMERICAN OR ENGLISH JURISPRUDENCE 84–85 (1879); see also T. CUNNINGHAM, A NEW AND COMPLETE LAW DICTIONARY (2d ed. 1771) (stating that “if the bailiff touched him, that had been an arrest”); *Arrest*, BLACK’S LAW DICTIONARY (2d ed. 1910) (defining “arrest” as including “the act of laying hands upon a person for the purpose of taking his body into the custody of the law”).

³¹ *Genner v. Sparks* [1704] 87 Eng. Rep. 928, 928; 6 Mod. 173.

³² *Id.* at 929; see also *Williams v. Jones* [1736] 95 Eng. Rep. 193, 194; Cas. t. Hard 299 (“[T]o be sure . . . there was no arrest, for the party was *neither* touched *nor* confined.”) (emphasis added).

³³ See LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 27 (1993) (discussing how constables and watchmen were “ordinary citizens” during the seventeenth century).

³⁴ See MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 594 (1736) (“If the constable arrest a man for felony, and bring him to the gaol, and the gaoler refuse to receive him, yet in law he is in the custody of the constable, and if he lets him go, he is chargeable in an escape.”).

Allowing ordinary citizens to easily understand when they had arrested someone was key to maintaining the system. Even once these rationales were no longer relevant, however, American and English judges in the nineteenth century continued to apply the common law mere touch rule to seizures by physical force.³⁵

The mere touch rule extended to situations in which the “mere touch” was carried out by an object rather than with the law enforcement officer’s bare hands.³⁶ For example, consider the 1605 case of Isabel Holcroft, Countess of Rutland. Several serjeants-at-mace tracked Holcroft down to execute a writ for a judgment of debt, and they “shewed her their mace, and touching her body with it, said to her, we arrest you, madam.”³⁷ This application of force by mace was enough to constitute an arrest. There was no need for her to have been touched by the police officer’s own hands.

Similarly, common law courts recognized that submission by an arrestee following a show of authority constitutes an arrest. An English court held in 1824, for example, that an officer did not make an arrest when he simply stated “Mr. Hamer, I want you.”³⁸ The court found that “[m]ere words will not constitute an arrest.” Rather, the court found that “if the party acquiesces in the arrest, and goes with the officer, it will be a good arrest.”³⁹ Thus, the court established the framework that would prove problematic in later years: An officer has only arrested someone if that person has submitted to the officer.

B. United States v. Mendenhall

The basic framework established by the common law of arrest persisted into the twentieth century, with the Court making clear that “[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.”⁴⁰ The most pressing question

³⁵ In *Sandon v. Jervis*, for example, Justice Williams found that “[i]t [wa]s perfectly clear that . . . touching the person constitute[d] an arrest” and “that it would be most pernicious if the question, whether the officer had such means of restraint, were perpetually to be submitted to a jury.” *Sandon v. Jervis* [1859] 120 Eng. Rep. 758, 762; El. Bl. & El. 942. Justice Crompton noted: “The touch is the test, and it is no part of the test that the officer must have corporal possession of the party.” 4 *The Jurist* (New Series) 737–38 (1859) (Crompton, J.). Justice Hill agreed: “touching in the most indefinite manner is sufficient” to prove an arrest. *Id.*

³⁶ *Torres v. Madrid* cited *Countess of Rutland’s Case* as an example of an arrest by touching with an object. *Countess of Rutland’s Case* [1605] 77 Eng. Rep. 332, 336; 6 Co. Rep. 52b.

³⁷ *Id.* at 54a, 77 Eng. Rep., at 336.

³⁸ *Russen v. Lucas* [1824] 171 Eng. Rep. 1141, 1141; 1 Car. & P. 153.

³⁹ *Id.*

⁴⁰ *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968).

then became what constitutes a show of authority seizure in a modern context. In 1980, the Court in *United States v. Mendenhall* created a test to determine just that.⁴¹

In *Mendenhall*, two DEA agents approached Sylvia Mendenhall, a Black woman, at the Detroit Metropolitan Airport because she allegedly matched the characteristics of a person unlawfully carrying drugs.⁴² The DEA identified themselves as federal agents and asked her questions. After examining her airplane ticket and driver's license, they noticed that the names on the two documents did not match.⁴³ At that point, one of the officers then identified himself as a federal narcotics agent, and, according to his testimony, Sylvia Mendenhall became visibly shaken and struggled to speak. The agents then asked Ms. Mendenhall to accompany them to their office for questioning. In the office, the agents asked her if she would consent to a search of her handbag and informed her of her right to decline. She agreed to the search. Finding nothing, the agent then requested a strip search to which she objected at first but ultimately consented. When she complied, the agents found heroin hidden on her person.⁴⁴

The issue before the Court in *Mendenhall* was whether a seizure occurred when the DEA first approached Ms. Mendenhall.⁴⁵ The Court found that no seizure occurred because Ms. Mendenhall had no reason to believe that she was not free to walk away when the agents first approached her.⁴⁶ The Court focused on the fact that she was in a public space and could have disregarded the agent's questions.⁴⁷ Therefore, there was no seizure before she followed the agents to the office.

In justifying the above reasoning, *Mendenhall* created a new test: “[A] person has been ‘seized’ within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.”⁴⁸ The Court looks to whether the citizen who is questioned “remains free to disregard the questions and walk away,” if they are able to do so, then “there has been no intrusion upon that person's liberty or privacy” that would require some “particularized and objective justification” under the Constitution.⁴⁹ The *Mendenhall*

⁴¹ *United States v. Mendenhall*, 446 U.S. 544 (1980).

⁴² *Id.* at 547 n.1, 558.

⁴³ *Id.* at 548.

⁴⁴ *Id.* at 549.

⁴⁵ *See id.* at 551–57.

⁴⁶ *See id.* at 554.

⁴⁷ *Id.* at 554–55.

⁴⁸ *Id.* at 554.

⁴⁹ *Id.*

test examines the totality of circumstances to determine when a given police exchange constitutes a seizure under the Fourth Amendment. The test is designed to be objective; it considers neither the officer's intent nor the citizen's reactions.⁵⁰

C. California v. Hodari D.

The new test did not stand very long. Less than a decade after *Mendenhall*, the Court decided *California v. Hodari D.*, which narrowed the *Mendenhall* test.⁵¹ In April 1988, in Oakland, California, police officers in an unmarked car encountered "four or five youths huddled around a small red car" in a "high-crime area."⁵² Hodari and his companions took flight after an unmarked police car approached.⁵³ As Hodari fled through the alley, an officer chased him on foot.⁵⁴ Although Hodari "[looked] behind as he ran," he did not notice that the officer "was almost upon him," and so he "tossed away what appeared to be a small rock."⁵⁵ The officer tackled and handcuffed Hodari and radioed for assistance. Backup identified the "tossed rock" as crack cocaine.⁵⁶ In his juvenile proceeding, Hodari moved to suppress the cocaine as the fruit of an unlawful seizure. He argued that the evidence was inadmissible because the officers unlawfully seized him when they began to chase him.⁵⁷

Justice Scalia, writing for the majority, held that to constitute a seizure under the Fourth Amendment, "[a]n arrest requires *either* physical force . . . *or*, where that is absent, *submission* to the assertion of authority."⁵⁸ As Justice Powell wrote in *Mendenhall*, Scalia found

⁵⁰ See *id.* at 554–56 ("As 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 under the Constitution require some particularized and *objective* justification.") (emphasis added). Some have argued that, based on the plain language of this test, whenever someone is approached by the police, a seizure occurs. See, e.g., Thomas K. Clancy, *supra* note 16, at 636–40 (1990) (explaining the evolution of the reasonable person test); 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT 411 (2d ed. 1987) (noting that, under a literal reading of the *Mendenhall* test, "virtually all police-citizen encounters must in fact be deemed to involve a Fourth Amendment seizure"). But, as evidenced by the holding, the Court declined to take things that far, instead leaving us with a test that looks to see if the officer did anything above and beyond approaching that would signal that the person questioned was not free to leave. *Mendenhall*, 446 U.S. at 554–56.

⁵¹ *California v. Hodari D.*, 499 U.S. 621 (1991).

⁵² *Id.* at 622.

⁵³ *Id.* at 622–23.

⁵⁴ *Id.* at 623.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 626.

that a seizure by “show of authority” occurs when, “in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.”⁵⁹ Yet Justice Scalia concluded that Hodari was seized when he was tackled by the officer, not when the officer began to run him down, because he had not submitted prior to the initial chase.⁶⁰ Thus, because the rock of cocaine was discarded before Hodari was tackled, it was admissible.⁶¹

The Court in *Hodari D.* held that the *Mendenhall* test stated only a necessary, but not a sufficient, condition for finding show of authority seizures.⁶² By adding a requirement that an individual must submit to police authority, the Court significantly narrowed the circumstances to which the *Mendenhall* totality of the circumstances test can be applied and required courts to delve not only into the appropriateness of officer conduct, but also the conduct of the suspect.⁶³

The dissent in *Hodari D.* criticized the Court for engaging in “creative lawmaking,” pointing out that *Mendenhall* does not “require[] more than whether a reasonable person felt free to leave.”⁶⁴ Scholars simply recognized the *Hodari D.* decision as an

⁵⁹ United States v. Mendenhall, 446 U.S. 544, 553–54 (1980).

⁶⁰ See *Hodari D.*, 499 U.S. at 629 (holding that there was no show of authority seizure since Hodari did not yield during the police chase).

⁶¹ See *id.* (“[S]ince Hodari did not comply with that injunction he was not seized until he was tackled. The cocaine abandoned while he was running was in this case not the fruit of a seizure, and his motion to exclude evidence of it was properly denied.”).

⁶² *Id.* at 628 (“[*Mendenhall*] says that a person has been seized ‘only if,’ not that he has been seized ‘whenever’; it states a necessary, but not a sufficient, condition for seizure—or, more precisely, for seizure effected through a ‘show of authority.’”).

⁶³ Circuit courts are now divided as to what constitutes submission to police authority. Compare United States v. Valentine, 232 F.3d 350, 359 (3d Cir. 2000) (“Even if [respondent] paused for a few moments and gave his name, he did not submit in any realistic sense to the officers’ show of authority, and therefore there was no seizure until [an officer] grabbed him.”), with United States v. Morgan, 936 F.2d 1561, 1567 (10th Cir. 1991) (noting that because respondent “yielded” momentarily to police authority, he was seized under the Fourth Amendment). This Note does not attempt to resolve that divide, but argues that it shouldn’t exist at all because submission should be irrelevant. For the purpose of this Note, the submission requirement is met when a defendant complies with police orders. See John Simon, *Conceptualizing “Submission to Police Authority” After Hodari D.*, U. CIN. L. REV. (Mar. 5, 2019), <https://uclawreview.org/2019/03/05/conceptualizing-submission-to-police-authority-after-hodari-d> [<https://perma.cc/BTU7-8TPC>] (“[C]ourts should follow the lead of the D.C. Circuit which maintains that a defendant submits to police authority when that defendant complies with police orders.”); Dean S. Acheson, *Seizures Conducted Absent Physical Force: Momentary Compliance Versus Submission*, N.Y.U. PROCEEDINGS (Oct. 5, 2020), <https://proceedings.nyumoot.court.org/2020/10/seizures-conducted-absent-physical-force-momentary-compliance-versus-submission> [<https://perma.cc/4X5U-MFZB>] (arguing a person is seized under the Fourth Amendment when they “unequivocally submit[] to a show of authority during a police encounter” but not when they “respond[] to brief, preliminary police questioning with evasive behavior”).

⁶⁴ *Hodari D.*, 499 U.S. at 639, 642 (Stevens, J., dissenting).

abandonment of the *Mendenhall* test, and an adoption of a new, objectionable rule. Thomas Clancy, for instance, argued that the *Hodari D.* standard failed to properly weigh society's interests in effective law enforcement against an individual's right to privacy.⁶⁵ Clancy found the *Hodari D.* test defective because it focused on the responses of the suspect instead of the governmental action, and therefore would inevitably fail to protect citizens from some police intrusions on their individual liberty.⁶⁶ Patrick Costello argued that *Hodari D.* required citizens to submit to unreasonable governmental intrusions if they wanted later recourse for police misconduct.⁶⁷ Therefore, it provided a perverse incentive for law enforcement to engage in police chases when they believe a person shows a propensity toward criminal activity but do not have enough facts to perform an investigatory stop, as long as they think the suspect will run.⁶⁸ Alyssa Saks pointed out that we penalize defendants criminally for attempted wrongdoing; it seems unfair, therefore, to refuse to punish police officers for attempted constitutional violations that fail only because the suspect escapes.⁶⁹

D. Florida v. Bostick

Florida v. Bostick was decided one month after *Hodari D.* *Bostick* similarly narrowed the *Mendenhall* test and illustrated a conservative Supreme Court's deference to law enforcement.⁷⁰ In *Bostick*, the police boarded a Greyhound bus while it was stopped along its route and questioned its passengers as to their identity and the purpose of their travel, asking to examine their tickets and

⁶⁵ Thomas K. Clancy, *The Future of Fourth Amendment Seizure Analysis After Hodari D. and Bostick*, 28 AM. CRIM. L. REV. 799, 841–42 (1991).

⁶⁶ *Id.* at 842.

⁶⁷ Patrick T. Costello, *California v. Hodari D.: The Demise of the Reasonable Person Test in Fourth Amendment Analysis*, 12 N. ILL. UNIV. L. REV. 463, 495 (1992).

⁶⁸ *Id.*

⁶⁹ Alyssa Saks, Essay, *Can Attempted Seizures be Unreasonable?: Applying the Law of Attempt to the Fourth Amendment*, 37 CAL. W. L. REV. 427, 430–33 (2001) (explaining how the law of criminal attempt applies to attempted seizures); see also Bacigal, *supra* note 21 at 202–13 (1993) (exploring how *Katz v. United States* can serve as a model to determine the scope of attempted seizures); Seth W. Stoughton, *How the Fourth Amendment Frustrates the Regulation of Police Violence*, 70 EMORY L.J. 521, 534–61 (2021) (identifying four shortcomings in the Fourth Amendment's regulation of seizures: attempts to use force that fail to connect, physical contact with an unintended person, physical contact without intent to restrain, and physical contact that fails to restrain).

⁷⁰ Linda S. Berman, *Leave the Driving to Us*, 12 PACE L. REV. 615, 617 (1992) (arguing that the holding in *Bostick* was demonstrative of the fact that “the conservative majority of the Supreme Court [was] more intent on viewing the Fourth Amendment as a means to effective law enforcement, than as a protector of personal freedom”).

requesting to search their luggage.⁷¹ When officers searched Bostick's luggage, they found cocaine, and he was arrested for drug trafficking. The question, then, was whether Bostick was improperly seized when the officers entered the bus and began to question passengers.

In answering that question, the *Bostick* Court further modified the *Mendenhall* test. The Court held that in such circumstances the appropriate inquiry is not whether a reasonable person would have felt free to leave, but rather whether a reasonable *innocent* person would feel free to "decline the officers' requests or otherwise terminate the encounter."⁷² This is subtly different from *Mendenhall*, which did not assume that the suspect was guilty or innocent, and, therefore, did not judge the reactions of the suspect based specifically on what an innocent person would do during a police encounter.⁷³ Based on this test, the majority argued that the police had done nothing that amounted to a seizure and the passenger never indicated a desire to leave.

The *Bostick* Court refused to apply the show of authority test in a way that closely examines the conduct of the police officer as *Mendenhall* did. In fact, under the facts in *Bostick*, the pure *Mendenhall* test probably would have found a seizure. *Mendenhall* indicated in dicta that the threatening presence of multiple officers, a display of weapons, and uniformed attire would trigger a seizure, all of which were present in *Bostick*.⁷⁴ Instead, *Bostick* puts the onus on the suspect to act as an innocent person even in the face of police misconduct. The Court maintained that a reasonable innocent person could have refused to cooperate with the police, ignored them, left the bus, or gone about his business.⁷⁵

But those solutions are unrealistic. If Bostick had stayed on the bus and refused to answer the officer's questions, it would only have increased their suspicions and intensified the interrogation. And if Bostick had left the bus, he would have had to squeeze past gun-wielding officers, which also would have raised their suspicions (and left him without transportation, since the bus was imminently departing). In other words, a guilty individual in Bostick's position was trapped from the moment the police officers entered the bus, but

⁷¹ Florida v. Bostick, 501 U.S. 429, 431–32 (1991); see also JOSHUA DRESSLER, ALAN C. MICHAELS & RIC SIMMONS, UNDERSTANDING CRIMINAL PROCEDURE 119 (7th ed. 2017) ("Has a fleeing suspect, for example, submitted to authority . . . as soon as she stops running, or only when she indicates by words or action . . . that she has submitted?").

⁷² *Id.* at 438.

⁷³ United States v. Mendenhall, 446 U.S. 544, 554 (1980) (creating a test with no reference to the guilt or innocence of the suspect).

⁷⁴ *Id.*

⁷⁵ *Bostick*, 501 U.S. at 437–38.

because an innocent person might have had other options, the Court refused to scrutinize the police's conduct.

Bostick, like *Hodari D.*, was intended to encourage citizens to comply with police orders, but it does so at the expense of protection against police misconduct.⁷⁶ The majority, by requiring active resistance by an individual to terminate an encounter, failed to recognize the inherently coercive aspects of police-citizen interactions. Because many individuals will be reluctant or unable to refuse to submit to a police encounter⁷⁷ even though an idealized innocent person theoretically could, seizures will be found in fewer cases.

E. Torres v. Madrid

On July 15, 2014, New Mexico State police officers entered an apartment complex in Albuquerque to arrest a person “involved with an organized crime ring” and “suspected of having been involved in drug trafficking, murder, and other violent crimes.”⁷⁸ Arriving at the complex, Officers Janice Madrid and Richard Williamson noticed Roxanne Torres and another individual next to a Toyota FJ Cruiser.⁷⁹ Officer Williamson concluded that neither was the subject of the arrest warrant. But as the officers approached, Torres' companion fled into the apartment complex, raising the officers' suspicions. Torres got inside the Toyota Cruiser and started the engine.⁸⁰

The officers then shouted commands to stop the vehicle, but Torres could not hear them through the car door. Nor could she see their vests marked with police identifications.⁸¹ The officers then attempted to open the side door of Torres' car.⁸² At this point, Torres believed she was a victim of a carjacking because two unknown people were approaching her and trying to get into her car, so she began to attempt to get away.⁸³ As she shifted into drive and drove out of the apartment complex, the police officers brandished their guns and shot

⁷⁶ See *id.* at 440 (Marshall, J., dissenting) (arguing that police sweeps of buses implemented during the “War on Drugs” was a law-enforcement technique that violated the Fourth Amendment); *California v. Hodari D.*, 499 U.S. 621, 627 (1991) (“Street pursuits always place the public at some risk, and compliance with police orders to stop should therefore be encouraged.”).

⁷⁷ See *infra* notes 124–29 and accompanying text.

⁷⁸ *Torres v. Madrid*, 769 Fed. Appx. 654, 655 (10th Cir. 2020); *Torres v. Madrid*, 141 S. Ct. 989, 994 (2021) (internal quotations omitted).

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

at her thirteen times, hitting her in the back twice and paralyzing her left arm.⁸⁴

Despite being partially paralyzed, Torres was able to drive a short distance before colliding with another vehicle and stopping in a parking lot.⁸⁵ After asking a bystander to call the police about an attempted carjacking, Torres decided not to remain at the scene and stole a Kia Soul that was left running.⁸⁶ She drove approximately seventy-five miles to a hospital in Grants, New Mexico, and was then airlifted to a hospital in Albuquerque.⁸⁷ She was arrested by the police at the second hospital the next day. Ms. Torres pleaded no contest to aggravated fleeing from a law-enforcement officer, assault upon a police officer, and unlawfully taking a motor vehicle.⁸⁸

Torres sued the police officers under 42 U.S.C. § 1983, claiming that the officers had violated her Fourth Amendment right to be free from unreasonable searches and seizures, and that, in doing so, they had caused her significant physical injury.⁸⁹ The District of New Mexico granted summary judgment to the officers, reasoning that because Torres was able to get away after they shot at her, there was no Fourth Amendment seizure.⁹⁰ Torres appealed.

The Court of Appeals for the Tenth Circuit affirmed the District Court, finding that “Torres failed to show she was seized by the officer’s use of force.”⁹¹ The court reasoned, following *Hodari D.*, that gunshot wounds do not cause a seizure because they do not “terminate [the suspect’s] movement.”⁹² The court reasoned that because “Torres managed to elude police for at least a full day after being shot, there is no genuine issue of material fact as to whether she was seized when Officers Williamson and Madrid fired their weapons into her vehicle.”⁹³

In a 5-3 decision authored by Chief Justice Roberts, the Supreme Court held that physical force to the body with intent to seize is a Fourth Amendment seizure even if the person does not stop.⁹⁴ The decision in *Torres* heavily relied upon the common law of arrest. It

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Torres v. Madrid*, No. 16-CV-01163, 2018 WL 4148405, at *2 (D.N.M. Aug. 30, 2018), *aff'd*, 769 F. App’x 654 (10th Cir. 2019), *vacated*, 141 S. Ct. 989 (2021).

⁹¹ *Torres v. Madrid*, 769 F. App’x 654, 657 (10th Cir. 2019).

⁹² *Id.* (quoting *Brooks v. Gaenzle*, 614 F.3d 1213, 1224 (10th Cir. 2010)).

⁹³ *Id.*

⁹⁴ *Torres v. Madrid*, 141 S. Ct. 989, 994 (2021).

found, in keeping with the common law, that a mere touch is sufficient to constitute an arrest by physical force and that such a mere touch can be conducted by means of a tool or weapon.⁹⁵ The *Torres* Court explained, therefore, that physical force seizures include seizures by the force of a gunshot.⁹⁶

While this holding might, at first, seem like a victory (after all, *Torres* was allowed to proceed with her Section 1983 suit), it failed to seriously move the needle on the doctrine of seizure. By only addressing whether there was a physical force seizure and not addressing whether there was a show of authority seizure, the Court left intact the problematic *Hodari D.* and *Bostick* rulings and left the *Mendenhall* test untouched.

II

COMMON LAW AND SUPREME COURT PRECEDENT SUPPORT AN EXPANDED DEFINITION OF SEIZURE

It was not necessary for *Torres* to come out the way that it did. *Torres* should not have reflexively relied on the common law to determine what constitutes a seizure. Instead, because of technological advancements in this context that have been made since the Framers' era, past precedent suggests that the Court should have jettisoned the common law approach.⁹⁷ But even assuming they insisted on relying on common law, the Justices should have referred to the common law of *seizure* rather than the common law of *arrest*. If they had done so, they would have recognized that the common law of seizure recognizes attempted seizures, and, therefore, supports a broader test.⁹⁸

A. *The Supreme Court Should Not Have Relied on the Common Law*

Both the *Torres* Court and the *Hodari D.* Court used the common law of arrest to justify the claim that termination of movement is required for seizures by show of authority.⁹⁹ However, the

⁹⁵ *Id.* at 995 (citing *California v. Hodari D.*, 499 U.S. 621, 624–25 (1991)).

⁹⁶ *Id.* at 997–99. *See also supra* notes 29–37 and accompanying text (explaining the origins and development of the “mere touch” rule at common law).

⁹⁷ *See supra* Part I.A (outlining development of common law approach); *supra* notes 89–96 and accompanying text (demonstrating how Supreme Court precedent adapted the common law in light of technological development).

⁹⁸ *See infra* Section II.C (arguing that common law recognizes attempted arrests as seizures).

⁹⁹ *Torres*, 141 S. Ct. at 995; *California v. Hodari D.*, 499 U.S. 621, 624–25 (1991).

Court should not rely on the common law of arrest at all to determine the outer limits of the Fourth Amendment.¹⁰⁰

There have been significant changes in policing since the Founding Era, changes which shift the rationale for our seizure doctrine. The common law held that an officer who negligently allowed a person suspected of a felony to escape was guilty of a misdemeanor.¹⁰¹ As a result, the police were allowed to use deadly force to seize a suspected felon who began fleeing after arrest.¹⁰² Thus, there was an increased need for a bright-line rule telling law enforcement which individuals had been arrested (and could therefore have deadly force levied against them if they chose to flee).

On the other hand, routine police encounters and chases were historically less inherently dangerous to the suspect. It is telling, for instance, that Chief Justice Roberts could only cite one common law case comparable to an officer shooting a person from a distance.¹⁰³ Police weaponry at common law simply was not as dangerous as it is today. Deadly force was mainly inflicted by hand-to-hand combat. It was not until the late nineteenth century that police officers started carrying handguns.¹⁰⁴ The suspects were often themselves more dangerous to the police because all felonies were dangerous felonies, so there was less concern about police abuses.¹⁰⁵ It made sense, therefore, to establish a rule that was easy for law enforcement to apply, even if it left open the possibility of (at the time) rare and minor abuses.

But that world is not the world we live in today. There is already precedent for courts to recognize that these differences in technology and punishment require different legal standards for seizure than those available at common law. *Tennessee v. Garner*, for instance, held that the common law rule for seizure by deadly force made no

¹⁰⁰ See *Hodari D.*, 499 U.S. at 632 (Stevens, J., dissenting) (arguing that relying on the common law in this area is “contrary to settled precedent”).

¹⁰¹ See *Riley v. State*, 16 Conn. 47, 51 (Conn. 1843) (“Hence, if the doors of a prison are left open, by the negligence or consent of the gaoler, and the prisoner depart from prison, he is guilty of a misdemeanor.”).

¹⁰² See Rollin M. Perkins, *The Law of Arrest*, 25 IOWA L. REV. 201, 272 (1940) [hereinafter Perkins, *The Law of Arrest*] (“Firmly established in the early common law of England was the privilege to kill a fleeing felon if he could not otherwise be taken.”); ROLLIN M. PERKINS, *CRIMINAL LAW* 873–74 (1957) (discussing the contours of this common law rule).

¹⁰³ See *Torres v. Madrid*, 141 S. Ct. 989, 997 (2021) (citing *Countess of Rutland’s Case* [1605], 77 Eng. Rep. 332; 6 Co. Rep. 52b).

¹⁰⁴ See *Tennessee v. Garner*, 471 U.S. 1, 14–15 (1985) (noting that common law developed in a time of “rudimentary” weapons).

¹⁰⁵ See *id.* at 14 (“[Changes to the law] have . . . made the assumption that a ‘felon’ is more dangerous than a misdemeanor untenable. Indeed, numerous misdemeanors involve conduct more dangerous than many felonies.”).

sense in our changed “legal and technological context” and ignores the purposes of the Fourth Amendment.¹⁰⁶ So, the Court created a new standard which limited the permissible use of deadly force. The Court recognized that police departments had already created policies involving deadly force that were more restrictive than the common law and adopted the restrictions those policies proposed. *Garner* recognized that the common law rules are not always appropriate to protect citizens from modern policing.

Torres should have similarly looked at the legal and technological landscape and found that the rationale for limiting the concept of seizure to events in which an officer either touches or gains the submission of a suspect no longer applies. Like the Court in *Garner*, the *Torres* Court should have recognized that police departments have created rules to protect citizens that limit the ability of officers to chase or shoot after fleeing suspects—rules that are stricter than the common law rules.¹⁰⁷ The Court should, therefore, have followed *Garner* in using those policies to fashion a more protective test.

B. Supreme Court Case Law Suggests that the Court Should Have Relied on an Expansive Definition of Common Law Seizure Rather than the Narrow Common Law of Arrest

Even if the Court wanted to rely on common law, however, it did not need to rely solely on the common law of arrest. The Court jumped straight from consideration of whether something was a seizure to the claim that if it didn't fit the common law of arrest, it wasn't a seizure.¹⁰⁸ This assumes that all seizures are arrests, yet Supreme Court precedent has made clear that an encounter need not be an arrest to be considered a seizure.¹⁰⁹

In *Terry v. Ohio*, Officer McFadden was patrolling an area in downtown Cleveland when he observed what he believed was suspi-

¹⁰⁶ *Id.* at 3, 14–15 (holding that deadly force can only be used if the police officer has probable cause that the fleeing suspect “poses a significant threat of death or serious physical injury to the officer or others”).

¹⁰⁷ Libor Jany, *In Policy Shift, Minneapolis Police No Longer Chasing Drivers over Minor Offenses*, STAR TRIBUNE (Oct. 23, 2019 9:13 AM), <https://www.startribune.com/under-new-chase-policy-minneapolis-police-no-longer-pursuing-fleeing-suspects-in-nonviolent-lesser-offenses/563658842> [<https://perma.cc/DM33-C9XG>] (describing the Minneapolis police's policy change to stop pursuing fleeing suspects for lesser offenses, following similar changes by other police departments).

¹⁰⁸ See generally Thomas K. Clancy, *What Constitutes an Arrest Within the Meaning of the Fourth Amendment*, 48 VILL. L. REV. 129, 135–41 (2003) (describing an arrest at common law).

¹⁰⁹ *Terry v. Ohio*, 392 U.S. 1, 16 (1968).

cious behavior from two black men. Petitioner John W. Terry stopped in front of a store and looked inside the window.¹¹⁰ Terry briefly continued walking until he turned around and looked back into the store window again.¹¹¹ Another man named Richard Chilton joined him and they paced and looked inside a store window about a dozen times.¹¹² Then, a third person joined them in this routine. Officer McFadden suspected that they were casing the store for a robbery.¹¹³ He approached them and conducted a stop and frisk of all three.

The Court held that the investigative stop was a seizure but was not an arrest.¹¹⁴ *Terry* created a new category of seizure to provide law enforcement officers with flexibility to conduct investigative stops without being subject to the restrictions placed upon arrests. In other words, the Court expanded the definition of seizure to make it easier for police officers to stop citizens.¹¹⁵ It is both inconsistent and one-sided to claim that non-arrest seizures exist when they allow law enforcement greater leeway but refuse to recognize non-arrest seizures when the seized person wishes to challenge the constitutionality of the seizure. The Court should recognize that there are non-arrest seizures not just when they make police officers' jobs easier, but also when they protect the privacy interests of citizens. As a result, in cases like *Torres*, the Court—if it is to look at the common law at all—should look not just to common law of arrest, but to common law of non-arrest seizure.

C. The Common Law of Seizure Recognizes Attempted Arrests as Seizures

Had the Court looked to the common law of seizure rather than the common law of arrest, it would have found a broader definition than the one used in the *Hodari D.* line of cases.¹¹⁶ The common law

¹¹⁰ *Id.* at 6.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.* at 27.

¹¹⁵ Under the Fourth Amendment, a seizure occurs when a police officer communicates to a person that they are not free to leave. An arrest and a *Terry* stop are both subsets of seizures. For an arrest, an officer needs probable cause that someone committed a crime; while for a *Terry* stop, an officer just needs reasonable suspicion that criminal activity is afoot. The reasonable suspicion standard requires a lower level of proof than probable cause. Therefore, *Terry* allows an officer to stop a person even if the person has done nothing wrong. *Id.*

¹¹⁶ *California v. Hodari D.*, 499 U.S. 621, 632 (1991) (Stevens, J., dissenting) (arguing that the Court should refer to the common law of attempted arrest, not the common law of arrest, to discern the scope of the Fourth Amendment). In response to the dissenters' contention that an attempted arrest was also unlawful at common law, Justice Scalia

of seizure recognizes *attempted* arrests as seizures: “[E]ven without touching the other, the officer may subject himself to liability if he undertakes to make an arrest without being privileged by law to do so.”¹¹⁷ Under this reasoning, then, the officers in *Torres* conducted an illegal seizure, not just because their bullets connected with Torres’ back, but because they gave chase without being “privileged by law” to do so (i.e., because they gave chase without reasonable suspicion or probable cause). Similarly, by this reasoning, the officers in *Hodari D.* conducted an illegal seizure as soon as they attempted to catch Hodari, even if they were unsuccessful in doing so.

This distinction between the common law of arrest and the common law of seizure is reflected in the difference between the common law of battery and common law of assault: anyone “who undertakes to make an arrest without lawful authority, or who attempts to do so in an unlawful manner, is guilty of an assault if the other is ordered to submit to the asserted authority, is guilty of battery if he lays hands on the other for this unlawful purpose.”¹¹⁸ In other words, an officer is guilty of an assault if they conduct an attempted arrest, even if they did not succeed in touching the other.¹¹⁹ The common law, therefore, is proscribing even unsuccessful unlawful attempts to arrest people. A faithful reliance on the common law in our Fourth Amendment jurisprudence would do so too.

Torres could have held that the common law of seizure recognized attempted arrests as seizures, thereby reinstating the pre-*Mendenhall* standard and reversing the damage done by *Hodari D.* The fact that Torres had been shot at multiple times and the police had chased after her with the intent to seize her should have sufficed to demonstrate that an attempted common law arrest, and therefore a common law seizure, had occurred.

remarked that the English common law was irrelevant, and that “[t]he common-law may have made an attempted seizure unlawful in certain circumstances; but it made many things unlawful, very few of which were elevated to constitutional proscriptions.” *Id.* at 626–27 n.2. Here, the Court is simply picking and choosing when the common law implicates the Fourth Amendment. See Bruce A. Green, “Power, Not Reason”: Justice Marshall’s Valedictory and the Fourth Amendment in the Supreme Court’s 1990 Term, 70 N.C. L. REV. 373, 403–04 (1992) (“Given the uncertainty of the relevant common-law analogue, one might again suspect that the Court’s decision was dictated by something other than the principle that common law determines the scope of the term ‘seizure’ . . . the *Hodari D.* decision was in fact dictated by a preference for promoting law enforcement.”).

¹¹⁷ Perkins, *The Law of Arrest*, *supra* note 102, at 201.

¹¹⁸ *Id.* at 263; see also Stephen A. Saltzburg, *The Fourth Amendment: Internal Revenue Code or Body of Principles?*, 74 GEO. WASH. L. REV. 956, 993–94 (2006) (“[T]he English common law made perfect sense, much more so than Justice Scalia [in *Hodari D.*]. . . . [N]o person should be put at risk of the use of force or threats unless constitutional standards are satisfied.”).

¹¹⁹ Perkins, *The Law of Arrest*, *supra* note 102, at 201 n.3.

III CONSEQUENCES OF *TORRES V. MADRID*

The majority opinions in both *Torres* and *Hodari D.* fail to consider the consequences of their narrow interpretation of seizure under the Fourth Amendment. Their focus on physical force or submission to authority, rather than officer conduct, leaves out a variety of situations where a person feels they have been seized by the police. Therefore, it leaves the door open to non-redressable police harassment and abuses.

A. *Example 1: Chasing After a Fleeing Suspect*

Imagine a woman named Hannah is out walking and sees a police officer approach her, asking her to stop. That officer intends to ask her for directions to the closest gas station. However, Hannah decides to avoid the officer. In her largely Black and Brown neighborhood, interactions with the police can often lead to violence. In fact, that morning she read a news story about an officer who stopped and frisked a college student on his way to an internship.¹²⁰ She has also heard stories from friends who spoke to the police but, when they refused to consent to a search, were arrested for failing to cooperate.¹²¹ Remembering all of this, she decides to run in the other direction (as she would be well within her rights to do if an ordinary citizen had approached her). The police officer becomes suspicious and decides to chase after Hannah, even though he has no reason apart from her flight to think she was engaged in any wrongdoing.

This situation highlights the pitfalls of both *Bostick* and *Hodari D.* Under the logic of *Hodari D.*, Hannah is not seized because she did not stop for the officer. Hannah would have been seized if she was apprehended by the police or if her exchange with the police had suggested that she was not free to terminate the encounter. Even still, the

¹²⁰ Christopher E. Smith, *What I Learned About Stop-and-Frisk From Watching My Black Son*, ATLANTIC (April 1, 2014), <https://www.theatlantic.com/national/archive/2014/04/what-i-learned-about-stop-and-frisk-from-watching-my-black-son/359962> [https://perma.cc/755H-BR78] (describing how New York Police Department officers stopped and frisked the author's son several times over the course of one summer).

¹²¹ Although citizens have the right not to answer police questions, an officer can arguably arrest a person for obstruction of justice during a *Terry* stop. See *Koch v. City of Del City*, 660 F.3d 1228, 1246 (10th Cir. 2011) (determining whether Koch was obligated to respond to the police officer's questions and whether her refusal would be considered an obstruction of justice); see also Sam Kamin & Zachary Shiffler, *Obvious but Not Clear: The Right to Refuse to Cooperate with the Police During a Terry Stop*, 69 AM. U. L. REV. 915, 959 (2020) (arguing that the right to refuse questions during a *Terry* stop is clearly established under the Fourth Amendment even if the Supreme Court has not explicitly said so).

chase alone is not enough. Under the logic of *Bostick*, Hannah is not seized because she could have just acted like the Court's idealized innocent person and walked calmly away instead of running, terminating the situation without arousing suspicion.

Both of these problematic results stem from the interaction of the overly restrictive definitions of seizure and the Court's longstanding assumption that innocent people have no reason to run away from the police. Justice Scalia in *Hodari D.*, for example, quoted from Proverbs 28:1¹²²—"the wicked flee when no man pursueth; but the righteous are as bold as a lion."¹²³

However, flight from the police is not always indicative of guilt.¹²⁴ It has long been a "matter of common knowledge that men who are entirely innocent do sometimes fly from the scene of a crime through fear of being apprehended as the guilty parties, or from an unwillingness to appear as witnesses."¹²⁵ As the District of Columbia Court of Appeals points out, an individual running from the police "may be motivated to avoid the police by a natural fear or dislike of authority, a distaste for police officers based upon past experience . . . a fear of being apprehended as the guilty party, or other legitimate personal reasons."¹²⁶

Particularly, for Black men who have been repeatedly subject to stops, frisks, searches and interrogations, fleeing from police officers is equally likely to signify distrust of the police as it is to signify consciousness of guilt.¹²⁷ Running when approached by the police could be motivated by a "desire to avoid the recurring indignity of being racially profiled."¹²⁸ The "proliferation of visually documented police

¹²² *California v. Hodari D.*, 499 U.S. 621, 624 n.1 (1991).

¹²³ *Proverbs* 28:1 (King James).

¹²⁴ See John Eligon, *Running from Police Is the Norm, Some in Baltimore Say*, N.Y. TIMES (May 10, 2015) <https://www.nytimes.com/2015/05/11/us/running-from-police-is-the-norm-some-in-baltimore-say.html> [<https://perma.cc/TCY7-US3V>] (discussing reasons why innocent people may run from the police); see, e.g., Margaret Raymond, *The Right to Refuse and the Obligation to Comply: Challenging the Gamesmanship Model of Criminal Procedure*, 54 BUFF. L. REV. 1483, 1502–03 (2007) ("[The reasonable person test] assumes that the choice to decline a police request is unburdened, that no negative consequences will accompany a failure to comply. . . . [R]easonable people are sometimes risk averse, however, and there are several downside risks involved in disregarding police directions.").

¹²⁵ *Alberty v. United States*, 162 U.S. 499, 511 (1896).

¹²⁶ *In re D.J.*, 532 A.2d 138, 142 n.4 (D.C. 1987), *holding modified by Allison v. United States*, 623 A.2d 590 (D.C. 1993).

¹²⁷ See *Commonwealth v. Warren*, 58 N.E. 3d 333, 342 (Mass. 2016) ("[T]he finding that black males in Boston are disproportionately and repeatedly targeted for FIO encounters suggests a reason for flight totally unrelated to consciousness of guilt.").

¹²⁸ *Id.*; see also Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CALIF. L. REV. 125, 142 (2017) ("Black people, across intraracial differences, are likely to feel seized earlier in a

shootings of Black people that has generated the Black Lives Matter protests” creates a very real fear and concern about police brutality and harassment toward Black Americans.¹²⁹

Hannah should have redress for the police chase in this example, assuming the police officer did not have the requisite reasonable suspicion or probable cause for the stop. But as long as the Supreme Court maintains its antiquated notions about flight from the police, the Court’s flawed logic in *Hodari D.* and *Bostick* will deny her such redress. Consequently, the police get to reap any potential evidence from this improper and unredressable chase. More importantly, if Hannah gets hurt as a result of the chase, she cannot bring a claim against the police no matter how unreasonable their conduct was.

B. Example 2: Attempted Force Against a Fleeing Suspect

Assume that Bill is driving to work, finds a parking space, and notices a large crowd outside of the convenience store next to his job. Bill decides to check out what is happening and then hears a police officer yelling “Stop, right there!” from behind him. Bill does not realize what’s going on, so he decides to keep walking in the direction of work instead of turning around. The police officer believes that Bill is a person of interest in a burglary that just occurred at the store, so he shoots at Bill. He misses just by a few feet.

The present Court would find no seizure. The Court has found that a fleeing suspect is seized when shot by an officer, but the seizure lasts for the duration of the application of force.¹³⁰ So, for Bill to be seized, he needs to be hit by the bullet. Even though the officer had every intention of shooting Bill, Bill can’t bring an excessive force claim against the officer under Section 1983 because he was not struck.

If the officer did hit Bill, Bill would have a remedy. For example, in 1988, David Cole and Todd Cole were in a tractor-trailer on a return trip to New Mexico.¹³¹ David began to drive the truck at a high speed without paying the toll. A Kansas state trooper pursued the truck and instructed David to stop. David refused. Several officers became involved in the pursuit and started to shoot at the truck. The

police interaction than whites, likely to feel ‘more’ seized in any given moment, and less likely to know or feel empowered to exercise their rights.”); Devon W. Carbado, (*E*)*racing the Fourth Amendment*, 100 MICH. L. REV. 946, 966 (2002) (“[P]eople of color are socialized into engaging in particular kinds of performances *for* the police. They work their identities in response to, and in an attempt to preempt, law enforcement discipline.”).

¹²⁹ *Miles v. United States*, 181 A.3d 633, 641 (D.C. 2018) (quoting Appellant’s Brief).

¹³⁰ *Torres v. Madrid*, 141 S. Ct. 989, 999 (2021); *see also Tennessee v. Garner*, 471 U.S. 1, 7 (1985) (finding that there is seizure when a fleeing suspect is killed by an officer).

¹³¹ *Cole v. Bone*, 993 F.2d 1328, 1330 (8th Cir. 1993).

Eighth Circuit held that David was not seized until the moment he was hit by the bullets.¹³² But the direct bodily hit provided him remedy.¹³³ Justice Stevens describes this gap in the law thus: “[A] police officer may now fire his weapon at an innocent citizen and not implicate the Fourth Amendment—as long as he misses his target.”¹³⁴

Police officers miss their target more often than they hit. Between 2003 and 2017 the Dallas Police Department hit their target 35% of the time;¹³⁵ between 1998 and 2006 the New York Police Department hit their target about 18% of the time;¹³⁶ and in 2019, the Los Angeles Police Department hit their target about 28% of the time.¹³⁷ Each time an officer misses—assuming no other seizure has been made—the targeted individual is unable to bring an excessive force claim against the officer. Equally troubling is the relative frequency with which many officers use weapons without sufficient legal justification. In the DOJ’s investigations of multiple police departments, officers were found to “fire their guns . . . against unarmed or fleeing suspects who do not pose a threat of serious harm.”¹³⁸

Black people are disproportionately more likely to be shot by the police than any other group.¹³⁹ In fact, police shootings are a leading cause of death among young Black men in United States.¹⁴⁰ The United States Civil Rights Commission concluded that “while people of color make up fewer than 38% of the population, they make up almost 63% of unarmed people killed by the police.”¹⁴¹ The Center

¹³² *Id.* at 1333.

¹³³ *Id.* at 1332 (citing *Tennessee v. Garner*, 471 U.S. 1 (1985)).

¹³⁴ *California v. Hodari D.*, 499 U.S. 621, 630 (1991) (Stevens, J., dissenting) (emphasis added).

¹³⁵ Christopher M. Donner & Nicole Popovich, *Hitting (or Missing) the Mark: An Examination of Police Shooting Accuracy in Officer-Involved Shooting Incidents*, 42 *POLICING: AN INT’L J.* 474, 481 (2019).

¹³⁶ *Id.* at 476.

¹³⁷ MICHEL R. MOORE, *LOS ANGELES POLICE DEPARTMENT USE OF FORCE YEAR-END REVIEW*, L.A. POLICE DEP’T 164 (2019), https://lapdonlinestrgeacc.blob.core.usgovcloudapi.net/lapdonlinemedia/2022/01/2019_uof_year-end-review.pdf [<https://perma.cc/DEJ5-H42B>].

¹³⁸ U.S. DEP’T OF JUSTICE, *INVESTIGATION OF THE CLEVELAND DIVISION OF POLICE* 13 (2014).

¹³⁹ See *GUN VIOLENCE AND THE POLICE, EVERYTOWN RSCH. & POL’Y* (Jan. 23, 2022), <https://everytownresearch.org/report/gun-violence-and-the-police> [<https://perma.cc/P2PT-4QPQ>].

¹⁴⁰ Amina Khan, *Getting Killed by Police Is a Leading Cause of Death for Young Black Men in America*, L.A. TIMES (Aug. 16, 2019), <https://www.latimes.com/science/story/2019-08-15/police-shootings-are-a-leading-cause-of-death-forblack-men> [<https://perma.cc/W4KC-ECNF>].

¹⁴¹ See *Police Use of Force: An Examination of Modern Policing Practices*, U.S. COMM. ON CIVIL RIGHTS 24 (Nov. 2018), <https://www.usccr.gov/files/pubs/2018/11-15-Police-Force.pdf> [<https://perma.cc/J6EK-VE45>].

for Policing Equity found that “1 in 5 Americans interacts with law enforcement yearly. Of those encounters, 1 million result in use of force. And if you’re Black, you are 2-4 times more likely to have force used than if you are white.”¹⁴²

There is growing consensus among law enforcement agencies based on these statistics that it is unreasonable for officers to shoot at fleeing suspects. The *National Consensus Policy and Discussion Paper on Use of Force* bars police from firing at a fleeing suspect in almost all situations.¹⁴³ The narrow circumstances in which officers are permitted to consider shooting at a moving vehicle are “when ‘a person in the vehicle is immediately threatening the officer or another person with deadly force by means other than the vehicle.’”¹⁴⁴

Some police departments have banned the practice of shooting at certain categories (e.g., those escaping in cars) of fleeing suspects entirely. In 1972, the New York Police Department banned police officers from shooting at suspects in moving vehicles unless the person was using or threatening to use deadly force.¹⁴⁵ The Chicago Police Department requires its officers to move out of the path of a fleeing suspect in a vehicle rather than shoot, even if the vehicle is headed right towards the officer.¹⁴⁶

If police departments are creating policies curbing use of force against fleeing suspects, the Court should follow and recognize that attempted use of force puts an individual’s security at risk. The Court

¹⁴² See *Police Abuse*, RODERICK & SOLANGE MACARTHUR JUST. CTR., <https://www.macarthurjustice.org/issue/enforcing-police-and-prosecutorial-accountability/police-abuse> [<https://perma.cc/QG6Z-V4ED>].

¹⁴³ INT’L ASS’N OF CHIEFS OF POLICE ET AL., NATIONAL CONSENSUS POLICY AND DISCUSSION PAPER ON USE OF FORCE 1 (July 2020), https://www.theiacp.org/sites/default/files/2020-07/National_Consensus_Policy_On_Use_Of_Force%2007102020%20v3.pdf [<https://perma.cc/K9YK-QKLF>].

¹⁴⁴ *Id.* at 14.

¹⁴⁵ David A. Graham, *Why Do Police Keep Shooting into Moving Cars?*, ATLANTIC (May 21, 2021), <https://www.theatlantic.com/ideas/archive/2021/05/andrew-brown-police-shootings-moving-vehicles/618938> [<https://perma.cc/C7KW-G8P4>].

¹⁴⁶ Sharon R. Fairley, *The Police Encounter with a Fleeing Motorist: Dilemma or Debacle*, 52 U.C. DAVIS L. REV. ONLINE 155, 194 (quoting CHI. POLICE DEP’T, GENERAL ORDER 03-02-03; DEADLY FORCE 13 (Oct. 1, 2002), <https://www.chicagocopa.org/wp-content/uploads/2017/10/Use-of-Force-Policy-Report-Final.pdf> [<https://perma.cc/7XS2-XELM>]). The Philadelphia Police Department policy states that firing at a moving vehicle is prohibited to avoid unnecessary endangerment of innocent persons in the vehicle and nearby. This policy is further justified because shooting at a moving vehicle is highly unlikely to disable or stop it, disabling the driver of a vehicle may cause the vehicle to crash and harm others, and taking cover promotes officer and public safety while reducing the need for deadly force. PHILA. POLICE DEP’T, USE OF FORCE—INVOLVING THE DISCHARGE OF FIREARMS 7 (Sept. 18, 2015), <https://www.phillypolice.com/assets/directives/D10.1.pdf> [<https://perma.cc/9AFK-Z88Y>].

has instead signaled to the police to “shoot first, think later.”¹⁴⁷ In doing so, the Court places citizens in a catch-22 anytime a police officer decides to chase them (justifiably or not). They can either stop running and submit to police authority—and be deemed seized—or they can continue fleeing from the police and put themselves at risk of being shot.¹⁴⁸

C. Example 3: Police Following a Suspect in Order to Surveil or Harass

A group of high school students are being followed by a police officer every day after school. This police officer follows them on their walk home, when they are at the park, and when they are with their families. The officer has had some prior interactions with this group of students and believes they are up to no good, but the officer has no specific evidence against them. The officer’s plan is to follow these students, wait for them to do something illegal, and arrest them. These students are not seized under current doctrine.

This raises the issue of touchless seizure. This Note defines “touchless seizures” as any situation where a reasonable person’s movement is restrained by an officer’s conduct, but the person never physically comes in contact with the police. In other words, it is like the situation above in which an individual might feel restricted in where they could go or what they could do because of police conduct.¹⁴⁹ Touchless seizures include a police officer chasing after a person in a car, on foot, or merely following a person with the intent to harass.

When police officers find justification for a stop as a result of these techniques (e.g., a traffic violation) the resulting police encounters can be deadly for the driver and the passenger.¹⁵⁰ The vic-

¹⁴⁷ *Mullenix v. Luna*, 577 U.S. 7, 26 (2015) (Sotomayor, J., dissenting).

¹⁴⁸ In New York City, deadly physical force by a police officer is permitted when a suspect is escaping whenever the: “(1) officer has probable cause to believe that the suspect has committed a felony involving the infliction or threat of serious physical injury or death; AND, (2) the officer reasonably believes that the suspect poses an imminent threat of serious physical injury to the officer or to others and (3) Where feasible, some warning should be given prior to the use of deadly physical force.” N.Y.C. DEP’T OF ENV’T PROT. POLICE, GENERAL ORDER (Nov. 1, 2020), <https://www1.nyc.gov/assets/dep/downloads/pdf/about/nyc-dep-police-general-order-use-of-force-policy.pdf> [<https://perma.cc/YZ9Y-CNME>].

¹⁴⁹ This is despite a lack of formal restrictions like trespassing laws that may reasonably restrict a person’s movement absent a police encounter.

¹⁵⁰ See David D. Kirkpatrick, Steve Eder, Kim Barker & Julia Tate, *Why Many Police Traffic Stops Turn Deadly*, N.Y. TIMES (Nov. 30, 2021), <https://www.nytimes.com/2021/10/31/us/police-traffic-stops-killings.html> [<https://perma.cc/4WY8-9MHN>]; Jordan Blair Woods, *Policing, Danger Narratives, and Routine Traffic Stops*, 117 MICH. L. REV. 635

tims of these touchless seizures are often Black, since Black drivers are disproportionately stopped as compared to white drivers.¹⁵¹ Among those who have been killed are George Floyd, who was pulled from his car on suspicion of possessing a counterfeit bill; Daunte Wright who was pulled over for expired registration tags; and Jordan Edwards who was shot leaving a house party in Texas.¹⁵²

Yet touchless seizures are not currently under the purview of the Fourth Amendment. Police officers can surveil a person short of a pursuit without reasonable suspicion or probable cause. This means that the police can follow a suspect around indefinitely in a “slow chase” as an evidence gathering technique, as long as they don’t use blue lights, flashers, or sirens, and as long as the suspect does not submit to that show of authority.¹⁵³

For example, in *Christensen v. County of Boone*, the Seventh Circuit considered a couple’s 1983 action against the county and the deputy sheriff.¹⁵⁴ The Deputy Sheriff had followed them by car and sat outside of businesses that they patronized. The Plaintiffs alleged that the sheriff interfered with their constitutional right to be free from an unconstitutional seizure. The Seventh Circuit held that there was no seizure despite the Deputy Sheriff’s persistent harassment. There was no show of authority seizure because the Deputy’s stalking of the couple would not cause a reasonable person to believe that they were not free to leave. The court argued that they were able to go

(2019); Omar Saleem, *The Age of Unreason: The Impact of Reasonableness, Increased Police Force, and Colorblindness on Terry “Stop and Frisk”*, 50 OKLA. L. REV. 451, 477 (1997) (“[F]or Blacks, the phrase ‘routine traffic stop’ is a misnomer because every stop has the potential for discretion and abuse.”).

¹⁵¹ See Emma Pierson, Camelia Simou, Jan Overgoor, Sam Corbett-Davis, Daniel Jenson, Amy Shoemaker, Vignesh Ramachandran, Phoebe Barghouty, Cheryl Phillips, Ravi Shroff & Sharad Goel, *A Large-Scale Analysis of Racial Disparities in Police Stops Across the United States*, 4 NATURE HUM. BEHAV. 736, 736, 737 (2020) (finding in an analysis of approximately 95 million stops nationwide that “[r]elative to their share of the residential population, . . . [B]lack drivers were, on average, stopped more often than white drivers,” and that Black drivers comprised a smaller share of drivers stopped at night, when it is harder for officers to detect race, “suggest[ing] [B]lack drivers were stopped during daylight hours in part because of their race”); see also *Utah v. Strieff*, 579 U.S. 232, 252 (2016) (Sotomayor, J., dissenting) (“[U]nlawful ‘stops’ have severe consequences much greater than the inconvenience suggested by the name. . . . When we condone officers’ use of these devices without adequate cause, we . . . risk treating members of our communities as second-class citizens.”).

¹⁵² See Kirkpatrick et al., *supra* note 150.

¹⁵³ LAFAYE, *supra* note 50, at 61 (noting that “[t]he ‘free to leave’ concept . . . has nothing to do with a particular suspect’s choice to flee . . . or with his assessment of the probability of successful flight,” and if it were otherwise, “police would be incentivized to utilize a very threatening but sufficiently slow chase as an evidence-gathering technique whenever they lack even the reasonable suspicion needed for a *Terry* stop”).

¹⁵⁴ *Christensen v. Cty. of Boone*, 483 F.3d 454 (7th Cir. 2007).

about their daily business despite being followed and repeatedly watched.

IV NO CHOICE BUT TO COMPLY TEST

A seizure rule that fails to treat attempted and touchless seizures as seizures under the Fourth Amendment fails to provide Americans with adequate constitutional protection. The *Hodari D.* physical force or submission test encourages “police to roam the streets, menacing and intimidating persons, free of constitutional checks.”¹⁵⁵ To include attempted and touchless seizures under the purview of the Fourth Amendment, the Court needs to create a new standard that will be more solicitous to citizens and acknowledge the inherent power imbalance between police and civilians. This Note argues for a reinvigorated *Mendenhall* totality of circumstances test that encompasses seizures where police officers attempt to use force against fleeing suspects and chase or follow a suspect. This proposed test is called the “no choice but to comply” test.

A. *Defining a New Test*

The no choice but to comply test asks the simple question: “Would a reasonable person feel that they had no choice but to comply with the officer’s conduct?” A person might feel they have no choice but to comply because the officer’s conduct suggests that no matter what they do, they will be searched or subjected to police violence. If a reasonable person would believe that an officer restrained their ability to avoid the encounter, then that person has been seized. The no choice but to comply test, therefore, focuses on the actions of the officer through the lens of a reasonable person, without regard to the suspect’s actions or their guilt or innocence.

The purpose of this standard is to deter police misconduct.¹⁵⁶ This reasonable person test would not only cover traditional show of authority seizures, but also attempted seizures where officers attempt, unsuccessfully, to use force against suspects. Further, this new test would cover touchless seizures where a suspect is chased, harassed, or followed by a police officer, or where a person has been initially seized by submitting to police authority but then later flees and is

¹⁵⁵ Bacigal, *supra* note 21, at 206.

¹⁵⁶ See *California v. Hodari D.*, 499 U.S. 621, 646–47 (1991) (Stevens, J., dissenting) (“It is too early to know the consequences of . . . [this] holding. If carried to its logical conclusion, it will encourage unlawful displays of force that will frighten countless innocent citizens into surrendering whatever . . . rights they may still have.”).

chased.¹⁵⁷ This change to the Court's approach will lead to an increase in the number of seizures within the meaning of the Fourth Amendment and, therefore, further accountability of police officers.

This new test fills in the gaps of the *Hodari D.* test. The modern test does not include persons who are running away from the police, but under the no choice but to comply test, police chases would be a quintessential example of a reasonable person feeling as if they had no choice but to comply. A person who is being chased by the police is restrained because they don't have the ability to walk away and go about their business; they must keep running or comply with the search. Further, *Mendenhall* recognized that "the display of a weapon by an officer"—even without it being drawn or fired—can communicate to a reasonable person that they are not free to leave.¹⁵⁸ The no choice but to comply test would not require that every police interaction be considered a seizure, but in cases where a person is chased by the police, it would consider the fact that police officers have special permission to carry guns and use them if necessary.¹⁵⁹

The no choice but to comply test will also address problems with the *Bostick* test. The *Bostick* standard queries whether a reasonable innocent person would feel free to terminate an encounter. The no choice but to comply test would encompass touchless seizures, regardless of the probable reaction of an innocent person versus a guilty person. Under the no choice but to comply test, a reasonable person would feel that they can't terminate an encounter if they are approached by multiple officers in a small, confined place, because, if they decline to cooperate with the officer, it would raise suspicions of illegal activity.¹⁶⁰

¹⁵⁷ The latter scenario is already broadly recognized as a seizure. Most circuits have held that even where there is a brief submission to authority, there is a seizure under the Fourth Amendment. *United States v. Morgan*, 936 F.2d 1561, 1567 (10th Cir. 1991); *United States v. Brodie*, 742 F.3d 1058, 1061 (D.C. Cir. 2014); *United States v. Brown*, 448 F.3d 239, 246 (3d Cir. 2006).

¹⁵⁸ *United States v. Mendenhall*, 466 U.S. 544, 554 (1980).

¹⁵⁹ *See, e.g., United States v. Smith*, 794 F.3d 681, 683 (7th Cir. 2015) (holding that an officer approaching defendant with their hand on a gun was relevant to the finding that there was a seizure); *Liberal v. Estrada*, 632 F.3d 1064, 1083 (9th Cir. 2011) (holding that an "officer's action of putting his hand on his gun, without drawing it, let[s] [a person] know that there could be adverse consequences for any failure to submit to authority"); *United States v. Saari*, 272 F.3d 804, 808 (6th Cir. 2001) (holding that a seizure occurred where officers were outside of defendant's apartment with guns drawn).

¹⁶⁰ There is commentary that even if officers give a warning, a person would still not feel like they would be able to terminate the encounter. *See* David K. Kessler, *Free to Leave – An Empirical Look at the Fourth Amendment's Seizure Standard*, 99 J. CRIM. L. & CRIMINOLOGY 51, 52 (2008) (surveying four hundred Boston residents and finding that the vast majority felt that they were not free to leave when approached by the police); *see also*

Similarly, under the no choice but to comply test, Roxane Torres was seized before she got shot. Torres was seized when the officer stepped in front of her car to prevent her from leaving the apartment complex. The officer gave Torres no choice to comply since the officers were in her way, and any attempt to evade them would be treated as suspicious flight.

B. Addressing Criticisms of the No Choice but to Comply Test

For any new test addressing the presence of a Fourth Amendment violation, courts generally have four categories of concerns. First, some judges may worry that tests which introduce a reasonable person standard could be unfair to minority populations.¹⁶¹ Second, courts worry that a new standard might open the floodgates to a slew of excessive force claims.¹⁶² Third, courts worry that a non-bright-line standard will be difficult for law enforcement to administer.¹⁶³ And finally, courts worry that a new test will incentivize suspects to refuse to comply with the police.¹⁶⁴ Yet, as will be discussed

Terry v. Ohio, 392 U.S. 1, 19 n.16 (1968) (“Obviously, not all personal intercourse between policemen and citizens involves ‘seizures’ of persons.”).

¹⁶¹ See Graham Cronogue, *Race and the Fourth Amendment: Why the Reasonable Person Analysis Should Include Race as a Factor*, 20 TEX. J.C.L. & C.R. 55, 85 (2015) (“[T]he general reasonable person standard applied to African Americans will significantly discount the importance of the views of people in their community; it will be heavily skewed toward the reasonable white person’s perceptions.”); see also Stephen B. Bright, *In Defense of Life: Enforcing the Bill of Rights on Behalf of Poor, Minority and Disadvantaged Persons Facing the Death Penalty*, 57 MO. L. REV. 849, 865 (1992) (“The criminal justice systems in our nation are the institutions least affected by America’s civil rights movement. In one community after another, even those with substantial minority populations, the courts are made up of judges who are white, prosecutors who are white, and jurors who are white.”); Robert V. Ward, *Consenting to a Search and Seizure in Poor and Minority Neighborhoods: No Place for a “Reasonable Person,”* 36 HOW. L.J. 239 (1993).

¹⁶² See Marin K. Levy, *Judging the Flood of Litigation*, 80 U. CHI. L. REV. 1007, 1008 (2013) (“Of the sixty or so cases in which the justices explicitly raised or addressed a so-called floodgates argument, fourteen came between 2010 and 2013 alone.”).

¹⁶³ *New York v. Belton*, 453 U.S. 454 (1981) was overruled by *Arizona v. Gant*, 556 U.S. 332 (2009), but remains an eminent defender of bright-line rules. In *Belton*, the Court applied a bright-line rule to searches of motor vehicles incident to arrest arguing that the protection of the Fourth Amendment “can only be realized if the police are acting under a set of rules which, in most instances, makes it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement.” *Belton*, 453 U.S. at 458 (citing Wayne R. LaFare, “Case-By-Case Adjudication” Versus “Standardized Procedures”: The Robinson Dilemma, 1974 SUP. CT. REV. 127, 142).

¹⁶⁴ *United States v. Knights*, 989 F.3d 1281, 1303 (11th Cir. 2021), cert. denied, 142 S. Ct. 709 (2021) (“I am also attuned to the Court’s concern—understandably shared by police officers working in challenging, dangerous jobs—that imposing a bright-line rule in the Fourth Amendment context could impose a cost, since people might not consent to a police interaction if advised that they not need do so.”).

below, these concerns have either been successfully addressed by courts implementing similar tests in the past, or they simply do not apply to this test.

This is not to say that none of these concerns have bases in fact. Indeed, it is true that a reasonable person standard does not always perfectly encompass the fears and anxieties of Black people who have disproportionately frequent interactions with the police. Courts have often failed to see that a reasonable person who is Black and lives in a heavily policed community is different from a reasonable person who is white and lives in a white suburb.¹⁶⁵ The Black experience with law enforcement is wholly different from the white experience. As Justice Sotomayor stated in her dissent in *Utah v. Strieff*: “For generations, black and brown parents have given their children ‘the talk’ . . . out of fear of how an officer with a gun will react to them.”¹⁶⁶

The flaws of the reasonable person test are not in its essence, but in its application, however. Thus, a court adopting the no choice but to comply test to protect over-policed citizens could do so while also aspiring to avoid the application problems other courts have encountered. A court could, for example, follow the lead of other courts that have recognized race as a factor in determining reasonableness.¹⁶⁷

The Ninth Circuit and the D.C. Circuit both have expressly held that a defendant’s race can inform the seizure analysis.¹⁶⁸ In *United States v. Washington*, the Ninth Circuit explained how the defendant’s race as a Black American informed whether a reasonable person in his position would feel free to leave and, therefore, whether he was

¹⁶⁵ BARACK OBAMA, A PROMISED LAND 395–96 (2020) (describing the arrest of Professor Henry Louis Gates, Jr. and concluding that a similarly “wealthy, famous, five-foot-six, 140-pound, fifty-eight-year-old *white* Harvard professor who walked with a cane” would not have been arrested “merely for being rude to a cop who’d forced him to produce some form of identification while standing on his own damn property”).

¹⁶⁶ 579 U.S. 232, 254 (2016).

¹⁶⁷ *United States v. Mendenhall*, 446 U.S. 544, 558 (1980) (finding that race can be a relevant factor in the seizure analysis). *But see* *United States v. Easley*, 911 F.3d 1074, 1081–82 (10th Cir. 2018), *cert. denied*, 139 S.Ct. 1644 (2019) (holding race should not be a factor in determining whether a seizure has occurred and that “[r]equiring officers to determine how an individual’s race affects her reaction to a police request would seriously complicate Fourth Amendment seizure law”); *Knights*, 989 F.3d at 1288–89 (same).

¹⁶⁸ *See* *United States v. Washington*, 490 F.3d 765, 773–74 (9th Cir. 2007); *Dozier v. United States*, 220 A.3d 933, 944 (D.C. 2019); *see also* *United States v. Smith*, 794 F.3d 681, 688 (7th Cir. 2015) (citing *Mendenhall*, 446 U.S. at 558); *State v. Sum*, 511 P.3d 92, 101 (Wash. 2022) (“Nothing in the text of the constitution indicates that the totality of the circumstances of an alleged seizure should be artificially limited to exclude race or ethnicity.”); *State v. Spears*, 839 S.E.2d 450, 463 (S.C. 2020) (“[A] true consideration of the totality of the circumstances cannot ignore how an individual’s personal characteristics—and accompanying experiences—impact whether he or she would feel free to terminate an encounter with law enforcement.”).

seized.¹⁶⁹ Bennie Demetrius Washington was sitting in his car when Portland Police officer Daryl Shaw decided to search him. Mr. Washington consented to the search of his person. *Washington* held that the search escalated into an impermissible seizure before Mr. Washington provided consent for the search, in part because there had been two recent incidents where white Portland police officers had shot Black citizens.¹⁷⁰ The Court indicated that these incidents would inform a reasonable Black person's interactions with the Portland Police.

Similarly, in *Dozier v. United States*, the D.C. Circuit factored race into their determination of whether an allegedly consensual encounter escalated into a seizure.¹⁷¹ The court explained that it is well-known that African-American men facing the police would be apprehensive because the degree to which one "feels free" to leave or terminate an encounter with police officers is rooted in an assessment of the consequences of doing so, and the consequences often depend on one's race.¹⁷²

Concerns about law enforcement and judicial administrability have less room to stand. There is a floodgate concern that a new test that allows more interactions to be seizures opens the courts to a ream of excessive force claims and suppression motions that would not previously have been subject to litigation.¹⁷³ Similarly, courts worry that a reasonable person test will not provide a bright-line rule for police officers.¹⁷⁴ Accordingly, police officers won't know whether their conduct will cause a person to feel as if they have no choice but to comply, making it unclear whether they can take certain investigative steps.¹⁷⁵

Neither of these concerns has held water in practice. At the federal level, when courts switched from a rigid bright-line test to a rea-

¹⁶⁹ *Washington*, 490 F.3d 765.

¹⁷⁰ *Id.* at 768.

¹⁷¹ *Dozier*, 220 A.3d at 933 (D.C. Cir. 2019).

¹⁷² *Id.* at 944; see also Aliza Hochman Bloom, "What Has Always Been True": The *Washington Supreme Court Decides That Seizure Law Must Account for Racial Disparity in Policing*, 107 MINN. L. REV. Headnotes 1 (2022).

¹⁷³ See *Skinner v. Switzer*, 131 S. Ct. 1289 (2011) (predicting a floodgate concern regarding state prisoners raising 42 USC § 1983 claims as opposed to filing a petition for habeas corpus). See also Levy, *supra* note 162, at 1029 (2013) (describing Justice Ginsburg's floodgate concern in a recent case).

¹⁷⁴ *United States v. Knights*, 989 F.3d 1281, 1291 (11th Cir. 2021) (Rosenbaum, J., concurring) (proposing a bright-line rule that officers announce to each suspect that they are free to leave).

¹⁷⁵ *Id.* at 1290 ("A citizen should not have to bet his and the officer's well-being on guessing correctly that he is free to leave. And an officer should not be placed in a situation where he mistakenly believes he must engage in physical force because the citizen presumed incorrectly.").

sonable person test for Fourth Amendment searches, the same concerns about administrability could have arisen. Yet, there was no catastrophe. The new test for search was more protective of individuals' liberty interests, but it didn't open the federal courts to the floodgates of new search claims. It did not become impossible for the police to implement this new standard and determine when and where they were allowed to search. There is no evidence that changing the seizure doctrine would produce different results.

Similarly, states have been able to apply a reasonable person test to seizure cases without hindering the effectiveness of their law enforcement or opening the floodgates to new cases. They have served as laboratories to show how an expanded definition of seizure can work in practice.¹⁷⁶ In *State v. Oquendo*, the Connecticut Supreme Court adopted a reasonable person-based test. In that case, Officer William Birney had a "hunch" that the defendant, Ferdinand Oquendo was engaged in a crime.¹⁷⁷ Officer Birney requested that Oquendo come to his police car, but Oquendo instead took flight. Officer Birney gave chase, eventually recovering a bag Oquendo dropped during the chase.¹⁷⁸

After interpreting the federal and state constitutions, the *Oquendo* Court rejected the Supreme Court's definition of seizure provided in *Hodari D.*, concluding that their "state constitution affords greater protection . . . than does the federal constitution."¹⁷⁹ The court found that the Connecticut state constitution adopted a standard similar to that expressed in *Mendenhall*, where a seizure occurs if a reasonable person would have believed he was not free to leave.¹⁸⁰ The court determined that a seizure occurred because a reasonable person in Oquendo's position would *not* have believed he was

¹⁷⁶ Some state courts have rejected *Hodari D.* as a matter of state law. See *State v. Oquendo*, 613 A.2d 1300 (1992); *Jones v. State*, 745 A.2d 856 (Del. 1999); *State v. Quino*, 840 P.2d 358 (Haw. 1992) (declining to adopt *Hodari D.* standard because Hawaii had created a higher state standard); *Baker v. Commonwealth*, 5 S.W.3d 142 (Ky.1999); *Commonwealth v. Powell*, 946 N.E.2d 114 (Mass. 2011); *Matter of Welfare of E.D.J.*, 502 N.W.2d 779 (Minn.1993); *State v. Clayton*, 45 P.3d 30 (Mont. 2002); *State v. Beauchesne*, 868 A.2d 972 (N.H. 2005); *State v. Tucker*, 642 A.2d 401 (N.J. 1994) (declining to adopt *Hodari D.* standard because it differed from the approach established in New Jersey); *People v. Holmes*, 619 N.E.2d 396 (N.Y. 1993); *State v. Garcia*, 217 P.3d 1032 (N.M. 2009); *Commonwealth v. Matos*, 672 A.2d 769 (Pa. 1996); *State v. Randolph*, 74 S.W.3d 330 (Tenn. 2002); *State v. Young* 957 P.2d 681 (Wash. 1998); *Commonwealth v. Stoute*, 665 N.E.2d 93, 96–97 (Mass. 1996) (stating Massachusetts case law provided more substantial protection than Fourth Amendment).

¹⁷⁷ *State v. Oquendo*, 613 A.2d at 1305.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 1309.

¹⁸⁰ *Id.* at 1310.

free to leave.¹⁸¹ In other words, the court adopted a reasonable person test, yet Connecticut has not been plagued by unusual administrability problems.¹⁸²

The Louisiana Supreme Court in *State v. Tucker* similarly held that their state constitution provided more protection than the federal Constitution.¹⁸³ In this case, the Court made clear that it declined to adopt the *Hodari D.* standard because it “simply offers less protection to our citizens that our constitution would allow.”¹⁸⁴ The Louisiana state constitution recognizes an expanded definition of seizure and protects individuals from imminent stops.¹⁸⁵ The court considers, in determining whether an “imminent stop” has occurred, factors such as:

- (1) the proximity of the police in relation to the defendant at the outset of the encounter;
- (2) whether the individual has been surrounded by the police;
- (3) whether the police approached the individual with their weapons drawn;
- (4) whether the police and/or the individual are on foot or in motorized vehicles during the encounter;
- (5) the location and characteristics of the area where the encounter takes place; and
- (6) the number of police officers involved in the encounter.¹⁸⁶

Thus, the court has essentially recognized touchless seizures as seizures because an officer chasing after an individual is “imminent” under the factors presented. Once again, Louisiana has not been plagued by unusual administrability problems.¹⁸⁷

Finally, some might argue, of course, that this standard will create a perverse incentive for people to flee or evade the police because they know the police cannot chase them or take action against them. However, people gain no advantage by evading a stop to which this rule applies. First, the standard would only suppress evidence in cases where the evidence would have been suppressed had the subject

¹⁸¹ *Id.*

¹⁸² The Connecticut courts still appear to be functioning with no administrability issues and *State v. Oquendo* is considered good law in Connecticut. C.G.S.A. Const. Art. 1, §§ 7, 9; *See Oquendo*, 613 A.2d at 1310–11 (explaining that under the Connecticut constitution, “what starts out as a consensual encounter becomes a seizure if, on the basis of a show of authority by the police officer, a reasonable person in the defendant’s position would have believed that he was not free to leave”).

¹⁸³ *State v. Tucker*, 626 So.2d 707 (La. 1993).

¹⁸⁴ *Id.* at 712.

¹⁸⁵ *Id.* at 712–13.

¹⁸⁶ *Id.*

¹⁸⁷ *State v. Tucker* is still considered good law in Louisiana and there are no administrability problems based on the observation that the Louisiana courts still appear to be functioning. LA. CONST. art. 1, § 5 (“Every person shall be secure in his person, property, communications, houses, papers, and effects against unreasonable searches, seizures, or invasions of privacy.”).

stopped (for example, if the police did not have probable cause or reasonable suspicion) so fleeing will not lead to the loss of admissible evidence.

Second, many states have laws that make fleeing a police officer a crime. For example, in New York, a person is charged with fleeing a police officer in a motor vehicle in the third degree if they have been directed to stop and attempt to flee at above 25 mph or more in excess of the speeding limits or drive recklessly as defined by New York Vehicle and Traffic Law Section 1212.¹⁸⁸ In Florida, it is a misdemeanor to “resist, obstruct, or oppose any officer,”¹⁸⁹ which applies to suspects who flee.¹⁹⁰ These laws already in place provide a disincentive for those to run away from the police, so there is no reason why individuals should also be stripped of their constitutional protections as a further disincentive.

V

APPLICATION OF THE NO CHOICE BUT TO COMPLY TEST

Part III explored several examples where a person would not be considered seized under the narrow definition of seizure in *Hodari D.* and *Torres*, but where it might be desirable for them to be considered seized. This section will apply the no choice but to comply test to each of these examples and illustrate how including attempted and touchless seizures under the Fourth Amendment would incentivize officers to pause before chasing suspects or using force.

A. Example 1: Chasing After a Fleeing Suspect

Hannah, the fleeing suspect in Part III, would be seized under the no choice but to comply test. Common sense dictates that when an officer chases an individual, it is reasonable to believe that the officer’s intent is to apprehend that suspect. This new test recognizes that an officer is invading a person’s right to ignore the police when they give chase.¹⁹¹ As Professor W. LaFave points out, under a reasonable person type test, when a person “indicate[s] his lack of consent by ignoring the officer’s summoning or by leaving [the officer’s]

¹⁸⁸ N.Y. PENAL LAW § 270.25.

¹⁸⁹ FLA. STAT. ANN. § 843.02 (West 2020).

¹⁹⁰ See *Brown v. State*, 199 So.3d 1010, 1012 (Fla. Dist. Ct. App. 2016) (finding that flight, standing alone, is not enough to be guilty of unlawfully resisting an officer).

¹⁹¹ See, e.g., *United States v. Mendenhall*, 446 U.S. 544, 553 (1980) (“A citizen has a ‘right to ignore his interrogator and walk away.’”) (quoting *Terry v. Ohio*, 392 U.S. 1, 33 (1968) (Harlan, J., concurring)); *Florida v. Bostick* 501 U.S. 429, 434 (1991) (holding that mere police questioning does not constitute a seizure). A chase can be lawful when the officer has the requisite probable cause for an arrest.

presence . . . police efforts to renew the encounter constitute a seizure.”¹⁹² Citizens like Hannah, who have decided to flee from an officer, have the right to not be forced to answer police questions, but chasing them forces them to comply. Thus, they have been seized.

In fact, there is precedent suggesting that, applying a pre-*Hodari D.* standard, the Court would hold that restrictive chases constitute seizures. In *Michigan v. Chesternut*, police officers in a patrol car followed Mr. Chesternut a short distance and drove parallel to him as he ran and discarded drugs. Mr. Chesternut argued that “any and all police ‘chases’ are Fourth Amendment seizures, . . . [and] the police may never pursue an individual absent a particularized and objective basis for suspecting that he is engaged in criminal activity.”¹⁹³

The Court held there was no seizure in that particular case because the chase was so brief and non-invasive. However, it suggested that if there were enough factors to communicate an officer’s attempt to restrict a person’s freedom of movement, there could be a seizure. The Court believed the “brief acceleration to catch up” and the “short drive alongside him . . . would not have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.”¹⁹⁴ But it acknowledged that the outcome might be different if the police activated a siren or flashers, commanded the pedestrian to halt, displayed any weapons, or attempted to block or control the pedestrian’s movement with their car.¹⁹⁵

If *Chesternut* opened the door to chase constituting a seizure, *Hodari D.* closed that door.¹⁹⁶ However, the no choice but to comply test would reopen it and expand it far enough to include even Mr. Chesternut. While Mr. Chesternut was running down the alley, officers accelerated after him. One of the officers claimed that he did not intend to capture Mr. Chesternut but only wanted “to see where he was going.”¹⁹⁷ However, a reasonable person observing the officer would conclude otherwise. There were several officers chasing after Mr. Chesternut and subjecting him to the “threatening presence of several officers” that concerned Justice Stewart in *Mendenhall*.¹⁹⁸ Thus, the no choice but to comply test would find that any reasonable

¹⁹² LAFAYE, *supra* note 50, at 408.

¹⁹³ *Michigan v. Chesternut*, 486 U.S. 567, 572 (1988).

¹⁹⁴ *Id.* at 576.

¹⁹⁵ *Id.* at 575.

¹⁹⁶ *California v. Hodari D.*, 499 U.S. 621, 627 (1991) (“We do not think it desirable, even as a policy matter, to stretch the Fourth Amendment beyond its words and beyond the meaning of arrest, as respondent urges.”).

¹⁹⁷ *Chesternut*, 486 U.S. at 569.

¹⁹⁸ *United States v. Mendenhall*, 446 U.S. 544, 554 (1980).

citizen would believe that the police intended to catch him, not that the officer merely wanted to discover the citizen's destination.

By including police chases as seizures, courts would ensure that evidence dropped by a fleeing suspect can be suppressed when it is the fruit of a chase for which the officer had neither reasonable suspicion nor probable cause.¹⁹⁹ In other words, it would prevent situations like *Hodari D.* where officers get away with, and even benefit from, misconduct. This new test would apply the exclusionary remedy across the board to illegal police attempts to seize.

Stricter regulation of police chases (and increased deterrence of unreasonable chases) will also promote public safety. Chases are dangerous for officers, bystanders, and suspects. Justice Scalia noted in *Hodari D.* that "street pursuits always place the public at some risk."²⁰⁰ A 2017 report by the Bureau of Justice Statistics found that nearly 7,000 people died in the United States as a result of pursuit-related crashes between 1996 and 2015.²⁰¹ The *Los Angeles Times* reported that 3 people were killed and 45 injured during 421 pursuits between 2015 and 2016.²⁰² Further, in 2007, it was recorded that only 8.6% of pursuits are due to violent felonies.²⁰³ By incentivizing officers to resist the urge to engage in police chases, this standard will protect the safety of everyone around the officers.

B. Example 2: Attempted Force Against a Fleeing Suspect

The no choice but to comply test would find that Bill was seized. This test encompasses attempted seizures where an officer attempts to shoot a suspect but misses. When Bill was walking back to work and the officer tried to shoot him, there was no doubt that the officer intended to hit Bill. And there can be no doubt that a reasonable person would assume a shooting police officer is demanding compliance on pain of potential serious bodily injury. The new test will allow

¹⁹⁹ The purpose of the exclusionary remedy is that when a search or seizure is deemed unreasonable, the government is penalized by the exclusion of evidence obtained from that unreasonable action. This rule is designed to prevent the use of evidence against a defendant in trial that was unlawfully obtained and is meant to deter the police from performing unreasonable seizures. *See* *Mapp v. Ohio*, 367 U.S. 643 (1961).

²⁰⁰ *California v. Hodari D.*, 499 U.S. 621, 627 (1991).

²⁰¹ BRIAN A. REAVES, U.S. DEP'T OF JUST., POLICE VEHICLE PURSUITS, 2012–2013 (May 2017), <https://bjs.ojp.gov/content/pub/pdf/pvp1213.pdf> [<https://perma.cc/M9PJ-AKBL>].

²⁰² Michael Balsamo, *Grand Jury: LA Pursuits Cause Unnecessary Injuries, Deaths*, NBC L.A. (July 11, 2017), <https://www.nbclosangeles.com/news/local/socal-police-chases/grand-jury-la-pursuits-cause-unnecessary-injuries-deaths/19731> [<https://perma.cc/92CW-JQH6>].

²⁰³ CYNTHIA LUM & GEORGE FACHNER, INT'L ASS'N OF CHIEFS OF POLICE, POLICE PURSUITS IN AN AGE OF INNOVATION AND REFORM 56 tbl. 10 (2008).

Bill to file a Section 1983 claim against the shooting officer for excessive use of force. This test, therefore, is a step towards protecting bodily autonomy and discouraging officers from shooting at citizens.

Under the old *Bostick* test, a person could be subjected to continuous attempted uses of force before receiving constitutional protection. In *Torres*, for example, the police officers fired at Torres thirteen times, hitting her twice.²⁰⁴ None of the eleven missed shots were redressable. Chief Justice Roberts is correct in his assessment that “[t]here is nothing subtle about a bullet.”²⁰⁵ Not only was this unsafe for Torres, but also for any innocent bystanders that could have been killed by mistake. Using lethal force against a suspect that presents neither a weapon nor an apparent threat should be a categorically unreasonable seizure, even if the force is unsuccessful. The no choice but to comply test would bring this once-considered pre-seizure conduct under the constitutional umbrella.

C. *Example 3: Police Patrolling to Surveil or Harass*

The students followed by the police officer would be seized under the new no choice but to comply test. Touchless seizures such as police patrolling to surveil or harass indicate to a person that they have no choice but to comply with the officer’s behavior. These types of seizures invade a person’s sense of privacy and leave the person without constitutional recourse. Currently, there is no constitutional protection for someone that is followed by an officer without probable cause or reasonable suspicion. For example, the students could not do anything to stop the officers from following them other than to file a report with the Police Department after the fact.

By including touchless seizures, the courts can determine whether an eventual stop was genuine or whether the police were merely targeting a person. The plaintiffs who were followed and harassed by the Deputy officer in *Christensen*, for example, could claim there was a seizure and argue that the officer unreasonably targeted them without probable cause or reasonable suspicion.

CONCLUSION

This Note proposes expanding the definition of a Fourth Amendment seizure to encompass a wider variety of problematic police conduct. Modifying seizure rules will not eliminate police violence in this country. It will not resolve the barriers, such as qualified

²⁰⁴ Brief for Petitioner at 2, *Torres v. Madrid*, 141 S. Ct. 989 (2021) (No. 19-292).

²⁰⁵ *Torres v. Madrid*, 141 S. Ct. 989, 998 (2021).

immunity, to holding police officers liable.²⁰⁶ Yet, even with all these obstacles, expanding the definition of seizure to include attempted and touchless seizures is important. Otherwise, many who have been the victims of police misconduct cannot bring excessive force claims or receive their exclusionary remedy. An officer should not be allowed to use irredressable unnecessary force against a person and have it excused simply because they are a bad shot or their victim managed to keep running.

The Fourth Amendment should protect the interests of United States citizens and should not merely serve to create bright-line rules for police officers. The new no choice but to comply standard encompasses seizures by the police that have not yet been recognized but clearly invade a person's right to be secure. *Torres v. Madrid* missed an opportunity to expand the definition of seizure to include attempted and touchless seizures, but when another seizure case is before the Justices, they should follow common sense and adopt a reasonable person test as they have with the law of searches.

²⁰⁶ See *Pearson v. Callahan*, 555 U.S. 223, 243–45 (2009) (finding that officers could not be held liable because of qualified immunity).