TORRES AND THE LIMITS OF ORIGINALISM

LAURENT SACHAROFF*

INTRODUCTION

In *Torres v. Madrid*, the Supreme Court confronted a novel question: when police shoot at and strike a fleeing suspect who nevertheless escapes, does that conduct constitute a seizure under the Fourth Amendment?[1] The Court properly answered yes.[2] But its opinion and that of the dissent represent the worst aspects of originalism and textualism. The majority engaged in detailed parsing of old English cases that provide superficial precedent but in the end are not sufficiently relevant.[3] The dissent meanwhile relied on a hyper-literal, plain-meaning reading of "seizure" that cannot even account for well-recognized definitions of the term.[4]

The *Torres* facts are challenging.[5] On the one hand, the police did not literally seize her in the sense of catching her.[6] Torres fled the scene without even slowing down.[7] On the other hand, their conduct seems to fall squarely within the Court's decades-old holding that that the Fourth Amendment governs excessive force cases.[8] After all, the police used deadly force to arrest a person who had neither committed a felony nor been deemed dangerous.[9] How did the Court resolve these conflicting high-level principles? By ignoring them.

Instead, Justice Robert's majority opinion relied almost entirely on an arcane and technical line of common law, English and American cases that held that when an officer merely touches a person, with the intent to arrest them, that touching counts as an arrest even if the person immediately eludes actual capture.[10] Those mere-touch cases do provide literal support for the Court's holding, but they arose in an entirely different context. For example, one line of such cases considered whether an officer should be liable for letting a person escape.[11] But cases addressing

* Professor of Law, University of Arkansas School of Law, Fayetteville. The author would like to thank Daniel Bell and Sarah King-Mayes for their dedicated research assistance.

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

2 *Id.* at 989.

3 *Id.* at 996-97.

4 *Id.* at 1006.

5 This essay accepts the facts as pleaded by Torres as true, as did the Court.

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

7 *Id.*

8 Graham v. Connor, 490 U.S. 386 (1988).

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

10 *Id.* at 996.

11 *See infra* Part I.

liability for letting a suspect escape provide little insight into how the founders sought to protect the very different interests announced in the Fourth Amendment—the security and liberty of the individual arrested.

Originalism, especially when interpreting the Constitution, should not devolve into soulless scholasticism, finding obscure cases to provide an idiosyncratic rule that happens to match the facts of a current case. Those English cases could well have held precisely the opposite, with little bearing on the goals of the Fourth Amendment. Indeed, writing about this mere-touch rule, the chief judge in one leading English case wrote that the rule did not seem supported by any "general principle."[12] Instead, whether a mere touch counts as an arrest "might have been reasonably prescribed either" way.[13]

Instead, originalism and constitutional interpretation should find guidance in the founders' goals and not arbitrarily decided cases. This guidance can and should be found, at least in the first instance, in the text and yes, the old English common law cases. But the words of the Fourth Amendment must be read with some principle in mind. We must seek out and read the *appropriate* common law cases—those cases that match the principle that undergirds the immediate legal question: what protection does the seizure clause provide?

This essay seeks to repair *Torres* by putting its holding on a firmer foundation while still using originalism tools. First, it looks to the text. The Fourth Amendment protects the right to be "secure" in one's "person" against unreasonable seizures.[14] To be secure at its core means as against physical violence, such as being grabbed or beaten, the threat of such violence, or being detained. An unreasonable "seizure" of course often involves the use of physical force that undercuts that security.

The founding era protected an individual's interest in personal security with the torts of battery, assault, and false imprisonment.[15] Those who drafted and ratified the Constitution would have had these remedies in mind. Indeed, when a person was wrongly arrested, she sued for battery, assault, and false imprisonment—as many of the cases cited by *Torres* itself reveal.[16] The Fourth Amendment practically codified the rules developed in such cases, especially the rules for when an officer was justified in arresting someone (i.e., in committing a battery). Of course, these are precisely the same basic torts that protect personal security today.

Section 1983, which allows persons such as Torres to sue for a Fourth Amendment violation, also tells us we should look to common law torts in discerning the "elements" of such a claim.[17] Moreover, the Court's Fourth Amendment cases interpreting and defining what counts as a "search" support

---

[12] Sandon v. Jervis (1859) 120 Eng. Rep. 760 (Exch. Ch.).

[13] *Id.*

[14] U.S. CONST., amend. IV.

[15] *See infra* Part II.

[16] The Court in *Torres* paid little heed to this aspect of those cases, focusing instead on the mere-touch rule.

[17] Manuel v. City of Joliet, 137 S. Ct. 911 (2017).

looking to common law torts—in those cases, the tort of trespass—rather than looking to the plain meaning of the word "search."[18] Again, that's because the Court in the context of searches defines the term based upon the principles and goals of the founders rather than any technical happenstance or obscure common law cases.

Therefore, I claim that we should define a Fourth Amendment seizure as including, at a minimum, police conduct that would constitute a battery, assault, or false imprisonment—quite possibly justified—as long as that police conduct was taken as part of a law enforcement effort to detain or arrest. Indeed, anytime police would justify a battery or assault based upon their official duties, that conduct should fall under the Fourth Amendment.

For ordinary arrests, this definition is obvious. An officer who grabs a suspect and handcuffs him has committed a battery—one that generally requires a warrant or probable cause to be justified. The officer who then maintains custody by the implicit threat of force against an escape has committed an assault—though potentially justified. Similarly, the detention pending an initial appearance before a judge would, if unjustified, constitute false imprisonment.

But even the application of force that does not successfully detain the person counts as a seizure under my test. It is a battery as part of a law enforcement effort to detain. Battery is part of that cluster of rights that the founders understood to be central to protecting the security of the individual, the liberty protected by the Fourth Amendment.[19]

In an excessive force case in particular, we are almost mandated to analogize to battery. After all, an excessive force case assumes the seizure was valid, such as pursuant to a warrant; but the police used extra force beyond that necessary to effectuate the arrest.[20] What is this extra force but a battery?

Applying my rule here, when the officers shot and hit Torres, they committed a battery in an effort to arrest her. Moreover, because this is an excessive force case, her claim singles out the battery aspect of the police conduct.[21] They, therefore, committed a Fourth Amendment seizure.[22] We have thus reached the same result as the Court in *Torres* did without much, if any, reliance on the mere-touch rule.

This essay proceeds as follows. Part I summarizes the Torres opinions. Part II shows why plain meaning cannot supply the answer to interpreting "seizure," as Justice Gorsuch would like. Part III supports my main claim: that the founders, in protecting the security of the person against unreasonable arrests, largely codified the common law rules of battery, assault, and false imprisonment—as applicable to law enforcement. They might not have expressly had in mind the battery of a fleeing

---

[18] *See infra* Part III(D).

[19] *See infra* Part III(B).

[20] *See infra* Part III(C).

[21] Torres v. Madrid, 141 S. Ct. 989, 994 (2021).

[22] If her allegations are true, the police use of deadly force was excessive and therefore unreasonable under *Tennessee v. Garner*, 471 U.S. 1 (1985) because she had neither committed a dangerous felony nor posed a danger of serious injury to others.

suspect, but a straightforward application of their general goal—to protect against unjustified government trespass—supports my argument here.

I. PART ONE

A. *The Opinion*

According to Roxanne Torres' account, at dawn in 2014, police approached Torres in her car to speak with her.[23] She thought they were carjackers and sped away.[24] The officers fired upon her in an effort to stop her.[25] Though they shot thirteen times and hit her twice in the back, she successfully drove off a short distance, stopped, stole another car, and drove another seventy-five miles before getting medical attention.[26] Torres sued the officers for violating her Fourth Amendment rights under Section 1983.[27] In particular, she alleged the officers used excessive force and that this force constituted a "seizure" under the Fourth Amendment.[28]

The issue before the Court was straightforward: do the police effect a Fourth Amendment "seizure" when they shoot a fleeing suspect in an effort to stop her but fail?[29] The majority said yes, "The application of physical force to the body of a person with intent to restrain is a seizure, even if the force does not succeed in subduing the person."[30]

In so holding, Justice Roberts's opinion for the Court relied partially upon dicta in precedent but primarily upon originalism, drawing on a series of mostly English cases.[31] The Court first established that the term "seizure," when applied to persons, simply means arrest.[32] Second, it then went on to survey English cases concerning arrests both before and after enactment of the Fourth Amendment—but only a very particular line of cases.[33]

These particular English cases held that a person effects a legal "arrest" if he merely touches the other person with the intent to arrest them.[34] The cases appear to

---

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

24 *Id.*

25 *Id.*

26 *Id.*

27 *Id.* at 989.

28 *Id.* at 994.

29 *Id.*

30 *Id.*

31 *Id.* (declining to decide whether *California v. Hodari D.* "controls the outcome of this case").

32 *Id.* at 996.

33 *Id.*

34 Nicholl v. Darley (1828) 148 Eng. Rep. 974, 974–76 (Exch.); Genner v. Sparks (1704) 87 Eng. Rep. 928, 928–29 (Q.B.).

have arisen in particular contexts. First, the legal issue asked when an officer could break into someone's home to arrest them. If the officer had already arrested them by merely touching them, then the officer was entitled to break into the house to finish the arrest.[35] Specifically, "a bailiff caught one by the hand (whom he had a warrant to arrest) as he held it out of a window. And the Court said, that this was such a taking of him, that the bailiff might justif[y] the breaking open of the house to carry him away."[36]

The mere-touch rule applied in a second major context: when determining whether a person had escaped from an arrest in order to determine whether the sheriff or constable should be liable for allowing an escape[37] or whether the person who escaped and their helpers should be liable.[38] If the officer had merely said, "you are under arrest," but had failed to touch the other person, and that other person had not submitted to lawful authority, then there was no arrest.[39] If that person ran away, there was no escape, and the officer would not be liable. But if the officer should so much as touch the person in an effort to arrest, and the person runs off, the officer is liable for allowing an escape because there was an arrest.[40]

Thus, in one leading case cited by *Torres*, *Genner v. Sparks*, a bailiff with a warrant came to arrest Sparks in his yard.[41] The bailiff told Sparks he was under "arrest" but did not touch him.[42] Rather, Sparks held the bailiff off with a pitchfork and then went into his locked house.[43] The bailiff argued in court that Sparks was liable for escape from a lawful arrest, essentially, but the court rejected the argument.[44] There was never an arrest because there was never a touching, and merely saying "you are under arrest" is not enough.[45]

Whereas in *Nicholl v. Darley*, a Sheriff's officer grabbed debtor by the waist, but he got away.[46] The court found that the Sheriff then became liable for the debt.[47] By merely touching the debtor, the officer had effected an arrest and was thus liable for the escape.[48] The judges affirmed the mere-touch rule, with one explaining the

---

35 Anonymous (1677) 86 Eng. Rep. 197, 197 (K.B.).

36 *Id.*

37 *Nicholl*, 148 Eng. Rep. at 974–76.

38 *Sparks*, 87 Eng. Rep. at 928–92; Hodges v. Marks (1615) 79 Eng. Rep. 414, 414–15 (K.B.).

39 *Sparks*, 87 Eng. Rep. at 928–29.

40 *Nicholl*, 148 Eng. Rep. at 974–76.

41 *Sparks*, 87 Eng. Rep. at 928–29.

42 *Id.*

43 *Id.*

44 *Id.* More technically, the bailiff moved for an attachment against Sparks for a "rescous" or at least a contempt.

45 *Id.*

46 Nicholl v. Darley (1828) 148 Eng. Rep. 974, 974–76 (Exch.).

47 *Id.*

48 *Id.*

rationale behind the rule: officers should come with enough force to finish what they start.[49]

The *Torres* Court adopted this mere-touch rule without really considering its justifications or why those justifications should apply to the Fourth Amendment. But it wasn't finished because in *Torres* the officers did not literally touch the fleeing suspect.[50] The Court, therefore, took the further step of applying this mere-touch rule to shooting and hitting a suspect from a distance.[51] It reasoned that shooting a person was analogous to touching them, but it could find no older English or American cases saying shooting did or did not count under the mere-touch rule.[52]

Torres thus won: shooting counts as touching, touching a person who escapes still counts as an arrest, and an arrest counts as a "seizure" of the person under the Fourth Amendment.[53]

Justice Gorsuch dissented, joined by Justices Alito and Thomas.[54] He started with a textual argument. The word "seize" means *successful* seizure.[55] To seize means to restrain by force, to grab, to physically hold.[56] The officers' bullets never stopped, grabbed, caught or restrained Torres; they did not appear even to slow her down.[57] Therefore, there was no seizure.[58]

He then grudgingly accepted that perhaps we can view a seizure as the same as a common law arrest, at least for argument's sake.[59] Even so, he rejected the mere-touch rule.[60] He argued that it arose in the context of civil debt collection and should have no application to arrests by law enforcement, especially when that rule would supersede plain meaning.[61] He argued that even if there was a mere-touch rule, shooting bullets at a distance should not be seen as sufficiently similar.[62] To him, the mere-touch rule served the symbolic purpose of announcing the arrest and only sufficed when the suspect submitted to authority.[63] Shooting bullets satisfied neither.[64]

---

49 *Id.*

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

51 *Id.* at 1003.

52 *Id.* at 997.

53 *Id.* at 1003.

54 *Id.* Justice Barrett took no part in the decision.

55 *Id.*

56 *Id.*

57 *Id.* at 1004.

58 *Id.*

59 *Id.* at 1017.

60 *Id.* at 1011.

61 *Id.*

62 *Id.* at 1012.

63 *Id.* at 1014.

64 *Id.* at 1013–14.

B. *Reaction to the Opinion*

A reader of *Torres* is left with an extremely detailed, technical discussion of textualism and originalism that seems unguided by any underlying principle. The majority advances an obscure mere-touch rule without explaining the rationale behind the rule or why that rationale should help us understand the meaning of "seizure" in the context of law enforcement shooting at a fleeing suspect. Why does the mere-touch rule capture the interests Torres had in not being shot at, hit, or nearly killed, even though she was not the person for whom the police had an arrest warrant?

The majority and Justice Gorsuch argue over trivial details, such as whether shooting from a distance should count as touch under the mere-touch rule by considering the case of a countess who was arrested by an officer who touched her with a mace.[65] Was the mace used symbolically as a designation of office to announce the arrest, or did it count as touching from a distance akin to a bullet? Who knows? The majority opinion in particular leaves the reader with no underlying principle to guide them in making that determination.

For his part, Justice Gorsuch's textualism becomes the worst kind of literalism. He rejects the notion that "seizure" can have a different meaning with respect to seizing a thing versus seizing a person and casts doubt on the majority's approach that we can interpret seizure with reference to arrests.[66] Seizure must mean the same thing for both, he argues, and the police cannot "arrest" a thing.[67] Such reasoning is bizarre. Of course, the term "seizure" can have different meanings, as a categorical matter, in different contexts that are established by the text itself. To seize an object might have one rule, and to seize a person can have another without doing violence to ordinary rules of interpretation or even the use of language.[68]

Justice Gorsuch, too, has no principle to guide him. *Why* did the founders ban unreasonable seizures of the person? What interests were the founders attempting to protect? Did the police invade those interests in shooting at Torres? Neither the majority not the dissent come close to addressing these questions.

This essay argues that originalism, done properly, must consider the interests the founders sought to protect and determine how those interests apply to new situations. That process does not even require living originalism.[69] One can interpret the text exactly as the founders would have, using ordinary founder tools such as analogies, to determine the meaning of the text. Of course, one need not limit constitutional interpretation to this version of originalism—but it forms a useful starting point.

---

[65] Countess of Rutland's Case (1605) 77 Eng. Rep. 332, 336 (Star Chamber).

[66] *Torres*, 141 S. Ct. at 1007.

[67] *Id.*

[68] The cases Justice Gorsuch cites that refuse to attribute different meaning to the same word modifying different objects would result in an untenable inconsistency.

[69] JACK M. BALKIN, LIVING ORIGINALISM.

Before I make my main argument, that seizure protects the interests protected by the common law torts of battery, assault, and false imprisonment, I turn to the textual arguments, particularly those advanced by Justice Gorsuch.

II. TEXTUALISM

We should not, and cannot, interpret seizure literally. First, consider the literal meaning of seizure. Seizure means to physically grab or catch. It also suggests that it occurs in a moment and that any subsequent restraint would require a different word, like "hold," "restrain," or "detain." In ordinary English, one might say, "the police officer seized me with his hands." One would not say, "the police seized me in jail overnight." Rather, one would say the police "held" me in jail overnight.

This literal interpretation of a Fourth Amendment seizure cannot work for several reasons. First, everyone, including Justice Gorsuch, agrees that if a person submits to authority, he has been seized even though no one grabbed him or even physically touched him.[70] But this concession contradicts the definitions of "seize" that Justice Gorsuch lists; they all involve actual, physical force rather than submission to authority: "to take custody by force," "to catch," "to take hold of violently [or] by force," "to take hold of," "to grasp," "the act of taking forcible possession."[71] Thus, Gorsuch's own plain meaning definition of seize—physical grabbing—fails to include a meaning that he himself concedes that the term "seize" embraces under the Fourth Amendment.

Now one might argue that a person who submits to authority might be metaphorically "seized" because he has submitted to the "force" of law. The law exerts a kind of force field. But that is a metaphor, not plain meaning. Better, rather, to concede that "seizure" under the Fourth Amendment does not always take its plain meaning.

We also should not rely simply on the plain meaning of "seize" because we have not done so in interpreting the meaning of "search" in the Fourth Amendment.[72] As discussed below, the Court has rejected the plain meaning of search and instead used either a privacy test or, as relevant here, the common law tort of trespass—which together are broader and narrower than the plain meaning of "search."

Further, we also cannot use a plain meaning understanding of seizure because it would conflict with other case law—recent and founding-era—that a Fourth Amendment seizure lasts longer than the moment of grabbing a person. Under plain meaning, a "seizure" ends as soon as the person has been successfully brought under control and is replaced by "detention" or "holding."[73] Seizure means to *take*

---

[70] *Torres*, 141 S. Ct. at 1006.

[71] *Id.*

[72] *See infra* Part III(D).

[73] Whitehead v. Keyes, 85 Mass. 495, 501 (1862) ("[A]n officer effects an arrest of a person whom he has authority to arrest, by laying his hand on him for the purpose of arresting him, though he may not succeed in stopping and holding him.").

possession, not keep possession. But courts have rejected such plain meaning. In *Manuel v. City of Joliet*, the Court held that a Fourth Amendment seizure includes any detention up until trial.[74] That detention can last months, as in *Manuel*, or years.[75] Even well before *Manuel*, the Supreme Court held that the period between arrest and initial appearance counted as a seizure governed by the Fourth Amendment even when this period lasted days or even weeks; indeed, these precedents go back to the founding era and before.[76]

Finally, we cannot use a plain meaning of seizure here because this is an *excessive force* case. Torres is not suing for an unlawful seizure because the police lacked probable cause.[77] Instead, conceding that they had probable cause to seize for the sake of argument, she claims that the method they used, particularly the force, was excessive.[78] This is not simply a question, therefore, of whether there was a seizure at all but whether there was too much force—i.e., a battery. More generally, the Court has made clear that excessive force cases fall under the Fourth Amendment and its seizure provision, even though the question in these cases does not turn on the literal, plain meaning of seizure but rather on whether the force was excessive.[79]

The foregoing sources are correct to reject a literal, plain meaning of "seizure." They are correct because "seizure" was understood to mean at least "arrest," and arrest includes concepts beyond the plain meaning of seizure, such as long duration and submission to authority. These sources are also correct because such broader interpretations of "seizure" include the interests that the founders sought to protect under the Fourth Amendment. They sought to protect not simply the initial grabbing, but the entire set of intrusions occasioned by a wrongful arrest: the battery, the assault, and the false imprisonment.

III. ORIGINALISM DONE RIGHT

Even a strict version of originalism should consider the interests and principles the founders sought to protect and advance. Below, I will show why the founders' ban on unreasonable seizures included a ban on battery, assault, and false imprisonment accomplished by law enforcement when they arrested and detained someone. Even today, these torts protect what it means to be "secure" in one's "person." Second, these torts were the kind that provided a remedy against an unlawful arrest in the founders' era, as well as long before and after. Section 1983

---

[74] Manuel v. City of Joliet, 137 S. Ct. 911, 917–18 (2017).

[75] *Id.* at 918.

[76] Gerstein v. Pugh, 420 U.S. 103, 111–16 (1975) (citing founding-era Supreme Court precedent and criminal procedure treatises from the early to mid-eighteenth century).

[77] Torres v. Madrid, 141 S. Ct. 989, 994 (2021).

[78] *Id.*

[79] Graham v. Connor, 490 U.S. 386, 394 (1988).

claims in particular should be seen as recognizing this complex of torts because Section 1983 creates a "constitutional tort."

A. *Principles and Interests*

The right the founders sought to protect appears in the text: "secure." The founders sought to protect the right of the people to be "secure" in their "persons."[80] From the founding era until today, secure—at its most basic—simply means safety from harm or danger[81]—i.e., others hitting you, beating you, threatening you, or grabbing or detaining you. It involves that complex of torts that protected personal security and liberty: battery, assault, and false imprisonment. These torts are not strange, path-dependent innovations of English law, though perhaps some of their pleading requirements might have been. Rather, they simply protect personal security in the most obvious way.

When the founders banned unreasonable seizures, what did they have in mind? They likely had in mind the entire cluster of torts that arrests involved: battery, assault, and false imprisonment. They sought to govern unlawful criminal law enforcement practices that threatened physical security. Government use of force to effectuate an illegal arrest (or the use of excessive force) would fall squarely within that purpose. It would be odd for the Fourth Amendment to protect every aspect of criminal law enforcement: arrest, detention and search, but not the process of attempting to arrest by threat of force—even though the latter was governed by tort (then and now).

B. *Torts as Remedies*

Once we recognize that the Fourth Amendment seizure clause protects an individual's liberty and security against arrests by law enforcement, we can then identify the *correct* English and early American cases on which to focus. We do not want to focus on liability for escape or the right of an officer to break into a home after touching the person to be arrested. Conversely, we want to focus on English cases in which persons sued officers for unlawful seizures. These cases were cases in battery, assault, and false imprisonment.[82] In many instances, these are the same cases that were cited in *Torres* but addressed from a completely different angle.

For example, *Williams v. Jones* presents both an unlawful arrest and an excessive force case.[83] There, law enforcement officers arrested the plaintiff with a warrant and detained him for six hours.[84] The plaintiff sued for assault, battery, and

---

[80] U.S. CONST., amend. IV.

[81] Merriam-Webster ("secure").

[82] *See, e.g.*, Williams v. Jones, (1736) 95 Eng. Rep. 193, 194 (K.B.).

[83] *Id.*

[84] *Id.*

false imprisonment—apparently attacking the validity of the entire arrest.[85] The defendants asserted that the arrest was lawful and justified those three torts.[86] At issue before the court was the battery only—i.e., excessive force.[87] The court held that generally a battery is not justified by an arrest that the person does not resist.[88] If the person does resist, then the battery, such as beating, is justified.[89] A battery "cannot be justified by shewing an arrest barely; but that in order to make it good, something further should be shewn [chiefly] that the plaintiff made resistance, and was going to rescue himself, and by reason of that he beat him to take him."[90] The court also noted in passing that an assault is always implicit in an arrest and therefore is always justified if the arrest is justified.[91]

Others complaining of unlawful arrests similarly sued for these torts.[92] For an arrest claimed to be a submission to authority, for example, the plaintiff in *Arrowsmith v. Le Meseur* sued for assault and false imprisonment but not battery.[93] In that case, the court treated the torts of false imprisonment and assault as coterminous with an "arrest," holding that since there was no arrest there, the claims must fail.[94] *Dickenson v. Watson* also involved what we might characterize as an excessive force case.[95] In that case, an officer charged with collecting hearth money discharged his gun, putting out the plaintiff's eye.[96] The plaintiff sued for assault and battery.[97] The defendant justified that he was entitled to carry a gun as part of his collection duties.[98] The court held, as would a court today, that a person can use only the level of force that is necessary: "in trespass the Defendant shall not be excused without unavoidable necessity."[99]

---

[85] *Id.*

[86] *Id.*

[87] *Id.*

[88] *Id.*

[89] *Id.*

[90] *Id.*

[91] *Id.*

[92] *See, e.g.*, Simpson v. Hill (1795) 170 Eng. Rep. 409, 409 (N.P.); Dunscomb v. Smith (1629) 79 Eng. Rep. 743, 743 (K.B.) (the officer sued for assault and battery and the person arrested claimed that *he* was assaulted by the officer as justification).

[93] Arrowsmith v. Le Meseur (1806) 127 Eng. Rep. 605, 605 (C.P.). The court held that the plaintiff went voluntarily and not under compulsion and that there was therefore no arrest. *Id.* at 606.

[94] *Id.*

[95] Dickenson v. Watson (1682) 84 Eng. Rep. 1218, 1218–19 (K.B.).

[96] *Id.*

[97] *Id.* at 1219.

[98] *Id.*

[99] *Id.*

We must remember that there was no cause of action for wrongful arrest *per se*—distinct from the ordinary tort of false imprisonment.[100] During the founding era, no case even used the term "false arrest."[101] Rather, those aggrieved sued for false imprisonment.[102] And in England, the Fourth Amendment did not exist. Even after the state and federal constitutional provisions came into effect in America, individuals would not sue under those provisions. They would not sue for a violation of their Fourth Amendment rights. Instead, they would sue for battery, assault, and false imprisonment.[103]

The Fourth Amendment was really a limit on the defenses an officer could assert in response to a battery, assault, and false imprisonment suit. The defenses mirrored the existing defenses under those torts. It was a defense to battery that the arrest was with a warrant or with probable cause for a felony, for example.[104]

As a result, we cannot disentangle the Fourth Amendment seizure provision from the cluster of torts in which it arose. The founders assumed those torts existed and would be the remedy for wrongful arrests. Battery was, by definition, the remedy for a wrongful seizure, almost literally. In justifying an arrest, officers would point to the recognized justifications to a battery action, which simply became codified in the Fourth Amendment. It would be strange for a court to allow an officer to justify the use of force by saying he was making a lawful arrest, but then deny the plaintiff the very cause of action, battery or, under Section 1983, the Fourth Amendment, needed to test that defense.

C. *Section 1983 and Excessive Force Cases*

My claim that common law torts such as battery should guide our understanding of *seizure* enjoys further support from the Court's Section 1983 jurisprudence. Those cases say that Section 1983 creates a "species of tort liability" and that courts should look to common law torts in ascertaining the "elements" of such a Section 1983 claim.[105] Torres' lawsuit is, of course, a Section 1983 claim.[106]

Courts must first identify the constitutional right at issue.[107] Second, the court must then determine the "elements" of the claim—often by consulting analogous

---

[100] 8 American Law of Torts § 27:2 ("False arrest and false imprisonment as causes of action are said to be distinguishable only in terminology.").

[101] Westlaw Search ("false.arrest") before 1800.

[102] *See, e.g.*, Strong v. Ives, 1 Root 388, 388 (Conn. Super. Ct. 1792).

[103] *See, e.g.*, Butler v. Washburn, 25 N.H. 251, 251 (1852) (assault, battery, and false imprisonment); Searls v. Viets, Grant et al., N.Y. Sup. Ct. 224 (N.Y. App. Div. 1873).

[104] WILLIAM WALLER HENING, THE NEW VIRGINIA JUSTICE 42 (1795) ("an officer authorized by warrant" may justify an assault or battery).

[105] Imbler v. Pachtman, 424 U.S. 409, 417 (1976).

[106] Torres v. Madrid, 141 S. Ct. 989, 989 (2021).

[107] Manuel v. City of Joliet, 137 S. Ct. 911, 925 (2017).

common law torts.[108] At times, "that review of the common law will lead a court to adopt wholesale the rules that would apply in a suit involving the most analogous tort."[109] As I have argued throughout, "courts must attend to the values and purposes of the constitutional right at issue."[110]

In *Torres*, the claim is excessive force, and the Supreme Court has already established that this claim falls under the Fourth Amendment seizure provision.[111] As noted above, battery, assault, and false imprisonment are the analogous torts, as they were the torts traditionally brought by those aggrieved by an unlawful arrest.

With respect to excessive force in particular, battery supplies the most analogous tort. In any excessive force case, the plaintiff concedes, at least for the sake of argument, the lawfulness of the seizure.[112] Assault and false imprisonment thus fall out of the picture—at least for the excessive force claim. The question depends entirely on whether the force used—the battery—exceeded what was reasonably necessary.[113] Indeed, as noted above, the common law battery cases use almost the same rule as the Fourth Amendment excessive force cases.[114] For example, merely using one's hands to arrest never counts as excessive force.[115] Above this *de minimis* threshold, courts justify greater force based upon a suspect's resistance.[116]

Both Chief Justice Roberts' and Justice Gorsuch's opinions agree it is appropriate to consult common law torts to help interpret the term seizure.[117] But an odd thing follows in those opinions. Neither justice looks to battery as the appropriate analogy here. They mistakenly believed that, under a Section 1983 action, they were permitted to analogize only to the "closest" common law tort, and both the majority and dissent apparently thought that false imprisonment was the closest analogy.[118] If false imprisonment is the closest analogy, the majority and dissent evidently believed battery could not *also* be an analogy.

But there is no requirement that the Court look at only one or the closest common law tort. Furthermore, battery, not false imprisonment, would be the most

---

[108] *Id.* at 920.

[109] *Id.*

[110] *Id.* at 921.

[111] Graham v. Connor, 490 U.S. 386, 397 (1988).

[112] *Id.* at 394–95 (noting that the Court assesses excessive force under the Fourth Amendment "notwithstanding the existence of probable cause to arrest").

[113] *Id.*

[114] Dickenson v. Watson (1682) 84 Eng. Rep. 1218, 1218–19 (K.B.) ("for in Trespass [assault, battery, and wounding] the defendant shall not be excused without unavoidable Necessity"); Williams v. Jones, (1736) 95 Eng. Rep. 193, 194 (K.B.).

[115] *Williams*, 95 Eng. Rep. at 194.

[116] *Id.*

[117] Torres v. Madrid, 141 S. Ct. 989, 1009 (2021).

[118] *Id.* at 1000.

analogous tort for an excessive force case in any event. Where did the two opinions go astray?

Some Section 1983 cases do require the Court to draw an analogy to only one tort, but those cases do so in determining the proper statute of limitations.[119] Or the Court has selected the most analogous tort for the specific type of Section 1983 claim at issue, as in *Heck v. Humphrey*, but again based upon a timing question that also acted as an on-off switch.[120] Since these cases must identify a determinate number, it makes sense to say they must pick one common law tort to the exclusion of others. But when interpreting a term such as seizure, there is no reason the Court should not analogize to that cluster of rights that protected the security of the person: battery, assault, and false imprisonment. Indeed, in the common law era, those aggrieved by unlawful arrests often sued for all three, or perhaps two out of three, depending on the type of arrest.[121] For example, a person who submits to the authority of an unlawful arrest would sue for false imprisonment but not battery or assault.

Moreover, while it is true that an initial arrest would be analogous to false imprisonment, the excessive force claim in *Torres* would be most analogous to battery, not false imprisonment. Torres argues not that the confinement was unlawful but that the level of force, the battery, was unjustified. Now Justice Gorsuch did admit that the conduct by the police was a battery under state law.[122] He would have the plaintiff sue in state court.[123] But Section 1983 provides a federal remedy for those same state tort actions when violated by state actors.[124] It is a federal tort remedy *in addition to* the analogous state tort action.

Justice Gorsuch would also likely argue that a seizure is analogous to a battery, but it covers only that subset of batteries that involve some grasping. But why limit to grasping when we have already established that submission to authority does not involve grasping and yet constitutes a seizure? More generally, the purpose of the Fourth Amendment is to protect security as against certain types of government intrusion: physical intrusion and violence against the person in aid of law enforcement investigation and prosecution. Battery, whether the officers catch or do not catch the person, falls squarely under that general principle.

---

[119] Manuel v. City of Joliet, 137 S. Ct. 911, 920–21 (2017) (involving accrual of a statute of limitations). The Court in *Manuel* also noted that courts often look to the most analogous tort but do not have to if more than one supply the appropriate principles. *Id.*

[120] Heck v. Humphrey, 512 U.S. 477, 484 (1994).

[121] *See, e.g.*, Arrowsmith v. Le Meseur (1806) 127 Eng. Rep. 605, 605 (C.P.) (assault and false imprisonment).

[122] *Torres*, 141 S. Ct. at 1016.

[123] *Id.*

[124] Imbler v. Pachtman, 424 U.S. 409, 417 (1976) (Section 1983 "creates a species of tort liability").

D. *Fourth Amendment Search*

The Court's jurisprudence concerning the definition of "search" in the same Fourth Amendment provision also supports my arguments above. First, the Court does not employ a plain meaning definition of search as meaning simply "to look for."[125] Rather, it has two particular tests that focus on the interests the provision protects. Those interests are that people should be "secure" in their "houses" and other places from unreasonable searches. To be secure in one's home means, of course, against physical invasion by others. The search provision also protects security in the sense of privacy.

The Court's two tests for ascertaining the meaning of search track these two protected interests. The reasonable expectation of privacy test protects privacy somewhat generally.[126] The trespass to land or chattel test protects physical security more directly.[127] A person's power to exclude others from his home or personal property stands as the most basic method to protect one's security in the home and property, as well as their privacy.[128] Moreover, the Court adopted this trespass test by expressly pointing to the founders' era, common law tort of trespass.[129]

When applying the tort of trespass, we must adapt it for law enforcement, given that the Fourth Amendment does not apply to private citizens. So adapted, it defines a search as a physical trespass by law enforcement.[130] In addition, it does not apply to any trespass an official happens to undertake; it must be a trespass for the purpose of obtaining information.[131] This last requirement simply adapts the "search" part of the equation.

We can use this same framework for seizures. Seizure should also take its meaning from the interests it protects, particularly as those interests were protected in the founders' era. The interests it protects are security of the person ("secure") from physical intrusion, safety, freedom from pain, threats, and imprisonment. The chief methods the common law used to protect these interests were the torts of battery, assault, and false imprisonment. Seizure should therefore be defined to protect this cluster of rights.

---

[125] Christopher Slobogin, *A Defense of Privacy As the Central Value Protected by the Fourth Amendment's Prohibition on Unreasonable Searches*, 48 Tex. Tech L. Rev. 143, 144–46 (2015) (noting how the Court's test for search excludes some plain meaning applications such as simply to "watch or look for" but also arguing a privacy test emerges from the general principles announced by the text).

[126] Katz v. United States, 389 U.S. 347, 347 (1967).

[127] United States v. Jones, 565 U.S. 400, 405 (2012).

[128] Semayne's Case, (1604) 77 Eng. Rep. 194, 195 (K.B.) ("the house of every one is to him as his castle and fortress, as well for his defence against injury and violence, as for his repose").

[129] *Id.*

[130] United States v. Jones, 565 U.S. 400, 404–05 (2012).

[131] *Id.*

Like "search," these common law torts need to be adapted. First, the Fourth Amendment and Section 1983 do not restrain private citizens, only government action.[132] Second, it should not apply to *any* battery an official happens to make. Rather, it must be those batteries the official undertakes as part of his law enforcement duties—those batteries, assaults, and false imprisonments that he would justify on the basis of his official duties.

E. *Other Scenarios and Conclusion*

My view suggests that *Hodari D.*[133] was wrongly decided. The Court there relied in part on the plain meaning of seizure to find that chasing a fleeing suspect in order to arrest him cannot be a seizure because they never caught him.[134] True, under a plain meaning view of seizure, it is not an arrest, and perhaps even under some common law cases defining arrest in other contexts such as officer liability.[135] But the officers in *Hodari D.* committed an assault, through a threat of force, in order to effectuate an arrest.[136] As a result, Hodari D. would have a cause of action against them under the common law. Under that cause of action, the police would justify their conduct, if they could, by arguing they had probable cause to arrest or reasonable suspicion to detain. If the police essentially look to the Fourth Amendment for their defense, that same Fourth Amendment should afford, under Section 1983, a cause of action.

Looked at more generally, the police in *Hodari D.* intruded upon the suspect's liberty, his freedom of movement, and, most importantly, the security of his person.[137] If we view the Fourth Amendment and criminal procedure more generally as governing police use of force and coercion, as does William Stuntz,[138] then *Hodari D.* should come out the other way.

Justice Gorsuch faulted the majority for creating a test, the mere-touch rule, that was not founded on a principle that would allow courts in future cases to determine how it applies to other uses of force from a distance.[139] He asked about

---

[132] United States v. Jacobsen, 466 U.S. 109, 113 (1984) (the Fourth Amendment applies only to government action); 42 U.S.C. § 1983 (applying only to those acting under "color of" state law).

[133] California v. Hodari D., 499 U.S. 621 (1991).

[134] *Id.* at 626.

[135] Genner v. Sparks (1704) 87 Eng. Rep. 928, 928–29 (Q.B.).

[136] *Hodari D.*, 499 U.S. at 623 (describing how two officers chased Hodari D., one by car, one on foot, until one tackled and handcuffed him. The chase was an assault, threatening the very force they ended up using).

[137] *Id.*

[138] William J. Stuntz, Privacy's Problem and the Law of Criminal Procedure, 93 Mich. L. Rev. 1016, 1020 (1995) (arguing that even the search provision of the Fourth Amendment and the Self-incrimination Clause of the Fifth Amendment should be viewed more as limits on police use of force and less as protections of privacy).

[139] Torres v. Madrid, 141 S. Ct. 989, 1015 (2021).

the use of pepper spray to move a crowd—and the majority demurred.[140] Justice Gorsuch had a point. My test provides an answer. Such use of pepper spray should fall under the Fourth Amendment as a seizure. Again, it is an assault and a battery used by law enforcement for the purpose of moving people. It intrudes upon their basic security.

One might object that my definition of seizure extends beyond any fixed limits and becomes a vague test of what counts as "security." It is no better than the reasonable expectation of privacy test for "search"—vague, boundless, and easily manipulated. These objections would be wrong. My test roots security in the three torts that existed at common law and supply certain, fixed rules. Those torts protected the core of security, in a bounded and precise way, and were almost certainly the cluster of rights the founders had in mind by protecting the right of the people to be "secure" in their "persons."

---

[140] *Id.*