2021

The Dormant Seizure Doctrine and Its Effect on Race Disparities

Joseph Alter

The Dormant Seizure Doctrine and Its Effect on Race Disparities

By: Joseph Alter

INTRODUCTION

In most circumstances, the seizure of a person is easy to spot. When one thinks of police "seizing" a suspect, perhaps images of a police officer handcuffing or tackling a suspect to the ground come to mind. That would be accurate, as these types of physical restraints understandably fall within the United States Supreme Court's definition of "seizure."[1] But what about the less obvious methods of police controlling or attempting to control the body of a suspect? If police are simply asking questions of someone, is that a seizure? What if they ask questions for hours without telling the person they can leave? What if they shoot or attempt to shoot a suspect, but he or she manages to escape? What if a suspect gives police permission to search them, but the permission is given under duress or coercive circumstances? These questions represent the more difficult side of seizure doctrine, and the Court has at one point or another attempted to answer them all, with confusing and often unreasonable results.

The Supreme Court's seizure doctrine becomes more complex when examined in the light of the current national dialogue the United States is having about law enforcement's disparate treatment of minority communities—the Black community in particular. Ample research shows higher arrest, conviction, and imprisonment rates for people of color. In today's world, in which there is a seemingly endless series of cases in which Black individuals are killed

[1] *California v. Hodari, D.,* 499 U.S. 621, 626 (1991). (A Fourth Amendment seizure requires "either physical force or, where that is absent, submission to assertion of authority").

or injured due to the excessive or unnecessary force used on them by police[2], many are calling on the Court to do something to alleviate this unjust and heartbreaking reality. One of the primary ways it can do so is to include race as a factor when determining certain types of seizures in order to reflect the reality that minorities are treated differently by police, and as a result, they understand and experience interactions with the police differently.

The Supreme Court's attempts at defining what is and is not a seizure have engendered and fostered a system in which law enforcement can not-so-covertly discriminate based on race, but the Court has taken any chances of discussing race in the seizure context completely off the table.[3] All of the Court's rulings on this point have operated to treat all Americans the same in their interactions with law enforcement. Despite statistics and current events undercutting that notion, the Court has not changed its tune, and shows very little signs of doing so in the future. An in-depth analysis of where American seizure law came from, how it developed, how it has disadvantaged minority communities, and what to do about it is imperative.

I. ROOTS OF SEIZURE DOCTRINE

In order to examine or analyze modern day seizure law, it is necessary to look into the history of the Fourth Amendment to the United States Constitution. This is because the United States Supreme Court decides current seizure cases based largely on what the Founding Fathers thought about the issue[4]. The rationale behind the Fourth Amendment's enactment continues to color how and when a seizure is deemed unconstitutional. Examining the history of the Fourth Amendment reveals that some of the modern seizure practices deemed constitutional may not

[2] Some recent examples include George Floyd, Breonna Taylor, Rayshard Brooks, Jacob Blake, Elijah McClain, Philando Castile, Daniel Prude, Duante Wright, Samuel DuBose, Alonzo Smith, Atatiana Jefferson, and many more.

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

[4] *Virginia v. Moore*, 553 U.S. 164, 175 (2008).

fully match up with the expectations the Framers had in mind when they argued for and wrote the amendment.

A. The History of the Fourth Amendment

Despite consisting of just over fifty words, the Fourth Amendment has and continues to be a highly debated and controversial area of law, and our understanding and interpretation of it has changed depending on the decade and the makeup of the Supreme Court. The Amendment, in its entirety, states:

> The right of the people to be secured in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.[5]

The key word in the amendment is "*unreasonable*", and its placement suggests that the Framers did not intend to prohibit all searches and seizures, but rather only ones they considered to be unreasonable. This is where the debate begins and never truly ends, as a court's determination of what exactly it considered to be unreasonable in 1789 can mean the difference between a defendant's freedom, incarceration, or ability to obtain a civil remedy in 2021. But this determination is no easy task, and to accomplish it requires an analysis of why the Framers felt the need to enact the Fourth Amendment in the first place.

The idea that people should be secure in their own houses, which birthed the Fourth Amendment, did not start with the Founding Fathers. Like much of American common law, Fourth Amendment jurisprudence can be traced back to England. One of the first English cases to deal with the issue of safeguarding the home from government

[5] U.S. Const., amend. IV.

interference was *Semayne's Case* in 1604, in which Sir Edward Coke declared, "the house of every one is to him as his castle and fortress, as well as for his defence against injury and violence as for his repose."[6] Despite this recognition, *Semayne's Case* allowed for the breaking and entering of a home in many circumstances, as long as the owner or tenant of the home was notified in advance of the sheriff's arrival, and a request was made by the sheriff to enter once he did arrive.[7] One of these circumstances was "execution of the King's process", as one of the holdings of the case was that "the liberty of the house does not hold against the King."[8] This meant that sheriffs could still enter a home for essentially any reason, as long as it was on behalf of the King and they announced their presence before entering. This paved the way for writs of assistance, or general warrants, created by Parliament in the 17th Century.[9] These warrants authorized government officials to enter private homes and businesses to search and seize contraband, with essentially zero limitations on the time or scope of the search and seizure.[10]

As one might expect, the notion that a sheriff or soldier may enter a home at any time and search and seize anything on behalf of the King was not met with much enthusiasm. In the 1760s, targets of these general warrant searches increasingly started to sue the officers who conducted them. The most notable of these targets was John Wilkes, a British radical and member of Parliament who penned publications critical of King George III.[11] One of these publications was "The North Briton," a newspaper that

[6] 5 Co. Rep. 91a, 77 Eng. Rep. 194 (K.B. 1603).
[7] *Id.* This is the origin of the modern-day "knock and announce" rule.
[8] *Id.*
[9] George Elliott Howard, *Preliminaries of the Revolution*, 1763-1777, 73 (1906).
[10] 13 & 14 Car. 2, c. §5(2) (1662).
[11] Jack Lynch, *Wilkes, Liberty, and Number 45*. Colonial Williamsburg Journal. (2003). https://research.colonialwilliamsburg.org/Foundation/journal/summer03/wilkes.cfm.

Wilkes wrote anonymously.[12] After reading a particularly critical issue of the newspaper, the King ordered the issuance of general warrants which authorized the arrest of the printers, publishers, and authors of "The North Briton", without identifying any of them by name.[13] Wilkes sued the King's messengers for trespassing on his property and arresting him under a general warrant and encouraged other printers and publishers who were similarly targeted under the general warrants to do the same.[14]

One of those publishers was John Entick, an associate of Wilkes whose house was forcibly broken into by the King's chief messenger, Nathan Carrington.[15] Carrington broke into locked desks and boxes and seized many pamphlets and charts, causing a great deal of damage.[16] Like Wilkes, Entick sued Carrington for trespass and the resulting litigation, *Entick v. Carrington*, became a landmark civil liberty case in Great Britain and a primary motivation for the Founding Fathers to enact the Fourth Amendment. In *Entick,* the Court held the general warrants in question to be subversive "of all comforts of society."[17] Specifically, the court took issue with the absence of probable cause. The court stated, "The great end, for which men entered into society, was to secure their property."[18] The U.S. Supreme Court has characterized *Entick* as "a great judgment," "one of the landmarks of English liberty," and characterized it as a guide to understanding of what the Framers meant in writing the Fourth Amendment.[19]

---

[12] *Id*.
[13] *Id*.
[14] *Id*.
[15] *Entick v. Carrington*, 2 Wils. K.B 275, 95 Eng. Rep. 807 (1765).
[16] *Id*.
[17] *Id*.
[18] *Id*.
[19] *Boyd v. United States*, 116 U.S. 616, 626 (1886).

In the American colonies, similar opposition to general warrants were taking place. Perhaps the most famous of such opposition came from Massachusetts lawyer James Otis in the 1761 *Writ of Assistance Case*, in which he advocated on behalf of Boston merchants petitioning the Massachusetts Superior Court to challenge the legality of writs of assistance.[20] In his scathing attack on the writ, Otis described them as a "power that places the liberty of every man in the hand of every petty officer.[21]" He also brought up what was first mentioned over a century earlier in *Semayne's Case*, likening the right to treat one's house as their castle:

> "A man's house is his castle, and whilst he is quiet, he is as well guarded as a prince in his castle. This writ, if it should be declared legal, would totally annihilate this privilege. Custom house officers may enter our houses when they please; we are commanded to permit their entry. Their menial servants may enter, may break locks, bars, and everything in their way; and whether they break through malice or revenge, no man, no court, can inquire. Bare suspicion without oath is sufficient. This wanton exercise of this power is not a chimerical suggestion of a heated brain…What a scene does this open! Every man, prompted by revenge, ill humor, or wantonness to inspect the inside of his neighbor's house, may get a writ of assistance. Others will ask it from self-defense; one arbitrary exertion will provoke another, until society be involved in tumult and blood."[22]

Despite losing the case, Otis was successful insofar as galvanizing the colonies into the revolutionary spirit. John Adams, who was present in the courtroom for Otis's speech, later remarked, "then and there, the child Independence was born."[23]

The idea that general warrants were illegal and an affront to personal liberty continued, so that when the colonies established independent governments in 1776, many of them prohibited general warrants. For example, Article I, Section X of the Virginia

---

[20] Richard Morris, *"Then and there the child independence was born,"* American Heritage Vol. 13, Issue 2, (Feb. 1962). https://www.americanheritage.com/then-and-there-child-independence-was-born.
[21] John Adam's Reconstruction of Otis's Speech in the Writs of Assistance Case, in *The Collected Political Writings of James Otis*, Ed. Richard A. Samuelson (Indianapolis: Liberty Fund, 2015), 11-4. Http://oll.libertyfund.org/titles/2703.
[22] *Id*.
[23] Richard Morris, *Supra* Note 18.

Declaration of Rights, states: "That general warrants, whereby an officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offense is not particularly described and supported by evidence, are grievous and oppressive, and ought not to be granted."[24] Massachusetts enacted a similar provision in their declaration of Rights, written by John Adams, which stressed the "right to be secure from all unreasonable searches, and seizures of his person, his houses, his papers, and all his possessions."[25] These prohibitions served as the basis for the language of the Fourth Amendment. Placing that amendment in the context of the time it was written and all that preceded it, it becomes clear that the Founding Fathers found searches and seizures to be unreasonable when they were done arbitrarily or at the whim of a tyrannical government, without any regard to the personal liberties or freedoms of the subject of the search or seizure. Further, their adamant opposition to general warrants would seem to indicate a low level of tolerance for warrantless searches and seizures. Their addition of "probable cause" as necessary in order to obtain a warrant for searches and seizures seems to drive this point home and stress how necessary it was to provide limitations on when searches and seizures would be permissible. However, as Fourth Amendment jurisprudence developed into what we see in the modern age, an important question must be asked: Has the Court permitted the very practices the Fourth Amendment was designed to prevent?

II. DEVELOPMENT OF SEIZURE DOCTRINE

While search doctrine has bred an enormous amount of case law, controversy, and exceptions, seizure doctrine has gotten very little attention in comparison. This is

[24] VA. Const. art. 1, § 10.
[25] MA. Const. § 1, art. 14.

especially curious considering the interests involved. Search doctrine is about the privacy of what we do and keep in our homes, businesses, papers, and effects. Seizure doctrine is about depriving one of their personal liberty, often accompanied by handcuffs and trips to the police station. If faced with the choice between liberty and privacy, what would you chose? Of course, there are instances in which privacy is a higher value than liberty, but on balance, the idea of being restrained and whisked away should count at least as equally, if not more than privacy. But given the sizeable disparity in how the Supreme Court has treated the two doctrines, that does not appear to be the case.

A. *Terry v. Ohio*: Seizures Absent Probable Cause and Arrest

Until 1968, "probable cause" was an all-or-nothing concept. Either you had it, and the search/seizure was reasonable, or you didn't, and the search/seizure was unreasonable.[26] Probable cause was loosely defined by the Supreme Court as "where the facts and circumstances within the officers' knowledge, and of which they have reasonably trustworthy information, are sufficient in themselves to warrant a belief by a man of reasonable caution that a crime is being committed."[27] This would seem to comport with the Founders' thinking in that it would bar arbitrary searches and seizures. Only where there was a specific basis and sufficient and trustworthy information to support the search/seizure, would a warrant be issued, making it reasonable.

All of this came to a screeching halt in *Terry v. Ohio*[28]. In that case, Officer McFadden, a Cleveland Police Officer, witnessed two African American men repeatedly

[26] There were some exceptions in which discerning probable cause was tricker. *See Draper v. United States*, 358 U.S. 307 (1959), in which the issue before the Court was whether an informant's descriptive tip to police was sufficient to establish Probable Cause.
[27] *Brinegar v. United States*, 338 U.S. 160, 175 (1949).
[28] 329 U.S. 1 (1968).

peering into a store window and then walking away to converse with a different man.[29] Finding this to be inherently suspicious, the officer approached the men and asked for their names.[30] Richard Terry mumbled something in response, which prompted the officer to grab him (a seizure), spin him around, and pat the outside of his clothing (a search).[31] The officer testified that this search and seizure was performed to see if Terry was armed.[32] However, based on the judicially defined probable cause standard and the facts of the case, probable cause did not exist.[33] Thus, the issue in the case was whether it is always unreasonable for an officer, without probable cause or a warrant, to seize a person and perform a limited search for weapons.[34] In an 8-1 decision authored by Chief Justice Warren, the court answered no, and its holding had a tremendous impact on the Fourth Amendment and future interactions between police officers and civilians.[35]

The impact *Terry* had on the Fourth Amendment cannot be overstated. For the first time, the Supreme Court held specific searches and seizures to be constitutionally permissible without a warrant or probable cause, the two ingredients the Founders deemed necessary in the text of the Fourth Amendment.[36] It went about this by recognizing that searches and seizures can vary in their level of intrusiveness. In making that recognition, the Court reasoned that the appropriate test for search and seizure is not whether there was a warrant or probable cause, but instead by focusing on the nature of

[29] *Id.* at 6.
[30] *Id.*
[31] *Id.* at 7.
[32] *Id.*
[33] Had Officer McFadden applied for a warrant and described only what he had seen—two men repeatedly looking into a store window and walking away to talk to a third man—it likely would not have been issued.
[34] *Id.* at 15.
[35] *Id.* at 29.
[36] *Id.*

the intrusion as it relates to privacy interests[37]. This was because the Court believed some searches and seizures fall so low on the spectrum as to require a lesser standard than probable cause.[38] Thus, what was later deemed the "reasonable suspicion" standard was born.[39] By creating this standard, and thus a way for police to search and seize people without probable cause, the Court tampered with the Fourth Amendmen by effectively driving a wedge between the first clause, which prohibits unreasonable searches and seizures, and the second, which seemingly allows them only when probable cause exists.

The reasonable suspicion standard is highly deferential to law enforcement. It allows police to temporarily seize a person and conduct "careful exploration[s] of the outer surfaces of a person's clothing all over his or her body in an attempt to find weapons,"[40] as long as the officer can point to some "specific and articulable facts" that justify their actions[41]. Any facts or observations that lead an officer to believe his safety was in question would likely justify the search and seizure.[42] The *Terry* Court did not do much further elaboration on the definition of the reasonable suspicion standard, or how to know if an officer went too far. In terms of a definition, it said in a later case that the standard cannot be "readily, or even usefully reduced to a neat set of legal rules."[43] In terms of evaluating whether an officer did or did not have reasonable suspicion when conducting a *Terry*-type search or seizure, the court said it would make this determination based on "the totality of the circumstances."[44] It also described the reasonable suspicion

[37] *Id.* at 24.
[38] *Id.* at 25.
[39] Despite being famous for creating the "reasonable suspicion" standard, the *Terry* opinion never mentions those words.
[40] *Id.* at 16.
[41] *Id.* at 21.
[42] *Id.* at 30.
[43] *United States v. Sokolow*, 490 U.S. 1, 7 (1989).
[44] *Id.*

standard as "obviously less demanding than that for probable cause," and requiring "considerably less" proof of wrongdoing.[45] In another case, the court said all that is necessary for reasonable suspicion is "some minimal level of objective justification."[46] The Court has also conceded that "In allowing such detention, *Terry* accepts the risk that officers may stop innocent people."[47] By making it easy for police officers to satisfy reasonable suspicion, the Court gave them a tremendous amount of power to stop and seize people on the street. Yale Kamisar, a constitutional law professor and author, explains that "*Terry* established a spongy test, one that allowed the police so much room to maneuver and furnished the courts so little basis for meaningful review, that the opinion must have been the cause for celebration in a good number of police stations."[48]

Terry impacted more than just probable cause. The case also had significant effects on how the Fourth Amendment should apply to seizures. This is because for the first time, The Supreme Court recognized that a person can be seized short of being arrested.[49] Chief Justice Warren believed a Fourth Amendment seizure to occur "whenever a police officer accosts an individual and restrains his freedom to walk away."[50] The Chief Justice specified a bit further in dicta, stating that "only 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." Despite the first judicial recognition of a seizure as something short of an arrest, the *Terry* Court raised more questions than answers. The Court concluded, "We thus decide nothing today

---

[45] *Id.*
[46] *Ins v. Delgado*, 466 U.S. 210, 217 (1984).
[47] *Illinois v. Wardlow*, 528 U.S. 119, 126 (2000).
[48] Yale Kamisar, *The Warren Court and Criminal Justice:* A Quarter-Century Retrospective, 31 Tulsa L.J. 1, 5 (1995).
[49] *Terry*, 329 U.S. 1 at 16.
[50] *Id.* at 19, n. 16.

concerning the constitutional propriety of an investigative "seizure" upon less than probable cause for purposes of "detention" and/or interrogation."[51] The Court attempted to answer that question in the future with some confusing results, as the threshold questions of whether, when, and how someone is seized within the meaning of the Fourth Amendment are issues still being litigated today.

B. Seizure Doctrine After *Terry*: *Mendenhall* and the Reasonable Person Test

After *Terry* recognized that one can be seized by police without being arrested, the question of what constitutes a Fourth Amendment seizure remained largely unanswered. The Supreme Court started to give seizure doctrine some rigid contours in the early 1980's, spurred by the questionable constitutionality of police efforts to combat the war on drugs. In the 1980 case of *Mendenhall v. United States*[52], the Court solidified its definition of seizure and introduced a new objective standard by which to measure whether one had occurred: the "reasonable person test."[53]

Mendenhall established two main pathways for a Fourth Amendment seizure to occur: the application of physical force by an officer on the subject, or the subject's submission to an officer's show of authority.[54] Seizures are easier to recognize in the former pathway, as physical force on a subject is usually self-evident. But seizures by submission can be more difficult because submitting to an officer's show of authority can occur in multiple contexts, and merely accepting an officer's request to have a conversation is not always a seizure. This difficulty is represented in *Mendenhall*, and the

[51] *Id.*
[52] 446 U.S. 544 (1980).
[53] *Id.* at 554.
[54] *Id.* at 552.

Court attempted to resolve it by creating the "reasonable person test," which asks whether "in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."[55] If the Court answers that question in the negative, then the subject cannot be deemed to have submitted to the officer's show of authority, and therefore a Fourth Amendment seizure has not occurred.

The dispute in *Mendenhall* arose when Drug Enforcement Administration (DEA) agents at airport used a "drug courier" profile to approach Sylvia Mendenhall, a twenty-two-year-old African American woman.[56] Believing her conduct was indicative of someone illegally trafficking narcotics, the officers confronted Mendenhall as she was walking through the airport concourse and asked to examine her ticket and identification.[57] They noticed that the name on her identification was different than the one on her ticket and asked her to accompany them to their office, which she did.[58] Once at the office, Mendenhall consented to a search of her person, which turned up nothing.[59] Undeterred, the officers asked for a more invasive search, which would require Mendenhall to take off her clothes.[60] Despite initially protesting and claiming she had "a plane to catch", Mendenhall eventually complied with the search, in which she produced a bag of heroin from her undergarments.[61] She argued that this incident was an unreasonable seizure.[62]

---

[55] *Id.* at 554.
[56] *Id.* at 548.
[57] *Id.*
[58] *Id.*
[59] *Id.*
[60] *Id.* at 549
[61] *Id.*
[62] *Id.* at 565 (Powell, J., Concurring).

The Supreme Court's analysis of the case was split, with only Justices Stewart and Rehnquist considering the issue of whether a seizure occurred when the DEA agents first stopped Mendenhall in the airport concourse. Justices Blackmun, Powell, and Chief Justice Burger believed that the officers had the requisite reasonable suspicion to stop Mendenhall from the outset, primarily because of their use of a drug courier profile and the high public interest in stopping narcotics trafficking.[63] On the other hand, Justice Stewart's plurality opinion (which only Justice Rehnquist joined) did not believe the initial stop of Mendenhall constituted a seizure.[64] Applying the dicta from *Terry v. Ohio*, in which the Court defined a seizure as "only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen," Justice Stewart pointed to the absence of a physical restraint or show of authority to reach the conclusion that Mendenhall was not seized when she was originally approached and questioned by the DEA agents.[65] In reaching this conclusion, Justice Stewart explained that in his view, Mendenhall had no reason to believe that she was not free to just walk away from the officers.[66] This meant that no seizure had occurred because, according to the plurality, "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."[67] Thus, the "reasonable person test" was born out of a two-justice plurality opinion.

[63] *Id.* at 565 (Powell, J., Concurring).
[64] *Id.* at 557.
[65] *Id.* at 554
[66] *Id.*
[67] *Id.*

In addition, Justice Stewart introduced some factors that courts should use in determining whether the reasonable person test is satisfied. These include the number of officers involved in the encounter (the more officers, the more threatening of a presence and the less likely the subject feels free to leave), the display of weapon by an officer, physical touching, and the language or tone of voice indicating that compliance might be compelled.[68] What is specifically excluded from the test, however, is the agent's subjective intent when approaching the defendant.[69] Similarly, the subjective impression of the suspect is also irrelevant in the analysis, except to the extent that a reasonable person in that suspect's situation would have the same concerns.[70] This is because the plurality intended for the reasonable person test to be objectively applied to the facts of each case.

The reasonable person test is not without its critics. For example, Justice White, in his *Mendenhall* dissent, questioned how a reasonable person in Mendenhall's position could have felt free to leave the DEA agents and board a plane after having her ticket and driver's license taken from her.[71] He also did not think Mendenhall's conduct was sufficient to establish the reasonable suspicion necessary to seize her.[72] Many critics also posit that a reasonable person always feels restricted when they are confronted by police, and thus no one truly feels free to simply terminate a police encounter.[73] Finally, by ignoring the subjective impressions of both the police officer and the person seized, the reasonable person standard fails to take into account how racism may play a role in who

[68] *Id.*
[69] *Id.* at n. 6.
[70] *Id.*
[71] *Id.* at 570, n. 6 (White, J., dissenting)
[72] *Id.* at 572 (White, J., dissenting).
[73] *See* David K. Kessler, *Free to Leave—An Empirical Look at the Fourth Amendment's Seizure Standard*, 99 J. Crim. L. & Criminology 51 (2008-2009).

police approach for questioning, and how the race of the person being questioned may affect how subjectively threatened they may feel.[74] Despite these criticisms and the fact that the reasonable person test stems seemingly out of nowhere from a two-justice plurality, the test continued to gain judicial approval and is still a crucial part of the Supreme Court's seizure jurisprudence today.

Since 1980, the reasonable person test has been used to decide a variety of cases in favor of law enforcement, with the Supreme Court deeming some questionable police tactics as not threatening for the purposes of answering the seizure question. One of the most notorious examples of this is the 1991 case of *Florida v. Bostick*[75]. There, narcotics officers boarded an interstate bus as part of a drug interdiction effort and began asking seated passengers for identification, tickets, and permission to search their luggage.[76] These searches were completely warrantless and suspicionless and depended on the consent of the subjects.[77] One of these subjects was the defendant, who consented to a search that revealed drugs.[78] He argued that a reasonable person in similar conditions would not feel free to terminate the encounter with the officer.[79] The Florida Supreme Court agreed, so much so that it adopted a *per se* rule prohibiting this type of police practice in the future.[80] But the U.S Supreme Court reversed, and despite calling this practice "distasteful," it found that it was the fact that the defendant was on a bus, not the coercive actions of the police, that made the defendant feel like he could not leave.[81]

---

[74] *See* Tracey Maclin, *Black and Blue Encounters—Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?* 26 Val. U.L. Rev. 243 (1991).
[75] 501 U.S. 429 (1991).
[76] *Id.* at 431.
[77] *Id.* at 432.
[78] *Id.* at 433.
[79] *Id.* at 435.
[80] *Id.*
[81] *Id.* at 439

Through this holding, the Court allowed warrantless, suspicionless searches of buses for the purposes of drug interdiction.

III. REVISITING SEIZURE DOCTRINE IN THE CONTEXT OF RACE

Throughout its analysis and application of the reasonable person test, the Supreme Court has consistently sanctioned the use of coercive police practices that are used disproportionately against people of color. The Court rarely mentions race or the overwhelming evidence of racism it has at its disposal. Instead, by making the objective analysis of the reasonable person test the focal point, the Court has been able to escape bringing up the obvious question of whether the race of the person being seized plays a role on whether that person feels as though they could simply terminate the encounter with a police officer and leave. It's time for that to change.

A. Racist Roots of Seizure Law: Slave Patrols

At the same time the Founding Fathers were complaining and revolting against oppressive British search and seizure measures, the colonies were searching and seizing Black people through far worse measures. Most of this was done by "slave patrols."[82] In 1693, court officials in Philadelphia responded to complaints about the congregating and traveling of Blacks without their masters by authorizing the constables and citizens of the city to "take up" any Black person seen "gadding abroad" without a pass from his or her master.[83] In 1696, South Carolina, initiated a series of measures authorizing state slave patrols to search the homes of slaves for weapons on a weekly basis.[84] In 1712, these "slave patrols" increased to being performed on a bi-weekly basis, and the scope of the searches increased from weapons to "any

[82] Tracey Maclin, *Race and the Fourth Amendment*, 51 Vanderbilt Law Review 331 (1998). Available at: https://sochalrship.law.vanderbilt.edu/vlr/vol51/iss2/2.
[83] *Id.* at 334.
[84] *Id.*

contraband."[85] Ten years later, these patrols were allowed to forcibly enter the home of any house they suspected Black people may be found, and to detain any "suspicious Blacks" they came across.[86] In 1737, slave patrols could search any tavern they thought might be serving Black people.[87] By 1740, justices of the peace could seize any slave suspected of any crime "whatsoever."[88]

Slave patrols in Virginia were similarly authorized to arrest slaves on "bare suspicion."[89] If a Black person's presence "excited suspicion," slave patrols could arrest them.[90] In Virginia slave patrols, "no neutral and detached magistrate intervened between a patrolman's suspicions and his power to arrest or search."[91] The same can be said of patrols in Virginia's neighboring southern colonies. A Black resident of Savannah in 1767 wrote that slave patrols would "enter the house of any Black person who kept his lights on after 9 P.M. and fine, flog and extort food from him."[92] Interestingly, around the same time, James Otis was speaking out about British oppression through the use of general warrants and comparing a man's house to his castle. Obviously, this was only the case for white men.

Slave patrols seizing Black people that "excite suspicion" should sound familiar. Despite taking place in the 17th and 18th centuries, these slave patrols are reminiscent of what the Supreme Court authorized in *Terry v. Ohio*. By allowing law enforcement to confront and seize people who "arouse suspicion," and by analyzing these confrontations without considering race, the Supreme Court was ushering in the modern equivalent of slave patrols. Under this regime,

---

[85] *Id.* at 335.
[86] *Id.*
[87] *Id.*
[88] *Id.*
[89] *Id.*
[90] *Id.*
[91] *Id.*
[92] *Id.*

just like slave patrols, Black people are systematically targeted because their skin color arouses "suspicion." They are seized and searched through means only recently deemed constitutional by the Supreme Court. Finally, if the suspicions of "law enforcement" happen to be correct, they are subject to cruel punishment—namely, extremely harsh and unwarranted prison sentences. In 2017, the United States Sentencing Commission reported that "Black male offenders received sentences on average 19.1 percent longer than similarly situated white male offenders."[93]

B. Effects of Supreme Court Seizure Doctrine on Racial Minorities.

The Supreme Court's seizure jurisprudence has had a disparate impact on racial minorities, especially African Americans. To illustrate this point, an examination of the above-mentioned seizure doctrine cases in the context of how they have affected minority communities is necessary. The best place to start is *Terry v. Ohio*, which, as previously mentioned, introduced and validated the concept of a "stop-and-frisk" based on "reasonable suspicion."

One major issue the *Terry* case discusses, but does little to combat, is race. By deferring to a police officer's experience and training in determining whether or not they fear for their safety[94], the Court made it easy for police officers with more racist intentions to justify seizing minorities in order to check for weapons. Chief Justice Earl Warren seemed to acknowledge this point in *Terry* when he said that the case "thrusts to the fore, difficult and troublesome issues regarding a sensitive area of police activity."[95] According to a New York County District Attorney *amicus* brief filed in *Terry,* 1600 police reports of stops-and-frisks by the NYPD

[93] *Demographic Differences in Sentencing: An Update to the 2012 Booker Report,* United States Sentencing Commission (November 14, 2016). Available at: ussc.gov/research/research-reports/demographic-differences-sentencing.
[94] *Terry,* 393 U.S. 1 at 30.
[95] *Id.* at 9.

"showed a disproportionate racial impact of those actions."[96] For an example of a racially motivated stop-and-frisk, look no further than facts of *Terry*.

Believing the stop in *Terry* may have been racially motivated, Louis Stokes, Terry's defense attorney, asked Officer McFadden what exactly it was about the defendants and their actions that aroused his suspicion.[97] McFadden replied, "Well, to tell you the truth, I just didn't like 'em."[98] After going on to say that he thought they were "casing the joint for the purpose of robbing it," he was asked if he had ever in his thirty-nine years as a police officer observed anybody casing a store for a robbery.[99] He replied that he had not.[100] He was then asked again what attracted him to the defendants, and again indicated that he just did not like them. This is not surprising to many people of color, as Tracey Maclin explains, "In America, police targeting of Black people for excessive and disproportionate search and seizure is a practice older than the Republic itself."[101]

The general efficacy of stop-and-frisk on crime reduction is highly debated, but there can be no question that even in the 21st century, it continues to be used overwhelmingly on racial minorities. For example, in 1999, African Americans made up 50 percent of New York's population, but accounted for 84 percent of the city's stops.[102] Between 2004 and 2012, the NYPD made 4.4 million stops under their stop-and-frisk policy.[103] More than 80 percent of those 4.4 million people were Black and Latino.[104] Interestingly, despite the entire justification for a

---

[96] Michael R. Juviler, *A Prosecutor's Perspective,* 72 St. John's L. Rev. 741, 743 (1998).
[97] Louis Stokes, *Representing John W. Terry*, St. John's L. Rev. 727, 729 (1998).
[98] *Id.*
[99] *Id.*
[100] *Id.*
[101] *Race and the Fourth Amendment, supra* note 80.
[102] *Stop and Frisk Data,* Am. Civ. Liberties Union, https://www/nyclu.org/en/stop-and-frisk-data.
[103] *Id.*
[104] *Id.*

stop being officer safety (to search for weapons), the likelihood of a Black New Yorker found to be yielding a weapon was half that of white New Yorkers.[105] The likelihood of finding contraband on a Black New Yorker was one third of that for a white New Yorker.[106] In 2017, 90 percent of those stopped in New York City were Black or Latino and almost 70 percent of those stopped were innocent.[107] According to the NYPD annual reports, 13,459 stops were recorded in 2019, with 7,981 of them being Black, 1,215 being white, and 8,867 being innocent.[108] The NYPD data breaking down *Terry* stops by race goes back as far as 2003. Every single year since then, Black people have made up over half of all those searched.[109] If these numbers prove anything, it's that stop-and-frisk policies disproportionately target racial minorities, and that the overwhelming majority of those stopped are innocent. Thanks to *Terry*, even if the primary motivation behind the stops is racial bias, it's irrelevant because the subjective motivations of the officer are not considered by the Court.

The Supreme Court continued the trend of discounting an officer's subjective motivations behind a seizure—this time, in the context of traffic stops—in *Whren v. United States*[110], where it unanimously held that pretextual traffic stops do not raise Fourth Amendment concerns.[111] In that case, police officers saw two African American men driving in a car and believed, without probable cause or even reasonable suspicion, that they were committing drug crimes.[112] In order to investigate further, they followed the car and eventually observed the driver make a turn without signaling first.[113] Using the minor infraction as a pretext to search the car, the officers

[105] *Id*.
[106] *Id*.
[107] *Id*.
[108] *Id*.
[109] *Id*.
[110] 517 U.S. 806 (1996).
[111] *Id.* at 813.
[112] *Id.* at 808.
[113] *Id*.

stopped the car, found drugs, and arrested the men.[114] The defendants contended that this was an unconstitutional seizure because the officers did not intend to issue a citation when they stopped the car and relied on racial profiling instead of reasonable suspicion.[115] Justice Scalia authored the opinion that it did not matter if police officers have ulterior or nefarious motives when stopping automobiles for minor traffic infractions because Fourth Amendment analysis does not inquire into the subjective mental state of police officers.[116]

But perhaps if the court in *Whren* did allow an analysis on the subjective mental state of police officers, the staggering evidence of pretextual stops might be too damning to ignore. Some of the most recent evidence comes from the Stanford University's Open Policing Project, which, using information obtained through public record requests, examined almost 100 million traffic stops conducted from 2011 to 2017 across 21 state patrol agencies and 29 municipal police departments. The results show that race is a factor when people are pulled over, and that this problem is occurring on national scale. Black and Latino drivers are stopped and searched based on less evidence than white drivers, but white drivers are more likely to be found with illegal items.[117] Across states, contraband was found in 36 percent of searches of white drivers, compared to 32 percent for Black drivers, and 26 percent of Latinos.[118] These statistics are not surprising to people of color, who refer to this phenomenon as the crime of "driving while Black."[119]

---

[114] *Id.* at 808-809.
[115] *Id.* at 809.
[116] *Id.* at 813.
[117] *Findings*, Stanford Open Police Project. Available at: https://openpolicing.stanford.edu/findings.
[118] *Id.*
[119] *See generally* David A. Harris, "*Driving While Black" and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops*, 87 J. Crim L. & Criminology 544; *see also* Tracey Maclin, *Can a Traffic Offense Be D.W.B (Driving While Black)?* L.A. Times, Mar. 9, 1997.

Minority communities are not just subject to arbitrary and racially motivated stops on the streets and in their cars. Public transportation has become a place for law enforcement to target them as well, thanks to cases like *Bostick*, which held that suspicionless bus sweeps in which police question passengers and ask permission to search their bodies and luggage would not communicate to a reasonable passenger that they were not free to leave and thus, it is not a seizure. Putting aside the questionable truthfulness of that assertion, the main criticism of *Bostick* has centered around its impact on minority groups. The *Bostick* majority had evidence of the large role that race played in bus sweeps but remained largely silent on the issue. In his dissent, Thurgood Marshall, then the first and only Black person on the Supreme Court, wrote, "the basis of the decision to single out particular passengers during a suspicionless sweep is less likely to be inarticulable than unspeakable."[120] In addition to this dissent, the Court received an amicus brief filed by the ACLU which claimed, "insofar as the facts of reported bus interdiction cases indicate, the defendants all appear to be Black or Hispanic."[121] Even Americans for Effective Law enforcement, an organization which prior to *Bostick* had filed 86 amicus briefs in the Supreme Court supporting the interests of law enforcement, argued that drug interdiction raids on buses violated the Fourth Amendment and alluded to the discriminatory impact that these confrontations had on minority citizens.[122] They explained that the Court has not extended the rationale of prior cases authorizing suspicionless seizures to the setting of passengers sitting on a bus and "moreover, any such extension would be constitutionally invalid…setting aside equal protection issues, it is difficult to imagine a scenario of police activities, as in the present case, upon a planeload of business class air passengers arriving at a busy air terminal after an interstate

[120] *Bostick*, 501 U.S. at 441 n. 1 (Marshall, J. dissenting).
[121] Brief for the American Civil Liberties Union et al. as Amicus Curiae at 8 n. 19, Florida v. Bostick, 501 U.S. 429 (1991) (No. 89-1717).
[122] Brief for the Americans for Effective Law Enforcement, Inc. as Amicus Curiae at 8, *Bostick* (No. 89-1717).

flight."[123] Despite alarming evidence that bus sweeps were being used to specifically target minority groups and the implications that constitutionalizing them would have on these groups, the Court simply ran the scenario through the reasonable person test and concluded that it did not violate the Fourth Amendment.

Over a decade after *Bostick*, the Court held the same way on similar facts in *United States v. Drayton*[124]. In that case, the Court held that during bus sweeps, police do not even have to inform the subjects of the sweep that they have the right to say no to questioning.[125] The Court again made this determination by using the reasonable person test, concluding that even if a reasonable person is not made aware by an officer requesting to search them that they can decline, they still feel as though that in an option.[126] But research reveals otherwise. An examination of the existing empirical evidence of the psychology of coercion suggests that in many situations where citizens find themselves in an encounter with the police, the encounter is not consensual because a reasonable person would not feel free to terminate it.[127] Such evidence suggests that the subsequent search is not voluntary, because a reasonable person would not be, under the totality of the circumstances, in a position to make a voluntary decision about consent. This is especially true in the context of bus sweeps. Michelle Alexander put it best when she said "consent searches are valuable tools for the police only because hardly anyone says no."[128]

If a "reasonable person" would have a hard time saying no to consent searches, this is especially true for a reasonable person of color. From all the data we now have available, it is obvious that Black and brown people are targeted and harassed by police at a higher rate than

---

[123] *Id*.
[124] 536 U.S. 194 (2002).
[125] *Id*. at 204
[126] *Id*.
[127] David K. Kessler, *supra* note 71.
[128] Michelle Alexander, *The New Jim Crow*: *Mass Incarceration in the Age of Colorblindness*. New York: New Press, 2012.

whites. According to a 2020 Kaiser Family Foundation poll, 71 percent of Black Americans said they have experienced some form of racial discrimination or mistreatment during their lifetimes.[129] 48 percent said that at a point, they felt their life was in danger because of their race.[130] 41 percent of Black Americans said they have been stopped or detained by police because of their race.[131] In comparison, only 3 percent of white people report these types of negative police interactions in their lifetimes.[132] This disparity gives credence to claims that there are really "two Americas", one for white people, who get to go about their business largely unaffected and unbothered by police, and one for Black Americans, who feel as though they are walking through life with a permanent target on their backs. When the Supreme Court applies an objective "reasonable person" test, it is, whether knowingly or not, applying a "reasonable white person" test. By keeping things as objective as possible, the law can continue to find the subjective experiences of minorities with police to be irrelevant when it comes to the Fourth Amendment.

C. Current Events Suggest the Time is Ripe for the Supreme Court to Reconsider and Redevelop Seizure Doctrine in the Same Way it has Treated Search Doctrine

Despite the obvious fact that racism has existed in America since before its founding, the events of the summer of 2020 and death of George Floyd at the hands of police triggered a pivotal national dialogue concerning racial inequality and civil rights in America. This dialogue cast a burning spotlight on the issue of police mistreatment of the Black community and resulted in the Black Lives Matter movement garnering national

[129] Kaiser Family Foundation, (2020). *Poll: 7 in 10 Black Americans Say They Have Experienced Incidents of Discrimination or Police Mistreatment in Their Lifetime, Including Nearly Half Who Felt Their Lives Were in Danger.*
[130] *Id.*
[131] *Id.*
[132] *Id.*

attention[133], which amplified their calls for justice on a global scale. This long-overdue discussion prompted outraged citizens of all races to protest and stand behind the Black Lives Matter movement as they demanded change and accountability in policing. Now, the reality that minorities are treated differently by police is seemingly impossible to ignore. But the Supreme Court continues to ignore it.

1. The Summer of 2020 Brought New Awareness to the Issue of Law Enforcement's Mistreatment of the Black Community

In 2020, the public constantly watched in horror at the seemingly endless high-profile cases in which police killed unarmed Black men and women in situations where deadly force was unnecessary. With each case, protestors took to the streets to demand justice in record numbers. One estimate found that from June 8 to June 14, roughly 26 million people in the U.S. said they participated in a Black Lives Matter protest.[134]

The now notorious murder of George Floyd in Minneapolis was the major catalyst for the protests and demands for justice by the Black Lives Matter movement. Floyd, a Black man, had allegedly used a counterfeit $20 bill at a grocery store, and the police were called.[135] After being placed in handcuffs, Mr. Floyd laid on the ground while Police Officer Derek Chauvin knelt on his neck for an astounding 9 minutes and 29

[133] Dhrumil Mehta, *National Media Coverage of Black Lives Matter Had Fallen During the Trump Era—Until Now*, FIVETHIRTYEIGHT, (Jun. 11, 2020), https://fivethirtyeight.com/features/national-media-coverage-of-black-lives-matter-had-fallen-during-the-trump-era-until-now/.
[134] Larry Buchanan, Quoctrung Bui and Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in U.S. History*, THE NEW YORK TIMES, (July 3, 2020), https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protest-crowd-size.html.
[135] Evan Hill, et. al., *How George Floyd Was Killed in Police Custody*, THE NEW YORK TIMES, (May 31, 2020), https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html.

seconds.[136] Unfortunately, this resulted in the death of George Floyd.[137] Amid global calls for justice and accountability for this public execution, Chauvin was charged with unintentional second-degree murder, third-degree murder, and second-degree manslaughter.[138] In April 2021, Chauvin was found guilty on all counts.[139]

Even in situations where Black men don't engage in any illegal conduct whatsoever, routine interactions with police can still result in their deaths. The 2019 death of Elijah McClain is illustrative. McClain, a twenty-three-year-old Black man, was walking home from a convenience store in Aurora, Colorado when police officers approached him.[140] McClain was wearing an open-faced ski mask due to his anemia, which often made him feel cold, but evidently this made someone call the police to report a "suspicious person."[141] When police ordered McClain to stop, he responded by saying ""I have a right to walk to where I'm going."[142] This should have ended the interaction, because McClain's swearing of a ski mask likely did not give rise to any reasonable suspicion. Wearing a ski mask is not illegal, and the 911 caller did not allege there was any sort of illegal conduct going on.[143] McClain was unarmed and simply walking

[136] Nicholas Bogel-Burroughs, *Prosecutors say Derek Chauvin Knelt on George Floyd for 9 Minutes 29 Seconds, Longer Than Initially Reported*, THE NEW YORK TIMES, (March 20, 2021), https://www.nytimes.com/2021/03/30/us/derek-chauvin-george-floyd-kneel-9-minutes-29-seconds.html.
[137] *Id*.
[138] Shalia Dewan, *What are the Charges Against Derek Chauvin*, THE NEW YORK TIMES, (April 19, 2021), https://www.nytimes.com/2021/04/20/us/derek-chauvin-charges.html.
[139] Laurel Wamsley, *Derek Chauvin Found Guilty of George Floyd's Murder*, NPR, (April 20, 2021), https://www.npr.org/sections/trial-over-killing-of-george-floyd/2021/04/20/987777911/court-says-jury-has-reached-verdict-in-derek-chauvins-murder-trial.
[140] Claire Lampen, *What We Know About the Killing of Elijah McClain*, THE CUT, (Updated Feb, 22, 2021), https://www.thecut.com/2021/02/the-killing-of-elijah-mcclain-everything-we-know.html.
[141] *Id*.
[142] Jonathan Smith, Dr. Melissa Costello, and Roberto Villaseñor, *Investigation Report and Recommendations*, (Feb. 22, 2021), p. 22, https://auroragov.org/UserFiles/Servers/Server_1881137/File/News%20Items/Investigation%20Report%20and%20Recommendations%20(FINAL).pdf.
[143] *Id.* at p. 23, the caller said he "didn't feel threatened or anything" and just thought "it was weird."

home.[144] Despite McClain's attempt to terminate the interaction with officers, they tackled him to the ground within ten seconds of first asking him to stop, and put him in a "carotid hold", which entails an officer applying pressure to the side of a suspect's neck in order to temporarily cut off blood flow to the brain.[145] The officers then called paramedics, who injected McClain with 500 milligrams of Ketamine to sedate him while officers held him down.[146] McClain suffered a heart attack on the way to the hospital and died two days later, after he was declared braindead.[147] Despite this incident occurring in 2019 and all officers being cleared of any wrongdoing, the death of George Floyd and the massive protests it sparked in the summer of 2020 led the Governor of Colorado to issue an executive order designating the State Attorney General to "investigate and, if the facts support prosecution, criminally prosecute any individuals whose actions caused the death of Elijah McClain."[148]

The 157-page incident report was released in February 2021, and it alleged large-scale misconduct by the police.[149] First, the report contends that the Aurora Police Department "stretched the record to exonerate the officers rather than present a neutral version of the facts."[150] Second, it found that the police escalated "what may have been a consensual encounter with Mr. McClain into an investigatory stop"[151] (or *Terry* stop), which was not warranted because "walking away from a police officer when told to stop, standing alone, is not sufficient" to trigger reasonable suspicion.[152] Finally, the report

[144] Lampen, *What We Know About the Killing of Elijah McClain.*
[145] *Id.*
[146] *Id.*
[147] *Id.*
[148] *Id.*
[149] Jonathan Smith, Dr. Melissa Costello, and Roberto Villaseñor, *Investigation Report and Recommendations.*
[150] *Id.* at 130-131.
[151] *Id.* at 2-3.
[152] *Id.* at 76.

noted that the 500 milligrams of ketamine the paramedics injected into McClain to sedate him was inappropriate in light of the fact that McClain "did not appear to be offering meaningful resistance in the presence of EMS personnel."[153] In fact, the report found McClain instead to be "crying out in pain, apologizing, explaining himself, and pleading with the officers."[154] The report also said that the 500 milligram dosage to be "based on a grossly inaccurate and inflated estimate of McClain's size."[155]

Despite the shocking amount of misconduct alleged in the report, none of the officers faced any criminal charges for their actions, and only one of them was fired.[156] The only other disciplinary action was for three officers who were not involved with the incident, who were fired because while standing in front of a memorial for Elijah McClain, they took a picture of themselves smiling happily while one of the officers reenacted the type of chokehold used on McClain on the other officer.[157] They then sent the photo to one of the officers involved in McClain's death.[158] Many accurately saw this as police mocking the death of McClain, which only strengthened calls for police accountability and disciplinary action. McClain's family summed up the entire incident and aftermath appropriately as "a textbook example of law enforcement's disparate and racist treatment of Black men."[159] These "textbook examples" are becoming far too frequent and serve as a reminder that minority communities have legitimate reasons to fear any contact with law enforcement because they do not want to be the next Elijah McClain. This reality should be reflected in the Supreme Court's seizure jurisprudence.

---

[153] *Id.* at 7.
[154] *Id.* at 5.
[155] *Id.* at 7.
[156] Lampen, *What We Know About the Killing of Elijah McClain.*
[157] *Id.*
[158] *Id.*
[159] *Id.*

2. **Search Doctrine has been readily revisited and adapted by the Supreme Court, but it has not done the same with Seizure.**

Revisiting and rethinking Fourth Amendment issues are not rare for the Supreme Court when it comes to the search context. Since the early 20th century, the Court has dealt with new technologies and police methods used to search by drawing new lines and creating new exceptions in attempt to square search doctrine with the realities of the modern age. Each time the Court has been presented with new knowledge about how or where police search, it has attempted to fit this new knowledge into their existing search doctrine framework.[160] But the same cannot be said of its seizure jurisprudence. Comparing the two, it's clear that the Supreme Court is allergic to reexamining seizure doctrine—primarily because it would necessarily entail a conversation about race, which it has persistently maintained has no place in Fourth Amendment Analysis. It is time to change that.

As new technology has developed over the years, the Supreme Court has been forced to weigh in on the constitutionality of these technologies when law enforcement uses them to search. For example, in the landmark Fourth Amendment case of *Katz v. United States*,[161] the Court upended its search doctrine, which until that point required officers to physically trespass on a suspect's property before it could be deemed a Fourth Amendment search.[162] But *Katz*, which involved wiretapping a defendant's conversation in a phone booth, revolutionized search doctrine by recognizing that new technologies enabled law enforcement to listen in on private

[160] *See generally, Kyllo v. United States*, 533 U.S. 27 (2001) (prohibiting the warrantless use of thermal scanners to detect heat levels outside a home); *California v. Ciraolo*, 476 U.S. 207 (1986) (allowing use of a plane to take aerial photos of home in certain conditions); *Smith v. Maryland*, 442 U.S. 735 (1979) (allowing use of then-new technology to determine the identity of a person making threatening phone calls).
[161] 389 U.S. 346 (1967).
[162] *See Olmstead v. United States*, 277 U.S. 438, 457 (1928) (wiretapping from outside building deemed constitutional because performed "without trespass); *Silverman v. United States*, 365 U.S. 505, 511 (wiretapping by means of an electronic device that penetrates the building deemed violation of Fourth Amendment).

conversations without trespass, and search doctrine needed to be updated to reflect that.[163] Thus, a new search framework was born and still exists today. That is, a search occurs when a defendant has a subjective expectation of privacy that society recognizes as objectively reasonable, and law enforcement violates this expectation.[164] Because the defendant in *Katz* had a subjective expectation that his conversation in a phone booth would be kept private, and society would recognize that as reasonable, police's wiretapping of his conversation without a warrant was deemed an unreasonable search violative of the Fourth Amendment, regardless of trespass.[165]

Katz is just one of many examples of the Supreme Court catching up with new technologies in its search jurisprudence. The advent and wide use of the Automobile in the early 20th century forced the Court to carve out an entirely new exception to the warrant requirement when it came to searching automobiles.[166] This automobile exception alone has spawned numerous cases concerning issues such as when police can search a car or objects in a car without a warrant.[167] It also necessarily brough up the issue of what constitutes an automobile when it comes to mobile homes, which can be used as both home and automobile.[168] Similarly, the advent and widespread use of cellular phones meant the Supreme Court had to update their search doctrine and issue rulings on the constitutionality of warrantless searches of both smartphones (such as iPhones and Androids commonly used today), and more outdated flip-phones.[169] The Court held that warrantless searches of either phone are prohibited by the Fourth

[163] *Katz*, 389 U.S. 346, 353.
[164] *Id.* at 361 (Harlan, J. concurring).
[165] *Id.* at 353.
[166] *See Caroll v. United States*, 267 U.S. 132, 154 (1925) (Upholding the warrantless search of automobiles with probable cause that vehicle is "carrying contraband or illegal merchandise").
[167] *See United States v. Chadwick*, 433 U.S. 1 (1977).
[168] *California v. Carney*, 471 U.S 386 (1985).
[169] *Riley v. California*, 573 U.S. 373 (2014).

Amendment, due to the overwhelming amount of private information stored on smartphones in the modern age.[170] Additionally, because of the modern smartphone's ability to reveal its user's location through cell-site location information (CSLI), the Court as recently as 2018 weighed in on the constitutionality of searching this information without a warrant.[171] Again, the Court found such a search unreasonable and unconstitutional because it violated the same privacy framework it created in *Katz.*[172]

An opposing argument can be made that by inventing new doctrines such as reasonable suspicion and the reasonable person test, the Court actually has been revisiting and adapting seizure doctrine. But these changes have led us to this precise moment. As outlined above, these changes have been unbelievably deferential to law enforcement and have lowered the quantum of proof necessary for the police to start and escalate interactions with civilians, and a disproportionate amount of those civilians are Black. In contrast to some of the more equitable and defendant-friendly decisions that operated to protect and expand the right of the people to be secure in their persons, houses, papers, and effects, the Court's fundamental seizure decisions like *Terry*, *Mendenhall*, and *Whren* did just the opposite. It is precisely because of these decisions that we so desperately need change in the seizure context. They have resulted in the ability of law enforcement to target and seize minority groups despite little to no evidence of wrongdoing and empowered police officers to become judges, juries, and executioners. Just as the Court has changed course in the wake of new realities in the search context, it must do the same in the context of seizure by acknowledging the harassment its decisions have forced

[170] *Id.* at 394.
[171] *Carpenter v. United States*, 138 S. Ct. 2206, 2227 (2018).
[172] *Id.*

minority communities to endure. The Court played a major role in breaking the trust between law enforcement and the Black community, and now it must work to repair it.

3. The Collateral Cost Arrest in the Modern Age

Another important reason why seizure doctrine must be updated is the fact that the cost of being arrested has changed since both the ratification of the Fourth Amendment and even the era where many foundational seizure cases like *Terry, Mendenhall,* and *Bostick* were decided. This is because, due to the increasingly widespread use of electronic records that were introduced close to the turn of the 21st century, virtually anyone with access to the internet can obtain an individual's arrest record anywhere and at any time. Arrest records are public records, but before the internet made digital records possible, accessing any given individual's record meant actually going to the agency responsible for keeping the record and requesting it. But in today's world, that's no longer the case. According to a 2021 study published by Cambridge University, every year in the United States, over ten million arrests, 4.5 million mugshots, and 14.7 million criminal court proceedings are digitally released at no cost.[173] The fact that anyone can now access these records easily means the cost of being arrested has increased.

In addition, being arrested can prohibit one from obtaining employment or occupational licenses. A survey by the Society for Human Resource Management reported that 73 percent of employers conducted background checks on all applicants.[174] The ease with which criminal records can be obtained online makes these checks quick and effortless, but the research shows

[173] Sarah E. Lageson, Elizabeth Webster and Juan R. Sandoval, *Digitizing and Disclosing Personal Data: The Proliferation of State Criminal Records on the Internet*, Cambridge University Press, (January 29, 2021). https://www.cambridge.org/core/journals/law-and-social-inquiry/article/abs/digitizing-and-disclosing-personal-data-the-proliferation-of-state-criminal-records-on-the-internet/0D7B9A42DA08BADB223D2DE206413585.
[174] Society for Human Resource Management, *Workers with Criminal Records, A Survey by the Society for Human Resource Management and the Charles Koch Institute*, (May 17, 2018), https://www.shrm.org/hr-today/trends-and-forecasting/research-and-surveys/Documents/SHRM-CKI%20Workers%20with%20Criminal%20Records%20Issue%20Brief%202018-05-17.pdf.

this may not be necessary, as "most managers and HR professional report that the 'quality of hire' for workers with criminal records is as good or better than that of those without records."[175] The ability to quickly obtain arrest records, along with most employer's unwillingness to hire someone with an arrest record, has a particularly negative effect on minority communities. According to data from the Equal Employment Opportunity Commission (EEOC), arrest rates for the African American and Latinx communities are two to three times higher than their proportion of the population.[176] This is likely because of the disparate treatment these groups receive from law enforcement. More minorities being arrested equates to less minorities in the workforce. It's unlikely that the Supreme Court could have envisioned that arrest records would be so ubiquitous when it issued major rulings on seizures and arrests in the 1960s, 1970s, and 1980s. But the decisions from that era are the rules that modern arrestees must play by. The law should be updated to reflect that. The fact that the Court prefers to keep subjectivity out of the Fourth Amendment plays no role here, as it is objectively the case that the costs of arrests have increased.

IV: PATHWAYS TO CHANGE

The nebulous nature of seizure doctrine has led to issues in police accountability and opportunities for relief. One of the primary methods to obtain relief for someone harmed by an unreasonable seizure by police is 42 U.S.C. §1983, which allows individuals the right to sue state government employees for civil rights violations.[177] This includes police officers who employ excessive or unreasonable force on a suspect. However, because the constitution only protects

[175] *Id*.
[176] U.S. Equal Employment Commission, *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act*, (April 25, 2012), Report Number 915.002, https://www.eeoc.gov/laws/guidance/enforcement-guidance-consideration-arrest-and-conviction-records-employment-decisions.
[177] 42 U.S.C. §1983 (2021).

against unreasonable seizures, a person filing a § 1983 claim against a police officer must first show that they were "seized" under the meaning Fourth Amendment. Thus, the more difficult it is for the Court to determine what constitutes a seizure, the easier it is for police to escape §1983 liability. The recent U.S. Supreme Court case of *Torres v. Madrid*[178] illustrates this point and represents a positive change in how the Court analyzes certain seizures, which will allow for more §1983 claims to proceed.

A. The Stunted Development of Seizure Doctrine Inhibits Civil Liability of Police, but *Torres* is a Step in the Right Direction.

On the night of July 15, 2014, Roxanne Torres was standing outside of an apartment complex when two police officers approached her to ascertain whether she was the subject of an arrest warrant (she was not).[179] Torres, who was going through methamphetamine withdrawal at this time, feared the officers were carjackers, and acted on that fear by quickly getting into her car and stepping on the gas pedal. [180]Neither officer was standing in the way of the vehicle, and thus their safety was not jeopardized by Torres's driving away.[181] Despite this, the officers took out their pistols and fired 13 shots at Torres's car. Two of these 13 bullets hit Torres's back, which lead to temporary paralysis in her left arm.[182] Miraculously, she was still able to escape and drive 75 miles to a different county, where she sought medical treatment for her serious injuries.[183] She was airlifted back to a hospital close to where the shooting incident took place, where she was eventually arrested and plead no contest to aggravated fleeing from a law

[178] 141 S. Ct. 989 (2021).
[179] *Id.* at. 994
[180] *Id.*
[181] *Id.*
[182] *Id.*
[183] *Id.*

enforcement officer and assault on a peace officer.[184] She also filed a § 1983 claim against the officers, seeking damages for her injuries and alleging that the officers applied excessive force, making their shooting at her an unreasonable seizure under the Fourth Amendment.[185]

One might think that Torres's claim would succeed due to the lack of justification for the barrage of bullets the officers subjected her to. But this is where the murky waters of seizure law again rear its head, because in order to even get to the question of whether the officers used excessive force, the threshold question of whether Torres was "seized" had to be answered. The officer's actions may have been unreasonable, but if they did not seize Torres, her claim fails. Thus, 250 years after the founding and ratification of the Fourth Amendment, fundamental questions surrounding seizure law remain, including the one at issue in *Torres*: whether the application of physical force is a seizure if the force, despite hitting its target, fails to stop the person.[186] The District Court granted summary judgment to the police officers and the Court of Appeals for the Tenth Circuit affirmed, holding that their actions did not constitute a seizure because "a suspects continued flight after being shot by police negates a Fourth Amendment excessive-force claim."[187] This result is an illustration of how the shortcomings and lack of development of seizure doctrine forecloses avenues for relief. Thankfully, the U.S. Supreme Court broke its centuries-long silence on this issue when it granted certiorari in *Torres* and reversed the rulings of the lower courts.

---

[184] *Id.*
[185] *Id.*
[186] *Id.* at 995.
[187] *Torres v. Madrid*, 769 Fed. Appx. 653, 657 (10th Cir. 2019).

In a 5-3 decision, the Supreme Court in *Torres* held that the application of physical force to the body of a person with intent to restrain is a seizure, even if the person does not submit and is not subdued[188] (Justice Amy Comey Barrett was not yet confirmed at the time of oral argument and took no part in the case). As a result, Torres was seized within the meaning of the Fourth Amendment and could proceed with her §1983 claim against the officers who shot her. This is an extremely important decision in the development of seizure doctrine, and one that will have an impact on a police officer's decision to use deadly or unreasonable force in the future.

As usual, the Supreme Court framed their analysis of the seizure question in *Torres* around founding-era and common law understandings of what constitutes a seizure.[189] In its analysis, the court found and cited ample evidence from the common law that a "seizure" or arrest can be accomplished by merely touching the subject. For example, the decision, authored by Chief Justice Roberts, states that "[t]he common law rule…that the application of force gives rise to an arrest, even if the officer does not secure control over the arrestee—achieved recognition to such an extent that English lawyers could confidently and accurately proclaim that "all the authorities, from the earliest time to the present, establish that a corporal touch is sufficient to constitute an arrest, even though the defendant do not submit.""[190] The majority goes on to find that America has adopted this "mere-touch" rule since the founding era, and that "the slightest application of force could satisfy this rule."[191] The dissenting opinion, authored by Justice Neil Gorsuch, reads these old English and American cases to mean that there must be a

[188] *Torres*, 141 S. Ct. 989 at 994.
[189] *Id.* at 995.
[190] *Id.* at 996 (quoting *Nicholl v. Darley*, 2 Y. & J. 399, 400, 148 Eng. Rep. 974 (Exch. 1828).
[191] *Id.*

literal "laying in of hands on the suspect" to constitute a seizure, and since the officers in *Torres* used a gun to shoot bullets from a distance as opposed to actually touching Torres with their hands, there was no seizure.[192] The majority disagreed, stating that "we see no basis for drawing an artificial line between grasping with a hand and other means of applying physical force to effect an arrest."[193]

The *Torres* majority also reached its conclusion by deferring to Antonin Scalia's majority opinion in *California v. Hodari D*[194], which synthesized a variety of old English and common law cases and concluded that "the mere grasping or application of physical force with lawful authority" is an arrest/seizure under the common law, "whether or not it succeeded in subduing the arrestee."[195] Scalia found this proposition to be consistent with the Framer's intentions when they wrote the Fourth Amendment, and the *Torres* majority agreed: "At the end of the day, we simply agree with the analysis of the common law of arrest and its relation to the Fourth Amendment set forth thirty years ago by Justice Scalia, joined by six of his colleagues, rather than the competing view urged by the dissent today."[196] Without these remarks from Scalia in *Hodari*, it's not clear that *Torres* would be decided the way it was.

B. Likelihood of Supreme Court to Reconsider Seizure Doctrine in Light of Race and other Demography

Torres suggests that movement on seizure doctrine is possible, but movement in light of known disparities on the basis of race is highly unlikely. This is because *Torres* represents a

[192] *Id.* at 1013 (Gorsuch, J. dissenting).
[193] *Id.* at 997.
[194] 499 U.S. 621 (1991). (*Hodari* is notorious for solidifying and upholding the two main pathways to a Fourth Amendment seizure: physical force or submission to show of authority).
[195] *Id.* at 624.
[196] *Torres,* 141 S. Ct. 989, 1003.

continuation of the Court's commitment to keeping the Fourth Amendment as objective as possible, and the more objective the analysis, the less likely race can be considered as a factor when reviewing the actions of both officer and defendant. The *Torres* Court is clear on its commitment to objectivity, averring that "we rarely probe the subjective motivations of police officers in the Fourth Amendment context…nor does the seizure depend on the subjective perceptions of the seized person."[197] So, while the Court will now find a seizure where a fleeing suspect is shot by police, there will be no analysis or recognition of race as a possible motivation for the officer's decision to shoot or the suspect's decision to flee.

While the Court decides every seizure case as though all races are treated the same by police, the facts tell a different story. In reality, Black individuals are much more likely to be killed while interacting with police than white people. According to a recent study, victims of fatal police shootings that identify as Black, Indigenous, or People of Color (BIPOC), whether armed or unarmed, had significantly higher death rates compared with whites.[198] Among the unarmed victims, Black people were killed at three times the rate of white people.[199] These numbers remained unchanged from 2015 to 2020.[200] Dowin Boatright, one of the authors of the study and an assistant professor of emergency medicine at Yale University, characterized this as a "public health emergency," and stressed the importance of treating it as such.[201] Another study found that the lifetime risk of being killed by police use of force was greatest among Black men,

[197] *Id*. at 998.
[198] Elle Lett, Emmanuelle Ngozi Asabor, Theodore Corbin and Dowin Boatright, *Racial Inequity in Fatal US Police Shootings, 2015-2020*, Journal of Epidemiology & Community Health, (Oct. 27, 2020). https://jech.bmj.com/content/75/4/394.
[199] *Id*.
[200] *Id*.
[201] Brita Belli, *Racial Disparity in Police Shootings unchanged over 5 Years*, YALE NEWS, (Oct. 27, 2020). https://news.yale.edu/2020/10/27/racial-disparity-police-shootings-unchanged-over-5-years.

who are about 2.5 times more likely to be killed by police than white men.[202] Black women are about 1.4 times more likely to be killed by police than white women.[203] The study also found that about 1 in 1,000 Black men and boys will be killed by police.[204] Whether the Supreme Court wants to recognize it or not, these statistics show that police officers are more likely to fire their weapons when interacting with Black people than white people, and that Black people should have more cause for concern than white people when stopped by police. But by keeping seizure doctrine objective, the Court ignores these realities and perpetuates a fantasy where all races receive equal treatment by police and are expected to act as such.

Despite its adherence to excluding race and other demography from the Fourth Amendment, the Supreme Court has been willing to consider certain demographics in some Fifth Amendment Contexts. For example, in *J.D.B v. North Carolina*,[205] the Supreme Court held that when a court is tasked with determining whether a juvenile suspect was in custody at the time they were questioned, that court must take the juvenile suspect's age into consideration.[206] Usually, the custody test for Fifth Amendment *Miranda* purposes mirrors the purely objective reasonable person test employed for seizure in the Fourth Amendment context. That is, a person is in "custody" when a reasonable person in the suspect's position would not feel free to terminate the conversation with police and leave.[207] But in *J.D.B.*, the Court found this inherently unfair as applied to juveniles they differ from adults in their mental and emotional processes: "to ignore the very real differences between children and adults would be to deny the full scope of

[202] Frank Edwards, Hedwig Lee and Michael Esposito, *Risk of Being Killed by Police Use of Force in the United States by Age, Race-Ethnicity, and Sex*, Proceedings of the National Academy of Sciences of the United States of America, (August 20, 2019), https://www.pnas.org/content/116/34/16793.
[203] *Id.*
[204] *Id.*
[205] 564 U.S. 261 (2011).
[206] *Id.* at 281.
[207] *Id.* at 270 (quoting *Thompson v. Keohane*, 516 U.S. 99, 112 (1995)).

the procedural safeguards that *Miranda* guarantees."[208] The Court also pointed to studies showing that the risk of involuntary confessions is higher among juveniles.[209] The present-day Supreme Court should take a page out of the *J.D.B.* Court's playbook and apply similar reasoning to minority communities in the seizure context. The fact that juveniles don't yet have the mental facilities to process interactions with police in the same way reasonable adults do can be compared to the fact that the Black community is targeted and killed by police at a disproportionately higher rate than whites. Both amount to important differences in the way a specific group handles interactions with police, and both—not just age—should be considered to afford the Black community the procedural safeguards of the Fourth Amendment.

C. Options Without Supreme Court Intervention

In the likely event that the Supreme Court does not update the law to better reflect the difference in experiences that minority communities have with law enforcement, there are still ways to address and alleviate the issue. Many of these involve States directly limiting the police practices that have been deemed constitutional by the Supreme Court. Some states have already enacted police reform in the wake of the murder of George Floyd, doing for themselves what the Supreme Court will not do on a Federal level. Sixteen States have restricted neck restraints, five States have restricted no-knock warrants, ten States have mandated that all police officers wear body cameras or provide funding for body cameras, and four States have put limitations on officer immunity.[210]

---

[208] *J.D.B.*, 564 U.S. 261, 281.
[209] *Id.* at 261.
[210] Steve Eder, Michael H. Keller and Blacki Migliozzi, *As New Police Reform Laws Sweep Across the U.S., Some Ask: Are They Enough?*, THE NEW YORK TIMES, (April 18, 2021), https://www.nytimes.com/2021/04/18/us/police-reform-bills.html?action=click&module=Spotlight&pgtype=Homepage.

On a Federal Level, democrats in the House of Representatives took advantage of their majority in March 2021 to pass what has been called "the most significant federal intervention into law enforcement in years."[211] The legislation would accomplish many of the above goals of some States who have decided to place limitations and restrictions on certain excessive law enforcement techniques. Namely, restricting qualified immunity to make it easier to prosecute police for misconduct, restrictions on the use of deadly force that is used frequently and disproportionately on Black people, and banning chokeholds like the one that resulted in the death of Elijah McClain.[212] The bill only narrowly passed in the House by only eight votes, and only one republican voted for it.[213] The republican party has made opposition to the bill one of their primary positions, and both minority leaders of the House and Senate, Kevin McCarthy and Mitch McConnell have spoken out against the bill, warning their party that its passage would lead to "defunding the police."[214] Still, because of this intense and passionate republican pushback, the bill is not likely to become law.[215]

One of the best ways to combat the police's predilection for targeting the Black community is to reduce the overwhelming number of laws that enable them to stop civilians in the first place. As *Whren* held, police perform a pretextual stop on a vehicle for any traffic violation, no matter how minor the offense. Another Supreme Court case, *Atwater v. City of Lago Vista,* held that police have discretion to arrest drivers for any offense whatsoever.[216] These two cases resulted in a toxic cocktail in which police have

[211] *Id*.
[212] *Id*.
[213] *Id*. (This republican later expressed regret for the vote).
[214] *Id*.
[215] *Id*.
[216] *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001).

full constitutional authority to pretextually stop drivers for a minor traffic violation and then arrest them. They have unsurprisingly used this authority to target minorities. The only way to address this issue without Supreme Court intervention is to change State laws by decriminalizing some of the conduct that Police have taken advantage of to stop and arrest Black people.

States and cities have done just that. For example, the State attorney for the City of Baltimore recently decided to stop prosecuting minor crimes such as drug possession and prostitution.[217] The reason for this, she said, was that "when we criminalize these minor offenses that have nothing to do with public safety, we expose people to needless interaction with law enforcement that, for Black people in this country, can often lead to a death sentence."[218] Baltimore is not the only city making these types of changes. The city of Berkeley, California, in reaction to research that showed Black drivers in the city were about six times more likely to be stopped than white drivers, recently prohibited police officers from pulling over drivers for minor offenses such as not wearing a seatbelt, misuse of high beam headlights, and expired registrations.[219] In another example, a recent Virginia law limited the minor traffic violations for which officers can stop vehicles. It also prohibited police from searching stopped cars simply because they smell marijuana.[220]

The decriminalization or legalization of marijuana can also be an effective method of reducing the disproportionate number of Black individuals arrested and

[217] Steve Eder, Michael H. Keller and Blacki Migliozzi, *As New Police Reform Laws Sweep Across the U.S., Some Ask: Are They Enough?*, *supra*, note 208.
[218] *Id*.
[219] *Id*.
[220] *Id*.

imprisoned. According to data reported by the ACLU, white and Black people use marijuana about the same, but are not arrested at the same rates. In fact, the data reveals that Black people have been nearly four times more likely than whites to be arrested for possession of marijuana.[221] In some States like Iowa, Minnesota, and Illinois, this number is closer to eight times more likely.[222] Even though marijuana is still illegal at the Federal level, many states have taken steps to combat the over-prosecution and high arrest rates for possession of marijuana by decriminalizing or legalizing it. As of April 2021, marijuana is legal in 17 states and Washington, D.C.[223] Another 13 states have decriminalized it.[224] Early data of stop rates in these states are promising. For example, after legalizing marijuana, Washington and Colorado saw dramatic drops in search rates, not just for Black drivers but for all drivers overall.[225] Hopefully, the recent trend of legalizing or decriminalizing marijuana at the State level, along with the implementation of laws that restrict the ability of police to search vehicles simply because they claim to smell marijuana, will result in less arrest rates and less opportunities for the police to harass minority communities.

CONCLUSION

The Supreme Court needs a wake-up call. In the same way that it has periodically adapted the Fourth Amendment to account for new realities in the realm of technology in search law, it must do the same to account for new realities in the realm of race in seizure

[221] *Marijuana Arrests by the Numbers*, Am. Civ. Liberties Union, https://www.aclu.org/gallery/marijuana-arrests-numbers.
[222] *Id*.
[223] *Map of Marijuana Legality by State*, Defense Information Systems Agency, (April 2021), https://disa.com/map-of-marijuana-legality-by-state.
[224] *Id*.
[225] *Findings*: *The Results of our Nationwide Analysis of Traffic Stops and Searches,* Stanford Open Policing Project, https://openpolicing.stanford.edu/findings/.

law. Statistics showing the disparate treatment, harassment, targeting, and unjustified killing of racial minorities, coupled with current events causing the U.S. to rethink the legality of police practices that lead to these statistics, should serve as the information the Court needs to make a change. Seizure doctrine has strayed away from what the Founders intended when they wrote the Fourth Amendment. The reasonable suspicion and reasonable person tests are inherently unreasonable. How many more minorities must unnecessarily die at the hands of police before the Supreme Court decides to do something about it?