

SEIZING § 1983 AFTER YOUR PROTEST TODAY:
FOURTH AMENDMENT AND PROTEST POLICING POST-
TORRES[†]

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INTRODUCTION

On June 1, 2020, a group of demonstrators gathered in Lafayette Square in Washington D.C., right outside of the White House, to protest the brutal killings of George Floyd, Breonna Taylor, and numerous others throughout the United States.¹ At approximately 6:30 pm, law enforcement officials started firing tear gas and other projectiles into the crowd.² Soon after, then-President Donald Trump reportedly “strolled out of the White House gates . . . and walked across the park that had just been cleared to accommodate his movements.”³ Black Lives Matters D.C. and other protestors who were present filed a lawsuit several days later,⁴ arguing that federal, state, and D.C. law enforcement officials’ action “to clear the area to permit the President to walk to a photo opportunity at a nearby church”⁵ violated their constitutional rights. They alleged, among

[†] This article is humbly dedicated to all my friends in the United States and in Hong Kong who have been the subject of police brutality in protests. Credit is owed to Kelsi Brown Corkran for her incisive insight and advice, and to April Rose Knight, Hannah Nguyen, and Sephora Grey for their assistance and comments.

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1. Complaint at 3, *Black Lives Matter D.C. v. Trump*, 544 F. Supp. 3d 15 (D.D.C. 2021) (No. 20-cv-1469).

2. *Id.* at 13; see also Tom Gjelten, *Peaceful Protesters Tear-Gassed To Clear Way For Trump Church Photo-Op*, NPR (June 1, 2020), <https://www.npr.org/2020/06/01/867532070/trumps-unannounced-church-visit-angers-church-officials> (“The plaza between St. John’s Church and Lafayette Park was full of people nonviolently protesting police brutality late Monday afternoon when U.S. Park Police and National Guard troops, with the use of tear gas, suddenly started pushing them away for no apparent reason.”); Jill Colvin & Darlene Superville, *Tear gas, threats for protesters before Trump visits church*, AP NEWS (June 2, 2020), <https://apnews.com/article/donald-trump-ap-top-news-dc-wire-religion-politics-15be4e293cdebe72c10304fe0ec668e4>. (“[L]aw enforcement officers were aggressively forcing the protesters back, firing tear gas and deploying flash bangs into the crowd to disperse them from the park for seemingly no reason.”).

3. Colvin & Superville, *supra* note 2.

4. Complaint at 6, 29, *Black Lives Matter D.C. v. Trump*, 544 F. Supp. 3d 15 (D.D.C. 2021) (No. 20-cv-1469).

5. *Id.* at 4.

other things, a claim of Fourth Amendment unreasonable seizure.⁶ In an order on consolidated motions to dismiss, the United States District Court for the District of Columbia dismissed plaintiffs’ Fourth Amendment claim for a reason that perhaps surprises few lawyers but might surprise many non-lawyers—there was no Fourth Amendment *seizure* at Lafayette Square because “the officers attacked and improperly *dispersed* the protesters . . . they did not restrain them or attempt to seize them in place.”⁷ As Karen Pita Loor lamented just a month before the Lafayette Square protest, “the Fourth Amendment fails to provide protection in the emblematic protest scenario, in which law enforcement employs brutal and often militaristic force to disperse protesters.”⁸

This “legal black hole [that] the [Supreme] Court’s seizure jurisprudence has created for protest police”⁹ is not new.¹⁰ Still, it probably remains shocking to non-lawyers (and the non-lawyer instincts of lawyers) that the constitutional provision which supposedly prohibits excessive force by the police would cease to apply depending on whether a person is so wounded that they cannot leave, or so wounded that they cannot stay.¹¹ Watching the Supreme Court in *Torres v. Madrid*¹² grapple with centuries-old common law and English cases to resolve the question of Fourth Amendment seizure,¹³ scholars have sought to remind the Court to return their attention to police violence itself.¹⁴

6. *Id.* at 26.

7. *Black Lives Matter D.C. v. Trump*, 544 F. Supp. 3d 15, 48 (D.D.C. 2021).

8. Karen J. Pita Loor, *Tear Gas + Water Hoses + Dispersal Orders: The Fourth Amendment Endorses Brutality in Protest Policing*, 100 B.U. L. REV. 817, 847 (2020) [hereinafter *Tear Gas*].

9. See Shawn E. Fields, *Protest Policing and the Fourth Amendment*, 55 U.C. DAVIS L. REV. 347, 364 (2021) [hereinafter *Protest Policing*].

10. The courts and academics have grappled with this problem for about 20 years, see, e.g., Renée Paradis, *Carpe Demonstratores: Towards A Bright-Line Rule Governing Seizure in Excessive Force Claims Brought By Demonstrators*, 103 COLUM. L. REV. 316, 334–340 (2003) (discussing the application of the Fourth Amendment seizure jurisprudence to protests) [hereinafter *Carpe Demonstratores*].

11. *Protest Policing*, *supra* note 9, at 362 (“While seemingly unrelated to mass protests, these cases rely on the same basic principle: that an officer’s use of force or show of authority to make someone go away does not constitute a seizure. In ‘large-scale public street demonstrations . . . police intent in using force is to clear the streets quickly by making demonstrators leave, rather than to detain and arrest them.’”).

12. 141 S. Ct. 989 (2021).

13. *Id.* at 995–99.

14. David H. Gans, “*We Do Not Want To Be Hunted*”: *The Right To Be Secure and Our Constitutional Story of Race and Policing*, 11 COLUM. J. RACE & L. 239, 309–10 n.305 (2021) (“*Torres* would be an easier case had the Court considered that ending unjustified police violence lies at the core of the Fourteenth Amendment’s protections [applying the Fourth Amendment]. . . . [L]imits on police violence are deeply rooted in the Constitution’s text and history[.]”).

Various scholars persuasively suggested more sensible Fourth Amendment doctrines of seizure that the Court should adopt.¹⁵ Perhaps it is unreasonable to expect any such changes to the Fourth Amendment jurisprudence in the near future. Focusing on the present, however, *Torres* seems to have clarified the landscape of Fourth Amendment seizure jurisprudence a bit—establishing the “mere-touch rule” for “seizures by force,”¹⁶ distinguishing “seizures by force” from “seizures by control,”¹⁷ etc. With *Torres*, it seems possible to more closely scrutinize what exactly is left in the “legal black hole”¹⁸ that is protest policing. As Allegra McLeod once noted so astutely to her students, “it is one thing to think that doctrines for constitutional rights are too narrow, it is another to blind oneself of the narrow space that still exists.”¹⁹

Instead of proposing visions of more sensible Fourth Amendment doctrines like the recent scholarship after *Torres* has done,²⁰ this Essay is more focused on existing room for litigation. It is devoted to examining the space of the Fourth Amendment that can be seized in the context of protest policing post-*Torres*, by suggesting (relatively) novel arguments regarding protest policing conduct that fall under the three types of seizure laid out in *Torres*. Part I of this Essay discusses the impact of *Torres* on

15. Shawn Fields, for example, proposed “a ‘restraint on liberty’ theory of Fourth Amendment seizure . . . [which] posits that any intentional restriction on an individual’s freedom of movement constitutes a seizure, whether the restriction infringes the freedom to go or the freedom to stay.” *Protest Policing*, *supra* note 9, at 353–54. Fields argues that this theory “accords with the underlying purpose of the Fourth Amendment and better reflects the practical reality of modern-day policing, including protest policing[.]” *Id.* at 353. Renée Paradis, much earlier in the scholarship discussing protest policing, suggested an even more direct theory: “to find that a constructive seizure occurs any time an officer uses force against a citizen.” *Carpe Demonstratores*, *supra* note 10, at 342. Under this theory, demonstrators “whom the bullets miss, or past whom the gas wafts” would be constructively seized because they were targeted by the police. *Id.* at 343.

16. *Torres*, 141 S. Ct. at 998, 1001.

17. *Id.* at 1001.

18. *Protest Policing*, *supra* note 9, at 364.

19. Personal conversation (paraphrasing).

20. See, e.g., Cynthia Lee, *Officer-Created Jeopardy: Broadening the Time Frame for Assessing A Police Officer’s Use of Deadly Force*, 89 GEO. WASH. L. REV. 1362, 1368 (2021) (“[T]he trier of fact in a state criminal prosecution should be permitted to broaden the time frame and consider conduct of the officer that increased the risk of a deadly confrontation as opposed to focusing narrowly on what the officer knew or believed at the moment the officer used deadly force.”); Laurent Sacharoff, *Torres and the Limits of Originalism*, 19 OHIO ST. J. CRIM. L. 201, 203 (“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.”); *Protest Policing*, *supra* note 9, at 353 (“[T]his Article articulates a ‘restraint on liberty’ theory of Fourth Amendment seizure that accords with the underlying purpose of the Fourth Amendment and better reflects the practical reality of modern-day policing, including protest policing.”).

Fourth Amendment seizure jurisprudence. Part II examines some sample categories of protest policing conduct and the (relatively) novel arguments that they remain reasonably (or even squarely) within the current seizure jurisprudence—under seizures by *force*, voluntary submission to show of authority (seizures by *control*), and termination of movement by means intentionally applied (seizures by *control*). Part III then concludes by summarizing alternative routes (e.g., Fourteenth Amendment substantive due process) should these seizure arguments fail, and some further barriers to proceeding (e.g., qualified immunity) should these seizure arguments succeed.

I. TORRES AND THE SEIZURE JURISPRUDENCE

Roxanne Torres was startled by police officers Madrid and Williamson when they tried to open the door to her car, believing the officers to be carjackers with guns.²¹ As she drove away in panic, the two officers fired thirteen shots at Torres, hitting her in her back and left arm.²² The question presented to the Supreme Court in her § 1983 case was “whether a seizure occurs when an officer shoots someone who temporarily eludes capture after the shooting,” which the court answered in the affirmative: “[t]he application of physical force to the body of a person with intent to restrain is a seizure, even if the force does not succeed in subduing the person.”²³

The case *California v. Hodari D.*²⁴ serves as an important background for *Torres*. The *Hodari D.* court noted, in language some view as dicta,²⁵ that “the mere grasping or application of physical force with lawful authority, whether or not it succeeded in subduing the arrestee, was sufficient [to constitute seizure of the person].”²⁶ *Hodari D.* also divided seizure of the person into two categories: “either physical force . . . or, where that is absent, *submission* to the assertion of authority.”²⁷

Torres solidified the mere-touch rule of seizure, and further divided seizure of the person into three categories. “Seizures by control” are distinguished from “seizures by force,” while the former “involves either voluntary submission to a show of authority or the termination of freedom of movement.”²⁸ The three *Torres* categories of seizure are thus

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

22. *Id.*

23. *Id.* at 993–94.

24. 499 U.S. 621 (1991).

25. *Torres*, 141 S. Ct. at 995 (“We need not decide whether *Hodari D.*, which principally concerned a show of authority, controls the outcome of this case as a matter of *stare decisis*, because we independently reach the same conclusions.”).

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

27. *Id.* at 626.

28. *Torres*, 141 S. Ct. at 1001 (emphasis added).

as follows: voluntary submission to show of authority, termination of movement by means intentionally applied, and seizures by force.

Before *Torres*, there remained some uncertainty about *Hodari D.*'s comment on police's application of physical force. First, commentators have long noted the potential breadth of *Hodari D.*'s suggestion of mere-touch seizure, including in the context of protests.²⁹ Second, it was unclear how exactly *Hodari D.* interacts with precedents like *Brower v. County of Inyo*,³⁰ which held that there is seizure "only when there is a governmental termination of freedom of movement *through means intentionally applied*."³¹ *Hodari D.* mentioned *Brower* in the context of show of authority without addressing the physical aspect of seizure, potentially raising the question of whether *Hodari D.* implicitly limited *Brower* by finding seizure in "the mere grasping or application of physical force with lawful authority."³²

For better or worse, *Torres* quite definitively clarified both issues and put these ambitious ideas to rest. On the first issue, the Court made clear that the mere-touch rule "does not transform every physical contact between a government employee and a member of the public into a Fourth Amendment seizure [which] requires the use of force *with intent to restrain*"³³; but it also held that "the appropriate inquiry is whether the challenged conduct *objectively* manifests an intent to restrain."³⁴ On the second issue, the Court dispelled any remaining suspicion that the requirement of intent in *Brower* is in any way limited, but did so by holding that "seizures by *control* [represented by *Brower*] and seizures by *force* [represented by *Torres*] [each] enjoy[] a separate common law pedigree that gives rise to a separate rule."³⁵ As Part II argues,³⁶ these two principles laid down in *Torres*—that (1) intent to restrain is determined objectively regardless of the officers' actual subjective intent and (2) seizures by control and seizures by force are doctrinally separate—leave some narrow room for protestors to challenge certain conduct of protest policing through 42 U.S.C. § 1983.³⁷

29. *Carpe Demonstratores*, *supra* note 10, at 339 ("If *Hodari D.* is taken at its word, it seems likely that demonstrators who were directly touched by rubber bullets and chemical irritants were seized by that use of force.")

30. 489 U.S. 593 (1989).

31. *Id.* at 597.

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

33. *Torres*, 141 S. Ct. at 998.

34. *Id.*

35. *Id.* at 1001.

36. *See infra* Part II.B and C.

37. *See* 42 U.S.C. § 1983 (providing a cause of action for deprivation of constitutional rights by state actors).

II. SAMPLE CATEGORIES OF SEIZURE BY FORCE AND SEIZURE BY CONTROL IN PROTEST POLICING

The courts do not always opine on the question of whether an act of police violence constitutes a seizure. On the exact same day Black Lives Matter D.C.’s complaint was filed, protestors in Denver who had gone to the streets in the wake of George Floyd’s killing also filed a complaint seeking a temporary injunction against the City and County of Denver.³⁸ The court quickly granted a temporary injunction without technical commentaries on whether seizure occurred:

Named plaintiffs were attacked with rubber bullets, tear gas, etc[.], . . . plaintiffs allege that officers specifically aimed at heads and groins, causing broken facial bones and ruptured testicles There may later be questions of qualified immunity to grapple with, but plaintiffs have established a strong likelihood that defendant engaged in excessive force contrary to the Fourth Amendment.³⁹

The plaintiffs in the Denver case might have pleaded the arguments well, such that the court found it unnecessary to address the issue of seizure; though even if the defendants had an argument that there was no seizure, they likely did not have a chance to challenge the issue of seizure given the rapid turnaround of the temporary injunction.⁴⁰ In some other cases, defendants might not hinge their argument on whether there was seizure, given the availability of other barriers to plaintiffs such as qualified immunity.⁴¹ In any case, protestors bringing civil rights lawsuits should make sure that they are stating valid legal claims, rather than betting on the court and defendants to not address the issue of seizure.

This Part explores sample categories of protest policing conduct that remain reasonably, or even squarely, within the current seizure jurisprudence, under the three *Torres* umbrellas of seizure: (A) voluntary submission to show of authority, (B) termination of movement by means intentionally applied, and (C) seizures by force.

38. See *Abay v. City of Denver*, 445 F. Supp. 3d 1286, 1290 (D. Colo. 2020) (“Plaintiffs filed a complaint in Denver District Court on June 4, 2020.”).

39. *Abay*, 445 F. Supp. 3d at 1292.

40. *Id.* at 1296 (issuing the temporary restraining order on June 5, 2020 while plaintiff filed a complaint on June 4, 2020).

41. See, e.g., *Tear Gas*, *supra* note 8, at 840 (“A court could just assume that the police conduct implicates the Fourth Amendment [as] in *Lamb v. City of Decatur*, where police used pepper spray against a group of protesters. However, it is unclear from the opinion whether the defendants made the argument that there was no seizure.”); see also *Lamb v. City of Decatur*, 947 F. Supp. 1261, 1264 (C.D. Ill. 1996) (addressing qualified immunity first and foremost, without addressing the issue of seizure).

Two notes should be made before diving into the doctrinal exploration. On the one hand, this Essay is not intended to address formal arrests that transpire during a protest. If an officer, like they normally would outside of the context of protest, “rolled [a protestor] over on the sidewalk and cuffed his hands tightly behind his back . . . lifted [him] up from behind, carried him over to [a] car . . . [then] grabbed [him] and threw him headfirst into the police car[.]”⁴² no disagreement should arise that the protestor has been seized. On the other hand, the following discussion of the Fourth Amendment seizure, though going beyond formal arrests, will be narrow and might not cover most of the conduct complained of by the D.C. protestors. As Part III explains, Fourteenth Amendment substantive due process should be pleaded as the (perhaps ineffective) catchall alternative. The point of this Essay, in sum, is to seize the Fourth Amendment space left applicable to conducts of protest policing beyond arrests.

A. VOLUNTARY SUBMISSION TO A SHOW OF AUTHORITY

A quintessential scenario that would fall under the umbrella of “voluntary submission to a show of authority”⁴³ is if the officer in *Hodari D.* shouted “stop, in the name of the law!” and the civilian stopped in compliance.⁴⁴ Applied to the context of protests, it is perhaps difficult to imagine cases where a protestor submits voluntarily in a circumstance that is not a formal arrest. More importantly, it might be difficult to imagine that an injury would be sustained after voluntary submission. But close scrutiny of the exact *Hodari D.* test reveals some plausible arguments.

One potential argument under this category is if a show of authority is established through force, upon which a protestor ceased movement. *Nelson v. City of Davis*,⁴⁵ which involved officers dispersing students attending an outdoor party, might be read as falling under this umbrella. Professor Shawn Fields argued that *Nelson* represents a holding by the Ninth Circuit that a student shot by pepper balls in the eye “submitted to the officers' show of authority when he dropped to the ground, remained there for fifteen minutes, and then was driven to the hospital.”⁴⁶ It might help to be more precise here: the Ninth Circuit held that the student was “an object of intentional governmental force and his freedom of movement was limited as a result,”⁴⁷ and was therefore seized

42. *Graham v. Connor*, 490 U.S. 386, 389 (1989).

43. *Torres v. Madrid*, 141 S. Ct. 989, 1001 (2021).

44. *California v. Hodari D.*, 499 U.S. 621, 626 (1991).

45. 685 F.3d 867 (9th Cir. 2012).

46. *Protest Policing*, *supra* note 9, at 365.

47. *Nelson*, 685 F.3d at 876

under the doctrine of *Brower* (discussed in Part II.B *infra*) “[e]ven in the absence of [the student]’s submission.”⁴⁸

To say that the Court likely did not decide the case under the umbrella of “voluntary submission” is, of course, not to say it is not a viable argument to make, but there might be some doctrinal difficulties to overcome. The “show of authority” part of “voluntary submission to a show of authority” is, per *Hodari D.*, determined by the test formulated in the *United States v. Mendenhall* plurality opinion,⁴⁹ and is a necessary part of seizure under this umbrella⁵⁰—whether “in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.”⁵¹ *Mendenhall* itself involved an officer asking whether the defendant would be willing to cooperate, which the plurality rejected as seizure by applying the test.⁵² This objective test for show of authority, combined with the submission of the protestor, constitutes a seizure under *Hodari D.*⁵³ If the pepper ball bullet suffices as a show of authority, then the student protestor likely submitted to authority by ceasing movement. But the challenge lies with establishing that the bullet *per se* sends a message that the students are not “free to leave,” especially if other students are dispersing without police resistance. *Torres* creates an opportunity to argue this case under the doctrine of seizure by force instead, discussed in Part II.C *infra*, not least because of the factual resemblance between *Nelson* and *Torres*.

A more fruitful example of voluntary submission to a show of authority might be if a protestor is trapped by tear gas in a building or some part of a road and ceases movement. Imagine a protestor facing tear gas emanating from one end of a street, turning around only to find tear gas on the other end, with no other escape; or a protestor stuck in an enclosed area where the only exit is blocked by tear gas. This is not a mere imagined scenario: on June 1 in Philadelphia, the same day D.C. protestors were teargassed out of Lafayette Square, Philadelphia police fired teargas canisters toward protestors stuck in a half-fenced area, blocking the police stationed at the unfenced side, directing people into the crowd trapped by tear gas and shooting projectiles into the crowd.⁵⁴

48. *Id.* at 875–76 & n.4.

49. 446 U.S. 544 (1980) (plurality opinion); see *Hodari D.*, 499 U.S. at 628.

50. *Hodari D.*, 499 U.S. at 628 (“[The *Mendenhall* test] says that a person has been seized ‘only if,’ not that he has been seized ‘whenever’ [the test is satisfied]; it states a *necessary*, but not a *sufficient*, condition for seizure.”).

51. *Mendenhall*, 446 U.S. at 554.

52. *Id.* at 555.

53. See *Hodari D.*, 499 U.S. at 628 (“We did not address . . . the question whether, if the *Mendenhall* test was met . . . a Fourth Amendment seizure would have occurred.”); *id.* at 626 (“An arrest requires *either* physical force . . . *or*, where that is absent, *submission* to the assertion of authority.”).

54. *Id.* (describing at 6:54 of the video police directing people into the crowd being

In that case, unlike a mere pepper ball bullet, there is a stronger argument to be made that under the *Mendenhall* test, a reasonable person would not have believed they were free to leave in light of the tear gas and the enclosed environment, the circumstances thus constituting a show of authority. If the protestor ceased movement, then it is also a colorable argument that they submitted to the show of authority. They could hence claim damages for, say, injuries to their respiratory system caused by the tear gas or projectiles under the claim of Fourth Amendment unreasonable seizure.⁵⁵ Granted, this argument is not the kind of examples that Justice Stewart envisioned when formulating the *Mendenhall* test like the “threatening presence of several officers,”⁵⁶ but to argue that the “threatening presence” of tear gas constitutes show of authority is far from an unreasonable application of the test.

B. TERMINATION OF FREEDOM OF MOVEMENT THROUGH MEANS INTENTIONALLY APPLIED

The facts of *Brower* itself constitute the quintessential example of seizure under this umbrella. William James Caldwell (*Brower*) was driving at high speeds while police pursued him. He crashed fatally into a tractor-trailer which the police placed deliberately in his path, and which was concealed behind a curved road. A police car headlight was also positioned to blind him on his approach.⁵⁷ The Court held that termination of freedom of movement is *per se* insufficient to constitute seizure; if, for example, *Brower* was stopped only due to “loss of control of his vehicle” upon being startled by police flashing lights, then there would not have been a seizure.⁵⁸ Seizure can be found only when there is “a governmental termination of freedom of movement *through means intentionally applied*.”⁵⁹ Because the police intentionally “sought to stop *Brower* by means of a roadblock and succeeded in doing so,”⁶⁰ the Court held that there was seizure in this case.

Nelson shows one possibility of applying *Brower*: when a protestor ceases movement after an application of force. The Ninth Circuit reasoned

teargassed and at 7:37 of the video a protestor recounting their experience being shot while in the crowd).

55. Provided, of course, that they prove unreasonableness of the seizure. *See infra* Part III.

56. *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (plurality opinion) (listing examples including “threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer’s request might be compelled”).

57. *Brower v. Cnty. of Inyo*, 489 U.S. 593, 594 (1989).

58. *Id.* at 597.

59. *Id.*

60. *Id.* at 599.

that because the student “was hit in the eye by a projectile filled with pepper spray and, after being struck, was rendered immobile,”⁶¹ his freedom was limited by governmental force intentionally applied.⁶² This would be an important line of argument in the context of protests, given the more sophisticated crowd control technologies noted by scholars: tear gas,⁶³ water hoses,⁶⁴ long-range acoustic devices (LRADs),⁶⁵ etc. If a person rendered immobile after being struck by a physical projectile was seized under the Fourth Amendment, then perhaps a protestor who is targeted by LRADs and painfully collapses to cover their eardrum is also seized.⁶⁶ The challenge lies with arguing that immobility after being struck by these crowd control weapons is less analogous to losing control of a vehicle upon hearing police sirens, and more analogous to crashing into police roadblock or being sideswiped by a police car.⁶⁷

Another possibility is to analogize to *Brower* more directly, say if a protestor is moving one direction and is forcefully stopped in their tracks. A protestor, granted, is unlikely to crash into a roadblock like a car⁶⁸; but a protestor could easily be moving in a particular direction, when a police vehicle crashes into them, or water cannon hits them right in the chest, stopping their movement. Again, this is not a mere conjured up example: on May 30, 2020, just two days before the aforementioned incidents in D.C. and Philadelphia, New York City Police Department vehicles were captured on video driving straight towards a group of people protesting police brutality.⁶⁹ In the videos, some people were moving in the direction of the police vehicles as they (slowly) drove into the crowd.⁷⁰ No one was reportedly injured in this incident, but one could easily imagine a more dramatized version where the protestors are running, and the police

61. *Nelson v. City of Davis*, 685 F.3d 867, 875–76 (9th Cir. 2012).

62. Note that this reasoning would hold true even if the student had successfully run away afterwards.

63. *Protest Policing*, *supra* note 9, at 349.

64. *Tear Gas*, *supra* note 8, at 822.

65. *Protest Policing*, *supra* note 9, at 353; *Tear Gas*, *supra* note 8, at 841.

66. The Second Circuit addressed the harm of sound cannons in *Edrei v. Maguire*, though parties there only raised the issue under the Fourteenth Amendment. *See Edrei v. Maguire*, 892 F.3d 525, 543 (2d Cir. 2018) (“Even though sound waves are a novel method for deploying force, the effect of an LRAD’s area denial function is familiar: pain and incapacitation. . . . Using common sense, any reasonable officer with knowledge of the LRAD’s operations would understand that the area denial function represents a ‘significant degree of force.’”).

67. *Brower v. Cnty. of Inyo*, 489 U.S. 593, 597 (1989).

68. If the protestor is driving, then certainly *Brower* would directly apply to establish seizure; whether the reasonableness determination of *Brower* also applies is a separate issue.

69. *See Tara Law, Footage of NYPD Vehicles Surging Into Crowd of Protesters Sparks Further Outrage*, TIME (May 31, 2020), <https://time.com/5845631/nypd-protests-vehicles-protesters/> (linking two videos recording the same incident).

70. *See id.*

vehicle (or water cannon, or some other physical means) collides head on with the protestors, stopping them and even hurling them into the air in the opposite direction. That would look quite like the facts of *Brower* itself, with a difference only in the way the person was moving (which should not matter in determining whether they were seized).

One challenge to this argument comes naturally: if the police were crashing into the crowd intending merely to disperse them rather than to apprehend them, would that distinguish this case from *Brower*? The answer is provided by *Torres*' clean distinction of seizures by force and seizures by control. While *Torres* established that intent to restrain must be proven in seizure by force,⁷¹ the Court's insistence that "each type of seizure enjoys a separate common law pedigree that gives rise to a separate rule"⁷² means that the same requirement of intent need not automatically apply to seizure by control. Just as *Torres* concluded that it would not make sense to apply the requirement of actual control to seizures by force,⁷³ a strong argument can be made that it would not make sense to apply the requirement of intent to restrain to cases like *Brower*, especially if intent to restrain is understood as intent to *apprehend* instead of just an intent to *stop*. It is only the latter that is required for terminating movement through means intentionally applied.

To see why only intent to stop is required for *Brower*, imagine if the police in *Brower* were merely trying to stop him from driving into a certain area; imagine also that *Brower* survived the crash and drove away some seconds later, and the police let him run away. Would that have undermined the fact that the police intentionally applied the tractor-trailer to terminate *Brower*'s movement, at least at the instant of crash? The reasonable answer seems to be no: it remains true that the police "sought to stop *Brower* by means of a roadblock and succeeded in doing so."⁷⁴ As Justice Scalia, the author of *Brower*, noted in *Hodari D.*, "A seizure is a single act, and not a continuous fact."⁷⁵ The instant of crash is the moment *Brower* was seized, even if he later got away and the police only wished to stop him and not to apprehend him. Analogously, applied to the case of protest, the instant where the police vehicle collided head-on into a running protestor is the moment the protestor was seized, even if they later got away and the police only wished at that moment to stop them from running instead of to apprehend them. The protestor could then arguably claim damages under the Fourth Amendment for injuries resulted from the

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

72. *Id.* at 1001.

73. *Id.* ("Under the common law rules of arrest, actual control is a necessary element for [seizure by control]. . . . As common law courts recognized, any such requirement of control would be difficult to apply in cases involving the application of force.")

74. *Brower v. Cnty. of Inyo*, 489 U.S. 593, 599 (1989).

75. *California v. Hodari D.*, 499 U.S. 621, 625 (1991) (quoting *Thompson v. Whitman*, 83 U.S. (18 Wall.) 457, 471 (1874)).

impact.⁷⁶

C. SEIZURE BY FORCE

Arguing for seizure by force in a protest is perhaps the most difficult among the three, because it gets to the bottom of the puzzle—even though physical force is indeed often involved in protests, police officers often intend to *disperse*, not to *restrain*, the latter of which is required by *Torres*.⁷⁷ The potential way out might, ironically, lie in the Court’s holding that “the appropriate inquiry is whether the challenged conduct *objectively* manifests an intent to restrain.”⁷⁸ Behind that ruling is the Court’s primary concern of how the rule impacts police officers: “[o]nly an objective test allows the police to determine in advance whether the conduct contemplated will implicate the Fourth Amendment.”⁷⁹ On the flipside, however, an objective test also leaves open the possibility that police officers can objectively manifest an intent to restrain, even if they subjectively intend to disperse.

The Ninth Circuit, in *Nelson*, forcefully demonstrated the benefit of the objective standard in the context of the *Brower* doctrine:

Whether the officers intended to encourage the [students] to disperse is of no importance when determining whether a seizure occurred. The officers took aim and fired their weapons towards Nelson and his associates. Regardless of their motives, their application of force was a knowing and wilful act that terminated Nelson's freedom of movement.⁸⁰

Similar reasoning applies if *Nelson* is analyzed under *Torres* instead of *Brower*. Like in *Torres* itself, *Nelson* involved the application of force from a distance; “corporal [seizing] or touching the defendant's body can be as readily accomplished by a bullet as by the end of a finger.”⁸¹ The key question, then, is about the intent. If the police’s deliberate use of force incapacitated a protestor in a dispersal such that the protestor is rendered immobile, then the police have objectively manifested an intent to restrain, even if they subjectively intended to disperse. In the words of Justice White in *Tennessee v. Garner*,⁸² “[w]henver an officer restrains the

76. Again, provided that they prove unreasonableness of the seizure. See *infra* Part III.

77. *Torres*, 141 S. Ct. at 998.

78. *Id.*

79. *Id.* (citing *Michigan v. Chesternut*, 486 U.S. 567, 574 (1988)).

80. *Nelson v. City of Davis*, 685 F.3d 867, 877 (9th Cir. 2012).

81. *Torres*, 141 S. Ct. at 998 (citing 3 WILLIAM BLACKSTONE, COMMENTARIES *288) (internal quotations omitted).

82. 471 U.S. 1 (1985).

freedom of a person to walk away, he has seized that person.”⁸³ That language (even if viewed as dicta) rings equally true in cases where the incapacitation is not fatal as in *Garner*, where the officer shot an unarmed juvenile to prevent an escape.⁸⁴ Thus, assuming the plaintiff in *Nelson* was incapacitated by deliberate use of force while the crowd is dispersing, then he should be able to argue that he was seized by force under the *Torres* doctrine.

III. CONCLUSION: ALTERNATIVE ROUTES AND FURTHER BARRIERS

The three categories discussed above are not mutually exclusive. Civil rights lawyers could, and sometimes should, as a matter of strategy, argue all these possible theories of Fourth Amendment seizure regarding a single instance of protest policing. This Essay has used *Nelson* to formulate arguments under all three umbrellas, and some examples listed under one umbrella might well be placed under the others. One might argue, for example, that the Philadelphia police terminated the movement of protestors through means intentionally applied when they shot teargas canisters, hindering the dispersal of protestors.

Fourteenth Amendment substantive due process claims should also be included in § 1983 strategies. Sometimes scholars and lawyers overstate the holding of *Graham v. Connor*⁸⁵—the application of Fourth Amendment in an excessive force seizure case—to their own disadvantage. While *Graham* indeed held that the Fourth Amendment displaced substantive due process in that case, it is (at least theoretically) overbroad to claim, for example, that “*all civilian claims of excessive force* by a law enforcement officer must be analyzed for reasonableness under the Fourth Amendment, not the Due Process Clause.”⁸⁶ What *Graham* actually held was only that “*all claims that law enforcement officers have used excessive force . . . in the course of an arrest, investigatory stop, or other ‘seizure’ of a free citizen* should be analyzed under the Fourth Amendment and its ‘reasonableness’ standard.”⁸⁷ As the Supreme Court later clarified in *County of Sacramento v. Lewis*:⁸⁸

Graham simply requires that if a constitutional claim is covered by a specific constitutional provision . . . the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due

83. *Id.* at 7.

84. *Id.* at 3.

85. 490 U.S. 386 (1989).

86. Lee, *supra* note 20, at 1381 (emphasis added).

87. *Graham*, 490 U.S. at 395 (emphasis added).

88. 523 U.S. 833 (1998).

process. . . . Substantive due process analysis is therefore inappropriate . . . only if respondents' claim is 'covered by' the Fourth Amendment."⁸⁹

In other words, civil rights lawyers could and should also include the Fourteenth Amendment substantive due process claim with their Fourth Amendment unreasonable seizure claim, the former of which automatically “kicks in” to state a claim if all the arguments mentioned in Part II fails.

All this is, of course, not to say there are no further barriers to litigation. The Fourteenth Amendment substantive due process “shock the conscience” standard is notoriously difficult to meet.⁹⁰ Even the Fourth Amendment reasonableness standard is deferential to the police.⁹¹ And on top of everything else, there is also the qualified immunity defense, which might be especially acute if the arguments suggested above are considered novel.⁹²

Brilliant lawyers sometimes manage to overcome all these barriers. Representing Denver Black Lives Matter protesters, civil rights lawyers from ACLU Colorado secured a verdict of \$14 million against the city and county of Denver, almost two years after the fact, just as this Essay is being written.⁹³ Plaintiffs in that case brought such voluminous evidence that, at summary judgment, the city and county of Denver did

89. *Id.* at 843 (internal citation omitted).

90. *See, e.g., Carpe Demonstratores, supra* note 10, at 326–27 (“The difference between these two standards, Fourth Amendment reasonableness and Fourteenth Amendment substantive due process, is considerable, and may end up being dispositive for most plaintiffs. The reasonableness standard is an objective balancing test, measuring the actual need for force against the force used. The conscience-shocking test, by contrast, inquires into the subjective motivation of the official, and only a subjective intent to injure can give rise to liability.”).

91. *See, e.g., Tear Gas, supra* note 8, at 826 (“In *Graham*, the Court defined the ‘calculus of reasonableness’ in a manner that immunizes aggressive police misconduct post-*Graham* and provides excessive deference to law enforcement, who the Court bemoaned are ‘often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving.’ The application of this version of reasonableness to post-*Graham* excessive-force cases has left civilians with no recourse against violent police conduct and arguably has allowed police to get away with murder.”).

92. *See, e.g.,* Shawn E. Fields, *Weaponized Racial Fear*, 93 TUL. L. REV. 931, 982 (2019) (“[E]ven when courts find that officers violated the ‘objective reasonableness’ test under *Graham* by using excessive force, they still shield officers from liability if the officer reasonably believed that no ‘clearly established’ right existed at the time. . . . As a result of this multilayered system of protection for police abuse, qualified immunity has moved closer to a system of absolute immunity for most defendants, resulting in a finding of liability for only the most extreme and most shocking misuses of police power.” (internal quotations omitted)).

93. Sophie Kasakove, *Colorado Jury Awards \$14 Million to Demonstrators Injured in George Floyd Protests*, N.Y. TIMES (Mar. 26, 2022), <https://www.nytimes.com/2022/03/26/us/denver-george-floyd-protests-ruling.html>.

not dispute the Fourth Amendment claim itself, only whether they should be held liable for individual officers' excessive force.⁹⁴ These legendary tales of success aside, formidable barriers remain standing. This Essay professes no solution to these barriers. It is only hoped that the above discussion at least gives protestors and civil rights lawyers some optimism, and that it provides the basis of a successful § 1983 lawsuit when the stars align under astronomical odds.

94. *Epps v. Denver*, No. 20-cv-1878, 2022 WL 605739, at *6 (D. Colo. Mar. 1, 2022) (“Defendants do not dispute that plaintiffs have sufficient evidence to sustain a Fourth Amendment claim; defendants argue only that the two *Monell* factors—policy and causation—are not met.”)