SMOKE AND SEIZURE: HOLDING LAW ENFORCEMENT ACCOUNTABLE FOR THE USE OF CHEMICAL IRRITANTS ON LAWFUL PROTESTERS BY MEANS OF THE FOURTH AMENDMENT IN THE AGE OF *TORRES V. MADRID*

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INTRODUCTION

On March 7th, 1965, over five hundred people marched in Selma, Alabama to confront the Governor of Alabama for his failure to hold law enforcement accountable after young Jimmie Lee Jackson was shot and murdered by a state trooper.[1] The demonstrators, linked arm-in-arm, were met with a wall of state troopers, gas masks affixed to their faces and clubs in hand.[2] Deputies on horseback charged at the demonstrators to prevent them from crossing the bridge, ensuing in well-documented one-sided violence that will forever stain the image of the United States.[3] Although the demonstration successfully progressed the conversation of the Civil Rights movement due to the undeniable mistreatment of the demonstrators, the infamous photographs of the march from Selma to Montgomery continue to evoke visceral reactions to this day for many.[4]

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[1] *See* John Fleming, *Who Killed Jimmy Lee Jackson*, SOJOURNERS MAGAZINE, Apr. 2005, at 20–21 (arguing that the initial idea for a march in Montgomery emerged in the wake of Jackson's death); *see also* Jeff Wallenfeldt, *Selma March*, BRITANNICA (Jan. 12, 2023), https://www.britannica.com/event/Selma-March (describing how Jackson was shot by the trooper during a demonstration pushing for the Voting Rights Act, thus the march from Selma to Montgomery was in response to his death and the overall American civil rights movement).

[2] *See* Christopher Klein, *How Selma's 'Bloody Sunday' Became a Turning Point in the Civil Rights Movement*, HISTORY STORIES (July 18, 2020), https://www.history.com/news/selma-bloody-sunday-attack-civil-rights-movement.

[3] *See id*.

[4] *See id*. ("[W]hen [the footage of the assault on protestors] aired that night, Americans were appalled at the sights and sounds of 'Bloody Sunday.'"); *see also* Max

Nearly sixty years later, history repeated itself when thousands of Americans in over one hundred cities across the United States assembled in mass protest after a police officer murdered George Floyd in late May of 2020.[5] While many of the demonstrations remained civil,[6] police used chemical irritants—pepper spray, tear gas, and smoke bombs—and other weapons of dispersal on the unarmed protesters.[7] Many protestors recounted the sight of law enforcement arriving at the scene, outfitted with military-grade artillery, occasionally followed by the acrid smell of freshly deployed tear gas.[8] Despite the evolution of civil rights and repeated inquiries into safer police tactics for controlling demonstrations,[9] the aggression towards the Black Lives Matter protesters in 2020 possessed striking similarities to the brutal treatment of the Selma Marchers.[10] The haunting black-and-white images from the 1960s protests were now colorized with new faces of a new generation.

Rathborne, *Selma and Civil Rights,* HISTORY TODAY (Mar. 6, 2008), https://www.historytoday.com/archive/feature/selma-and-civil-rights (describing how over the Edmund Pettus Bridge has now become a historic symbol of the civil rights movement because of the assault that occurred there, forcing 70 marchers to require hospital treatment).

[5] *See* Deborah Barfield Berry, *They Overcame Police Dogs and Beatings: Civil Rights Activists From 1960s Cheer on Black Lives Matter Protesters Leading New Fight*, USA TODAY (July 3, 2020), https://www.usatoday.com/story/news/2020/07/03/civil-rights-black-lives-matter-protesters-build-1960-s-movement/5356338002/.

[6] *See, e.g.*, Jan Wolfe & Ismail Shakil, *U.S. Settles With Black Lives Matter Protesters Violently Cleared From White House Park*, REUTERS (Apr. 13, 2022), https://www.reuters.com/world/us/us-justice-dept-settles-cases-related-police-response-dc-anti-racism-protests-2022-04-13/ (describing how the Black Lives Matters were kneeling in front of police when law enforcement forcibly removed them, in part by the use of chemical irritants).

[7] *See* K.K. Lai, B. Marsh, & A. Singhvi, *Here Are the 100 U.S. Cities Where Protesters Were Tear-Gassed*, THE NEW YORK TIMES (Apr. 13, 2022), https://www.nytimes.com/interactive/2020/06/16/us/george-floyd-protests-police-tear-gas.html.

[8] *See* Berry, *supra* note 5.

[9] *See, e.g.*, Anjuli Sastry & Karen Grigsby Bates, *When LA Erupted in Anger: A Look Back at the Rodney King Riots*, NPR (Apr. 26, 2017), https://www.npr.org/2017/04/26/524744989/when-la-erupted-in-anger-a-look-back-at-the-rodney-king-riots (recounting the aggressive tactics of law enforcement used on the protesters in LA and the call for reform afterward).

[10] *See* Berry, *supra* note 5.

Public demonstration and protest as an exercise of free speech has become a defining feature of the United States,[11] particularly in the last century.[12] As public demonstrations continue to grow in number[13] so, too, do the accounts of law-enforcement-related violence targeting these protesters—violence that is perpetuated by law enforcement weaponry protected under the guise of "riot control agents."[14] The phrase "riot control agents" is a euphemism for weapons used to disperse demonstrators that are "less lethal" in nature than firearms and artillery.[15] They are not intended to be fatal but often inflict harm, sometimes even resulting in severe injury.[16] The list of "riot control agents" includes tear gas and other common chemical irritants.[17] Although chemical weapons protocols prevent the use of chemical irritants by soldiers in a war zone, domestic law enforcement has accepted tear gas as a means to control crowds because it falls under this category of "riot control agents."[18] Simply put, weaponry too harmful for soldiers has become a default mechanism for crowd control on lawful demonstrators who congregate in narrow city streets. Because

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[11] *See* U.S. CONST. amend. I.; *see also* Michelle L. Janowiecki, *Speaking and Protesting in America*, AMERICAN ARCHIVE OF PUBLIC BROADCASTING (last visited May 2, 2023), https://americanarchive.org/exhibits/first-amendment ("Protests have long been an essential part of American life, employed to draw attention to critical issues, events, and injustices.").

[12] *See* Berry, *supra* note 5.

[13] *See* Adam Taylor, *Why Is the World Protesting So Much? A New Study Claims to Have Some Answers*, THE WASHINGTON POST (Nov. 4, 2021), https://www.washingtonpost.com/world/2021/11/04/protests-global-study/ (finding that between 2006 and 2020, the number of protest movements around the world have more than tripled in less than fifteen years).

[14] *See* Jen Kirby, *The Disturbing History of How Tear Gas Became the Weapon of Choice Against Protesters*, VOX (June 3, 2020), https://www.vox.com/2020/6/3/21277995/police-tear-gas-protests-history-effects-violence (describing a history of police use of tear gas on protesters as a means to disrupt demonstrations).

[15] *See id.*

[16] *See id*. (noting that the severity of the injury "depends on how [tear gas is] used, and when, and where.")

[17] *See id.*

[18] *See id.* The Organization for the Prohibition of Chemical Weapons regulates the use of chemical irritants internationally, and has created an exception clause under the Chemical Weapons Conventions that exempts chemical irritants used as "riot control agents." Thus, it is up to individual law enforcement precincts to regulate their use of tear gas, pepper spray, and other chemical irritants.

of this apparent contradiction, the prevalence of "riot control agents" by American law enforcement has been condemned internationally by the United Nations[19] and by numerous domestic activists advocating against its harmful impact on demonstrators.[20]

Despite this pushback, the decision to exercise control over protesters lies in the hands of the people holding the weapon rather than with those who face the barrel. Advocates have called for the eradication of chemical irritants as a means to crowd control, but they have been met with resistance as police departments and precincts have ultimate control over what tools and tactics are deployed by their officers.[21] To overcome this power imbalance, protesters have looked to civil litigation to hold law enforcement accountable and ensure that brutal protest regulations and tactics are condemned through the power of injunctive relief and other remedies. Outcomes have been inconsistent; some courts have condemned the violence perpetrated by law enforcement and have requested a change in protocol, while others have found that plaintiffs failed to bring a sufficient claim.[22]

However, with the recent Supreme Court decision in *Torres v. Madrid*,[23] there is potentially a new avenue for bringing claims against law enforcement for the impermissible use of excessive force and unlawful seizures in violation of the Fourth Amendment, particularly for those affected by indiscriminate chemical irritants[24] deployed during demonstrations. This Essay argues that *Torres v. Madrid* can assist

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[19] *See id.* (describing the history of chemical irritants in protests, internationally, and the call for change by both the United Nations and global activists, like War Resisters League).

[20] *See id.*

[21] *See id. But see* Alex Altman, *Ferguson Protesters Try to Block Use of Tear Gas*, TIME (Dec. 12, 2014), https://time.com/3631569/ferguson-protesters-try-to-block-use-of-tear-gas/ ("A federal judge in St. Louis ordered local police to limit their use of tear gas after Ferguson protesters filed a complaint alleging their right to peaceful assembly had been violated.").

[22] *See* Altman, *supra* note 21 (describing how protesters were successful in court when they argued that law enforcement must warn demonstrators about the use of tear gas before using the weapon). *But see infra* notes 74–75 and accompanying text (describing the conflicting precedent).

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

[24] For the purpose of this Essay, "indiscriminate chemical irritants" describes chemical irritants that are deployed in crowds, such that multiple people are affected by their use, rather than chemical irritants that are directed towards a singular person.

victims of chemical irritants when holding officers accountable in civil litigation. The Supreme Court's expansion of what constitutes an unlawful "seizure" under the Fourth Amendment now provides the grounds for excessive force claims when demonstrators are effectively seized by means of chemical irritants.

This Essay will proceed in four parts. First, it will summarize the pre-existing law on 42 U.S.C § 1983 claims for the use of excessive force and unreasonable seizures, further discussing why litigants harmed during demonstrations have previously been unsuccessful in establishing a violation of their rights. Second, it will explain the Supreme Court's ruling in *Torres v. Madrid* and how this ruling expanded the definition of a Fourth Amendment "seizure." Third, it will argue that demonstrators are unlawfully seized under the meaning of the Fourth Amendment when stopped by chemical irritants by a) explaining how chemical irritants corporally touch their victims and thus fall under the expanded definition of "seizure;" b) analyzing how the historical purpose of chemical irritants creates an objective intent to seize as is required by the expansion of the definition; and c) describing how the deployment of chemical irritants is inherently intrusive in nature, therefore creating a compelling claim for protection under the Fourth Amendment. Lastly, it will analyze the success of civil claims under 42 U.S.C § 1983 in holding law enforcement accountable and the potential to compel procedural changes to these widely used but harmful tactics in controlling demonstrations. It is my hope that this Essay will be used as a framework for advocates when assisting protestors in litigation so that they may be more successful in holding law enforcement accountable.

I. PRE-EXISTING LAW CONCERNING EXCESSIVE FORCE CLAIMS

Persons aggrieved by state or local law enforcement may bring civil claims for relief under 42 U.S.C § 1983.[25] The Supreme Court has found that § 1983 provides a cause of action for the deprivation of civil rights

[25] 42 U.S.C § 1983 ("Every person who… subjects… any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action…").

by persons acting under the color of the law.[26] In other words, it grants citizens the right to bring civil lawsuits against government officials who abuse their power by impeding on an individual's civil rights as conferred and protected under the Constitution or other federal law.

When law enforcement officers use real or apparent government authority, they are acting under the color of the law.[27] To bring an actionable claim against state or local law enforcement, the plaintiff must allege that the officer violated their civil rights—"clearly established rights" guaranteed by the Constitution.[28] Plaintiffs commonly bring claims arising under the First Amendment right to freedom of speech, the Fourth Amendment protection against unreasonable searches and seizures, and the Eighth Amendment protection against cruel and unusual punishment, among other things.[29]

In particular, the Fourth Amendment has provided fruitful claims under § 1983, as it protects persons from unreasonable searches and seizures.[30] Under the Fourth Amendment, law enforcement officers are not entitled to stop persons without the requisite level of suspicion.[31] Therefore, arbitrary seizures are often found to be unreasonable because the victim is seized without this requisite level of suspicion required by

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[26] *See* Graham v. Connor, 490 U.S. 386, 394 (1989); *see, e.g.*, Tolan v. Cotton, 572 U.S. 650, 654 (2014) (Petitioner brought § 1983 suit when the officer "used excessive force against him in violation of the Fourth Amendment"); Chavez v. Martinez, 123 S. Ct. 1994, 2000 (2004) (Petitioner unsuccessfully brought § 1983 suit when officers "violated his Fifth Amendment right not to be 'compelled in any criminal case to be a witness against himself,' as well as his Fourteenth Amendment substantive due process right to be free from coercive questioning"); Whitley v. Albers, 475 U.S. 312, 317–19 (1986) (Respondent successfully brought § 1983 suit when officers violated his right to be free of "cruel and unusual punishment" under the Eighth Amendment).

[27] *See What Are The Elements of a Section 1983 Claim?*, THOMSON REUTERS (June 13, 2022), https://legal.thomsonreuters.com/blog/what-are-the-elements-of-a-section-1983-claim/ (apparent authority refers actions that appear to be authorized by the government).

[28] *Id.*

[29] *See id.*

[30] U.S. CONST. amend. IV.

[31] See HEMMENS, DEL CARMEN & BRODY, CRIMINAL PROCEDURE AND THE SUPREME COURT: A GUIDE TO THE MAJOR DECISIONS ON SEARCH AND SEIZURE, PRIVACY, AND INDIVIDUAL RIGHTS 49–57 (2010). To conduct a brief stop-and-frisk, law enforcement must have *reasonable suspicion* that unlawful activity is afoot, requiring a minimal degree of certainty. To conduct an arrest, or extended seizure, law enforcement must have *probable cause*, requiring a higher degree of certainty.

the law.[32] The protection from arbitrary seizures is important to enforce; otherwise, officers could conceivably deploy unsolicited seizures without repercussions.

Seizures effectuated by excessive force are also considered an unreasonable seizure.[33] To determine if force was excessive, the court will consider the totality of the circumstances—*inter alia*, severity of the crime, resistance to arrest—under the framing of what an objectively reasonable officer would know in the moment of effectuating the stop.[34] In total, under § 1983, plaintiffs may argue that they were deprived of their Fourth Amendment right protecting them from unreasonable seizures if an officer seizes them arbitrarily or by means of excessive force.[35]

Demonstrators who have been injured by chemical irritants have brought § 1983 claims against law enforcement for their use of excessive force but have often been unsuccessful.[36] This is in part because plaintiffs have failed to prove that they were seized when the chemical irritants were deployed.[37] This Essay will argue, however, that the court need not determine if the demonstrators were seized by looking at the extenuating factors, like if there was path to egress or if the dispersal of weaponry was so severe. Instead, *Torres* suggests that demonstrators are seized *the very moment* they inhale the chemical irritants. Therefore, demonstrators could bring § 1983 claims against law enforcement officers who arbitrarily deployed chemical irritants on peaceful protesters because this action constitutes a seizure, and when done indiscriminately, is an unreasonable one.

II. FOURTH AMENDMENT SEIZURE UNDER *TORRES V. MADRID*

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[32] *See* Graham v. Connor, 490 U.S. 386, 394 (1989).
[33] *See id*.
[34] *See id*. at 396. *See, e.g.*, Lombardo v. City of St. Louis, 141 S. Ct. 2239, 2241 (2021) (reasoning that the Court will look at circumstances, such as the relationship between the need for the use of force and the amount used, the extent of the injury, and efforts made to limit the amount of force used).
[35] *See Graham*, 490 U.S. at 394.
[36] *See, e.g.*, Quraishi v. St. Charles Cnty., 986 F.3d 831, 840 (8th Cir. 2021) (holding that law enforcement officer did not seize demonstrators when deploying tear-gas because the journalists were not fully blocked by barricades).
[37] *See id.*

The Supreme Court's ruling in *Torres v. Madrid* expanded the court's understanding of "seizure" under the Fourth Amendment to include corporal touch of weapons, even when the intended target escapes law enforcement. For this reason, it is particularly applicable to the indiscriminate use of chemical irritants, as in the context of protests.

A. Facts

In July 2014, New Mexico State Police attempted to execute an arrest warrant for a woman suspected of involvement in various violent crimes.[38] The officers arrived on scene and observed two people standing near a car, none of whom were the intended target.[39] Nevertheless, the officers approached one of these individuals, Roxanne Torres, who was experiencing methamphetamine withdrawals and was retreating to her car.[40] Fearing that the officers were carjackers attempting to steal her vehicle, Torres hit the gas and drove away from the officers.[41] Although the officers were not in the path of the car and not in danger of getting hit by the vehicle, both fired their service pistols for a total of thirteen shots in an attempt to stop Torres, striking her twice in the back and causing temporary paralysis.[42] Torres continued to drive away for several miles, evading the stop, and did not succumb to her wounds.[43] Torres brought a claim against the officers under 42 U.S.C § 1983,[44] seeking damages for the officers' use of excessive force when they fired their pistols at her, "making the shooting an unreasonable seizure under the Fourth Amendment."[45]

B. Holding

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[38] *See* Torres v. Madrid, 141 S. Ct. 989, 994 (2021).
[39] *See id.*
[40] *See id.*
[41] *See id.*
[42] *See id.*
[43] *See id.* (noting that Torres drove nearly 75 miles before she was airlifted to another hospital to receive necessary care).
[44] 42 U.S.C § 1983 ("Every person who… subjects… any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action…").
[45] *Torres*, 141 S. Ct. at 994.

The lower courts found that the success of Torres' claim turned on whether Torres was effectively seized when the bullets entered her body, despite her evading the stop by driving away, under the meaning of the Fourth Amendment.[46] Under Tenth Circuit precedent, Torres failed to establish that she was effectively seized because an officer does not effectuate a seizure unless there is physical touch or show of authority, and this contact or authority terminates the movements to otherwise gain physical control over the intended target.[47]

The Supreme Court overturned this holding,[48] reasoning instead that under the Fourth Amendment, slight "corporal touch" is sufficient to constitute a seizure, even when the touch does not subdue the person, as long as there was both physical force and an intent to restrain on the part of the officer.[49] In his dissent, Justice Alito expressed concern with this new rule and how it could implicate what he implied to be normal police activity.[50]

C. Corporal Touch

Under *Torres*, the Court determined that the "slightest touch" or nominal contact to the body, even when created by the contact of an instrument (e.g. bullet or baton), is sufficient to constitute a seizure and maintains the spirit of the Fourth Amendment.[51]

This holding built upon the Court's prior determination that an officer's application of physical force to the body, by means of touch, was a seizure, even if the force fails to gain actual control of the person.[52] It is also consistent with the Fourth Amendment at the time of

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[46] *See* Torres v. Madrid, 769 F. App'x. 654, 657 (2019) ("Thus, '[t]o establish [her] claim, [Torres] … must show both that a seizure occurred and that the seizure was unreasonable.").

[47] *See id.* ("Thus an officer's intentional shooting of a suspect does not effect a seizure unless the "gunshot… terminate[s] [the suspect's] movement or otherwise cause[s] the government to have physical control over him.").

[48] *See Torres*, 141 S. Ct. at 996.

[49] *Id.* at 996–98.

[50] *See id.* at 1015; *see also* discussion *infra* Section II.E.

[51] *Id.* at 995–96, 998.

[52] *See* California v. Hodari D., 499 U. S. 621, 626 (1991); *see also Torres,* 141 S. Ct. at 996 (citing Nicholl v. Darley, 148 Eng. Rep. 974 (Exch. 1828)) (establishing that a corporal touch is sufficient to constitute an arrest, even though the defendant did not submit).

its adoption, where the historical record and common law demonstrated that the word "seizure" meant application of force to restrain movement, even when the restraint is unsuccessful.[53]

The touch in question for *Torres* was not like the previous body-to-body contact that constituted a seizure[54] because it was a bullet, shot from a pistol, that impaled her skin and effectuated the contact.[55] However, common law suggests that the corporal touch need not require skin-on-skin contact for it to be an effective seizure.[56] The Court held that there is no distinguishing difference between weaponry, like the end of a mace, and the "end of a finger."[57] The Court reasoned that this extension of the touch to technology maintains the spirit of the Fourth Amendment as it aims to protect against "[s]ubtler and more far-reaching means of invading privacy."[58] By its nature, "[t]here is nothing subtle about a bullet" in terms of invading personal security to effectuate apprehension.[59] Therefore, although the bullet was no longer in the physical hands of the officers after being expelled by the pistol, the Court held that the intrusion of the bullet effectuated a touch that invaded Torres' sense of personal security, and thus constituted a seizure.[60]

D. Intent to Restrain

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[53] *See Torres,* 141 S. Ct. at 996.

[54] *See Hodari D*., 499 U.S. at 623 (finding that it was not until the police officer physically touched Hodari by tackling him to the ground that the seizure was effectuated).

[55] *See Torres*, 141 S. Ct. at 994.

[56] *See id.* at 997 (citing Countess of Rutland's Case, 6 Co. Rep. 52b, 77 Eng. Rep. 332 (Star Chamber 1605)). With little precedent on the issue of what constitutes a corporal touch, the Court followed the analogous Countess of Rutland's case, which found that law enforcement officers effectuated an arrest when sergeants-at-mace attempted to stop the Countess by physically touching her body with their maces and announcing her arrest.

[57] *Id.* at 997.

[58] *Id.* at 998 (citing Olmstead v. United States, 277 U.S. 438, 473 (1928)).

[59] *Id.* (noting that the focus of the Fourth Amendment is on the privacy and security of individuals, and not the particular manner of the invasion of this privacy, thus may extend to more far-reaching means of invasion).

[60] *See id.* at 996–98.

A notable condition of this rule is the requirement of an "objective intent to restrain."[61] Objective intent refers to reasonableness of intent[62] and whether it was intended for the target.[63]

In essence, an officer has objective intent if a reasonable officer in that position would have consciously decided to do the same thing when completing an action.[64] Individual reasoning or knowledge of the officer in question does not change the analysis.[65] The Court reasoned that "force intentionally applied for some other purpose" will not satisfy this requirement.[66] For there to be a seizure, law enforcement officers must have an objective intent to restrain the intended target and must have used physical force to do so.[67] This force then must make physical contact with its intended target.[68] In other words, if an unintended recipient is touched by an officer, the unintended target is not effectively seized because the officer did not have the objective intent to restrain this particular victim.

In Torres' case, not only did the individual officers intend to stop her car by firing their pistols aimed at her body, but an objectively reasonable officer would have also understood that firing their pistols would have effectuated a stop, indicating they intended to stop Torres herself.[69] With this objective intent, the Court held that Torres was effectively seized the moment the bullet grazed her skin, regardless of her subsequent flight.[70]

E. Justice Alito's Dissent

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[61] *Id.* at 998.
[62] *See* Whren v. United States, 517 U.S. 806, 814–16 (1996) (establishing that the Fourth Amendment is rooted in objectivity).
[63] *Torres,* 141 S. Ct. at 998.
[64] *See, e.g.*, *Whren*, 517 U.S. at 814–16 (explaining, further, that police manuals and standard practices can be evidence of objectivity, but are not dispositive); *see generally* Orin Kerr, *The Questionable Objectivity of Fourth Amendment*, 99 TEX. L. REV. 447 (2021) (discussing the contradictive history and nature of the objective standard).
[65] *See Whren*, 517 U.S. at 814–16.
[66] *Torres*, 141 S. Ct. at 998.
[67] *See id.* at 996–99.
[68] *See id.* at 999.
[69] *See id.*
[70] *See id.* at 996–99.

In his dissent, Justice Alito expressed concern that expanding the definition of "seizure" would create more problems than it resolved.[71] Justice Alito was especially concerned that the majority opinion left open the question of what sort of contact would be sufficient to constitute a "touch."[72] In particular, he questioned whether officers who deploy pepper spray, detonate flash-bang grenades, or shine retina-damaging lasers with the objective intent to detain a suspect will be susceptible to claims of unlawful seizure.[73] The majority did not opine on whether the use of these sorts of police tactics would constitute a seizure.[74]

Justice Alito was correct in identifying that the new rule for determining whether a seizure occurred expanded the definition of "seizure" and created the potential for claims to be brought by victims of weapons like pepper spray, flash-bang grenades, and even lasers.[75] Part III of this Essay will argue that the new rule for "seizure" that incorporates corporal touch by means of invasive technology can and *should* be used by victims of chemical irritants when bringing claims of unreasonable seizures.

III. APPLYING *TORRES*'S SEIZURE TEST AND THE FOURTH AMENDMENT TO THE USE OF CHEMICAL IRRITANTS BY LAW ENFORCEMENT

Before *Torres*, the lower courts were split on whether an officer's use of chemical irritants—like pepper spray, mace, and tear gas—with an intent to restrain constituted a seizure under the Fourth Amendment.[76] Even following the decision in *Torres*, federal courts

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[71] *See id.* at 1015.
[72] *Id*.
[73] *See id*.
[74] *See id*. at 999.
[75] *See infra* Part III.
[76] *Compare* Nelson v. City of Davis, 685 F.3d 867, 879, 884–88 (9th Cir. 2012) (denying law enforcement officers qualified immunity because firing pepperballs on non-threatening individuals constituted a seizure as it knowingly terminated freedom of movement, even if the officers intended to disperse, and because the dual kinetic and sensory danger of pepperballs cause substantial harm), *with* Quraishi v. St. Charles Cnty., 986 F.3d 831 (8th Cir. 2021) (holding that qualified immunity should be granted to a law enforcement officer who only used one canister tear-gas because he did not have fair-warning that tear-gas could be considered a seizure because the law is

have applied the expanded definition of "seizure" differently.[77] Despite the lack of consensus, the new standard from *Torres* substantiates claims that an officer effectuates a seizure when they deploy a chemical irritant with the objective intent to restrain, even if the officer is unsuccessful in subduing the intended target. Litigants should bring these claims because a) in practice, chemical irritants corporally touch their victims; b) the history of chemical irritants implies an objective intent to restrain when exercising force; and c) the purpose of the Fourth Amendment is to protect privacy and security interests, and chemical irritants inherently intrude upon these interests.

A. Chemical Irritants Touch Their Victims

Under *Torres*, the Supreme Court held that a "seizure" occurs when law enforcement corporally touches a victim in attempts to stop them, even if this contact is effectuated by physical objects no longer in the hands of the officer.[78] Just like bullets touching skin, other weapons deployed by law enforcement physically contact or touches their targets and will constitute a seizure if used to effectuate the arrest of an intended target.[79]

Chemical irritants, like pepper spray or tear gas, are tangible chemical compounds that form a liquid spray and viscous mist and are only effective when the chemical compound touches the eyes'

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undecided). *See also* Logan v. City of Pullman, 392 F. Supp. 2d 1246, 1260, 1267–68 (E. D. Wash. 2005) (denying qualified immunity for officers who sprayed pepper spray directly on individuals without warning was a seizure, but granted qualified immunity for law enforcement officers in claims brought by plaintiffs who experienced secondary exposure as this was not a seizure under the Fourth Amendment).

[77] *Compare* Alsaada v. City of Columbus, 536 F. Supp. 3d 216, 265 (S.D. Ohio 2021) (holding that the application of tear gas against protestors to disperse them without a means of egress constituted an unlawful seizure under the Fourth Amendment), *with* Black Lives Matter D.C. v. Trump, 544 F. Supp. 3d 15, 48–49 (D.D.C. 2021) (holding that plaintiffs were not seized when law enforcement officers used tear gas and pepper spray to improperly disperse protesters), *and* Dundon v. Kirchmeier, 577 F. Supp. 3d 1007, 1039–40 (D.N.D. 2021) (finding that seizure did not occur when law enforcement deployed less-lethal munitions like tear gas on crowd because the officers did not march toward the protestors in an attempt to move or encircle, thus not herding the crowd and offering room for the plaintiffs to leave).

[78] *See Torres*, 141 S. Ct. at 997–99.

[79] *See id*.

capillaries and the mucus membrane of the nose, throat, and lungs.[80] These chemical irritants are made up of a compound containing capsicum pepper derivatives that cause irritation by agitating nerve endings, affecting the eyes and respiratory tracts of those exposed to them.[81] Chemical irritants can even blister skin.[82]

This compound is often used in law enforcement work as a non-lethal mechanism designed to stop individuals from fleeing or at times to disperse large crowds, and its use has only grown in popularity, having been discharged in over one hundred cities in the United States in the first six months of 2020 alone.[83] However, the use of the compound can create dangerous side effects when administered in high doses.[84] Studies have determined that exposure can lead to gastrointestinal and menstrual effects, and in some cases, sufficiently high doses can lead to cardiovascular and pulmonary toxicity.[85] The United States House of Representatives was particularly alarmed by the lack of epidemiological studies on the health effects of this federally unregulated weapon, concluding that "[t]ear gas use is woefully understudied given recent increases in its use" in a 2021 memorandum

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[80] *See* Michael Sicard, MD, and Michael Spicola, OD, *How Does Pepper Spray Work?*, CHARLOTTE EYE EAR NOSE & THROAT ASSOCIATES (Feb. 2020), https://www.ceenta.com/news-blog/how-does-pepper-spray-work; *see also* Kirby, *supra* note 14 (describing how the "gasses" can come in different forms, including liquid and powder, with devices to shoot or spray it).

[81] Herrero and Higgins, *Field Use of Capsicum Spray as a Bear Deterrent*, 10 URSUS 533, 533–34 (1998); Sicard & Spicola, *supra* note 80.

[82] *See* Kirby, *supra* note 14; *see also* Sicard & Spicola, *supra* note 80.

[83] LESLEY J. WOOD, THE MILITARIZATION OF PROTEST POLICING 9 –108 (2014); Teaganne Finn, *Tear Gas Unregulated By U.S. Government, Safety Studies Lacking Despite Widespread Use: House Panels*, NBC NEWS (Oct. 14, 2021, 11:46 AM), https://www.nbcnews.com/politics/congress/u-s-government-has-not-weighed-safety-tear-gas-despite-n1281508 (finding that tear gas was "used in at least 100 U.S. cities in the first six months of 2020 alone" and describing its use as widespread).

[84] *See* WOOD, *supra* note 83.

[85] *See id.*; *see also* Finn, *supra* note 83. Cardiovascular and pulmonary toxicity refers to damage done to the heart muscles and lungs by toxins. *See Cardiac Toxicity*, ONCOLINK, (Aug. 1, 2022), https://www.oncolink.org/support/side-effects/other-side-effects/cardiac-toxicity (describing how there are different injuries that can result from cardiac toxicity, including myocarditis, cardiomyopathy, or even congestive heart failure); *Pulmonary Toxicity*, ONCOLINK, July 29, 2022, https://www.oncolink.org/support/side-effects/pulmonary-side-effects/pulmonary-toxicity (damage may include inflammation or scarring to the lungs).

regarding these chemical products.[86] Despite the lack of research, the physical manifestation of symptoms is evidence enough that a victim has come into contact with the chemical irritant because the irritants are only effective when the chemical touches the nerve endings.[87]

Torres did not explicitly detail the amount of force an officer must exert on a person's body for that contact to constitute a seizure; rather, it specified only that the amount of force may be pertinent in the assessment of objectivity.[88] In other words, the amount of force committed by the touch to the subject is not dispositive when determining if the touch was a "seizure," but its forcefulness may denote intent. In the case of *Torres*, it was readily apparent that contact had been made on Torres' body, evidenced by the physical wounds left behind by the bullets that impaled her skin.[89] But the Court never suggested this force must be deadly, or even severe, for the contact to be considered a seizure. Instead, the Court suggested that even the touch of a finger or the end of a baton was enough to constitute a seizure.[90] Therefore, the contact need not be as severe, permanent, or even as visible as being impaled by a bullet to meet the Court's standards for appropriate contact.

Without a threshold of force required by the Court, even contact that is softer than a bullet, perhaps even undetectable by sight but certainly registered by other senses like physical feeling, can be sufficient to constitute a touch. Because chemical irritants can only cause irritation if the particles contact the sinuses of the victim,[91] the mere manifestation of symptoms is enough to display that contact has been made and that a victim was in fact touched by the chemical to some degree. Furthermore, much like the wounds created from an impacting bullet, chemical irritants can cause severe injury and alter a victims' physical state, from blisters on the skin to the damage of pulmonary and cardio muscle tissue.[92] Each person maintains protection under the Fourth Amendment from arbitrary seizures by the State, and this protection would be severely limited if it only applied to contact made

[86] *Finn*, *supra* note 83.
[87] *See* Sicard & Spicola, *supra* note 80.
[88] *See* Torres v. Madrid, 141 S. Ct. 989, 999 (2021).
[89] *See id.* at 994.
[90] *See id.* at 997.
[91] *See* Sicard & Spicola, *supra* note 80.
[92] *See id.*

through deadly or severe force. Thus, under the Court's definition, where intent is apparent, the brush of a chemical compound on the victim's sinuses denoted by the agitation from inhalation is enough to constitute a seizure.

B. The History of Chemical Irritants Demonstrates Their Use in Exercises of Force to Detain Targets

Torres limited the rule of what constitutes a "seizure" to the application of force via corporal touch that is committed with the objective intent to restrain the intended target.[93] One of the difficulties that demonstrators face when contending unreasonable seizure is asserting an officer's objective intent to restrain. Because chemical irritants were designed as a non-lethal replacement for firearms when police needed to control and detain an individual, the history behind the production of chemical irritants and the recurrence of federal guidance memoranda impute the intent to detain.

At the outset, pepper spray was originally carried by postal service workers as a form of personal security to be used against aggressive dogs or persons.[94] The chemical irritant was not used officially by law enforcement until research was conducted at the Federal Bureau of Investigation ("FBI") Academy in 1987, after which its use by police officers was expedited in the wake of the 1991 Los Angeles riots.[95] Pepper spray was promoted as a mechanism for prevention of violence and for "subduing agitated individuals," especially in crowd control situations.[96] Despite ongoing controversy concerning police misuse of pepper spray and reports of its harsh side effects, by the end of the 1990s, pepper spray had "virtually replaced police use of the baton [and] mace."[97]

Because the original purpose of this chemical irritant was to allow law enforcement to assert control and restrain the target,[98] an objectively reasonable officer would view the use of the irritants as means to carry out a seizure. Furthermore, because pepper spray was

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[93] *See id.* at 998–99.
[94] WOOD, *supra* note 83, at 95.
[95] *See id.* at 95–96.
[96] *Id.* at 96.
[97] *Id.*
[98] *See id.* at 95–97.

designed as a replacement for weapons such as firearms,[99] the use of which the Court in *Torres* held to constitute a seizure,[100] the same intent derived from the use of firearms should be imputed to the use of chemical irritants. Thus, the very reasons why officers employ the use of chemical irritants indicate that the courts should apply the expanded *Torres* rule and find that its use is for the objective purpose of effectuating a "seizure."

Moreover, historically there have been federal law enforcement memoranda providing guidance and information regarding the use of force that strongly suggests that law enforcement officers generally use chemical irritants as means "to restrain an individual."[101] Specifically, in a federal memorandum that provided the policies most law enforcement agencies employ to guide their use of force, the Department of Justice described how officers "may use chemical sprays or projectiles embedded with chemicals to restrain an individual."[102] Although this guidance is not mandatory for individual precincts to follow, as each department generally follows their own protocol,[103] this statement attempted to summarize the decision-making process of law enforcement agencies who deploy a continuum of force. It provides a glimpse into the practices of many law enforcement agencies and clearly illustrates the scenario and reason in which these agencies have chosen to exercise chemical irritants as a means of force—to restrain others.[104] Even officers who are unaware of this rich history illustrating that intended reason for deploying irritants will likely use the weapon as a means of detaining and restraining individuals because, as this federal guidance suggests, it is a generally accepted practice that many law enforcement agencies decide to use for the specific purpose of restraint. Unless the "objectively reasonable officer" is one who does not follow guidance provided by federal agency or does not belong to one of the many agencies that abide by this practice, it is reasonable to

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[99] *See id.*
[100] *See* Torres v. Madrid, 141 S. Ct. 989, 996–99 (2021); *see also supra* Part II (discussion on firearms as an extension of touch).
[101] *See, e.g.*, NATIONAL INSTITUTE OF JUSTICE, DEPT. OF JUSTICE, THE USE-OF-FORCE CONTINUUM (2009), https://nij.ojp.gov/topics/articles/use-force-continuum.
[102] *Id.*
[103] *See* Kirby, *supra* note 14.
[104] *See* NATIONAL INSTITUTE OF JUSTICE, *supra* note 101.

presume the objective intent to restrain each time law enforcement officers use chemical irritants against another individual.

Even where testimony and evidence suggest that an officer deployed the chemical irritants for reasons other than detaining victims, courts may still find that mitigating factors will tip the scale towards the objective intent to restrain. This is because determinations of intent remain context-specific.[105] Today, chemical irritants are deployed for more reasons than just the detention of individuals; for example, it can also be used to disperse large gatherings.[106] Despite this, some jurisdictions have found that the deployment of chemical irritants into mass gatherings can functionally detain members of the group and therefore seize group members, even if the deploying officer's individual purpose in using the irritants was simply to disperse the group.[107] This further illustrates an important distinction of Fourth Amendment jurisprudence; seizures are based on the objective intent to detain rather than the officer's individual reasoning.[108]

Particularly in the context of deploying chemical irritants in large crowds, a federal court recently held that, where the objective intent of the officer is considered, individuals may be seized if their ability to avoid the irritant was restricted and if the effect of the irritant left victims so disoriented that their freedom of movement was terminated.[109] In that case, the Court found that a group of protesters was effectively seized when officers deployed chemical irritants without providing a means of egress because any reasonable officer would agree that deploying such weapons on a group, surrounded by officers and barricades, is thereby restraining the freedom of the individuals.[110] This decision reiterates that even where the history and guidance of chemical irritants fail to impute the intent to restrain on their deployment, courts will still find that an officer had an objective intent to restrain based on the circumstances surrounding an officer's use of

[105] *See Torres*, 141 S. Ct. at 998–99 (discussing the determination of intent).
[106] *See* Kirby, *supra* note 14 (describing the strong history of chemical irritants being used to disperse large protests, dating back to 1920s labor demonstrations).
[107] *See, e.g.*, Alsaada v. City of Columbus, 536 F. Supp. 3d 216, 264–65 (S.D. Ohio 2021).
[108] *See supra* Section II.D.
[109] *See Alsaada*, 536 F. Supp. 3d at 264.
[110] *See id*.

the weapon, especially when deployed on large gatherings like demonstrations.

Because the intent is objective, intent may be assumed even if such a finding contradicts an officer's assertion that they merely intended to disperse the gathering rather than detain the group or individuals within it. This will be particularly helpful for demonstrators, where the sheer number of participants makes it difficult to prove individual intent of the seizure by way of chemical irritants.[111] Under this theory, the mere application of the weapon on such a large group may be enough to prove objective intent, given the history, guidance, and circumstances associated with the deployment of chemical irritants as a means of force.

C. Chemical Irritants Intrude Upon Privacy

The Supreme Court in *Torres* found convincing evidence of what constitutes a seizure by looking to the spirit of the Fourth Amendment: to protect the privacy and security of individuals.[112] Much like a bullet that grazes the skin, chemical irritants are an invasive weapon that enters the body and can leave long-lasting effects on individuals, such as lung inflammation and burns on skin.[113] As such, the privacy and security concerns presented by the chemicals provide a compelling reason as to why courts should view the inhalation of chemical irritants as analogous to the graze of an officer's weapon in the Supreme Court's decision in *Torres*.

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[111] *See, e.g.*, L Buchanan, Q. Bui & J. 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-protests-crowd-size.html (suggesting that between 15 million to 26 million people participated in Black Lives Matter demonstrations within June of 2020).

[112] *See* Torres v. Madrid, 141 S. Ct. 989, 996–98 (2021) ("[T]he focus of the Fourth Amendment is the 'privacy and security of individuals,' not the particular manner of 'arbitrary invasion[] by governmental officials.'") (citing Camara v. Municipal Court of City and Cnty. of San Francisco, 387 U.S. 25, 34 (2001)).

[113] *See* Craig Bettenhausen, *Tear Gas and Pepper Spray: What Protesters Need to Know*, CHEMICAL & ENGINEERING NEWS (June 18, 2020), https://cen.acs.org/policy/chemical-weapons/Tear-gas-and-pepper-spray-What-protesters-need-to-know/98/web/2020/06 ("[T]he effects of pepper spray and tear gas tend to wear off within 30 min[utes]… although pepper spray stimulates lung inflammation that can be dangerous for people with existing breathing problems.").

The purpose of the Fourth Amendment is to protect the privacy and security of individuals from the arbitrary intrusion or invasion of government officials.[114] The Court in *Torres* was particularly convinced by the refinement of the Fourth Amendment proposed in *Olmstead v. United States*.[115] There, the Court stated that the protections derived from the Fourth Amendment could be extended to "more far-reaching" means of invasion than obvious intrusions, such that privacy concerns were validated for even the most subtle of intrusions upon a person.[116] In *Torres*, this earlier description was seen as an expansion of the Fourth Amendment's protection when determining if the use of firearms constitutes a seizure.[117] The Court held that the invasion of the body via an intrusive weapon, like bullets piercing skin, is not so subtle of an intrusion that the Fourth Amendment would not protect against it, even though distinctive firearms did not exist at the time of the Amendment's conscription and were not explicitly considered by the Framers.[118] Therefore, where the Court finds the invasion to be so egregious, they are more willing the expand Fourth Amendment protections, even when the intrusion was effectuated by technology inconceivable by the Framers.

Much like the invasive nature of bullets, chemical irritants, too, are intrusive to the person who falls victim to them.[119] The compound contained within these irritants invades the body, irritating both the eyes and the inner respiratory tract by agitating copious nerve endings.[120] Chemical irritants can cause long lasting effects that follow the victim

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[114] U.S. CONST. amend. IV.
[115] Olmstead v. United States, 277 U.S. 438 (1928).
[116] *Torres*, 141 S. Ct. at 998 (citing *Olmstead*, 277 U.S. at 473–74 (Brandeis, J., dissenting) (suggesting that advances in technology could allow intrusions to be more subtle, for example like investigative technology that "without removing papers from secret drawers, can reproduce them in court").
[117] *See id.*
[118] *See id.*
[119] *See, e.g.*, Young v. Cnty. of Los Angeles, 655 F.3d 1156, 1163 (9th Cir. 2011); *see also* Bettenhausen, *supra* note 114 (describing the lasting effects that follow the victims after leaving the scene); Sicard & Spicola, *supra* note 80 (describing the effects of chemical irritants and how it registers as pain to the senses).
[120] *See* Sicard & Spicola, *supra* note 80.

even after their initial symptoms subside.[121] In extreme cases, the use of chemical irritants can even lead to death.[122] Furthermore, it is more difficult to avoid the effects of chemical irritants than it is to avoid the personal invasion of a bullet.[123] This is because individuals who are crowded into compact spaces are often unable to dodge the effects of these irritants, with little protection from this airborne chemical compound.[124] And when victims leave these demonstrations, the impacts and effects of chemical irritants follow them through sustained health complications.

Despite being a relatively new technology that would have been unknown to the Framers, the invasive intrusion on the body and lasting impact from chemical irritants fall squarely within the protection of the Fourth Amendment. In order to protect individuals from these often-arbitrary uses of chemical irritants, in which officers deploy the chemicals to affect all demonstrators regardless of whether their actions rise to the level of necessary suspicion of unlawful conduct, the court should find that chemical irritants are analogous to firearms in the Fourth Amendment context. In the interest of maintaining the spirit of the Fourth Amendment, courts should apply the ruling in *Torres* to the deployment of chemical irritants and find that a person is "seized" when they are subjected to the weapon.

IV. HOLDING LAW ENFORCEMENT ACCOUNTABLE THROUGH LITIGATION

Demonstrators should use the power of litigation to hold law enforcement accountable. Before *Torres*, circuit courts were split on whether the Fourth Amendment seizure provision applied to chemical irritants.[125] Even after *Torres*, there has yet to be a notable case applying

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[121] *See* WOOD, *supra* note 83, at 96 ("In 1998, there were various publications issued about the toxicological impacts of the use of pepper spray, as reports of injury and death began to increase.").
[122] *See id.*
[123] *See* Bettenhausen, *supra* note 113 (describing the dispersive nature of chemical irritants).
[124] *See id.*
[125] *See, e.g.*, District of Columbia v. Wesby, 138 S. Ct. 577, 589–90 (2018) (stating that there is no precedent or "robust consensus of cases of persuasive authority" to

the expanded rule to the use of chemical irritants. Such a finding is important, as a matter of justice, because it offers a method of accountability for many potential victims who manage to avoid arrest but still suffer the excruciating effects of chemical irritants—a story that has sadly become commonplace among demonstrators following the recent spike in street activism.[126]

Although the use of chemical irritants as a form of crowd control has been criticized since its inception,[127] these critiques have grown in the wake of the Black Lives Matter protests starting in 2020 in response to the death of George Floyd.[128] Law enforcement began to deploy these weapons even during *peaceful* protests, arguably without reasonable suspicion or probable cause that a crime had been committed.[129] These demonstrators have had varied success in bringing claims to hold police accountable.[130] If these protestors were use the theory of seizure proposed in this Essay, it is likely they would find more success in bringing their complaints because in the past establishing that a seizure took place burdened plaintiffs with an evidentiary hurdle.[131]

In particular, when attending these protests, law enforcement may detonate chemical irritants to subdue the protesters and stop those

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show it was clearly established that tear-gassing was a seizure); *see also supra* note 76 and accompanying test.

[126] *See, e.g.*, Berry, *supra* note 5 (recounting the stories of several demonstrators, between generations, who have suffered at the hands of law enforcement during their engagement at peaceful demonstrations).

[127] *See, e.g.*, Kirby, *supra* note 14 (explaining that tear gas was used on demonstrators dating back to the 1920s, particularly against labor movements); WOOD, *supra* note 83, at 95–97 (explaining that pepper spray was officially used by law enforcement in the 1980s).

[128] *See* T. Buford, L. Waldron, M. Syed, & A. Shaw, *Protest Police Tactics*, PROPUBLICA (July 2020), https://projects.propublica.org/protest-police-tactics/.

[129] *See id.*

[130] *Compare* Alsaada v. City of Columbus, 536 F. Supp. 3d 216, 265 (S.D. Ohio 2021) (holding that the application of tear gas against demonstrators to disperse them without providing a means of escape constituted an unlawful seizure under the Fourth Amendment because it effectively detained the demonstrators), *with* Dundon v. Kirchmeier, 577 F. Supp. 3d 1007, 1039–40 (D.N.D. 2021) (finding that seizure did not occur when law enforcement deployed tear gas on demonstrators because the officers did not march towards them and thus offered room for the plaintiffs to escape).

[131] *See supra* note 130.

suspected of committing crimes.[132] However, because these protests draw in a large numbers of individuals,[133] those few individuals who are acting unlawfully are justly detained, while those only practicing their right to demonstrate are unjustly detained because they are not violating any law that would give rise to a permissible arrest, bearing in mind that the right to protest and demonstrate is protected by the Constitution.[134] This has become a common narrative: peaceful protestors getting caught in the crossfire when chemical irritants are deployed by police.[135] Although these peaceful protesters may avoid further detention by law enforcement, they have undoubtedly still been affected by the irritants and their treatment as a whole.[136] Applying the *Torres* standard, a court should find that such actions by police establish constitutional violations, as these protestors were seized the moment they inhaled the chemical compound. Police should not be allowed to deploy chemical irritants with impunity against protesters lawfully exercising their First Amendment rights. Because of this, there is the potential for justice if the many people who experienced this were to bring suit using § 1983 to hold law enforcement accountable.

Successful litigation incentivizes officers to reform their practices, not just as a way to avoid expensive trials, but because other authorities may order precincts to reform their demonstration-control practices. For instance, after successful litigation in St. Louis brought by Ferguson protestors, a federal judge ordered that local police limit their use of tear gas on demonstrations to protect the right to peaceful assembly.[137] One can expect that with an increase in litigation against the indiscriminate use of chemical irritants on demonstrations, and thus a likely increase in media attention around the issue as well, other federal judges and

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[132] *See* Kirby, *supra* note 14 ("[T]ear gas is deemed a 'riot control agent.'") (describing how the history of chemical irritants have been used on protesters, dating back to the Bonus Army March in 1932, to subdue the protestors).
[133] *See* Buchanan, Bui & Patel, *supra* note 111.
[134] U.S. CONST. amend. I.
[135] *See, e.g.*, Wolfe & Shakil, *supra* note 6 (retelling the stories of several protesters who kneeled in front of the White House and were forcibly moved by law enforcement with the use of chemical irritants and physical force).
[136] Berry, *supra* note 5 (retelling the stories of those who demonstrated and have been affected by the movements).
[137] *See* Altman, *supra* note 21.

elected representatives will call for similar changes to law enforcement procedures.

As new data makes clear, chemical irritants are not the humane form of crowd control that law enforcement once defended.[138] The more claims brought forth under the new standard, the more potential there is to deter future abuses by law enforcement.[139] The effectiveness of law enforcement reform will continue to be a long contested debate, but as the judgments continue to mount in response to the increase in successful § 1983 claims, perhaps law enforcement agencies will begin to take seriously claims of excessive force and acknowledge that there exists a need to reform the protest tactics that have left so many maimed.[140]

CONCLUSION

The United States has been plagued by protest-related violence for the last century, due to the prevalence of military-like control tactics employed by law enforcement, including the excessive use of chemical irritants, like tear gas and pepper spray. This dependency on antiquated techniques must change in order to protect our right to demonstrate and ensure the safety of our communities.

Advocates for demonstrators are in the best position to prevent future abuses and should not be dissuaded by past jurisprudence where the difficulty to prove "seizure" disrupted what could have been transformative litigation. Before *Torres*, the courts looked at environmental details to determine if there was a "seizure," like where the protest was held, the formation of the officers, and the potential for egress. But with an expansion of the corporal touch rule, the arbitrary

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[138] *See* WOOD, *supra* note 83, at 95–96.

[139] *See* Altman, *supra* note 21 and accompanying text; Kirby, *supra* note 14 (explaining that individual precincts ultimately decide whether chemical irritants should be in their arsenal of riot prevention, and how some law enforcement educators have amended their lessons in response to public opinion and changing regulations). As evidenced by the success of past cases, new regulations have compelled individual precincts in their decision of when and how to use chemical irritants.

[140] Teressa Ravenell and Armando Brigandi, *The Blurred Blue Line: Municipal Liability, Police Indemnification, and Financial Accountability in Section 1983 Litigation*, 62 VILL. L. REV. 839, 845–47 (2017) (explaining that due to disparate indemnification clauses, sometimes civil litigation will hold just the individual officer accountable or will hold the municipality accountable).

deployment of chemical irritants may be enough to lay this foundation. This is why demonstrators should feel empowered in bringing § 1983 claims against law enforcement for the excessive force exerted on them when a peaceful protest was underway.

Bringing forth claims against law enforcement would do more than just disincentivize officers from abusing their power. It would compel precincts to reform procedures dictating all "riot control methods." With an influx of civil litigation, departments might determine that the benefits of using chemical irritants indiscriminately against demonstrators do not outweigh the costs. This reform should go further than warning individual officers from using the weapon so carelessly, instead calling for the complete eradication of the use of chemical irritants in response to peaceful demonstration and protest.

The advocacy for demonstrators will also reaffirm the belief that protest is powerful, and demonstrations should be amplified, not silenced, as they remain a right of all citizens. In an era where democracy continues to be challenged, demonstrations will be an important platform for protecting the rights of all persons. And while demonstrators take to the streets like our forebearers, they can be comforted in knowing that officers can no longer harm them with their smoke bombs and tear gas cannisters—that now the Fourth Amendment can offer more protection. If enough officers are held accountable, demonstrators can safely join movements with less fear that their voices will be silenced by the burning sense of toxins, caused by police ministered chemical weapons. Perhaps one day, photographs of street activism will be rid of the gloomy smog from chemical irritants, and the United States may proudly display pictures of effective democracy, our children still linked arm-in-arm.